

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

CRIMINAL BAIL APPLICATION NO. 1820 of 2018

Rabeekhan Abdullah

... Applicant

Versus

1. Air Intelligence Unit (SI Airport)

2. The State of Maharashtra

... Respondents

.....

Ms. Lochan Chandka I/by Mr. Taraq Sayed for the applicant.

Mr. Francis Saldanha, Spl. PP for the Respondent No.1

Mr. Prashant Jadhav, APP for Respondent-State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 7th FEBRUARY, 2019.

P.C. :

The applicant seeks bail in Narcotic Drugs and Psychotropic Substances (hereinafter referred to as “NDPS” Act for short) special case No. 66 of 2017 pending before the NDPS Special Judge, City Civil and Sessions Court, Greater Bombay arising out of the complaint bearing No. SD/INT/AIU/03/2017-AP 'C'. The offences registered under Section 8(C), 9(A), 22(C), 23(C), 28 and 29 of the NDPS Act.

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

a) On 5th January 2017 on suspicion, officers of Air Intelligence Unit CSI Airport (hereinafter referred to as “AIU”) intercepted the passenger (applicant) who was departing to Kuala Lumpur by

Malaysian Airline.

b) The officers kept watch on the movements of the applicant from Airline counter to immigration counter. The officers found the checked-in baggages of the applicant suspicious and hence, they informed the Airline staff to keep on hold the checked-in baggage of the passenger (applicant) The officers kept watch on the body language of the applicant and found it suspicious and finally stopped the applicant after immigration checked.

c) The applicant was asked whether he was carrying any contraband, dutiable articles or the narcotic drugs either in his baggage or in his hand bag to which he replied in the affirmative. He informed the officers that narcotic drugs have been concealed in the articles he was carrying in the checked-in luggage.

d) In the presence of Panchas and the applicant, the officers retrieved the checked-in baggage of the applicant having baggage from the Airline counter. The cardboard carton box having baggage tag was screened in the machine situated near pillar No. "N" in the presence of independent panch witnesses. The cardboard carton box was showing presence of foreign substances along with kitchen utensils. Personal search of the applicant was conducted. Before personal search he was told that he has the right to be searched in

the presence of the Magistrate or the Gazetted Officer of the Customs. He replied that he would like to be examined in the presence of Gazetted Officer of Customs. The officers told him that Shri. Lad is Superintendent of Customs, a Gazetted Officer present among them.

e) The carton box was opened and it was found containing articles with the plastic bag. False cavity was created in one of the article containing white crystalline powder covered in aluminum foil. The other articles also found to contain similar plastic bags with similar contents.

f) Small quantity of white crystalline powder was taken for testing. The test conducted on the small quantity of powder gave indication of Methamphetamine and one of the packet indicated positive indication of Ephedrine. The officers took over and seized recovered 10 bags of white crystalline powder purported to be Methamphetamine weighing 2680 grams valued at Rs.4,02,00,000/- (Rupees. Four Crore Two Lacs) illicit market value of 5 packets white crystalline powder purported to be Ephedrine weighing 2072 grams valued at Rs. 2,07,200 was recovered. Under the provisions of the NDPS Act 1985 in the reasonable belief that the same was attempted to be smuggled out of India. The applicant was arrested. The investigation proceeded. Complaint was filed before the concerned

Court.

3. The applicant preferred an application for bail before NDPS Special Court. The said application was rejected vide order dated 17 April 2018.

4. The Learned Advocate for the applicant submitted that the respondent had reasonable belief from his personal knowledge that the applicant might be carrying contraband concealed in his baggage and hence the respondent had approached the Airline ticket counter withheld baggage of the applicant hence, writing down the information and forwarding to the immediate superior was mandatory and non-compliance of the same would amount to violation of the Section 42 of the NDPS Act. It is further submitted that the officers of AIU have also not followed the mandatory Section 50 of the NDPS Act. The raiding party was accompanied by a Gazetted Officer who cannot be considered as an independent officer. Informing that the suspect would be searched in the presence of raiding party will not amount to compliance of provisions of Section 50. It is submitted that the officers of AIU have failed to follow the procedure for obtaining the samples during the course of panchnama in the presence of independent panch and the samples obtained at the time of compliance of Section 52(A) of the NDPS Act. There is no material to show the samples forwarded to the

laboratory for chemical analysis for identification of drug is the same which is in-fact obtained from the applicant during the course, of his apprehension. Section 52(A) deals with disposal of seized narcotic drugs and psychotropic substances. The Metropolitan Magistrate has committed an error while passing an order dated 17 January 2017. There has been delay in drawing samples.

5. The Learned Counsel for the respondents submitted that there is no violation of any provision of NDPS Act. The case relates to chance recovery and compliance of the provisions of Section 42 and 50 does not arise. Nothing recovered from personal search of applicant hence Section 50 is not attracted. It is further submitted that in any case the issue relating to compliance of Section 50 is required to be determined at the time of trial. The recovery was conducted at public place and hence, Section 42 is not attracted. The case would be covered by Section 43 of the NDPS Act. The other submission relating to non-compliance of Section 52(A) and alleged infirmity regarding samples is required to be adjudicated at the time of trial. The respondents have also filed reply opposing bail.

