

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL MISC. APPLICATION (BAIL) NO. 246 OF 2022 (F)
WITH
CRIMINAL MISC. APPLICATION (BAIL) NO. 13 OF 2022
CRIMINAL MISC. APPLICATION (BAIL) NO. 246 OF 2022 (F)

Nihad Cheti Prembath, Presently lodged at
Judicial Lock Up Colvale ... Applicant

Versus

Union of India as rep. By Officer in Charge & ... Respondents
anr.

WITH
CRIMINAL MISC. APPLICATION (BAIL) NO. 13 OF 2022

Nijil Raj, Presently lodged at Judicial Lock Up, ... Applicant
Colvale Modern Jail

Versus

Union of India, rep. By Officer in Charge & ... Respondents
anr.

Ms. Caroline Collasso, Advocate for the Applicants.

**Mr. Pravin Faldessai, Deputy Solicitor General of India for the
Respondent no. 1.**

Mr. S. G. Bhobe, Public Prosecutor for Respondent no. 2.

CORAM: G. S. KULKARNI, J
DATED: 14 November, 2022

ORAL ORDER

1. These are two applications for bail. The applicants are accused in Special Case No. 32 of 2021, pending before the learned Sessions Judge. They are accused of committing offences under Sections 8(c), 22(b), 21, 22, 27 and 29 of Narcotics Drugs and Psychotropic Substance Act, (for short, 'NDPS Act').

2. The primary ground raised in the present applications claiming an entitlement to bail is to the effect that there is a breach of their fundamental rights guaranteed under Article 22(2) and consequently under Article 21 of the Constitution, inasmuch as the applicants were not produced before the nearest Magistrate within 24 hours of their arrest which, according to the applicants, was on 12 March, 2021, at about 2.45 a.m. According to the applicants, the applicants however were shown to have been arrested at 21.00 hours on 13 March, 2021 (Applicant in CRMAB no.246 of 2022) and at 20.55 hours on 13 March, 2021 (Applicant in application CRMAB No. 13 of 2022). This, according to the applicants, is clear from the panchanama which was recorded by the Investigation officer, as also the complaint dated 13 March, 2021, filed on behalf of the respondent. It is on this such premise the present application has been argued.

3. The relevant facts seen from the first application, which was argued as the lead matter are required to be noted. In the memo of the application, the applicant has averred that he is a permanent resident of Kerala. He had come to Goa for a holiday on 12 March, 2021, at around 11.30 p.m., when he was near Shiva shack suddenly he saw about 15–20 men in civil dress who stopped him and started searching his person. He did not resist the search as he did not have any incriminating articles. He also informed the Officers about his stay in Goa and his innocence which the Officers were not ready to accept. He states that he was put in a vehicle and brought to Anjuna Police Station and was detained in the Police Station lockup. He was never disclosed the ground of arrest and detention, nor was he allowed to contact his family and friends.

4. In paragraph 5 of the application, it is stated that the arrest and detention of the applicant continued from 11.30 p.m. on 12 March, 2021 till around 9.00 a.m. on 13 March, 2021, at Anjuna Police Station, when a police Officer came and told the applicant that he has to append his signature on some papers and when he signed the same, he would allow the applicant to leave the Police Station. It is stated that the officer presented many blank pages and made the applicant sign at the foot of the page and also in the margins of some

blank papers. He states that he was scared and he signed on all the blank pages. It is next averred that he was asked number of questions about his personal life, education, family business, etc. and also about the alleged drug dealing. It is his case that he was then handcuffed and taken to the Porvorim health Centre and was warned not to mention about his arrest and detention to the Doctors, and on 13 March, 2021, he was detained in the office of the NCB for the full day and night.

5. The applicant has stated that on 14 March, 2021, the Officers told the applicant that he would be produced before the Magistrate who would release him provided that he did not disclose/complain against the Officers about their conduct, arrest and detention. The applicant states that the applicant was produced before the learned Judicial Magistrate on 14 March, 2021, (Sunday) at 3.40 p.m. The applicant states that he complained to the Magistrate about his illegal arrest and detention. Thereafter at about 7.30 p.m., in pursuance of the order passed by the learned Judicial Magistrate, it is stated that he was taken to the NDPS Court, the learned Special Judge remanded him to judicial custody (Colvale Jail) by an order passed on the remand application filed by the Respondents.

6. The applicant has contended later he was shocked and surprised to learn that he was falsely implicated in a drug case under CR. No. NCB/GSZ/CR-04/2021 under Section 8(c), 22(b), 21, 22, 27 and 29 of the NDPS Act. He was placed under arrest for offences under the NDPS Act for alleged possession of 5.1 grams of Heroine, 33 grams of Crystalline White Color Powder (Mephedrone), 34.2 grams of Crystalline White Color Powder and 8 blots of LSD weighing 0.15 grams.

