

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPLICATION (BA) NO.178/2023

Kuldeep s/o Suresh Raut

..VS..

State of Mah., thr.PSO PS Sonegaon, District Nagpur

AND

CRIMINAL APPLICATION (BA) NO.318/2023

Mukarram Sheikh s/o Nawab Sheikh

..VS..

State of Mah., thr.PSO PS Sonegaon, Nagpur

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders

Court's or Judge's Order

.....

BA No.178/2023

Shri P.S.Wathore, Counsel for the Applicant.

Shri A.M.Kadukar, Additional Public Prosecutor for the State.

BA No.318/2023

Shri A.K.Bhangde, Counsel for the Applicant.

Shri A.M.Kadukar, Additional Public Prosecutor for the State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 20/07/2023

PRONOUNCED ON : 27/07/2023

1. By these applications, moved under Section 439 of the Code of Criminal Procedure, the applicants seek regular bail in connection with Crime No.51/2022 registered with Sonegaon Police Station, district Nagpur for offences punishable under Sections 8(c); 22(c), and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. Both the applicants are arrested on 14.4.2022 and

since then they are in jail.

3. The accusations against the applicants are on the basis of report lodged by Pramod Chintamanrao Mohite, who is Police Constable of Sonegaon Police Station, district Nagpur. As per the report, on the basis of a secret information that four persons possessing "Mephedrone Drug Powder" are entering into Nagpur City from Mumbai in a car bearing registration No.MH-14/BY/0100, the police officer of the Sonegaon Police Station restrained the said car. Accordingly, notices were issued to the applicants for their search. During their search, applicant Kuldeep s/o Suresh Raut, who was driving the car, was found to be in his possession 56.79 milligrams of the said drug. Whereas, applicant Mukarram Sheikh s/o Nawab Sheikh was found to be in his possession of 109 grams 17 milligrams of the drug. After seizure of the said articles, the applicants were arrested. From the seized articles, the raiding party members collected 5 grams powder for forensic examination.

4. As per contentions of applicant Kuldeep s/o Suresh Raut, he is an unemployed youth and was preparing for National Academy Examination. He was also doing part time job as an electrical technician. He has no criminal antecedent. He is implicated maliciously in the alleged offence. There is no

material to show that he was engaged in sale or purchase of the alleged drug. Now, the investigation is completed and chargesheet is filed. According to the said applicant, as there is no material to connect him with the alleged offence, he be released on bail.

5. As per contentions of applicant Mukarram Sheikh s/o Nawab Sheikh, while he was travelling in the car, he was accosted by the police and arrested on false and baseless allegations. Now, the investigation is completed and chargesheet is filed. According to the said applicant, as there is no material to connect him with the alleged offence, he be released on bail.

6. Both these applications are opposed by the State on the ground that on the basis of the secret information, the raid was conducted by restraining the car. Both the applicants were travelling in the said car. All the occupants of the car were found to be in their possession of the "Mephedrone Drugs Powder". Thus, there is a *prima facie* material against the applicants. Hence, the applications deserve to be rejected.

7. Heard learned counsel Shri P.S.Wathore for the applicant in Criminal Application No.178/2023, learned counsel Shri A.K.Bhangde for the applicant in Criminal Application

No.318/2023, and learned Additional Public Prosecutor Shri A.M.Kadukar for the State.

8. It is submissions of learned counsel for applicants that in view of Section 50(1) of the NDPS Act, there was no compliance. The requirement of Section 50 of the NDPS Act is also not complied with. Mere notices to the applicants are not sufficient. Moreover, the samples were not obtained before the magistrate as basic requirement of Section 50 of the NDPS Act have not been complied with and, therefore, the limitation under Section 37 (1)(b)(ii) would not be an obstacle in the way of releasing the applicants on bail. Now, the chargesheet is filed and no purpose will be served by keeping the applicants behind the bars.

9. *Per contra*, learned Additional Public Prosecutor for the State reiterated the contentions and submitted that there is substantial compliance which is sufficient to show that the applicants were found to be in their possession of the "Mephedrone Drug Powder". The seizure was made in presence of panchas. Thus, a *prima facie* case is made out against the applicants. Hence, the applications deserve to be rejected.

