

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.1754 OF 2018

Paki Babloo Shaikh, Age 33 years,
R/o.Ekta Nagar, Jhopadpatti in front of
BPT Colony, Jhopda No.45, Opp.Bus Route No.135,
Dockyard Road, Mumbai. Applicant

versus

The State of Maharashtra Respondents

Mr.Anil G. Lalla with Beerta Bajwa and Anchal Lalla I/by Lalla &
Lalla for applicant.

Mr.R.M.Pethe, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 7th February 2019

PC :

1. The applicant is seeking bail in CR No.48 of 2017 registered by Anti Narcotic Cell, Azad Maidan Unit, Crime Branch, Mumbai. The offences were registered under Sections 8(c) r/w 22(c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985.

2. The prosecution case can be summarized as under :

(a) On 18th August 2017 at about 2345 hours, Police Inspector Bhalekar along with his team proceeded towards Central and Southern Region of Mumbai on patrolling duty upon instructions from his superior officers. At about 00.15 hours, they reached at Mulji Rathod Road, Mazgaon and noticed three persons which included two male and one female in suspicious manner. After having observed these persons for a while, they were approached by

the police. The male persons attempted to flee from the spot. They were apprehended. The female tried to conceal the plastic bag in her possession. Panchas were called at the spot. The police then conducted search and seizure operation;

(b) The first person gave his name as Zakir Mansur Shaikh. He was carrying black plastic bag. On being questioned about contents of bag, he gave evasive answers. The bag was searched and it was found containing white coloured powder and cash of Rs.950/-. The accused disclosed that the powder is Mephedrone;

(c) The second person gave his name as Nooranbi Ali Ahmed Shaikh. He was also carrying black plastic bag containing white powder and cash of Rs.1,000/-. The powder was Methedrone;

(d) Police Inspector Bhalerao inquired about the contents of black plastic bag in possession of the applicant. Search was conducted. The police recovered transparent plastic bag containing white powder purported to be Mephedrone and Indian currency of Rs.900/- found in possession of applicant;

(e) The weight of contraband seized from the aforesaid persons was found to be 55 grams; 56 grams and 60 grams respectively. All of them were arrested on 19th August 2017.

3. The chemical examination report of FSL, Kalina dated 8th February 2018 was received by ANC, Azad Maidan Unit on 12th February 2018. On completing investigation the charge sheet was filed against the accused.

4. The applicant preferred an application for bail before the Session Court for NDPS, which was rejected vide order dated 16th April 2018.

5. Learned counsel Mr.Lalla appearing for the applicant submitted that there is gross violation of the mandatory safeguards enumerated under the NDPS Act. He submitted that there is clear violation of Section 42 of NDPS Act. According to him although the suspects were apprehended during the course of patrolling and without prior information at the stage when the investigating machinery had suspected that the accused were suspected to be in possession of contraband, it was imperative for the respondent-investigating machinery to have invoked the provisions of Section 42 of NDPS Act. It is submitted that Section 42(2) requires that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within 72 hours send a copy thereof to his immediate official superior. It is submitted that it was incumbent upon the investigating machinery to comply the said provision even after the seizure of the contraband by forwarding the information to the superior officer. Mr.Lalla relied upon the decision of the Supreme Court in the case of Mohinder Kumar Vs. State, Panaji, Goa (1998)8-SCC-655. It is submitted that even in the said decision the factual matrix of the said decision indicate that the seizure was carried out which was in the nature of chance recovery without prior information and even in such circumstances the Supreme Court has held that it was necessary for the investigating agency to comply the provision of Section 42 of NDPS Act as soon as they had suspected that the accused were in possession of the contraband. In support of

his submission that it was mandatory to comply the provisions of Section 42, Mr.Lalla relied upon the decision of the Supreme Court in the case of State of Punjab Vs. Balbir Singh 1994-Cri.L.J.-3702, Sarija Bano @ Janarthani @ Janani and another Vs. State through Inspector of Police (2004)12-SCC-266. It is submitted that in the decision of Sarija Banu, the Supreme Court has held that the issue relating to violation of Section 42 can be dealt with even at the stage of bail and the accused in the said case was directed to be released on bail. He also relied on order passed by this Court in Bail Application No.2108 of 2016.

