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

**CRIMINAL BAIL APPLICATION NO. 350 OF 2022
WITH
INTERIM APPLICATION NO. 1135 OF 2024
IN
CRIMINAL BAIL APPLICATION NO. 350 OF 2022**

Farooq Mohd. Naim Chaudhary .. Applicant

Vs.

Union of India & Anr. .. Respondents

.....

Mr. Dilip Mishra i/b Mr. Ayaz Khan for the applicant
Mr. Shreeram Shirsat, Special P.P. a/w Ms. Karishma Rajesh and Mr.
Nishad Mokashi for the respondent no.1 – UOI
Ms. Rashmi S. Tendulkar, APP for the respondent no.2 – State

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CORAM : PRITHVIRAJ K. CHAVAN, J.

**Closed on : 2nd MAY, 2024.
Pronounced on : 7th MAY, 2024.**

P.C.

1. By this application under Section 439 of the Cr.P.C. the applicant is praying for his bail, who has been arrested by the NCB in connection with F. No. NCB/MZU/CR-38/2020 for the offences punishable under Sections 8(c), r/w 22(b) and (c), 25, 27A, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985

(for short 'NDPS Act') in respect of NDPS Special Case No. 619 of 2021.

2. Intelligence Officer of the respondent received a secrete information on 25.11.2020 that an Indian National namely Nawab Jalil Shaikh, who is a resident of Flat No.2402, 24th Floor, Nathani Heights, Nagpada, Mumbai Central, Mumbai deals in illegal business of Narcotic drugs from his house. He sells, operates and stores the contraband in his flat.

3. Based on the said information, a team was constituted by the Intelligence Officer namely Ashish Prasad Ranjan as per the directions issued by the Zonal Director and the Superintendent. A team so formed proceeded to the said flat on the given address along with the 3 panch witnesses. When the door was knocked, it was opened by the accused no.1 himself by disclosing his name as Nawab Jalil Shaikh. Having informed him about the purpose of the team, a search of the premises was conducted. 19 small polythene packets containing white powder adjoining the aquarium tank were recovered. The accused informed that it was Mephedrone (MD).

4. Upon weighing the alleged contraband, it was noticed that the quantity was about 12.9 grams. The said contraband was sealed in a packet and the NCB Seal No. 03 was affixed and marked "M". Remaining transparent pouches were separately sealed and marked as "P".

5. During further inquiry with the said accused, it was learnt that the present applicant used to supply LSD and MD at the main gate of Nathani Apartment. Accordingly, the officers of the team went to the main gate of the said building and laid a trap.

6. On 26.11.2020 around 1.00 p.m. the applicant arrived on a scooter bearing Registration No. MH-01-CF-2312. The identity of the applicant was confirmed on the basis of his Driving Licence. When enquired, the applicant, on his own, admitted of having in possession of MD and LSD. He took out two transparent plastic pouches from his shirt's pocket by stating that the first pocket contained MD and second pocket contained LSD. The weight of the LSD was about 20 grams. The same was packed and sealed and marked as "M-1". The second transparent plastic bag contained

10 LSD dots. The weight of the same was 0.21 grams. It was also sealed and packed by giving mark as “M-2”.

7. During personal search, the Officers also recovered certain documents from both the accused. A panchanama was drawn and was completed at about 1.40 p.m. on 26.11.2020.

8. Statement of the first accused came to be recorded under Section 67 of the NDPS Act on the same day. He was arrested and thereafter a crime was registered against him for having found in possession of 12 grams of MD. Similarly, statement of the present applicant also came to be recorded under Section 67 of the NDPS Act on the same day. He too was arrested.

9. After investigation, a charge-sheet has been filed. An application for bail preferred by the applicant before the Special Judge, Mumbai, came to be rejected vide an order dated 20.12.2021. As such, the applicant approached this Court.

10. I heard Mr. Mishra, learned Counsel for the applicant and Mr. Shirsat, learned Special Public Prosecutor.

11. The salient features of the argument of Mr. Mishra are that non-compliance of Section 52A of the NDPS Act immediately after the raid, change of NCB Seal number, habitual and stock panch witnesses, non-compliance of Section 50 of the NDPS Act and last but not the least, long incarceration of the applicant in light of the fact that charge has not been framed and the trial would not commence, so also the first applicant has already been granted bail by the trial Court, which has not been challenged by the prosecution.

12. On the other hand, Mr. Shirsat, while strongly opposing the application for bail, emphasized that all the procedure has been scrupulously followed by the respondent – NCB including search and seizure of the contraband not only from the house of the first accused but from the person of the applicant. He would argue that there could be no question of a notice under Section 50 of the NDPS Act in light of the fact that before the applicant was appraised of his right, he voluntarily handed over Narcotic drugs to the raiding team.

