

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

BAIL APPLICATION NO. 404 OF 2021

Jignesh P. Bhanushali
Age: 41, Occu.: Operational Manager,
Residing at 1305,
Vishram Towers, No.2,
Srinagar, Section 9, Wagle Estate,
Thane.

..Applicant
(Org. Accused No.1)

VERSUS

The Intelligence Officer,
Directorate of Revenue Intelligence,
Bangalore.

..Respondent

Shri Taraq Sayyad h/f. Shri Swapnil S. Patil, Advocate for the
applicant
Shri. A. G. Talhar, ASG for the respondent

**WITH
BAIL APPLICATION NO. 867 OF 2021**

Vijaykumar Lakshmananm
Age: 33 years, Occu.: Driver,
R/o. House No.73, Selvanagar,
Govardhangire Avadi, Chennai
600071.

..Applicant

VERSUS

The Intelligence Officer,
Directorate of Revenue Intelligence,
Bangalore Zonal Unit, No.8(2) P,
Opp. BDA Complex, HBR Layout,
Kalyannagar Post Banaswadi,
Bangalore.

..Respondent

...

Shri Harshal Prakash Randhir and Shri Iliyas Deshmukkh,
Advocate for the applicant
Shri. A. G. Talhar, ASG for the respondent

CORAM : M. G. SEWLIKAR, J.
RESERVED ON : 22nd December, 2021
PRONOUNCED ON : 25th January, 2022

ORDER :-

1. These applications are filed under Section 439 of the Code of Criminal Procedure for releasing the applicants on bail in connection with Crime No.17 of 2018, registered with Intelligence Officer, Directorate of Revenue Intelligence, Bangalore (DRI), under Sections 36A(1)(d), 8(c), 21(c), 22(c), 23(c), 28, 29 read with 38 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 and under Section 135A of the Customs Act, 1962.

2. Both these applications are being disposed of by a common order as they arise out of the same crime.

3. Facts in brief are that the Department of Directorate of Revenue Intelligence (DRI) had received information that on 11th January, 2018 a psychotropic substance was being transported in a car bearing registration No.KA39 M2117 near

L&T Toll Plaza, Kamkole village, Munipalli Mandal, Sangareddy District, Telangana. This car was intercepted by the Officers of DRI. Three persons by the name of Villautham Nagu, Venkatesan Balasubramaniyan and Vijaykumar L. (applicant in Bail Application No.867 of 2021) were traveling in the car. On taking search of the car, contraband was recovered behind the rear seats and the side walls of the boot of the car. The Officers of DRI had carried with them a test kit. On conducting the test, contraband was found to be of Methaqualone. Samples were taken. The contraband article was sent to the Chemical Analyzer (CA) for analysis. On receipt of report of CA, it was found that the contraband article was not Methaqualone but it was Ketamine Hydrochloride.

4. It is further alleged in the FIR that during the investigation, statement under Section 67 of the NDPS Act was recorded to the effect that the alleged contraband was loaded in the vehicle by person named as Suraj at Omerga, District Osmanabad for onward delivery to a place in Chennai. A search was conducted at the premises of M/s.Pragati Electrical Work, Plot No.B-75, MIDC, Omerga, Dist.Osmanabad. According to the DRI, this premises was used for the purpose of manufacturing of

contraband i.e. Ketamine Hydrochloride. It is the case of the DRI that raw material was supplied to Rajesh Bhanusali and one Suraj of Kerala (accused No.4) by one Mangesh of Solapur utilizing the services of Mr.Prasad M.C. of Kerala as Chemist.

5. Accordingly, complaint was lodged by the Officers of the DRI. During the investigation, it was found that Jignesh P.Bhanushali (applicant in Bail Application No.404 of 2021) is involved in the manufacturing process of Ketamine Hydrochloride a contraband substance. According to the DRI, applicant Jignesh used to remain present in the premises of M/s.Pragati Electrical Work. Therefore, he is also involved in the process of the manufacturing of contraband substance.

