

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

BAIL APPLICATION NO.1262 OF 2021

SOMNATH DATTATRAYA KADAM

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. S.S. Deshmukh, Advocate for the applicant

Mr. N.T. Bhagat, APP for the respondent

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 20th DECEMBER, 2021

PRONOUNCED ON : 04th JANUARY, 2022.

ORDER :

1 Applicant has been arrested on 18.06.2020 in connection with Crime No.186/2020 registered with Naldurg Police Station, Dist. Osmanabad, for the offence punishable under Section 8(c), 20(b) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. He has filed present application under Section 439 of the Code of Criminal Procedure, 1973.

2 Heard learned Advocate Mr. S.S. Deshmukh for the applicant and learned APP Mr. N.T. Bhagat for the respondent.

3 It has been vehemently submitted on behalf of the applicant that as per the prosecution story, the police had received a secret information that some narcotic drug would be transported, and therefore, it was decided by the police to conduct raid. It has been further stated that one Innova Crysta car bearing registration No.MH-25-AL-9199 was intercepted, in which the present applicant was present and he was along with one Balasaheb Parbat, who was driving the car. Search of the vehicle was taken and it is stated that in all 97.96 k.gs. of Ganja worth Rs.19,59,200/- was seized from the car. Now, the investigation is over and charge sheet is filed. Perusal of the statements of the witnesses and the documents on record would show that there is absolutely no compliance of Section 42 and Section 50 of the N.D.P.S. Act. Though contents have been written, yet, they are false and no such opportunity was given to the present applicant to have search of the police persons. There is also no compliance of Standing Order, which is in respect of compliance under Section 42 of the N.D.P.S. Act. Taking into consideration the fact that there is absolutely no compliance of the Standing Order No.1 of 1989, which is issued by the Department of Revenue, Ministry of Finance, Government of India. The samples have not been sealed. It goes to the root of the case. The applicant deserves to be released on bail.

4 The learned Advocate appearing for the applicant has relied on the decision in **Noor Aga vs. State of Punjab and another**, 2008 (16) SCC 417,

which is regarding the compliance of the Standing Order. It is held that such compliance of the said Standing Order No.1/1989 is mandatory.

4.1 Further reliance has been placed on the decision in **State of Rajasthan vs. Parmanand and another**, (2014) 5 SCC 345, **Vijaysinh Chandubha Jadeja vs. State of Gujrat**, (2011) 1 SCC 609 (Constitutional Bench), **Mohsin Mohammed Khan vs. State of Maharashtra**, 2018 SCC OnLine Bom 12898, **Mohanlal Khetaram Jangid vs. State of Maharashtra**, 1998 (5) Bom.C.R. 771, **Dharmaveer Lekhram Sharma and another vs. The State of Maharashtra and others**, 2001(5) Bom.C.R. 9. All these cases are under Section 50 of the N.D.P.S. Act. They report that the accused has right to be searched before the nearest Gazetted Officer or before nearest Magistrate. The non compliance of Section 50 of the N.D.P.S. Act has been held as violating his rights and the rights of the accused would frustrate.

4.2 Further reliance has been placed on the decision in **Yogendra R. Virkar vs. State of Maharashtra**, 2018 SCC OnLine Bom 17842, wherein it is observed that joint communication or consent of the accused would frustrate the Section 50 of the N.D.P.S. Act. The law requires that each of the accused would be given a right to be searched before nearest Gazetted Officer.

4.3 Further reliance has been placed on the decision in **State of Rajasthan vs. Jagraj Singh @ Hansa**, (2016) 11 SCC 687 and **Bipin Kumar**

Ramsagar Pandit @ Saxena vs. State of Maharashtra, 2014 (1) Bom.C.R. (Cri.) 486. Both these cases are on the point of non compliance of Section 42(2) of the N.D.P.S. Act.

5 The learned Advocate for the applicant, based on above points of argument, prayed for the release of the applicant on bail.

