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

BAIL APPLICATION NO. 53 OF 2024

Mohammed Nasir Saifur Rehman Khan

Applicant

.. (Accused No.1)

Versus

Union of India and Anr.

.. Respondents

-
- Ms. Munira Palanpurwala Shaikh a/w. Ms. Deepa Amati Muttagi, Advocates for Applicant.
 - Mr. Mohit Darji, Advocate i/by Mr. Rahul Tiwari, Advocate for Respondent No.1.
 - Mr. Y.Y. Dabke, APP for Respondent No.2 - State.
-

CORAM : MILIND N. JADHAV, J.

DATE : MAY 09, 2024.

P.C.:

1. Heard Ms. Shaikh, learned Advocate for Applicant; Mr. Darji, learned Advocate for Respondent No.1 and Mr. Dabke, learned APP for Respondent No.2 – State.

2. This is an Application seeking enlargement on bail of Applicant i.e. accused No.1 - Mohammed Nasir Saifur Rehman Khan prosecuted by the Narcotics Control Bureau (for short “**NCB**”) in CR. No.85 of 2021 under the provisions of Section 8(c) read with Section 20(b)(ii)(A), 21(c), 22(b), 25, 27A, 28, 29, 32(B) and 35 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short “**NDPS Act**”).

3. Briefly stated, the Intelligence Officer of the NCB received information on 06.09.2021 that the Applicant was holding illegally acquired narcotic drugs / psychotropic substances procured illegally in his premises situated at Byculla (West), Mumbai upon which the Respondent swung into action. The information received is at page No.41 of the Bail Application. Search and seizure was carried out presumably on the intervening night on 06.09.2021 and 07.09.2021 and according to panchnama it culminated on 07.09.2021 as stated in the panchnama which is appended at page No.45 of the Bail Application. Seizure was of 3 cartons totally comprising 270 bottles of codeine, a psychotropic substance; carton No.1 comprised 160 bottles of 100 ml each; carton No.2 comprised of 100 bottles of 100 ml each. Admittedly all 3 cartons pertained to a different manufacture, different marketer and a different batch which is stated in detail in the panchnama at page No.46 of the Bail Application. The place of seizure happened to be a dwelling house of accused No.1 who is the Applicant before me. He was apprehended on 07.09.2021 and since then he is in custody. He seeks enlargement on bail.

4. Ms. Shaikh, learned Advocate for the Applicant would submit that there is a complete breach of the provisions of Section 42 in the present case in as much as during the seizure there is absence of authorization of warrant which is absolutely essential considering that this is a seizure on specific information received by the Intelligence

Officer and on notice. She would submit that none of the officers, rather four officers who carried out the seizure were authorized to carry out the said seizure without an authorized warrant in view of their designation and rights.

5. She has drawn my attention to paragraph No.1 of the panchnama which gives the details of the 4 officers who carried out the seizure and would contend that the seizure has been carried out by a junior Intelligence Officer alongwith 3 guards and 1 driver. Next she would submit that provisions of the NDPS Act require presence of the designated officer. She would submit that the provisions enumerated in the second proviso of Section 41 (A) of the NDPS Act has also not been complied with in the present case in as much as considering the seizure having been carried out between sunset and sunrise which is clearly exemplified from the reading of the panchnama itself, there has been no recording of the grounds of satisfaction as required under the said proviso. In this regard, she has drawn my attention to page No.47 of the Bail Application and would contend that the seizure was conducted between sunset and sunrise and culminated only on 21:30 hrs. on 07.09.2021 as stated in the panchnama whereas the signatures of the panchas are taken on 06.09.2021.

6. In so far as the last submission of the Applicant is concerned, I do not agree since the date '07.09.2021' is a clearly typographical

mistake especially in view of the fact that the seizure was completed on 06.09.2021 and direction was given to the parties in the preceding penultimate paragraph of the panchnama that the party will have to remain present at 10:00 a.m. in the morning on 07.09.2021 in the Respondent's office.

7. Next she would submit that there is a serious discrepancy in drawing of the samples and compliance of the provisions of Section 52-A of the NDPS Act. She would submit that seizure took place on 06.09.2021 whereas Application under Section 52-A was made for the first time on 07.12.2021 which is appended at page No.240. I have perused the said Application which certifies that the Intelligence Officer of the Respondent had applied to the concerned Magistrate on 07.12.2021.

