

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO.1096 OF 2020

Shabana Begum

.. Applicant

Vs.

Union of India & Anr.

.. Respondents

Mr. Sayed Asif Abbas Naqvi, Advocate for Applicant.

Mr. Y.M. Nakhwa, APP for the Respondent -State.

Mr. Shreeram Shirsat, Special P.P. for Respondent No.1.

CORAM : PRAKASH D. NAIK, J.

DATE : 10th MARCH, 2021

PC.

1. The Applicant is arrested in connection with C.R. No.17/2018 registered with NCB Mumbai for the offence punishable under Sections 8 (c), 20 (c), 28 and 29 of the Narcotics Drugs and Psychotropic Substances (for short "NDPS") Act, 1985.

2. The case of the prosecution is that on 29.09.2018 information was received by NCB Mumbai from CISF, CSI Airport, Mumbai that they have detained a lady passenger named Shabana Begum (Applicant) with some contraband.

The information was reduced into writing and was placed before the Superintendent, NCB, Mumbai. The team of officers and personnel reached CSI Airport. Panchas were called. The applicant was found carrying trolley bag. On opening the bag, it was found to contain false bottom in the bag. One carbon paper wrapped with transparent polythene and cello tape containing dark brown coloured substance kept inside false bottom of bag. She replied that she does not know about the substance lying in her baggage. Dark brown coloured substance contained in the polyethene bag was concealed in the baggage. Provisions of Section 50 of NDPS Act 1985, were explained to the accused that she has legal right to be searched before the nearest magistrate or gazette officer. She replied that she does not wish to exercise her legal right u/s.50 of NDPS Act and requested NCB Officer to take her search. The contents of transparent polythene were weighed and found to be 2.9 Kgs in total. It was found to be Hashish (Charas). Her personal search was conducted. Statement was recorded under Section 67 of NDPS Act. She was arrested on

30.09.2018 at 11:00 hours. On completing investigation, complaint was filed before the Special Court.

3. The applicant preferred an application for bail before the Special Court under the NDPS Act. The said application was rejected by order dated 29.09.2020.

4. Learned advocate for the applicant submitted that there is violation of Section 57 of the Cr.P.C. Section 41 (B) of Cr.P.C. was not complied. There is violation of Section 50(A) and Section 46(4) of Cr.P.C. The applicant was illegally detained. She was taken in custody on 29.09.2018 at 10:45 am. and she was shown arrested on 30.09.2018. There is violation of Article 21 and 22 (2) of Constitution of India. Section 42 (1) (2) of NDPS Act is not complied. There is violation of Section 50 of NDPS Act. The word right is not mentioned in the notice. The applicant was arrested after sunset and before sunrise. The applicant was arrested on 29.09.2018. She was not produced before the court within 24 hours. The applicant was in custody with NCB since 10.45

am. On 29.08.2018 letter was forwarded to Godown In-charge, which mentions that applicant was arrested on 29.09.2018. It is submitted that the trial Court has observed that applicant was detained from 10.45 am of 29.09.2018 till 11.00 am of 30.09.2018 at office of NCB. The letter issued by NCB to Godown In-charge dated 29.09.2018 provides that on 29.09.2018 applicant was arrested at CSI Airport. The letter issued by Inspector CISF Mumbai to Assistant Director NCB dated 29.09.2018 is relevant. The custody was given to NCB. The seizure panchnama started on 12:30 pm on 29.09.2018 and concluded at 06:00 pm on the same day. The accused was in the office of CISF, CSI Airport, Mumbai. Prima facie there is no document to show that after completing the panchnama the accused was allowed to leave the CISF Office or NCB and again she was called at 11:00 on 30.09.2018. The documents indicate that since 10:45 am on 29.09.2018 till 11:00 am of 30.09.2018, the applicant was detained in the office of NCB, Mumbai. Learned Advocate submitted that from 10.45 am of 29.09.2018 till production of accused before

Court on 30.09.2018, applicant/accused was in custody and detention of NCB.

5. It is submitted that despite illegal detention the learned Judge did not grant bail. It was observed that the applicant may seek remedy provided under the Constitution. The detention is to be looked into in the light of 2.9 Kg. Hashish (Charas) found in the bag of the applicant. She has liberty to exhaust the remedies available with her.

