

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

BAIL APPLICATION NO. 996 OF 2022

Prakash Sudhakar Patil ..APPLICANT

VERSUS

State of Maharashtra ..RESPONDENT

**WITH
BAIL APPLICATION NO. 1086 OF 2022**

Mahendra Kisan Koli ..APPLICANT

VERSUS

State of Maharashtra ..RESPONDENT

....

Mr. B.R. Waramaa, Advocate for applicant in BA/996/2022

Mr. P.R. Harshal, Advocate for applicant in BA/1086/2022

Mr. V.S. Badakh, A.P.P. for respondent - State

....

**CORAM : R.G. AVACHAT, J.
RESERVED ON : 05th AUGUST, 2022
PRONOUNCED ON : 05th SEPTEMBER, 2022**

ORDER :

1. Both these applications for bail under Section 439 of Code of Criminal Procedure are being decided by this common order since they arise from one and the same crime. The applicants have been arrested in connection with Crime No. 22 of 2022 registered with Chopada Rural Police Station, Dist.Jalgaon for the offences punishable under Sections 8, 15, 18 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('N.D.P.S.').

2. Heard. Perused the First Information Report (“F.I.R.”) and related police papers.

3. The F.I.R. has been lodged on 07th March, 2022 by a police official serving with Chopada Rural Police Station. It is the case of the prosecution that on 03rd March, 2022, Devidas Kungar, Police Inspector of the said police station had received a tip off that applicant – Prakash Patil has raised/cultivated opium crop in his own field and the field of one another. It was about 08.30 p.m. The police inspector, therefore, alongwith some police staff and independent persons, went to the said field at village Walki. They found some maize crops in the field. Grown up plants of opium were also noticed in both the fields. Those plants borne white flowers and fruits as well. Since it was some what late in the night, the police inspector and others returned to the police station. Some police staff was however, deputed at the site so as to prevent causing disappearance of the contraband. It is also the case of prosecution that on the following morning i.e. on 04th March, 2022, the police inspector alongwith his staff, local Tahsildar, revenue officers viz. Circle Officer and Talathi came to the said field. Two government servants were also alongwith them to act as panch witnesses. The contraband crops were taken charge of under the panchanama drawn then and there. Some portion thereof was separated for analysis by an expert of Central Forensic Science Laboratory. It was found that those were

the agricultural lands bearing Gut Nos. 431/2 and 454/6. Gut No.431/2 belongs to applicant – Prakash Patil. The other land bearing Gut No. 454/6 was taken by applicant – Prakash Patil from applicant – Mahendra Koli for cultivation. Applicant – Mahendra Koli had taken said land for cultivation from it's owner – Bhagwat Patil and allowed applicant – Prakash Patil to raise contraband in the said field. On investigation, charge came to be laid against both the applicants.

4. Both learned counsel for the applicants would submit that there is non-compliance of Section 42 of the N.D.P.S. Act. Mr. Harshal, learned counsel would submit that as per the case of prosecution itself the land (Gut No. 454/6) was not being cultivated by applicant – Mahendra Koli. He had given it to applicant - Prakash Patil, who had raised contraband plants in that land. Except the statement of applicant – Prakash Patil there is nothing to indicate applicant – Mahendra Koli to have consciously allowed applicant – Prakash Patil to raise contraband plants in the land Gut No.454/6. Learned counsel, therefore, urged for grant of bail to both the applicants.

5. Learned A.P.P. would, on the other hand, submit that the Police Inspector had made a station diary entry relating to the information received. A communication was thereafter made with the Sub-Divisional Police Officer (Deputy Superintendent of Police), who in turn, granted permission to go

ahead and effect the trap. The documents indicating the same were referred to in compliance of Section 42 of the N.D.P.S. Act. Learned A.P.P. would further submit that applicant – Mahendra Koli had given the land to applicant – Prakash Patil to raise/cultivate the contraband plants therein. The quantity of contraband plants seized from both the fields is more than commercial quantity. Section 37 of the N.D.P.S. Act, therefore, gets attracted. The applicants are, therefore, not entitled for grant of bail. Learned A.P.P., therefore, urged for rejection of the applications.