7. It is the applicant's case that thereafter he filed Bail Application no. 63 of 2021, seeking bail on grounds *inter alia* on the breach of the mandatory provisions of Sections 41 and 42 of the NDPS Act and on the ground that he was detained in custody beyond 24 hours without a warrant, hence, his detention being illegal and in violation of Sections 57, 58 and 167 of the Code of Criminal Procedure (Cr.P.C.) He contended that in the absence of a field testing kit being used and no chemical analysis report being received, there was no *prima facie* evidence to indicate the nature of the contraband. The respondents filed a reply to the applicants' bail application contending that all procedural formalities with his arrest were complied, inasmuch as the applicant was arrested at 21.00 hours on 13 March, 2021 and was served a copy of the arrest memo

explaining the grounds of arrest as also informed the applicant's cousin about the arrest. The respondents stated that on 14 March, 2021, the applicant was produced before the Magistrate within 24 hours from his arrest. The respondents contended that all these facts were on record with the applicant's signature and hence no ground for bail was made out.

8. The applicant has stated that after considering the arguments on such bail application, the learned Special Judge, by an order dated 26 May, 2021, was pleased to grant bail to the applicant on certain conditions. It is stated that the applicant was granted bail considering the fact that there was no field testing kit used to test the contraband at the spot and in the absence of a chemical analysis report, the applicant was entitled to bail. The respondent was also granted liberty to apply for cancellation of bail on receipt of the expert report. It is stated that the Special Court did not consider the other points which were urged by the applicant in the Bail Application. The applicant has contended that in paragraph 10 of the said order granting bail to the applicant, the learned Special Judge observed that the other points which were raised in this bail application by Advocate for the accused at the time of arguments can be considered after the receipt of the expert report. It is the applicant's case that the

applicant is among five others arrested under the same FIR. The co-accused (applicant in companion CRMAB No.246 of 2022), was also granted bail on similar grounds by an order passed by the learned Special Judge, on 26 May, 2021.

9. The applicant states that the expert report from CFSL, Pune, reached the respondents on 4 July, 2021, which detected positive for a commercial quantity of LSD. It is stated by the applicant that the applicant was in the process of obtaining surety for complying with the bail conditions and continued to be in custody, when on 5 July, 2021, an application was filed by the respondent-State on the basis of the said CFSL report received from the Pune Laboratory detecting positive for the contraband LSD, under Section 439(2) Cr.P.C., that the bail granted to the applicant on 26 May, 2021, be cancelled.

10. The applicant contends that in the intervening period, the respondents have also filed a chargesheet on 6 September, 2021, before the learned Special Court at Panaji. The case was assigned to the Court of Additional Sessions Judge-1, Mapusa, wherein the applicant was arraigned as accused no. 1 in NDPS Special Case No. 32 of 2021.

11. It is stated the application as filed by the respondents for cancellation of bail was finally argued on 18 November, 2021 and the same came to be allowed by an order dated 3 February, 2022. It is on such premise, the present application has been filed praying that the applicant be released on bail. The grounds in support of the plea for bail are set out in paragraph 22 of the application (CRMAB No. 246 of 2022) and paragraph 21 of the companion application CRMAB No. 13 of 2022. However, the only contention as argued and urged on behalf of the applicants in the present bail applications is of the applicants being illegally detained as they were produced before the Magistrate within 24 hours from the time of his arrest. Although there are some other grounds that are taken in the application, the only ground which was argued was to the effect that the applicant was not produced before the learned Magistrate within 24 hours of his arrest which is alleged to be on 12 March, 2021, at about 11.30 a.m. and this ground itself, the applicant is entitled for bail.

12. At this juncture, it needs to be noted that the case of the applicant in regard to the date and timing of the arrest is as set out in paragraph 2 and paragraph 5 of the application wherein the applicant has stated that the arrest and detention of the applicant

continued from 11.30 p.m. on 12 March, 2021 till around 9.00 a.m. on 13 March, 2021. The said paragraphs are required to be noted :

“2. The applicant states that on 12.03.2021 at around 11.30, when he was near Shiva Shack suddenly, he saw around 15-20 men in civil dress suddenly stopped him and started searching his person. The officers were talking in a commanding voice and shouting at him. They didn't show any identity card or badge to indicate their authority. That nothing incriminating was found on his person or the motorbike.”

5. The arrest and detention of the applicant continued from 11.30 pm till around 9.00 am on 13.03.2021, at Anjuna Police Station when one Officer came and told the applicant that he has to append his signature on some papers and when he signs the same, he will allow the applicant to leave the Police Station. The Officer presented many blank pages and made him sign at the foot of the page and also in the margins of some blank papers. The applicant was sated of his life and since he was promised of release he signed all the blank pages.”