6 Per contra, the learned APP strongly opposed the application and submitted that there is absolutely non compliance of any of the sections. The order passed by Sub Divisional Officer, Sub Division, Tuljapur, after it was communicated by PSI Mr. Rodge to him about the secret information received; permitting PSI Mr. Rodge to conduct the legal investigation is the compliance of Section 42 of the N.D.P.S. Act. Even in the First Information Report there is specific mention about obtaining such order prior to leaving the Police Station for raid is reflected. Further, in the FIR as well as in the panchnama, it is specifically mentioned that Tahsildar, who is a Gazetted Officer and Naib Tahsildar, who is also a Gazetted Tahsildar were present. Their statements have been recorded, showing the fact that they were present at the spot and they had explained the right to both the accused i.e. present applicant as well as co-accused, who were travelling from said Innova car, of their right to be searched before them. Those both Gazetted Officers have stated that both the accused persons declined to take search of the police

persons in presence of said Gazetted Officers. Further, as regards Section 50 of the N.D.P.S. Act is concerned, it is not the personal search. Therefore, there is compliance of both the mandatory sections. Further, the C.A. report has been produced along with this charge sheet, which specifically states that the quantity of Ganja that was seized was huge and it was commercial, and therefore, the applicant does not deserve any sympathy.

7 At the outset, it is to be noted in **Vijaysinh Chandubha Jadeja's** case (supra) Hon'ble Supreme Court has observed that -

“The question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. Though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.”

Earlier to those observations, it was observed in the same decision that -

“In order to prevent abuse of the provisions of the NDPS Act, which

confer wide powers on the empowered officers, the safeguards provided by the legislature have to be observed strictly.”

Further, it is stated that -

“Insertion of sub-sections (5) and (6) in Section 50 by Act 9 of 2001, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the sub-sections, even in such cases the safeguard against any arbitrary use of power has been provided under sub-section (6).”

8 Here, in this case, the Gazetted Officer was accompanying the police party itself, and therefore, whether the decision in State of **Rajasthan vs. Permanand and another** would come into play would be decided by the Trial Judge, which is in respect of a joint communication and the fact that there was no independent Gazetted Officer but Superintendent of Police himself was amongst the raiding party. He was held to be not an independent officer. But here, in this case, the Tahsildar and Naib Tahsildar, who are not part of police machinery, may not be strictly considered as not an independent Gazetted Officer. Definitely, as a precaution they were kept present at the spot.

9 As regards Section 42 of the N.D.P.S. Act is concerned, reference can be made to **Karnail Singh vs. State of Haryana, (2009) 8 SCC 539**, which

was the Constitutional Bench decision, wherein the effects of the **Abdul Rashid** [(2000) 2 SCC 513] and **Sajan Abraham** [(2001) 6 SCC 692] were taken note of. Here, in this case, when the secret information was received, it appears from the record that, that was informed to the Sub Division Officer, who was the superior of PSI Mr. Rodge. Thereafter, the superior officer had given directions in writing to the concerned police officer to conduct the raid. Therefore, as regards a vigour of Section 42 of the N.D.P.S. Act is concerned, there appears to be prima facie compliance. The recent decision in **Boota Singh and others vs. State of Haryana** by the Hon'ble Apex Court in Criminal Appeal No.421 of 2021 decided on 16.04.2021 would make the position clear.

“12. The evidence in the present case clearly shows that the vehicle was not a public conveyance but was a vehicle belonging to accused Gurdeep Singh. The Registration Certificate of the vehicle, which has been placed on record also does not indicate it to be a Public Transport Vehicle. The explanation to Section 43 shows that a private vehicle would not come within the expression “public place” as explained in Section 43 of the N.D.P.S. Act. On the strength of the decision of this Court in **Jagraj Singh alias Hansa**, the relevant provision would not be Section 43 of the N.D.P.S. Act but the case would come under Section 42 of the NDPS Act.

13. It is an admitted position that there was total non-compliance of the requirements of Section 42 of the N.D.P.S. Act.

14. The decision of this Court in **Karnail Singh** as followed in **Jagraj Singh alias Hansa**, is absolutely clear. Total non-compliance of Section 42 is impermissible. The rigor of Section 42 may get lessened in situations dealt with in the conclusion drawn by this Court in **Karnail Singh** but in no case, total non-compliance of Section 42 can be accepted.”

10 Huge amount of narcotic drug has been seized in the Innova Crysta car. It cannot be stated because of the structure of the car that there would not have been conscious possession of such huge amount of the quantity, which was consisting in five gunny bags to the extent of 97.96 k.gs. The young generation is mainly affected by the narcotic drugs and when such drugs are seized in such huge quantity, then the object is very much clear. It would be definitely being transported for sale. However, it is for the prosecution to prove it beyond reasonable doubt. Taking into consideration the entire material in the charge sheet, no case is made out to use discretion. Bail application of co-accused viz. Balasaheb Dashrath Parbat is rejected by this Court on 27.04.2021. Hence, the application stands rejected.

(Smt. Vibha Kankanwadi, J.)