

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO.1649 OF 2018

Himmatsingh Pratapsingh Rajput .. Applicant

Vs.

State of Maharashtra .. Respondent

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Mr.Ayaz Khan a/w. Ms.Zehra Charania, Advocate for the Applicant.

Mr.A.R. Kapadnis, APP for the Respondent - State.

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CORAM : PRAKASH D. NAIK, J.

DATED : JANUARY 4, 2019.

P.C. :

This is an application for bail in N.D.P.S. Special Case No.81 of 2017, pending before the NDPS Special Court at Thane.

2 The brief facts of the prosecution case are as follows:

- (i) On 4th April, 2017 API Amol Walzhade attached to ANC Thane received an information to the effect that on 4th April, 2017, at about 16:00 hrs., a person aged about 50 to 55 years is coming in a white coloured Renault Duster Car bearing Registration No.GJ-06-FQ-7536 with one kilogram Buprenorphine for selling the same to his customer near

Maa High School road going towards Hiranandani Estate, Thane.

- (ii) The said information was reduced into writing in the information register by API Walzhade and informed the same to API Ghosalkar.
- (iii) API Ghosalkar prepared a letter vide Outward Number 235 of 2017, and, forwarded the same to ACP, Crime Branch, Thane, for permission to conduct the raid. The said permission was granted by ACP, Crime Branch, Thane.
- (iv) The material required for the said were taken and two panchas were called for the purpose of drawing the panchcanama. The said pre-trap panchanama was completed at 14:55 hrs.
- (v) The raiding party members went to the spot reflected in the information and arranged a trap. The vehicle reflected in the information was intercepted at 15:55 hrs. Said person was found in the vehicle and was identified as the present applicant - accused.

- (vi) PSI Ghadge made initial enquiry with the applicant - accused and informed Section 50 of the NDPS Act and gave a letter bearing signature of API Ghoshalkar for compliance of Section 50 of The Narcotic Drugs and Psychotropic Substances Act, 1985, Act ("NDPS Act", for short).
- (vii) On search of the applicant, the officers recovered a black coloured hand bag on his shoulder, having white plastic bag. In the said plastic bag they recovered white colour powder. On weighting, the same was found to be 920 grams.
- (viii) From the above search, 920 grams of Buprenorphine was recovered. Officers prepared two samples of 5 grams each. The sample alongwith the remaining bulk quantity was sealed and packed under a panchcanama on 4th April, 2017 and the same was completed at 18:10 hrs.
- (ix) Accused was placed under arrest and First Information Report ("FIR", for short) came to be lodged against them at Kasarwadwali Police Station by P.N. Deepesh Kinni.

- (x) The samples of the present case were sent to the office of FSL, Kalina on 5th April, 2017, for analysis.

3 During the course of investigation, prosecution has recorded the statement of the witnesses and after completion of investigation, charge - sheet has been filed before the trial Court. the case is numbered as NDPS Special Case No.81 of 2017.

4 Applicant thereafter filed a Bail Application after filing of charge-sheet before the Special Judge at Thane. the same was rejected vide order dated 24th May, 2018.

6 Learned counsel for the applicant made following submissions:

- (i) There is non-compliance of Section 50 of the NDPS Act;
- (ii) Section 42 is violated;
- (iii) The investigating machinery has utilized services of professional panchas who were not Gazetted officer in the raiding party.
- (iv) There was no presence of Gazetted Officer at the time of seizure.

7 The applicant was found in possession of the contraband. It is contented that there is no clear appraisal of the raid envisaged under Section 50 of NDPS Act. Learned counsel for the applicant submitted that the panchanama of seizure shows the manner in which the applicant-accused was apprised the right under Section 50 of the NDPS Act. Learned counsel pointed out the notice dated 4th April, 2017, relating to purported appraisal under Section 50 of the NDPS Act. It is submitted that the accused should be informed that he has right to be searched before the Gazetted officer or Magistrate. It is submitted that what is informed to the applicant is that the applicant is in possession of contraband, which is an offence under the NDPS Act, and personal search of the applicant-accused is required to be carried out and if he demands, then he will be searched in the presence of the Gazetted Officer or Magistrate, which is his right. Learned counsel submitted that the purported appraisal is not in accordance with Section 50 of the NDPS Act. It is not categorically stated that the applicant has right to be searched in the presence of Gazetted officer or Magistrate. What is being informed to applicant is that if he demands he can be searched before the aforesaid officers, which would be his right. Unless the

