

**IN THE COURT OF SH. AJAY PANDEY
ADDITIONAL SESSIONS JUDGE 04
PATIALA HOUSE COURTS: NEW DELHI.**

State Vs. Mashiar Rahaman Mondal and Anr.

SC no. 22/18

FIR no. 57/17

PS: Special Cell

12.12.2018

File taken up today on bail application of accused
Mohd. Arif.

Present:- Sh. S.K. Kain, learned Addl. PP for the State along
with IO SI Manoj Singh.

Sh. Sumit Sharma, learned counsel for accused
Mohd. Arif.

ORDER ON BAIL APPLICATION OF ACCUSED MOHD.

ARIF:-

1. Reply to bail application filed.
2. Arguments on bail application heard.
3. As per allegations in charge-sheet, secret
information was received and thereafter raiding team was

constituted. Raiding team reached the spot and laid a trap. Accused was arrested. Notice u/s 50 NDPS Act was served upon him. After his personal search, search of his shoulder bag was carried and 06kg charas was recovered from accused Md. Arif.

4. It is submitted by learned Sh. Sharma that proceedings against accused Md. Arif are vitiated as section 50 NDPS Act was not complied with. As per charge-sheet, notice u/s 50 NDPS Act was served upon accused Md. Arif.

5. It appears to be rightly submitted by learned Sh. Sharma, that proceedings against accused stands vitiated in view of the ratio laid down by Hon'ble Supreme Court in **Arif Khan @ Aga Khan VS State of Uttarakhand, 2018 SC 459**.

6. As per the charge-sheet, applicant/accused was served with a notice u/s 50 NDPS Act and he denied to avail the opportunity to be searched before any Gazetted Officer or Magistrate.

7. In the case of Arif Khan @ Aga Khan (supra), the Hon'ble Apex Court held as under:-

First, it is an admitted fact emerging from the record of the case that the appellant was not produced before

any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband “Charas” was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband “Charas” from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband “Charas” as provided under [Section 50](#) of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer (emphasis supplied).

8. In the present case also, by a bare reading of charge-sheet it emerges that applicant/accused was never produced before any Magistrate or Gazetted Officer and the

search of the narcotic substance, from the accused was not made in presence of any such Magistrate or Officer. It is further clear from the charge-sheet that none of the police officials of the raiding party, who recovered the contraband was a gazetted officer. In view of the ratio laid down by the Apex Court, they were not empowered to make search and recovery from the accused except in presence of Magistrate or Gazetted officer. The search and recovery of contraband from the possession of accused is therefore not in conformity with the requirements of section 50 NDPS Act. The court cannot expect that during the trial of the case the prosecution can prove that the search and recovery was made in compliance of section 50 NDPS Act, in presence of any Magistrate or a Gazetted Officer. In the list of witnesses filed along with the charge-sheet there is no witness who can prove this fact. The entire case of the prosecution to be proved against accused persons is narrated in the charge-sheet. There is not an iota in the entire charge-sheet to suggest that the mandate of section 50 NDPS Act in the light of the judgment of the Apex Court in the case of Aga Khan (supra), was complied with.

9. The ratio laid down by Hon'ble Supreme Court in Arif Khan @ Aga Khan (supra) was followed by Hon'ble High

Court of Delhi in **Crl. Appeal No. 658/2017** in its **judgment pronounced on 13.11.2018 in the case of Dharambir Vs State** and it was held that once a notice u/s 50 NDPS Act is served upon the accused, section 50 NDPS Act is applicable even when recovery is not made from body search of accused. In the case of **Gurtej Singh Batth Vs State, Crl. A. 39/2015**, Hon'ble High Court of Delhi held as under:-

26. *Apropos **Arif Khan (supra)**, the contention of Mr. Aggarwala, is that the said judgment had not applicability, as the recovery had taken place, not from the person of the appellant, but from his baggage. This submission, too, has no force, in view of the law laid down by the Supreme Court in **Dilip v. State of Madhya Pradesh, (2007) 1 SCC 450** and **State of Rajasthan v. Parmanand, AIR 2014 SC 1384** which hold that, where the search of the baggage of the accused (from which the contraband was recovered) takes place alongwith the search of his person, Section 50 applies with full force. I may mention, here that I have, in my judgment in **Dharambir v. State, 2018 SCC OnLine Del 12305** also dealt with this aspect of the matter.*

27. *Once Section 50 of the NDPS Act, is treated as applicable, **Arif Khan (supra)** clearly applies, resulting in the present proceedings being vitiated additionally for the reason that the search and recovery did not take place in the presence of a Magistrate or a Gazetted Officer. The requirement of consent, from the appellant, for being searched by the members of the raiding team, would be irrelevant, in view of the law laid down in **Arif Khan (supra)**.*

10. Hence, in view of the law laid down by the Hon'ble Supreme Court, as followed by Hon'ble High Court of Delhi, once section 50 NDPS Act was invoked by the IO, the search and seizure in the absence of gazetted officer or Magistrate is in violation of the procedure laid down and the proceedings stand vitiated. Hence, it is rightly submitted by learned Sh. Sharma, that the accused has able to come out of the bar u/s 37 NDPS Act.

11. Accused is in custody since beginning. There is no previous conviction alleged against him.

12. In the facts and circumstances of the case, accused is admitted to bail on the following terms and conditions:-

1. He shall furnish personal bond in the sum of

Rs.2.00/- lakhs with one surety in the like amount.

2. He would present himself on each and every date of hearing and would not be attempting to delay the case, if in exceptional circumstances he seeks his exemption he would duly instruct his counsel for proceeding further with the case.

3. He shall not call or visit or approach or intimidate directly or indirectly any of the prosecution witnesses except to call the IO of the case, if required.

4. He will not leave India without prior permission of the court.

13. At request of learned Sh. Kain, copy of order be given dasti to him.

(Ajay Pandey)

Addl. Sessions Judge-04

New Delhi District, Patiala House Courts

New Delhi/12.12.2018