

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO.162 OF 2018

Sunil Arun Chamalwar,
Age : 35 years, Occu. Service,
R/o N-9, Sartharak Apartment,
M-2, CIDCO, Aurangabad,
Tal. & Dist. Aurangabad

PETITIONER

VERSUS

The State of Maharashtra,
Investigating Officer of
Police Station CIDCO (City),
Aurangabad, Tal. & Dist.
Aurangabad

RESPONDENT

Mr. Shailesh P. Brahme, Advocate for the petitioner
Mr. S.D. Ghayal, A.P.P. for the respondent/State

CORAM : SANGITRAO S. PATIL, J.

JUDGMENT RESERVED ON : 29th SEPTEMBER, 2018
JUDGMENT PRONOUNCED ON: 4th OCTOBER, 2018

JUDGMENT :

Rule, made returnable forthwith. With the consent of the learned counsel for the petitioner and the learned A.P.P., heard finally.

2. The petitioner has challenged the order dated 28th June, 2018, passed by the learned Special Judge

(NDPS Act), Aurangabad below application (Exh.118) in Special (NDPS) Case No.1 of 2010, whereby the claim of the petitioner for his discharge of the offences punishable under Sections 20 (b) (ii), 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("Act", for short), came to be rejected.

3. It is the case of the prosecution that on 18th March, 2009, on receiving a secret information, the informant, namely Shashikant Laxmanrao Singare, Assistant Police Inspector, Anti Terrorist Squad, Aurangabad Unit laid a trap in front of Hotel Suyog, N-11, HUDCO, Aurangabad and caught hold of accused No.1 Naresh Rakhewar, accused No.2 Rajkamal Pande, accused No. 4 Tushar Patil and the present petitioner (accused No.3). Search of the persons of accused Nos.1 to 4 was taken by the informant in the presence of panchas. Charas weighing 750 grams worth Rs.60,000/- was found concealed by accused No.1 Naresh Rakhewar in a plastic bag in his backside under the banyan. On being asked, accused No.1 informed that he had brought charas for being given to accused No.4 as per the instructions of the present petitioner. He further informed that the said charas was brought by accused No.2 from Bhiwandi.

All necessary formalities are stated to have been completed prior to and after seizure of charas from accused No.1 excepting the formalities which are required to be completed as per the provisions of Section 52-A of the Act. All the four accused came to be arrested. After completion of the investigation, the chargesheet came to be filed against accused Nos.1 to 4 on 12th January, 2010 for the above mentioned offences.

4. The petitioner filed application (Exh.118) and claimed his discharge of the above mentioned offences on the ground that the provisions of Section 52-A of the Act, which are mandatory, have not been followed and therefore, on this sole ground, the petitioner is entitled to get discharged.

5. The learned A.P.P. opposed the application on the ground that the charges have already been framed and the case is listed for evidence. Therefore, the application for discharge was not maintainable. The learned A.P.P. alleged that the application for discharge has been filed just to prolong hearing of the case. He prayed that the application (Exh.118) may be rejected.

6. The learned Special Judge heard both the sides and rejected the application as per the impugned order.

7. The learned counsel for the applicant submits that the provisions of Section 52-A (2) of the Act are mandatory. Non-compliance of the said provisions would be fatal to the prosecution. According to him, this being the fundamental defect, in view of the judgment in the case of **Ratilal Bhanji Mithani V. State of Maharashtra 1979 (2) SCC 179**, discharge can be claimed even after framing of the charges. He further relied on the judgment in the case of **Baburao Hari Pawar V. State of Maharashtra 1987 CRI.L.J.584**, wherein it is observed that the accused is entitled to ask for discharge from the prosecution at any stage and there is no time limit for filing such an application.

