

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****ANTICIPATORY BAIL APPLICATION NO. 865 OF 2018**

Suraj @ Gundy Manohar Macharekar

....Applicant.

Vs.

The State of Maharashtra

....Respondent.

Mr. Aniket Nikam I/by Mr. Aashish Satpute for the Applicant.

Mr. N.B. Patil APP, for the Respondent-State.

CORAM : A. S. GADKARI, J.

DATE : 24th NOVEMBER, 2018.

P.C.:-

This is an Application under Section 438 of the Code of Criminal Procedure for pre-arrest bail in C.R. No. 123 of 2018 , registered with Vishrantwadi Police Station, Pune for the offences punishable under Sections 8(C), 20 (b) (ii) and (C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and under Section 65-E of the Bombay Prohibition Act and under Sections 4 and 5 of the Bombay Gambling Act.

2 By an Order dated 2nd May 2018, the Applicant was granted interim relief mainly on the ground that, there is non-compliance of Section 42 (1) and (2) of the NDPS Act.

3 Heard the learned counsel appearing for the Applicant at length and the learned APP. Perused the record.

It is the prosecution case in brief that, on the basis of confidential information received by Police, the Police conducted the raid at the residential premises of co-accused Smt. Jijabai Yashwante wherein, 56 kg. contraband/Ganja was seized. During the course of the inquiry with co-accused Smt. Jijabai Yashwante, she informed that the said contraband/Ganja was stored at the instance of the Applicant. She thereafter showed the house of the Applicant wherein, co-accused Mrs. Sonali Macharekar was found at the said place. During the course of the search of the said premises, 2 kg. more contraband/Ganja was seized by the Police at her instance. She also informed the police that, at the instance of Applicant the said contraband was stored in the said premises. Till date, the police have seized about 58 kg. of contraband/Ganja from the other accused persons. The Applicant is therefore, apprehending arrest in the present crime.

4 The learned counsel for the Applicant submitted that, there is non-compliance of Section 42 of the NDPS Act by the Investigating Agency, as the basic information was received by the Assistant Police Commissioner and the said information has not been

further provided/supplied to his immediate Higher Authority i.e. the Deputy Commissioner of Police and therefore, there is a clear violation of Section 42 (1) and (2) of the NDPS Act. He further submitted that, the Applicant has no way concern with the said contraband and it is only on the basis of the statements given by the co-accused, the police are seeking custody of the Applicant.

In support of his contention he relied on the judgment of the Constitutional Bench of the Hon'ble the Supreme Court in the case of *Karnail Singh Vs. State of Haryana reported in (2009) 8 SCC 539*. He also relied on the decision of the learned Single Judge of this Court of the Aurangabad Bench (Coram:- Sangitrao S. Patil, J.) (*Balu s/o Babu Phoomali Vs. State of Maharashtra,*) Criminal Application No. 52 of 2018, dated 30th January 2018, granting pre-arrest bail to the accused persons therein, under the NDPS Act.

He therefore, prayed that, the Applicant may be protected by pre-arrest bail.

5 The material available on record indicates that, the co-accused Smt. Jijabai Yashwante is the mother-in-law and Mrs. Sonali Macharekar is the sister-in-law of the Applicant. They have no reason to falsely implicate the Applicant in the present Crime to save their

own skins. It is the categorical case of the prosecution that, at the instance of Applicant the said contraband was stored in the co-accused persons' respective houses.

6 As far as the non-compliance of Section 42 (1) and (2) of the NDPS Act in the present case is concerned, the Constitutional Bench of the Supreme Court in the case of *Karnail Singh (Supra)*, has categorically held that, non-compliance of Section 42 may not vitiate the Trial, if it does not cause any prejudice to the Accused. That, whether there is an adequate or substantial compliance under Section 42 of the NDPS Act or not, is a question of fact to be decided in each case.

