

Ms. Alisha Parekh with Mr. Taraq Sayed, Ms. Ashwini Achari, for Applicant.
Mrs. Geeta P. Mulekar, APP for State.

DATE : 7 FEBRUARY 2024

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in C.R.No.320 of 2022 registered with Mira Road Police Station for the offences punishable under Sections 20(b)(ii) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge her on bail.
3. The indictment against the applicant runs as under :
 - 3.1 On 4 August 2022, a secret information was received at Anti-Narcotic Cell that at about 5.00 p.m., a lady was to come in front of K.D.Empire Building, Mira Road (E) to sell charas. Police Constable Yadav who received he information recorded the same into writing and after complying with the statutory requirements, a surveillance was conducted near K.D.Empire Building. At about 5.10 p.m., the applicant alighted from the autorikshaw. She was accosted. From her expressions and

movements, it appeared that she was carrying contraband articles. Thus, after apprising the applicant of her right to be searched in the presence of a Gazetted Officer or Magistrate, under Section 50 of the Act, 1985, a search was conducted by API Tejashree Shinde by taking her to a private vehicle beyond the gaze of males. In the search, charas weighing 3.165 kg. was found in her hand purse. It was seized. Samples were collected. The applicant came to be arrested.

3.2 The applicant has preferred this application for bail as the learned Special Judge declined to exercise the discretion in favour of the applicant opining, inter alia, that the twin test envisaged by Section 37 of the Act, was not satisfied.

4. Ms. Parekh, learned Counsel for the Applicant, would urge that the statutory requirements have been observed in breach. Firstly, there is no compliance of the mandate contained in Section 42(2) of the Act, 1985, as the information which was allegedly reduced in writing and communicated to the superior officer does not indicate the date on which the suspect was to arrive. Inviting the attention of the Court to the said communication dated 4 August 2022 (page 78 of the application), it was urged that in the absence of the date on which the said suspect was to arrive, the said intimation cannot be said to be in compliance with the statutory requirement.

5. Secondly, it was submitted that the search stands completely vitiated as API Shinde, who was alleged to be a member of the raiding party, was stated to be a Gazetted Officer, and Devidas Handore, PI, ANC, had allegedly informed the

applicant that he wanted to have the applicant's search by API Shinde, who was the Gazetted Officer. Such appraisal, according to Ms. Parekh, is not in conformity with the provisions of Section 50 of the Act, 1985. To lend support to this submission, Ms. Parekh placed reliance on the judgments of the Supreme Court in the cases of **State of Rajasthan V/s. Parmanand and Anr.**¹, and **Dilip V/s. State of M.P.**².

6. Thirdly, Ms. Parekh would urge, the purported compliance of Section 52-A is also infirm, as the inventory was conducted before the learned Magistrate on 24 February 2023. Whereas, the samples which were allegedly collected at the time of seizure itself were already forwarded to the FSL on 5 August 2022. Thus, the inventory before the learned Magistrate under Section 52-A of the Act, loses significance.

7. Mrs. Mulekar, learned APP, resisted the prayer for bail. It was submitted that none of the grounds sought to be urged on behalf of the applicant is sturdy enough to dislodge the rigor of Section 37 of the Act, 1985. Laying emphasis on the fact that a commercial quantity of charas was recovered from the possession of the applicant and there has been compliance of all the procedural requirements, Mrs. Mulekar submitted that the application deserves to be rejected.

8. In any event the applicant cannot be permitted to draw any mileage from the alleged non-compliance of the statutory requirements as the question as to

1 (2014) 5 SCC 345

2 (2007) 1 SCC 450

whether there has been scrupulous compliance of Section 42(2), 50 and 52-A of the Act, 1985, is a matter for adjudication at trial. Thus, the applicant does not deserve to be released on bail.

9. Non-compliance of the mandate contained in Section 42(2) of the Act was premised on the alleged infirmity in the communication forwarded to the superior officer. It was urged that the fact that the suspect was to arrive on 4 August 2022 does not find mention therein.

10. I have perused the said communication (page 78 of the application). It records that an intimation was received at about 3.00 p.m., that the suspect was to arrive in the evening at 5.00 p.m. The absence of date or the words 'today', even if assumed to be one, is not prima facie such an infirmity as to vitiate the entire search and seizure.

11. As regards the non-compliance of the mandate contained in Section 52-A of the Act, the submission was that the material indicates that the inventory before the learned Magistrate was conducted on 24 February 2023 after more than six months of the alleged seizure. What, according to Ms. Parekh, impairs the seizure is the fact that the samples were forwarded to FSL on 5 August 2022. The submission is borne out by the communication dated 5 August 2022 (page 130 of the application). At the same time, there is a certificate under Section 52-A of the Act, by the learned Magistrate. In the circumstances of the case, whether the delay in carrying out the

inventory caused such prejudice and miscarriage of justice as to vitiate the trial would again be a matter for adjudication at the trial.