8. The learned counsel relied on the judgments in the cases of **Jitendra V. State of Madhya Pradesh 2004 (10) SCC 562**, **Hanamantu s/o Gangaram Badawat V. State of Maharashtra 2007 All M.R.(Cri)3359**, **Dayakar Illandulla s/o Maratyya Illandulla V. State of Maharashtra 2010 All M.R.(Cri)1899** and **Mohd. Gulam Hussein Mohd Meghu Shaikh @ Nana V. State of Maharashtra 2013 All.M.R.(Cri.)2842**,

in support of his contention that if the provisions of Section 52-A (2) of the Act are not complied with, the accused is liable to be acquitted. The learned counsel then relied on the judgment in the case of ***Union of India V. Mohanlal and another 2016 DGLS (Supreme Court)***⁷⁹, in support of his contention that the provisions of Section 52-A of the Act have to be followed while effecting seizure of contraband.

9. Relying on the judgment in the case of ***M/s Pepsi Foods Ltd. and another V. Special Judicial Magistrate and others AIR 1998 S.C.128***, the learned counsel submits that though this is a Criminal Revision Application, this Court has inherent powers under Section 482 of the Code of Criminal Procedure ("Code", for short), which could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice. He submits that considering the fate of the case, for non-compliance of Section 52-A (2) of the Act, there is no point in asking the petitioner to face the ordeal of trial. He, therefore, submits that even by exercising the powers under Section 482 of the Code, this Court may entertain the claim of the petitioner for discharge of the above mentioned offences

and discharge him. He submits that the learned Special Judge did not consider the facts as well as the mandatory nature of the provisions of Section 52-A of the Act and wrongly rejected the application. He, therefore, prays that the impugned order may be quashed and set aside and the petitioner may be discharged of the above mentioned offences.

10. The learned A.P.P. strongly opposed the Revision Application. He submits that in none of the judgments cited by the learned counsel for the petitioner, it has been specifically held that non-compliance of the provisions of Section 52-A (2) of the Act would enable the accused to claim discharge of the offences under the Act and avoid the trial. He submits that in all those judgments, after the full-fledged trials, the accused persons were acquitted on the ground that neither the provisions of Section 52-A (2) of the Act were followed, nor the bulk of the seized contraband was produced before the Courts at the time of the trials. He submits that in the present case, the stage of production of the bulk of the seized charas has yet to come. Therefore, the said rulings would not be helpful to the petitioner. He then relied on the

judgment in the case of ***State of Punjab V. Makhan Chand 2004 (3) SCC 453***, which was decided by the same Hon'ble Judges of the Apex Court after about five months of pronouncing the judgment in the case of ***Jitendra (supra)***, wherein also, while challenging conviction of the accused, a contention was raised on behalf of the accused that the provisions of Section 52-A of the Act were not followed. However, the Hon'ble the Apex Court upheld the conviction of the accused for the offences punishable under Sections 18 and 21 of the Act that was recorded by the Trial Court and set aside the judgment of the High Court acquitting the accused. The learned A.P.P., therefore, submits that merely non-compliance of the provisions of Section 52-A would not entitle the petitioner to claim discharge. He submits that the charges have already been framed. Now the case is ripe for recording evidence of witnesses. He, therefore, prays that the Criminal Revision Application may be dismissed.

11. Though the learned counsel for the petitioner, in support of his contention that the accused can claim discharge even after framing of the charges by the Trial Court cited the above-referred judgments, I think fit

to entertain this Criminal Revision Application on merits on the facts of the present case and the provisions of Section 52-A of the Act, instead of harping on the technical point whether, indeed, the accused can seek discharge before the Trial Court after framing of charges.

12. In the cases of **Jitendra, Hanamantu s/o Gangaram Badawat, Dayakar Illandulla s/o Maratyya Illandulla** and **Mohd. Gulam Hussein Mohd Meghu Shaikh @ Nana** (supra), cited by the learned counsel for the petitioner, the accused were convicted of the offences under the Act after full-fledged trials. Thus, it is obvious that they were not discharged of the said offences prior to recording of evidence. Moreover, in those cases, the bulk of the contraband seized was not produced before the Trial Court at the time of the trials. Therefore, for want of production of bulk of the seized contrabands at the time of the trials, the accused persons were acquitted.

