

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2108 OF 2016

Rajaram Kadu, presently in Judicial Custody
in Taloja Central Prison

Applicant

versus

The State of Maharashtra
through Crime Branch, Special Squad,
Unit Nos.3 and 4, Kalyan.

Respondent

Mr.Ayaz Khan for Applicant.
Smt.J.S.Lohokare, APP, for State.

CORAM : PRAKASH D. NAIK, JJ.

DATE : 13th June 2017

PC :

1. This is an application for bail in connection with CR No.II-8 of 2016 registered with Crime Branch, Special Squad, Unit Nos.3 and 4, Kalyan. The offence was registered on 29th May 2016 under Sections 8(c) and 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. The prosecution case is that on 29th May 2016 the complainant Police Naik Bhagwat Tukaram Saudane attached to Special Squad, Crime Branch, Unit Nos.3 and 4, Kalyan had received an information that on that day a person by name Rajaram Kadu will arrive,. with Ganja in his possession by Maruti Ertiga car through via Kalyan-Badlapur Road, at Badlapur (West). Police Naik Bhagwat Saudane allegedly conveyed said information orally to in-charge

officer of his squad i.e. API Divekar. Thereafter API Divekar orally informed about said information to his superiors, who directed him to conduct a raid with the help of Crime Branch, Unit-4, Ulhasnagar. API Divekar came with his staff and informed Senior Police Inspector Sanjay Sable of Crime Branch Unit-4, Ulhasnagar and submitted report to that extent. Senior PI.Sable passed on the said information to his superior officer and directed one of the raiding party members to bring two panchas and other raiding member were asked to arrange for photographer and weighing scale. In pursuance to that, panchas were called along with photographer and weighing scale. The panchanama was prepared. The FIR was lodged with Ulhasnagar Police Station by Police Naik Bhagwat Saudane. The raiding party apprehended the Applicant-accused who was travelling in car. His personal search was taken. It was found that there were nylon bags lying in the said car. It was noted that the said two bags were containing Ganja of 40 kgs. each. The samples were taken of the contraband. The applicant was arrested on the same day.

3. The Applicant preferred an application for bail before the Sessions Court, which has been rejected. Hence, the Applicant has preferred this application.

4. Learned advocate for the Applicant submitted that there is non compliance of Sections 42 and 42(2) of the NDPS Act. It is submitted that as per first information report ('FIR'), the complainant received the information in the present case, however, the FIR does not disclose that the complainant had reduced the said information into writing or forwarded a copy thereof for information

to his superior officers. It is further submitted that the statement of API Divekar also does not disclose that he has reduced the information into writing or forwarded a copy thereof for information to his immediate superior. As per the prosecution case, Senior Police Inspector Sable after receiving the information from API Divekar made entries in the station diary to show compliance of Section 42 of NDPS Act. It is further submitted that making entries in the station diary does not amount to sufficient compliance of Section 42 of the NDPS Act. There is no document on record to indicate that a copy of the information was forwarded to the official superior before proceeding for the raid. It is, therefore, submitted that there is violation of Section 42 of NDPS Act. It was further submitted that the contraband was sealed by the raiding party and samples were obtained. However, from the record it appears that the contraband were de-sealed and thereafter again re-sealed and the samples were sent for chemical analysis. It is submitted that there was ample opportunity for the investigating machinery to tamper with the contraband. It is further submitted that the complaint indicates that what was recovered from the bags were leaves and flowers which was allegedly Ganja. Learned advocate for Applicant pointed out that the C.A. report which refers to the description of articles mentions that two sealed envelopes are received, seals are intact, flowering/fruited tops with greenish leaves and stalks in two separate press sealed polythene bags packed separately in two packets marked. It was, therefore, submitted that presence of stalk is referred for the first time in the C.A. Report, which is not the case of prosecution at the time of seizure. It is, therefore, submitted that on this count, the Applicant may be released on bail.

5. Learned advocate for Applicant relied upon several decisions of this Court in support of his submission. Reliance is placed on a decision of this Court in **Criminal Application No.355 of 2010 in Criminal Appeal No.1057 of 2008 (A.Nasar Cherukara Vs. R.G.Gokhale & others)**. The Court in the said decision was pleased to consider the issue of non-compliance of Section 42(2) of the NDPS Act. In the facts of that case it was contended that the information received first in point of time by Mr.Dev, Superintendent of Trivandrum Regional Unit and there is no evidence to show that Mr.Dev had reduced the information in writing and conveyed it to the immediate superior officer, as required under Section 42(2) of the NDPS Act. It was, therefore, submitted that there was no compliance of Section 42. The prosecution in the said case had contended that the witness Mr.Nair had reduced the information into writing. However, the point which was canvassed was that the officer who had received the information, had not reduced the same into writing. The Court referred to the decision of **Directorate of Revenue and another Vs. Mohd. Nisar Holia {(2008)1-SCC [Cri]-415}**. In the said decision of Apex Court, it was observed that information was received in the office of Directorate of Revenue that one person was in possession of fax copy of the consignment note under which the mandrax tablets were being transported from Delhi to Mumbai. The said information was passed on to PW-1 Parmar. He reduced the same into writing and placed before Mr.A.D.Patekar, Senior Intelligence Officer. In the said case, the High Court in appeal had opined that the statutory requirement of Section 42 of the Act had not been complied with. The said decision was challenged

before the Supreme Court in the aforesaid case. The Apex Court observed that the statutory requirement had not been complied with. The person who had received the information did not reduce the same into writing. The Apex Court further observed that the officer who received such information, is bound to reduce the same into writing and not the person who shares the same. The decision of this Court in the aforesaid appeal was challenged before the Apex Court and the special leave appeal challenging the said decision was dismissed by Apex Court by order dated 9th December 2013.

