



2025:DHC:4870



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 28th May, 2025

Pronounced on: 3rd June, 2025

+ BAIL APPLN. 1978/2024

HABIOB BEDRU OMER

.....Petitioner

Through: Mr. Arun K. Srivastva, with Mr.
Ashish Sindhu & Ms. Shahina Praveen,
Advs.

versus

CUSTOMS

.....Respondent

Through: Mr. Jatin Singh, SSC (through VC).
Mr. Ravi Arya, Superintendent,
Customs.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present application under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973, (for short, 'CrPC'), has been filed seeking regular bail in Complaint No. VIII (AP)10/P&I/4170-C/ARRIVAL/2023, under Sections 21/23 of the Narcotics Drug and Psychotropic Substances Act, 1985, (for short, 'NDPS Act'), filed by Customs IGI Airport, Delhi.



2. The case of the respondent against the applicant as per their complaint dated 20.11.2023 is as under: -

i) On 21.05.2023, the applicant, who is holder of Ethiopian Passport No. EP7807550 issued on 27.01.2023 and valid upto 26.01.2028, arrived by Flight No. ET 686 dated 20.05.2023 from Addis Ababa at Terminal-3, IGI Airport, New Delhi, and was intercepted by Customs Officer on suspicion/profiling. The applicant was taken at Green Channel for the X-ray of his baggage.

ii) Thereafter, he was served with notice under Section 102 of the Customs Act, 1962, and Section 50 of the NDPS Act. Personal and baggage search of the applicant was conducted but nothing was found. However, it was suspected that he was concealing narcotic substance inside his body and on further enquiry, the applicant accepted that he has concealed some capsules in his body, so in order to do screening/x-ray of his body, notice under Section 103 of the Customs Act was served to him whereby he was informed that x-ray/screening of his body is required, to which he consented and he admitted that he had ingested some pellets/capsules containing some narcotic substances and further voluntarily submitted his willingness for undergoing procedure for removal of the said secreted capsules/pellets from his stomach. The same was duly recorded in *Panchnama-1* dated 21.05.2023 drawn at T-3, IGI Airport, New Delhi.

iii) The applicant was then taken to Safdarjung Hospital, New Delhi for x-ray/CT scan/Medical Examination. During the medical examination, the applicant was found to have swallowed some capsules



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and accordingly, the applicant was admitted into the aforesaid hospital. During his stay in hospital, the applicant eased out the swallowed capsules and accordingly, 3 *panchnamas* (Panchanamas-2,3,4) were prepared, one on 21.05.2023 and two on 22.05.2023, in Emergency Building of the Safdarjung Hospital whereby, 75 capsules of contraband were allegedly recovered from him. The said *panchnamas* were duly signed by the applicant, the *panchas* and the officers present there. The recovered capsules were kept in separate plastic containers and were sealed after affixing paper slip duly signed by Customs Officers, *panchas* and the accused/applicant.

iv) On 25.05.2023 at about 1830 hours, the applicant was discharged from the Safdarjung Hospital vide discharge summary dated 25.05.2023 along with 3 sealed plastic containers containing 75 capsules for further proceedings. On 26.05.2023 at around 0900 hours, two independent witnesses were called by the Customs Officer and apprised them about the above said background of the case. The Customs Officer also introduced the witnesses with the applicant and showed them the said 3 plastic containers containing recovered 75 capsules and the same were also identified by the present applicant.

v) The Customs Officer cut open the said boxes one by one in the presence of the present applicant and the *panchas*, and on cutting the capsules sealed therein, an off-white colour powdery substance was found, which on testing with Smiths IONSCAN 500 DT drug detection machine found positive for 'Methaqualone'. The respective *panchanamas* were then marked as A-1, A-2, and, A-3 and weighed



accordingly and total weight of the recovered 'Methaqualone' came around 960 grams including the weight of the pouch used for packing the substance which was 2 grams per pouch approximately.

vi) The said 3 pouches were then stitched in a cloth and marked 'X'. They were seized *vide* detention receipt No. 32734 dated 26.05.2023 and the same were deposited in Customs Non-Valuable godown. Thereafter, the recovered powdery substance was seized under Section 43 of the NDPS Act and the contents of the *panchnama* were also fully explained to the applicant who accepted the facts contained therein as true and correct.

