

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

CRIMINAL APPLICATION (BA) NO.1239 OF 2022

Shivshankar S/o Chandrabhan Kandrikar

Vs.

State of Maharashtra, through its PSO, PS, Ganeshpeth, Crime Branch
(NDPS Cell), Nagpur

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

Court's or Judge's orders.

Shri R.M. Daga, Advocate for applicant.

Shri A.M. Kadukar, APP for non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.

ARGUMENTS HEARD ON : JUNE 22, 2023.

PRONOUNCED ON : JUNE 30, 2023.

This is an application for grant of bail under Section 439 of the Code of Criminal Procedure and under Section 37 of the Narcotic Drugs And Psychotropic Substances Act, 1985 (for short, "NDPS Act") . The applicant is arrested on 07.02.2020.

2. The crime is registered on basis of a report lodged by informant namely Suraj Sambhaji Suroshe, who is Police Sub Inspector, on an allegation that on 07.02.2023 one of the staff members namely Manoj Sidam received a secrete information that the applicant alongwith co-accused Sangita are coming from Mumbai in Duranto Express and they are in possession of Mephedrone Powder (MD), which is a narcotic drug. Accordingly, a raid was conducted and the applicant alongwith co-accused Sangita and one Akash

were accosted in grey colour Honda City car in front gate of Santra market. During their personal search 51.830 gram of Mephedrone powder was seized from the possession of the present applicant and 5.710 gram of M.D. drug was seized from the possession of his wife Sangita. The applicant was arrested and after investigation charge-sheet came to be filed.

3. As per contention of the present applicant, the investigating officer has not complied with the mandatory provision under Section 50 of the NDPS Act and intimation letter is given to the applicant. The said letter shows that for personal search the presence of Gazetted Officer or Magistrate can be arranged, if the applicant so desire. Now it is stated that the personal search has to be taken in presence of either Gazetted Officer or Magistrate. On non-compliance of the said provision the trial is vitiated. There is non-compliance of other mandatory provisions also and there are other material discrepancies in the charge-sheet. Now investigation is completed, further custody of the present applicant is not required and therefore he prayed for bail.

4. Said application is strongly opposed by the State on the ground that there was substantial compliance of Section 50 of the NDPS Act as intimation was given and the applicant was made aware that if he deserves he can ask for search before the Gazetted Officer or Magistrate. As there is substantial compliance the applicant cannot take assistance

of provision that there is no compliance and prays for bail. Infact, prima facie material on record shows that applicant was found in possession of the MD powder, which is of commercial quantity. He has brought the same for selling, which is seized by the officials of the Local Crime Branch. *Prima facie* material is against the present applicant to connect with him with the alleged offence and hence application deserves to be rejected.

5. Heard learned counsel Shri R.M. Daga for the applicant. He invited my attention towards Section 50 of the NDPS Act and submitted that in view of Section 50 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 nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate. He submitted that in view of sub-section (1) of section 50 when the empowered officer is about to search any suspect person, he shall, if the person to be searched so requires, take him to the nearest Gazetted Officer or the Magistrate for the purpose. Under sub-section (2) of section 50, it is laid down that if such requisition is made by the respective person, the officer, who has to take search, may detain the suspect until he can be brought before the Gazetted Officer or the Magistrate. It is manifest that if the suspect expresses the desires to be taken to the Gazetted Officer or the Magistrate, the empowered officer is

restrained from effecting the search of the person concerned. He can only detain the suspect for being produced before the Gazetted Officer or the Magistrate, as the case may be. He further submitted that sub-section (3) of section 50 lays down that when the person to be searched person is brought such Gazetted Officer or the Magistrate and such Gazetted Officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person but otherwise shall direct that search be made. He submitted that the mandate of section 50 is precise and clear that if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so. He submitted that mere giving intimation is not sufficient. Thus, there is no compliance under Section 50 of the NDPS Act.

