



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

CRIMINAL APPLICATION (BA) NO.679/2023

Sunil s/o Sheshrao Pawar

..VS..

**State of Mah., through PSO PS Mehkar, Taluka Mehkar, District
Buldana**

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

Court's or Judge's Order

.....
Shri A.K.Bhangde, Counsel for the Applicant.
Ms.T.H.Udeshi, Additional Public Prosecutor for the State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 06/02/2024

PRONOUNCED ON : 12/02/2024

1. Heard learned counsel Shri A.K.Bhangde for the applicant and learned Additional Public Prosecutor Ms.T.H.Udeshi for the State.

2. The applicant came to be arrested on 19.5.2022 in connection with Crime No.284/2022 registered with the non-applicant/police station for offences punishable under Sections 2(b), 8(c), 20(b)(c), and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act) and under Sections 130 and 177 of the Motor Vehicles Act and, therefore, the present application is filed for grant of regular bail.

3. The accusations against the applicant are on the basis of a report lodged by Police Sub Inspector Shri Vijaykumar Uttamrao Ghule attached with Mehkar Police Station, district Buldana. As per the report, the complainant received a secret

information that the applicant is indulged in selling contraband substance viz. "Ganja" in a hut situated at Janephal Road and, therefore, he and police officials conducted a raid and the applicant is found in possession with 17 sealed packets having smell like "Ganja". After following due procedure, they arrested the applicant.

4. Initially, the applicant filed an application before the trial court seeking bail. However, the said application was rejected.

5. The applicant, as per allegations, was found in possession 35.407 kilograms of "Ganja" and thereby he committed an offence under the NDPS Act.

6. Learned counsel for the applicant submitted that there is no compliance under Sections 50 and 52-A of the NDPS Act. The provisions of the NDPS Act are extremely stringent coupled with various presumptions raised against the applicant as well as stringent bail conditions and, therefore, the same require a strict compliance. He submitted that the applicant was not informed, in view of Section 50 of the NDPS Act, about his right to be searched before gazetted officers. The settled position of law is that a person to be searched under the NDPS Act is required to be told about his right, before he is searched, under Section 50 of the NDPS Act and that is the mandatory

requirement. He submitted that apart from the above, there is also no compliance under Section 52-A of the NDPS Act which states that samples are to be obtained in presence of the Magistrate. If samples, at the time of seizure, are obtained, the said samples and seized materials are to be forwarded forthwith to the Magistrate for inventory. There is an inordinate delay in following the procedure prescribed under Section 52-A of the NDPS Act. The drawing of samples, at the time of seizure of contraband, is permissible. In the light of the above, rigor under Section 37 of the NDPS Act would not attract and, therefore, the applicant is entitled to be released on bail.

7. Learned Additional Public Prosecutor for the State strongly opposed the application on the ground that the samples were drawn at the time of seizure in presence of panchas and the same were immediately sent to the Forensic Science Laboratory for its analysis. The analysis report shows that it is analyzed as "Ganja". She submitted that provisions under Section 52-A of the NDPS Act nowhere prohibit to obtain samples at the stage of seizure. The reasons for the delay for not forwarding the samples before the Magistrate are matter of trial. She further submitted that it is not law that samples drawn at the time of seizure in presence of panchas have to be discarded totally. There is rigor under Section 37 of the NDPS Act and, therefore, the application deserves to be rejected.

8. Having heard learned counsel for parties and perused record available, First Information Report shows that on 19.5.2022 the informant received a secret information and he immediately conducted a raid along with police officials by visiting a hut owned by the applicant and found the applicant in possession 35.407 kilograms of "Ganja". It further reveals from investigating papers that on 19.5.2022 a letter was issued before proceeding to the raid to the Tahsildar requesting to send gazetted officers to conduct the search. Accordingly, a Naib Tahsildar was directed to remain present at the place of the seizure. A written communication was also issued to the applicant stating that his personal search is to be carried out and if he requires his personal search to be in presence of gazetted officers, he can ask for the same. The applicant, who is illiterate, stated that he cannot read and write and, therefore, in presence of panchas the letter was read over to him and his right to be searched before gazetted officer was informed to him. However, he was not intending that his personal search or search of his house requires to be carried out in presence of gazetted officers. As the applicant did not raise any objections, regarding his search before panchas and police officers and that he has not insisted for presence of gazetted officer, the search was carried out and during the personal search and search of the house, contraband articles are found in his possession.

