

Emeka Emmanuel vs The State on 18 November, 2022

Author: Jasmeet Singh

Bench: Jasmeet Singh

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IN THE HIGH COURT OF DELHI AT NEW DELHI
BAIL APPLN. 1231/2022
EMEKA EMMANUEL

Through: Mr. JS Kushwaha, Adv.
versus

THE STATE

Through: Ms. Manjeet Arya, APP
SI Rajender Dhaka, Narcotics Squad

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH
ORDER

% 18.11.2022

1. This is an application filed seeking bail in the FIR No. 612/2018 dated 23.11.2018 registered at PS Tilak Nagar under Section 21/25 of the NDPS Act.

2. Mr. Kushwaha, learned counsel for the applicant states that the applicant is resting his bail on a limited ground that no proper notice under Section 50 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) was given to the applicant. The notice under Section 50 of the NDPS Act reads as under:-

"(NOTICE U/S 50 OF THE NDPS ACT, 1985) To, EMEKA S/O EMMANUEL EZEONUORAH R/O FESTAC, LAGOS, NIGERIA Sub: Notice under Section 50 of the NDPS Act, 1985 Sir, Whereas there is reason to believe that Narcotic Drugs/Psychotropic Substances and things which may furnish evidence of commission of an offence under the NDPS Act, 1985 are in your possession, therefore, your personal search is to be conducted by the undersigned, if you so require, such search will be conducted in presence of the nearest Gazetted Officer or Magistrate.

(Charan Singh) ASI, No. 196/W Narcotics Squad West District, ND"

3. Mr. Kushwaha, learned counsel for the applicant has drawn my attention to a judgment of a Coordinate Bench in "Mohd. Rahis Khan vs. State" [(2014) (1) LRC 363 (Del)], and more particularly paragraphs 8, 9 and 10 which read as under:-

"8. Applying the law laid down by the Apex Court to the facts of this case, it would be

useful to reproduce the notice so issued to the appellant under Section 50 of the NDPS Act:

"Notice u/s.50 NDPS Act You, Mohd. Raees Khan s/o. Mohd. Pyare Khan r/o. Village Mohanpur, P.S. Faridpur, Post Office Navada Bilsadi, District Bareilly, U.P. are hereby informed that we have suspicion that you have some more smack in your possession, therefore, we intend to search you. If you desire, your search may be carried out in front of a gazetted officer or a Magistrate, who can be requested to come to the spot and you can also carry out the search of the police party. (NARENDER KUMAR, S.I.) Special Staff /ME 27.6.2001 Witnesses:

1. Ct.Devender Kumar 1120/NE

2. Ct.Pradeep Kumar 897/NE Reply to notice u/s.50 NDPS Act Whatever smack I had in my possession you have already seized. Now I do not have any more smack. I do not want that my search is carried out in the presence of a gazetted officer or a Magistrate, nor I want to carry out the search of the police party. (NARENDER KUMAR, S.I.) Special Staff /ME 27.6.2001 Witnesses:

1. Ct.Devender Kumar 1120/NE

2. Ct.Pradeep Kumar 897/NE"

9. A careful examination of this notice would show that an option was given to the appellant that if the appellant so desired the search could be conducted in the presence of a gazetted officer or a Magistrate, however, he had responded by saying that since smack had already been recovered, he has no further smack; he did not want his search to be carried out in the presence of a gazetted officer or a Magistrate. Various decisions rendered by the Apex Court have drawn a distinction between an option being given to a person that he may have the search conducted in the presence of a gazetted officer or a Magistrate and communicating to him in clear words that he has a right in law to be searched in the presence of a Magistrate or a gazetted officer.

10. In this case, a mere offer was made to the appellant that in case he so desires, his search may be conducted in front of a gazetted officer. Thus a mere offer would not satisfy the mandatory ingredients of section 50 of the NDPS Act. In my view the judgment in the case of Ram Avatar (Supra) is fully applicable to the facts of this case, as a similar offer was given to Ram Avtar and the Apex Court held that such an offer did not comply with the mandatory requirement of section 50 of the NDPS Act."

4. The facts of the said case are squarely applicable to the issue in hand.

The notice issued in the present case is almost identical to the notice as reproduced in "Mohd. Rahis Khan vs. State".

