

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO. 3122 OF 2022

Mohammed Jafar Mohammed
Babar Shaikh

..Applicant

vs.

The State of Maharashtra

...Respondent

Mr.Advait Tamhankar a/w Ms.Ashwini Achari a/w Mr.Taraq Sayed
a/w Mr.Lochan Chandka – Advocate for Applicant.
Mr.H.J.Dedhia – APP for Respondent – State.

CORAM : S. M. MODAK, J.

DATED : 21ST JUNE 2023

P. C. :

1. Heard learned Advocate Shri.Tamhankar for the Applicant and learned APP Shri.Dedhia for Respondent-State at great length.
2. The present Applicant is charge-sheeted Accused No.1. He was arrested on 25th November, 2021 near Kadam Estate, R.M.Road, Munshi Compound, Oshiwara, Rammandir (West), Mumbai. The trap panchnama is on Page No.41. He was found with various articles including mephedrone powder costing Rs.4,08,000/-. It was revealed during investigation that he procured that contraband from other Accused persons. Accordingly, charge-sheet is filed for the

offences punishable under Sections 8(c), 21(c), 20(b)(ii), 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ["NDPS Act"]. Bail Application is rejected by the Court of Additional Sessions Judge–Thane. Charge-sheet is submitted by Kashimira Police Station.

3. There are various grounds taken about non compliance of the mandatory provisions of NDPS Act. However, there is emphasis on one point relating to non compliance of the provisions of Section 42 of NDPS Act relating to search and seizure and particularly, taking search by incompetent police officers.

4. It is true that even though the PI. of Narcotic Cell had gone for search on the basis of information (Page No.41), that search was taken by following two persons :-

- (i) Police Constable – Ingale
and
- (ii) Police Naik – Sapkal

It finds place on Page No.42.

PROVISIONS OF SECTION 42 OF N.D.PS.ACT

5. Section 42 of NDPS Act lays down various officers who can take search. Either they may be serving with Central Government or State Government. The relevant categories of Police Officers are as follows :-

“Any such officer (**being an officer superior** in rank to a peon, sepoy or **constable**) of the departments of central exercise....., or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, exercise, **police** or any other department of a State Government as is empowered in this behalf by general or special order of the State Government,”
 (Emphasis supplied)

In this case, this is by the Police department. So, searching officer must be superior to a constable. As said above, in this case, Para 42 mentions that it was taken by Police Constable and Police Naik. Admittedly, Police Constable does not fall within the purview of Section 42 of NDPS Act. Police Naik is above the rank of Police Constable.

PROVISIONS OF STATE NOTIFICATION.

6. The emphasis is that this Police Naik does not fall within the category of officers which are prescribed as per the Notification dated 14th November, 1985 issued by the Home Department. It is issued in exercise of the powers conferred as per Sub-section 1 of Section 42 of NDPS Act. Clause No.(6) is relevant which is reproduced for ready reference :-

“6. All Police Officers of and above the rank of Head Constable in the State of Maharashtra”.

According to Mr.Tamhankar, even though Police Naik was there, he is below the rank of Head Constable.

7. By way of reply, learned APP submitted that in the present set of facts, the officers prescribed under Section 42 of NDPS Act can take a search and those provisions prevail over the contents of Notification. This is disputed by Mr.Tamhankar. He read the following provisions of Section 42(1) thus :-

“42. Power of entry, search, seizure and arrest without warrant or authorisation.–(1) of a State Government as is empowered in this behalf by general or special order of the State Government,.....”

His contention is that the officers prescribed as per clause no.6 of the Notification (Head Constable and above) are prescribed by the State Government as per the power given vide Section 42(1) of NDPS Act and in such a contingency, the officers prescribed as per Section 42(1) of NDPS Act cannot be said to be competent officers.