6. Mr.Khan further relied upon several other decisions in support of his submission with reference to non compliance of Section 42(2). He relied upon the decision of the Apex Court in case of **Sarija Banu (A) Janarthani Vs. State through Inspector of Police {(2004)12-SCC-266}**. In the said decision, the Apex Court was pleased to consider the embargo of Section 37 and the question of grant of bail for non compliance of the mandatory provisions under the Act. In paragraph 7 of the said decision, the Apex Court has observed that in the bail application of the appellant, it was alleged that there was serious violation of Section 42 of NDPS Act. In the impugned order nothing is stated about alleged violation of Section 42 of the Act and it is observed that it is not necessary to consider said violation at that stage. Compliance to Section 42 is mandatory and that is relevant fact which should engage the attention of the Court while considering the bail application. Relying upon aforesaid observation, learned advocate for Applicant submitted that the issue of non compliance of Section 42 can be considered even at the stage of bail.

7. Learned counsel for Applicant further relied upon the decision of learned Single Judge this Court in **Criminal Application No.143 of 2011 (Suresh Somraju Ali Vs. The State of Maharashtra)**. In paragraph 5 of the said decision, the Court has considered the issue of non compliance of Section 42 of NDPS Act and has placed reliance upon the decision of Apex Court in case of Sarija Banu & another Vs. State (supra) and the Applicant therein was granted bail. He also placed reliance upon the decision of learned Single Judge of this Court delivered in **Criminal Bail Application No.1311 of 2012 (Smt.Najma Abdul Shaikh Vs. The State of Maharashtra)**. In the said decision also, the Court had considered the issue of non compliance of Section 42 of NDPS Act in the application for bail preferred by the Applicant therein. Learned counsel for Applicant also relied upon another decision of learned Single Judge in case of **Bipin Kumar Ramsagar Pandit @ Saxena Vs. State of Maharashtra {2014(1)-Bom.C.R. [Cri]-486}**. In the said decision also, the Court had considered the issue of non compliance of Section 42 of NDPS Act while granting bail to the Applicant therein. Reliance is also placed on the decision of this Court delivered in Bail Application No.857 of 2016, Bail Application No.1145 of 2015 and Bail Application No.2105 of 2015. In all the decisions, the Court had considered the issue of non compliance of Sections 42 and 50 of NDPS Act in the application for bail preferred by the Applicants therein.

8. Learned APP submitted that the grounds raised by the Applicant can be considered at the stage of trial and need not be looked into while considering the application for bail. She submitted

that huge quantity of contraband has been recovered from the Applicant and there is sufficient compliance of Section 42 of the NDPS Act. She further submitted that as far as other issues with regard to the discrepancy in the C.A. Report and de-sealing of the contraband are concerned, it would be a matter of evidence and cannot be considered at this stage.

9. I have perused the FIR and other documents which form part of the charge sheet and which have been annexed with the application. As far as submission with regard to the discrepancy in the C.A. Report and de-sealing of the articles is concerned, I am of the opinion that the said issue will be the matter of evidence and can be raised during the course of trial. As far as non compliance with Section 42 of the Act is concerned, it can be seen that the information was received by Police Naik Bhagwat Saudane. The FIR does not indicate that he had reduced the information into writing or provided any copy of the information to his superior officer. The statement of API Divekar also does not indicate that he had reduced the information into writing or forwarded the same to his superior officer. However, the prosecution is relying upon the entries made by Senior P.I. Sable of Ulhasnagar in the station diary to show the compliance of Section 42. That cannot be considered to be the compliance of Section 42 of NDPS Act. The point which is canvassed by learned counsel for Applicant is that the person who had received the information had not forwarded it to the superior officer and there is nothing on record to indicate that any such information was forwarded in writing. It is, therefore, rightly contended that there is non compliance of Section 42(2) of NDPS Act. As observed by the

Apex Court in the case of Sarija Banu (supra), the issue with regard to non compliance of Section 42 of NDPS Act can be considered at the stage of bail. I have also perused the decisions of this Court relied upon by learned advocate for Applicant wherein this Court had granted bail for non compliance of Section 42 of NDPS Act.

10. In the light of aforesaid circumstances, I am inclined to grant bail to the Applicant. Hence, I pass following order :

ORDER

- (i) Bail Application is allowed;
- (ii) The Applicant is directed to be released on bail on furnishing PR bond in the sum of Rs.50,000/- with one or more sureties in the like amount;
- (iii) The Applicant shall not leave India without seeking prior permission of this Court. The Applicant shall surrender forthwith his passport, if any. If the Applicant does not have passport, then he shall file an affidavit stating that he does not have passport forthwith;
- (iv) The Applicant is directed to attend Crime Branch, Special Squad, Unit Nos.3 and 4, Kalyan, once in a week on every Monday between 5 p.m. and 6 p.m. till trial is over;
- (v) The Bail Application is disposed of.

(PRAKASH D. NAIK, J.)

MST