In support of his contention, he placed reliance on *Vijaysinh Chandubha Jadeja Vs. State of Gujarat* reported in (2011) 1 SCC 609, *Arif Khan alias Agha Khan Vs. State of Uttarakhand* reported in (2018) 18 SCC 380, *Narcotics Control Bureau Vs. Sukh Dev Raj Sodhi* reported in (2011) 6 SCC 392, *Sarija Banu alias Janarthani alias Janani Vs. State through Inspector of Police* reported in (2004) 12 SCC 266, *Criminal Application (BA) No.1449/2018* (Himmatsingh Pratapsingh Rajput Vs. State of Maharashtra) decided on 04.01.2019, *Criminal Application (BA) No.1451/2018*

(Mohd. Suleman Abdul Khalid Shaikh Vs. State of Maharashtra) decided on 30.10.2018, ***Criminal Application (BA) No.1145/2015*** (Afaque Asif Sayyed Vs. State of Maharashtra) decided on 22.12.2015, ***Criminal Application (BA) No.1335/2021*** (Ravi Mangya Dharwat Vs. State of Maharashtra) decided on 18.02.2022, ***Sholadoye Samuel Joy Vs. State of Maharashtra*** reported in ***2022 ALL MR (Cri) 1420*** and ***Lawarance D'Souza Vs. State of Maharashtra*** reported in ***1992 CRI.L.J. 399***. He submitted that in all these cases the Courts have considered the judgment of the Constitution Bench, wherein it is held that the requirement under Section 50 of the NDPS Act held to be mandatory-concept of substantial compliance is not applicable to section 50.

6. *Per contra*, learned APP reiterated the contention and submitted that there is a substantial compliance and the Hon'ble Delhi High Court held that the substantial compliance is sufficient to show the compliance under Section 50. In support of his contention, he placed reliance on ***Nabi Alam alias Abbas Vs. State (Govt. of NCT of Delhi)*** reported in ***2021 (3) Cri.CC 167***, ***Ashok Kumar Sharma Vs. State of Rajasthan*** reported in ***2013(2) SCC 67***, ***Sekhar Suman Verma Vs. The Superintendent of NCB and another*** reported in ***2016 ALL (Supreme Court) 3193***, ***Navdeep Singh Vs. State of Haryana*** reported in ***2013(3) Mh.LJ (Cri.) 263*** and ***State of Punjab Vs. Ram Pal*** reported in ***2009(5) SCC 565***.

7. Having heard both the sides and on perusal of the mandate of the law, section 50(1) of the NDPS Act requires that when any officer duly authorised under section 42 of the NPDS Act 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 a nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate before whom the search would take place. The provision of the section 50 of the NDPS Act have been held by the Constitution Bench in *State of Punjab Vs. Baldev Singh* reported in (1999) 6 SCC 172 to be mandatory as severe punishment has been provided under the Act for mere possession of illicit drug and narcotic substances and therefore it was held that it is necessary that the safeguard provided in section 50 of the NDPS Act are to be observed strictly. The Constitution Bench in *Vijaysinh Chandubha Jadeja* referred supra while reiterating the aforesaid position has held that failure to comply with mandatory provision of section 50 would (1) cause prejudice to suspect /accused (2) render the recovery of the illicit article from suspect/accused and vitiate the conviction if the same is records only on the basis of recovery of such illicit article. Insofar as the concept of substantial compliance is concerned, it has been specifically held in paragraph 31 that the concept of 'substantial compliance' is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh's*

case. In *State of Rajasthan Vs. Parmanand* reported in **2014(5) SCC 345** the Hon'ble Apex Court has held that a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would not be permissible as that would frustrate the very purport of Section 50 as communication of the said right to the person who is about to be searched is not an empty formality. It has held in paragraph 12 that if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act would have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application.

