

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

BAIL APPLICATION NO.631 OF 2022

1. Govind s/o. Hiralal Chanda,
 2. Badal s/o. Hiralal Chanda
- ..Applicants

Vs.

The State of Maharashtra

..Respondent

Mr.V.D.Sapkal, Senior Advocate i/b. Mr.D.K.Rajput, Advocate for applicants

Mr.S.P.Sonpavale, APP for respondent

**CORAM : R.G. AVACHAT, J.
RESERVED ON : JULY 26, 2022
PRONOUNCED ON : SEPTEMBER 05, 2022**

ORDER :-

This is an application under Section 439 of the Code of Criminal Procedure. The applicants have been arrested in connection with Crime No.0449 of 2021 registered with Mantha Police Station, Dist. Jalna, for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances, Act, 1985 ("N.D.P.S. Act", for short).

2. Heard learned counsel appearing for the parties.

3. The FIR has been lodged by the Police Inspector, Mantha Police Station, Jalna, on 24.12.2021. It is his case that he had received

a tip-off that a truck was proceeding along Jintur-Mantha road, carrying some contraband articles. Presence of two persons was, therefore, secured to act as panch witnesses. A photographer was also summoned. All the arrangements to intercept the truck and take search thereof were made. The trap party went towards Jintur-Mantha road. The members of the trap party noticed one truck near 'Hotel Indian'. There were two persons at the truck (the applicants herein). They claimed to be drivers of the truck. For safety purpose, the truck was brought to the front-yard of Mantha Police Station. Search of the truck was made to find therein fruit plants/saplings in large quantity. After having unloaded them from the truck, it was found that 12 nylon bags containing 148 packings, were concealed in the truck. It was found that the packings contained Ganja worth Rs.18,43,680/-. The quantity thereof was 3 quintals, 7 kgs. and 280 gms. Some portion thereof in requisite quantity was taken separately for analysis. A seizure panchnama was drawn. The informant then lodged the FIR.

4. During investigation, it was found that the Ganja was received at Rajmudri (Andhra Pradesh). It was loaded at the instance of the co-accused Bhavlal and Sachin and one unknown

person. It was further found that the truck belongs to the present applicants. They are in transport business. The plants/saplings were to be delivered to a nursery at Mantha, while Ganja was to be delivered to someone at Badnapur, Dist. Jalna. On completion of the investigation, charge sheet has been filed.

5. Learned Senior Counsel appearing for the applicants herein would submit that there is non-compliance of provisions of Section 42 of the N.D.P.S. Act. He would submit that although said compliance is a question of fact, the same may be looked into while hearing the application for bail. He would further submit that the co-accused who have been granted bail, were in the custody of the police the previous day. The case of the prosecution, therefore, could not be accepted that those co-accused had loaded contraband Ganja in the truck at Rajmudri (Andhra Pradesh). The co-accused appears to have been arrested in connection with some offence committed against police personnel. The co-accused, therefore, appear to have been falsely implicated. The investigation of the crime appears to have been tainted. On the question of conscious possession, learned senior counsel would submit that the applicants were not expected to know what the plastic bags contained. The

bags contained some wrappers with Ganja therein. The applicants, being transporters, simply got loaded the goods for being transported to their destination. The applicants may, therefore, appear to have not been in the know of it being Ganja. According to him, it will take time for commencement and conclusion of the trial. Pre-trial detention of the applicants, in the facts and circumstances of the case, is unwarranted. He, therefore, urged for grant of bail.

6. Learned APP would, on the other hand, submit that the secret information received by the concerned Police Officer was recorded in the station diary. The information was immediately passed on to the immediate Officer concerned. Said Officer, in turn, granted permission to lay a trap. The station diary entry and the communication made by the Dy. Superintendent of Police, asking for his permission to effect the raid were relied on. On the question of conscious possession, learned APP would submit that the applicants being transporter must be presumed to have been in the know of the plastic bags to have contained Ganja. The applicants may make out their defence of not having been in conscious possession, during trial. He, therefore, urged for rejection of the application.

7. Considered the submissions advanced. Perused the FIR and the related papers.

8. Undisputedly, the truck was found at 'Hotel Indian' at Jintur-Mantha road. It was taken to Mantha Police Station. On search thereof, it was found that the truck was loaded with a number of fruit/flowers plants. Twelve nylon bags containing 148 wrappers/packages of Ganja therein were found concealed behind the plants. It is a case of commercial quantity. The truck, wherein the contraband was found, belongs to present applicants. They are in the transport business. They are, therefore, presumed to have been in the know of the nature of the goods that were being carried in the truck. Both of them, admittedly, have been with the truck from the place from where it started to the place, whereat the police intercepted them. The applicants, therefore, could not be heard, at this stage, to contend that they were not in conscious possession of the contraband Ganja. It being a case of commercial quantity, Section 37 of N.D.P.S. Act gets invoked. The conditions contained in Section 37(1)(b) of N.D.P.S. Act get *prima facie* satisfied from the facts and circumstances of the case.

9. There is, however, another aspect of the matter. Compliance of Section 42 of N.D.P.S. Act is said to have not been made. For better appreciation, Section 42 is reproduced herein below:-

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 VA 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 VA 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.

