

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 2649 OF 2023

SANTOSH  
SUBHASH  
KULKARNI

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Yasar Kutbuddin Shaikh ...Applicant  
Versus  
The State of Maharashtra ...Respondent

Mr. Ayaz Khan, a/w Dilip Mishra i/b Harshita Shroff, for the  
Applicant.

Mr. Y. M. Nakhwa, APP for the State/Respondent.

PSI Bhau Dube, Virar Police Station, present.

CORAM: N. J. JAMADAR, J.

DATED: 29<sup>th</sup> JANUARY, 2024

**ORDER:-**

1. Heard the learned Counsel for the parties.
2. This is an application for bail in Special Case No.310 of 2022 arising out of CR No.657 of 2021 registered with Kashimira Police Station, Mira-Bhayander, for an offence punishable under Section 21(b) read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, ("the NDPS Act").
3. On 26<sup>th</sup> September, 2021, the Kashimira Police were on a patrolling duty. At about 12.30 pm., the police party noticed the applicant loitering in suspicious circumstances in the parking lot in front of Fountain Hotel, Ghodbandar Junction.

**1/10**

Order corrected as per order dtd.5/2/2024.

After noticing the police party the applicant made an attempt to flee away, post haste. The applicant was, however, accosted. Panch witnesses were summoned. In the search of the applicant, in presence of the punch witnesses, a packet was found in the pocket of the trouser of the applicant. It appeared to be MD. It weighed 100 gm. It was seized and samples were collected under the seizure panchnama. The applicant came to be arrested.

4. The learned Special Judge declined to exercise the discretion in favour of the applicant as, in the view of the learned Special Judge, the twin test envisaged under Section 37 of the NDPS Act was not satisfied.

5. Mr. Khan, the learned Counsel for the applicant, submitted that the search was completely vitiated on account of the non-compliance of the provisions contained in Sections 42 and 50 of the NDPS Act. The FIR as well as the seizure panchnama, according to Mr. Khan, indicate that the person of the applicant was allegedly searched by Mr. Kailas Takale, Assistant Police Inspector and Mr. Vijay Gaikwad, Police Naik, who was not an authorized person. Thus, there was breach of the mandate contained in Section 42 of the NDPS Act. Secondly, there is a clear non-compliance of the provisions

contained in Section 50 of the NDPS Act as the applicant was not at all apprised of the right to be searched before the Gazetted Officer or Magistrate. Moreover, the empowered officer has not complied with the mandate contained in Section 52-A of the NDPS Act.

6. Mr. Nakhwa, the learned APP, submitted that the applicant was apprised of the right to be searched in the presence of the Magistrate or Gazetted Officer as is evident from the appraisal notice (page 40 of the application). The alleged breach of the provisions contained in Section 42 of the NDPS Act, according to the learned APP, would be a matter for determination at the stage of trial and that cannot be a ground to release the applicant on bail in the face of the interdict contained in Section 37 of the NDPS Act, 1985.

7. Mr. Khan joined the issue by canvassing a submission that the compliance of Section 50, sought to be sustained on the basis of the appraisal notice (page 40), is infirm as the applicant was asked to furnish the names and address of the Gazetted Officer, who can be called for the said purpose. Such appraisal is not in consonance with the mandate of Section 50 of the NDPS Act. To this end, reliance was placed on an order passed by this Court on 14<sup>th</sup> September, 2022 in

BA/1801/2021 in the matter of *Nadeem Abdul Rahim Choughule vs. State of Maharashtra*.

8. I have perused the FIR and seizure panchnama. The FIR as well as seizure panchnama are conspicuously silent about the fact that the applicant was apprised of his right to searched in the presence of the Gazetted Officer or Magistrate. The first informant does not at all refer to the fact that the applicant was made aware of the said right, in any form whatsoever. In the seizure panchnama it is mentioned that the API gave a notice to the applicant under Section 50 of the NDPS Act and, thereupon, the applicant verbally informed and also made an endorsement thereon, that the said process was not required. Clearly the material on record does not indicate that the applicant was apprised that he had a right to be searched in the presence of the Gazetted Officer or Magistrate.

9. In the case of *State of Punjab vs. Baldev Singh*<sup>1</sup> the Constitution Bench of the Supreme Court held that it was not mandatory to give a written notice in order to show the compliance of the mandate contained in Section 50 of the NDPS Act. However, there must be material to indicate that

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<sup>1</sup>(1999) 6 SCC 172.

the accused was duly apprised by the said right. As noted above, the FIR and the seizure panchnama are conspicuously silent about the said appraisal.