6. Mr.Lalla further submitted that there is violation of Section 50(4) of the NDPS Act. It is submitted that as per the said provision no female shall be searched by any one excepting a female. He submitted that the provision has to be implemented in letter and spirit. It is submitted that the search is required to be conducted by female as the applicant is a female and it was expected that she should be searched in the presence of female panchas and not in the gaze of male. It is submitted that the applicant was searched in the presence of the raiding party comprising of male persons. He submitted that the legislative intent is to protect the lady accused's modesty while conducting search. The search has to be conducted by having strict regard for decency. If the search is carried out in the presence of male panchas, the purpose of sub-section (4) of Section 50 of NDPS Act would be frustrated. The applicant was not searched in seclusion and in the absence of any male persons. Learned counsel relied upon order passed by this Court in Bail Application No.1051 of 2016 dated 24th April 2017. Learned counsel also relied upon the decision of the Division Bench of this Court in the case of

Mrs.Veenila Tilak Vs. Collector of Customs and another 1997-ALL MR (Cri)-368. Learned counsel submitted that in the said decision it is observed that if the search is carried out in the presence of male panchas, the very purpose of Section 50(4) of NDPS Act and such similar provisions contained in other statutes would be frustrated. Mr.Lalla then submitted that the applicant was searched by a female Head Constable Smt.Bhosale who is not authorized or empowered under the law to conduct personal search. Hence it is submitted that the search stands vitiated and thus the applicant is entitled to be released on bail. Learned counsel drawn my attention to notification bearing No.BPA1085/1180/81-A (II)/PRO-1, dated 14th November 1985, which records that in exercise of the powers conferred in sub-section (1) of Section 42 of NDPS Act, certain officers are empowered for the purpose of said sub-section and among those officers at sr.no.6 all police officers of and above the rank of Head Constable in the State of Maharashtra have been mentioned. It is thus submitted that the search of the applicant was conducted by the female Head Constable who was not the officer empowered in that behalf in accordance with Section 42 of NDPS Act and therefore, the search would again stand vitiated on this count. Learned counsel relied upon the decision of this Court in Bail Application No.1311 of 2012 dated 23rd October 2012 in support of his submission. It is further submitted that the prosecution did not make the search/recovery from the applicant in the presence of a Magistrate or a gazetted officer and therefore the recovery from the applicant is rendered being in contravention of requirement of Section 50 of the NDPS Act. Learned counsel relied upon the decision of the Supreme Court in the case of Arif Khan @ Aaga Khan Vs. State of Uttarakhand delivered in Criminal Appeal No.273 of

2007 on 27th April 2018. It is submitted that in the said decision the Supreme Court has observed that in compliance with Section 50, the search and seizure is required to be carried out in the presence of Magistrate or gazetted officer. It is therefore submitted that the applicant be released on bail.

7. Learned APP Mr.Pethe submitted that there is no violation of any of the provisions of the NDPS Act. The grounds agitated by learned counsel for applicant are required to be considered at the time of trial and this is not the stage to adjudicate the same. He further submitted that the decisions relied upon by learned counsel for applicant are not applicable to the facts of the present case. Mr.Pethe submitted that the case of the applicant would be covered by Section 43 of NDPS Act. It is submitted that in the event the case false within purview of aforesaid provision, the question of non-compliance of the provisions contemplated u/s 42 as argued by learned counsel for applicant, does not arise. It is submitted that the search was conducted in the open place and therefore Section 43 would come into operation. He submitted that the contraband was found in the bag which was in possession of the applicant and the co-accused. It is therefore submitted that the decision relied upon by counsel for applicant in the case of Mohinder Kumar and the other decisions would not be applicable to the facts of present case. Mr.Pethe, however, strongly relied upon the decision of Supreme Court in the case of SK.Raju @ Abdul Haque @ Jagga (2018)9-SCC-708 to contend that in the event the case is covered by Section 43, the compliance of Section 42(1) or (2) would not arise. He further submitted that the personal search of the applicant was not conducted. She was found in possession of bag containing

