

officer.

4. The learned counsel for the applicant submits that such disclosure of fact that he himself is a gazetted officer suggest by necessary implication that the accused were discourage in obtaining for search by independent authority.

5. To buttress the said submission he has placed reliance upon the judgment of the Division Bench of this Court in the case of '*Dharmaveer Lekhram Sharma and Anr. Vs. The State of Maharashtra and Ors.*)¹ and judgments of co-ordinate benches of this Court in the cases of '*Moin Khan Afzal Khan Pathan v/s. State of Maharashtra*)², '*Saad Sohail Shaikh vs. The State of Maharashtra*)³, '*Nafor Igwe Chima vs. The State of Maharashtra*)⁴, '*Afaq Asif Sayyed*)⁵, and '*Salim Akbar Khan vs. The State of Maharashtra*)⁶.

6. Having gone through the charge-sheet and the relevant material collected by the IO during the investigation, there is admittedly the officer who conducted the search of the applicant has disclosed the fact that he himself is the gazetted officer and he further apprised the applicant regarding his rights of contemplated under section 50 of the said act in writing.

7. The Division Bench of this Court in the case of *Dharmaveer Lekhram Sharma* (supra), has observed thus:

1 (2000) SCC online Bom 604

2 Bail application 405 of 2023

3 Bail application 2804 of 2023

4 Bail application 541 of 2019

5 Bail application 1145 of 2015

6 Bail application 3337 of 2023

‘21. Therefore, in our considered view, the search of Accused Nos. 1 to 4 and consequent seizure of the contraband becomes a suspect for non-compliance of [section 50](#) of the N.D.P.S. Act. In our view, inclusion of Police Officers, who are also Gazetted Officers, in the raiding party is obvious, however, mention of the fact while apprising the accused regarding their right as contemplated under [section 50](#) of the said Act, suggests, by necessary implication, that the accused were discouraged in opting for search by independent authority. The possibility of misleading the accused also cannot be ruled out in this regard’.

22. The learned Counsel for the appellants further pointed out one more glaring infirmity in the prosecution evidence. According to him, at the relevant time and place, all the four accused persons were jointly apprised of their right contemplated under [section 50\(1\)](#) of the N.D.P.S. Act, and therefore there is no valid compliance with the said provision of law which should vitiate the search.

The evidence of P.W. 1, in this regard, shows that he has stated that "They were also given to understand that they were being searched for the suspected narcotics. P.I. Surya also gave them understanding that they had a right to be searched in the presence of Gazetted Officers or Magistrate if they desired so. P.I. Surya also told them that he himself and Mr. Mehta were the Gazetted Officers. All those four persons then declined the offer and also told that they could be searched by we people."

8. The Co-ordinate Bench of this Court in the case of *Moin Khan Afzal Khan Pathan (supra)*, has observed thus:

‘6. Having heard the learned counsel for the applicant, as also the learned APP and upon perusal of the material

on record, this Court is inclined to allow the present application for the following reasons:-

a. The document on record at page 67 shows that at the time of carrying out search of the person of the applicant, although he was made aware about his right to be searched in the presence of a Gazetted Officer or a Magistrate, in the very same document, it was stated that the person searching the applicant was himself a Gazetted Officer. The Supreme Court in the case of *State of Rajasthan Vs. Parmanand* and another (*supra*) has deprecated such a practice and held that mandatory procedure under Section 50(1) of the NDPS Act cannot be said to be complied with. The same has been followed in various orders of High Courts, as also by the learned Single Judge of this Court in the case of *Afaq Asif Sayyed Vs. State of Maharashtra* (*supra*). In the said order, it is specifically recorded that making such a suggestion that a person searching the accused himself is a Gazetted Officer amounts to discouraging the accused person from insisting on an independent authority searching him. The said position of law accrues in favour of the applicant'

9. The Co-ordinate Bench of this Court in the case of *Saad Sohel Shaikh* (*supra*), has observed thus:

'6. I have perused the allegations in the first information report as well as the seizure panchnama. After the applicant was allegedly accosted, it seems Madhuri Jadhav, the then P.I., had disclosed her identity as a Gazetted Officer and declared that she has a right to search the person of the accused, and, thereafter, the accused was apprised of the right under [Section 50](#) of the Act. Appraisal memo also makes it clear that the Police Inspector disclosed her identity as the Gazetted Officer and then called upon the accused as to whether he would like to be searched before any other Gazetted Officer.

7. In the case at hand, the authorized officer seems to have specifically disclosed that being a Gazetted Officer,

she had the right to search the applicant. Such appraisal has been held to be in violation of [Section 50](#) of the NDPS Act as that has the tendency to dissuade the suspect from exercising the right under [Section 50](#) of the NDPS Act, as an impression is given that he is being searched by a Gazetted Officer. Moreover, it does not appear that the applicant was specifically informed that he has a right to be searched before the Magistrate as well. Prima facie, the mandate contained under [Section 50](#) of the NDPS Act, 1985 has not been complied with scrupulously. The search, therefore, stands vitiated.

