



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

CRIMINAL APPLICATION (BA) NO.942 OF 2024
Rahul Gotiram Sabale

..VS..

State of Maharashtra, thr.its PSO PS Dhad, District Buldhana

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

Court's or Judge's Order

Shri R.Bidkar, Counsel for the Applicant.
Shri K.R.Lule, Additional Public Prosecutor for the NA /State.

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 09/12/2024
PRONOUNCED ON : 18/12/2024

1. By this application under Section 439 of the Criminal Procedure Code, the applicant seeks regular bail in connection with Crime No.347/2023 registered with the non-applicant/police station for offences punishable under Sections 8(C), 20(B)(II), and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. The applicant came to be arrested on 9.11.2023 and since then he is in jail.

3. Heard learned counsel Shri R.Bidkar for the applicant and learned Additional Public Prosecutor Shri K.R.Lule for the State.

4. The accusations against the applicant are on the basis of a report lodged by Police Sub Inspector Shri Shrikant Ramrao Jidamwar (the complainant) on an allegation that he received a secret information that one truck bearing No.DD-01/C/9131 proceeding from Jafrabad to Dhad village was carrying the "Ganja" and was transporting the same illegally and, therefore, he along with other raiding party members intercepted the truck and "Ganja" weighing 469.300 kilograms worth of Rs.91,88,000/- along with two mobile phone was seized. The applicant was caught red handed along with the contraband article by following a due procedure of law and by obtaining the samples, the contraband "Ganja" was seized and FIR was lodged against the applicant.

5. Learned counsel for the applicant submitted that the entire investigation papers show description of the contraband articles as "greenish leaves". The leaves are not within the definition of "Ganja". Moreover, there is no compliance under Section 52-A of the NDPS Act. The entire contraband article was mixed and sample was obtained. 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 requires a strict compliance. He submitted that even sampling was not done properly. The samples are drawn on spot after mixing the contraband which is not permissible. The samples are not obtained in presence of the Magistrate. Mandatory provisions are not followed and, therefore, rigour under Section 37 of the NDPS Act will not attract. In view of that, the application deserves to be allowed.

6. In support of his contentions, learned counsel for the applicant placed reliance on following decision:

(1) Bail Application No.1646/2022 (Abdul Kadir Ghogari vs. Union of India and anr) decided by this court on 15.9.2023;

(2) Bail Application No.253/2023 (Kashif vs. Narcotics Control Bureau) decided by the Delhi High Court on 18.5.2023;

(3) Criminal Appeal No.1610/2023 (Mohammed Khalid and anr vs. The State of Telangana) decided by the Hon'ble Apex Court on 1.3.2024;

(4) Thana Singh vs. Central Bureau of Narcotics, reported in 2013 Cri.L.J. 1262;

(5) Criminal Application (BA) No.101/2023 (Praveen Supda Chavan and anr vs. State of Maharashtra) decided by this court on 23.6.2023;

(6) Bail Application No.3784/2023

(Venkatesh Shiva Permal vs. The State of Maharashtra) decided by this court on 23.1.2024, and

(7) Bail Application No.2108/2023 (Sameer Rais Shaikh vs. The State of Maharashtra) decided by this court on 3.11.2023.

7. *Per contra*, learned Additional Public Prosecutor for the State strongly opposed the application on the ground that commercial quantity was seized from the applicant. In view of rigour under Section 37 of the NDPS Act, the application deserves to be rejected.

8. After hearing both the sides and perusing of the investigation papers, it reveals that on receipt of the secret information, the complainant and other raiding party members conducted the raid. Prior to the raid, the information was reduced into writing and entry was taken to that effect. A Gazetted Officer was also called and the applicant was informed as to his right to take their personal search as well as right of his search before the Gazetted Officer. The information received was also conveyed to the superior police officer. On interception of the truck, two drawers were found wherein two packets were found. The said packets were opened and from the said packets 91

bundles were found wherein there were “greenish leaves” having strong odor and the same were seized. The entire contraband was weighed 469.300 kilograms. The samples were obtained from the said contraband. Accordingly, panchanama was drawn. While drawing the panchanama, every packet was weighed and weight of the packet was mentioned in the panchanama. The contraband article was also sent for the inventory. The inventory also shows the weight of every sample. The samples were also referred for the analysis.

9. The first limb of submission is that the seized contraband articles are not “Ganja” within the definition of “Ganja” as only leaves are mentioned not only in the report but also in the inventory certificate. It is significant to note that the definition of “Ganja” under the NDPS Act takes in its ambit only flowering or fruiting tops of cannabis plant and excludes the seeds and leaves when not accompanied by the tops. Thus, the definition of “Ganja” is restricted and it does not include the seeds and leaves of “Ganja”.

10. In the light of the above definition, if the description in the case mentioned is taken into consideration,

it shows “उग्रट वासाचा कळीदार थोडा ओलसर “गांजा”.” The word “कळीदार” itself is sufficient to show that it was along with the flowering tops. If the leaves are along with the flowering or fruiting tops, it is covered under the definition of “Ganja”.

11. Another limb of submission was that, there was no compliance of Section 52-A of the NDPS Act. 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 Code of Criminal Procedure would apply.