“50. Conditions under which search of persons shall be conducted. -

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazette Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazette Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within a seventy-two hours send a copy thereof to his immediate official superior.”

9. The settled position of law is that a person to be searched under the NDPS Act is required to be informed about

his right under Section 50 of the NDPS Act before he is searched and the same is mandatory requirement. Section 50 of the NDPS Act would be applicable in case of personal search of accused and not when it is in respect of baggages; articles, and vehicles and or container. In case, where searching officer fails to communicate accused, who are subjected to search that he has a right to search in the presence of the gazetted officer or magistrate, there would be non-compliance of requirement of Section 50 of the NDPS Act.

10. It is also well settled law that, merely for the reasons that accused did not make request to searching officer on his own that the search should be conducted in presence of such officer, it cannot be held that there was no need to inform him about his right. Requirement of the said Section is that accused is to be informed about his right to be searched before gazetted officer.

11. It is not disputed that there is no specific form prescribed or intended for conveying information required to be given under Section 50 of the NDPS Act. What is necessary is, that accused should be made aware about existence of his right to be searched in presence of one of officers named in Section itself. Since no specific mode or manner is prescribed or intended, substance is to be seen and

not the form of intimation.

12. Coming back to the present case, insofar as compliance is concerned, the communication on record shows that after receipt of the information, the informant has issued a letter to the Tahsildar for making available the gazetted officer. Not only this, the Residential Naib Tahsildar was directed to remain present at the spot where the search is to be conducted. Moreover, intimation letter was issued to the applicant in presence of panchas. The contents of the said communication was read over to the applicant and his right of search in presence of the gazetted officer is intimated to the applicant, but he denied to avail his right to be searched before the gazetted officer.

13. The next submission of the applicant is that there is no compliance of Section 52-A of the NDPS Act also.

14. Chapter V of the NDPS Act pertains to procedure. Section 51 contained in the said Chapter provides that the provisions of the Code of Criminal Procedure shall apply insofar as they are not inconsistent with the provisions of the Act to all the warrants issued and arrests, searches and seizures made under the NDPS Act. Thus, unless there is anything contrary provided in the NDPS Act, in relation to all the warrants issued and arrests, searches and seizures carried out by the

investigating agency during the course of investigation, the provisions of the Cr.P.C. would apply.

15. Section 52 of the NDPS Act pertains to disposal of persons arrested and articles seized. Sub-section (2) of Section 52 provides that every person arrested and articles seized under the warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. Sub-section (3) of Section 52 provides that every person arrested and article seized under sub-section (2) of Sections 41, 42 or 43 or 44 shall be forwarded without unnecessary delay (a) to the officer in-charge of the nearest police station; or (b) to the officer empowered under Section 53. Sub-section (4) of Section 52 which is of importance, provides, that the authority or officer to whom any person or article is forwarded under Sub-section (2) or sub-section (3) shall with all convenient dispatch take such measures as may be necessary for the disposal according to law of such person or article. It is in this context that Section 52A comes into play. The Section pertains to disposal of seized narcotic drugs and psychotropic substances. Sub-section (1) of Section 52A provides that the Central Government may having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration in respect to narcotic drugs or psychotropic substances specify

such substances which shall as soon as may be after the seizure be disposed off by such officer and in such manner as the government may from time to time determine after following the procedure hereafter specified. Sub- section (2) of Section 52 prescribes the procedure for preparation of inventory etc., of the seized substances and enables the competent officer to apply to the Magistrate for the purpose of (a) certifying the correctness of inventory; or (b) taking in presence of the Magistrate photographs of such drugs, substances or conveyances and certifying such photographs as true; or (c) allowing to draw representative samples of such drugs or substances in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. Sub- section (3) of Section 52A provides that when an application is made under sub-Section (2) the Magistrate shall as soon as may be allow the application. This is significant since this sub-section does not leave any discretionary powers in the Magistrate to grant or not to grant an application so made under sub-Section (2). It only requires the Magistrate to allow the application as soon as possible. Sub-section (4) of Section 52A is of great importance. It provides that notwithstanding anything contained in the Indian Evidence Act or the Cr.P.C., every court trying an offence under the NDPS Act shall treat the inventory, the photographs of narcotic drugs, psychotropic substances or controlled

substances or conveyances and any list of samples drawn under sub-Section (2) and certified by the Magistrate as primary evidence in respect of such offence.

