



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

BAIL APPLICATION NO.1127 OF 2024

1. Sureshkumar s/o. Kisnaram Bishnoi,
Age 29 years, Occu. Steel welding,
R/o. Village Arniyali, Tahsil Raniwada,
District Jalor (Rajasthan)
2. Amari d/o. Narayan Aad
Age 26 years, Occu. Aad
R/o. Village Bassi, Tahsil Kushalgad
District Baswada (Rajasthan) .. Applicants

Versus

State of Maharashtra .. Respondent

Mr. Prashant P. Giri, Advocate for Applicants;
Mr. S. B. Narwade, A.P.P. for Respondent

CORAM : S. G. MEHARE, J.
Reserved on : 24.07.2024
Pronounced on : 14.08.2024

PER COURT :-

1. Heard the learned counsel for the applicants and the learned A.P.P. for the respondent.
2. The applicants seek bail in C.R.No.0577 of 2023 registered with Vajirabad Police Station, Nanded, Taluka and District Nanded, for the offences punishable under Sections 7 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act").

3. The bail is sought on the ground that Section 50 of the NDPS Act has not been complied with. The notice under Section 50(1) of the NDPS Act shall be served individually upon each applicant. However, in the case at hand, a common notice has been served upon them. Therefore, the said notice is bad. The applicants have further claimed bail on the grounds of violation of Section 52A of the NDPS Act.

4. The learned counsel for the applicants vehemently argued that compliance with Section 50 of the NDPS Act is not required when the alleged contraband was seized, not from the bag carried on by the accused on his person. The samples should only be drawn from the seized contraband in the presence and under the supervision of the Magistrate and not soon after his apprehension on the spot. It is a contravention of Section 52A of the NDPS Act. He also submitted short notes on legal issues raised in the application.

5. To bolster his arguments, he relied on the cases of –

(a) *Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609.*

(b) *Sholadoye Samual Joy vs. State of Maharashtra, 2022 SCC OnLine 142.*

(c) *Order of this Court passed in Bail Application No.1670 of 2022, Sumit Santosh Kasle versus The State of Maharashtra, dated 09.11.2022,*

- (d) *Mina Pun vs. State of Uttar Pradesh, 2023 LiveLaw (SC) 724,***
- (g) *Bhanudas Dnyanoba Girigosawi and others versus The State of Maharashtra, 2015 SCC OnLine Bom 6062.***
- (h) *Sk. Raju @ Abdul Haque @ Jagga vs. State of West Bengal, (2018) 9 SCC 708.***
- (i) *Lav Amma Ramu Aarli and another vs. The State of Maharashtra, (Bail Application No.328 of 2022, dated 11.08.2022 and connected matter) of this Bench.***

6. Per contra, learned A.P.P. has strongly opposed the application. It has been vehemently argued by the prosecution that Sections 50 and 52 have been complied with. There is no law prohibiting drawing of samples from the spot of the incident soon after his apprehension on the spot of the incident. Section 52A of the NDPS Act speaks of the disposal of contraband. For the purpose of identification of the contraband, samples should be taken in the presence of a Magistrate, and those are used in the crime without producing the entire contraband. The contraband, which is a narcotic drug, is to be destroyed. The Investigating Officer may apply to the Magistrate under Section 52A of the NDPS Act for certifying the correctness of inventory so prepared; or taking the photographs of contraband narcotic drugs in the presence of the Magistrate to certify that such photographs as true; or allowing to draw representative samples of such contraband and certifying the correctness of any list of samples so drawn.

7. It has also been vehemently argued that the applicants were apprised of their rights under Section 50 of the NDPS Act. There was no violation of law taking the samples from the seized contraband on the spot of the incident.

8. To bolster arguments, learned A.P.P. relied on the following cases:-

(a) *Sunil Sheshrao Pawar vs. State of Maharashtra through PSO PS Mehkar, Taluka Mehkar, District Buldana, High Court Bombay, Nagpur Bench, Criminal Application (BA) No.679 of 2023, dated 12.02.2024 : (2024:BHC-NAG:1678).*

(b) *Mukesh Rajaram Chaudhari vs. The State of Maharashtra, Bail Application 54 of 2023, dated 27.09.2023;*

(c) *Ranjan Kumar Chadha versus State of Himachal Pradesh, 2023 LiveLaw (SC) 856,* and argued that compliance with Section 50 of the NDPS Act is mandatory only when there is physical search and not when the contraband is seized from other places or premises. Lastly, she prayed to dismiss the application.

