



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

CRIMINAL APPLICATION (BA) NO.685/2023
Vaibhav s/o Naresh Dhulas

..VS..

The State of Mah., thr.PS0 PS Kurkheda, District Gadchiroli

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

Court's or Judge's Order

.....
Shri S.P.Bhandarkar, Counsel for the Applicant.
Ms.T.H.Udeshi, Additional Public Prosecutor for the
State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 11/03/2024

PRONOUNCED ON : 19/03/2024

1. Heard learned counsel Shri S.P.Bhandarkar
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.126/2022
registered with the non-applicant/police station for
offences punishable under Sections 20(B) and 22(c)
of the Narcotic Drugs and Psychotropic Substances
Act, 1985 (the NDPS Act) and, therefore, he seeks
regular bail by this application.

3. Accusations against the applicant are on
the basis of report lodged by Police Constable Anil

Yashwant Warkade attached to Kurkheda Police Station, Gadchiroli. As per the report, when on 24.8.2022 he and his associates were performing duty at Gothangaon Naka, at about 11.05 pm, one white car bearing registration No.MH-46/AL/6545 was intercepted by them as they suspected the vehicle. During search of the vehicle, two gunny bags containing dry ganja weighing 24.700 kilograms were found and the same were seized by following a due procedure of law. The samples were obtained in presence of panchas and sent for forensic analysis. The applicant and another co-accused are arrested on the spot. On the basis of the said report, the police registered the crime.

4. Initially, the applicant had filed an application before the sessions court seeking bail, however the same was rejected.

5. Learned counsel for the applicant submitted that as per seizure panchanama, description mentioned as contraband article is dry "Ganja". The samples are not produced and obtained before the Magistrate. Neither the report nor the seizure panchanama describes the contraband article which was seized. There is no compliance of Section 52-A

of the NDPS Act. Though the Chemical Analyzer's Report discloses the contraband article as "Ganja", description mentioned is, greenish and brownish colour leaves, flowering tops, seeds, and stalks are put in a polythene. The said description neither reflects in the report and seizure panchanama nor in inventory report. The inventory report only shows that said gunny bags containing green colour herbs (vanaspati) are having of dry "Ganja". Thus, there is no consistency, regarding the description of articles seized, to show that it was "Ganja". He submitted that in order to rescue from the clutches of legal provisions, the description is not mentioned. From photographs it cannot imagine that seized articles are fruiting or flowering tops. At the time of inventory also, samples were not taken. He submitted that in catena of decisions, the Honourable Apex Court held that non-compliance of Section 52-A of the NDPS Act is fatal to the prosecution and it vitiates trial. The Standing Order, regarding seizure and storage, is also not followed by investigating officer. Considering the entire scenario and circumstances, there is no *prima facie* case against the applicant and, therefore, rigor under Section 37(1)(a) of the NDPS Act will

not come into play and the applicant deserves to be released on bail. In addition to this submission, he further submitted that there is no compliance of Sections 42 and 50 of the NDPS Act, which is mandatory requirement.

6. Learned Additional Public Prosecutor for the State strongly opposed the application on ground that samples were drawn at the time of seizure in presence of panchas and the same were immediately sent to Forensic Science Laboratory for its analysis and analysis report shows that it is analyzed as "Ganja". She submitted that provisions under Section 52-A of the NDPS Act nowhere prohibits to obtain samples at the stage of seizure. Reason for the delay or non production of samples before the Magistrate is matter of trial. She further submitted that it is not the 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.

7. Having heard learned counsel for the applicant and learned Additional Public Prosecutor for the State and perused record available, the

First Information Report shows that when on 24.8.2022 Police Constable Anil Yashwant Warkade, attached to Kurkheda Police Station, Gadchiroli, and his associates were performing duty at Gothangaon Naka, at about 11.05 pm, one white car bearing registration No.MH-46/AL/6545 was intercepted by them as they suspected the vehicle. During search of the vehicle, two gunny bags containing dry "Ganja" weighing 24.700 kilograms were found and the same were seized by following a due procedure of law. The samples were obtained in presence of panchas and sent for forensic analysis. The applicant and another co-accused were arrested on the spot. On the next day, contraband article is placed before the Magistrate for inventory. During inventory, the Magistrate observed that seized contraband article is green colour herbs (vanaspati) which is known as dry "Ganja". The contraband with gunny bags and without gunny bags was weighed and accordingly inventory was conducted. During investigation, it further revealed that the applicant and other co-accused were informed regarding their right of search in presence of gazetted officer. The said option was not availed by the applicant and other co-accused and, therefore, personal search are not

carried out in presence of the gazetted officer.

8. Section 50 of the NDPS Act states as under:

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

(1) When any officer duly authorized 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 authorized 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, vehicles or container.

10. It is further contention of learned counsel for the applicant that there is non-compliance of Section 42 of the NDPS Act also which is mandatory.

11. Section 42 of the NDPS Act 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

(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:

¹[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.

12. 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.

13. 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, reported in (2009)8 SCC 539**. 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.

14. Thus, if the aforesaid judgment is taken into consideration, facts of the present case show that while the informant was on Bandobast Duty on 24.8.2022 at about 11:05 pm, he intercepted the car and the applicant along with the co-accused was found carrying the contraband articles. The documents show that the raid has been conducted. The raid was conducted by the Head Constable. As regards proviso to Section 42(1) of the NDPS Act, it was submitted that documents on record did indicate that the superior officer was not informed. 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. Thus, it is only upon trial that the aforesaid aspect could be decided in the present case also.

