

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2647 OF 2022**

Riyaz Iqbal Tandel	...Applicant
vs.	
Union of India and Anr.	...Respondents

Mr. Tariq Sayed with Ms. Ashwini Achari with Alisha Parekh with Advait Tamhankar i/b Lochan Chandka for the Applicant.
Ms. Manisha Jagtap for Respondent No.1.
Mr. S. R. Agarkar APP for the Respondent - State.

CORAM : S. M. MODAK, J.

DATED : 11TH AUGUST 2023

P. C. :

1. Heard learned Advocate for the Applicant, learned Advocate for Respondent No.1 and learned APP for Respondent No.2-State.
2. The trap was laid by the Intelligence Officer, NCB, Mumbai on 27th August 2021, at 18.00 hours. It was near Shanti Shopping Center, Mira Road Station (East), Vasai, Thane, whereas information was received on the same day at about 15.00 hours. The present Applicant came there for delivering Mephedrone. He was apprised about his right to be searched under Section 50 of the NDPS Act.

During his personal search, polythene pouch was found. It consist of six packets of Mephedrone. The panchnama was there. After investigation, the complaint was filed for the offence under Section 8(C) read with 22(C), 27, 27A, 28 and 29 of the NDPS Act.

3. The Applicant prayed for bail on the following grounds :-

- (i) Though information is recorded on 27th August 2021, (page 35), it does not contain the date and time of arrival of the Applicant for purpose of delivery.
- (ii) The panchnma was carried on 27th August 2021, (page 36), however, while giving information to Superior officers under Section 57 of the NDPS Act (page 46), at several places, the date of search is recorded as 28/08/2021. It creates doubt about search alleged to be conducted on 27/08/2021.
- (iii) Learned Magistrate while taking inventory on page 59 has mentioned wrong address of the place of search as Room No.149, SMD Road, near Antop Hil, Wadala (E), Mumbai.
- (iv) While giving notice under Section 50 of the NDPS Act on page 40, it does not contain necessary particulars :-

“Suspect is having right to be searched in presence of
Gazetted Officer or Magistrate”

(v) The following are defects pointed out :-

(a) What is mentioned is that the Gazetted Officer is present, and the suspect can search all the officials of NCB, what is not there, search can be taken in presence of Gazetted Officer or Magistrate.

(b) At the bottom of that notice the Applicant had expressed his wish not to be searched in presence of the Gazetted Officer or Magistrate. This cannot be said to be compliance.

4. Learned Advocate Ms. Achari relied upon the following judgments :

(i) *State of Rajasthan vs. Parmanand and Anr*¹

(ii) *K. Mohanan vs. State of Kerala*²

(iii) *Rashid Aslam Shaikh vs. The State of Maharashtra*³

(iv) *Nadeem Abdul Rahim Choughule vs. State of Maharashtra*⁴

5. Learned Advocate Ms. Jagtap for NCB made the following submissions :-

1 (2014) 5 SCC 345

2 (2000) 10 SCC 222

3 BA No.3140/2022 dt. 12/04/2023

4 BA No.1801/2021 dt. 14/09/2022

- (a) It is not always required to mention the date and timing of arrival of suspect in the information note.
- (b) Reference of the trap as 28th August 2021, in the report to “higher officer” is a type writing mistake.
- (c) Learned Magistrate while issuing certificate has wrongly mentioned the residential address of the Applicant instead of place of trap.
- (d) The wordings appearing in notice under Section 50 are sufficient.

6. Learned Advocate Ms.Jagtap relied upon the following judgments :

(i) *State of Kerala etc vs. Rajesh etc.*⁵

(ii) *Union of India through Narcotics Control Bureau*

*Lucknow vs. Md. Nawaz Khan*⁶

(iii) *State of Punjab vs. Baldev Singh*⁷

7. It is true that unless and until conditions laid down in Section 37 of the NDPS Act are satisfied, no person can be granted bail. The

5 AIR 2020 SC 721

6 Manu/SC/0689/2021

7 (1999) 6 SCC 172

Hon'ble Supreme Court in case of *State of Kerala vs. Rajesh* has emphasized on this aspect. The High Court of Kerala without arriving at satisfaction under Section 37 of the NDPS Act has granted bail. It was set aside by the Hon'ble Supreme Court with direction to give finding about satisfaction under Section 37 of the NDPS Act. Whereas in case of *Union of India through Narcotics Control Bureau Lucknow vs. Md. Nawaz Khan*, the Hon'ble Supreme Court has set aside bail granted by the High Court of Allahabad. The main contention was not possessing the contraband. The contraband was found in vehicle in which the Respondent was traveling. The circumstances which weigh the mind of Hon'ble Supreme Court is reproduced in para 13 of the said judgment.