accused is informed specifically that he has right to be examined before the Gazetted Officer or the Magistrate, the response, if any, given by the accused is inconsequential as it would not amount to appraisal/apprised of right provided under Section 50 of NDPS Act. The averments made in the notice dated 4th April, 2017 and the arrest panchanama are completely ambiguous and does not meet the requirement of Section 50 of the NDPS Act. Learned counsel for the applicant in support of his submission relied upon the decision of the Supreme Court in the case of **Arif Khan @ Agha Khan Vs. State of Uttarakhand**¹. Reliance is also placed on the order passed by this Court in Criminal Bail Application No.3023 of 2018.

7 Learned APP submitted that there is compliance of Section 50 as well as Section 42 of the NDPS Act. It is submitted that the appraisal of right under Section 50 is implicit in notice dated 4th April, 2017, which is signed by the applicant-accused. He has also responded by stating that he has understood the notice and he can be searched. It is further submitted that the applicant has been made aware that he has right to be searched in the presence of the Gazetted Officer or the Magistrate.

1 2018 AIR (SC) 2123

Considering the submissions with regards to non-compliance of Section 50 of NDPS Act, it is not necessary to advert to the other submissions. On receipt of the information that the applicant-accused is likely to come in a vehicle, the information was recorded. The said information was forwarded by API Ghosalkar to ACP Crime Branch. The applicant was thereafter intercepted and the contraband were recovered from his possession. It is a settled law that Section 50 of the NDPS Act, has to be complied in proper perspective. It is mandatory on the part of the authorized officer to make suspect aware of the existence of his right to be searched before the Gazetted officer or a Magistrate, if so required by him and it requires strict compliance. This view has been taken in several decisions by the Apex Court, which was followed by this Court. The suspects may or may not exercise his right under Section 50 of the NDPS Act, but, the obligation cast upon raiding party under Section 50 of the NDPS Act, to apprise suspect of the right to be searched before a Gazetted officer or the Magistrate. On perusal of the averments reflected in the notice executed in writing dated 4th May, 2017 and the seizure panchanama, it is apparent that what was put to the applicant-accused is that if he demands he can be searched before the Gazetted officer or the Magistrate, which would be his right.

Apparently, this is not strict compliance of Section 50 of the NDPS Act. There cannot be any ambiguity in appraisal of the said provisions. The right cannot be apprised by stating that if suspect demands, he could be searched before the Gazetted Officer or the Magistrate. What is required to be informed to the suspect is that he has right to be searched before the Gazetted Officer or the Magistrate and if he demands he can be searched before Magistrate or Gazetted Officer. In similar situation, this Court has granted bail to the accused in criminal Bail Application No.3023 of 2018, and the ground that the right under Section 50 of the NDPS Act, has not been informed to suspect as required under the said provisions to the suspect. Whatever response allegedly given by the accused is of in-consequence. The Apex Court in in the case of **Arif Khan (Supra)** has observed that it is mandatory on the part of the authorized officer to make the suspect aware of his existence of right to be searched before the Gazetted Officer or Magistrate, and, it requires strict compliance. The suspect may or may not exercise the right provided to him under Section 50 of the NDPS Act, but, as far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the right to be searched before the Gazetted Officer or the Magistrate.

8 Hence, I pass the following order:

:: ORDER ::

- (i) Bail Application No.1649 2018, is allowed;
- (ii) Applicant is directed to be released on bail in connection with C.R. No.II-10 of 2017, registered with Kasarwadavali Police Station, District-Thane, which is subject matter of N.D.P.S. Special Case No.81 of 2017, pending before the NDPS Special Court at Thane, on his furnishing P.R. Bond in the sum of Rs.25,000/-, with one or more sureties in the like amount;
- (iii) Applicant shall attend ANC, Thane, once in a month on first Saturday of the month between 11:00 a.m. to 01:00 p.m., till further orders;
- (iv) Applicant shall attend the trial Court on the date of hearing regularly, unless exempted by the Court;
- (v) Bail Application No.1649 of 2018, stands disposed of.

(PRAKASH D. NAIK, J.)