

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.4439 OF 2024

Faisal Bin Saber

.. Applicant

Versus

Dharmendra Kumar Rajput

Senior Intelligence Officer and Anr.

.. Respondents

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- Mr. Sherali S. Khan, Advocate for Applicant.
 - Ms. Megha S. Bajoria, SPP for Respondent No.1.
 - Ms. Mahalakshmi Ganapathy, APP for Respondent No.2.
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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 10, 2025

P.C.:

1. Heard Mr. Khan, learned Advocate for Applicant and Ms. Bajoria, learned SPP for Respondent No.1 and Ms. Ganapathy, learned APP for Respondent No.2.

2. This is an Application under Section 439 of Code of Criminal Procedure, 1973 (for short '**Cr.P.C.**') seeking Bail for offences punishable under Section 8(c) read with Sections 21(c), 23(c), 27, 27(A) and 28 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short '**NDPS Act**').

3. After hearing Mr. Khan on the previous occasion i.e. 11.02.2025, this Court passed the following order:-

"1. Mentioned out of turn at the time of rising of Court.

2. Heard Mr. Khan, learned Advocate for Applicant; Ms. Ganapathy, learned APP for State and Ms. Bajoria, learned SPP

for Respondent No.1.

3. In the present case Applicant has been indicted under the provisions of NDPS Act for having been apprehended in possession of commercial quantity of alleged contraband. He is incarcerated for the past 2 years.

4. At the outset, Mr. Khan would point out that persons who have carried out search and seizure operation claim to be the Officers in whose presence search and seizure was to be carried out and the certificate appended at page No.59 of the application does not bear the signature of the witnesses/panchas at the time of carrying out search and seizure operation. He would submit that there is clear transgression of Section 42 in the present case wherein there is material information stated in the charge-sheet that the Officers had prior information of the applicant being in possession of the alleged contraband and arrival of applicant but despite the same being stated there is no letter or notice or intimation forming part of charge-sheet.

5. Ms. Bajoria, learned SPP appearing for Respondent No.1 would take instructions and file an appropriate affidavit-in-reply with respect to the discrepancy pointed out by Mr. Khan. Let the affidavit-in-reply be filed within a period of one week with an advance copy of the same served on the learned Advocate for Applicant.

6. Stand over to 25th February, 2025 (at 02:30 pm).”

4. Mr. Khan has placed before the Court two decisions of the Supreme Court in the cases of *Ranjan Kumar Chadha Vs. State of Himachal Pradesh*¹ and *State of NCT of Delhi Vs. Moh. Jabir* ². He would submit that the provisions under the NDPS Act *prima facie* have not been followed when the statutory notice under Section 50 of the NDPS Act as appended to the charge-sheet and placed at page No.59 of the Application is seen. He would submit that the said notice does not bear the signatures of the panchas neither the endorsement of panchas or the endorsement of the Applicant regarding appraisal or his consent.

1 2023 SCC Online SC 1262.

2 Criminal Appeal No.4391 of 2024 (arising out of SLP (Crl.) No.1173 of 2024) decided on 02.12.2024.

5. What is argued by Mr. Khan is that in the present case there has been absolute dereliction on the part of the prosecution regarding complying with the statutory procedure prescribed and envisaged under the NDPS Act for effecting search, seizure, interception, storage, sampling and certification of the alleged contraband which is seized from the Applicant on receiving intelligence report. He would argue that non-compliance of the provisions of Section 42(1), Section 50 and Section 52A of the NDPS Act if seen *prima facie* is fatal to the prosecution case and entitles the Applicant for release on bail. Applicant is incarcerated for 2 years in jail pending trial.

6. In reply to the above argument Ms. Bajoria, learned SPP appearing on behalf of Respondent No.1 has made certain submissions which are dealt with hereinunder. She would submit that even if there is dereliction on the part of the prosecution for not complying with the statutory procedure, no benefit can be extended to the Applicant at the stage of bail so as to invalidate the effect of recovery of the alleged contraband from him from the folders that he was carrying on his person / in his bag as any such idea would be directly in the teeth of the conclusion under Section 50(3) of the NDPS Act. She would submit that if the Court renders any finding on the alleged procedural lapse at the stage of bail it would amount to the Court undertaking a mini trial at an interim stage without evidence being led and this is impermissible in law.

7. She has referred to the decision of the Supreme Court in the case of *State of Punjab Vs. Baljinder Singh and Anr.*³ and would submit that this is a three judge bench decision which should be considered by the Court. She has referred to and relied on paragraph Nos.11, 12, 16 and 17 of the said decision which refer to the case of *State of Punjab Vs. Baldev Singh*⁴ and *Vijaysinh Chandubha Jadeja Vs. State of Gujarat*⁵ to contend that the law is well settled that if an illicit article is seized from the person during personal search conducted in violation of the safeguards provided in Section 50 of the NDPS Act it cannot itself be used as an admissible evidence or proof of unlawful possession of the contraband by the accused person.