9. The papers from the chargesheet reveal that upon receiving the secret information, a trap was laid at the railway station. As per the information, they found the accused carrying the bags. The Police offered them an opportunity to have search by the raiding

parties. A notice under Section 50 of the NDPS Act was also served upon them. However, they refused to have a search before the Gazetted officer. The Police took a physical search as well as search of bags and found that the applicants were carrying 3.660 Kgs. of opium. It was seized on the spot of the incident and samples of 30 grams each were drawn from both bags. No individual notices were served upon the applicants. It was a joint notice in *Marathi*. The contents of the notice show that the Police intended to search the applicants physically and the bags in their custody. The applicants were informed that they may search the staff and to have a search before another Gazetted officer.

10. In the case of **Vijaysinh** (supra), the law has been laid down that it is imperative on the part of the empowered officer to apprise the person intended to be searched of the right under Section 50 of the NDPS Act to have a search before the Gazetted Officer or a Magistrate. It is not necessary that the information may be given under Section 50 should be in the prescribed form or in writing, but the suspect must be made aware of the existence of his right to be searched before the Gazetted Officer or Magistrate, if so required by him and this mandatory provision requires strict compliance. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

11. In the case of **Sholadoye** (supra), the ratio laid down in the case of **Vijaysinh** (supra) was followed. It has been further

observed that a simple reading of the same would show that the applicant was not apprised of his right under Section 50 of the NDPS Act to be searched “only” before Gazetted Officer or Magistrate as mandatory in **Vijaysinh** (supra). In **Sunil Pawar** (supra), relying on the cases of **Vijaysinh** (supra) and **Sholadoye** (supra) the Court granted bail.

12. In **Mina Pun** (supra), the ratio laid down in case of **Vijaysinh** (supra) has been reiterated.

13. In **Bhanudas** (supra), it has been held that the right under Section 50 of the NDPS Act is an indefeasible right, and the same right must be apprised to the person independently by the empowered officer. A joint appraisal of the said right is prohibited. Failure to give such information i.e. appraisal of the right by the empowered officer to the accused persons individually, would not vitiate the trial but render recovery of the illicit article suspect and vitiate the conviction and sentence.

14. In **State of Rajasthan v. Parmanand and another, (2014) 5 SCC 345**, it has been held that a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purpose of Section 50 of the NDPS Act. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure must be meticulously followed.

These are minimum safeguards available to the accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. Hence, the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before the nearest Gazetted Officer or Magistrate.

15. The learned counsel for the applicants has pointed out that in **Ranjan Kumar** (supra), it has been observed that “We do not propose to say anything further as regards **Sk. Raju** (supra) as well as **State of Punjab vs. Baljinder Singh reported in (2019) 10 SCC 473**”. We adhere to the principles of law as explained by the Constitutional Bench in **Baldev Singh** (supra) and the Larger Bench answering the reference in **State of Himachal Pradesh vs. Pawan Kumar, 2004 SCC 305**”. Therefore, it is clear that the above judgment is based upon the decision of Constitutional Bench in **Baldev Singh** (supra) and **Pawan Kumar** (supra). Relying on both these judgments, Honourable Judges in **Ranjan Kumar** (supra) have observed that compliance under Section 50 is not required when the alleged contraband is seized from the bag carried by the accused,

irrespective of the fact that his body search is also taken. He further referred to paragraph No.46 of the **Baldev Singh** (supra) and argued that in the said case, it was held that Section 50 would come into play in the case of search of the person as distinguished from search of any premises. In **Baldev Singh** (supra) the observations were regarding the search of the person vis-a-vis search of premises. Thus, what is axiomatic is that the Hon'ble Constitutional bench had absolutely no occasion to make any observation regarding the search of baggage by a person in **Baldev Singh**. In the entire judgment, the word 'bag' and its search along with search of the accused, were not used. Thus, the Hon'ble Apex Court in **Baldev Singh** appears to have distinguished search of 'person' other than 'search of premises'. For the search of any premises, like a house, building, etc., compliance with Section 50 of the NDPS Act is not required, like the search of a person if the only law propounded by the Constitutional Bench in **Baldev Singh** (supra). Referring to paragraph No.51 of **Ranjan Kumar** (supra), he argued that the word 'in other words' cannot be said to be an observation of Five Hon'ble Judges in observations of Two Hon'ble Judges in **Ranjan Kumar** (supra), independently the law laid down in **Baldev Singh** (supra). This is the only reason why the Hon'ble Court despite the judgment of **Baldev Singh** (supra) has interpreted the word 'person to include things' in inextricably linked to the person in various judgments thereafter. The Constitutional Bench in **Baldev**