6. So far as Vijaykumar L. (applicant in Application No.867 of 2021 is concerned, he has made a confessional statement under Section 67 of the NDPS Act that he was called by the driver of the car by name of Villautham Nagu. In the confessional statement, he further stated that Driver Villautham Nagu told him that contraband substance was being carried to Chennai in the car and the applicant Vijaykumar was asked by Driver Villautham Nagu to accompany him (Villautham Nagu) and

for that purpose applicant was offered Rs.20,000/-. It is alleged that applicant was in conscious possession of contraband substance. Therefore, applicant Vijaykumar L. has also been implicated in this offence. After completion of investigation, charge-sheet came to be filed.

7. I have heard Shri. Taraq Sayyad, learned counsel holding for Shri. S. S. Patil, learned counsel for the applicant in Bail Application No.404 of 2021, Shri. Harshal Prakash Randhir, learned counsel and Shri. Iliyas Deshmukkh, learned counsel for the applicant in Bail Application No.867 of 2021, and Shri. A. G. Talhar, learned ASG for the respondent.

8. Shri. Taraq Sayyad, learned counsel for the applicant in Bail Application No.404 of 2021 submitted that the provisions of Section 42 of the NDPS Act have not at all been followed by the DRI. In terms of Section 42 of the NDPS Act, on receipt of information, it has to be recorded in writing by the Officer receiving the information and it has to be forwarded to the immediate superior of the Officer concerned. He submitted that in the case at hand, though information was recorded in writing, it was not forwarded to immediate superior of the Officer

concerned. He submitted that compliance of provisions of Section 42 can be looked into at the stage of bail. He further submitted that the role of the applicant Jignesh is only to the extent of remaining present in the premises of M/s.Pragati Electrical Work when the manufacturing activity of contraband substance Ketamine Hydrochloride was in progress. He submitted that simply because the applicant was present at the time when manufacturing process was going on, it cannot be said that he was involved in the manufacturing activity. He submitted that except this evidence, there is no other evidence to indicate that applicant Jignesh was found possessing contraband substance Ketamine Hydrochloride or that he was involved in the manufacturing activity of the said contraband substance. He further submitted that information which was received by the DRI does not specify the name of the drug.

9. Shri. Harshal Prakash Randhir, learned counsel for the applicant in Bail Application No.867 of 2021 submitted that the only evidence against Applicant Vijaykumar is that of confessional statement under Section 67 of the NDPS Act. He submitted that confessional statement under Section 67 of the NDPS Act is not admissible in the evidence as the Officers of DRI are held to be

Police Officers within the meaning of NDPS Act and therefore, the confessional statement given by the applicant is hit by Section 25 of the Evidence Act. He submitted that there is no other evidence to show the involvement of the applicant Vijaykumar in the alleged offence.

10. Shri. Talhar, learned ASG for the respondent submitted that applicant Jignesh was involved in the manufacturing activity of contraband substance. He used to remain present in the premises of M/s.Pragati Electrical Work and closely watch the manufacturing activity. He has some other business. There was no reason for the applicant Jignesh to remain present at the place where manufacturing activity of contraband substance was being carried out. He used to remain present throughout the manufacturing process in the premises. Thus, his presence in the premises indicates his involvement in the manufacturing activity. Statements given by witness Shri M.C.Prasad and Shri Suresh Ramrao Rajnale indicate that the manufacturing of the contraband substance was being monitored by Rajesh Bhanushali @ Rajesh Nakhua and applicant Jignesh Bhanushali. He submitted that summons was issued to applicant Jignesh for remaining present in the Office of DRI but applicant

Jignesh did not pay any heed to this summons. This conduct indicates his guilty mind. He submitted that applicant Jignesh was released under Section 167(2) of the Code of Criminal Procedure by the Sessions Court, Hyderabad. This order was set aside by the High Court of Telangana and the order of the High Court was confirmed by the Hon'ble Supreme Court. He submitted that this order was obtained from the Sessions Court by playing fraud on the Sessions Court. Therefore, applicant Jignesh does not deserve to be released on bail.