*8. It is trite law that the provisions of [Section 50](#) are required to be scrupulously complied with. Substantial compliance of the provisions is neither envisaged by the provisions of the Act, 1985, or by the Constitution Bench judgment in the case of (**State of Punjab V/s. Baldeo Singh**) (**Vijaysinh Chandubha Jadeja V/s. State of Gujarat**)’*

10. The Co-ordinate Bench of this Court in the case of *Nafor Igwe Chima (supra)*, has observed thus:

‘5. Perused the papers. On 16.02.2017 at around 9.30 p. m., on the basis of specific information that there was going to be dealing of Mephedrone, a trap was laid and the Applicant was apprehended with 51 grams of Mephedrone and 212 grams of Ephedrine. The information received by the police was that a Nigerian national was going to visit Amit Sagar Society, Sector – 10A, Vashi, Navi Mumbai on 17.02.2017 at 1:00 – 1:30 a. m., for illegally selling Mephedrone and Ephedrine to his customers. In the trap, the police accosted the Applicant. Police Inspector – Chetan Kakade disclosed his identity to the Applicant that he was a Gazetted officer and thereafter, informed the Applicant whether he would like to be searched by any other officer or a Magistrate. Thereafter, the police took search and the Applicant was found in possession of 51 grams of Mephedrone (psychotropic substance) and 212 grams of Ephedrine (controlled substance). A

perusal of the panchanama shows that the Police Inspector – Chetan Kakade had disclosed that he was a Gazetted officer and after disclosing the same, asked the Applicant, whether he would like to be searched by any other officer or a Magistrate. The said appraisal under Section 50(1) of the NDPS Act, prima facie, appears to be contrary to the ratio laid down by the several Judgments. It is noted by this Court (A. S. Gadkari, J.) in the order dated 08.02.2016 passed in B. A. No. 1145 of 2015, that the moment the police officer informs the Applicant that he is a Gazetted officer and then apprises the accused of his right to be searched by other Gazetted officer or a Magistrate, the provision of Section 50(1) of the NDPS Act is violated. The Applicant has no antecedents. Investigation is complete and charge-sheet is filed. In the facts, the Applicant has made out a case for being enlarged on bail...)'

11. The Co-ordinate Bench of this Court in the case of *Salim Akbar Khan (supra)*, has observed thus:

'3. On 30th June, 2021 while the Anti Narcotic Cell police were on patrolling duty near Goregaon Bus Depot, New Link Road, two persons were found moving suspiciously. After noticing the police party, they attempted to flee away. However, they were accosted. Entertaining suspicion that those persons might be carrying drugs, panch witnesses were called. The applicant and co-accused Sanjib Sarkar @ Raja Sarkar (accused No. 1) were apprised of their right to be searched before a Magistrate or gazetted officer. As they declined to avail the said right, the search was conducted. In the search of accused No. 1, 1.8 kg heroine and 1.1 kg Mephedrone (MD) were found. The contraband articles were seized and samples were collected. In the search of the applicant, a yellow cloth bag was found. It contained another transparent plastic pouch. The said pouch contained MD. It weighed 150 gms. Two samples weighing 5 gm each (E1 and E2) were collected and

the bulk was labeled (E). The applicant came to be arrested.

4. Mr. Tabish Mooman, the learned counsel for the applicant, submitted that there is non-compliance of the mandatory provisions contained in [section 52A](#) of the NDPS Act, 1985. To fill in the lacuna the inventory was conducted before the learned Magistrate belatedly on 18th February, 2022. Such inventory is of no legal sanctity. In fact, the prosecution banks upon C.A report, on the basis of analysis of the sample (E1) collected at the time of alleged search and seizure. Therefore, ultimately the prosecution case would fail for not adhering to the mandate of provisions contained in [section 52A](#) of the NDPS Act, 1985. It was further submitted that having regard to the fact that the applicant has been in custody for more than 2 years and 9 months, the applicant deserves to be enlarged on bail'.

12. Thus, considering the above referred observations made by the learned Division Bench and as well as the co-ordinate benches of this Court, I am of the opinion that since there is non compliance of Section 50 (1) of the NDPS, Act the applicant is entitled for grant of bail.

ORDER

- (i) Criminal Bail Application is allowed and disposed off;
- (ii) It is directed that the applicant shall be released on bail in Crime No.354 of 2023, registered with Kondhwa Police Station, Pune for the offences punishable under Sections 8(c), 21(c) of the Narcotic Drugs and Psychotropic

Substances Act, 1985, on furnishing PR.Bond of Rupees Twenty-five Thousand with one solvent surety in the like amount;

iii) The applicant shall attend the said Police Station on 1st and 16th day of every month between 10.00a.m 11.00 a.m, till the conclusion of the trial except on the date of trial;

iv) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case, as also not tamper with the evidence;

v) Liberty is granted to the State for cancellation of bail if the applicant commits similar offence;

vi) The applicant shall attend the trial before the Trial Court regularly on every date unless exempted by the trial Court for any reason.

(ANIL S. KILOR, J)