

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.4448 OF 2021**

Anil Ramlinga Matri ...Applicant
vs.
State of Maharashtra ...Respondent

Ms. Ashwini Achari with Mr. Advait Tamhankar with Mr. Tariq Sayed
i/b Lochan Chandka for the Applicant.
Mr. A. R. Kapadnis APP for the Respondent-State.

CORAM : S. M. MODAK, J.

RESERVED ON : 16TH JUNE 2023

PRONOUNCED ON : 4TH SEPTEMBER 2023

ORAL ORDER :

1. Heard learned Advocate for the Applicant and learned APP for the Respondent-State.
2. Present Applicant is sole charge-sheeted accused in C.R.No.II-72 of 2021, registered at Kashmirira police station. There are other accused but they were yet to be arrested. Present Applicant was arrested on 23/11/2021.
3. The Applicant was found at 00.45 hours at midnight on 23/01/2021, near Jainab Building, Pendkar Pada, Kashmirira. There was information received from informant about possible arrival of

one person for selling narcotics. After completing formalities, when personal search was taken, he was found with Cocaine weighing 125 gms. He was also found with personal belongings. All formalities were completed.

4. There is an offence registered by Police Naik-Wasim Shaikh with Kashimira police station. Charge-sheet is filed for the offence punishable under Section 8(C), 20 and 22(C) of NDPS Act. He was refused bail by the Court of Special Judge, (NDPS), Thane.

5. I have heard learned Advocate for the Applicant and learned APP. Learned Advocate for the Applicant Mr. Tamhankar and Ms. Achari raised the following points :-

- (a) The provisions of Section 42(1) of NDPS Act are not complied. So to say in different documents prepared simultaneously, there is variance in information about suspect noted down therein. These documents are :-
 - (i) Information given to Senior PI of Anti Trafficking Cell at 22/01/2021 (para 66). It only mentions above arrival of one person. His further description is not mentioned.
 - (ii) Information given by API to ACP dated 22/01/2021 (para 67) about trap to be organized at Kashimira. Here

description of person is added.

- (iii) An entry in station diary on 22/01/2021, by PI Nagorkar about ordering staff to arrange trap. Here full description of suspect is mentioned.

- (b) How this Court has dealt with similar situation, Applicant's Counsel relied upon following judgments :-

- (i) *Sarija Banu vs. State*¹
- (ii) *Karnail Singh vs. State of Haryana*²
- (iii) *Mehadi Majid vs. State of Maharashtra*³
- (iv) *Sanobar Khotal vs. State of Maharashtra*⁴

- (c) Appraisal given to the Applicant is defective and that is why there is non compliance of the provisions of Section 50 of NDPS Act. My attention is invited to following contents :-

- (A) Contents of notice given under Section 50 (page 69). The wording is – you have got legal right to be searched in the presence of

1 (2004) 12 SCC 266

2 (2009) 8 SCC 539

3 BA No.3493/2021 dt.14/10/2022

4 BA No.3337/2021 dt.14/10/2022

(i) any Gazetted Officer or Magistrate – known to you.

or

(ii) Any other close Gazetted Officer or Magistrate.

In support, there is reliance on the following judgment :-

(i) *Nadeem Choughule vs. State of Maharashtra* (page 56)

(d) There is non compliance of the provisions of Section 41 of NDPS Act as no Gazetted Officer was present at the time of trap.

(e) There is reliance on the notification dated 19/12/1985 issued by Government of Maharashtra, the Officers of the rank of the Inspector of Police and above are notified as Gazetted Officers.

(f) When two samples were drawn of 5 grams each from 4 plastic bags, entire contents/powder was mixed and no individual samples from every bag was collected. This is in clear violation of *Union of India vs. Mohanlal and Anr.*⁵

6. Whereas learned APP submitted that the 3 documents referred above on the point of receiving information of a suspect, were prepared on the basis of information gathered at the relevant time

⁵ (2016) 3 SCC 379

and hence, that variance is not fatal to the prosecution. The appraisal given fully satisfies the provisions of Section 50 of NDPS Act. He relied upon a subsequent notification dated 26th February 2004, issued by Government of Maharashtra and according to him the earlier notification stands superseded. He contend that the following upgradation is made –

(A) The post of Police Inspector was upgraded from B-category to A-category.

(B) The post of Assistant Police Inspector is upgraded from C-category to B-category.

7. It is true that the provisions of Section 42(1) of NDPS Act needs to be followed strictly. At the same time it is true that the nature of non compliance also needs to be seen. If the non compliance is exfacie apparent, then benefit can be given at bail stage. However, if they are not apparent but requires some clarification then prosecution needs to be given an opportunity to adduce evidence. It is true that in the judgments referred above benefit of non compliance was given at bail stage. In this case, I am not inclined to give benefit of non compliance of Section 42(1)

and Section 50 of the NDPS Act. Because, I find that in the 3 documents referred about the information of the suspect is on the basis of information gathered. Because, first information is gathered from informant. Later on, permission was sought to lay a trap and then station diary entry is made. It can't be said to be *ex facie* non compliance. If we see the notice under Section 50 of the NDPS Act, we may find that two options are given. Firstly, on the basis of any Gazetted Officer or Magistrate known by the Applicant and, secondly, any Gazetted Officer or Magistrate nearby. I don't find any lacuna at this stage.

8. However, I am inclined to grant benefit to the Applicant on account of procedure followed while taking samples. There were four plastic bags and two samples of 5 gram each A-1 and A-2 were drawn. If we read the contents on page 76 of the trap panchnama, we will find that the police have removed the powder from four plastic bags and then took representative samples. It is not clear from which cocaine powder from the bags, samples were taken. So, on that aspect there is a defect in the procedure. Benefit needs to be given to the Applicant. Hence, bar under Section 37 is lifted. No previous antecedent is pointed. Hence, the

following order is passed :

ORDER

- (a) Applicant-Anil Ramlinga Matri be released on bail in connection with C.R.No.II-72 of 2021, registered at Kashimira police station under Sections 8(c), 20(c) 29 of the NDPS Act on furnishing personal bond and surety bond of Rs.50,000/-.
 - (b) Applicant shall not threaten the prosecution witnesses or allure them in any manner.
 - (c) Applicant is directed to give attendance to the Kashimira police station on the first Saturday of every month from 10 am to 12 noon for one year.
 - (d) Needless to say, violating of the condition above will make the Applicant liable for cancellation of bail, after notice to the Applicant.
9. Application is disposed of accordingly.
10. These are my *prima facie* observations and the trial Court may not be influenced by that.
11. All the parties to act on an authenticated copy of this order.

[S. M. MODAK, J.]