Singh (supra) never observed that ‘search of baggage’ is different than ‘search of person’ and the word ‘premises’ used in the said judgment cannot be given a wider meaning ‘to include a bag carried by the person’.

16. Further, he argued that in the case of **Ranjan Kumar** (supra), the judgment of **Pawan Kumar** (supra) was relied upon. It is true that it was the judgment of the Larger Bench of the Hon’ble Apex Court. In **Pawan Kumar** (supra), it is observed that a search of the bag is not required under Section 50 of the NDPS Act. However, after the judgment of **Pawan Kumar** (supra), the judgment of **Sk. Raju** (supra), placed on record was delivered. Both judgments were of Larger Bench. It is pertinent to note that in subsequent judgment i.e. in the judgment of **Sk. Raju** (supra), both earlier judgments of **Baldev Singh** (supra) and **Pawan Kumar** (supra) were referred by the Hon’ble Supreme Court. The Hon’ble Supreme Court in **Sk. Raju** (supra), in no uncertain terms, held that if the person, as well as the bag carried by such person is searched, then Section 50 has to be complied with. Therefore, the judgment of **Sk. Raju** (supra) was passed. Considering **Pawan Kumar** (supra) is a binding precedent. Similarly, the judgment of **Balvinder Singh** (supra), was delivered after **Sk. Raju** (supra), wherein the alleged contraband was recovered from the vehicle in possession of the accused. Hence, compliance under Section 50 of the NDPS Act is not required.

17. In short, the arguments of the learned counsel for the applicants were that the ratio of **Pawan Kumar** (supra) was taken into consideration in **Sk. Raju** (supra). Hence, it is a binding precedent.

18. In **Ranjan Kumar** (supra), the facts discussed above were that the bag which the accused was carrying along with him was also searched with his person. However, the High Court of Himachal Pradesh, relying on the case of **State of Himachal Pradesh vs. Pawan Kumar** (supra) held that Section 50 of the NDPS Act is not at all applicable and the recovery of the contraband substance was not bad as a result of the personal search of the accused but on account of search from the bag. Therefore, the Police were not required to comply with Section 50 of the NDPS Act.

19. The learned counsel for the applicant argued that the judgment of **Sk. Raju** (supra) was prior in time, and thereafter, **Vijaysinh** (supra) laid down the law on Section 50 of the NDPS Act.

20. The Full Bench also discussed the case of Baldev Singh (supra). **Vijay Singh's** case was referred to the Full Bench since there was a diverse view of the Hon'ble Supreme Court in **Joseph Fernandes vs. State of Goa, (2000) 1 SCC 760, Prabha Shankar Dube vs. State of M.P. (2004) 2 SCC 56** on hand and **Krushna Kanwar vs. State of Rajasthan, (2004) 2 SCC 608,**

on the other, with regard to the dictum laid down by Constitutional Bench of the Hon'ble Apex Court, in ***State of Punjab vs. Baldev Singh, (1999) (6) SCC 172***, in particular regarding the question, whether before conducting the search the police officer concerned is merely required to ask the suspect whether he would like to be produced before the Magistrate or Gazetted Officer for the purpose of search or is the suspect required to be made aware of the existence of the right in that behalf under law.

21. In paragraph No.4 of the said case, it has been observed that the cases were placed before the Constitutional Bench for a limited purpose of clarification as to the interpretation of Section 50 of the NDPS Act by the Constitutional Bench in ***Baldev Singh*** (supra).

22. The Hon'ble Constitutional Bench in ***Viajysinh*** (supra), reproducing the relevant paragraph from ***Baldev Singh*** (supra), observed in paragraph No.24 that "Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPC 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 (suspect) about the existence of the right that if he so requires, he shall be searched before a Gazetted officer or 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 illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of possession of illicit article, recovered from the person during the search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 of the NDPS Act should be in the prescribed form or in writing, but it was mandatory that the suspect was made aware of the existence of his right to be searched before Gazetted Officer or Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.”