6. Considered the submissions advanced. Pursuant to a tip off received by the Police Inspector of Chopada Rural Police Station, a raid was effected at village Walki. Local revenue officer has identified both the lands, being Gut Nos. 431/2 and 454/6. Admittedly Gut No. 431/2 belongs to applicant - Prakash Patil, whereas Gut No. 454/6 belongs to one Bhagwat Patil, who had given it to applicant - Mahendra Koli for cultivation. As per the case of the prosecution itself, applicant – Mahendra Koli did not raise contraband plants in that land. The charge against him is that he allowed applicant – Prakash Patil to raise such crop in the said land. It would be a matter of evidence during trial of the case whether applicant – Mahendra Koli was in league with applicant – Prakash Patil so as to permit him (Prakash Patil) to raise contraband plants in the land Gut No. 454/6. This Court is, therefore, inclined to grant bail to applicant - Mahendra Koli.

7. As regards applicant – Prakash Patil is concerned, there is strong prima facie material to indicate him to have raised contraband plants in both the lands. Section 37 of the N.D.P.S. Act would necessarily come in his way for grant of bail. There is however, another aspect of the matter. Section 42 is said to have not complied with. It is, therefore, necessary to refer to Section 42 of the N.D.P.S. Act as under :-

“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 paramilitary 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 V-A 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 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 V-A 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.”

8. The Apex Court in case of ***Sarija Banu @ Janarthani @ Janani and Anr. Vs. State Through Inspector of Police, (2004) 12 SCC 266*** has observed that compliance with Section 42 is mandatory and is a relevant fact to be taken into account while considering the bail application. Constitutional Bench of the Apex Court in case of ***Karnail Singh Vs. State of Haryana, (2009) 8 SCC 539*** has held as under :-

“(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.”

9. Let us advert to the police papers to find whether there is compliance or non-compliance or substantial compliance of provisions of Section 42 of the N.D.P.S. Act. As per the case of prosecution, a tip off was received by Devidas Kungar, Police Inspector, sometime before 08.00 p.m. on 03rd March, 2022. He was, therefore, expected to record the said information in writing and then forward a copy thereof to his immediate higher ups viz. Deputy Superintendent of Police. This Court, in Bail Application No. 568 of 21 decided on 26th October, 2021, has observed that making an entry of the tip off in the station diary is not a compliance with Section 42(1) of the N.D.P.S. Act. A communication dated 03rd March, 2022 made by the police inspector to the Deputy Superintendent of Police vide Outward No. 290/22 has been relied on. Contents of the said communication indicate that the concerned Police Inspector had received an information that in the land Gut No. 431/2, belonged to applicant -Prakash Patil, contraband plants have been raised/cultivated, and therefore, permission for effecting a raid was solicited. Learned A.P.P. may be justified in contending that the said communication is nothing short of compliance of the provisions of Section 42(2) of the N.D.P.S. Act. For compliance of mandate of Section 42(1) thereof, i.e. recording of information is concerned, a station diary entry dated 03rd March, 2022 made at 06:23 p.m. was placed on record. It is evident from the said station diary

entry that police party left the police station for effecting the raid at a place disclosed pursuant to the tip off. Station diary entry cannot be said to be the compliance with taking down (recording) the tip off. Another station diary entry of the same day made by 07:54 p.m. was also relied on. The same also indicates that the police staff alongwith photographer, panchas, etc. left the police station for village Walki. The next station diary entry of the same day made by 10:19 p.m. is to the effect of some of the police staff to have come back after paying visit to the concerned lands.

10. In view of this Court, the aforesaid documents prima facie indicate non-compliance of Section 42(1) of the N.D.P.S. Act. The compliance could only be ascertained during trial of the case when the concerned police officer will produce evidence in proof of his case. This Court is, therefore, also inclined to grant bail to applicant – Prakash Patil.

11. In view of above, both the applications deserve to be allowed. Hence I pass the following order :-

ORDER

(I) The bail applications are allowed.

(II) Applicant – Prakash Sudhakar Patil be released on bail, in connection with Crime No. 22 of 2022 registered with Chopada Rural Police Station, Dist. Jalgaon for the offences punishable

under Sections 8, 15, 18 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 on executing PR. Bond in the sum of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand) with one surety in the like amount.

(III) Applicant – Mahendra Kisan Koli be released on bail, in connection with Crime No. 22 of 2022 registered with Chopada Rural Police Station, Dist. Jalgaon for the offences punishable under Sections 8, 15, 18 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 on executing PR. Bond in the sum of Rs.15,000/- (Rupees Fifteen Thousand) with one surety in the like amount.

(IV) The applicants shall not tamper with the prosecution evidence.

(R.G. AVACHAT, J.)

SSD