

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Criminal Application (BA) No.183 of 2020

Imran Ilyas Dalla Vs. State Through Station Gittikhadan, Nagpur.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. S.P. Dharmadhikari, Sr. Counsel with Mr. Chinmay Dharmadhikari,
Counsel for the applicant.
Mr. A.M. Deshpande, APP for the respondent - State

CORAM : MANISH PITALE, J.

DATED : MAY 26, 2020

Hearing was conducted through video conferencing and the learned counsel agreed that the audio and visual quality was proper.

2. By this application, the applicant is seeking bail in connection with FIR registered on 15/06/2019 against the applicant and other accused persons for offences under Section 21(c) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). An earlier bail application, bearing Criminal Application (BA) No. 755 of 2019, was filed by the applicant herein, but, the same was rejected by this Court by order dated 14/10/2019. Since chargesheet came to be filed after passing of the said order, this bail application has been filed by placing on record copy of chargesheet and other relevant documents.

3. As per the investigating authority, information was

received in the early hours of 15/06/2019 that the applicant and accused No.1 Mujahid were in possession of Mefadron, which is a psychotropic substance. A raid was conducted at about 1:15 AM and the applicant and other accused persons were found in possession of the said psychotropic substance. The applicant was taken into custody on the basis of aforesaid raid.

4. Mr. S.P. Dharmadhikari, learned senior counsel appearing with Mr. Chinmay Dharmadhikari, Advocate, submitted that the manner in which the raid was conducted in the present case violated the mandatory requirements of Section 42 of the NDPS Act and that there was no possibility of the applicant being convicted for the alleged offence. By inviting attention of this Court to the proviso to Section 42(1) and sub-section 2 of Section 42 of the NDPS Act, it was contended on behalf of the applicant that the person who conducted the raid was not an empowered officer as expected under the said provision of law. It was further contended that since the raid was conducted between sunset and sunrise, the mandatory requirement of the aforesaid provision to the effect that the officer conducting the raid was required to record grounds of belief and to communicate the same to the superior officer within 72 hours, was not followed in the present case. Reliance was placed on the judgments of the Hon'ble Supreme Court in the cases of **State of Punjab Vs. Balbir Singh (1994) SCC 299** and **State of Rajasthan Vs. Jagraj Singh Alias Hansa (2016) 11 SCC 687**. On this basis, it was contended that when the entire raid itself was vitiated, the applicant clearly deserved grant of bail. It was further submitted that CCTV footage of the place where the raid took place was specifically demanded by the applicant, but, the same was not provided to him thereby

showing that an adverse inference was necessary in the present matter. It was also submitted that reliance placed on certain alleged WhatsApp communications between the applicant and accused No.1 Mujahid, by the Trial Court while rejecting the bail application, was wholly misplaced and it had nothing to do with the alleged involvement of the applicant in the offence. It was further submitted that the applicant had no criminal antecedents and that being a businessman of repute, running a famous restaurant in Nagpur, there was no chance of his absconding.

5. On the other hand, Mr. Anand Deshpande, learned APP appearing for the respondent – State submitted that at this stage it could not be said that there had been violation of mandatory requirements of Section 42 of the NDPS Act, while conducting the raid. It was submitted that the person, who conducted the raid was indeed an empowered officer as contemplated under the said provision of law and that the applicant had failed to show that there was non-compliance of law on the part of the officer conducting the raid. In so far as the proviso to Section 42(1) and subsection 2 of Section 42 of the NDPS Act were concerned, reliance was placed on the Constitution Bench Judgment of the Hon'ble Supreme Court in the case of **Karnail Singh Vs. State of Haryana (2009) 8 SCC 539**, to contend that the applicant had failed to show any prejudice caused to him during the raid and that, therefore, it was a matter for trial and no case for grant of bail was made out. On the aspect of CCTV footage, it was submitted that non-availability of such footage could not become a basis for grant of bail to the applicant. The learned APP also relied on the judgment of the Hon'ble Supreme Court in the case of **State of Kerala Vs. Rajesh AIR 2020**

SC 721, to contend that Section 37 of the NDPS Act was relevant while considering the application for bail for offence under the provisions of the NDPS Act. Attention of this Court was invited to the observation of the Hon'ble Supreme Court to the effect that liberal approach in the matter of bail under the provisions of the NDPS Act was uncalled for. On this basis it was submitted that the bail application deserved to be rejected.

6. Heard learned counsel for rival parties and perused the material on record.

7. Much emphasis has been placed on Section 42 of the NDPS Act on behalf of the applicant to contend that the raid conducted in the present case was entirely vitiated on the basis of material available upon filing of chargesheet and that, therefore, the applicant deserved to be enlarged on bail.