23. Further, it has been laid down that Section 50 of the NDPS Act though gives an option to the empowered officer to take the search of the person (suspect) either before the nearest gazetted officer or Magistrate, but in order to impart authenticity, transparency and credit worthiness to the entire proceeding, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to such proceeding, but it may verily strengthen the prosecution as well.

24. The finding of the Hon'ble Supreme Court was that 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 was also held that the compliance of Section 50(1) of the NDPS Act is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is required only on the basis of recovery of an illicit articles from the person of the accused during search, thereafter, the suspect may or may not choose to exercise right provided to him under the said provision.

25. On reading **Vijaysinh** (supra), it appears that the phrase "to search any person" occurring in Section 50 of the NDPS Act was not referred to for consideration. The issue was referred to the Constitutional Bench only for clarification on whether Section 50(1) of the NDPS Act is mandatory.

26. In **Ranjan Kumar** (supra), the said case was also considered and discussed. In that case, the search for a person and the bag were of a person as well as the bag was taken (paragraph No.3). Under this premise, the question before the Court was whether Section 50 of the NDPS Act was applicable to that case. The next question that fell before the Court for consideration was what meaning should be assigned to the phrase "to search any person" occurring in Section 50 of the NDPS Act. In the said case, the

Hon'ble Supreme Court also discussed whether Section 50 is applicable while searching a bag of the accused. The case of Baldev Singh was also considered, and in which it was held that the provisions of Section 50 will come into play only in the case of only personal search of the accused and not of some baggage like a bag, article or container, etc which he may be carrying.

27. It has also been observed in **Ranjan Kumar** (supra) that there was a direct conflict between **Sk. Raju** and **Pawan Kumar** (supra). Finally, the Hon'ble Supreme Court analyzed the issue and Section 50 of the Act as regards to its applicability to the bags carried by a person on his shoulder or in a hung bag that in paragraph No.114 that the only idea with which we have referred to various decision of this Court starting with **State of Punjab vs. Balbir Singh, 1994 (3) SCC 299, P. Dayalu Kashyap vs. State of Chattisgarh, (2022) 12 SCC 398**, is to highlight that Section 50 of the Act has been tried to be interpreted and understood in many cases. As noted earlier, in some of the decisions of this Court, the concept of 'inextricably linked to person' was applied. In other words, if the bag, etc. is in immediate possession of the accused and the search is taken of such bag, etc. even then, according to those decisions, Section 50 would be applicable.

28. The Hon'ble Supreme Court in **Ranjan Kumar** (supra) under heading 'Settling the conflicts between Sk. Raju and Balbir Singh

(supra)' in paragraph No.108, observed that the High Court of Delhi in **Akhilesh Bharti vs. State** reported in **2020 SCC OnLine Delhi 306** : (2020) 266 DLT 689, had the occasion to look into the cleavage of opinion expressed in **Baljinder Singh** (supra) and **Sk. Raju** (supra). The High Court therein, noted the thin line of distinction drawn by **Sk. Raju** (supra), where the contraband is recovered from an object which is held by the accused in his hand. In such a situation the High Court held that even if nothing is recovered from the person, Section 50 ought to be complied with. Then reproduced the findings of the Delhi High Court.

29. In **Sk. Raju** (supra), the Bench of three Judges held that where merely a bag carried by a person is searched without there being any search of his person, Section 50 will have no application, but if the personal search of the accused is also conducted, the provisions of Section 50 of the NDPS Act would wholly apply.

30. The Hon'ble Supreme Court in **Ranjan Kumar** (supra) in paragraph No.120 observed that in the facts of the present case there is no scope of applying the ratio of **Paramanand and Sk. Raju** (supra). At the cost of repetition, we may say that in the case on hand there is nothing to indicate that the person of the accused was also undertaken along with a bag which he was carrying on his shoulder.

31. In paragraph No.121, it has been further observed that we do not propose to say anything further as regards **Sk. Raju**

(supra) as well as **Baljinder Singh** (supra). We adhere to the principles of law as explained by the Constitution Bench in **Baldev Singh** (supra) and the larger Bench answering the reference in **Pawan Kumar** (supra).