15. Second limb of submissions was that there is no compliance of Section 52-A of the NDPS Act.

16. Learned counsel for the applicant placed reliance on Standing Orders issued by the Ministry of Finance vide Notification dated 23.12.2022.

Chapter-II of the said Standing Orders

deals with seizure and storage of seized material. Narcotic drugs and psychotropic substances and controlled substances seized under the NDPS Act shall be classified in view of sub clause (1) of Clause-3 of Chapter-II of the said Standing Orders and the said classification is based on physical properties and shall be weighed separately.

Sub clause (2) of Clause-3 of Chapter-II of the said Standing Orders states that if narcotic drugs, psychotropic substances, and controlled substances are found in packages or containers, such packages and containers shall be weighed separately and serially numbered for the purpose of identification.

Proviso to sub clause (3) of Clause-3 of Chapter-II of the said Standing Orders states that bulk quantities of "Ganja" and poppy straw may be packed in gunny bags and sealed in such a way that it cannot be tampered with.

Sub clause (4) of Clause-3 of Chapter-II of the Said Orders states that clarification, weighing, packaging, and numbering referred to in this sub-rule shall be done in presence of search witnesses

(panchas) and the person from whom possession drugs and substances were recovered and a mention to this effect shall invariably be made in panchanama drawn on the spot of seizure.

Sub clause (5) of Clause-3 of Chapter-II of the said Standing Orders states detailed inventory of packages, containers, conveyances, and other seized articles shall be prepared and attached to panchanama.

Chapter-III of the said Standing Orders deals with sampling. Whereas, Chapter-IV of the said Standing Orders deals with disposal.

17. Chapter-V of the NDPS Act pertains to procedure.

Section 51 contained in the said Chapter provides that provisions of the Code of Criminal Procedure shall apply insofar as they are not inconsistent with provisions of the NDPS Act to all warrants issued and arrests, searches and seizures made under the NDPS Act.

18. Thus, unless there is anything contrary provided in the NDPS Act, in relation to all

warrants issued and arrests, searches and seizures carried out by investigating agency during course of investigation, provisions of the Cr.P.C. would apply.

19. Learned counsel for the applicant placed reliance on the decision in the case of **Simarnjit Singh vs. State of Punjab, 2023 LiveLaw (SC) 570** wherein the Honourable Apex court has refused to accept evidence of drawing samples at spot and conviction was set aside. The Honourable Apex Court has given benefit of observation and view is expressed on the basis of evidence recorded and the decision is delivered after a full-fledged trial.

He further placed reliance on the order in Criminal Application (BA) No.650/2023 (**Shrinivas Narsayya Machidi vs. State of Mah.**) decided on 20.12.2023 wherein this court considered definition of "Ganja" and observed that seized material was weighed after separating flowering tops and held that it is difficult to ascertain whether it can be said to be commercial quantity and considering there is non-compliance of provisions, granted bail.

20. In the case of **Simarnjit Singh vs. State of**

Punjab *supra*, it is observed that seizure was not in conformity with law laid down by the court and creates a serious doubt.

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

22. Admittedly, samples were not obtained and produced before the Magistrate. It is undoubtedly true that when investigating agency has not followed procedure under Section 52-A of the NDPS Act, deeming fiction of photograph 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. Whether any mode otherwise in which the prosecution can establish a charge against the accused, though the prosecution has not followed provisions of Section 52-A of the NDPS Act and not drawn samples in presence of Magistrate, still the prosecution has followed procedure of obtaining samples in presence of independent witnesses i.e. panchas. Whether procedure followed by the

investigating agency is sufficient to establish a charge against accused, is a matter of evidence.

23. At this stage, when the court is concerned with question of granting or refusing bail, the same cannot be the sole consideration. However, consideration should be viewed in the light of rigor of Section 37 of the NDPS Act. In view of Section 37 of the NDPS Act, bail can be granted if court is satisfied i.e. applicant is not likely to commit offence while on bail and the bail can be granted if the court is satisfied that there are reasonable grounds for believing that applicant is not guilty of offence.

24. Learned counsel for the applicant further placed reliance in the cases of **Amani Fidel Chirs vs. Narcotics Control Bureau**, reported in 2020 SCC OnLine Delhi 2080 and **Mukesh Rajaram Chaudhary vs. State of Maharashtra**, reported in 2023 SCC Online Bom 2096 to submit that as far as observation in the case of **Mukesh Rajaram Chaudhary** *supra* is concerned, co-ordinate bench of this court had only considered sub section (4) of Section 52-A and not sub section (2) of Section 52-A of the NDPS Act.

25. The lapses pointed out by learned counsel for the applicant are *prima facie*. This aspects can be considered at the time of trial. Question is, whether the applicant is entitled to claim any benefit at this stage for grant of bail on the basis of contentions raised in the context of Sections 42 and 52-A of the NDPS Act.

26. 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.

27. 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 quo non* for

grant of bail.

28. In the light of the above well settled legal position, there is sufficient material on record to hold that the applicant is 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 the applicant and there are reasons to believe that the applicant is guilty of said offences.

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

30. The record and proceedings be sent back.

The application stands **disposed** of.

(**URMILA JOSHI-PHALKE, J.**)

!! BrWankhede !!