vii) The statement of the applicant under Section 67 of the NDPS Act was recorded on 26.05.2023 wherein he admitted the search, recovery and seizure of recovered drugs as mentioned in the aforesaid *panchnamas*. He further stated that he is doing business of bakery in Addis Ababa and was contacted by Mr. Mohammad through his old friend, Amanul Girma and said Mohammad arranged his return air tickets to and from India to Addis Ababa for tourist purpose. His main purpose was to come to India for delivering the narcotics substance to a person in Delhi. As per the direction of Mr. Mohammad he had swallowed 75 capsules As per instructions, of said Mohammad, the said person in Delhi would have contacted him on his mobile number as soon as he reached India. He further stated that since he was in dire need of money, he agreed to the said proposal and swallowed those capsules with water on instructions of Mr. Mohammad and the said



person was known to Mr. Mohammad only and he did not know the person in Delhi to whom the said capsules were to be handed over.

viii) The applicant was arrested *vide* arrest memo dated 26.05.2023, by the Customs Officer and produced in the Court, where he was remanded to judicial custody. It is their case that IO had sent the intimation of seizure and arrest in terms of Section 57 of the NDPS Act to his superior officers, the Assistant Commissioner of Customs on 26.05.2023. Thereafter, samples were drawn under Section 52A of the NDPS Act and sent to FSL for examination and the results thereof were received *vide* report dated 04.09.2023, as per which samples tested positive for ‘Cocaine Hydrochloride’.

ix) On completion of investigation, complaint was filed before the learned Special Court on 21.11.2023. Charges were framed by learned Special Court *vide* order dated 31.01.2024, whereby the applicant was charged for commission of offence punishable under Sections 21(c)/23(c) read with Section 8 of the NDPS Act and the matter is presently at the stage of prosecution evidence and out of 29 witnesses cited by the respondent/customs in the complaint, 6 have been examined so far before the learned Trial Court.

3. Learned counsel for the applicant has submitted that in the present case there is complete non-compliance of Section 42 of the NDPS Act inasmuch as in the seizure memo dated 26.05.2023 drawn under Section 43 of the NDPS Act, it has been recorded that the present applicant was apprehended on the basis of “one specific intelligence” and thus, the respondent was having prior information of the arrival of the applicant with alleged contraband and despite



the same, no prior information in terms of Section 42 of the NDPS was taken down in writing. It is further submitted that there has been absolute non-compliance of Section 42 of the NDPS Act, as the prior information was not recorded in writing.

4. Learned counsel for the applicant has further submitted that the latter was apprehended by the respondent on 21.05.2023, however, his formal date of arrest has been shown as 26.05.2023. It is submitted that during the said period, the present applicant was neither produced before any Magistrate or Special Court. It is the case of the applicant that the contraband recovered during the said period cannot be used to fasten any liability under NDPS Act against the present applicant as the concerned Officer of the respondent instead of following the procedure established by law had merely acted on the alleged consent of the applicant, who was in their unauthorized detention/custody. The said consent was allegedly given by the applicant when notice under Section 103 of the Customs Act was served to him for screening/X-ray of his body for the detection of narcotic substances ingested by the applicant. It is further argued that the respondent had not even informed the local police regarding the applicant being taken to hospital. It is further submitted that the respondent had not informed any relative or any other person regarding the detention of the applicant prior to his formal date of arrest, *i.e.*, between 21.05.2023 to 26.05.2023, and also, the fact that he has been taken to hospital for ejecting out of the aforesaid alleged capsules. It is further submitted that there has been non-compliance of Section 50 of the NDPS Act inasmuch as the applicant was not served with the notice each time prior to the ejection of the alleged capsules from his body and simply



panchnamas’ were drawn showing the recovery of alleged contraband from the applicant.

5. It is further the case of the applicant that there has been non-compliance of Section 52A of the NDPS Act as the alleged recovery was affected from the applicant on 18.07.2023, however, the sample of the contraband was sent for examination to CRCL on 17.08.2023 and further that, the weight of the alleged capsules recovered from the body of the present applicant was not noted during the alleged recovery by the Customs. It is further submitted that complaint in the present case was filed and charges have been framed by the learned Special Court in the present case and the applicant has undergone incarceration for approximately 2 years.

