

Sayali Upasani

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

ANTICIPATORY BAIL APPLICATION NO. 2643 OF 2023

Santosh Pundalik Kale ...Applicant

Vs.

The State of Maharashtra ...Respondent

Mr. Aniket U. Nikam i/b Mr. Amit Icham, for Applicant.

Ms. Pallavi Dabholkar, APP, for State.

CORAM:- N. J. JAMADAR, J.

DATED:- 27th SEPTEMBER, 2023

PC:-

1) This is an application for pre-arrest bail in connection with C.R. No. 165 of 2023, registered with Khed Police Station, Ratnagiri, for the offences punishable under Sections 8(6) and 20 (b)(ii) (B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act").

2) Pursuant to a secret intimation on 12th June, 2023 at about 8.40 pm, Khed police laid a trap near Shifata Tolnaka. The co-accused was found moving in suspicious circumstances with a sack. The police party apprehended him. In the search of the co-accused, 2 kg 855 grams Cannabis (Ganja) was found in his

possession. The contraband article along with other incriminating articles found in the possession of the co-accused were sealed and seized. During the course of the investigation, it transpired that the co-accused had purchased the contraband from the applicant, 10 to 15 days prior to the said occurrence.

3) Apprehending arrest, the applicant approached the Court of Session, Khed. By an order dated 2nd September, 2023, the learned Additional Sessions Judge declined to exercise the discretion in favour of the applicant. Hence, this application.

4) I have heard Mr. Aniket Nikam, the learned Counsel for the applicant, and Ms. Pallavi Dabholkar, the learned APP for the State.

5) Mr. Nikam submitted that the solitary material against the applicant is the statement of the co-accused who was allegedly found in possession of the contraband article. The said material according, to Mr. Nikam, is inadmissible in evidence and the applicant cannot be deprived of the personal liberty on the said ground. Mr. Nikam would further urge that though the learned Additional Sessions Judge has adverted to the antecedents of the applicant, those antecedents are of no significance as in two of the cases the applicant has been acquitted and in another case under the NDPS Act, the applicant has been ordered to be

released on bail. Therefore, those antecedents cannot be pressed into service against the applicant.

6) As against this, Ms. Dabholkar stoutly resisted the prayer for pre-arrest bail. It was submitted that the applicant has been indulging in identical offences. Since the applicant has been specifically named as the supplier, to facilitate an effective investigation, custodial interrogation of the applicant is warranted. A direction for the release of the applicant on bail, in the event of arrest, would seriously jeopardise the investigation. It was further submitted that the CDR revealed that the applicant had been in touch with the co-accused.

7) Mr. Nikam joined the issue by submitting that the mobile phone numbers stand in the name of the sons of the applicant and conversations were between the applicant and Somnath Khade and not the co-accused, from whose possession the contraband article has been allegedly seized.

8) I have carefully considered the rival submissions. Two circumstances have been primarily arrayed against the applicant. One, the co-accused named the applicant as the supplier. Two, the antecedents of the applicant. On the first count, it is trite a statement of the co-accused does not constitute substantive evidence and cannot be pressed into service to bring home the

charge to the named accused. At the stage of the investigation, however, the Investigating Officer would be within his rights to rely upon the said statement to carry out further investigation. Inadmissibility of such statement, as substantive evidence, does not preclude its consideration at the stage of investigation, for all intent and purpose.

9) Mr. Nikam would submit that this Court has exercised discretion in favour of the accused and granted pre-arrest bail where the only material is the statement of the co-accused. Attention of the court was invited to the orders passed by this Court in ABA No. 1820 of 2021 in the case of **Shankar Shivaji Dhale**, dated 12th October, 2021, and Criminal Application No. 52 of 2018, in the case of **Balu S/o Babu Phoomali Vs. State of Maharashtra and Others** dated 30th January, 2018.

10) Mr. Nikam would further submit that even where there are antecedents coupled with the statement of co-accused, the Supreme Court has granted pre-arrest bail. To lend support to this submission, Mr. Nikam placed reliance on the orders of the Supreme Court in the cases of **Vijay Singh Vs. The State of Haryana** in Special Leave to Appeal (Cri.) No. 1266 of 2023 dated 17th May, 2023 and **Seesh Singh @ Mor Vs. State of Punjab** in Criminal Appeal No. 822 of 2020 dated 2nd December, 2020.

11) Evidently, all these orders have been passed in the peculiar facts of the cases. In the matter of grant of bail, one additional fact or absence thereof makes a world of difference.

12) In the case at hand, apart from the fact that the applicant has been named as the supplier by the co-accused, there are antecedents of the applicant which prima facie indicate that the applicant has been indulging in the activities like the one for which he has been arraigned in the instant case. It is true, the applicant has been acquitted in Special case No. 2 of 2009 and Session Case No. 2 of 2016 and the applicant has been granted bail by this Court in Criminal Bail Application No. 1583 of 2020 in connection with an offence punishable under Section 20 (b) of the NDPS Act, in CR No. 250 of 2020.

13) However, at this stage, the Court has to consider the broad conspectus of the matter. In an offence of this nature, if the statement of a co-accused who is apprehended with a sizeable quantity of contraband articles is held to be inconsequential, the investigating agency would not be able to trace the suppliers. The offences are of a grave nature. They have deliterious effect on the society. Often the syndicates in narcotics work on “need to know” basis. The person who is apprehended with the contraband often does not know the source of contraband beyond his

immediate supplier. If a proper investigation is not carried out, the link would get snapped at the person who is found in possession of the contraband articles. Control over narcotics supply and trade would then be a casualty.

14) In the case at hand, apart from the statement of the co-accused, the antecedents of the applicant *prima facie* indicate that the applicant has been indulging in the alleged activity. If that be the case, discretion cannot be exercised in favour of the applicant without jeopardising the interest of effective and complete investigation and the larger interest of the society. It is only the custodial interrogation of the applicant that would reveal the source of the contraband articles.

15) Hence, I am not inclined to exercise the discretion in favour of the applicant.

16) Thus, the following order.

ORDER

I) The application stands rejected.

II) It is clarified that these *prima facie* observations are confined to determine the entitlement to pre-arrest bail only.

[N. J. JAMADAR, J.]