6. The Learned Advocate for the applicant relied upon the decision in the case of *State of Punjab Vs. Baldev Singh AIR (1999)6 (SCC)172* and the decision in the case of *Mohinder Kumar Vs. State of Goa 1995 AIR (SC)1157: 1998 (8) SCC 655*

7. The Learned Counsel for the respondent has relied upon the *State of Punjab Vs. Baldev Sing (supra)*, *State of Himachal Pradesh Vs. Sunilkumar (2014) 4 SCC 780*, *SK Raju @ Abdul Haque @ Jagga Vs. State of West Bengal AIR (2018) 9 SCC 708* and *Babubhai Patel Vs. State of Gujrat 2005 8 SCC 725*.

8. Having heard both sides, I have also perused the documents on record. The factual matrix of the case indicates that, on 05.01.2017 on suspicion officers of AIU kept watch on suspicious movements of the applicant. The checked-in baggages of the applicant was found suspicious and hence, the Airline staff instructed to withhold the said baggages. The contraband was found concealed in the articles recovered from the bag and huge quantity of narcotic drug was recovered. The first submission of the Learned Counsel for the applicant is with regard to non compliance of Section 42 of the said Act. The seizure was conducted at the public place. There was no prior information leading to recovery. The suspect was apprehended on account of his suspicious movements. Since the recovery was conducted at the public place, the case would be covered under Section 43 of the NDPS Act.

9. The Supreme Court in the recent decision in the case of *S.K. Raju @ Abdul Haque @ Jagga* (supra) has considered 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 read 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, Mandarax 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 therefore 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 of 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”

10. 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)8SCC7, 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)2SCC608***, 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 he 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. Subsection (2) mandates, as was noted in Baldev Singh case that where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, subsection (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.”

11. The applicant was given notice in writing wherein it was mentioned that there is reason to believe that narcotics drugs/ Psychotropic substances/controlled substances and/or documents, articles and things which may furnish evidence of commission of an offence under NDPS Act are in his possession, therefore, his personal search is to be conducted. If he so required, such search will be conducted in presence of nearest Gazetted Officer or Magistrate. The response of the applicant is also recorded stating that he has been informed and understood the notice of personal search under Section 50 of the NDPS Act and he requires that his personal search may be

conducted in the presence of the nearest Gazetted Officer or Magistrate. In the panchanama of seizure, it is mentioned that the officers told the applicant that as stipulated under the provision of Section 50 of the NDPS Act 1985, he had the right to be searched himself and examine his baggage in the presence of gazetted Officer of Customs or a Magistrate and he replied that he would like to be examined in the presence of Gazetted Officers of Customs and he was told that the Superintendent of Custom is a Gazetted Officer who is present among them. Accordingly, the passenger was searched and nothing incriminating was found. The contraband was found in the baggage.

12. The Learned Counsel for the applicant had relied upon the observation in the decision of the Supreme Court in case of ***Mohinder Kumar Vs. State of Goa*** wherein it was observed that from the stage the officer had reason to believe that the accused persons were in custody of narcotic drugs and he was under an obligation to proceed further in the matter in accordance with the provisions of the Act. The reliance is also placed on the observation in the case of ***State of Punjab Vs. Baldev Sing (supra)*** where it was observed that when the officer conducting investigation including search seizure or arrest under the provisions of the Code of Criminal Procedure comes across a person being in possession of narcotic drug

or psychotropic substance then he must follow from that stage onwards the provisions of NDPS Act and continue the investigations as provided thereunder. However, considering the facts of the present case and in light of the observations of the decision of the Supreme Court in the case of **S.K. Raju**. The contention that the information ought to have been forwarded to the superior officer and there is non-compliance of Section 42 of the said Act is devoid of merits.

13. The Learned Counsel for the respondent Mr. Saldana had relied upon the decision in the case of **Babubhai Patel Vs. State of Gujrat (supra)**. In para 5 it is observed that if it is not chance recovery the procedure contemplated under Section 42 cannot be complied with. It was also observed that Section 42 of the NDPS Act provides that special information alone need to be recorded by the officer empowered to conduct search. The Ld. Advocate also relied upon the observation in para. 6 of the said decision where it was observed that no narcotic substance was recovered on the person of the applicant. Even if it is assumed that the search was made on the person of the applicant, no evidence in that behalf was made use of by the prosecution to sustain the charge against the appellant. He also relied upon the decision of the Apex Court in the case of **State of Himachal Pradesh Vs. Sunil Kumar** (supra) wherein it was

observed that chance recovery of narcotic substance during personal/body search by police, while checking for ticketless passengers on a bus - Compliance with Section 50 in such case - Not required.

14. 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 19 of 23 902.BA.1754.2018.doc 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.

15. The submission of the Ld. Counsel for the applicant with regard to Section 52A is based on disputed facts and it has to be adjudicated at the time of trial. In view of the above observations, the contentions of the applicant cannot be accepted and hence, application deserves to be rejected.

ORDER

The Criminal Bail Application No. 1820 of 2018 is rejected.

(PRAKASH D. NAIK, J.)