6. *Per contra*, learned Senior Standing Counsel for the customs/respondent has submitted that the present case is not of prior information or any specific intelligence as the present applicant was apprehended on suspicion/profiling while he was passing through the green channel for X-Ray of his baggage and thus, the question of non-compliance of Section 42 of the NDPS Act does not arise. He submitted that the present applicant was served with notice under Section 102 of the Customs Act, 1962, and Section 50 of the NDPS prior to his personal and baggage search at the airport itself. It is the case of the customs that in response thereto and on further enquiry from the applicant, he had admitted in notice under Section 103 of the Customs Act that he was concealing narcotic substance in his body and he was willing to undergo X-ray/screening of his body and accordingly, the same was conducted, to which the applicant had voluntarily given consent. It is further submitted that the applicant was taken to Safdarjung



Hospital with his consent for ejecting of the capsules swallowed by him. It is further submitted that a letter was also written to the Medical Superintendent of the said Hospital informing him of the facts of the present case and for their assistance in carrying out the procedure for ejecting the capsules from the body of the applicant.

7. It was submitted that the applicant was not under illegal detention as he had consented to go to the hospital for ejecting of the capsules swallowed by him. It has been argued that the applicant had himself admitted in his statement given under Customs Act that he had swallowed the capsules containing narcotic substance and thus, in pursuance thereof, his personal search was carried out and accordingly, he was also served with notice under Section 50 of the NDPS Act, and thereafter, he was taken to hospital. It has been further argued that the applicant was not detained as his phone was with him and he was kept in a room in the hospital in which there were 3/4 other beds of patients.

8. He has further submitted that recovery of the contraband was duly noted in the *panchnamas* drawn each time there was recovery of the capsules, same was noted in the said *panchnama*. It is the case of the customs that the samples of the contraband were drawn in accordance with Section 52A of the NDPS Act.

9. It is further submitted that there has been recovery of commercial quantity (954 grams) of 'Cocaine Hydrochloride' from the present applicant and thus, rigors of Section 37 of the NDPS Act are applicable to the present case. The case is presently at the stage of prosecution evidence. Therefore, the present application is to be dismissed at this stage.



10. Heard learned counsel for the parties and perused the record.
11. Admittedly, in the present case, the applicant was intercepted by the Customs on 21.05.2023. As per first *Panchnama-1* dated 21.05.2023 drawn on T-3, IGI Airport, New Delhi, it is recorded that after search conducted in pursuance of a notice issued under Section 102 of the Customs Act and as well as under Section 50 of the NDPS Act, no recovery had taken place. Thereafter, another notice under Section 103 of the Customs Act dated 21.05.2023 was issued whereby, the applicant was informed that the concerned Officer has reason to believe that he had goods liable to confiscation secreted inside his body and in order to get the same ejected, he had to be x-rayed, to which, the applicant had voluntarily agreed to get x-rayed.
12. It is the case of the respondent that the applicant was thereafter taken to Safdarjung Hospital and was admitted there till his discharge on 25.05.2023 at about 18:30 hours. During the aforesaid period, the applicant allegedly eased out the swallowed capsules, which were seized *vide* three *panchnamas*, out of which one was prepared on 21.05.2023 and the other two were prepared on 22.05.2023.
13. Admittedly, the respondent did not produce the applicant before any Magistrate or the Special Court before his admission at Safdarjung Hospital. The case of the Customs is that the applicant volunteered to get himself admitted in order to ease out the capsules swallowed by him. On the back side of the MLC of the applicant prepared at the Safdarjung Hospital, there is a noting by Mr. Ashish Bisht, ACO, Shift A, IGI Airport, New Delhi, that the applicant has been 'handed over' by ACO Shift-C, IGI Airport, New Delhi at



06:30 PM on 21.05.2023. On the said MLC relevant endorsements have been mentioned as “handed over by” and “taken over by”. There is an additional noting which reads as under: -

“The aforementioned PAX Mr. Habib Bedru Omer (D.O.B. 12-09-1991) handed over to you, you are requested to take for the necessary action as per Customs Act, 1962, NDPS Act, 1985 and other allied Acts.”

