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CRIMINAL BAIL APPLICATION NO.1003 OF 2021

VS.

CRIMINAL BAIL APPLICATION NO.2229 OF 2021

VS.

Mr. H. J. Dedhia, APP for the Respondent-State.

DATED : 12TH JULY 2023

1. Heard the learned advocate Mr. Tamhankar for the applicants and the learned APP for the respondent – State.
2. Both sides were heard on 23 March 2023. The contentions were recorded. Learned APP expressed desire to file an affidavit-in-reply. Time was granted on more than one occasion. Today also he sought time. I am not inclined. He also raised the contention that the

grounds taken today were not taken before the Sessions Court. Even though he may be right. But these ground pertains to compliance of provisions of law. Hence I am considering them.

3. In addition to the grounds recorded in order dated 23 March 2023, Mr. Tamhankar also raised ground that the samples which were sent to the **medical**/chemical analyser were the samples taken at the spot and their certification by the learned Magistrate at the time of recording inventory panchnama does not nullify the lacunae which was already there. In view of that I heard both of them again.

4. The timing mentioned at page no.60 of the panchnama dated 25 May 2019 are 7.20 hrs to 9.40 hrs. Accused nos.2, 3 and 4 were searched, the present applicant was one of them. As against this, the arrest date and timing mentioned for applicant Rahul at page 30 are 25 May 2019 at 0.32 hrs that is during midnight. This ground does not appeal to my conscience. I reject it.

5. There is contention raised about non compliance of the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act") for the reason that proper words are not used in the panchnama at page 59 and there was a joint appraisal exists. Mr. Tamhankar also relied upon few of the

Judgments but later on he accepted the legal provision that Section 50 need not be complied with when personal search of the body was not taken. In this case, the contraband was found in the gunny bags which were in the hands of these three applicants. So admittedly from their person nothing contraband was found. So that contention also goes away.

6. Initially, accused no.1 was arrested and he gave information about possibility of arrival of his three associates in a Bolero car at Hatkesh region for selling Morphine. The said information is part of his trap panchnama at page 59. Admittedly no separate information is recorded so also the said information is not passed on to superior officer as contemplated under Section 41(1) & (2) of the NDPS Act. Mr. Tamhankar relied upon the observations in the case of ***Anwar Hasusain Mohd. Idris Ansari vs. State of Maharashtra***¹ in paragraphs 6 & 8. The information given by accused no.1 leads to recovery. Even though the said information was recorded, it was not sent to higher officer and that is why it was considered as non compliance of Section 42(2) of the NDPS Act.

7. I am not making any observation so far as the applicability of

1 (2001) Bom CR Cri(2001) : 3 BOMLR 338

Section 41(1) of the NDPS Act that is to say recording of the information given by accused no.1 about arriving of three associates, I am confined myself to sending this information to higher officer within 72 hrs. Admittedly it has not been done. This is nothing but non compliance of Section 42(2) of the NDPS Act.

8. It is true that in this case three samples were taken from three gunny bags. Reference is there in the panchnama at page 59 whereas inventory panchnama is at pages 61 to 63 dated 25 May 2019. Learned Magistrate has verified in all 12 exhibits. It consists of two samples each are taken from A to A3 and B to B3 and C to C3 and including residue samples. Learned Magistrate has verified the resealed it. Whereas chemical analyser report is dated 9 January 2020 which mentions about exhibits A1, B1, C1 and D1 (from all the accused). The report is positive. Certain lacunae are pointed out from inventory proceedings. Though it bears date 25 May 2019, on the last page below signature by the learned Magistrate the date put is 26 May 2019.

9. Learned APP submitted that this inconsistency can be cured at the time of trial. Further more, two panchas attended inventory panchnama have not stated in their statements given to police that

they have attended proceedings before the learned Magistrate. Their statements namely Mahadev Vansing Bandichhode and Hasmukh Jagjeevan Soni are at pages 72 and 75 respectively.

10. From the above sampling, it is clear that the learned Magistrate has only verified the samples taken at the spot. The samples were not taken and drawn independently by him. Further there is variation between the date of inventory panchnama and the date below the signature. My attention is invited to paragraph 31.1 in the direction given in the case of *Union of India vs. Mohanlal and anr*².

11. So if the certification is done by the learned Magistrate whether it cures the defects occurred due to taking samples at the spot, needs to be looked into. It can be dealt with in some other case. In this matter, I find there is variance in the date of inventory panchnama. The Hon'ble Supreme Court in the case of *Simranjit Singh vs. State of Punjab*³ has emphasized lacunae in sampling and was not considered as primary evidence. In this case also there are certain lacunae in the sampling. So also information is not passed on to the superiors. So the bar under Section 37 of the NDPS Act is

² (2016) 3 SCC 379

³ Criminal Appeal No.1443/2023 by the Hon'ble Supreme Court dated 09.05.2023

lifted. There are no antecedents against the present applicant. so I am inclined to grant a bail. Hence the following order;

ORDER

- (a) The applicants be released on bail in connection with C.R. No.II 163 of 2019 registered with Bhayander Police Station, Thane for the offences punishable under Sections 8(c), 21 and 22 of the NDPS Act, on furnishing personal bond and surety bond of Rs.50,000/- each.
- (b) The applicants shall not threaten the prosecution witnesses or allure them in any manner.
- (c) The applicants shall give attendance to the Bhayander Police Station, Thane on 1st and 3rd Wednesday of every month between 10 am to 12 noon for a period of one year.
- (d) Needless to say, violating of the condition above will make the Applicant liable for cancellation of bail, after notice to the Applicant.

12. Application is disposed of accordingly.
13. These are my *prima facie* observations and the trial Court may not be influenced by that.
14. All the parties to act on an authenticated copy of this order.

[S. M. MODAK, J.]