11. So far as as applicant Vijaykumar (applicant in Bail Application No.867 of 2021) is concerned, learned ASG submitted that the applicant Vijaykumar has given a confessional statement under Section 67 of the NDPS Act. He submitted that in the confessional statement, applicant Vijaykumar has admitted that he was asked by Driver Villautham Nagu to accompany him in the car and applicant Vijaykumar will be paid Rs.20,000/- for three days. He submitted that this confessional statement indicates that he was in conscious possession of the contraband substance. He submitted that Driver Villautham Nagu had made known to the applicant that the vehicle contained contraband substance but its name was not disclosed to applicant Vijaykumar. He

submitted that contraband weighing 46 kgs. (approximately) worth Rs.22 Crores was found in the boot of the car. He submitted that the applicants in both the applications are out to ruin young generation of this Country. He further submitted that the provisions of Section 42 of the NDPS Act need not be considered at the stage of bail. The compliance can be considered during the trial. For this purpose, he placed reliance on the Judgments of the Hon'ble Supreme Court in the following cases:

(i) Judgment in *Criminal Appeal No.1043 of 2021 (Arising out of SLP (Cri.) No.1771 of 2021)* in the case of *Union of India through Narcotics Control Bureau, Lucknow Vs. Md.Nawaz Khan* dated 22nd September, 2021.

(ii) Judgment in the case of *Achint Navinbhai Patel alias Mahesh Shah and Others Vs. State of Gujarat and another* [2001 Legal Eagle (SC) 1232].

(iii) Judgment in the case of *Collector of Customs, New Delhi Vs. Ahmadalieva Nodira* [2004 Legal Eagle (SC) 242].

12. I have given thoughtful consideration to the submission of learned counsel on both sides. Case of the prosecution is that the applicant Jignesh Bhanushali used to

remain present through out the manufacturing process and therefore he participated in the manufacturing activity and abetted the commission of the offence.

13. An accused claiming his release on bail has to satisfy twin conditions in terms of 37 of the NDPS Act i.e. there is no possibility of conviction having regard to the evidence collected by the prosecution and that he is not likely to commit similar offence again. Let us now analyse the evidence collected by the prosecution.

14. Section 2(x) of the NDPS Act defines expression manufacture thus;

2(x) "manufacture", in relation to narcotic drugs or psychotropic substances, includes-

- (1) all processes other than production by which such drugs or substances may be obtained;
- (2) refining of such drugs or substances;
- (3) transformation of such drugs or substances; and
- (4) making of preparation (otherwise than in a pharmacy on prescription) with or containing such drugs or substances;"

15. Preparation is defined in Section 2(xx) it is defined thus;

2(xx) "preparation", in relation to a narcotic drug or

psychotropic substance means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances;”

16. It is, thus, clear that ‘manufacture’ encompasses processing, refining of such drugs or substances, transformation of such drugs or substances and making of preparation with or containing such drugs or substances. When a person involves himself in all these activities then only it can be said that he is involved in a manufacturing activity. Therefore, mere presence at the site of manufacturing activity is not enough to invoke the stringent provisions of NDPS Act. Applicant was not involved in processing, refining of drugs or substances their transformation and making preparation (otherwise than in a pharmacy on prescription) with or containing such drugs or substances. Simply because someone is present at the site and is watching the manufacturing activity, provisions of NDPS Act cannot be used against him. Since nothing of this sort is alleged against the applicant, it cannot be said he was involved in manufacturing of the drugs or substances.

17. What is punishable under Section 8(c), under Section 21 and under Section 22 is manufacturing, possessing, selling,

purchasing, transporting, importing inter-State, exporting inter-State or use of any manufactured drug or any preparation containing any manufactured drug. In the case at hand no allegation of this sort is made against the applicants. Section 23 of the NDPS Act cannot be attracted as it relates to punishment for illegal import into India, export from India or transshipment of narcotic drugs or psychotropic substances as there are no such allegations against any of the applicants.