contraband which was searched and from which the drug was seized by the investigating machinery. It is submitted that the bag which was found in possession of the applicant was searched by the female Head Constable and therefore the question of non compliance of Section 50(4) of the NDPS Act does not arise. It is further submitted that the grounds relating to the non-compliance of Section 50 requires to be appreciated by leading evidence at the time of trial and this is not the stage to embark upon the analysis about the compliance of the said provision. It is thus submitted that there is no violation of Section 50(4) of the NDPS Act. Learned APP relied upon the decision in the case of State of Himachal Pradesh Vs. Pawan Kumar (2005)4-SCC-350. It is submitted that in the said decision it was observed that in common parlance it would be said that a person carrying a particular article specifying the manner in which it is carried, like hand, shoulder, bag or head etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of NDPS Act. Section 50 would only apply to search of a person and not to any bag, article or container etc being carried by him. Mr.Pethe also relied upon the decision of the Supreme Court in the case of State of Punjab Vs. Baldev Singh (1999)6-SCC-172 and submitted that the grounds relating to non-compliance of Section 50 of the NDPS Act can be agitated during the trial. He further submitted that the present case was relating to a chance recovery and therefore the submissions of learned counsel for applicant are misplaced. He further submitted that the contention of the counsel for the applicant that the search was not carried out by the empowered officer is devoid of merits. It is further submitted that the search of the applicant was conducted in the presence of the officers who were the members of raiding

party. The bag which was in possession of the applicant was searched at the instance of the female Head Constable, under the supervision of the officer who was empowered to conduct such. The applicability of the circular relied upon by the applicant can be considered at the time of trial. He further submitted that the decision in the case of Arif Khan is not applicable in the present case. The issue has to be agitated after adducing evidence during the trial. It is therefore submitted that the application for bail may be rejected.

8. From the factual matrix of the present case it is apparent that on 18th August 2017 at about 23.45 hours, Police Inspector Bhalekar and his team were on a patrolling duty. At about 00.15 hours, the police noticed three persons in a suspicious condition. Two of them tried to run away from the place of incident. The applicant was the third person who was found in possession of bag which was searched by female head constable and found to be containing the contraband namely Mephedrone. The two other persons accompanied by applicant were apprehended and they were also found in possession of contraband. All of them were arrested and on completing investigation charge sheet has been filed against them. The first submission advanced by learned counsel for applicant was in relation to non-compliance of Section 42 of the NDPS Act. It is contended that the police party had suspected that the applicant and the co-accused were in possession of the contraband and at that stage although it was a chance recovery, it was mandatory for them to comply the procedural safeguards contemplated u/s 42 of the said Act. It is also contended that even after the seizure it was open to the investigating agency to forward the information to the superior officers with regards to the search carried out by them. On

considering the aforesaid facts it is clear that the accused were found in a suspicious manner at about 00.15 hours and thereafter they were searched and were found in possession of contraband. There was no prior information. It was a chance recovery. The search and seizure was conducted in the open place. Thus the case would fall within purview of Section 43 of the NDPS Act. Section 43 reads as follows :

“43. Power of seizure and arrest in public place. - Any officer of any of the departments mentioned in section 42 may

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(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.- For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

Thus, the seizure was in open place. The Supreme Court in the recent decision in the case of SK.Raju @ Abdul Haque @ Jajja (supra) has considered the the issue relating to the compliance of Section 42. The facts of the said case would reveal that the accused

was apprehended and was found in possession of contraband. The seizure was made from the open place. The contention of the accused was that there is non-compliance of Section 42 and 50 of the NDPS Act. After analyzing the factual aspects, the provisions of Section 42 and 43 of the said Act, the Court was pleased to observe that it is difficult to accept the submission of learned counsel for the accused that Section 42 is attracted in the facts of the said case. The Court relied upon the observations in the case of State of Punjab Vs. Baldev Singh (supra) and other decisions of the Apex Court. Paragraphs 12, 13 and 14 of the said decision reads thus :

“12. An empowered officer under Section 42(1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act is attracted in situations where the seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop or other place intended for use by, or accessible to, the public.

13. The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase “public place” in the Explanation to Section 43. Section 42 had no application.