13. The applicant's case in the memo of the application, although is of the arrest to be considered at 11.30 p.m. on 12 March, 2021 till around 9.00 a.m. on 13 March, 2021, however, it is pointed out by

the learned Counsel for the applicant that the final report filed by the respondent would indicate that the applicant was arrested on 13 March, 2021 at 21.00 p.m. and in regard to the applicant in the companion application (CRMAB No. 13 of 2022) at 20.55 p.m. on 13 March, 2021, under Sections 8(c), 22(b), 21, 22, 27 and 29 of the NDPS Act.

14. A reply/affidavit has been filed on behalf of the respondents of the Investigation Officer Shri Ajay Kumar, NCB, Goa, denying the case of the applicant. It is contended that the case of the applicant as set out in the application that he was arrested on 12 March, 2021, at 11.30 p.m., is not correct as the applicant arrested at 21.00 hours on 13 March, 2021 (applicant in the companion matter at 20.55 hours). The reply affidavit has stated that acting on a specific information through a reliable source, that the applicant was frequently delivering narcotics drugs to the customers, visitors and tourists around the parking area in front of Larive Beach Resort at small Vagator, a team of Narcotics Control Bureau & Goa Police, intercepted the applicant along with his vehicle Scooty bearing no. GA 03 N 7062 at about 2.30 hours on 13 March, 2021. It is stated that after observing all legal formalities, search of the applicant along with his vehicle was carried out on the spot in the presence of two

independent witnesses and the Executive Magistrate Shri Rajaram Parab, which resulted in the recovery of the said contraband. It is stated that during the spot interrogation, the applicant disclosed that there was a party going on in Shiva Place, at Ozran beach at Vagator, and that he had supplied drugs to several persons in that party, just before he was apprehended by the team. It is stated that the applicant further disclosed that he had procured LSD and other drugs from one Nijil Raj (applicant-accused in the companion application CRMAB No. 13 of 2022), who could be found at Monkey Bar & Restaurant, Gomal Wado, Anjuna, at that time. Subsequently thereto, a team of NCB, Goa and Goa Police reached Monkey Bar and identified the accused Nijil Raj (accused no.2-applicant in companion application CRMAB No, 13 of 2022) with the help of the applicant. After observing all legal formalities, search of Nijil Raj (accused no.2) was conducted in presence of two independent panch witnesses and Executive Magistrate and during the search, 21 blots of LSD weighing 0.36 gms (Commercial Quantity) were recovered from the possession of said Nijil Raj (applicant no. 2).

15. It is stated that another team of NCB along with two independent witnesses reached at Shiva Place, Ozran Beach, Vagator and a team of Goa Police including one lady Officer and Executive

Magistrate Shri Rajaram Parab, also reached the spot as per request, at that time, 25 persons were present at the party. All persons were apprised of the information and further intention of the team to search them and there were recoveries made from such persons as set out in paragraph 3(ii) of the reply affidavit. Insofar as the arrest of the applicants is concerned, it would be appropriate to note the contents of the affidavit reply, which reads thus :

"3 (ii) : All recovered drug was seized under the provisions of the NDPS Act, 1985. Nihad Chethi Parambath (Applicant/Accused-1), Nijil Raj (Accused-2), Joel Mendonsa (Accused-3), Ajinkya Kalekar (Accused-4) and Kenny Frischknecht (Accused-5) were served notices u/s 67 of the NDPS Act, 1985 and they all appeared in NCB Goa office on 13.03.2021 and tendered their voluntary statements regarding the recoveries of drugs from their persons. On the basis of recovery of drugs from their possession and voluntary statements they tendered, Nihad Chethi Parambath (Applicant/Accused-1), Nijil Raj (accused-2), Joel Mendonsa (Accused-3) Ajinkya Kalekar (Accused-4) and Kenny Frischknecht (Accused-5) were placed under arrest in between 20.35 to 21.00 hours on 13.03.2021. Grounds of their arrests were explained to each of them and information of their arrest was passed as per the law. On 14.03.2021, the above accused persons were produced before the Hon'ble Court and further sent to Judicial Custody Remand.

3 (iii) That the accused Nihad Chethi Parambath (Applicant/Accused-1) filed the bail application bearing no -n 64/2021 before the Hon'ble Session Court. The said application was heard before the Hon'ble Additional

Session Judge, Mapusa and the Hon'ble Additional Session Judge, Mapusa was pleased to grant conditional bail to the accused vide order dated 26.05.2021 for not testing the contraband LSD prima facie with the drug detection kit. The Hon'ble Court while passing the order was further pleased to grant the liberty to the Respondent to file application for cancellation of bail on receipt of the expert report."

