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

BAIL APPLICATION NO.1804 OF 2023

Mohd. Maqbool Abdul Gafar Bhat ...Applicant
vs.
State of Maharashtra ...Respondents

Mr. Tarak Sayed with Ms. Ashwini Achari with Lochan Chandka with Alisha Parekh with Advait Tamhankar for the Applicant.
Mr. H. J. Dedhia APP for the Respondent - State.

CORAM : S. M. MODAK, J.

DATED : 11TH AUGUST 2023

P. C. :

1. As stated in the order dated 9th August 2023, the bail is asked on two grounds (I) His long incarnation and (ii) on merits.
2. The only ground taken about merits is non-compliance of the provisions of Section 52A of the NDPS Act. My attention is invited to the following relevant documents :-
 - (a) Page 39 – pre-trap panchnama
 - (b) Page 40 – trap panchnama
 - (c) Four persons were noticed coming in front of Cafe Dine Restaurant, Kalwa, Thane. One person tucked to his shoulder a

travel bag and other three persons possessed with cotton bags. The present Applicant – Mohd. Maqbool Abdul Gafar Bhat is one of them. During their individual search, they were found with “Charas”, which is of commercial quantity. The Applicant was found with 2 kgs of charas. “B-1” and “B-2” are representative samples, whereas Exhibit-B is remaining contraband. The reference find place on page 42.

(d) Whereas the Chemical Analyser’s report is on page 108. It is positive.

3. On this background, there is contention that the provisions of Section 52A of the NDPS Act and observations in case of *Union of India vs. Mohanlal*¹ are violated. It is true that in some of earlier orders at the time of bail, I have given benefit to the accused for not drawing samples before the learned Magistrate but drawing samples at the spot only. I have observed that this is clear violation of the observations in case of *Mohanlal* (supra).

4. When I heard learned APP, he invited my attention to the few of the guidelines therein. According to him, on earlier occasion, the real meaning of those guidelines was not put before me. They are as

1 (2016) 3 SCC 379

follows :

(a) There are three subjects dealt with

- (i) Seizure,
- (ii) Storage
- (iii) Disposal

(b)	Discussion about seizure and sampling	Find place in para 12 to para 19 of the said judgment.
(c)	Discussion about storage	Find place from para 20 to para 26 of the said judgment.
(d)	Discussion about disposal of drugs	Find place from para 27 to para 30
(e)	Directions	Find place in para 31

5. It is true that the Hon'ble Supreme Court has considered the storage provisions from standing order No.1 of 1989, in para 20, whereas comparison of the said standing order and notification dated 16/01/2015 finds place in para 29, At the bottom of the order. In the para 29 it is observed as under :

“Be that as it may, to the extent the subsequent notification prescribed a different procedure, we treat the earlier Notification/Standing Order No.1 of 1989 to have been superseded.”

6. Contention of learned APP is that this stands superseded, so far as only disposal is concerned, and not sampling. I have also read the standing order and notification of 2015. The following facts emerges in the standing order No.1 of 1989 dated 13th June 1989. **The procedure for sampling is laid down in para 2.2 which says that samples at spot are to be drawn in duplicate.**

7. Whereas the Hon'ble Supreme Court in para 29 has compared both these documents on the following aspects :-

- (i) **Para 1** of the standing order **deals with type of narcotics** which can be disposed of whereas in the notification dated 16th January 2015, all narcotics and substance can be disposed of as per Section 52A (**Guidelines No.2**)
- (ii) There is marginal difference in between procedure to be followed for **making an application** in both these documents. So also there is difference in procedure relating to the officers, who can make an application.
- (iii) **Prescribed limits of disposal** are also laid down. In case of excess quantity the disposal as per standing order has to be done in presence of the Head of Department.

Whereas as per notification it is before the Committee.

- (iv) **Approval of the Court** is required for disposal as per standing order, whereas as per notification it does not provide for such approval.

8. That's why it is observed by the Hon'ble Supreme Court that the standing order stands superseded in terms of notification 2015.

So the submission is "*on the basis of these observations can it be said that the procedure for sampling in standing order also stand superseded*". At the same time it is relevant to consider the observations which is often being quoted on behalf of the accused.

In para 16 of the said judgment there is observation as :-

"Process of drawing samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct".

9. In para 17,

It is further observed that

"Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure".

In para 18

“It is observed that

“Be that it may, a conflict between the statutory provision governing taking of samples and the Standing order issued by the Central Government is evident when the two are placed in juxtaposition.”

Furthermore,

“It is observed as the Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction”.

10. It is very well true that in para 14 the provisions of Section 52A of the NDPS Act are reproduced. Furthermore, directions in para 31.1, says as under :

“31.1 No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall

be allowed by the Magistrate as soon as may be required under Sub- Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading ‘seizure and sampling’. The sampling shall be done under the supervision of the magistrate as discussed in paras 15 to 19 of this order.”

11. It is true that Hon’ble Supreme Court has reproduced “para 2.2 of the standing order in para no.12”. So also it is true that Hon’ble Supreme Court in para no.13 noted down the practice of most of the states not taking the samples at the spot except the directorate of revenue intelligence. At this stage it is submitted that in fact in State of Maharashtra there was a practice of taking spot samples. That is why submission is made while giving predominance to notification dated 16th January, 2015 over standing order, the provisions of sampling as per 1989 standing orders were not superseded.

12. While making observations in para 31.1, the provisions of Section 52A of the NDPS Act are considered. No doubt it is true that Section 52A of the NDPS Act does not contain provision of taking samples at the spot. Those provisions find place only in standing order No.1 of 1989.