8. I have perused the aforesaid decision. Though it is vociferously argued by the learned SPP but it is lamented that the said argument is half-baked in the *prima facie* facts of the present case.

9. Facts in the present case are extremely narrow for effecting a decision on *prima facie* basis. Court needs to refer to the *prima facie* material on record. It cannot be argued that Court cannot even look at it merely because the Applicant is apprehended with the alleged contraband. When an application for bail is considered Court has to look into the *prima facie* facts and material made available on record

3 (2019) 10 SCC 473

4 (1999) 6 SCC 172

5 (2011) 1 SCC 609

to determine its veracity on *prima facie* consideration, especially when it goes to the root of the matter. This is a classic case where the learned SPP is arguing that in the present case even if the prosecution officers have not complied with any of the directory and mandatory procedures prescribed under the NDPS Act, none of their actions vitiate their action of seizure of the alleged contraband and the arrest of the Applicant and even if it does so, the same should only be a matter of trial and bail should be rejected.

10. The *prima facie* glaring facts in the present case as seen from the record are shocking to say the least.

11. Dereliction of Section 42 (1) :- Dereliction is *prima facie* seen on three statutory counts. There are two specific prosecution documents appended at page Nos.60 and 91 of the Application. At page No.60 is the seizure panchnama dated 03.01.2023 which is signed by the two panchas and the Customs Officer. In line No.7 of the seizure panchnama the signatories to the said panchnama have stated that the Customs Officer informed them that on the basis of intelligence (*emphasis supplied*), one male passenger (reference is to the Applicant) who has arrived from Nairobi to Mumbai was intercepted and further procedure was to be carried out. At page No.91 is the seizure report of the prosecution which in line No.1 states that on the basis of intelligence (*emphasis supplied*) the officers of Air

Intelligence Unit intercepted on passenger viz. Applicant herein.

11.1. Once the prosecution case is based on intelligence received then an appropriate report has to be made in terms of Section 42(1) of the NDPS Act by the person receiving the information to the immediate superior which is admittedly not made in the present case. There is virtually no answer for not complying with this mandatory procedure by the prosecution argued though an unacceptable response is given to the Court. It is based on prosecution's own documents that they claim to have received information on the basis of intelligence. It is seen that in the trial Court's order dated 18.09.2024 while rejecting the bail application of Applicant the Special Court in paragraph No.13 of this order has returned a *prima facie* incorrect finding stating that it appears that there was no intelligence. This *prima facie* finding is contrary to the prosecution's own documents appended at page Nos.60 and 91 of the Application.

12. Dereliction of Section 50 :- Next there is non-compliance of the provisions of Section 50 of the NDPS Act. Notice given to Applicant of appraisal under Section 50 is appended at page No.59. *Prima facie* if the same is seen it does not bear the written endorsement of the Applicant of he having been appraised or he having exercised his statutory right. According to the seizure panchnama at page No.60 it reads that Applicant was appraised of his right but then the

endorsement is missing. It is stated in the seizure panchanama that Applicant opted to be searched in the presence of a gazetted officer but his search was infact carried out by the seizure officer himself. Nevertheless, the endorsement in *prima facie* missing.

12.1. In paragraph No.7 of the Affidavit-in-reply dated 03.03.2025 filed by the Respondent No.1 it is stated that Applicant was made aware about his right under Section 50 of the NDPS Act and he opted for his personal search to be conducted by a Gazetted Officer and he has signed the Notice under Section 50 of the NDPS Act. However it is seen that search of the Applicant was carried out by the seizure officer acting as a gazetted officer in violation of the provisions of Section 50 of the NDPS Act. In the same Affidavit in paragraph No.6 it is also stated that procedure prescribed under Section 42 is also duly complied with but apart from merely stating so in the Affidavit, there is no documentary record or proof placed on record by the prosecution for this compliance.

13. Dereliction of Section 52A :- *Prima facie* in the present case there is non-compliance of the provisions of Section 52A of the NDPS Act by the Prosecution. The inventory panchnama is appended at page No.95. Inventory is carried out on 27.01.2023. The certificate issued by the Magistrate is appended at page No.97. At page No.97 what is appended is compliance of Form 4 only wherein provisions of Section

52A(2) stand complied with. The Application made by the Competent Officer to the Magistrate is missing and absent. Rather certification by the Magistrate in Form 5 is completely missing and absent. In this regard, attention is invited to Rule 8 of the Narcotic Drugs And Psychotropic Substances (Seizure, Storage, Sampling And Disposal) Rules, 2022 which refers to sub-section 2 of Section 52A of the NDPS Act for making the Application in Form 5 after preparing the inventory in Form 4. Rule 18 (1) and (2) thereof pertains to allowing the Application under sub-section 3 of Section 52A of the NDPS Act. The Application and certification in Form 5 admittedly in the present case is not done by the prosecution.