14. The cases relied on by the learned counsel for the appellant will also not apply in the context of the facts before us. In Mansuri, an autorickshaw driver was intercepted by police personnel. Four gunny bags of charas were recovered from the autorickshaw. The police officer who had prior information about transportation of

some narcotic substance, had neither taken down the information before carrying out the seizure and arrest, nor apprised his superior officer. He contended that the action taken by him was under Section 43 and not Section 42. Rejecting the argument of the State, this Court held that compliance with Section 42 was required as the autorickshaw was a private vehicle and not a public conveyance as contemplated under Section 43. Similarly, in Jag Raj, contraband was recovered from a jeep which was intercepted by police personnel on a public road after receiving prior information. The police officer who had received the information, admitted to not taking it down in writing, contending that Section 43 would be applicable. Rejecting the argument of the State, this Court held that the jeep which was intercepted, was not a public conveyance within the meaning of Section 43 and compliance with Section 42(1) was therefore mandatory. In Holia, Mandrax tablets were recovered from the hotel room of the respondent. The information was not reduced in writing by the officer who had first received the information. The State claimed that compliance with Section 42 was not required as the hotel was a public place. Rejecting the submission of the State, this Court held that while a hotel is a public place, a hotel room inside it is not a public place. This Court held thus :

“14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place where at search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. *It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefor coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest*

may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or housekeeping of the room, the guest is entitled to maintain his privacy.

There is hence no substance in the first submission”

9. In the case of State of Punjab Vs. Baldev Singh (supra), the Supreme Court in para 10 has observed that the material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting u/s 43 of the Act, the empowered officer has the power of seizure of the article etc and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful. In Narayan Swami Ravishankar Vs. Directorate of Revenue Intelligence (2002)8-SCC-7, the three Judge bench of Supreme Court considered whether the empowered officer was bound to comply with the mandatory provisions of Section 42 before recovering heroine from the suitcase of the accused at the airport and subsequently arresting him. Answering the question in the negative the Court held that the search and seizure took place at the airport which is a public place. This being so, it is the provision of Section 43 of the NDPS Act which would be applicable. As Section 42 of the said Act was not applicable, seizure having been effected in a public place, the question of non compliance, if any, of the provisions of Section 42 of NDPS Act, is wholly irrelevant. In another decision in the case of Krishna Kanwar (Smt) @ Thakuraeen Vs. State of Rajasthan

(2004)2-SCC-608, the Supreme Court has considered whether a police officer who had prior information was required to comply with the provisions of Section 42 before seizing contraband and arresting the accused who was travelling on a motor cycle on a highway. The question was answered in the negative. in para 16 it was observed as follows :

“16. The proviso comes into operation if such officer has reason to believe that search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escaped offender, he may enter and search such building, conveyance or enclosed place any time between sunset and sunrise after recording grounds of his belief. Section 42 comprises of two components. One relates to the basis of information i.e. : (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates, as was noted in Baldev Singh case that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc must be in any building, conveyance or enclosed place.”

10. Learned counsel for the applicant, however, submitted that the Supreme Court vide dealing with the decision in the case of SK Raju

@ Abdul Haque @ Jagga (supra) has not taken into consideration the earlier decision of the Supreme Court which was by a larger Bench in the case of Karnal Singh Vs. State of Haryana (2004-AIR-SCW-2465). Mr.Lalla drew my attention to the observations of the Court in para 17 of the said decision wherein it was observed that the officer on receiving the information of the the nature referred to in sub-section (1) of Section 42 from any person, had to record it in writing in the concerned register and forthwith send a copy of the same to his immediate superior officer before proceeding to take action in terms of clause (a) to (d) of Section 42(1). If the information was received when the officer was not in the police station, but while he was on the move either on patrolling duty or otherwise, either by mobile phone or other means, and the information calls for the immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he would take action as per clauses (a) to (d) of Section 42(1) and thereafter as soon as it is practical record the information in writing and forthwith inform the same to the official superior. In other words, the compliance with requirement of sub-section (1) of Section 42 and 42(2) in regards to writing down the information received and sending a copy thereof to the superior officer should normally precede the entry, search and seizure by the officer but in special circumstances involving emergent situation, the recording of the information in writing and sending a copy thereof to the official superior, may get postponed by a reasonable period, i.e. after the search, entry and seizure. The question is one of urgency and expediency. While total non compliance of requirement of sub-sections (1) and (2) of Section 42