13. Submission on behalf of the Applicant is how this court can

relook at observations of Hon'ble Supreme Court. Because this Court (Coram : Modak J, himself) has granted benefit earlier. It is true. But it is also true that submissions now made by learned APP were not made earlier. It is also true that observation are on the basis of submissions made and as understood to a particular judge. If new submission about true meaning of the observations of Hon'ble Supreme Court are made and if it appeals to the conscious of the Judge, the earlier view can certainly be changed. Considering the importance, even I have heard Advocate Shri Ayaz Khan.

14. I agree with learned APP that standing order No.1 of 1989 is superseded only for purpose of disposal, as observed in para 29. It can't be said that this standing order is superseded so far as other particulars of standing order are concerned. The presence of Magistrate at the time of following procedure under Section 52A is for purpose of disposal because prior to disposal there has to be certification by the learned Magistrate. So, what I gather is that the standing order contains provisions for taking samples at the time of seizure whereas Section 52A contain provisions for taking samples before learned Magistrate prior to disposal.

New Rules

15. As per the new 2022 Rules, now, different procedure is laid down. After seizure, the contraband needs to be produced before the Magistrate and then samples are to be drawn and then sent to the Chemical Analyser. Contention on behalf of Applicant is earlier lacunae was taken care in the Rules.

16. There was no need to send the samples which were drawn before the Magistrate to the Chemical Analyser, prior to 2022 Rules. Now the rules have cleared the controversy.

17. So, I feel that merely because spot samples are taken, it does not violate the provisions of Section 52A of the NDPS Act for the simple reason that it does not contain provision for taking samples at the spot but it deals with different situation. So, the contention raised in that on behalf of Applicant does not appeal to my conscience.

18. It is true that in case of *Simranjit Singh and Anr. vs. State of Punjab*² Hon'ble Supreme Court has refused to accept the evidence of drawing of samples at spot and conviction was set aside. My

2 CRS-S-2030-SB2006 dt.31/08/2022

attention is also invited to judgment given by High Court of Punjab and Haryana in the same case wherein the samples were taken in the year 2005. That is much earlier to the observations in case of *Mohanlal*. We also are not aware what is the practice prevailing in that State. So also those observations are post trial observations. No doubt earlier this Court has also given benefit of observations in case of *Simranjit Singh* but it is very well true that *Simranjit Singh* is delivered after full fledged trial.

19. No doubt it is true that in case of *Quentin Decon vs. Customs*³ the samples were taken not at the spot but before learned Magistrate in the year 2021. There was certain defect noticed in that procedure so ratio in case of *Quentin Decon* relied by learned APP is on different aspect. Whereas the Division Bench of Calcutta High Court in case of *Manotosh Ghosh and Ors. vs. The State of West Bengal*⁴ in para 15 observed :

“Procedure engrafted in Section 52A is a post seizure exercise to ensure prompt destruction of narcotic substance so that seized material may not be misused”

³ BA No.71/2023 dt. 31/05/2023 High Court of Delhi

⁴ 2022 (1) DC (Narcotics) 737

20. In case of *State of Punjab vs. Makhan Chand*⁵, the Hon'ble Supreme Court observed :

“Section 52A does not empower the Central Government to lay down procedure for search of accused. But, deals only with disposal of seized narcotic drugs and psychotropic substances”.

21. In that case conviction was challenged for the reason that at the time of trap, standing order was not followed. It was turned down.

22. In view of above discussion, there is no non-compliance of the provisions of Section 52A of the NDPS Act. The objection is unwarranted.

Long Incarceration

23. At the same time it is true that the Applicant is behind bar since 2018. The trial has not started. There is strong opposition by learned APP for grant of bail. It is for the reason that he is resident of Jammu and Kashmir and there is not likelihood that he will attend the trial. There is reliance on the observations in case of ***Rabi Prakash Vs. State of Odisha***⁶. That was a prosecution under the

⁵ (2004) 3 SCC 453

⁶ Special Leave to Appeal (Crl.) No(s).4169 of 2023 : 13th July, 2023 : Supreme Court of India

NDPS Act and 19 witnesses were examined and he was behind bar for 3 and half years and he was granted bail. Learned Advocate for the Applicant submitted that necessary conditions be imposed.

24. The Applicant is behind bar for more than five years. He cannot be blamed for delay in trial. His presence can be secured by imposing strict conditions. The bail is granted only on that ground. Hence, the following order is passed :

ORDER

- (a) Applicant-Mohd. Maqbool Abdul Gafar Bhat be released on bail in connection with Anti Narcotic Cell, Crime Branch Thane in C.R. No.16 of 2017, for the offences punishable under Sections 8(c), read with 21(c), 23(c), 28 and 29 of the NDPS Act on furnishing personal bond and surety bond of Rs.1,00,000/-.
- (b) Applicant shall not threaten the prosecution witnesses or allure them in any manner.
- (c) Applicant is directed to furnish surety, who is having residence in Thane District.
- (d) Applicant is directed to give attendance to the Thane Nagar police station on the first Monday of every month from 10 am to 12 noon till conclusion of trial.
- (e) Needless to say, violating of the condition above will make the Applicant liable for cancellation of bail, after notice to the

Applicant.

25. Learned APP submitted that copy of this order be circulated in entire State of Maharashtra, it is for the reason that earlier orders passed by this Court are cited on behalf of the defence. Let this order be circulated to all District Courts in the State of Maharashtra.

26. Application is disposed of accordingly.

27. These are my *prima facie* observations and the trial Court may not be influenced by that.

28. All the parties to act on an authenticated copy of this order.

[S. M. MODAK, J.]