8. Considering the above position of law and applied the same to the factual position as available on record, in my considered opinion, the record does not disclose that requirement of section 50(1) of the NDPS Act having been done. Though learned APP placed reliance on the judgment of the Hon'ble Apex Court in the case of *Ashok Kumar Sharma* referred supra, wherein it is held that the suspect may or may not choose to exercise the right provided to him under the said provision and in case of *Sekhar Suman Verma* it is held that written offer was given to him whether to be searched by a Gazetted officer or a Magistrate and therefore there is a substantial compliance. However, as observed by the Hon'ble Apex Court in a judgment of *Vijaysinh Chandubha Jadeja*, which is a judgment by the Constitution Bench, wherein it is held that

the concept of substantial compliance is not applicable to section 50. It is further held that the mandate of section 50 is precise and clear i.e. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so. It is further held that Section 50(1) of the NDPS Act, which leads the safeguards and protections to an accused person, as envisaged under Section 50 of the NDPS Act to be read down, making the said provision virtually ineffective and, therefore, the decision of this Court in *Baldev Singh* (supra) needs reconsideration. It is held that although the Constitution Bench in *Baldev Singh's* case did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to 'inform' the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate. Failure to inform the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused. It is further held by the Hon'ble Apex Court that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard,

has been conferred on the suspect, to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. It is further held that since the appellant/accused was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant/accused gave his consent in writing to be searched by the police officials, the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act. It is further held that we do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of ***Vijaysinh Chandubha Jadeja*** (supra). In ***Narcotics Control Bureau*** (supra) it is held by the Hon'ble Apex Court that from the perusal of the conclusion arrived at by this Court in ***Vijaysinh Chandubha Jadeja's*** case, it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues

even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate and in Para 32, the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate.

9. Thus, in the present case, State has relied upon the notice which was issued to the applicant and submitted that there was substantial compliance of the mandatory provision of section 50. As it has been held by the Constitution Bench in the case of ***Vijaysinh Chandubha Jadeja***'s case as far as concept of 'substantial compliance' is concerned, it was neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down by the Hon'ble Apex Court in the case of ***Baldev Singh***. In the case of ***Parmanand*** referred supra, the Hon'ble Apex Court has held that a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would not be permissible as that would frustrate the very purport of Section 50. Considering the provision of law and in view of the judgment of the Hon'ble Apex Court's Constitution Bench, in my considered opinion, the record does not disclose the compliance with the requirement of section 50(1) of the NDPS Act having been done. None of the witnesses discloses that there was compliance in view of section 50(1) of the NDPS Act. Rather on the contrary all of

them state that the search of the person of the applicant having been made after informing them even after the applicant was summoned and the contraband was weighed and seized their statements do not indicate that there was any compliance of section 50(1) of the NDPS Act. As far as the judgment relied upon by the learned APP are concerned, this Court is bound by the judgment of the Hon'ble Apex Court, which is of Constitution Bench. In view of the observations of the Constitution Bench, here there is no compliance under Section 50 than being the case. In my considered opinion, the basic requirement of section 50 of the NDPS Act not having been complied with and therefore section 37(1)(b)(ii) would not be an obstacle in the way of releasing the applicant on bail. So also, no the charge-sheet has already filed and no purpose will be served by keeping the present applicant behind the bars. Hence, I proceed to pass the following order:

ORDER

- i. The application is allowed.
- ii. The applicant- Shivshankar S/o Chandrabhan Kandrikar, in connection with Crime No.32/2022 registered with Police Station, Ganeshpeth, Nagpur for the offence punishable under Sections 8(c), 22(c) and 29 of the Narcotic Drugs And Psychotropic Substances Act, 1985, shall be released on bail on he furnishing PR bond of ₹1,00,000/- with two solvent sureties of like

Corrected as per
Hon'ble Court's order
dated 04.07.2023.

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amount to the satisfaction of the trial Court.

iii. The applicant shall attend each and every date before the learned Sessions Court and even a single default shall result in cancellation of the bail.

iv. The applicant shall not tamper with the prosecution evidence or try to influence the prosecution witnesses in any manner.

v. The applicant shall not involve in any criminal activity and even if a single offence is registered against him the same shall result the cancellation of the bail.

vi. It is made clear that the above observations are *prima facie* in nature and trial Court shall not be influenced by the said observations.

With this, the application is disposed of.

JUDGE

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