

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

BAIL APPLICATION NO. 3269 OF 2022

Chand Riyaz Shaikh s/o. Riyaz Shaikh ..Applicant

v/s.

The Union of India & Anr. ..Respondents

Senior Advocate Mr. A.P.Mundargi i/b. Adv. Agastya Desai with Mr. Ayaz Khan & Mr. Mithilesh Mishra for the Applicant.
Mr. Madhukar Dalvi for the Respondent No.1.
Mrs. A.A.Takalkar, APP for the State.

**CORAM : ANUJA PRABHUDESSAI ,J.
DATED : 13th JULY, 2023.**

P.C.

1. This is an application under Section 439 Cr.P.C. filed by the aforesaid Applicant who is facing trial in NDPS Special Case No. 796 of 2021 pending on the file of learned Special Judge NDPS (C.R.42), Gr. Bombay, for offences punishable under Section 8(C), 22(C), 27A, 28, 29, and 35 of the Narcotics and Psychotropic Substances Act, 1985 (NDPS Act).

2. The case of the prosecution is that on 2.1.2021 at about 16.15 hours specific information was received that the Applicant would be delivering the contraband which was concealed in the dicky of the scooter, to an unknown person near Novelty Medicine Shop, near Bandra Railway Station, Guru Nanak Marg, Bandra. The information

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was reduced into writing and forwarded to the Superintendent and the Zonal Director of the Narcotic Control Bureau (NCB) and the NCB team proceeded to the disclosed spot. It is alleged that at about 11.00 p.m. the scooter driven by the Applicant was intercepted and four zip-lock pouches, which contained some white colour substance, concealed in the dicky of the scooter, were recovered. The said pouches were separately weighed, and later emptied in one transparent ziplock pouch and a homogeneous mixture was prepared which weighed 400 grams. The same was seized under the panchanama drawn at the spot. The representative sample was drawn and forwarded to CSFL for testing. It has tested positive for mephadrone.

3. In the course of the investigation the co-accused came to be arrested. The Applicant as well as the co-accused were initially remanded to police custody, and subsequently to Judicial Custody. The investigation proceeded and after conclusion of the investigation, Chargesheet came to be filed against the Applicant for the offences as stated above.

4. The Applicant filed bail application before learned Special Judge, which came to be dismissed by order dated 16th December, 2021, mainly on the ground that the Applicant was in possession of commercial quantity of the contraband MD. Relying upon the decision of the Apex

Court in ***Rajendra & Anr. vs. State of MP (2004) 1 SCC 432***, the learned Special Judge observed that Section 43 was applicable to the facts of the case and hence there is no contravention of Section 42 of the NDPS Act. Learned Special Judge observed that in view of rigors of Section 37 of the NDPS Act, the Applicant is not entitled for bail. Hence the present application.

5. Shri Mundargi, learned Sr. Counsel submits that the investigating officer had received information at about 4.15 p.m. that the Applicant, who was traveling by scooter, was to deliver contraband to an unknown person near Novelty Medicine Store at about 11.00 p.m. He submits that the contraband was concealed in a private vehicle, hence provisions of Section 43 are not applicable. It was urged that since the search was to be conducted between sunset and sunrise, the investigating officer was required to comply with the provisions of Section 42 of the NDPS Act. In support of his contention, he has relied upon the decision in ***State of Rajasthan vs. Jagraj Singh @ Hansa (2016) 11SCC 687*** and ***Boota Singh & Ors. vs. State of Haryana 2021 SCC Online SC 324***.

6. Learned counsel for the Applicant further submits that though it is alleged that all four packets recovered from the Applicant were emptied in one transparent zip lock pouch and were sealed in presence of panchas, the media report, the news articles as well as the photos

circulated through whatsapp messages show the Applicant in the office of NCB with four packets of white substance. Furthermore, the panchanama, which was allegedly drawn at the place of the incident as well as the notice under Section 67 of the NDPS Act, which was served on the Applicant on the spot makes reference to the crime number. These facts prima facie falsify the case of the prosecution that the contraband which was in four packets, was emptied in one packet and sealed at the place of the incident and further that the panchanama and the notice were prepared/issued on the spot. Reliance is placed on the decision in the case of ***Kamaljit Singh Alias Pappu v/s. State of Punjab (2020) 14 SCC 9*** and ***State of Orissa v/s. Sitansu Sekhar Kanungo 2002 SCC Online SC 1296***.

7. Learned counsel for the Applicant submits that the NCB team had not drawn the sample from each of the zip lock bags but had mixed the substance from all the four bags without field test. He contends that the sample was not drawn as per the standing order and consequently, the sample sent to CFSL cannot be considered as the representative sample.

