



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

CRIMINAL APPLICATION (BA) NO.113/2024

Kayyum Shah s/o Shahan Shah and anr

..VS..

**State of Maharashtra, through PSO Police Station Karanja (Ghadge),
District Wardha**

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

Court's or Judge's Order

Shri J.B.Kasat, Counsel for Applicants.
Shri M.J.Khan, Additional Public Prosecutor for the State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 25/04/2024

PRONOUNCED ON : 29/04/2024

1. By this application under Section 439 of the Code of Criminal Procedure, applicants arrested on 2.9.2022 seek regular bail in connection with Crime No.327/2022 registered with the non-applicant/police station for offences punishable under Sections 8(c), 20, and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. Heard learned counsel Shri J.B.Kasat for applicants and learned Additional Public Prosecutor Shri M.J.Khan for the State.

3. On 2.9.2022, a Police Officer attached to the non-

applicant/police station received a secret information that applicants are proceeding in car bearing registration No.MH-31/CR/8527 and carrying contraband article “Ganja” weighing 266.705 kilograms in the said car. A report came to be lodged. On the basis of the said report, the police registered the crime and, after investigation, submitted chargesheet against applicants.

4. Learned counsel for applicants submitted that insofar as seizure of contraband article is concerned, there is no compliance of Section 42 of the NDPS Act, which is mandatory in nature. In view of settled principles of law and the said non-compliance of Section 42(1) of the NDPS Act, trial vitiates and it results into violation of Article 21 of the Constitution of India. It is submitted that entire chargesheet nowhere shows compliance of Section 42 of the NDPS Act. As such, applicants deserve to be released on bail.

5. In support of his contentions, learned counsel for applicants placed reliance on the decision of this court in the case of **Sholadoye Samuel Joy vs. State of Maharashtra**, reported in 2022 SCC ONLine Bom 142 wherein by referring the decision of the Honourable Apex Court in the case of

Karnal Singh vs. State of Haryana, reported in (2009)8 SCC 539 held that there was no compliance of Sections 42 and 50 of the NDPS Act and the accused is released on bail.

6. *Per contra*, learned Additional Public Prosecutor for the State strongly opposed the application on ground that huge quantity of “Ganja” was seized from possession of applicants who were travelling in the car which was intercepted by the police. After following a due procedure, the contraband article “Ganja” was seized in presence of panchas. The entire material was produced before the Magistrate and inventory certificate was obtained. The samples were drawn and sealed in presence of the Magistrate. Thus, there is due compliance of provisions of the NDPS Act. Considering rigor under Section 37 of the NDPS Act, the application deserves to be rejected.

7. In support of his contentions, learned Additional Public Prosecutor placed reliance on the decision in the case of **Karnal Singh vs. State of Haryana** *supra* and submitted that mere non-compliance under provision of the NDPS Act is not sufficient to release applicants on bail.

8. Having heard learned counsel for applicants and

learned Additional Public Prosecutor for the State and perused investigation papers, the First Information Report shows that a Police Officer received a secret information that applicants are proceeding in car bearing registration No.MH-31/CR/8527 and carrying contraband article “Ganja” in the said car. Accordingly, the said car was intercepted in presence of panchas. A search of the car was taken and contraband article “Ganja” was seized from the said car weighing 266.705 kilograms. The said contraband article was produced and samples were obtained in presence of the Magistrate. Accordingly, inventory certificate was obtained from the Magistrate. Thus, there is no dispute as to fact that applicants were found in possession of contraband article “Ganja: when they were travelling in the said car.

9. Learned counsel for applicants emphasized on compliance of Section 42 of the NDPS Act. Said Section 42 reads thus:

“42. Power of entry, search, seizure and arrest without warrant or authorisation.-- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government

including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable

under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

10.(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

11. Much emphasis has been placed on Section 42 of the NDPS Act on behalf of the applicant to contend that the raid conducted was entirely vitiated as there is no compliance

of Section 42 of the NDPS Act. Twin requirements of Section 42(1) and 42(2) of the NDPS Act are; firstly, person conducting raid must be an empowered officer, superior to the rank of constable, and secondly, if raid was conducted between sunset and sunrise, the officer conducting such raid must report grounds of belief that if the raid was not so conducted, there would be chance of escape of offender and further that such recorded grounds for his belief shall be communicated to the superior officer within 72 hours. Learned counsel for the applicant submitted that the said requirement is not fulfilled or satisfied.

12. In the context of these twin requirements, apparent conflict between two earlier judgments of the Honourable Apex Court was sought to be resolved in the case of Karnal Singh vs. State of Haryana *supra*. The Constitution Bench of the Honourable Apex Court considered extent of mandatory nature of requirement of Section 42 of the NDPS Act and in what circumstances accused may not get benefits of mere non compliance unless it was established that he suffered prejudice due to such non compliance. After considering scope of Section 42 of the NDPS Act, the Bench concluded that although twin

requirement of Section 42 of the NDPS Act requires to be complied with and total non-compliance of the same was impermissible, if there was some delay in compliance which could be explained satisfactorily by placing material on record, such compliance be acceptable.

13. Thus, if the aforesaid judgment is taken into consideration, facts of the present case show that the secret information was received by the police station and immediately the car was intercepted. Perusal of the First Information Report shows that information was given to superior officer. Though document is not on record to show that the said information was forwarded to the superior officer, the First Information Report specifically states that by informing the superior officer raiding party members proceeded towards the spot. The Constitution Bench in the aforesaid decision held that whether there has been an adequate or substantial compliance of Section 42 of the NDPS Act is a question of fact which can be decided in each case.

14. Thus, it is only upon trial that the aforesaid aspect could be decided in the present case also.

15. The lapses pointed out by learned counsel for applicants are *prima facie*. This aspect can be considered at the time of trial. Question is, whether applicants are entitled to claim any benefits at this stage for grant of bail on the basis of contentions raised in the context of Section 42 of the NDPS Act.

16. The Honourable Apex Court in the case of **State of Kerala vs. Rajesh**, reported in 2020 ALL SCR CRI 1555 laid down liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

17. Thus, satisfaction contemplated regarding accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of satisfaction on these aspect is *sine qua non* for grant of bail.

18. In the light of the above well settled legal position, there is a sufficient material on record to hold that applicants are involved in crime. In view of the rigor under Section 37 of the NDPS Act, I do not find merits in submissions of learned counsel for applicants and there are reasons to believe that applicants are guilty of said offences.

19. In this view of the matter, the application deserves to be rejected and the same is **rejected**.

The application stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!