8. To buttress his submissions, he relied upon the following judgments :-

(i) ***Rakesh Hiloria @ Dhobi V/s. State of Maharashtra***¹

In that case, search was taken by Police Naik. Bail was granted as Police Naik does not fall within the purview of the Notification

¹ ***Criminal Bail Application No.362 of 2019 : 13th June, 2019 : Bombay High Court***

dated 14th November, 1985.

(ii) ***Miss.Henna Bharat Shah V/s. State of Maharashtra***²

In that case, search was taken by Police Constable Mahadeo Chabukswar attached to Anti Narcotic Cell. Relevant discussion finds place in Para No.5. Learned Single Judge has considered the provisions of Section 42 of NDPS Act and the Notification / Circular dated 14th November, 1985. The search was in breach of the provisions of Section 42 of NDPS Act and bail was granted. In that case, no contingency was involved wherein there is conflict about the provisions of Section 42 of NDPS Act on one hand and the contents of the circular on the other hand. Admittedly, the Police Constable is neither covered as per Section 42 nor as per the notification.

(ii) ***Emeka Chales V/s. The State of Maharashtra***³

Search was taken by Police Naik. As Police Naik is not empowered as per the Notification (clause-6), it was considered as illegal search. (Para No.3).

9. Learned APP tried to make a point that this issue is not raised before the Special Judge. This is a question relating to compliance of the provisions of law and as such, it can be taken before this Court

² *Bail Application No. 1051 of 2016 : 24th April, 2017 : Bombay High Court*

³ *Criminal Bail Application No. 842 of 2013 : 27th June, 2013 : Bombay High Court*

also.

10. Even learned APP submitted that in the present case, Police Naik has also searched the Accused along with Police Constable and as such, the search cannot be said to be an illegal. To rebut his contention, Mr.Tamhankar relied upon the observations by learned Single Judge in case of *Aarif Akram Shaikh V/s. The State of Maharashtra*⁴. In that matter, the search was carried out by PSI and by Police Naik (Para No.4). Even it was observed that Police Naik was not authorised to carry out the search. (Para No.9). Benefit was given to the Applicant.

11. It is true that in the said order, the only emphasis is on competency of Police Naik to take search. I do not find that there is any discussion on the issue whether one of the searching officers is incompetent and others is competent whether the search will be vitiated. Even though, this submissions is made by learned APP, he could not substantiate this submission by placing reliance upon any other interpretation. So, today, I am not accepting his contention.

12. In view of the above, I am inclined to grant bail to the Applicant. The rigor under Section 37 of NDPS Act will not come into play. Admittedly, Police Naik has taken the search in this offence

⁴ *Bail Application No. 3158 of 2021 : 7th February, 2023 : Bombay High Court*

(is along with the Constable). Even though, he is superior to the Constable as their internal rules, the provisions of the circular/notification will be applicable and Police Naik does not fall within the purview of clause (6) of that circular. Ultimately search is vitiated. No need to wait till conduct of trial. The prosecution is at liberty to adduce evidence thereby giving any other explanation. Hence, following order is passed :-

ORDER

- (i) Application is allowed.
- (ii) Applicant Mohammed Jafar Mohammed Babar Shaikh be released on bail in connection with C.R.No. 804 of 2021 registered with Kashmiri Police Station for the offences punishable under Sections 8(c), 21(c), 20(b)(ii), 29 of NDPS Act, on furnishing personal bond and surety bond of Rs.50,000/-.
- (iii) Applicant is directed to give attendance to Kashmiri Police Station on first and third Saturday from 3.00 to 05.00 p.m., for one year.
- (iv) Applicant not to threaten the Prosecution witnesses or to allure them in any manner.
- (v) Applicant to attend the trial Court punctually.
- (vi) In case of breach of any of the conditions, the bail of the Applicant is liable to be cancelled after notice.

13. These are my *prima facie* observations. Let the learned trial

Court need not be influenced by them.

14. Application is disposed of in the aforesaid terms.

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

[S. M. MODAK, J.]