12. The ground of non-compliance of the mandate contained in Section 50 of the Act, 1985, however, seems to carry substance. I have carefully perused the first information report, seizure panchanama and the appraisal memo purportedly given to the applicant under Section 50 of the Act, 1985. In all these documents, it has been recorded with consistency that Devidas Handore, PI, intended to search the person of the applicant as there was a specific information that she was carrying the contraband article and the said search was to be conducted by API Shinde, a Gazetted Officer, who was a member of the raiding party.

13. Ms. Parekh would urge that giving an option of search in the presence of Gazetted Officer or Magistrate after disclosing that the search was proposed to be conducted by a member of the raiding party, who himself/herself was the Gazetted Officer, in essence, precluded the suspect from exercising such a right.

14. Mrs Mulekar joined the issue by canvassing a submission that the declaration that a member of the raiding party is the Gazetted Officer does not erode the sanctity of search as the suspect could still exercise the right to be searched before another Gazetted Officer or Magistrate.

15. The pronouncement of the Supreme Court in the case of **State of Rajasthan V/s. Parmanand and Anr. (supra)**, on which a strong reliance was

placed on behalf of the applicant, seems to govern the controversy at hand. In the said case, after adverting to the provisions contained in Section 50 of the Act and the decisions of the Supreme Court in the cases of **State of Punjab V/s. Baldev Singh**³ and **Dilip V/s. State of M.P. (supra)** and **Union of India V/s. Shah Alam**⁴ it was enunciated that if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the Act, will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the Act, will have application. Communication of the right of suspect under Section 50 of the Act, who is about to be searched, is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed.

16. In the said case, the authorized officer had informed the accused therein that they could be searched before the nearest Magistrate or before the nearest Gazetted Officer or before P.W.5 J.S.Neg, the Superintendent, who was a part of the raiding party. The Supreme Court held that such communication was in breach of the mandate of Section 50 of the Act. The observations in paragraph 19 read as under :

“19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a

3 (1999) 6 SCC 172

4 (2009) 16 SCC 644

part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.”

17. Reverting to the facts of the case, the purported communication to the applicant that the authorized officer intended to have the applicant's search by API Shinde, who was herself a Gazetted Officer, had the propensity to give an impression that since a Gazetted Officer was already present, the applicant could not exercise the said option. The assurance and sanctity which the search in the presence of an independent Gazetted Officer or Magistrate afford, would be lost if the member of the raiding party proclaims that he is the Gazetted Officer. The communication of such right, prima facie, appears to be in teeth of the provisions contained in Section 50 of

the Act. It has the effect of vitiating the search.

18. An endeavour was also made by Ms. Parekh to urge that the applicant was not searched in seclusion in the presence of the female public witnesses. Amplifying the submission, it was urged that though the seizure panchanama indicates that one of the panch witnesses was female, yet it is not borne out by the seizure panchanama that when the applicant was actually searched in seclusion by taking her over to a private vehicle, a female panch witness was present.

19. Evidently, seizure panchanama does not record that the female panch witness was present when API Shinde searched the person of the applicant in a private car. However, since the panch witnesses have drawn the panchanama, the question as to whether a female panch witness was present when the applicant was actually searched by API Shinde appears to be a debatable issue and can only be resolved at the trial. I am, thus, not inclined to attach much weight to this circumstance. However non-compliance of Section 50 of the Act, stands on a different pedestal.

20. A profitable reference in this context can be made to a Constitution Bench judgment of the Supreme Court in the case of **Vijaysinh Chandubha Jadeja V/s. State of Gujarat**⁵ wherein the Supreme Court enunciated that Section 50 of the Act commands scrupulous compliance and the concept of substantial compliance was not in consonance with law.

⁵ (2011) 1 SCC 609

21. In the aforesaid view of the matter, I am inclined to hold that non-compliance of the statutory requirement contained in Section 50 of the Act, in the manner ordained by Section 50, has the effect of vitiating the search and, therefore, the Court may be justified in drawing an inference that the applicant may not be guilty of the offences.

22. The Court is not informed that there are antecedents of the applicant. Thus, it can be legitimately inferred that the applicant will not indulge in identical offences, if released on bail. The twin test contained in Section 37 of the Act, thus, stands fulfilled.

23. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Shanaz Khatoon @ Shehnaz Shaikh @ Sana be released on bail in C.R.No.320 of 2022 registered with Mira Road Police Station on furnishing a PR bond in the sum of Rs.30,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

(iii) The applicant shall mark her presence Mira Road Police Station on first Monday of every month between 11 am to 1 pm for a period of three years or till the conclusion of the trial whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

(v) On being released on bail, the applicant shall furnish her contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

(vi) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(vii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N.J.JAMADAR, J.)