18. Section 28 of the NDPS Act is also invoked against the applicants. Section 28 relates to punishment or attempt to commit offences. It reads thus;

“28. Punishment for attempts to commit offences – Whoever attempts to commit any offence punishable under this Chapter or to cause such offence to be committed and in such attempt does any act towards the commission of the offence shall be punishable with the punishment provided for the offence.”

19. It is, thus, clear that in order to invoke the provisions of this Act, there has to be some overt act towards the commission of the offence. Therefore, simply remaining present at the site of manufacturing activity, does not amount to attempting towards the commission of the offence.

20. Thus, from any angle no provision of NDPS Act can be invoked against the applicant.

21. So far as applicant Jignesh Bhanushali is concerned, learned ASG Shri. Talhar submitted that applicant Jignesh abetted the commission of the offence under Section 29 of the NDPS Act. Section 29 of the NDPS Act reads thus;

“29. Punishment for abetment and criminal conspiracy-(1) Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code, be punishable with the punishment provided for the offence.

(2) A person abets, or is a party to a criminal conspiracy to the commit, as offence, within the meaning of this section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which-

(a) would constitute an offence if committed within India; or

(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it can offence punishable under this Chapter, if committed within India.”

22. Abetment consists in aiding, instigation or conspiracy to commit the offence. Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. More active role which can be described as instigating or

aiding the doing of a thing is required before a person can be said to be abetting the commission of offence. There has to be some overt act on the part of the applicant showing as to in what manner he assisted the accused in the commission of offence under the NDPS Act. Mere presence without there being any overt act on the part of the applicant does not constitute abetment.

23. So far as applicant Vijaykumar Lakshmanan is concerned the evidence which is adduced against the applicant is his confessional statement under Section 67 of the NDPS Act. It is alleged that applicant was traveling in the car in which Ketamine Hydrochloride is stored. Applicant Vijaykumar L. has given confessional statement. The said confessional statement is not admissible in evidence in view of the judgment of the Hon'ble Supreme Court in the case of ***Tofan Singh Versus State of Tamil Nadu***, reported in ***(2013) 16 Supreme Court Cases 31***. It has been held that a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act. It can be used only for investigation purposes. In the case of ***Tofan Singh*** it has been held that the officers under the NDPS Act are the police officers and therefore, confessional statement recorded by them

cannot be used against the applicant as it is hit by Section 25 of the Evidence Act and cannot be used against the maker.

24. In the case of **Aryan Shah Rukh Khan Versus The Union of India & Anr, 2021 All M.R. (Cri.) 4337** it has been held that;

“15. Section 67 of the NDPS Act provides for powers to call for information. Hence, it also empowers Investing Officer to record confessional statement of the Accused which has a binding effect. Prosecution has claimed that confessional statements given by Accused persons admitting to have committed offence alleged against them, however, such confessional statements are not having any binding effect in law as the said issue is squarely covered by the Apex Court in the matter of **Tofan Singh Vs. State of Tamil Nadu in Criminal Appeal No. 152 of 2013**. Once the confessional statement of the Applicants/Accused cannot bind them of the offence in view of the judgment of Supreme Court in the matter of Toofan Singh (cited uspra), the claim put forth by the Respondent that Accused persons have accepted their involvement in the crime is liable to be rejected.”

25. So far as accused No. 1 is concerned the only allegation against him is that he was present at the spot where manufacturing activity was going on. So far as accused Vijaykumar L. is concerned the only evidence against him is confessional statement which cannot be used against him.

26. In the case of **Bharat Chaudhary Versus Union of**

India reported in **2021 SCC OnLine SC 1235** the Hon'ble Apex Court held that confessional statement under Section 67 of NDPS Act cannot be used against the accused. In para 11 it is observed thus;

"11. In the absence of any psychotropic substance found in the conscious possession of A-4, we are of the opinion that mere reliance on the statement made by A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order dated 15th July, 2021. This is all the more so when such a reliance runs contrary to the ruling in Tofan Singh (supra)."