8. The twin requirements under Section 42(1) and subsection 2 of Section 42 of the NDPS Act are, firstly, the person conducting the raid must be an empowered officer, superior to the rank of Constable and secondly, if the raid was conducted between sunset and sunrise, as in the present case, the officer conducting such a raid must report grounds of belief that if the raid was not so conducted there would be chance of escape of the offender and further that such recorded grounds for his belief shall have to be communicated to the superior officer within 72 hours. As per the learned senior counsel appearing for the applicant, both these requirements were not satisfied, thereby showing that there was no chance of conviction of the applicant in the present case and that, therefore, he deserved to be enlarged

on bail.

9. In the context of these twin requirements, the learned APP relied upon Constitution Bench judgment of the Hon'ble Supreme Court in the case of **Karnail Singh Vs. State of Haryana** (supra), wherein apparent conflict between two earlier judgments of the Hon'ble Supreme Court was sought to be resolved. The Constitution Bench of the Supreme Court considered the extent of mandatory nature of requirements of Section 42 of the NDPS Act and in what circumstances the accused may not get benefit of mere non-compliance, unless it was established that he suffered prejudice due to such non-compliance. After considering Section 42 of the NDPS Act and earlier judgments, the Constitution Bench of the Hon'ble Supreme Court concluded that although the twin requirements of Section 42 were necessary to be complied with and total non-compliance of the same was impermissible, if there was some delay in compliance, which could be explained satisfactorily by material on record, such compliance would be acceptable.

10. By relying upon the aforesaid Constitution Bench judgment of the Hon'ble Supreme Court, the learned APP invited attention of this Court to the documents showing the manner in which the information was received at 00:30 Hrs. on 15/06/2019, regarding possession of the aforesaid psychotropic substance with the applicant and accused Mujahid and the permission sought by the Head Constable (empowered officer in the present case) from the Assistant Commissioner of Police for conducting the said raid. The document showing the raid having been conducted and the accused including the applicant found in possession of the said

psychotropic substance was also adverted to by learned APP and it was submitted that there was specific compliance of the requirements of Section 42 of the NDPS Act. As regards the question as to whether the officer, who conducted the raid, was empowered to do so or not, certain documents were referred to by learned APP in support of the said contention. It was submitted that Hawaldar was equal to Head Constable, who was superior in rank to the Constable and, therefore, there was no violation of Section 42(1) of the said Act. As regards proviso to Section 42(1) and subsection 2 of the Section 42 of the NDPS Act, it was submitted that the documents on record did indicate that the superior officer was informed and express permission was given by the superior officer for conducting the raid.

11. The aforesaid material brought to the notice of this Court by the learned APP, does indicate that at this stage, it cannot be concluded that there was total non-compliance of Section 42 of the NDPS Act, for the applicant to successfully claim that the raid was entirely vitiated and there was no chance of conviction of the applicant. In this context, Section 37 of the NDPS Act also becomes relevant, because in addition to the requirements under the Code of Criminal Procedure, while considering the question of grant of bail in offences under the NDPS Act the Court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offences and that he is not likely to commit any offence while on bail. In the present case, the contentions raised on behalf of the applicant concerning Section 42 of the NDPS Act have not impressed this Court to come to a finding at this stage that there has been total non-compliance of the mandatory requirements of

Section 42 of the NDPS Act. As noted by the Hon'ble Supreme Court in the Constitution Bench judgment in the case of **Karnail Singh Vs. State of Haryana** (supra), whether there has been adequate or substantial compliance of Section 42 of the NDPS Act is a question of fact, which can be decided in each case. This Court is of the opinion that it is only upon trial that the aforesaid aspect could be decided in the present case also. The applicant is not entitled to claim any benefit at this stage for grant of bail on the basis of contentions raised in the context of Section 42 of the NDPS Act.

12. As regards non-availability of CCTV footage of the area where the raid was conducted, that in itself cannot be a basis for grant of bail to the applicant. In so far as possibility of the applicant of committing such offence in future, attention of this Court was invited by learned APP to certain statements made to the police by accused No.1 and another person indicating association of the applicant with accused No.1 Mujahid for long period of time and their prima facie involvement together in possession, sale and supply of drugs, including the aforesaid psychotropic substance. The material does prima facie show that it would not be appropriate to grant bail to the applicant. It appears that it is in this context that the Sessions Court referred to screenshots of WhatsApp chat between the applicant and other accused persons, including accused No.1 Mujahid, as prima facie showing involvement of the applicant in the present crime.

13. In view of above, this Court is of the opinion that the applicant has failed to make out a case for grant of bail. It is also relevant that the Hon'ble Supreme Court in the case of **State of**

Kerala Vs. Rajesh (supra), in the context of exercise of power under Section 37 of the NDPS Act, has laid down that liberal approach in the matter of bail under the NDPS Act is indeed uncalled for. Therefore, it is found that the present application deserves to be dismissed.

14. Accordingly, the application is dismissed. Needless to say, the observations made in this order are limited to the question of grant or refusal of bail to the applicant and the Trial Court shall proceed with the trial on merits without being influenced by such observations.

15. This order be communicated to the counsel appearing for the parties, either on the email address or on WhatsApp or by such other mode, as is permissible in law.

JUDGE