13. Mr. Shirsat would argue that the change of Seal No.03 to Seal

No.02 is an error, which would not be fatal in the given facts and circumstances of the case in light of the fact that panchanama and the statement of the witnesses indicate that the respondent had scrupulously followed the procedure. He would further argue that the place of panchanama was near Mumbai Central and also near the office of the NCB. After the raid was conducted, a messenger was sent to office of the NCB to get the notice under Section 67 of the NDPS Act since the team of the respondent was not carrying a laptop and printer with them. Notice came to be typed on the laptop. He, therefore, opposed release of the applicant on bail.

14. Admittedly, accused no.1 has already been released on bail by the trial Court. The said order has attained finality since it has not been challenged by the respondent – NCB. The panch witnesses namely Adil Fazal Usmani and another panch namely Fletcher Patel appears to have acted in several cases of the NCB as panch witnesses. Learned Counsel for the applicant has, therefore, given entire list of crime numbers which is extracted below :-

Panch Adil Fazal Usmani has acted as Panch for NCB in the following cases:-

- i. CR No. 32 of 2020 (dt. 03/01/2021),
- ii. CR No. 32 of 2020 (dt. 07/01/2021),

- iii. CR No. 35 of 2020 (dt. 21/11/2020),
- iv. CR No.36 of 2020 (dt. 22/11/2020),
- v. CR No. 38 of 2020 (dt. 26/11/2020), i.e. the present case,
- vi. CR No.17 of 2021 (dt. 27/02/2021),
- vii. CR No.27 of 2021 (dt. 27/03/2021),
- viii. CR No. 28 of 2021 (dt. 19/06/2021),
- ix. CR No. 30 of 2021 (dt. 31/03/2021),
- x. CR No. 35 of 2021 (dt. 08/04/2021),
- xi. CR No. 38 of 2021 (dt. 15/04/2021),
- xii. CR No. 40 of 2021 (dt. 17/04/2021),
- xiii. CR No. 40 of 2021 (dt. 18/04/2021),
- xiv. CR No. 69 of 2021 (dt. 15/07/2021),
- xv. CR No. 82 of 2021 (dt. 28/08/2021),
- xvi. CR No. 94 of 2021 (dt 06/10/2021),

Panch Fletcher Patel has acted as Panch for NCB in the following cases:-

- i. CR No. 16 of 2020 (dt. 09/12/2020)
- ii. CR No. 32 of 2020 (dt. 07/11/2020),
- iii. CR No. 38 of 2020 (dt. 26/11/2020), i.e. the present case,
- iv. CR No. 2 of 2021 (dt. 02/01/2021),
- v. CR No. 37 of 2021 (dt. 12/04/2021),
- vi. CR No. 37 of 2021 (dt. 13/04/2021),
- vii. CR No. 49 of 2021 (dt. 20/05/2021),

15. This Court in the case of **Mohd. Hussain Babamiyan Ramzan Vs. State of Maharashtra**¹ has held that if the Investigating Officer knowingly taking pliable witnesses as a panch witnesses, the entire raid would become suspicious and the evidence of only police witnesses themselves is not sufficient to base conviction. The very credibility of the prosecution's case receives a jolts when such panch witnesses are summoned who had acted on several occasions in the past for the prosecution.

¹ 1994 CRI. L.J. 1020

16. It is alleged that the NCB had recovered 20 grams of MD and 0.21 grams of LSD (10 LSD Dot papers). The quantity of MD allegedly recovered from the possession of the applicant is non-commercial. There is no material on record to show that there was violation of Section 27A of the NDPS Act by the applicant for allegedly financing illicit traffic and harbouring offenders. So far as statement under Section 67 of the NDPS Act is concerned, the law on the said aspect is no more *res integra* in view of the decision of the Supreme Court in case of **Tofan Singh Vs. State of Tamil Nadu**². The information does not reflect the name of the applicant.

17. If the name of the applicant was disclosed by the accused no.1 who was arrested at the gate of Nathani building while supplying the contraband to the said accused, the respondent ought to have made compliance of Section 42 of the NDPS Act. Be that as it may.

18. Though Mr. Mishra argued that there is non-compliance of Section 50 of the NDPS Act, however, before the applicant was appraised of his right, he himself had voluntarily took out the contraband from his person and handed over to the raiding team, therefore, there is no question of due compliance of Section 50 in

2 AIR (2020) SC 5592

view of the recent judgment of the Supreme Court in the case of **Ranjan Kumar Chadha Vs. State of Himachal Pradesh**³.

19. It has been argued by Mr. Mishra, learned Counsel for the applicant that the panchanama reflects seizure of the contraband sealed with NCB Seal No.03. Statement of the panchas also reflect that the contraband was sealed with the help of NCB Seal No.03. During search by the Officers, the panchas noticed NCB Seal No.03. Interestingly, at the time of conducting inventory under Section 52A of the NDPS Act before the learned Magistrate, it was noticed that the seized articles were having NCB Seal No.02 and not NCB Seal No.03. It creates a reasonable doubt as regards authenticity of the seizure of the contraband at the time of raid and the production of the same before the Magistrate. It is surprising to note that at the time of inventory proceedings under Section 52A of the NDPS Act, photographs of the articles were taken as primary evidence, which reflects signature of the NCB officer apart from the signatures of 3 panchas and 2 accused persons. It is more surprising as to how the officer who alleged to have seized the contraband had put his signature on the sealed envelope at the time of conducting inventory in view of Sub-section (4) of Section 52A of the NDPS

3 AIR (2023) SC 5164

Act ?