27. So far as compliance of Section 42 is concerned. The Hon'ble Supreme Court in the case of Union of India through Narcotics Control Bureau, Lucknow Vs. Md. Nawaz Khan it has been held that compliance of Section 42 can be considered during trial. Para 29 it is held thus;

"29. In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial."

28. Reliance was placed by the learned ASG on the case of **Sushant Gupta Versus Union of India, 2014 308 ELT 661 (Allahabad)**. This decision of the Allahabad High Court is not

applicable to the facts of the case at hand. In that case the father and son were traveling in the family car, without any other person, and contraband material was recovered from a secret cavity made specially for this purpose. It was held that the accused was in conscious possession of the contraband and that he had mental state with respect to the act charged as an offence. This is not the factual situation in the case at hand. Applicant Vijaykumar L. is not an employee of Pragati Electricals. He has no concern with Pragati Electricals. Therefore, he cannot be imputed with knowledge of existence of contraband articles in the car. Simply because of he was traveling in the car it cannot be said that he was in conscious possession of the contraband substance. In the case of ***Khadag Badadur Yada Versus Union of India, (2017) 343 E.L.T. 444 (All) (Allahabad)*** facts were that 210 packets of Charas was found in the hidden cavity of truck. The accused pleaded that he was merely a truck driver. No contraband substance was found in his possession. Bail was rejected considering huge recovery and confessional statement of accused. In the case at hand applicant Vijaykumar L. was not driving the car. He has no concern with M/s. Pragati Electricals. He was simply traveling with driver who is also an accused. In these circumstances it cannot be said that applicant was in

conscious possession of contraband substance. I have carefully gone through the other authorities cited by the learned ASG. They are not applicable to the facts of the present case.

29. In view of this applicants have been successful in proving that twin conditions do not apply to them. Hence, they are entitled to be released on bail. Following order, therefore, is passed.

ORDER

- i) Bail Applications are allowed.
- ii) Applicant Jignesh Bhanushali be released on P.R.Bond of Rs. 1,00,000/- (Rs. One lakhs/-) with one solvent surety in the like amount, in connection with Crime No. 17 of 2018, registered with Intelligence Officer, Directorate of Revenue Intelligence, Bangalore, under Sections 36A(1)(d) of NDPS Act, 1985, under Section 8(c), 21(c), 22(c), 23(c), 28 and 29 read with section 38 of NDPS Act and under Section 135A of the Customs Act, 1962.
- iii) Applicant Vijaykumar Lakshmananm be released on P.R.Bond of Rs.50,000/- (Rs. Fifty thousand/-) with one solvent surety in the like amount, in connection with Crime No. 17 of 2018, registered with Intelligence Officer, Directorate of Revenue Intelligence, Bangalore, under Sections 36A(1)(d) of NDPS Act, 1985, under Section 8(c), 21(c), 22(c), 23(c), 28 and 29 read with section 38 of NDPS

Act and under Section 135A of the Customs Act, 1962, on following conditions :-

- iii) Both the applicants shall not make any attempt to influence the prosecution witnesses in any manner.
- iv) Both the applicants shall not put any obstacle in the trial and remain present on the dates fixed by the concerned Special Court and co-operate the Special Court.
- v) Both the applicants shall deposit their passport, if any, with the concerned Special Court.
- vi) Both the applicants shall not travel abroad without prior permission of the concerned Special Court.
- vii) Both the applicants shall furnish their addresses in detail and mobile phone numbers with the concerned Special Court and concerned police station to verify the same.
- viii) Bail Applications are disposed of.
- ix) It is clarified that the observations made in the above order are restricted to the decision of this application only and the trial Court shall not get influenced by the same and can come to its independent conclusion during trial.

[M. G. SEWLIKAR, J.]

ssp