13. In the case of **Jitendra** (supra), as seen from paragraph No.4 of the judgment, the learned counsel for the accused pointed out that one kilogram of charas, alleged to have been seized from the custody of the

accused Jitendra and one kilogram of ganja, alleged to have been seized from the possession of the accused Sheela (the mother of Jitendra), were not at all produced at the trial. The second limb of argument was that the provisions of Section 52-A of the Act are mandatory and that there was violation of these provisions by the prosecution. The Hon'ble the Apex Court observed that the accused are entitled to succeed on the first contention of the learned counsel i.e. non-production of the seized bulk contraband at the trial. The judgment would show that the accused were acquitted on the sole ground that the charas and ganja alleged to have been seized from the custody of the accused persons had neither been produced in the Court, nor marked as articles, which ought to have been done. There is no observation in the said judgment that compliance of the provisions of Section 52-A of the Act was mandatory and that non-compliance thereof would be fatal to the prosecution and/or vitiate the trial.

14. In the case of **Hanamantu s/o Gangaram Badawat** (supra) also, the accused was acquitted as the contraband seized from the possession of the accused was not produced at the trial.

15. In the case of **Dayakar Illandulla s/o Maratyya Illandulla** (supra), in paragraph No.10 of the judgment, it is observed that non-compliance with the statutory provision under Section 52-A of the Act, which is held mandatory by the Apex Court, goes to the substratum of the prosecution case and entitles the accused to claim acquittal. The only judgment delivered by the Hon'ble the Apex Court that was cited in that case was of **Jitendra** (supra). As stated above, in the case of **Jitendra** (supra), the Hon'ble the Apex Court has not held that the provisions of Section 52-A of the Act are mandatory and would go to the substratum of the prosecution case.

16. In the case of **Mohd.Gulam Hussein Mohd.Meghu Shaikh @ Nana** (supra) also, the accused was acquitted on the ground that the bulk of seized contraband was not produced at the trial. In paragraph NO.11 of the said judgment, it is observed that the production of Muddemal property could have been dispensed with in the eventuality that the prosecution had placed before the Court the inventory prepared, submitted to the Metropolitan Magistrate and the orders thereupon. In that case, neither the inventory as contemplated under

Section 52-A of the Act was prepared, nor the seized contraband was produced before the Trial Court. In the circumstances, it was held that the failure on the part of the prosecution to follow the provisions of Section 52-A of the Act is certainly fatal to the prosecution.

17. It is clear from the above cited judgments that if neither inventory as contemplated under Section 52-A of the Act is prepared, nor the seized bulk of the contraband is produced before the Trial Court, the accused would be entitled to get acquittal. In the present case, the stage of production of bulk of the seized charas has yet come. In case the seized charas is not produced before the Trial Court, the petitioner may claim acquittal on the basis of the above mentioned rulings. However, mere non-compliance of the provisions of Section 52-A of the Act, at this stage, would not enable him to claim the relief of discharge of the above mentioned offences.

18. As stated above, in the case of ***State of Punjab V. Makhan Chand*** (supra), cited by the learned A.P.P., though there was non-compliance of the provisions of Section 52-A of the Act, the accused was convicted for the offences punishable under Sections 18

and 21 of the Act.

19. In the case of ***Union of India V. Mohanlal and another*** (supra), cited by the learned counsel for the petitioner, the controversy involved was in respect of the standing orders issued by the Central Government, which were running contrary to the provisions of Section 52-A of the Act and the Hon'ble the Apex Court observed that such a conflict shall have to be resolved in favour of the statute on the first principle of interpretation. The Central Government was, therefore, directed to re-examine the matter and take suitable steps to resolve that controversy. This judgment would be of no help to the petitioner.

20. Considering the above facts and circumstances of the case as well as the legal position referred to above, the petitioner, at this stage, is not entitled to claim discharge of the above mentioned offences. Though the impugned order is cryptic, for the reasons mentioned above, I uphold the rejection of the application (Exh.118) for discharge filed by the petitioner as per the impugned order. The Criminal Revision Application is devoid of any substance. It is liable to be dismissed. In the result, I pass the following order:-

ORDER

- (i) Criminal Revision Application is dismissed.
- (ii) Rule is discharged accordingly.
- (iii) Criminal Revision Application stands disposed of accordingly.

[SANGITRAO S. PATIL]
JUDGE

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