14. The next document is *Panchnama-2* dated 21.05.2023 prepared at 4th Floor, Ward B, Cubical-12, Emergency Building, Safdarjung Hospital, New Delhi. In this *panchnama*, it is recorded, a total 45 oval shaped capsules were ejected by the applicant, which were then kept in one plastic box and sealed with the ‘Customs’ seal. On the back side of the said *panchnama*, again there is an endorsement, in the middle of the page, titled as “Handed Over by” and “Taken Over by”. It is noted, therein, that the applicant was handed over by Mr. Sukhshyam, ACO, Shift-B to Mr. Vineet, ACO, Shift-B. It is further recorded in the said page, that at 11:30 PM on 21.05.2023, the applicant, further, ejected oval shaped capsules, however, the number is not mentioned there and again, the applicant was “Handed Over by” Mr. Vineet, ACO, Shift-B and “Taken Over by” Mr. C.R. Ranjan, ACO, Shift-D, and there is same “Handed Over by” and “Taken Over by” endorsement towards the end. Thereafter, it is noted that “You are requested to take the necessary action as per Customs Act 1962, NDPS Act 1985 and other allied Acts.”

15. Similarly, there are other handing over and taking over memos prepared by the Customs on 22.05.2023, 23.05.2023, 24.05.2023 and 25.05.2023 and in all these memos towards the end, there is a noting for



necessary action, as per Customs Act 1962 or NDPS Act, 1985 and other allied Acts, as deemed fit to be taken.

16. As per the case of the respondent, the applicant was discharged from the said hospital on 25.05.2023 and a *Panchnama-5* dated 26.05.2023 was prepared at 09:00 Hours and concluded at 12:30 hours on the said date and was prepared at Customs Arrival Hall of Terminal-3, IGI Airport, New Delhi. In the said *panchnama*, in the first para itself, it is recorded as under: -

“The Custom Officer informed us that he had received specific information about one passenger, Mr. Habib Bedru Omer (D.O.B. 12-09-1991), S/o Shri Budiru Omer, R/o H.No. 441, Ayate Road, Addis Ababa, Ethiopia (as told by the Pax), Holder of Ethiopian Passport No. EP7807550 issued on 27.01.2023 and valid up to 26.01.2028, arrived at IGI Airport, New Delhi on 21.05.2023 from Addis Ababa to New Delhi by Flight No. ET 686 dated 20.05.2023 was suspected to have swallowed/ingested pellets/capsules containing a narcotic substance, which are liable to confiscation under the provisions of NDPS, Act, 1985 read with Customs Act, 1962.” (emphasis supplied)

17. The said *panchnama* was prepared with respect to the recovered capsules eased out by the applicant at Safdarjung Hospital, which were tested with field-testing kit and the contraband was suspected to be Methaqualone, since the same was liable to be seized under Section 43 of the NDPS Act, an order under Section 43(a) of the NDPS Act was passed on 26.05.2023, wherein again, it has been recorded as under: -

“On specific intelligence one passenger Mr. Habib Bedru Omer (D.O.B: 12-09-1991), S/o Shri Budiru Omer, R/o H.No.441, Ayate Road, Addis Ababa, Ethiopia (as told by the Pax), Holder of Ethiopian Passport No. EP7807550 issued on 27.01.2023 and valid up to 26.01.2025, arrived at IGI Airport, New Delhi on 21.05.2023 from Addis Ababa to New Delhi by Flight No. ET 686 dated



20.05.2023 was intercepted at Green Channel carrying one small grey colour trolley bag. On further enquiry the pax accepted that he was concealed some capsules in his body subsequent to which the pax was taken for Medical Examination. The Pax was found to have swallowed some capsules and subsequently Pax was admitted to hospital for medical procedure to recover the same. A total of 75 capsules were recovered and were sealed in the presence of Panchas at Safdarjung Hospital as per panchanama-2 to 4.” **(emphasis supplied)**

18. Thereafter, summons under Section 67 of the NDPS Act dated 26.05.2023 were issued to the applicant to appear before the concerned Officer on the said date at 12:30 PM at the Office of Commissioner of Customs, IGI Airport, Terminal-3, New Delhi. Pursuant thereto, statement of the applicant under Section 67 of the NDPS Act was recorded, wherein, he admitted that he had come to India on being sponsored by one Mr. Mohammad for the purpose of delivering the 950 grams of narcotics substance swallowed by him, to a person in Delhi. Thereafter, the applicant was arrested *vide* arrest memo dated 26.05.2023 at 03:30 PM. In the arrest memo, it is mentioned that the applicant had informed his brother on his phone number in respect of his arrest at IGI Airport, New Delhi. The applicant was, thereafter, produced before the learned Special Court and was committed to judicial custody.