is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. It was also observed that where the police officer does not record the information at all and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the NDPS Act. Whether there is adequate or substantial compliance with Section 42 or not is a question to be decided in each case. Thus, the Court was dealing with the compliance of Section 42 of the NDPS Act. On perusal of the said decision, however, apparently the Court was not dealing with a situation where Section 43 would attract. In fact, in para 12 of the said decision of the Constitution Bench, it was observed that the material difference between the provisions of Sections 42 and 43 is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure. Section 43 does not contain any such provision and as such while acting u/s 43 of the Act, the empowered officer has the power of seizure of the articles etc and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful. In the case of Mohinder Kumar (supra), the issue was dealt with at the time of trial and the factual aspects reveal that the contraband was seized from the house of the accused. The Court has not dealt with the issue of applicability of Section 43 of the Act as the same was not involved in the said proceedings. The ratio laid down in the case of S.K.Raju (supra) is applicable in the present case.

11. On perusal of the charge sheet it is apparent that the station diary entry dated 19th August 2017 indicate that the report was

submitted with regards to the arrest of the accused and the special report to the superior officers on 19th August 2017 and the investigation is being conducted under the supervision of the superior officers.

12. The other submission advanced by learned counsel for applicant was in relation to non compliance of Section 50(4) of NDPS Act. The search in the present case was conducted at about 00.15 hours when the accused were found in suspicious manner. The documents on record would indicate that the applicant was found in possession of the contraband. It was noticed that she was in possession of a bag and was not willing to disclose the contents of the same. Hence female Head Constable Smt.Bhosale conducted the search of the bag which was found to be containing the contraband. Panchanama was recorded. One of the pancha was female pancha namely Roshni Salim Shaikh. The search of the bag which was carried by applicant, was conducted and her person was not searched. Section 50(4) mentions that the search of a female shall be carried out by a female. Learned counsel for the applicant had relied upon the decision of this Court in the case of Mrs.Veenela Tilak Vs. Shri Shahasane, Assistant Commissioner of Customs and another (1997-ALL MR (Cri)-368 and order dated 24th April 2017 passed by this Court in Bail Application No.1051 of 2016 wherein the reliance was placed on the aforesaid decision while granting bail for non compliance of Section 50(4) of the NDPS Act. This Court in the decision of Mrs.Veenela Tilak (supra) has observed that if a woman accused to be searched, merely calling a female officer to search will not fulfill the legislative intent. The legislative intent appears to be to protect the modesty of lady accused while conducting the search.

The search has to be conducted by having strict regard with decency. Therefore, the officers will necessary to have secure the presence of lady panchas. If the search is carried out in the presence of male panchas, the very purpose of Section 50(4) of the NDPS Act and such similar provisions contained in other statutes will be frustrated. The said decision was delivered after recording evidence and putting the accused on the trial. The observations were made in an appeal against the conviction after appreciating the evidence on record. The facts of the said decision would indicate that the personal search of the accused was carried out. Though search was carried out by a lady, it was not carried out in the presence of lady panchas. Thus, the Court was posed with the question whether when a lady is being searched, then presence of lady panchas is required to be secured or not. In the present case, it is noted that the bag which was in the possession of the applicant was searched. She was searched by a lady head constable. One of the pancha was a female pancha. According to learned APP, except the search of the bag, the personal search of the applicant was not conducted. The issue is debatable which needs to be decided at trial. In any case the decision was delivered after the trial and not at the stage of grant of bail. In the case of **State of Punjab Vs. Balbir Singh**, the Supreme Court has analyzed the requirement of the compliance of Section 50 of NDPS Act. The Court has also analyzed the provisions of Sections 41 and 42 of the NDPS Act. Some of the accused were acquitted while some were convicted. The High Court had refused to grant leave to file an appeal against order of acquittal. It was held that compliance of Sections 42 and 50 is necessary. Subsequently the issue was dealt with by a larger Bench of the Supreme Court in the case of **State of Punjab Vs. Baldev Singh (supra)**. It was observed that the

omission of non compliance of the provisions of Section 50 of the Act may not vitiate the trial as such but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazette officer or a Magistrate, if so requires, is sacrosanct and indefeasible. It cannot be disregarded by the prosecution except at its own peril. It is pertinent to note that in paragraph 33 of the said decision it was observed as follows :

“33. The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50 and, particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial.”