5. This Court was of the view that these kinds of notices only are offer to the applicant and do not satisfy the mandatory ingredients of Section 50 of the NDPS Act. The Hon ble Supreme Court in "State of Delhi vs. Ram Avtar @ Rama" [(2011) (3) JCC 146] has also held as under:-

24. We are also unable to appreciate how the provisions of Section 50 of the Act can be read to support such a contention. The language of the provision is plain and simple and has to be applied on its plain reading as it relates to penal consequences. Section 50 of the Act states the conditions under which the search of a person shall be conducted. The significance of this right is clear from the language of Section 50(2) of the Act, where the officers have been given the power to detain the person until he is brought before a Gazetted Officer or Magistrate as referred to in sub-section (1) of Section 50 of the Act. Obviously, the legislative intent is that compliance with these provisions is imperative and not merely substantial compliance. Even in the case of Ali Mustaffa Abdul Rahman Moosa (supra), this Court clearly stated that contraband seized as a result of search made in contravention to Section 50 of the Act, cannot be used to fasten the liability of unlawful possession of contraband on the person from whom the contraband had allegedly been seized in an illegal manner. „Unlawful possession of the contraband is the sine qua non for conviction under the Act. In the case of Ali Mustaffa Abdul Rahman Moosa (supra), this Court had considered the observation made by a Bench of this Court, in an earlier judgment, in the case of Pooran Mal v. Director of Inspection [(1974) 1 SCC 345] which had stated that the evidence collected as a result of illegal search or seizure could be used as evidence in proceedings against the party under the Income Tax Act. The Court, while examining this principle, clearly held that even this judgment cannot be interpreted to lay down that contraband seized as a result of illegal search or seizure can be used to fasten the liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner.

„Unlawful possession of the contraband, under the Act, is a factor that has to be established by the prosecution beyond any reasonable doubt. Indeed, the seized contraband is evidence, but in the absence of proof of possession of the same, an accused cannot be held guilty under the Act."

6. Ms. Arya, learned APP states that in the present case, the Tehrir recorded on the same day complies with the mandate of Section 50 of the NDPS Act as the specific word „legal right has been used. She further states that in the present case, the search was conducted before the Gazetted Office. She also states that in the present case, the seizure is of commercial quantity and hence the bar of Section 37 of the NDPS Act also applies.

7. I have heard learned counsels for the parties.

8. I am of the view that the judgment of "Mohd. Rahis Khan vs. State" is squarely applicable. The Section 50 of the NDPS Act has to be complied with both, not only substantially but fully, as it is a mandatory requirement.

9. The Hon ble Supreme Court as well as this Court has clearly opined that in case Section 50 of the NDPS Act is not complied with, the applicant is entitled to bail.

10. In the present case, I am of the view that the notice under Section 50 of the NDPS Act fails to give notice to the applicant his legal right of being searched before a Gazetted Officer. The fact whether the Tehrir or the fact whether the applicant was searched before the Gazetted Officer is not relevant since the fountainhead i.e. the notice under Section 50 of the NDPS Act fails to give notice to the applicant of his statutory right.

11. Since the mandatory requirement of Section 50 of the NDPS Act has not been met in the first instance, the recovery itself is under doubt. Any recovery made without compliance of Section 50 of the NDPS Act itself cannot be sustained.

12. In this view of the matter, the twin conditions of Section 37 are also met as the learned APP has been given the right to oppose the bail application.

13. Since the fountainhead of the recovery itself is missing, I am of the view that no reliance can be placed on the recovery made from the applicant and I am also prima facie of the view that if the applicant is released on bail, he would not commit any offence.

14. As the complaint also contains the violation of Section 468 and 471 IPC, my attention has been drawn to the judgment titled "Anil Kumar @ Nillu vs. State" [(2022) (3) JCC 1669], wherein the Coordinate Bench has held that in case of absence of fair, just and reasonable procedure, the right of the applicant to personal liberty is affected.

15. The applicant is in custody since 23.11.2018.

16. In this view of the matter, I am inclined to allow the application. The applicant is directed to be released on bail subject to the following terms and conditions:-

- i. The applicant shall furnish a personal bond and a surety bond in the sum of Rs. 50,000/- each, to the satisfaction of the Jail Superintendent;
- ii. The applicant shall appear before the Court as and when the matter is taken up for hearing;
- iii. The applicant shall join investigation as and when called by the I.O concerned;
- iv. The applicant shall provide her mobile number to the Investigating Officer (IO) concerned, which shall be kept in working condition at all times. The applicant shall not switch off, or change the same without prior intimation to the IO concerned, during the period of bail;

v. In case the applicant changes her address, she will inform the IO concerned and this Court also;

vi. The applicant shall not leave the country during the bail period and surrender her passport, if any, at the time of release before the Jail Superintendent;

vii. Till the time the applicant obtains a valid VISA, she shall be kept in observation home in accordance with FRRO guidelines; viii. The applicant shall not indulge in any criminal activity during the bail period;

ix. The applicant shall not communicate with, or come into contact with any of the prosecution witnesses, or any member of the victim's family, or tamper with the evidence of the case.

17. The application is disposed of in the aforesaid terms.

JASMEET SINGH, J NOVEMBER 18, 2022 / (MS) [Click here to check corrigendum](#), if any