10. In support of contentions, learned counsel for applicants placed reliance on the following decisions:

Vijaysinh Chandubha Jadeja vs. State of Gujarat, reported in (2011)1 SCC 609;

Sholadoye Samuel Joy vs. State of Maharashtra, reported in 2022 SCC OnLine Bom 142;

Fabian Helmchen vs. State of Goa, reported in 2021 SCC OnLine Bom 311;

Mobin Ahmed Shaikh vs. State of Maharashtra, reported in 2018 SCC OnLine Bom 5396;

Prashant Chute vs. State of Maharashtra (in Criminal Application BA No.693/2021 decided by this court on 6.8.2021), and

Shivshankar s/o Chandrabhan Kandrikar vs. State of Mah., thr.its PSO PS Ganeshpeth, Nagpur (in Criminal Application BA No.1239/2022).

11. Having heard both the sides and perused the mandate of the law, section 50(1) of the NDPS Act requires that when any officer duly authorised under section 42 of the NDPS Act is about to search any person under the provisions of Sections 41, 42, and 43, he shall, if such person so requires, takes such person without unnecessary delay to a nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate before whom the search would take place. The provisions of the Section 50 of the NDPS Act have been held by the Constitution Bench in **State of Punjab Vs. Baldev Singh**, reported in (1999) 6 SCC 172 to be mandatory as severe punishment has been provided under the

Act for mere possession of illicit drug and narcotic substances and, therefore, it was held that it is necessary that the safeguards provided in Section 50 of the NDPS Act are to be observed strictly. The Constitution Bench in **Vijaysinh Chandubha Jadeja** referred *supra* while reiterating the aforesaid position has held that failure to comply with mandatory provision of section 50 would (1) cause prejudice to suspect accused (2) render the recovery of the illicit article from suspect/accused and vitiate the conviction if the same is records only on the basis of recovery of such illicit article. Insofar as the concept of substantial compliance is concerned, it has been specifically held in paragraph 31 that the concept of 'substantial compliance' is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in **State of Punjab Vs. Baldev Singh's** case cited *supra*. In **State of Rajasthan vs. Parmanand**, reported in 2014(5) SCC 345 the Honourable Apex Court has held that a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would not be permissible as that would frustrate the very purport of Section 50 as communication of the said right to the person who is about to be searched is not an empty formality. It has held in paragraph 12 that if merely a bag carried by a person is searched without there being any

search of his person, Section 50 of the NDPS Act would have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application.

12. Considering the above position of law and after applying the same to the factual position as available on record, in my considered opinion, the record does not disclose that requirement of Section 50(1) of the NDPS Act having been done. Though it is submitted by learned Additional Public Prosecutor for the State that there is a substantial compliance, the Honourable Apex Court in the case of **Vijaysinh Chandubha Jadeja vs. State of Gujarat** cited *supra* has held that the concept of substantial compliance is not applicable to Section 50 of the NDPS Act. The mandate of Section 50 of the NDPS Act is precise and clear that if the person intended to be searched, expresses to his authorized officer his desire to be taken to the nearest gazetted officer or the magistrate, he cannot be searched till the gazetted officer or the magistrate, as the case may be, directs the authorized officer to do so. It is further held that Section 50(1) of the NDPS Act, which leads safeguards and protections to accused persons, as envisaged under Section 50 of the NDPS Act to be read down, making the said provision virtually ineffective and, therefore, the decision of this Court in

the case of **State of Punjab Vs. Baldev Singh** cited *supra* needs reconsideration. It is held that although the Constitution Bench did not decide in absolute terms the question whether or not, Section 50 of the NDPS Act was directory or mandatory. Yet, it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to 'inform' the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate. Failure to inform the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused. It is further held by the Hon'ble Apex Court that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, to check the misuse of power, to avoid harm to innocent persons and to minimize the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. It is further held that since the appellant/accused was apprised of his right to be

searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant/accused gave his consent in writing to be searched by the police officials, the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act. It is further held that we do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband does not satisfy the mandatory requirements of Section 50 of the NDPS Act.