16. The reply categorically denies the case of the applicant that there was any illegality on the part of the respondents in not producing the applicants before the Magistrate within 24 hours as per the requirement of law. It is also denied that the arrest had taken place of the applicant at 11.30 p.m. on 12 March, 2021 as alleged by the applicant and had in fact, taken place on 13 March, 2021 between 8.35 p.m. and 9.00 p.m.. It is stated that after the detention and arrest of the applicants, they were produced before the Executive Magistrate on 14 March, 2021, who referred the case to the Special Court and which remanded the applicants to judicial custody by an order dated 14 March, 2021.

17. On the above backdrop, it needs to be observed as also noted above, that both the applicants had applied for bail. By an order dated 26 May, 2021, the applicants were granted bail on the ground that the report of the chemical analyser was not available, the

applicants were granted bail for the reason that the time when the seizure had taken place, no field testing kit was used for testing the LSD and the Mephedrone as it was. The applicants accordingly came to be released on bail by the following order :

“11. Hence for the reasons stated herein the applicant can be released on Interim conditional bail at this stage on the following conditions.

- 1. The applicant shall furnish personal bond and surety for an amount of Rs. 50,000/- with address proof of the applicant and the surety.*
- 2. The applicant shall furnish his address of stay along with proof.*
- 3. The applicant shall appear before the IO on Monday and Thursday between 10.00 am to 1.00 pm till the filing of the expert report.*
- 4. The applicant shall not leave the State of Goa without the prior written permission of the court.*
- 5. The applicant shall co-operate with the investigation.*
- 6. The prosecution is at liberty to file application for cancellation of bail on receipt of the expert report.*

ORDER

The application for bail shall stand allowed accordingly on the terms and conditions mentioned hereinabove.”

18. It also needs to be noted that in the bail application, the applicants had raised a specific ground that the detention of the applicants was illegal as they were not produced within 24 hours before the Executive Magistrate and, for such reason, the applicants were entitled for bail. The case of the applicants to that effect is set

out in paragraph 3 of the order passed by the learned Sessions Judge, which reads thus :

“3. It was argued by the advocate for the applicant that the applicant was intercepted at about 12.45 am till 9.00 am on 13/3/2021 and on 13/3/2021 in the office of NCB full day and night and on 14/3/2021 the officers produced the accused at 3.40 pm before the Magistrate and thereafter around 7.30 pm he was taken before the PDJ Panaji for remand who remanded him to JC. Hence the detention of the applicant is illegal as he is not produced within 24 hours before the Magistrate and thus he is entitled for bail.”

19. In pursuance of the liberty granted to the prosecution for filing an application for cancellation of bail on the receipt of the expert report, the respondents filed such application dated 5 July, 2021, (Criminal Miscellaneous Application No. 54/2021). The learned Sessions Judge considered the expert report dated 28 June, 2021, filed by the respondent-prosecution. On examination of the report, it was noticed that one of the substance contraband seized from the applicant was found to be LSD. The weight of the LSD was stated to be 0.15 grams, which was a commercial quantity. The learned Sessions Judge observed that the rigors of Section 37 of the NDPS Act would become applicable and accordingly the applicant would not be entitled to bail. The learned Sessions Judge also considered the plea of

the applicant for bail on the basis of illegal arrest and detention and remarked that the applicant had made no complaint of illegal arrest or detention when he was produced before the Magistrate on 14 March, 2021. The Sessions Judge categorically recorded that the applicant having not complained about such illegal arrest and detention before the Magistrate could not agitate such a plea once the applicant was taken into judicial custody. It was observed that in such circumstances, the respondent-prosecution was justified in seeking cancellation of bail as granted to the applicant vide order dated 26 May, 2021 and accordingly passed the following order :

“ORDER

This application is allowed. Bail granted to the present respondent by Order dated 26.05.2021 in Bail Application No.64/2021, is cancelled and the respondent is to be taken into custody forthwith.”

20. It is on such premise, the present application is filed simpliciter praying for bail.

21. Ms. Caroline Collasso, learned Counsel for the applicants, has confined her submissions to the principal ground which was also the ground in the earlier bail application which came to be filed by the applicants, namely, the applicants being not produced before the

Magistrate within 24 hours of their arrest and hence the detention of the applicants having been not produced before the Magistrate would amount to illegal detention offending the rights of the applicants guaranteed under Article 21 read with Article 22(2) of the Constitution.