19. During the course of hearing, on a pointed query to Mr. Ravi Arya, Superintendent, Customs, it was stated that the local police were not informed with regard to the applicant being taken to Safdarjung Hospital, nor was there any information given to his family members or the Ethiopian Embassy. It was further submitted that the personal liberty of the applicant was not curtailed as he was allowed to keep his mobile, however, it was admitted that



the applicant did not call anyone from his phone. It was further admitted that the Custom's Officers were present outside the Hospital room for 24 hours on rotational duty. It was also admitted that each time, the aforesaid *panchnama* was prepared with regard to capsules being eased out by the applicant, the intimation of the same was not given to Superior Officers. Thus, according to the respondent, the applicant was not in custody from 21.05.2023 to 26.05.2023, when he was formally arrested. It was also stated that since the applicant was under heavy medication he could not be physically moved out of the hospital till the doctors cleared him for such movement.

20. The Hon'ble Supreme Court in **Niranjan Singh and Another v. Prabhakar Rajaram Kharote and Others**¹, while explaining the meaning of the word "custody", had observed and held as under: -

"7. When is a person in *custody*, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in *custody* for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the

¹ (1980) 2 SCC 559



accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

(emphasis supplied)

21. Hon'ble Supreme Court in **Directorate of Enforcement v. Subhash Sharma**², while dealing with the similar situation where the respondent therein was granted bail on the ground that the said respondent was detained and taken into custody at 18.00 hours (06:00 PM) on 04.03.2022 at IGI Airport, New Delhi, when the Bureau of Immigration executed the LOC issued against the respondent and held him in custody on behalf of ED. The contention raised before the Hon'ble Supreme Court was that ED had taken physical custody of the respondent therein at 11:00 hours on 05.03.2022 and produced him before the Court in the afternoon on 06.03.2022 within 24 hours. Rejecting the said contention on behalf of the appellant therein, the Hon'ble Supreme Court has observed and held as under: -

“6. This argument cannot be accepted. Admittedly, the LOC was issued at the instance of the appellant - Directorate of Enforcement. By executing the LOC, the Bureau of Immigration detained the respondent at IGI Airport from 4th March 2022 on behalf of the Appellant. The finding of fact recorded in paragraph 10 is that undisputedly, the physical custody of the respondent was taken over by the appellant from the Bureau of Immigration at 11.00 hours on 5th March, 2022. Thereafter, at 1.15 hours on 6th March 2022, an arrest memo was prepared by ED at Raipur. He was produced before the Court at 3 p.m. on 6th March, 2024. The perusal of the arrest order(Annexure p-1) shows that the typed order was kept ready. The date and time of arrest were kept blank which appear to have been filled in by hand. Admittedly, the respondent was not produced before the nearest learned Magistrate within 24 hours from 11.00 a.m. on 5th March, 2022. Therefore, the

² 2025 INSC 141



arrest of the respondent is rendered completely illegal as a result of the violation of clause 2 of Article 22 of the Constitution of India. Thus, the continuation of the respondent in custody without producing him before the nearest Magistrate within the stipulated time of 24 hours is completely illegal and it infringes fundamental rights under clause 2 of Article 22 of the Constitution of India. Therefore, his arrest gets vitiated on completion of 24 hours in custody. Since there is a violation of Article 22(2) of the Constitution, even his fundamental right to liberty guaranteed under Article 21 has been violated.

8. Once a Court, while dealing with a bail application, finds that the fundamental rights of the accused under Articles 21 and 22 of the Constitution of India have been violated while arresting the accused or after arresting him, it is the duty of the Court dealing with the bail application to release the accused on bail. The reason is that the arrest in such cases stands vitiated. It is the duty of every Court to uphold the fundamental rights guaranteed under Articles 21 and 22 of the Constitution.