10. In the case of **Sarija Bano Alias Janarthani Alias Janani Vs. State Through Inspector of Police, (2004)12 SCC 266**, the Hon'ble Supreme Court has observed as under:-

" Bail application alleging serious violation of provision of Section 42 – Said facts to be considered while considering bail application."

11. Learned APP would, on the other hand, relied on the Constitution Bench judgment of the Apex Court in the case of **Karnal Singh Vs. State of Haryana, 2009 Cri. L.J. 4299**, wherein it has been concluded as under:-

17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of [Sections 42\(1\)](#) and [42\(2\)](#) nor did Sajan Abraham hold that the requirements of [Section 42\(1\)](#) and [42\(2\)](#) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information (of 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 to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of [section 42\(1\)](#).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for 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 could 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.

(c) In other words, the compliance with the requirements of [Sections 42 \(1\)](#) and [42\(2\)](#) in regard 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 situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements 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](#). To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of [section 42](#). But if the information was received when the police officer was in the police station with sufficient time to take action,

and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of [section 42](#) of the Act. Similarly, 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 Act. Whether there is adequate or substantial compliance with [section 42](#) or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to [section 42](#) by Act 9 of 2001.

Learned APP also relied on the following judgments :-

- (i) Judgment of Gujrat High Court in the case of State of Gujarat Vs. Shashikant Dharamdev Singh, Criminal Misc. Application (for Cancellation of Bail) No.6809 of 2014 and other connected matters delivered on 26.02.2015;
- (ii) Judgment of Madras High Court in the case of Shiv Shankar Kesari (Crl. O.P. No.24489 of 2012 and M.P.Nos.1 and 2 of 2012).

Relying on the aforesaid two decisions, learned APP would submit that there is bar of Section 37 of N.D.P.S. Act to grant bail to the applicants herein, particularly, in the facts and circumstances of the present case. He would also submit that in view of Section 54 of N.D.P.S. Act, there is presumption, unless and until the contrary is proved, that the accused committed an offence under the N.D.P.S.

Act. Section 35 of N.D.P.S. Act speaks of existence of culpable mental state.

12. This Court, in the case of **Raju Bhavlal Pawar and ors. Vs. The State of Maharashtra in Bail Application No.568 of 2021 decided on 26.10.2021**, held that taking entry in the station diary regarding the secret information received, is no compliance of Section 42(1) of the N.D.P.S. Act.

13. Learned APP has placed on record a number of station diary entries made on 24.12.2021. First one was made from 10.00 in the morning. The same indicates the trap party to have left the police station for the place whereat the truck was reported to have been stationary. Another station diary entry was made at 12:26 p.m. to the effect that the truck was brought to the police station. The next entry in the station diary pertains to the Tahsildar informing to have been on leave and therefore, deputing the Naib Tahsildar for the purpose. The next one is regarding deputing a police constable to fetch the scale/weighing machine. The station diary entry made by 12.45 p.m. indicates that the higher-up was informed that the truck has been brought to the police station and necessary action is to be taken. All these station diary entries were

placed on record for perusal of this court. None of them pertain to have recorded a tip-off/secret information and that copy thereof was sent to the higher-up. A communication bearing outward no.1793 dated 24.12.2021 has been relied on to indicate that the concerned Dy. Superintendent of Police, Partur Sub-Division, was informed that an information was received that Ganja was being transported in a truck (MH 21-BH-1758) and permission was solicited for making *Nakabandi* on the road by using barricades for intercepting the vehicles near Indian Hotel.

14. Scrutiny of papers relied on, suggests that there is no separate document indicating what tip-off/secret information was received by the Police Inspector and that was recorded/written down. Whether the afore mentioned station diary entries and the communication made by the Police Inspector to the S.D.P.O., constitutes compliance of Section 42 of the N.D.P.S. Act, could, therefore, be well decided by the trial Court since it is a question of fact.

15. There is another aspect of the matter. The co-accused, who are alleged to have or at whose behest the contraband Ganja

was loaded in the truck and being transported is concerned, the record indicates both of them were in the custody of one of the Taluka Police Stations in the District of Jalna for 4-5 days, immediately before the truck was intercepted. They were arrested in connection with the offence allegedly committed by them against some of the police staff serving in District Jalna. Learned Senior Counsel had every reason to contend that both of them were falsely implicated. Present applicants were compelled to take their names. Same indicates that the investigation appears to be tainted one. No investigation in right direction appears to have been made, so as to find as to at whose behest, the contraband articles were loaded in the truck for onward transportation of the same.

16. For all these reasons, this Court is inclined to grant the present applicants bail, with a direction to the trial court to expedite hearing of the case. Hence, the following order:-

- (i) The application is allowed.
- (ii) The applicants be released in connection with Crime No.0449 of 2021 registered with Mantha Police Station, Dist. Jalna, for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances, Act, 1985, on executing P.R. Bond in the sum of

Rs.1,50,000/- (Rupees One Lakh Fifty Thousand) each with one surety each in the like amount.

- (iii) The applicants shall not tamper with the prosecution evidence in any manner.
- (iv) The trial Court is directed to expedite hearing of the case.

[R.G. AVACHAT, J.]

KBP