22. As can be seen, the contention as urged by Ms. Collasso is little different from what has been urged in the memo of the application. Ms. Collasso has drawn the Court's attention to the complaint/report and final report as filed on behalf of the respondent to submit that the period of arrest and detention of the applicant is required to be taken from the time of the panchanama which is 2.45 hours (2.45 am), on 13 March, 2021. It is her contention that the applicants were produced before the Magistrate on 14 March, 2021 at about 3.40 p.m. and hence this is a clear case where there is no explanation for the detention beyond the period of 24 hours which would come to an end on 14 March, 2021 at 2.45 am.

23. Ms. Collasso, in supporting such contention, has drawn the Court's attention to the relevant paragraphs of the complaint-final report filed by the respondent against the applicants dated 13 March, 2021 and more particularly paragraph 5, 6, 7, 10, 11 and 13. Ms.

Collasso has submitted that it is required to be presumed that the applicants were arrested at the time when the applicants were searched and there was alleged seizure of contraband and a panchanama to that effect being recorded at 2.45 am on 13 March, 2021. According to her, the reasons being that the applicants were not at any liberty to move freely, as if they were not arrested. It is her submission that the Court needs to consider that the moment it becomes a case of restricted movement, it was as good as applicant's arrest. Ms. Collasso submitted that right from the inception i.e. when the applicants were produced before the Magistrate, they asserted that they were not produced before the Magistrate within 24 hours of their arrest. She submits that even in the bail applications which were filed by the applicants on 31 March, 2021, a specific plea to this effect was raised and it was also noted by the learned Sessions Judge in paragraph 3 of the order granting bail to the applicant.

24. Ms. Collasso has submitted that in fact in paragraph 10 of the order dated 26 May, 2021, granting bail to the applicants, the learned Sessions Judge had categorically observed that the other points which were raised in the bail application at the time of arguments would be considered after the receipt of the expert report. It is hence her submission that now the bail as granted to the

applicants has stood cancelled, the ground of illegal detention and the rights of the applicants under Article 21 read with Article 22(2) as guaranteed by the Constitution, being violated are made available in the present application. This is the primary case of the applicants in praying for a bail in the present proceedings.

25. Ms. Collasso has submitted that the premise on which the application of the respondent for cancellation of the applicant's bail has been granted, is totally erroneous. It is her submission that the learned Sessions Judge has completely overlooked that the ground of breach of the applicants' rights under Article 22(2) of the Constitution, was clearly available to the applicants, even when the application of the respondents for cancellation of bail was being considered by the learned Sessions Judge. It is her contention that the decision of the Supreme Court in *Pragyna Singh Thakur vs. State of Maharashtra*¹ was wrongly applied in the facts of the present case in allowing the application of the respondents for cancellation of bail for the reason that once there was a violation of the applicants rights under Article 22(2) of the Constitution, mere order of remand would not make any difference. According to her, in any case, the decision in *Pragyna Singh Thakur* (supra) has been held to be *per incuriam* in

¹ (2011) 10 SCC 445

the decision of the Supreme Court in *Union of India, through Central Bureau of Investigation vs. Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav*² and also by the decision of the Supreme Court in *M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence*³.

26. Ms. Collasso would thus submit that the issue which goes to the root of the matter namely that the applicants actually being arrested at 2.45 am on 13 March, 2021, and being produced before the learned Magistrate only on 14 March, 2021 at about 3.40 pm, which was beyond the period of 24 hours, was sufficient for the Courts below to grant bail to the applicants. It is her submission that such situation is clearly covered by the law as laid down by the co-ordinate bench of this Court in *Suaibo Ibow Casamma vs. Union of India*⁴ and in a recent decision of the co-ordinate bench of this Court in *Ugochukwu Solomon Ubabuko vs. Union of India & anr.*⁵

27. On the other hand, Mr. Pravin Faldessai, learned Deputy Solicitor General of India appearing for the respondent no.1, in opposing both the applications, has relied on the reply affidavit as

2 (2014) 9 SCC 457

3 (2021) 2 SCC 485

4 1994(1) Bom. C.R. 64

5 2021(2) Drugs Cases (Narcotics) 473

filed on behalf of the respondent. It is his primary submission that the premise on which the applicants have urged their case in the application, is totally unfounded not only on facts but also on law. It is his submission that it is clear from the record that there is no material to support the contention as urged on behalf of the applicants that the applicants were arrested either at 11.30 pm on 12 March, 2021 as per the averments made in the application or at 2.35 am on 13 March, 2021, as argued before this Court referring to the paragraphs of the complaint. Mr. Faldessai, has drawn the Court's attention to the averments as made in the application as also the other materials including to the copy of the complaint as also the final report. It is also Mr. Faldessai's submission that it is nowhere the case of the applicants that the arrest of the applicant was at 2.45 am on 13 March, 2021 and/or that any such case can be culled out after a reading of the panchanama. It is submitted that, in fact, in para 13 of the complaint, it has been specifically recorded that the panchanama proceedings which had started at 2.45 hours on 13 March, 2021, ended peacefully without causing any damage to the property and religious sentiments in the presence of independent witnesses. Mr. Faldessai has submitted that the principal ground as urged on behalf of the applicants in the present proceedings, namely that there is a detention of the applicants and it is in breach of Article 21 read with