32. It appears from the observations that the case of **Ranjan Kumar** (supra) was decided on the fact that there was no personal search but only the search of the bag which the accused was carrying on his shoulder.

33. In the case on hand, notice under Section 50 of NDPS Act was served upon the accused for personal as well as the search of the bags in their custody. So, it can't be said that Section 50 has not been complied with.

34. The learned counsel for the applicant raised an objection that the applicants are from the State of Rajasthan. They do not know Marathi. Hence, the notice under Section 50 served in Marathi does not apprise them of their right to have a search before the Gazetted Officer or the nearest Magistrate.

35. The notice under Section 50 reveals that it was addressed to both applicants jointly and bears their signatures. However, in the first information report, it was mentioned that the applicants were apprised of their right to have a search before the Gazetted Officer, and the right to have a search before the Gazetted Officer, and they may take a search of the raiding staff and panchas. It has

further contended that the applicants replied to them that they do not want to take their personal search. They can take their personal search as well as their bag. No such endorsement was put on the written notice under Section 50 of the NDPS Act. The law has been laid down that notice under Section 50 is not mandatorily in writing. The Court is of the view that when the notice is in writing, the endorsement of the accused opting not to be searched before the Gazetted officer or the nearest Magistrate should have also been in writing. Therefore, it may not be accepted that notice under Section 50 has been strictly complied with.

36. There is a force in the arguments of the learned counsel of the applicants that the notice served upon the applicants in the Marathi language makes sense that they understood their right to go before the Gazetted officer or the nearest Magistrate for search.

37. The Police recovered 3.660 Kg of opium from the applicants. The quantity recovered from the applicants was commercial. Hence, Section 22 of the NDPS Act was applied.

38. Another objection has been raised that Section 52A of the Act has not been complied with. Rule 8 of the Rules 2022 provides for an application to the Magistrate. These Rules are under Chapter III under the head 'Sampling'. Reading Rules 8 and 9 together, it is clear that soon after the seizure of the material under the NDPS Act, it must be forwarded to the in charge of the

nearest Police Station or to the officer empowered under Section 53 of the Act, and such an officer shall on preparing the inventory move an application to the Magistrate under Sub-section (2) of Section 52A of the NDPS Act. The Investigating Officer shall ensure that the samples of the seized material are drawn in the presence of the Magistrate and that they are certified by the Magistrate in accordance with the provisions of said subsection and same is certified by the Magistrate in accordance with the provisions of said sub-section. Rule 10 provides for drawing the samples in duplicate from each packet. Rule 11 provides for the quantity to be drawn from sampling. Reading these Rules, it is crystal clear that soon after the seizure of the contraband, the investigating officer or the officer empowered under Section 53 of the NDPS Act has no power to draw the samples on the spot of the incident or the place where the contraband is seized.

39. Recently, the Hon'ble Supreme Court in the case of ***Simaranjit Singh V State of Punjab, 2023 (3) Crimes 168***, relying on the observation of ***Union of India v Mohanlal and Another (2016) 3 SCC 379***, held that drawing the samples soon after the arrest of the accused on the spot is not in conformity with law.

40. In this case, the Police extracted the samples soon after the seizure on the spot of the incident and violated Section 52A of the NDPS Act, read with Rule 8 of the Rules 2022. Considering the

various case laws on the effect of failure to comply with Sections 50 and 52A of the NDPS Act, with the facts of the case at hand, the Court is of the view that the applicants deserve bail as Section 37 of the NDPS Act could not come in their way for the reason that the incarceration of the accused violates Article 21 of the Constitution of India. Hence, the following order.

ORDER

- i) The bail applications are allowed.
- ii) Applicants No. 1 - Sureshkumar s/o Kisnaram Bishnoi and No.2 - Amari d/o Narayan Aad, be released on bail on furnishing PB and SB of Rs.50,000/-, with one local solvent surety of the like amount each, in the above crimes for the aforesaid offences, on the conditions that,
 - (a) they should furnish their residential proof and cell phone numbers with the Investigating Officer with an undertaking that they would not change them till the conclusion of the trial;
 - (b) they should not leave their residence without prior permission of the Court;
 - (c) they should not involve in similar crimes;
 - (d) they should attend the trial on each and every effective date.

**(S. G. MEHARE)
JUDGE**