13. In the case of **Narcotics Central Bureau vs Sukh Dev Raj Sodhi**, reported in (2011)6 SCC 392 it is held by the Honourable Apex Court that From the perusal of the conclusion arrived at by this Court in Vijaysinh Chandubha Jadeja's case, it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate and in Para 32, the Constitution Bench made it clear that in order to impart

authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate.

14. Thus, in the present case, the State has relied upon the notices which were issued to the applicants apprising them about their right under Section 50 of the NDPS Act and submitted that there was substantial compliance of the mandatory provisions.

15. The Honourable Apex Court has observed that Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in presence of gazetted officer or before magistrate. However, it is required that the accused persons are actually brought before the gazetted officer or the magistrate.

16. As far as the submission of substantial compliance is concerned, the Honourable Apex Court in the case of Vijaysinh Chandubha Jadeja's *supra* held that the concept of substantial compliance was neither borne out from the language of sub section (1) of Section 50 nor it is in consonance with the dictum laid down by the Honourable Apex Court in the case of State of Punjab Vs. Baldev Singh *supra*.

17. Considering the provisions of law and mandate of the Honourable Apex Court's judgment, in my considered opinion, the record does not disclose the compliance with the requirement of Section 50(1) of the NDPS Act having been done.

18. The seizure of the contraband articles and recital of the First Information Report show that at the time of raid "Mephedrone Drug Powder" was taken in one envelope for the purpose of forensic examination which shows that the samples for the forensic examination were obtained at the time of seizure itself. Sub section (3) of Section 52-A of the NDPS Act requires that the magistrate shall as soon as may be, allow the application for the inventory. This implies that as soon as the seizure was effected and contraband was forwarded to the officer incharge of the police station or the officer empowered, the officer concerned has to approach the magistrate for the purpose of grant of permission to draw representative samples in his presence and the same samples shall be enlisted and correctness of the list of samples so drawn certified by the magistrate.

19. The Honourable Apex Court in the case of **Bothilal vs. The Intelligence Officer, Narcotics Control Bureau**, reported

in 2013(6) SCALE 377 has held that the question of drawing of samples at the time of seizure, which more often than not, takes place in the absence of the magistrate, does not in the above arise and held that the act of drawing samples from all the packets at the time of seizure is not in conformity with what is held in the case of **Union of India vs. Mohanlal and anr, reported in (2016)3 SCC 379**. [The act of drawing samples from all the packets at the time of seizure is not in conformity with what is held in the case of **Union of India vs. Mohanlal and anr, reported in (2016)3 SCC 379**.]

20. In view of the above observations, in the present case, there is neither compliance under Section 50(1) nor under Section 52-A of the NDPS Act and, therefore, the basic requirements are not complied with and, therefore, Section 37 (1)(b)(ii) of the NDPS act would not be an obstacle in the way of releasing the applicants on bail. Now, the chargesheet is filed and no purpose will be served by keeping the applicants behind the bars. Accordingly, both the applications deserve to be allowed by imposing certain conditions, as per order below:

ORDER

(1) The criminal applications are **allowed**.

(2) Applicants Kuldeep s/o Suresh Raut and Mukarram Sheikh s/o Nawab Sheikh, in connection with Crime No.51/2022 registered with Sonegaon Police Station, district Nagpur for offences punishable under Sections 8(c); 22(c), and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, be released on bail on their executing a P.R.Bond in the sum of Rs.25,000/- by each of them with one solvent surety of the like amount by each of them.

(3) The applicants shall attend the concerned police station once a month on first Saturday of such month between 11:00 am and 1:00 pm.

(4) The applicants shall not directly or indirectly make any inducement and threat or promise to any person acquainted with the facts of the present case.

(5) The applicants shall furnish their cell phone number(s) and addresses with the address proof. Additionally, they shall furnish names of their two relatives and their addresses with proofs.

(6) Needless to mention that the observations made in this order are purely *prima facie* for deciding the present applications for grant of bail only and learned Judge before

whom the trial will be conducted shall not get influenced by the said observations.

With this, the criminal applications stand **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!