6. Learned counsel for the applicant placed reliance on the decision of this Court in the case of **Lawarance D'Souza, Vs. State of Maharashtra & Anr. reported in 1992 Cri.L.J. 399,** wherein it was observed that case of non-compliance with procedural requirements can be looked into even at the stage of bail. Reliance is placed on the decision of the Supreme Court in the case of **State of Rajasthan Vs. Parmanand & Anr. reported in (1994) 3 SCC 299,** in which it was held that Section 50 of NDPS Act is required to be complied with. The breach of the said provision would vitiate the search. The applicant also relied upon the decision of this Court in the

case of **Suabo Ibow Cassama Vs. Union of Indian & Anr. 1994 (1) Bom. C.R. 64**. In the said decision this Court had granted bail to the accused on the ground of illegal detention. Reliance is placed on the decision in the case of **Kavita Manikikar Vs. CBI & Ors. (2018) ALL MR (Cri.) 3169**. In the said decision it was observed that there was violation of Section 46 (4) of Cr.P.C. The said provision mandates that no woman shall be arrested after sunset and before sunrise, save and except in exceptional circumstances without prior permission of the Court in whose legal jurisdiction the offence is committed. Learned advocate also relied upon the decision of the Division Bench of this Court in the case of **Thulile Goodness Dhalmini Vs. Union of India & Anr. 2014 ALL MR (Cri) 1953**. In the said decision it was observed that even if contraband was not found on person of accused but found in bag taken by him as cabin baggage Section 50 would be attracted. Lastly, he relied upon the order of this Court delivered in Criminal Bail Application No. 1451 of 2018 wherein bail was granted to the accused for non-compliance of

Section 50 of NDPS Act.

7. Learned counsel for the Respondent submitted that the offence is of serious in nature. The applicant was found in possession of Charas. There is no violation of provision of Section 50 or 42 of NDPS Act. The applicant was not subjected to illegal detention. Merely on the basis of the document forwarded to the Godown Kipper, it cannot be inferred that the applicant was under arrest. The issue relating to the illegal detention is based on disputed question of fact. Applicant was produced before the Court after arrest and remanded to custody and detention is legally sanctioned. The applicant is not entitled for bail on the said ground. There was a compliance of Section 50 of NDPS Act. There is no breach of provisions of Cr.P.C. He relied upon the decision of Supreme Court in the case of **Sadhwi Pragyna Singh Thakur Vs. State of Maharashtra**, wherein it was observed that the decision relied upon by the counsel for the appellant therein do not support the plea that in every case where there is violation of Article 22 (2) of the Constitution, the accused has to be set at

liberty and released on bail. The accused may be entitled to be set at liberty if it is shown that the accused at that point of time is in illegal detention by the police and such a right is not available after Magistrate remands the accused to custody. Right under Article 22 (2) is available only against illegal detention by police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22 (2) does not operate against the judicial order. He further relied upon the decision of the High Court of Orissa in the case of **Rajani Kanta Meheta Vs. State of Orrisa** in the said decision it was observed that the accused was already produced before the Magistrate and police custody was terminated and judicial custody had replaced it. The illegal detention beyond 24 hours of arrest has now become legalized and the present detention cannot be attacked on the footing of the detention at an earlier point of time being illegal. Reliance is also placed on another decision of the same High Court in the case of **Durei Behera Vs. Suratha Behera.** In the said decision the Orissa High Court has observed that to lay down a rule that an earlier

invalid detention entitles an accused to bail despite his valid detention pursuant to orders of remand at the time of making the application for bail, would be introducing a new provision for grant of bail not contemplated by the Legislature. The earlier unauthorized or illegal detention of an accused does not invalidate his infringement of provisions contained in Section 167 (2), 209 or 309 (2) of the Code, he may make an application for habeas corpus or pursue remedies as are available to him under the law but he cannot seek bail on the that ground. Reliance is placed on the decision of the Supreme Court in the case of **Jeet Ram Vs. The Narcotics Control Bureau, Chandigarh** delivered in Criminal Appeal No.688 of 2013. In the said decision it was observed that Section 50 of the NDPS Act is applicable only in the case of personal search. The counsel for the respondent then referred to the decision of the High Court of Kerala in the case of **Amina Vs. Circle Inspector of Police**. In the said decision it was held that Section 42 empowers the officer for making search and seizure under the Act; but Section 50(4) of the Act insists only that

such search should be by another female even where the search is conducted by an empowered officer. Those provisions can be compromised if it is provided that the search contemplate under Section 42, in the case of a female offender, should be by a female officer; but under the directions and supervision of the empowered officer. There is nothing in Section 50(4) which show that the female who acts in accordance with the instructions of the empowered officer while making the search herself be empowered under Section 42.