12. 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 52-A comes into play. The Section pertains to disposal of seized narcotic drugs and psychotropic substances. Sub-section (1) of Section 52-A 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 hereinafter 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 52-A provides that when an application is made under sub-Section (2) the Magistrate shall as soon as may 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 52-A 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.

13. Thus, provisions contained in Section 52-A of the NDPS Act show that it is connected 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.

14. This aspect is considered by the Hon'ble Apex Court in catena of decisions. The purpose of incorporation of Section 52-A of the NDPS Act is to mitigate the issues of the hazardous nature of the contraband, vulnerability to theft, substitution, and constraint of proper storage space etc. The same is a major to safeguard primary evidence even when the contraband is disposed.

15. In case of State of **Punjab vs. Balbir Singh, reported in (1994)3 SCC 299** it has been held that while officers cannot totally ignored the provisions under the NDPS Act, mere non-compliance will not vitiate the prosecution. It was held that prejudice caused by the non-compliance would have to be shown by the accused and alternatively, the prosecution would need to give a proper explanation for non-

compliance without which the non-compliance will adversely affect the prosecution's case.

16. In the case of **Arvind Yadav in JC through his Parokar vs. Government of NCT of Delhi (Bail Application No. 1416/2021)**, the Delhi High Court held that non-compliance of Section 52-A of the NDPS Act would not vitiate the trial.

17. In the case of **Superintendent, Narcotics Central Bureau of Investigation vs. R.Paulsamy, reported in AIR 2000 SC 3661** it is observed by the Hon'ble Apex Court that it is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been prejudged by learned single Judge at the stage of consideration for bail. The minimum which learned single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before learned single Judge during bail stage regarding the compliance of the formalities mentioned in those two sections.

18. The Hon'ble Apex Court has laid down the parameters to be followed while considering the bail applications moved by the accused involved in offences under the NDPS Act in the case of **Union of India vs. Ram Samujh and anr, reported in (1999)9 SCC 421** wherein it is held that the jurisdiction of the Court to grant bail is circumscribed by the provision of Section 37 of the NDPS Act. It can be granted in case where there are reasonable grounds for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. At this juncture, a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and non-bailable. It reads thus:

"37. Offences to be cognizable and non-bailable:

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973:

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 of section 27-A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) the limitations on granting of bail specified in clause (b) of sub- section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting bail."

19. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely.

20. To check the menace of dangerous drugs flooding

the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37 are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail and cancelled the bail.

21. Learned counsel for the applicant placed reliance on order in **Bail Application No.1646/2022 (Abdul Kadir Ghogari vs. Union of India and anr)** *supra* wherein the decision of the Hon'ble Apex Court in the case of **Union of India vs. Mohanlal, reported in (2016)3 SCC 379** was considered.

The Hon'ble Apex Court in **Criminal Appeal No.1610/2023 (Mohammed Khalid and anr vs. The State of Telangana)** *supra* on the basis of the evidence recorded before the trial court held that no proceedings under Section 52-A of the NDPS Act were undertaken by the Investigating Officer for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate.

The Hon'ble Apex Court in the case **Thana Singh**

vs. Central Bureau of Narcotics *supra* also on the basis of the evidence it is held retesting and re-sampling are permissible only in exceptional cases.

In the case of **Bail Application No.3784/2023 (Venkatesh Shiva Permal vs. The State of Maharashtra)** *supra* the contraband articles were seized on 31.1.2023 and inventory was conducted on 10th Feb. On the basis of the same, the observation of the court is, it vitiates the seizure.

22. In the present case, the samples were obtained on 9.11.2023 and inventory was on 20.11.2023 and immediately the samples were forwarded to analysis on 27.11.2023.

23. This court, at this stage, is ceased with the limited question of whether the alleged non-compliance would entitle the applicant to grant bail. The most of decisions are placed by learned counsel for the applicant especially the decision of the Hon'ble Apex Court in **Criminal Appeal No.1610/2023 (Mohammed Khalid and anr vs. The State of Telangana)** *supra* which is passed on the basis of the evidence recorded therein.

24. As far as issue regarding improper sampling is concerned, the onus is on the prosecution to establish that

the seized substance is the contraband and in absence of proper procedure being followed, the recovery would be deemed suspicious. The Courts have noted the irregularity in the procedure and discrepancies in the case of the prosecution to hold that the prosecution has not been able to prove the guilt of the accused beyond reasonable doubt. Therefore, in my opinion, it can be determined at the time of conclusion of the trial and it would be premature to comment on the procedure adopted by the investigating agency while considering applications for bail.

25. At this stage, when the court is concerned with the question of granting or refusing the bail in view of Section 37 of the NDPS Act, the bail can be granted if the court is satisfied that the reasonable grounds that the accused is guilty of the offences that is likely to commit while on bail, the bail should be granted.

26. 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.

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

28. Considering the intent of the legislation behind Section 37 of the NDPS Act, the offence committed by the applicant is socio economic offence. The Hon'ble Apex Court in the case of **Durand Didier vs. Chief Secretary, Union Territory of Goa, reported in (1990)1 SCC 95**, observed that, "with deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in

the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.”

29. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37 are satisfied.

30. In the result, the application deserves to be rejected and the same is rejected.

Application stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!