8. In support of her above submissions, Ms. Shaikh has referred to and relied upon unreported decisions of this Court in the case of *Sunil Bhagwandas Dhutiya Vs. The State of Maharashtra*¹ and *Shivraj Gorakh Satpute Vs. The State of Maharashtra*² and after going through the said decisions would contend that *prima facie* search and seizure of the present case is in complete contravention of the mandatory provisions of Section 42 of the NDPS Act and therefore that would make the recovery doubtful. She would submit that Applicant has

1 BA No.2138 of 2017 decided on 14.11.2017.

2 BA No.2865 of 2022 decided on 15.09.2023.

been incarcerated since 07.09.2021, the impending trial would take a very long time. She would submit that though charge-sheet is filed, charges are not framed as yet.

9. *PER-CONTRA*, Mr. Darji, learned Advocate for Respondent No.1 would submit that in the instant case the provisions of Section 42(2) of the NDPS Act have been complied with in its entirety and the seizure and recovery would suggest that the Applicant was in possession of the concerned codeine syrup. He would vehemently argue and inform the Court that antecedents of the Applicant need to be taken into account for in view of one CR having been registered against him for an earlier offence of a similar nature.

10. I have consider the submissions made by the learned Advocates appearing for the respective parties and perused the record.

11. *Prima facie*, from the panchnama it is clearly seen that the authorized officer has not conducted the raid and seizure despite having adequate information through the department in writing on 06.09.2021 or even for that matter having received the said information prior to 06.09.2021 in compliance with the provisions of Section 42. In that view of the matter, it was absolutely incumbent on the part of the Respondent's officers to have obtained the appropriate authorisation to conduct the raid after sunset.

12. *Prima facie*, on reading the panchnama itself, it is clear that the seizure and raid culminated at 21:30 hrs. In that view of the matter, admittedly when the seizure was carried out between sunset and sunrise, the authorization requirement having not been complied and there been breach of the provisions of Section 42 of the NDPS Act *prima facie*, a doubt is created on recovery and seizure. That apart, there is another defect which needs to be addressed for consideration of the Applicant's case namely that the batch number, manufactures name and marketer's name on all the cartons are entirely different and it is seen that only carton No.1 was opened and sample was drawn therefrom in breach of the provisions of the NDPS Act and therefore considering the fact that trial is not likely to conclude and would take a long time and Applicant been in custody since 07.09.2021 and such prolonged incarceration, this generally militates against the most precious fundamental right to liberty guaranteed under Article 21 of the Constitution of India and in such a situation, the conditional liberty must override the statutory embargo created under Section 37 of the NDPS Act. Reference in this regard is made to the decisions of the Supreme Court in the case of ***Rabi Prakash Vs. The State of Odisha***³ as also the following decisions:-

(i) ***Nitesh Adhikary @ Bapan Vs. The State of West Bengal***⁴;

3 Special Leave to Appeal (Crl.) No.4169 of 2023

4 Special Leave to Appeal (Crl.) No.5769 of 2022

- (ii) *Gopal Krishna Patra @ Gopalrusma Vs. Union of India*⁵;
and
- (iii) *Sharifulislam @ Sarif Vs. The State of West Bengal*⁶.

13. In view of the above and considering the facts, I am of the opinion that the Applicant deserves enlargement on bail. Hence, the following order:-

- (i) Applicant - Mohammed Nasir Saifur Rehman Khan, who is facing trial in NDPS Special Case No.254 of 2022 pending on the file of NDPS Special Judge, City Civil & Sessions Court, Greater Bombay, is ordered to be released on bail in the sum of Rs.1,00,000/- (Rs. One Lakh only) with one or two sureties to the like amount;
- (ii) Applicant shall report to the NCB, Mumbai Zonal Unit, Mumbai, once every month on the first Monday of the month between 11:00 a.m. to 02:00 p.m.;
- (iii) Applicant shall co-operate with the conduct of trial and attend the Trial Court on all dates, unless specifically exempted;
- (iv) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;

5 Criminal Appeal No.1169 of 2022 decided on 05.08.2022

6 Special Leave to Appeal (Crl.) No.4173 of 2022 decided on 04.08.2022

- (v) Applicant shall not influence with the witnesses or tamper with the evidence in any manner;
- (vi) Applicant shall keep the Investigating Officer informed of his current address and mobile contact number and/or change of residence or mobile details, if any, from time to time, as applicable.

14. The above observations are *prima facie* and should not be construed as an expression of any opinion and are made only for the purpose of bail and the same shall not influence the trial in any manner whatsoever.

15. Bail Application is disposed.

[MILIND N. JADHAV, J.]

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by AJAY
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Date: 2024.05.09
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