

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

**CRIMINAL APPLICATION (BA) NO.416/2023
Chandrakant s/o Murlidhar Trivedi**

..VS..

The State of Mah., thr.PS Rajura, District Chandrapur

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

Court's or Judge's Order

.....
Shri S.V.Sirpurkar, Counsel for the Applicant.
Shri I.J.Damle, Additional Public Prosecutor for the NA/State.

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 10/07/2023
PRONOUNCED ON : 20/07/2023

1. By this application, being moved under Section 439 of the Code of Criminal Procedure, bail is sought in Connection with Crime No.203/2021 registered with the non-applicant for offences punishable under Sections 8(c) and 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. On 17.6.2021, the applicant is arrested and since then he is behind the bars.

3. The crime is registered on accusations that Assistant Police Inspector Shri J.K.Bobade, Rajura Police Station, district Chandrapur, received a secret information that two persons, riding on a moped having registration

No.MH-34/BL/4967, are carrying 'Ganja' with them. Accordingly, the informant accosted the applicant and one other co-accused and found that they were carrying 37 bundles of 'Ganja'. So-called 'Ganja' was seized and the applicant and other three co-accused persons were arrested. On the basis of the said report, the police have registered the crime.

4. Heard learned counsel Shri S.V.Sirpurkar for the applicant and learned Additional Public Prosecutor Shri I.J.Damle for the State.

5. Learned counsel Shri S.V.Sirpurkar for the applicant submitted that the applicant is falsely implicated in the crime. The alleged seized material is not 'Ganja' in view of the definition of 'Ganja' under the NDPS Act. According to him, the applicant has been made a scapegoat in the instant crime. Since the date of arrest he is in jail. The mandatory provisions of 'search' under Section 50 of the NDPS Act are not complied with. He submitted that if the chargesheet is perused, it will be difficult to establish that the alleged contraband falls within the definition of 'Ganja' under Section 2(i)(b) of the NDPS Act. During the investigation, seizure

panchanama as well as inventory was carried out. The seizure panchanama as well as inventory shows that description mentioned is greenish substance. The description mentioned in the inventory would not fall within the four corners of 'Ganja'.

In support of his contentions, he placed reliance on the orders of this court in Criminal Application (BA) No.101/2023 (Praveen Supda Chavan and anr vs. State of Mah., thr.its PS Risod, district Washim) decided on 23.6.2023; Criminal Application No.1296/2022 (Ibrahim Khwaja Miya Sayyed @ Raju vs. State of Mah) decided at the Principal Bench on 17.3.2023, and Special Leave Petition (Cri.) No.915/2023 (Mohd.Muslim @ Hussain vs. State (NCT of Delhi) decided by the Honourable Apex Court on 28.3.2023.

Lastly, he prays that as the alleged seized material is not 'Ganja', in view of the definition of 'Ganja' under the NDPS Act, further custody of the applicant is not required and, therefore, he be released on bail.

6. *Per contra*, learned Additional Public Prosecutor Shri I.J.Damle for the State, vehemently opposed the application on the ground on 17.6.2021 police official of

Rajura Police Station received a secret information and accordingly the applicant and other three accused were accosted. The applicant and other co-accused were found in their possession of 37 bundles of greenish substance which were seized by the police. The seized material were having 86.720 kilograms. The police staff obtained the samples and forwarded to Chemical Analyzer. The Chemical Analyzer's Report shows the article as 'Ganja'. The investigating agency also conducted inventory before learned Judicial Magistrate. After completion of the investigation, chargesheet is filed. Since huge commercial quantity of 'Ganja' is recovered, bar under Section 37 of the NDPS Act would attract and, therefore, the application deserves to be rejected.

7. Having heard both the sides and perused the investigation papers made available on record in the form of chargesheet and other documents including the inventory certificate relied upon by the learned counsel for the applicant as well as learned Additional Public Prosecutor for the State, there is no dispute that commercial quantity of 86.720 kilograms was found along with the applicant and other co-accused person. There is no dispute that commercial quantity, in relation to the NDPS Act for 'Ganja', means any

quantity greater than 20 kilograms.

8. Definitions under Section 2(iii)(b) and 2(iii)(b)(c) specify 'Ganja' as flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated, and any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom.

9. Thus, the definitions of terms 'Ganja' clarify that 'Ganja' is the flowering or fruiting tops of the cannabis plants excluding the seeds and leaves when not accompanied by the tops.

10. In the case in hand, as seen from the First Information Report and the investigation papers, quantity of 86.720 kilograms of 'ganja' was seized from the applicant and other two co-accused carrying on two-wheeler. The certificate of the inventory, carried out before learned Magistrate, describes articles as green leaves having furious smell weighing in one gunny bag marked as P1 of 13.270 kilograms, P2 39.460 kilograms, and P3 33.620 kilograms. The samples are obtained from the said bags. On measurement, the

alleged 'Ganja' contained in 3 gunny bags weighed and noted. It further shows that it was seized in the same sacks/bags along with the particulars of crime.