9. Therefore, when arrest is illegal or is vitiated, bail cannot be denied on the grounds of non-fulfillment of twin tests under clause (ii) of sub-section 1 of Section 45 of PMLA.”

(emphasis supplied)

22. Following the aforesaid judgement, learned Division Bench of Hon'ble High Court of Bombay in **Kaushik Rameshchandra Thakkar v. State of Maharashtra Through PI³**, had observed and held as under:

“26. In the case in hands, at the cost of repetition, the record clearly indicates that the Petitioner was taken into custody at 7.00 AM on 16.08.2024. He could have been produced before the nearest learned Magistrate and a transit remand could have been obtained. Nevertheless, the Accused was taken by the Police team in a vehicle to Ahmedabad and they flew to Mumbai, admittedly landing at 12 noon on 16.08.2024. He was taken to the office of the

³ 2025 SCC OnLine Bom 1493



EOW. He was medically examined on the same day and lodged in the lock-up. He was purportedly produced at 1.15 PM, on 17.08.2024 and was actually presented before the Magistrate at 2.50 PM. It is also stated that the Court is at a distance of 500 meters from the office of the EOW. Considering the law laid down by the Hon'ble Supreme Court in *Niranjana Singh* (Supra) and *Subhash Sharma* (Supra), the fundamental right of the Petitioner under Article 22 read with clause 2, and the protection under Article 21, has been violated.

23. In the similar circumstances, learned Division Bench of Hon'ble High Court of Andhra Pradesh at Hyderabad in **Mrs. Iqbal Kaur Kwatra v. The Dist. General of Police, Rajasthan State, Jaipur**⁴, had observed and held as under: -

“18. It is well settled that “police custody” does not necessarily mean custody after formal arrests. It also includes “some form of police surveillance and restriction on the movements of the person concerned by the police”. The word “custody” does not necessarily mean detention or confinement. A person is in custody as soon as he comes into the hands of a police officer.

19. Section 57 of the Code of Criminal Procedure, 1973 reads:

“57. Person arrested not to be detained more than twenty-four hours:— No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.”

20. On a reading of Section 57 of the Code of Criminal Procedure it is evident that no police officer can detain in custody a person arrested without warrant for a period longer than twenty-four hours besides the time taken for journey.

⁴ 1996 SCC OnLine AP 206



23. Thus it is seen that a police officer cannot detain any person in custody without arresting him and any such detention will amount to a wrongful confinement within the meaning of Sec. 340 of the Penal Code, 1860. Actual arrest and detention do not appear to be necessary, A person in custody cannot be detained without producing him before a Magistrate under the colourable pretension that no actual arrest is made and the burden of proving the reasonable ground is on the arrester that the time occupied in the journey was reasonable with reference to the distance traversed as also other circumstances and in case of continuation of detention for twenty four hours, particularly, when the police officer has reason to believe that the investigation cannot be completed within twenty-four hours, he must produce the accused forthwith before the magistrate and cannot wait for twenty-four hours.”

(emphasis supplied)

24. In view of the aforesaid judgments, there can be no doubt that the applicant was under the “custody” of the respondent, since the time of his interception on 21.05.2025. As pointed out hereinabove, “The Handing Over” –“Taking Over” memos prepared by the Customs clearly show the transfer of applicant’s custody from one officer to the other of the respondent. It is further recorded therein, that appropriate procedure was to be followed as per the Customs Act, 1962 or NDPS Act, 1985 meaning thereby, that the concerned Officers were conscious of the fact that the applicant was being detained for suspicion of commission of offence punishable under the NDPS Act. It is the case of the respondent itself, that the applicant had admitted that he was carrying capsules of contraband for which he was taken to Safdarjung Hospital for ejection. Although, the case of the respondent is that there was no prior information with regard to the applicant, however, the two documents as pointed out hereinabove, *i.e.*, *panchnama* dated 26.05.2023 and seizure memo



under Section 43(a) of the NDPS Act dated 26.05.2023, clearly records the fact that there was specific intelligence with regard to arrival of the present applicant with the allegedly recovered contraband.

25. The Constitutional Bench of the Hon'ble Supreme Court in **State of Punjab v. Balbir Singh**⁵ has observed and held as under: -

“10. It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC namely Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.”