Thus, the aforesaid observation would indicate that the question whether or not the safeguard provided in Section 50 were observed, would have, however, to be determined by the Court on the basis of the evidence laid at the trial and the finding on that issue one way or the other would be relevant for recording an order of conviction or acquittal. In paragraph 57(5), the Supreme Court in the said decision has observed as follows :

“57(5). That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at

the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.”

Thus, without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50 and particularly the safeguards provided therein are duly complied with, it will not be permissible to cut short a criminal trial. It is pertinent to note that Act provides rigours and embargo while granting bail to an accused who is prosecuted under the provisions of the said Act subject to certain exceptions by invoking Section 37 of the NDPS Act. In the circumstances, whether there is compliance of Section 50 of the NDPS Act would be a matter of evidence and would be dealt with at the time of trial and at the stage of bail it would not be possible to determine that there was non compliance with the said provision. The decisions relied upon by the learned counsel for applicant wherein bail was granted, even for non compliance of Section 50 of the NDPS Act, there was no occasion for this Court to deal with the observations made by the Constitution Bench of Supreme Court in the aforesaid decision.

13. The other submission advanced by learned counsel for applicant is that the female head constable was not empowered to conduct search of the applicant. Reliance is placed on the circular dated 14th November 1985. On perusal of the said circular it appears that the circular was issued in exercise of powers conferred by sub-section (1) of Section 42 of NDPS Act and in supersession of all previous orders or notifications issued u/s 23 of the Dangerous

Drugs Act, 1930 and in force in any part of the State. The circular empowers for the purposes of said sub-section (1), the officers named therein. Clause (6) of the said circular indicate that all police officers of and above the rank of Head Constable in the State of Maharashtra are empowered within the provisions of Section 42(1) of the NDPS Act. Learned APP has, however, contended that Section 43 is attracted in the present case and the question of applicability of Section 42 does not arise. It would be relevant to quote Section 42 which reads as follows :

“42. Power of entry, search, seizure and arrest without warrant or authorisation.- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) *seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and*

(d) *detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act :*

(Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector :

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape, of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.)

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy two hours send a copy thereof to his immediate official superior."

The provision refers to the officer being an officer superior in rank to a peon, sepoy or constable. In the present case, the search was carried out in the open place. The accused was found in possession of a polythene bag containing contraband which was searched and found to be containing the contraband. Learned APP submitted that there was no personal search of applicant. The search and seizure contemplated u/s 42 does not mean that a search by individual

member of a raiding party. In the present case, the accused were found in suspicious condition by the police who were on patrolling duty. The members of the search and seizure party included Police Inspector Bhalerao. The search of the bag was conducted by a female head constable. However, the same was conducted in the presence of the other officer and under the supervision of the police officer who was part of the police machinery who had conducted search and seizure. Thus, it cannot be said that search was carried out by officer who was not empowered to conduct the search and seizure. Apart from that, Section 42 empowers the officers who are superior to the sepoy or the peon. The applicability of the circular relied upon by the counsel for the applicant and grounds raised by applicant stated hereinabove, will be matter of evidence to be considered at the time of trial.

14. It is also submitted by learned counsel for the applicant relying on the decision of Supreme Court in the case of Arif Khan (supra) that the search/ recovery was not conducted in the presence of Magistrate or a gazetted officer and therefore the recovery is illegal and in contravention of Section 50 of the NDPS Act. As stated hereinabove, the issue of compliance of Section 50 can be agitated during the trial. The Constitution Bench in the decision referred to above, has dealt with the issue with regards to compliance of Section 50 and has also observed as to in what manner the compliance is required to be done. The principles regarding compliance of Section 50 is again dealt in the decision in the case of Vijaysinh Jadeja Vs. State of Gujarat (2011)1-SCC-609. In the light of above observations the argument of the learned counsel for the applicant cannot be considered at this stage.

15. In view of the above, I do not find any merits in the contentions of the learned counsel for the applicant and no case for bail is made out. Hence, the application deserves to be rejected. Hence, I pass following order :

ORDER

- (i) Criminal Bail Application No.1754 of 2018 is rejected.

(PRAKASH D. NAIK, J.)

MST