8. It is true that contention of non compliance of Section 50 of the NDPS Act was made and the Applicant is desirous that benefit be given to him at the stage of bail. It is true that benefit of every non compliance cannot be granted at the time of bail. It depends upon sections violated and nature of non compliance.

9. In case of *Vijaysingh Chandubha Jadeja*⁸, the Constitutional Bench of the Hon'ble Supreme Court has dealt with the provisions of

⁸ (2011) 1 SCC 609

Section 50. Particular form of notice under Section 50 is not required. Earlier constitutional bench in case of *Baldev Singh* (supra) has observed that even notice in writing is not required. Earlier to the judgment of *Vijay Singh Jadeja* (supra), there was a view that Section 50 should be strictly complied with. It was upheld but the concept of substantial compliance was held not to be in consonance with the law laid down in *Baldev Singh's* case. What is purpose of issuing notice under Section 50 is reproduced in para 29 of the said judgment. It is true that when a suspect is to be searched, that search procedure has to be transparent. It should not be an affair in between the raiding party and suspect. It has to be carried out in presence of an independent person. The law recognizes them as the Gazetted Officer or the Magistrate.

10. It is true that in case of *Nadeem Abdul Rahim Choughule* (supra) and *Rashid Aslam Shaikh* (supra), the learned Single Judge of this Court has observed that the provisions of Section 50 are not complied with and bar under Section 37 was lifted and bail was granted. Whereas in case of *Parmanand* (supra) there has to be individual communication.

11. On this background, when I have read the notice on page 40,

on one hand, and the search panchnama on page 37, on the other hand, what I find is that there is reference to appraisal of the right to be searched in presence of the Magistrate or Gazette Officer. However, it is important to note that notice under Section 50 of the NDPS Act is to be given first, and the entire proceedings is to be reduced into writing in the form of panchnama. Even though notice under Section 50 of the NDPS Act need not be in writing but if it is given in writing it must comply with the provisions of Section 50 of the NDPS Act. When I have read the provision of Section 50 of the NDPS, what I find is that there is no reference that the Applicant is made aware that he can be searched in presence of the Magistrate or Gazetted Officer. What is there in the notice in question, is the Gazetted Officer is present and what is there that all NCB Officials can be searched. Merely mentioning that the Gazetted Officer is present is not sufficient. The Applicant must be made known of his right. When at the bottom, the Applicant has shown his disinclination to be searched in presence of the Gazetted Officer or Magistrate, it will not relieve the NCB from complying with the provisions of Section 50 of the NDPS Act.

12. It is true that certain lacuna can be explained during the trial

but what can be explained is on the basis of documents created at the time of search and seizure. If necessary particulars are absent in notice under Section 50, it cannot be cured by way of oral evidence. So benefit of application can be given at this stage. So far as other grounds are concerned, I am not impressed. The date of search is wrongly typed in the report given to the Superior Officer. So, also the learned Magistrate was wrong in mentioning address of the accused as place of trap. These grounds does not weigh to my conscience. I am only impressed by the ground relating to non compliance of Section 50 of the NDPS Act. The quantity is commercial quantity. So, I am inclined to grant him benefit. The bar is lifted. There are no criminal antecedents and the Applicant is entitled to bail. Hence, the following order is passed :-

ORDER

- (a) The Applicant-Riyaz Iqbal Tandel be released on bail for the offence under Section 8(C) read with 22(C), 27, 27A, 28 and 29 of the NDPS Act, bearing NCB/MZU/CR-81/2021, on furnishing personal bond and surety bond of Rs.50,000/-.
- (b) The Applicant shall not threaten the prosecution witnesses or allure them in any manner.
- (c) The Applicant shall give attendance to NCB, Mumbai on the

first Monday of every month from 10 am to 12 noon till conclusion of trial.

- (d) Needless to say, violating of the condition above will make the Applicant liable for cancellation of bail, after notice to the Applicant.

13. Application is disposed of accordingly.

14. These are my prima facie observations and the trial Court may not be influenced by that.

15. All the parties to act on an authenticated copy of this order.

[S. M. MODAK, J.]