



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

CRIMINAL APPLICATION (BA) NO.948 OF 2024

Mohd.Arshann s/o Mohd.Issar and anr

..VS..

**State of Maharashtra, through PSO Railway Police Station, Gondia,
District Gondia**

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

Court's or Judge's Order

Shri M.V.Rai, Counsel for Applicants.

Shri S.V.Narale, Additional Public Prosecutor for the NA/State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 19/11/2024

PRONOUNCED ON : 27/11/2024

1. Applicants, who are since date of arrest i.e. 30.4.2024 are in jail, seek regular bail in Crime No.92/2024 registered with the non-applicant/police station for offences under Sections 20(b)(ii), 29, and 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. Accusations against applicants are on the basis of report lodged by Assistant Sub Inspector Shri Yuvraj Govind Ramteke serving in Railway Protection Force.

As per the report, the complainant along with

other raiding party members conducted a raid in Train No.08327 (Sambalpur-Pune Express) and during the raid, in Coach No.B-3, beneath Seat Nos.17, 18, 19, 20, and 21, contraband “Ganja” was recovered from five persons including applicants. As per Reservation Chart, said seats were allotted to applicants along with other co-accused persons. Commercial quantity of “Ganja” of 33.201 kilograms worth of Rs.6,64,020/- was found. During search, co-accused Rahul and his wife Sonali were found in possession of bags from which the contraband article “Ganja” was seized.

3. Insofar as applicants are concerned, from possession of applicant No.1, 8.333 kilograms of “Ganja” was recovered. Whereas, from possession of applicant No.2, 11.339 kilograms of “Ganja” was recovered. The Investigating Officer collected samples in presence of panchas from each of bags. The entire contraband articles were referred to inventory to the Judicial Magistrate. Samples obtained were forwarded to the Chemical Analyzer. After completion of investigation, chargesheet was filed

against accused persons.

4. Heard learned counsel Shri M.V.Rai for applicants and learned Additional Public Prosecutor Shri S.V.Narale for the State.

5. Learned counsel for applicants submitted that there was no compliance of Sections 50 and 52-A of the NDPS Act. It is submitted that provisions of the NDPS Act are extremely stringent coupled with various presumptions raised against applicants as well as stringent bail conditions and, therefore, the same require a strict compliance. He submitted that there was no compliance of Section 50 of the NDPS Act. There was no compliance of Section 52-A of the NDPS Act also. He submitted that commercial quantity was not found as individually applicants were found in possession of contraband articles less than commercial quantity and, therefore, rigour under Section 37 of the NDPS Act will not attract. In view of that, applicants be released on bail.

6. Learned Additional Public Prosecutor for the State strongly opposed the application on ground that as per

Reservation Chart, Seat Nos.17, 18, 19, 20, and 21 were allotted to applicants and other co-accused persons. All accused persons were carrying contraband articles, which were of commercial quantity and thus they found in possession of commercial quantity. He submitted that as far as compliance under Section 50 of the NDPS Act is concerned, the same was not required. As far as compliance under Section 42 of the NDPS Act is concerned, there was a substantial compliance and though samples were not obtained in presence of the Magistrate, the same were obtained by following a procedure under the Code of Criminal Procedure. In view of that, the application be rejected.

7. Having heard learned counsel for parties and perused investigation papers, it reveals that contraband quantity was seized from applicants and other co-accused persons. As far as authorship of bags are concerned, statements of applicants and the Reservation Chart are sufficient to show that contraband articles belong to applicants.

8. Coming to compliance under Section 50 of the NDPS Act is concerned, the same was not required in respect of baggage or vehicles or container. It would be applicable in case of personal search. It is not disputed that Notice was issued to applicants as to their search. 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 the Section itself.

9. The next submission of learned counsel for applicants is that there was no compliance under Section 52-A of the NDPS Act also.

10. 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.

11. 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.

12. 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.

13. 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.

14. It is apparent that samples were obtained in presence of panchas on 29.4.2024. Immediately, a dog squad was also called. Contraband articles were forwarded to Inventory. The inventory was conducted in presence of the Magistrate. Inventory Note shows that commercial quantity contraband was seized by the Investigating Agency. Chemical Analyzer's Report substantiates contention that the contraband article was found in possession of applicants.

15. 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 would attract. In view of Section 37 of the NDPS Act, bail can be granted if court is satisfied that reasonable grounds of believing that accused is guilty of offence that is likely to commit while on bail.

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

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

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

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

Application stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!