8. The applicant was found in possession of contraband which was concealed in her baggage on 29.09.2018. Notice under Section 50 of the NDPS Act, 1985 was issued to the applicant which mentions that there is reason to believe that Narcotics Drugs/ Psychotropic Substances /controlled Substances and/or documents, articles and things which may furnish evidence of commission of an offence under the NDPS Act, 1985 are in her possession and that her personal search is to be conducted. If she required, search will be conducted

in presence of the nearest Gazetted Officer or Magistrate. The notice further mentioned that she has been informed and have understood the notice of personal search under Section 50 of the NDPS Act. She does not require that the personal search may be taken in presence of the nearest Gazetted Officer or Magistrate. Letter dated 29.09.2018 was addressed to Godown In-charge of NCB, Mumbai. In the said letter it was mentioned that the NCB has seized 2.9 Kg of dark brown coloured substance and arrested one lady namely Shabana Begum on 29.09.2018. The applicant has relied upon the said letter to contend that the said document indicates her arrest on 29.09.2018.

9. The case of prosecution is that information was received from CISF, CSI Airport Mumbai on 29.09.2018 at about 11.00 hrs. that they have detained lady passenger, Shabana Begum with some contraband. Information was reduced into writing by Intelligence Officer of NCB and placed before Superintendent of NCB, Mumbai. The team of officers reached C.S.I. Airport. The applicant was asked to open her bag.

Contraband charas was found in bag. The officer explained provisions of Section 50 of NDPS Act and served notice under Section 50 of the Act. The applicant stated that she does not wish to exercise her legal right under Section 50 of NDPS Act. The contraband was weighing 2.9 kgs. The officer requested lady team member to take personal search of applicant in a separate room but nothing incriminating was found except passport, boarding pass etc. Panchnama was concluded at around 18.00 hrs. on 29.09.2018. Applicant was asked to accompany NCB Officers to NCB Office. The contraband was seized. It was deposited with godown custodian vide letter dated 29.09.2018. Statement of applicant was recorded under Section 67 of NDPS Act at office of NCB, Mumbai. The applicant was placed under arrest on 30.09.2018. The applicant produced before the Court for remand on 01.10.2018 and remanded to Judicial custody from time to time. Report of arrest was submitted to Assistant Director, NCB through Superintendent, NCB, Mumbai. Apparently, no grievance about breach of provisions regarding arrest and production of

accused and/or illegal detention were made during first remand. The memo of arrest is on record. It shows that applicant was arrested on 30.09.2018 at 11.00 am. It bears signature of applicant with date mentioned below it as 30.09.2018. It also bears statement that, she has informed her daughter about her arrest by NCB. It is signed by applicant with date 30.09.2018. The complaint mentions that applicant was informed about grounds of arrest. Thus, the submissions of applicant cannot be accepted. On the basis of letter to godown keeper, no inference could be drawn that arrest was on 29.09.2018. Arrest was not effected after sunset and before sunrise. The applicant was produced before Court and as per orders of Court, she is remanded to custody. Her detention in custody is legal. Court has taken cognizance of complaint.

10. Supreme Court in the case of **State of Punjab Vs. Baldev Singh reported in AIR (1999) 6 SCC 172** has observed that whether or not the safeguards provided in Section 50 have been duly observed would have, however, to

be determined by the Court on the basis of the evidence led during trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50, and particularly, the safeguards provided in that section were complied with, it would not be permissible to cut short a criminal trial. Hence, there is no merits in the contention of applicant that she is entitled for bail for alleged non-compliance of Section 50.

11. The Supreme Court in the case of **S.K. Raju @ Abdul Haque @ Jagga Vs. State of West Bengal** reported in AIR (2018) 9 SCC 708 has observed that Section 42 is not applicable for seizure effected in public place. In the present case Section 43 would be applicable. In any case it is disputed by prosecution that there is no compliance of procedural safeguards under NDPS Act.

12. Considering the aforesaid aspects, no case for grant of bail is made out.

ORDER

Criminal Bail Application No. 1096 of 2020 is rejected and stands disposed of accordingly.

(PRAKASH D. NAIK, J.)