8. Per contra, Mr. Dalvi, learned Special PP submits that section 43 deals with power of seizure and arrest in public place. In the instant case, the information received by the NCB was in respect of concealed contraband in a vehicle in transit, which was intercepted in a public

place. He therefore contends that section 42 has no application. He has relied upon the decision of the Hon'ble Supreme Court in the case of ***Rajendra and others v/s. State of Madhya Pradesh (2004) 1 SCC 432.***

9. Learned APP urges that the Applicant was found in possession of commercial quantity of contraband. Hence, the exercise of power to grant bail is subject to the limitation placed by section 37 of the NDPS Act. He submits that the Applicant would not be entitled for bail unless the Court is satisfied that he is not guilty of such offence and that he is not likely to commit any such offence while on bail. Reliance is placed on the decision of the Apex Court in ***State of Kerala, etc. v/s. Rajesh, etc.***

10. Learned APP contends that there is no illegality or irregularity in drawing the sample. Even otherwise, compliance of the procedure for drawing the sample or the procedure laid down under section 42 of the NDPS Act, is a question of fact which can be raised only in the course of the trial. Reliance is placed on the decision of the Apex Court in ***Union of India through Narcotics Control Bureau, Lucknow v/s. Md. Nawaz Khan*** in ***Criminal Appeal No.1043 of 2021.***

11. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

12. The Applicant seeks bail inter alia on the ground of breach of Section 42 of the NDPS Act. This provision deals with the power of entry, search, seizure and arrest without warrant or authorization, whereas, Section 43 deals with power of seizure and arrest in public place. The scope of Section 42 and 43 has been considered by the Apex Court in *Rajendra & Anr. (supra)*. In this case, information was received that two persons carrying contraband articles had got down from Madhya Pradesh Express and were waiting at the platform. The said information was recorded and subsequently the person carrying contraband was apprehended, and later convicted. The conviction was challenged on the ground of violation of Section 42(2) of the Act. It was held that :-

“9. Section 42 enables certain officers duly empowered in this behalf by the Central or State Government, as the case may be, to enter into and search any building, conveyance or enclosed place mentioned therein without any warrant or authorizaation . Section 42 deals with “building, conveyance or enclosed place, whereas Section 43 deals with power of seizure and arrest in public place. Under sub-section (1) of Section 42 the method to be adopted and the procedure to be followed have been laid down. If the concerned officer has reason to believe from personal knowledge, or information

given by any person and has taken down in writing, that any narcotic drugs or substance in respect of which an offence punishable under Chapter IV of the Act has been committed or any other articles which may furnish evidence of the commission of such offence is kept or concealed in any “building or conveyance or enclosed place” he may between sunrise and sunset, do the acts enumerated in Clauses (a) and (b), (c) and (d) of Sub-section (1).

10. The proviso came into operation if such officer has reason to believe that search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escaped offender, he may enter and search such building, conveyance or enclosed place any time between sunrise and sunset after recording grounds of his belief. Section 42 comprises of two components. One relates to the basis of information i.e. (i) from personal knowledge (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub- Section (2) mandates as

was noted in Baldev Singh's case (supra) that where an officer takes down any information in writing under Sub-section(1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, Sub-section(2) only comes into operation where the officer concerned does not enumerate acts in case any offence under Chapter IV has been committed or documents etc., are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place."

13. In Jagraj Singh, and Boota Singh, supra, the Hon'ble Supreme Court has observed that Section 42(1) indicates that any authorized officer can carry out search between sunrise and sunset without warrant or authorization. The scheme indicates that in the event the search has to be made between sunrise and sunset, the warrant would be necessary unless the officer has reasons to believe that a search warrant or authorization cannot be obtained without affording the opportunity for escape of the offender, which grounds of his belief have to be recorded. The Hon'ble Supreme Court has further observed that the Explanation to Section 43 which defines the expression "public place" includes any public conveyance. The word public conveyance as used in the act has

to be understood as a conveyance which can be used by the public in general. It is held that the vehicles which can be used for public are public motor vehicles for which necessary permits have to be obtained. Referring to the Constitution Bench judgment in *Karnail Singh vs. State of Haryana*, it was reiterated that non compliance with requirement of Section 42 is impermissible, whereas delayed compliance with satisfactory explanation will be acceptable compliance with Section 42.