Article 22(2) of the Constitution itself, is not available to the applicants in view of the fact that subsequent to the arrest of the applicants, which according to the respondent-prosecution, is dated 13 March, 2021 at 21.00 hours and 20.55 hours respectively, they were produced before the Magistrate within 24 hours i.e. by 3.40 p.m. on 14 March, 2021 and the applicants were remanded to judicial custody after which the applicants had moved the application for bail on 31 March, 2021 and which came to be granted by the learned Sessions Judge by an order dated 26 May, 2021. It is his submission that once the applicants were released on bail, by judicial order, there is no question of the applicants taking recourse to the fact that there was any case of illegal detention which, in any case, according to Mr. Faldessai, there is none. It is his submission that on this ground itself, the application would deserve to be dismissed.

28. Mr. Faldessai submits that even the averments in the initial bail application on any case being made out of violation of the applicants' right under Article 22(2) of the Constitution, were vague and the case in the present application is no different.

29. Mr. Faldessai has submitted that the contention as urged on behalf of the applicant if accepted, it would certainly lead to a patent

absurdity in law inasmuch as such a ground, if at all, it were to have any relevance, it could have been relevant only in relation to the arrest dated 13 March, 2021, which had completely lost its efficacy in the applicants being remanded to judicial custody, thus such ground was certainly not available to the applicants after the consequence of arrest itself was judicially intervened and further when the applicants were being granted bail on 26 May, 2021.

30. Mr. Faldessai, has submitted that none of the decisions that are relied on behalf of the applicants are applicable to the facts of the present case as it is his contention that those were cases in which there was material for the Court to come to a conclusion that *prima facie* the applicant was not produced before the Magistrate within the prescribed period of 24 hours. It is his submission that such decisions are not applicable also on the ground that those were not cases similar to the case in hand in which the applicants earlier were granted bail and any issue on detention could be relevant in the context of the initial arrest of the applicants in such cases. Mr. Faldessai in support of his contention has also submitted that in fact the notice under Section 67 of the NDPS Act was issued to the applicants on 13 March, 2021 and such notice can never be issued to a person who is already taken into custody and/or arrested. It is Mr.

Faldessai's submission that there is no averment either in the application, neither is there any material whatsoever that the panchanama would suggest that the control of the applicants was with the respondents so as to presume that there was a deemed arrest. It is his submission that mere interception of the applicant for the purpose of further procedure to be undertaken, namely of search and/or interrogation would not amount to arrest as sought to be urged on behalf of the applicants. It is on such premise that Mr. Faldessai would submit that the application deserved to be dismissed.

31. Having heard the learned Counsel for the parties and having perused the record, the only question which arises for consideration in the present applications is whether any case has been made out by the applicants for bail on the ground that their rights under Article 22(2) of the Constitution stand violated being not produced before the learned Magistrate within 24 hours of their arrest. To decide the said question, it would be necessary to examine as to what is the relevant date and time of the arrest of the applicants so that the period of 24 hours would be required to be considered and arrived at as per the provisions of Article 22(2) of the Constitution and Section 167 of the Cr.P.C.

32. At the outset, it needs to be stated and as also noted above, the case of the applicant as argued by Ms. Collasso and as to what is averred in paragraphs 2 and 5 of the application, wherein the applicant has categorically averred that the arrest was at 11.30 pm on 12 March, 2021 till around 9.00 am on 13 March, 2021. Paragraphs 2 and 5 are already noted herein above.

33. Ms. Collasso, learned Counsel for the applicants has in contrast urged that the arrest is required to be considered at 2.45 am on 13 March, 2021 namely the time when the panchanama proceedings commenced. In my opinion, the same cannot be accepted, in the present facts on record for more than one reason. The first and foremost reason is that there is no material on record and not even an averment to that effect, in the memo of application or any previous statement to that effect in the earlier applications filed by the applicants, in the Courts below, that the respondent-prosecution was in complete control of the applicants and the control was of such nature that there would be no other presumption but that of an arrest and/or a case of any total restraint. Once the case of the applicant itself at all material times was silent on such allegations merely as what has been stated by the prosecution in the complaint-final report referring to the date and time of the panchanama, it cannot be

presumed that the date and time of panchanama would be required to be construed as an arrest in the absence of any contrary material. If such contention as urged on behalf of the applicants is to be accepted to be any position of law, in my opinion, it would lead to an absolute absurdity in the given circumstances.