14. No explanation whatsoever has been rendered by the prosecution for the above procedural lapses. Rather what is argued across the bar is that all these procedural lapses are technical issues and will have to be determined in the trial and the bail Court cannot conduct a mini trial by looking into them at the bail stage. The sequitur of the argument of the learned SPP is that the prosecution can put the caution to the wind without following the prescribed mandatory procedures. In effect, what is argued is that the arrested person would not be in a position to apply for grant of bail even if the prosecution does not follow the mandatory prescribed procedural requirements under the NDPS Act. This submission, I am afraid cannot be countenanced.

15. The Supreme Court in the case of *State of NCT* (2nd *supra*) has laid down and interpreted the mandate of Section 50 of the NDPS Act. It states that sub-section 1 of Section 50 mandates that when an officer duly authorized under Section 42 is about to search a person under the provisions of Sections 41, 42 or 43 of the NDPS Act, he shall, if the person about to be searched so requires, take the person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. It further states that the intent behind the said provision is to ensure that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. Use of the expression 'nearest' refers to the convenience as the suspect is to be searched. Delay should be avoided, as is reflected from the use of the word 'unnecessary delay' and the exception carved in sub-section (5) to Section 50 of the NDPS Act. Nothing more is articulated and meant by the words used, or the intent behind the provision.

16. In the present case if the Section 50 appraisal letter at page No.59 is seen there is no appraisal stated therein neither any endorsement of the Applicant on the said letter is taken. That apart it is seen that the notice under Section 50 is not even signed by the panchas who were infact present at the then time. This is glaring and this is nothing but *prima facie* gross violation of the prescribed

mandatory procedural requirement for seizure and arrest.

17. Though Ms. Bajoria, learned SPP in respect of transgression of provisions of Section 42 of the NDPS Act would submit that the relay and intimation of the intelligence information received was duly effected pursuant to receipt of the said information and in support she would rely upon the endorsement made on the noting side of the prosecution file, that *prima facie* would not be compliance of the statutory procedure. Once specific intelligence information is received as per prosecution's own case, it has to be conveyed and intimated to the Superior Officer in accordance with the provisions of Section 42(1) of the NDPS Act. There is a reason for enactment of such procedural requirement on receipt of intelligence report / information. It is not only required to be noted down in writing by the person receiving the information, but within 72 hours it is required to be intimated in writing to the Superior as stated in the said provisions of Section 42 (1). Not conveying the same amounts to clear transgression of the procedural requirement which is *prima facie* noticed in the present case. In the present case, there is no denial of the same. Though the said intelligence information was received regarding Applicant arriving with the alleged contraband in question what is required to be noted is whether that information was specifically noted down and informed under Section 42(1) of the NDPS Act by the person who received the said information or by his immediate superior. It is not done so save

and except making a note of the same on the noting side in the file.

18. The provisions of Section 50 in sub-section (1) of the NDPS Act specifically refer to Sections 41, 42 and 43 of the NDPS Act with respect to the procedure that is required to be carried. The specific Intelligence Report / information received not having been reduced down in writing and informed to the concerned appropriate Superior officer is clear transgression of the provisions under Section 42 of the NDPS Act. That apart Section 52A(3) is *prima facie* not complied with as the certification is not done by the Magistrate in Form 5 under the NDPS Act read with the Rules.

19. In view of the above *prima facie* observations, the case of the prosecution regarding seizure, storage, arrest and certification on *prima facie* consideration becomes a suspect. Looking into the above issues *prima facie* does not amount to a mini trial. Prosecution can prove its case against the Applicant on the above issues to the contrary in trial. Liberty being a right of the Applicant on *prima facie* considerations at the interim stage cannot be opposed by the prosecution if there are such overwhelming procedural lapses which are seen by the Court. Applicant is incarcerated for 2 years. Trial will take its time for commencement and completion. Due to the above reasons and *prima facie* observation Bail Application of the Applicant is allowed subject to the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs.50,000/- with one or two sureties in the like amount;
- (ii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;
- (iii) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (iv) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;
- (v) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;
- (vi) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;

(vii) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and

(viii) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

20. It is clarified that the observations made in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case. The trial shall be adjudicated on the strength of the evidence led and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

21. Bail Application is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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