14. Issue of non compliance of Section 42(2) of the NDPS Act was also raised in *Md. Nawaz Khan (supra)*. Referring to the decision in *Karnail Singh*, the Hon'ble Supreme Court reiterated that though the writing down of information on the receipt of it should normally precede the search and seizure by the officer, in exceptional circumstances that warrant immediate and expedient action, the information shall be written down later along with the reason for the delay. It is further observed that whether there was compliance of the procedure laid down under Section 42 of the Act is a question of fact and should be raised in the course of the trial.

15. In the instant case, the Applicant has alleged that despite specific information, search was conducted and contraband was allegedly seized from a private vehicle between sunset and sunrise without warrant or authorization. It is not in dispute that the specific information received

by the Intelligence Officer was reduced in writing. A perusal of the said information note reveals that on 2.1.2021, at about 4.15 p.m., the Intelligence Officer, NCB, Mumbai Zone Unit, had received information that an Indian National – Chand Riyaz Shaikh i.e. the Applicant herein, the rider of scooty bearing R.C. No. MH 02 FK 7694, was going to deliver to an unknown person a large quantity of mephadrone, concealed in the dicky of the said scooter. The place of delivery was stated to be near Novelty Medicine Shop (Johnson Complex), Near Bandra Railway Station, Guru Nanak Marg, Bandra and the time of delivery was stated to be at about 23.00 hours. The information was forwarded to the Superintendent and the Zonal Director of the NCB, Mumbai, and the NCB team proceeded to the alleged place of delivery. The two wheeler as described in the information note, which was driven by the Applicant herein, was intercepted and four transparent zip-lock pouches containing white coloured crystalline substance suspected to be mephadrone were recovered from the dicky of the scooter.

16. The records thus reveal that the alleged recovery was not a chance recovery in the normal course of investigation, but it was on the basis of specific information that the Applicant was to deliver the contraband concealed in the dicky of scooty no. MH 02 FK 7694, to an unknown person between sunset and sunrise at the specified address. The scooty

wherein the contraband was allegedly concealed was a private vehicle. Consequently, the same would not fall within the purview of “public place” as explained in Section 43 of the NDPS Act. Since Section 43 is not attracted, search was to be conducted after complying with the provisions of Section 42 of the NDPS Act.

17. In this regard, it is pertinent to note that the Intelligence Officer had received the information at 16.15 hours. He was well aware that the contraband was to be delivered at 23.00 hours and that search was to be conducted after sunset. It was therefore obligatory upon the officer to obtain warrant or authorization, unless he had reason to believe that warrant or authorization could not be obtained without affording opportunity to the offender to escape or to conceal the evidence. It is not in dispute that search, seizure as well as arrest was effected without warrant or authorization. The concerned officer has not recorded reasons for his belief in terms of proviso to Section 42(1) of the NDPS Act. The search and seizure which is in contravention of mandatory provision of Section 42 of the NDPS Act, *prima facie* makes the recovery doubtful.

18. It is the case of the prosecution that the contraband was seized under panchanama drawn at the place of the incident and concluded at about 23.50 hours. The panchanama states that notice under Section 67

was served on the Applicant at the spot of the incident. The notice which preceded registration of the FIR, mentions the crime number. Indication of crime number in the notice which was allegedly issued at the spot, before registration of the crime, prima facie raises a serious doubt about the prosecution case.

19. The record also prima facie reveal that the investigating agency had not drawn sample independently from each packet but had mixed together the entire contraband in one packet without field test and thereafter taken the sample and forwarded the sample to CSFL for analysis. In my prima facie view, the sample was not drawn in consonance with the standing orders, and hence prima facie the sample sent to CSFL was not the representative sample.

20. Considering the above facts and circumstances, the applicant would be entitled for bail despite rigors of Section 37 of the NDPS Act. Hence the following order:-

(i) The Application is allowed;

(ii) The Applicant who is facing trial in NDPS Special Case No. 796 of 2021, is ordered to be released on cash bail of Rs.1,00,000/-

(Rupees One Lakh Only) for a period of four weeks;

(iii) The Applicant shall within the said period of four weeks, furnish bail bond in the sum of Rs.1,00,000/- (Rupees One Lakh Only) with one or two solvent sureties in the like amount;

(iv) The Applicant shall attend the hearing before the Special Court on every date, unless exempted.

(v) The Applicant shall surrender his passport, if any, before the Special Court and shall not leave the country without prior permission of the Court.

(vi) The Applicant shall keep the Investigating Officer informed of his permanent as well as temporary address, if any, and his contact details, and/or change of residence or mobile details from time to time.

(ANUJA PRABHUDESSAI, J.)