10. The notice dated 26<sup>th</sup> September, 2021 (page 40) relied upon by the learned APP, in the facts of the case, does not seem to advance the cause of the prosecution. By the said notice, the applicant was asked to furnish the name and address of the Gazetted Officer, who can then be called to supervise the search. Such contingent appraisal was held by this Court in the case of *Nadeem Choughule* (supra) to be not in consonance with the letter and spirit of Section 50 of the NDPS Act. The observations in paragraph 5 read as under:

“5. On perusal of the complaint lodged on 06/10/2020 and the panchnama, it can be seen that the said safeguard contemplated under Section 50 has not been adhered to at all. The statements of two panchas as well as the statement of police constable Keshav Nivrutti Shinde, who was present, are also conspicuously silent about the said procedure being followed, which is in form of a statutory mandate. Surprisingly, at page 104, a notice under Section 50 is placed on record in an attempt to demonstrate that the applicant was apprised of the right available to him. When the said letter, allegedly to be issued to the applicant during the course of search is carefully perused, it is stated that he is informed that he has right to be searched in presence of the Magistrate or Gazetted Officer and, therefore, he should disclose the name of such an Officer or the Magistrate alongwith his address so that search can be arranged. Similar such intimation to other two accused persons are placed on record and it can be seen that the said communications are at variance, as the intimation given to accused Dawood Ansari intimates that he has a right to seek his search by the Gazetted Officer or the Magistrate located nearby, and arrangement to that effect can be done. When the communication is perused, prima facie, it

appears to be an after thought attempt as it does not bear the signatures of the panchas and in the statements of the two panchas, compiled in the charge-sheet, there is no mention of such an intimation given to the accused persons.”

11. Secondly, the said communication is *prima facie* at variance with the contention in the seizure memo that the applicant made an endorsement in Hindi that it was not necessary to follow the said procedure. It simply bears the signature, purported to be made by the applicant. It does not bear the signatures of the public witnesses. Nor it bears the endorsement of the applicant in Hindi.

12. It is well recognized that the compliance of the provisions contained in Section 50 of the NDPS Act is mandatory. Substantial compliance would not suffice and there must be strict compliance with Section 50(1) of the NDPS Act by the authorised officer.

13. It would be suffice to make a reference to the Constitution Bench judgment of the Supreme Court in the case of *Vijaysinh Chandubha Jadeja vs. State of Gujarat*<sup>2</sup>, wherein the Supreme Court enunciated that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the

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<sup>2</sup> 2011(1) SCC 609.

said Section in *Joseph Fernandes vs. State of Goa*<sup>3</sup> and *Prabha Shankar Dubey vs. State of M.P.*<sup>4</sup>, *Krishna Kanwar vs. State of Rajasthan*<sup>5</sup> 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*<sup>6</sup>. In *Baldev Singh* (supra) the Supreme Court emphasized that in so far as the obligation of the authorized officer under sub-section (1) of Section 50 of the NDPS Act is concerned it is mandatory and requires strict compliance. Failure to comply that provision would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article with the person of the accused during such search.

14. As regards the alleged non-compliance of the provisions contained in Section 42 of the NDPS Act on account of search by two persons, one of them being not empowered . Mr. Khan invited the attention of the Court to an order dated 7<sup>th</sup> February, 2023 passed by this Court in BA/3158/2021 in the

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**3**(2000)1 SCC 707.

**4**(2004) 2 SCC 56.

**5**(2004) 2 SCC 608.

**6**(1999) 6 SCC 172.

matter of *Aarif Akram Shaikh vs. The State of Maharashtra*.

This Court, *inter alia*, observed as under:

“9. In my opinion, having regard to the language of section 42 of the NDPS Act, only the officers mentioned therein are empowered to carry out the search. It may be that the PSI was authorised, but the search was also carried out by the Police Naik. The Police Naik was not authorised to carry out the search. *Prima facie*, in my opinion, the search carried out also by one of the official (Police Naik) who was not authorised, renders the search illegal. These observations are restricted for considering the application for bail. I am, *prima facie*, satisfied that there are reasonable grounds for believing that the applicant is not guilty of the offence.”

15. I am conscious that the non-compliance of Section 42 of the NDPS Act is held to be a matter to be adjudicated at the stage of trial. Thus, even if the aspect of non-compliance of Section 42 is not given much weight, at this stage, yet a clear case of non-compliance of Section 50 of the NDPS Act is *prima facie* made out.

16. The conspectus of the aforesaid consideration is that since the search appears to have been *prima facie* vitiated, an inference become justifiable that the applicant may not be guilty of the offence punishable under Section Section 21(b) read with Section 8(c) of the NDPS Act. The Court is not informed that there are antecedents of the applicant, which would justify an inference that, if released on bail, the applicant may indulge in identical offences.

17. The applicant is in custody since 27<sup>th</sup> September, 2021. Having regard to the large pendency of cases, it is unlikely that the trial can be concluded within a reasonable period.

18. For the foregoing reasons, I am inclined to exercise the discretion in favour of the applicant.

19. Hence the following order:

**: O R D E R :**

(i) Application stands allowed.

(ii) The applicant Yasar Kutbuddin Shaikh be released on bail in Special Case No.310 of 2022 arising out of CR No.657 of 2021 registered with Kashimira Police Station, Mira-Bhayander, on furnishing a P.R. Bond of Rs.1,00,000/- with one or more sureties in the like amount.

(iii) The applicant shall mark his presence at the Kashimira Police Station on the first Monday of every alternate month in between 10.00 am. to 12.00 noon for the period of three years or till 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 his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

(vi) The applicant shall not indulge in identical activities for which he has been arraigned in this case.

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

(viii) 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 stands disposed.

[N. J. JAMADAR, J.]