20. Panchanama at page 31 is hand-written since no laptop and printer were available at the relevant time. The panchanama reflects that before it was drawn, notice under Section 67 of the NDPS Act was issued to both the accused. The said notices are at page nos. 46 to 51 which are typed and also indicate Crime No. F.No.NCB/MZU/CR-38/2020. However, the names of both the accused are hand-written. Therefore, it is quite probable that the sealing of the contraband was perhaps carried out in the office of the NCB and even before the notice under Section 67 of the NDPS Act was issued to the applicant. No doubt, there was a delay in conducting the proceedings under Section 52A of the NDPS Act.

21. In so far as recovery of 10 dots of LSD weighing 0.21 grams, this Court, in case of **Narcotics Control Bureau Vs. Anuj Keshwani & Ors. (Criminal Writ Petition No.2077 of 2021)** held that it is the duty of the prosecution to get all the LSD dots analyzed individually. Few blot papers may test positive for LSD but some may not. It is incumbent upon the Forensic Science Laboratory to analyze blot papers purportedly containing LSD on it. The

Chemical Analyser's report in the instant case does not reflect that all the blot papers have been examined for confirming as to whether it contained LSD.

22. Learned Counsel for the applicant has invited my attention to certain glaring discrepancies and serious defects committed by the learned Metropolitan Magistrate, 16th Court, Ballard Pier, Mumbai in respect of the proceedings under Section 52A of the NDPS Act. The proceeding appears to have been conducted on 13.01.2021 however, it was signed by the learned Magistrate on 12.01.2021 i.e. a day before the proceedings were conducted, which is quite surprising.

23. At the time of seizure panchanama of the contraband on 25.11.2020, the NCB had used Seal No.03. At the time of the proceedings under Section 52A of the NDPS Act, the learned Metropolitan Magistrate failed to notice that the sealed packets had NCB Seal No.02 instead of Seal No.03. The learned Metropolitan Magistrate ought to have taken due care as, the inventory proceedings under Section 52A is not a mere formality. Sub-section 4 of Section 52A of the NDPS Act provides :-

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]”

24. Photostat copies of the photographs on record at page nos. 91 to 109 appears to have been signed by the learned Metropolitan Magistrate but the dates have been interpolated beneath the signatures. *Prima facie*, it seems that the signatures were made on 14.11.2012 but later on interpolated as 12.11.2012 which also creates a doubt as regards genuineness and authenticity of the inventory conducted by the learned Metropolitan Magistrate in view of Section 52A of the NDPS Act.

25. There is one more aspect which needs to be pointed out is that the inventory proceedings, apart from bearing the seal and signature of the Magistrate, also bore the seal and signature of the Intelligence Officer of the NCB, Mumbai which is not the requirement of law. Let this aspect be brought to the notice of the

responsible officer of the N.C.B.

26. As already stated, the applicant is in custody since 26.11.2020. The Special Court has not yet framed the charge. The co-accused has already been granted bail. There is no likelihood of trial being concluded within reasonable time. As regards rigours of Section 37 of the NDPS Act, the State has been duly heard. The first condition stands complied with. So far as the second condition namely formation of opinion as to whether there are reasonable grounds to believe that the applicant is not guilty, the same may not be formed at this stage when the applicant has already spent more than 2½ years in custody. The prolonged incarceration generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution of India and in such situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act. Even otherwise, the discrepancies noted hereinabove would *prima facie* indicate that the applicant is not guilty of such offences.

27. Consequently, the following order is passed :-

ORDER

- (a) The application is allowed.
- (b) The applicant – Farooq Mohd. Naim Chaudhary be released on executing a P.R. bond in the sum of Rs.30,000/- with one or two sureties in the like amount to the satisfaction of the Special Court in NDPS Special Case 619 of 2021 for the offences punishable under Sections 8(c), r/w 22(b) and (c), 25, 27A, 28 and 29 of the NDPS Act.
- (c) The applicant shall report the office of the NCB, Mumbai on first Monday of every month between 10.00 a.m. to 1.00 p.m. till charge is framed.
- (d) After framing the charge, the applicant shall attend each date in the trial Court scrupulously.
- (e) The applicant shall not tamper with the evidence or attempt to influence or contact any of the witnesses or persons concerned with this case.
- (f) The applicant shall furnish his residential address and contact details forthwith to the respondent and the Special Court. The applicant shall inform in case of any change in his contact details or residential address to the respondent as well as the Special Court.

(g) The applicant shall surrender his passport, if any, to the Investigating Officer immediately.

(h) In case of two consecutive defaults either in attending the respondent or the trial Court or in case of breach of any of the aforesaid conditions, the prosecution shall be at liberty to seek cancellation of his bail.

28. The application stand disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)