34. Insofar as the present facts are concerned, in the context of what has been observed above, it would be required to be considered as to whether the contention of the applicants that arrest of the applicants at 21.00 hours and 20.55 hours respectively on 13 March, 2021, in reality, is not the correct time and date of the arrest and it is only a technical arrest which has been set up by the respondents. To accept such contention as urged on behalf of the applicants that such arrest of the applicants is only a technical arrest, it is essential that there is sufficient and strong material to support such contention. This material also needs to be of such nature, that it would completely belie and/or expose the case of the respondent-prosecution, for the Court to come to an unimpeachable conclusion that the arrest as shown on record by the prosecution is only a technical arrest.

35. Thus, to examine such contention as urged by Ms. Collasso, with the assistance of the learned Counsel for the parties, the records,

including the case set out by the applicants as also in the earlier bail applications have been examined. Considering such material, it is difficult to accept Ms. Collasso's submission that the Court needs to presume the arrest to be at 2.45 am on 13 March, 2021 and not as to what has been set out by the respondent-prosecution namely the arrest of the applicants to be at 21.00 hours and 20.55 hours on 13 March, 2021. One of the strong reasons being that the applicant Nihad (in CRMAB No.246 of 2022) in fact had furnished valuable information in regard to the suppliers of the contraband to be given by one Nijil Raj, (applicant in CRMAB No.13 of 2022), who as stated was available at Monkey Bar at Ozran beach at Vagator. It is also seen from the record that the statement of the applicants as also several others who were persons and who were sold such contraband, were recorded and only after this entire procedure of search and seizure and recording of statements of all the concerned persons was completed and after the following procedure, a memo came to be issued by the Intelligence officer to the applicant Nihad, which is annexed to the compilation as tendered by Mr. Faldessai. The memo of arrest clearly records that the applicant Nihad was arrested at 21.00 hours on 13 March, 2021 and also an intimation of arrest being communicated to the applicant and was issued to his friend on his mobile as set out in the said intimation of arrest. This

apart, a notice under Section 67 of the NDPS Act was also issued to the applicant Nihad to remain present before the Investigation Officer, which was received by the applicant without protest. Although it is urged by Ms. Collasso that as there is no time as set out as also the applicant being called upon to remain present forthwith and thus it needs to be construed that the applicant was under arrest, also cannot be accepted considering the unconditional receipt of such notice by the applicant by endorsing his initials on the same. This apart, there is no averment in that regard in any of the applications as filed by the applicants before the Trial Court or even before this Court. Thus, on the examination of the material, it is not indicated in any manner, that the applicants were arrested and they had lost their liberty of control over themselves before they could be arrested as set out by the Respondents at 21.00 hours and 20.55 hours respectively on 13 March, 2021.

36. Insofar as the reliance on the applicants on the decision of the coordinate bench of this Court in *Suaibo Ibow Casamma vs. Union of India* (supra) is concerned, in my opinion, the same is not applicable to the facts of the present case. This was a case where the applicant was charged with offences punishable under Section 135 of the Customs Act, 1962 as also under Section 8(c) read with Sections 21,

23, 28 and 9 of the NDPS Act. In the said case, the Court had recorded that the petitioner was arrested by the officers of the Air Intelligence Unit of the Customs Department at Sahar Air-Port Bombay on the night between 1st and 2nd November, 1991, before his boarding the Ethiopian Airlines Flight and heroin weighing about 4.5 kg. was found concealed in his suit case. It was observed that the documents annexed to the petition showed that recording of the seizure panchanama commenced at 5.30 am on 2nd November, 1991 and was completed by 8 a.m. on the same day. Immediately, thereafter, his statement was recorded. It was also observed that the panchanama under Section 110 of the Customs Act, 1962 was annexed to the petition which supported the prosecution case that heroin was recovered from the suit case belonging to the petitioner. Despite these circumstances, the petitioner was produced before the Chief Metropolitan Magistrate as late as on 4 November 1991 at about 3 p.m. The Court had observed that it was not in dispute that *“right from the early hours of 2nd November, 1991, the petitioner was in the custody of the customs officials and there was a total restraint on his movements.”* It is in these circumstances the Court observed that as there was no dispute on the total restrictions imposed on the petitioner ever since he was apprehended at the airport in the early hours of 2nd November, 1991, as undoubtedly, the petitioner was not