26. Relevant provisions of the NDPS Act relating to entry, search, seizure and arrest without warrant or authorization are under: -

42. Power of entry, search, seizure and arrest without warrant or authorisation.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including paramilitary forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which

⁵ (1994) 3 SCC 299



may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, **may between sunrise and sunset,**—

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.



52. Disposal of persons arrested and articles seized.—(1) Any officer arresting a person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to—

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.

53. Power to invest officers of certain departments with powers of an officer-in-charge of a police station.—(1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the department of central excise, narcotics, customs, revenue intelligence 2 [or any other department of the Central Government including para-military forces or armed forces] or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act.

(2) The State Government may, by notification published in the Official Gazette, invest any officer of the department of drugs control, revenue or excise 3 [or any other department] or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act.

57. Report of arrest and seizure.—Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the



particulars of such arrest or seizure to his immediate official superior. **(emphasis supplied)**

27. In the present case, admittedly, the documents of the respondent shows that there was specific intelligence/prior information with regard to the arrival of the present applicant with the contraband. It is, however, the case of the respondent in the complaint filed before the learned Special Court that the applicant was intercepted on the basis of suspicion/profiling. The sequence of events and record would reflect that from the very interception, the respondent had reasons to believe that the applicant was carrying the contraband recovered. In these circumstances, it was incumbent upon the concerned Officer to comply with the provisions of the NDPS Act. Admittedly, there has been no such compliance and the respondent proceeded to detain the applicant without complying with the aforesaid procedure. The respondent was bound to comply with the aforesaid provisions from the time the applicant was intercepted at the IGI Airport. In any case, when the first set of capsules were seized by *panchnama* dated 21.05.2023, the respondent was bound to act in accordance with the provisions of the NDPS Act. It is pertinent to note that the report under Section 57 of the NDPS Act was sent only on 26.05.2023.

28. The applicant was in the continuous custody of the respondent from 21.05.2023 till 26.05.2023 without any authorisation. “Handing Over” and “Taking Over” memos annexed with the complaint leaves no manner of doubt that the custody of the applicant was being transferred from one Officer to the other on the basis of the rotational duties. Thus, in the opinion of this Court, such custody without any authority and without producing him before the



concerned Magistrate or Special Court within 24 hours in accordance with law is completely illegal. Even if the applicant was under medication for the procedure being carried out, the same cannot be a ground to keep him in custody. Magistrates exercising power of remand or otherwise in respect of persons in hospital is not unheard of and well recognised procedure in law.

29. Thus, the respondent without producing the applicant within 24 hours of his detention continued to keep him in Safdarjung Hospital till his final arrest on 26.05.2023. In view of the above, this Court holds that the applicant was kept in illegal custody by the respondent from 21.05.2023 to 25.05.2023. His arrest on 26.05.2023 stands vitiated. In terms of the judgment of Hon'ble Supreme Court in **Subhash Sharma (supra)**, rights of the applicant guaranteed under Articles 21 and 22 of the Constitution of India have been violated, and therefore, he has to be released on bail despite the restrictions provided under Section 37 of the NDPS Act. The applicant has been in judicial custody since the date of his formal arrest, *i.e.*, 26.05.2023, and has undergone incarceration for more than 2 years as of today.

30. In totality of the facts and circumstances of the case, the present application is allowed and the applicant is directed to be released on bail on his furnishing a personal bond in the sum of Rs. 25,000/- with one surety of like amount to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions: -

- i. The applicant shall not leave India without the prior permission of the learned Trial Court.
- ii. The applicant is directed to give all their mobile numbers to the Investigating Officer and keep them operational at all times.



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iii. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witness in any manner.

iv. In case, it is established that the applicant has tried to tamper with the evidence, the prosecution will be at liberty to apply for cancellation of his bail.

31. Needless to state that, nothing mentioned hereinabove, is an opinion on the merits of the case or pending trial before the learned Trial Court and observations made herein are only for the purposes of the present bail application.

32. The application stand allowed and disposed of along with all the pending application(s), if any.

33. Let a copy of this judgment be communicated to the concerned Jail Superintendent for necessary information and compliance, *forthwith*.

34. Judgment be uploaded on the website of this Court, *forthwith*.

AMIT SHARMA, J.

JUNE 03, 2025/bsr/ns