

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

BAIL APPLICATION NO.188 OF 2022

Maroti S/o Manikrao Dhepe

...APPLICANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Swapnil S. Rathi Advocate for Applicant.
Mr.V.S. Badakh, A.P.P. for Respondent-State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 25th APRIL 2022

DATE OF PRONOUNCING ORDER : 4th MAY 2022

ORDER :

1. Present applicant has been arrested on 10th July 2021 in connection with Crime No.161 of 2021 registered with Kotwali Police Station, Parbhani for the offence punishable under Sections 20(b)(ii), 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act"). Applicant has filed

present application under Section 439 of the Code of Criminal Procedure.

2. Heard learned Advocate Mr. Rathi for the applicant and learned APP Mr. Badakh for the respondent – State.

3. It has been vehemently submitted on behalf of the applicant that co-accused is the mother-in-law of the applicant. The place where the alleged narcotic drug was found, belongs to her and she had criminal antecedents under the same Act. She is 84 years old lady and therefore, in order to make inquiry about her health, the applicant had gone to her house when the raid was conducted. The applicant has nothing to do with the narcotic drug. It is stated in the First Information Report (for short "FIR") that Ganja weighing 27.617 Kg. worth Rs.1,38,085/- was recovered. The bail has been sought on the ground that there is no compliance of mandatory provisions of Sections 40, 41, 42, 50 and 50-A of the NDPS Act. Now the investigation is complete and charge-sheet is filed. The charge-sheet would show that only station diary entry was taken, which cannot be said to be a mandatory compliance under Section 42 of the NDPS Act. It was obligatory on the part of the Police Officer, who received the information, to send the copy of that information, which he has

reduced into writing, to the superior officers within 72 hours, however, the charge-sheet does not say so. Further, it has been shown that a notice was given to the applicant and co-accused, as to whether they want the raid to be conducted in presence of S.D.P.O. Parbhani and whether a Gazetted Officer should remain present. If we consider the FIR, then it makes a mention about presence of Naib Tahsildar who has been stated to be Gazetted Officer, but his presence has not been shown in the said notice. Their reply has not been taken on the document, however, the informant and witnesses say that both the accused refused that the raid be conducted in presence of the Gazetted Officer and gave nod for the raid or search by the Police Officers. This is not the proper compliance of Section 50 of the NDPS Act.

4. Learned Advocate for the applicant is relying on the order dated 26th October 2021 passed by this Court in ***Bail Application No.568 of 2021 (Raju Bhavlal Pawar and others vs. the State of Maharashtra), Sarija Banu (A) Janarthani alias Janani and another vs. State through Inspector of Police, 2004, AIR, SCW, 7488***, order dated 20th January 2022 passed by this Court in ***Criminal Bail Application No.2295 of 2021 (Sholadoye Samuel Joy vs. the State of Maharashtra), Arif Khan Alias Agha Khan vs.***

State of Uttarakhand, (2018) 18 S.C.C. 380, and Judgment in ***Criminal Appeal No.2 of 1999*** passed by this Court on 10th December 2010 (***Sarubai W/o Malhari Gunthe vs. the State of Maharashtra***), in which the co-accused Sarubai was the appellant. By the said order, the substantive sentence awarded against co-accused Sarubai for the offence involved therein, of three years was reduced by this Court to six months for the offence punishable under Section 20(b)(i) of the NDPS Act.

5. It was also submitted on behalf of the applicant that since the charge-sheet has been filed, the custody of the present applicant is not required. He is ready to abide by the terms of the bail. It is also pointed out that co-accused Sarubai has been released on anticipatory bail by the learned Special Judge under the NDPS Act, Parbhani under Section 438 of the Code of Criminal Procedure.

6. Per contra, the learned APP strongly objected the Application and submitted that there is every compliance of the mandatory provisions of the NDPS Act. The option was given to the present applicant as well as co-accused Sarubai, whether they want Gazetted Officer to be present at the time of raid, they have stated orally that they do not want. It can also be seen

from the fact that co-accused Sarubai as well as present applicant appear to be illiterate. They both have given their thumb marks and present applicant is merely writing his name as a signature. In such circumstances, much more could not have been expected from the applicant in writing. Substantial amount of Ganja has been recovered and therefore, when it is an offence against the society at large, no sympathy deserves to be shown.