7 In the present case, the investigation *qua* the Applicant is at nascent stage. The police are yet to submit charge-sheet as against the Applicant. Whether there is a total non-compliance or there is adequate or substantial compliance of the provisions of Section 42 is a question of fact, which will be decided after granting sufficient opportunity to the prosecution at the time of Trial and it will not be proper to adjudicate the said issue at this stage. It further clearly appears that, no prejudice at all, at this stage, is caused to the Applicant even if there is a total non-compliance of Section 42 of the

Act, which as per the ratio laid down by the Constitutional Bench of the Supreme Court in the case of *Karnail Singh (Supra)* is a directory and as noted earlier, at this stage, no prejudice would be caused to the Applicant in that behalf.

8 As far as the Order passed in *Balu s/o Babu Phoomali (Supra)* by the learned Single Judge of this Court dated 30th January, 2018, is concerned, the learned Single Judge has recorded a finding that, *prima facie* the said Applicant therein, cannot be connected with the offence alleged against him and therefore, he is entitled to be extended relief of pre-arrest bail.

9 Section 37 of the NDPS Act imposes certain rigours even, while considering the Application for regular bail and the Court is required to record its satisfaction that, there are reasonable grounds for believing that the accused is not guilty of such offence and that is not likely commit to an offence while on bail. If the statute has mandated such stringent condition, even for an Application of regular bail, an Application under Section 438 of the Cr.P.C. needs to be viewed with more circumspection by the Courts.

10 A useful reference, at this stage, can be made to the decision of the Supreme Court in the case of *Muraleedharan Vs. State*

of Kerala reported in AIR 2001 SC 1699, wherein, in paragraph No. 7 the Supreme Court has held as under:-

“7 The above provision is in pari materia with Section 37 of the Narcotic Drugs and Psychotropic Substances Act. This Court has held, time and again, that no person who is involved in an offence under that Act shall be released on bail in contravention of the conditions laid down in the said Section. (vide *Union of India vs. Ram Samujh* (1999) (9) SCC 429. If the position is thus in regard to an accused even after arrest, it is incomprehensible how the position would be less when he approaches the Court for pre-arrest bail knowing that he would also be implicated as an accused. Custodial interrogation of such accused is indispensably necessary for the investigating agency to unearth all the links involved in the criminal conspiracies committed by the persons which ultimately led to the capital tragedy.”

11 There cannot be any dispute or quarrel with respect of the observations made by the Hon'ble the Supreme Court in the case of *Muraleedharan (Supra)*. In view of the ratio laid down by the Supreme Court, though an Application under Section 438 of the Code of Criminal Procedure for pre-arrest bail under NDPS Act is maintainable, it cannot be entertained mechanically, which would ultimately frustrate the mandate of law.

12 In the present case, the allegation against the Applicant is that, at his instance the co-accused stored about 58 kgs. of

contraband/Ganja at their premises. The Applicant is the main source for procuring and storing the contraband/Ganja at the houses of the said two co-accused. It is imperative on the part of the Investigating Agency to trace out the links of the Applicant with the other accused persons, who have in turn supplied the said contraband/Ganja to him.

The Applicant is also involved in 12 other offences, under the Bombay Prohibition Act and/or the Bombay Gambling Act.

13 After taking into consideration the material available on record, this Court is of the considered view that, no finding can be recorded that the Applicant is *prima facie* not guilty of an offence as contemplated under the NDPS Act and that is not likely to commit any offence while on pre-arrest bail. The material available on record indicates clear complexity of the Applicant in the present crime and to reveal the entire truth behind the crime, the custodial interrogation of the Applicant is necessary.

14 In view of the above and after taking into consideration serious allegation against the Applicant and the gravity of the offence, this Court is of the considered view that, the Applicant does not deserve to be protected by pre-arrest bail.

Application is accordingly rejected.

15 At this stage, the learned counsel for the Applicant submitted that, the Applicant intends to challenge the present Order before the Hon'ble, the Apex Court and therefore, the interim relief granted by Order dated 2nd May, 2018, may be continued for a period of three weeks from today.

 At his request, interim relief granted by Order dated 2nd May, 2018, will continue for the period of 3 weeks from today.

(A.S. GADKARI, J.)