



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

BAIL APPLICATION (BA) NO.155 OF 2024

Sheikh Aslam Sheikh Mustashekh .VS. The State of Maharashtra, through PSO
Malegaon, Washim

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

Mr Mir Nagman Ali, Advocate for the applicant
Ms K. H. Bhondge, APP for respondent/State

CORAM : G.A. SANAP, J.
DATE : MARCH 27, 2024.

Heard learned Advocate Mr Mir Nagman Ali
for the applicant and Ms K. H. Bhondge, learned APP
for the respondent/State.

2. The applicant, who is accused No.2, in Crime
No. 144 of 2022 registered at Malegaon police station
District Washim for the offences punishable under
Sections 15, 17, 22 and 25 of the Narcotic Drugs and
Psychotropic Substances Act, 1985 (for short 'the NDPS
Act') has made this application for bail under Section
439 of the Code of Criminal Procedure. This is the
second bail application made by the applicant before this
Court. The first application was withdrawn with liberty
to file a fresh application.

3. Learned Advocate for accused No.2/ applicant submitted that in this case there was no strict compliance of Section 50 of the NDPS Act. Learned Advocate submitted that third option given to the accused to give a search before the police officer, who was also a gazetted officer, has vitiated the entire search. Learned Advocate submitted that this third option given to the accused tantamount to a violation of the mandatory provisions of Section 50 of the NDPS Act. Learned Advocate submitted that, in view of such a violation, the entire prosecution against the accused has been vitiated. In order to seek support to his submissions, he has placed reliance on the decision of the Apex Court in the case of ***State of Rajasthan .v/s. Parmanand and another***¹. Learned Advocate submitted that, in view of this gross violation of the mandate of Section 50 of the NDPS Act, further incarceration of the accused is not warranted. Learned Advocate submitted that the accused is ready to abide by the conditions that may be imposed by the Court.

4. Learned APP submitted that the separate letters were given to accused Nos. 1 and 2 and they were

1 AIR 2014 SC 1384

informed about their right under Section 50 of the NDPS Act. Learned APP took me through those letters and pointed out that in writing, the accused were apprised of their right to give their search before the Magistrate or Gazetted Officer. Learned APP submitted that the third option, which has been recorded in the FIR and panchanama, was not given under these two letters. Learned APP submitted that the investigating officer may come before the Court and explain this inconsistency. Learned APP submitted that whether there was a breach and violation of Section 50 in this case or not will have to be decided in the backdrop of the two letters given to the two accused individually at the stage of the trial after recording the evidence. Learned APP submitted that in view of the facts of this case, the decision relied upon by the learned Advocate is not applicable, at this stage, for deciding the bail application.

5. The Hon'ble Apex Court in the case of *State of Rajasthan .v/s. Parmanand (supra)* has considered the decision of the Constitution Bench of the Apex Court in the case of *State of Punjab .v/s. Balbir Singh*². The

relevant observations from the Constitution Bench decision are in para No. 8 of this decision. Para No. 8 is extracted below:

“8. In State of Punjab v. Balbir Singh, this Court held that Section 50 of the NDPS Act is mandatory and non-compliance thereof would vitiate trial. In State of Himachal Pradesh v. Pirthi Chand, this Court held that breach of Section 50 does not affect the trial. There were divergent views on this aspect and, therefore, a reference was made to the Constitution Bench. Out of the three questions of law, which the Constitution Bench dealt with in State of Punjab v. Baldev Singh', the question which is relevant for the present case is whether it is the mandatory requirement of Section 50 of the NDPS Act that when an officer duly authorized under Section 42 of the NDPS Act is about to search a person, he must inform him of his right under sub-section (1) thereof of being taken to the nearest gazetted officer or nearest Magistrate. The conclusions drawn by the Constitution Bench, which are relevant for this case could be quoted.

"(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search 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 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, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.”

6. In this case, the Apex Court has held that if there are more than one accused, then they must be individually informed about their rights under Section 50 of the NDPS Act. It is held that they can be informed orally as well as in writing. In the facts of this case, it was found that one of the members of the raiding party was a Gazetted Officer and he informed the accused that he was a Gazetted Officer and the search could be conducted in his presence. The Apex Court has held that

in view of the third option given to the accused, it could not be said that the right of the accused has been properly taken care of and thereby, the mandate of Section 50 has been complied with in letter and spirit. It is held that failure to strictly comply the provisions of Section 50 of the NDPS Act vitiates the search and ultimately, the outcome of the prosecution.

7. I have gone through the copy of the charge-sheet filed on record. It is seen on perusal of the panchanama as well as the FIR that, there is a mention that, apart from the appraisal of the right of the accused in terms of Section 50 of the NDPS Act, the third option was given to the accused for giving search in presence of the investigating officer. The moot question in this case, at this stage, is as to whether this material is sufficient to establish the *prima facie* compliance of Section 50 of the NDPS Act. In my view, in this case, the two letters given to the accused individually are part of the charge-sheet. Perusal of those letters, which were prepared before conducting the search and more particularly before drawing the panchanma and lodging the FIR, show that there is no mention of the third option as sought to be

contended on the basis of the panchanama and the FIR. Perusal of two letters given to two accused individually would show that the accused Nos. 1 and 2 were apprised of their rights under Section 50 of the NDPS Act. They were specifically informed in writing that they have a right to give their search before the gazetted officer or the Magistrate and if they so demand then the necessary arrangements could be made. The accused Nos. 1 and 2 made an endorsement on their individual letters that they understood their right and thereafter, they expressed their willingness to give the search before the police. In my view, these letters at this stage, are prima facie evidence to establish compliance of Section 50 of the NDPS Act.

8. As far as the third option, which has been recorded in the FIR and panchanama is concerned, the same could be a matter of evidence. The investigating officer would be required to depose about it. The letters which are part of the record can not be brushed aside. In view of the letters given to the accused individually the prima facie compliance of Section 50 of the NDPS Act was made before conducting the search. It is to be noted

that whether the compliance of Section 50 has been made or not is a question of fact and the same has to be decided on the basis of the evidence adduced by the prosecution. At this stage, on the basis of the available material, it cannot be held that there was total non compliance of Section 50 of the NDPS Act and as such, the entire prosecution against the accused persons has been vitiated.

9. It needs to be stated that the charges have been framed against the accused. Learned APP has made a statement across the bar that the programme for recording the evidence is likely to be finalized very shortly. In view of this, it cannot be said that the learned Judge has not taken steps to conduct the trial speedily. In view of this, I do not see any substance in the application. In the facts and circumstances, at this stage, the law laid down, as above, is not of any help to the case of the accused No.2. As such, the bail application stands rejected.

(G. A. SANAP, J.)