allowed to go out of the clutches of the customs officials, from 5.30 a.m. on 2nd November, 1991 and, therefore, it was not possible to accept that the petitioner was not arrested at 5.30 a.m. on 2nd November, 1991. The Court observed that none of the Counsel appearing for respondents could produce any formal panchanamas of arrest or any other document showing the formal arrest was at any subsequent period after 5.30 a.m. on 2nd November, 1991. It was further observed that on the material that was placed before the Court, it was not disputed that the detention of the petitioner commencing from 5.30 a.m. on 2nd November, 1991 was total. It is in these circumstances, the Court observed that this was a case where there was a breach of rights of the applicants under Article 21 read with Article 22(2) of the Constitution. Thus, it is seen that in the said case, there was no arrest memo whatsoever and as it was an undisputed position that there were restrictions imposed on the applicant, ever since he was apprehended from the airport in the early hours on 2nd November, 1991, the Court had come to a conclusion that the applicant was arrested. In my opinion, the position is contrary in the present facts. There is not only a memo of arrest but also an intimation of arrest given. Further, the applicant himself has made vague averments in the memo of application that there was a breach of Article 22(2) of the Constitution as sought to

be urged without any supporting material that he would be entitled to bail on such grounds.

37. Insofar as the decision of this Court in *Ugochukwu Solomon Ubabuko vs. Union of India & anr.*⁶ (supra) is concerned, the said decision is also not applicable in the facts of the present case. In such case, it was the applicant's case that his right under Article 21 and Article 22(2) of the Constitution, stood violated and his detention was rendered illegal and he be granted bail on the ground that he stood detained from 6.25 p.m. on 7 March, 2021 and he was eventually produced before the Magistrate on 9 March, 2021 in the morning at about 10.00 a.m. Considering the facts on record and making a reference to the decision in *Suaibo Ibow Casamma* (supra), the Court observed that in the bail application filed by the applicant therein on 8 March, 2021, before the Magistrate on 10 March, 2021 and, at that stage also, a specific contention regarding illegal detention of the Applicant was raised, pointing out that he was produced before the Magistrate after expiry of 24 hours and yet, the Magistrate held that the question of custody of the Applicant being illegal, no longer survived as he was already remanded to judicial custody. The Court observed that the applicant was justified in claiming that he was

⁶ CRMAB(F) No. 37 & 38 of 2021 decided on 05.02.2021

detained on 7 March, 2021 and to accept such contention, the Court had referred to the panchanama dated 7 March, 2021 which had assumed significance. The Court observed that perusal of the panchanama showed that the Respondent no.1 had recorded that the house of the Applicant was raided at about 6:25 p.m. on 7 March, 2021. It was recorded that when the Applicant and the other accused person saw the team of Respondent no.1 at the door, they resisted entry as a result of which, one of the Officers of the Respondent no.1 suffered minor injuries. The Court observed that it was significant that in the panchanama itself, it was specifically recorded that the Applicant and the other persons were taken into control by the team of Respondent no.1. It was also observed that the panchanama recorded in detail the manner in which the house was searched and records the details of the contraband recovered from the said house and that the Applicant was taken to the Police Station at about 11:30 p.m. and the panchanama proceedings were completed at 1:20 a.m. The Court observed that the contents of the panchanama clearly indicated that when the team of Respondent no.1 reached the house of the applicant at 6:25 p.m. on 7 March, 2021, the members of the team took the applicant in their control. It was further observed that throughout the proceedings of the panchanama, the applicant was not free to move out and he was kept in control by the team of

Respondent no.1. It was also observed that the applicant was physically taken to the Police Station where the panchanama proceedings were completed at 1:20 a.m. and that the applicant continued in the custody of the team of Respondent no.1 and eventually at 5:30 p.m. on 8 March, 2021, the Applicant was shown to be arrested. It is for such reason that the contents of the panchanama having clearly demonstrated that there was total restraint on the movement of the applicant from 6:25 p.m. on 7 March 2021 itself and, therefore, for all purposes, the applicant stood detained and arrested at that point in time, it is on this premise that this Court referring to the orders in the case of Suaibo Ibow Casamma (*supra*), granted bail to the applicants.

38. It can be thus observed that the premise the Court granted bail in *Ugochukwu Solomon Ubabuko vs. Union of India & anr.* (*supra*), was not different what the Court considered in *Suaibo Ibow Casamma vs. Union of India* (*supra*). In the present case, as noted above, even remotely a case has not been pleaded by the applicant that in any manner he was under the restraint and total control of the police from 23.30 hours on 12 March, 2021, till the time of his arrest on 13 March, 2021 at 21.00 hours and 20.55 hours respectively, and/or that the movement of the applicant from the time of the

panchanama namely about 2.45 am on 13 March, 2021 till his arrest was in any manner restricted, so as to presume that the applicants in fact stood detained and arrested at that point of time. Thus, these decisions are not applicable in the facts of the present case.

39. In the light of the above discussion, no case has been made out by the applicants for grant of the applications. The applications are accordingly rejected.

G. S. KULKARNI, J

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA
Date: 2022.12.20 17:17:16 +05'30'