16. Thus, provisions contained in Section 52-A of the NDPS Act show that it is connection with disposal of seized narcotic drugs psychotropic substances. What is required is that the Magistrate shall certify the same and inventory and any list of samples drawn certified by the Magistrate would be treated as a primary evidence.

17. Learned counsel for the applicant has placed reliance on **Simarnjit Singh vs. State of Punjab** decided on 9.5.2023 in Criminal Appeal No.1443/2023 wherein the Honourable Apex Court has refused to accept evidence of drawing of samples at spot and conviction was set aside. The Honourable Apex Court has given benefit of observation and the view is expressed on the basis of the evidence recorded and the decision is delivered after a full-fledged trial.

He has further placed reliance on the decision of the Honourable Apex Court in the case of **Union of India vs. Mohanlal and anr, reported in (2016)3 SCC 379** wherein in the light of possibility of pilferage contraband goods and its return into the market took help of Islamic *curiae* and examined the issue of proper disposal of same at considerable length. In

paragraph No.14, the Honourable Apex Court has taken a note of the statutory provisions contained in Section 52-A of the NDPS Act. Perusal of the entire judgment reveals proper disposal of contraband goods seized during course of investigation was an issue and it is observed that the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the things arise.

18. In the case of **Bothilal vs. The Intelligence Officer, Narcotics Control Bureau, reported in 2023(6) SCALE 377** it is observed that drawing of samples from all packets at the time of seizure is not in conformity with what is held by this Court in the case of Mohanlal *supra*. It was, therefore, observed that this creates a serious doubt about the prosecution's case that the substance recovered was contraband.

19. In the case of **Simarnjit Singh vs. State of Punjab** *supra* also, it is observed that seizure was not in conformity with the law laid down by the court and creates a serious doubt.

20. In the case of **Mangilal vs. The State of Madhya**

Pradesh, decided on 12.7.2023 in Criminal Appeal No.1651/2023, the Honourable Apex Court observed that when there is non-compliance, where a certification of Magistrate is lacking any inventory, photograph or list of samples, would not constitute primary evidence.

21. In the light of the above, entire issue revolves around, whether judgments *supra* completely take away the discretion of the court while considering question of bail and whether rigor under Section 37 of the NDPS Act would not apply.

22. It is apparent that samples are obtained in presence of panchas on 19.5.2022. On 26.5.2022, samples and seized materials were produced before the Magistrate for inventory.

23. Admittedly, there is non-compliance as the seized muddemal were not produced forthwith. This aspect is dealt by this court at Principal Seat in **Mukesh Rajaram Chaudhari vs. The State of Maharashtra**, reported in 2023 SCC OnLine Bom 2096 wherein it is observed that it is undoubtedly true that when the investigating agency has not followed the procedure under Section 52-A of the NDPS Act, the deeming fiction of photographs, samples etc., being treated as primary evidence as provided under Sub-section (4) of Section 52-A of the NDPS Act would not be available. However, the question is, is this the only mode in which the prosecution can establish the charge

against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52-A of the NDPS Act and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provided under Section 52-A of the NDPS Act before destroying or disposing off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52-A of the NDPS Act . The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the goods have been destroyed with the permission of the Magistrate. In such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52-A of the NDPS Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it.

24. Admittedly, both aspects can be considered at the time of trial. At this stage, when court is concerned with question of granting or refusing bail, this cannot be the sole

consideration, but if it fits by one of sole considerations, rigor of Section 37 of the NDPS Act. In view of Section 37 of the NDPS Act, the bail can be granted if court is satisfied that reasonable grounds of believing that the accused is guilty of offence that is likely to commit while on bail. The bail should be granted.

25. Thus, satisfaction contemplated regarding the 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 quo non* for grant of bail.

26. In the light of the above well settled legal position, at this stage, there is sufficient material on record to hold that the applicant is involved in crime.

27. In view of rigor under Section 37 of the NDPS Act, I do not find any merit in the submissions of learned counsel for the applicant and there are reasons to believe that the applicant is guilty of the said offences.

28. 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 !!