7. At the outset, it is to be noted that the learned Special Judge under the NDPS Act appears to have got impressed by the fact that co-accused Saubai was 84 years old and she was handicapped. She produced the certificate issued by the Medical Board. Photographs were also produced which shows that co-accused Sarubai had lost all the fingers because of leprosy and taking into consideration those aspects, anticipatory bail was granted. However, it appears that the earlier background that she had already been convicted, may be for six months, by this Court i.e. by reducing her sentence, under Section 20(b)(i) of the NDPS Act, ought to have been considered by the learned Special Judge. Even otherwise, that cannot be the ground for consideration of the relief prayed by the present applicant. His case will have to be considered independently.

8. As regards the non compliance of the mandatory provisions are concerned, it is to be noted that there is a copy of the communication stating that on 9th July 2021 an information was given to Deputy Superintendent of Police, Parbhani by Police Inspector, Kotwali Police Station, Parbhani that he has received information about possession of narcotic drug – Ganja by a lady. He sought permission to conduct raid. That communication does not say that the information was reduced into writing separately. However, by the contents of the said communication containing all those particulars about the information should not be treated as the information, is a question. Section 42 of the NDPS Act does not say that FIR will have to be lodged first and then copy of the same should be forwarded to the superior. Section 42(1) of NDPS Act requires the person receiving the information to be recorded in writing. Then Section 42(2) mandates that such information received by the police has to be forwarded to the superior officer within 72 hours. The information therefore contained in the communication by the Police Inspector, Kotwali Police Station, Parbhani dated 9th July 2021 can be treated, at this prima facie stage, as the information. Even otherwise also, Section 42(2) of the NDPS Act does not say that copy of whatever was reduced in writing should be annexed. Definitely,

mere entry in the case diary cannot be considered as the necessary compliance. But here, communication referred in the charge-sheet, dated 9th July 2021 is not a station diary entry. Further, on the same day, it appears that S.D.P.O. had granted permission to conduct raid. Rather S.D.P.O. himself had also remained present at the time of raid. The facts of the order passed in ***Bail Application No.568 of 2021***, referred above, were different and then there was clear non compliance of Section 42 of the NDPS Act.

9. As regards the personal search as contemplated under Section 50 of the NDPS Act is concerned, though the learned Advocate for the applicant is relying on the decision ***Arif Khan Alias Agha Khan vs. State of Uttarakhand*** (supra), the difference in the facts of that case and this case is that the search in this case was of the house and not of the personal search. Hon'ble Supreme Court in catena of Judgments, has held that the provision of Section 50 of NDPS Act is required to be complied in case of personal search only but not in case of search of vehicle, and the said analogy would have to be applied in case of search in respect of a house and therefore the decision in ***Arif Khan Alias Agha Khan vs. State of Uttarakhand*** (supra) will not be applicable here. In ***Arif Khan Alias Agha***

Khan vs. State of Uttarakhand (supra) after taking note of the earlier Judgment, it was observed that, it is imperative on the part of the police officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a gazetted officer or a Magistrate. The Division Bench of Delhi High Court in the decision in the case of ***Nabi Alam @ Abbas vs. State (Govt. of NCT of Delhi) [Bail Application No.2641/2018 & Criminal M.(Bail) No.555 of 2021 decided on 4th June 2021***) has held that, the person to be searched is mandatorily required to be taken by the empowered officer, for the conduct of the proposed search before a Gazetted Officer or Magistrate, only “if he so requires”, upon being informed of the existence of his right to be searched before a Gazetted Officer or Magistrate and not if he waives his right to be so searched voluntarily, and chooses not to exercise the right provided to him under Section 50 of the NDPS Act. Thus, it is to be noted that in the FIR as well as in the statements of the witnesses as well as Panchnama it appears that said option was given and orally it was refused by the present applicant. There is no non compliance of any of the mandatory provisions.

10. There is prima facie evidence against the present applicant. A substantial amount of narcotic drug – Ganja has

been seized. Narcotic drugs are menace to the society especially to the young generation and therefore, when there is prima facie evidence against the applicant, question of grant of discretionary relief does not arise.

11. The Application, therefore, stands rejected.

[SMT. VIBHA KANKANWADI , J.]

asb/APR22