

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

BAIL APPLICATION NO.1481 OF 2022

Mahesh Bhagwan Darekar

...Applicant

Versus

The State Of Maharashtra

...Respondent

...

Advocate for Applicant : Mr. Satej S. Jadhav

APP for Respondent/State : Ms. V.S. Choudhari

...

CORAM : S.G. MEHARE, J.

RESERVED ON : 11th OCTOBER, 2022

PRONOUNCED ON : 19th OCTOBER, 2022

ORDER:-

1. The applicant seeks bail under Section 439 of the Criminal Procedure Code for the offences punishable under Section 20(b) and 29 of the Narcotic Drugs And Psychotropic Substances Act, 1985 ('NDPS Act' for short) in Crime No.0182 of 2022 registered by Police Station Pachod, Aurangabad Rural, District Aurangabad.

2. It has been alleged against the applicant that Police Inspector Shri R. T. Renge, Local Crime Branch, received the secret information that Ganja is carried in a white Innova bearing No.MH-17-AE-3013 via Beed-Aurangabad road. Shri Renge passed the said secret information to the Superintendent of Police, Additional Superintendent of Police and Sub Divisional Police Officer, Sub Division Paithan, by wireless message. He received the authority from

the Superintendent of Police for a raid under the NDPS Act. Then the raiding party was formed, and other formalities calling two panchas, a photographer and collecting an electronic weighing scale were done. At about 22.30 hrs, they led the raiding party for the trap near one hotel. After some time, they saw the suspected motor vehicle. They hail the driver of the said vehicle. The driver stopped the vehicle by the side of the road. The raiding party was introduced to the persons sitting in the car. They have given their physical search. They did not find any incriminating articles. Then the raiding party asked the name of the persons sitting in the vehicle. One of them was the applicant. Thereafter, the raiding party took the search of the vehicle. They found some paper packets tied with nylon wire beneath the seat and in the bonnet. They also found three mobile handsets. In inquiry, it was confirmed that the packets contained Ganja. The samples were taken for chemical analysis. Hence, the crime.

3. Learned counsel for the applicant has vehemently argued that the investigation is defective for want of compliance with Sections 42(1) and (2) and Section 50 of the NDPS Act. The samples were not collected from each packet, and the charge sheet was filed without a chemical analysis report. Until today, the owner of the said vehicle is not investigated. The applicant was not in conscious possession. Instead of making one Yunus accused, he has been made a witness. The applicant is behind bars since 02.06.2022. It is the first

offence against the applicant. The statement of the co-accused is not evidence.

4. Learned APP opposed the application. He argued that CA report supports the prosecution case. The applicant was in the vehicle in which the contraband was transported and recovered. The applicant has knowledge of transporting contraband. It has transpired in the investigation that the applicant used to purchase the contraband from the State of Andhra Pradesh. The applicant was active in purchasing the Ganja. Yunus has stated he used to purchase the Ganja from the applicant. The offence is serious. Hence, the applicant is not entitled to bail.

5. Apart from the factual aspects, the bail has been claimed on the legal flaws committed by the investigation officer. By catena of judgments, the Hon'ble Apex Court laid down the law that compliance with Sections 42(1) and (2) and 50 of the NDPS Act is mandatory. The Hon'ble Apex Court in the case of Directorate of Revenue and another Vs. Mohammad Nisar Holia, (2008) 2 SCC 370, has observed that the person who had received the information has to reduce the information into writing and then send its copy to the official superior. The view is consistent and reiterated in the case of Karnail Singh Vs. the State of Haryana, (2009) 8 SCC 539. The exception to the non-compliance with recording the information in writing and sending the copy to the superior is the urgency and expediency or

where the information is received by the officer concerned when he is on patrolling duty or otherwise or on a mobile phone or by other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed or it would not be feasible or practical to take down the information in writing given to him.

6. As far as Section 50 of the said Act, the law is well settled that the person to be searched under NDPS Act is required to be told about his right under Section 50 before his search, which is a mandatory requirement. No presumption to that effect can be raised. The person who was subjected to search has a right to be searched in the presence of Gazetted Officer or a Magistrate.

7. The investigation paper reveals that the police inspector from the Local Crime Branch has received secret information about the transport of contraband. He intimated to his superior by wireless. However, it was not described anywhere that the information he received was reduced to writing, and its copy was sent to his superior. The officer received the secret information had received information well in advance. He had sufficient time to complete the formalities of forming the raiding party, calling the witnesses, and collecting a weighing scale. The FIR also reveals that the raiding party was waiting for the vehicle as per the secret information. Therefore, the case also does not fall under the exception that the officer conducting

the raid required immediate action, and delay would have resulted in goods or evidence being removed or destroyed, nor it was feasible or practical to take down the information in writing given to him. The papers do not reveal compliance with Section 42(1) and (2) of the NDPS Act. However, the FIR reveals that after intercepting the vehicle, the persons sitting in the car were searched upon introducing the raiding party members. The FIR nowhere reveals that the persons sitting in the vehicle were informed about their rights to be searched in the presence of Gazetted Officer or Magistrate.

8. It has also been argued by the learned APP that there are no reasonable grounds for believing that the applicant is not guilty of the offence and is not likely to commit any offence while on bail. He has supported his contention on the material that one person Yunus has stated to the investigation officer that he used to purchase the contraband from the applicant. The prosecution has no material to show that there was any such crime to discredit the applicant. It is the first offence registered against him. For want of non-compliance with the mandatory provisions of law as stated above, there are reasonable grounds to believe that the applicant is not guilty of the offence. Consequently, the applicant is entitled to bail. Hence, the following order :

ORDER

- (i) Bail Application is allowed.

(ii) The applicant, Mahesh Bhagwan Darekar, be released on bail on executing PB. and S.B. of Rs.50,000/- (Rupees Fifty Thousand) with one surety in the like amount in Crime No.0182 of 2022 registered by Police Station Pachod, Aurangabad Rural, District Aurangabad for the offences punishable under Section 20(b) and 29 of the Narcotic Drugs And Psychotropic Substances Act, 1985, on the condition that he shall not tamper with the prosecution witnesses and shall not involve in the same crime.

(iii) Needless to state, the observation recorded in this application are *prima facie* and confined to the bail applications only.

(iv) The trial Court shall not be influenced by the findings recorded in this order during the trial.

(S.G. MEHARE, J.)