11. The above state of affairs would make it clear that there is nothing on record *prima facie* to show that before carrying the weight of the seized plants of 'ganja', the Investigating Officer has separated the flowering and fruiting tops of cannabis plants in order to ascertain the exact quantity of 'Ganja'. In fact, neither in the First Information Report nor in the inventory report it is mentioned that the flowering and fruiting tops of cannabis plants were separated in order to ascertain the correct quantity of 'Ganja'. The Chemical Analyzer's Report is forthcoming. It shows the flowering and fruiting tops of cannabis plants.

12. Thus, perusal of material shows that what seized were leaves and there was no quantification of flowering tops and without separating the flowering of fruiting tops, the 'Ganja' was weighed. As the seized material was not weighed, after separating the flowering tops, it is difficult to ascertain whether the quantity said to be commercial.

The similar observations were made in the orders

of this court in the cases of:

Kallapa Irappa Biradar vs. State of Maharashtra in Criminal Application (BA) No.509/2021 decided on 20.8.2021;

Hari Mahadu Valse vs. State of Maharashtra in Criminal Application (BA) No.2299/2019 decided on 29.7.2021.

13. In view of Section 37 of the NDPS Act, powers to release an accused on bail subject to the limitation contained in Section 439 of the Code of Criminal Procedure coupled with the limitation contemplated in view of Section 37 of the NDPS Act are itself mainly on, (1) there are reasonable grounds for releasing accused that he is not guilty of such offence and (2) that he is not likely to commit such offence while on bail. The expression reasonable ground means something more than *prima facie* ground. It contemplates substantial probable cause for believing that accused is not guilty of the offence.

14. In the present case, there is no compliance of Section 50 of the NDPS Act also. Thus, there is failure to comply with the mandatory provisions of Section 50 of the NDPS Act.

The record does not disclose that the requirement

of Section 50(1) of the NDPS having been done.

15. In the case of **State of Rajasthan vs. Parmanand, reported in 2014(5) 345**, the Honourable Apex Court has held that a joint communication of the right available under Section 50(1) of the NDPS Act to accused would frustrate very purport of Section 50. The communication of the said right to the person who is about to be searched is not an empty formality.

In the case of **Vijaysinh Chandubha Jadeja vs. State of Gujarat, reported in (2011)1 SCC 609**, the Constitution Bench of the Honourable Apex Court reiterated position and held that failure to comply with mandatory provisions of Section 50 of the NDPS Act would cause prejudice to suspect/accused and render the recovery of the illicit article from the accused and vitiate conviction if the same is recorded only on the basis of such illicit article. It is held that the concept of substantial compliance is neither borne out from the language of sub section (1) of Section 50 of the NDPS Act nor it is in consonance with the dictum laid down in the case of **State of Punjab Vs. Baldev Singh, reported in (1999) 6 SCC 172**.

16. It is significant to note that the definition of 'Ganja'

under the NDPS Act, in its ambit, is only the flowering or fruiting tops of cannabis plants and excludes the seeds and leaves when not accompanied by the tops. Thus, definition of 'Ganja' is restricted and it does not include the seeds and leaves of 'Ganja' plants.

17. The First Information Report, seizure panchanama, and inventory report do not reflect the presence of flowering or fruiting tops on the plants.

18. Another aspect of the matter is, whether the applicant could be said to have been charged for dealing in commercial quantity of the contraband articles.

19. The inventory certificate mentions of the plants of 'Ganja' which are leaves of greenish colour and it nowhere discloses that it includes flowering or fruiting tops. If all the seeds were to be counted as a fruiting part, it ought to have been excluded and weighed separately to measure the quantity of 'Ganja'.

20. Thus, perusal of the investigation papers and the material complied with the chargesheet, *prima facie*, shows that it is difficult to say that the alleged prohibited substance is 'Ganja' since it does not come within the definition of

'Ganja' under the NDPS Act.

21. Since the only flowering or fruiting tops of cannabis plants are classified as 'Ganja', in absence of the said substance, being seized from the applicant, *prima facie*, there is no ground for believing that the applicant is guilty of the offence for aforesaid recorded reasons.

22. In the result, the application can be allowed, however imposing certain conditions upon the applicant, as per order below:

ORDER

(1) The criminal application is **allowed**.

(2) Applicant Chandrakant s/o Murlidhar Trivedi, in Connection with Crime No.203/2021 registered with the non-applicant for offences punishable under Sections 8(c) and 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985, be released on bail on his executing a P.R.Bond in the sum of Rs.25,000/- with one solvent surety of the like amount.

(3) The applicant 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 applicant 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 applicant shall furnish his cell phone number(s) and address with the address proof. Additionally, he shall furnish names of his 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 application 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 application stands disposed of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!