



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
BAIL APPLICATION NO.1485 OF 2023**

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|--------------------------------|-----|------------|
| Alpesh Kumar Suresh Kumar Jain | ... | Applicant  |
| versus                         |     |            |
| The State of Maharashtra       | ... | Respondent |

Mr. Dilip Mishra i/by Zehra Charania for Applicant.  
Mr. S.R.Agarkar, APP for State.  
Mr. Sachin More, PI, and PSI Kshirsagar, Sewree Police Station present.

**CORAM: N.J.JAMADAR, J.**

**DATE : 31 JANUARY 2024**

**P.C.**

1. Heard the learned Counsel for the parties.
2. The applicant who is arraigned in NDPS Special Case No.669 of 2021 arising out of C.R.No.48 of 2020 registered with DCB, CID Unit No.9, for the offences punishable under Sections 22(c) read with 8(c), and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, 1985) has preferred this application to enlarge him on bail.
3. The indictment against the applicant and the co-accused is that a secret information was received on 8 December 2020 that the applicant and co-accused Shahnawaj would come near Raheja College Road, Daulat Nagar, Santacruz (W), Mumbai, to sell Mephedrone (MD) in a car bearing registration No.MH-04-JZ-369. The Police conducted a surveillance. At about 7.40 a.m., the persons matching the

description came at the said spot in the said car. They were accosted. They were apprised of their right to be searched in the presence of the Gazetted Officer or the Magistrate. As the applicant and co-accused Shahanawaj gave consent for search by police, in the personal search of the co-accused Shahanawaj, 35 gms MD, a contraband article was found. It was seized and samples were collected.

4. In the personal search of the applicant, 80 gms MD was found. It was also seized and samples were collected. During the course of investigation, it further transpired that the applicant and co-accused procured the substance from Co-accused Mohd. Nahid Shaikh and Ravish Ansari, Accused Nos.3 and 4. They were arrested. Pursuant to the disclosure statement made by accused No.4, accused No.5 Ranjan Mawar, who supplied the contraband article was also arrested. The prosecution alleged that the applicant and co-accused committed offences in pursuance of the criminal conspiracy punishable under Section 29 of the Act, 1985. The applicant and the co-accused came to be arrested on 9 December 2020.

5. Mr. Mishra, learned Counsel for the Applicant submitted that the material on record would indicate that the alleged search and seizure is foisted on the applicant. Taking the court through the allegations in the FIR, the seizure panchanama and the connected documents, it was submitted that there is non-compliance of Section 50 of the Act as there was a joint appraisal of the right of the accused to be searched before the Gazetted Officer or the Magistrate. Secondly, the

search and seizure become suspicious as the seals do not match. Thirdly, the first informant Vikas S. Sawant, PHC 32085, was shown to be present in the police station at about 10.00 a.m., while the seizure panchanama was conducted at about 10.30 a.m.

6. Lastly and most importantly, learned Counsel for the Applicant submitted that, there is a total non-compliance of the mandatory provisions contained in Section 52-A of the Act, 1985. On account of total non-compliance of the seizure and collection of samples in the presence of the Magistrate, as mandated by Section 52-A of the Act, the entire trial would stand vitiated. Strong reliance was placed on the judgment of the Supreme Court in the case of Yusuf @ Asif V/s. State<sup>1</sup> and an order passed by this Court in the matter of Jabir Nader Ali V/s. The State of Maharashtra<sup>2</sup>.

7. Mr. Mishra would further urge that the applicant is in custody since December 2020 and the trial has yet not commenced. Therefore, on the ground of long incarceration also, the applicant deserves to be released on bail.

8. Learned APP, on the other hand, resisted the prayer for bail. It was submitted that the alleged non-compliance of the provisions contained in Section 50 of the Act, would be a matter for adjudication at the trial. The discrepancy in the seals and the time of recording the seizure panchanama and the presence of the first informant at the police station, are also matters which are rooted in facts, and,

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1 Cri. Appeal No.3191 of 2023 dt. 13 Oct. 2023

2 dt. 4 December 2023 in BA 303 of 2023

therefore, can only be determined at the trial, post evidence.

9. Learned APP submitted that, prima facie, there is compliance of the statutory requirements contained in Sections 42 and 50 of the Act. Learned APP, however, fairly submitted that the material on record does not indicate that there is compliance of the provisions contained in Section 52-A of the Act.

10. I find substance in the submission of Mr. Aagarkar, so far as the inconsistency in the seal numbers in the panchanama and the forwarding letter under which the samples of the contraband articles were allegedly sent for analysis to Forensic Science Laboratory. Likewise, prima facie, it appears that the applicant and the co-accused were apprised of their right to be searched in the presence of a gazetted officer or Magistrate. Though, in the FIR, there is a reference to the effect that the applicant and co-accused Shahanawaj were apprised of their right to be searched in the presence of the gazetted officer or Magistrate under Section 50 of the Act together, yet there is further material to show that two separate appraisal letters were given to the applicant and co-accused and their individual consent was separately obtained. In any event, whether there is scrupulous compliance of the mandate contained in Section 50 of the Act and non-compliance, if any, was such that it would vitiate the search, would be a matter for trial.

11. The submission on behalf of the applicant that the documents on record do indicate that the search and seizure was conducted at about 10.30 a.m. on 9

December 2020 and an entry was made in the station diary at about 10.00 a.m., that PHC Devrukhkar 980454 took charge from the first informant Sawant, PHC 32085, also indicates the presence of the PHC Sawant at the police Station, is borne out by the material on record. Nonetheless, whether on account of the said discrepancy, the entire search and seizure is required to be thrown overboard would again be a matter for adjudication at the trial.

12. This leads me to the thrust of the submission of Mr. Mishra regarding the non-compliance of Section 52-A of the Act. Evidently, the investigating agency has not complied with the mandate contained in the said Act. Mr. Mishra would urge that the compliance of Section 52-A of the Act, has been held to be mandatory and the failure thereof, entails the consequences of acquittal, and, therefore, the applicant deserves to be released on bail. A very strong reliance was placed on an order passed by a learned Single Judge of this Court in the case of **Jabir Nader Ali (Supra)**.

13. Relevant part of Section 52A reads as under :

**“52-A - Disposal of seized narcotic drugs and psychotropic substances -**

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances controller substances of conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances of conveyances, which shall, as soon as may be after their seizure, be disposed of by such

officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall, prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under Sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(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.”

14. Plain reading of the aforesaid provisions would indicate that when any contraband / narcotic substance is seized and forwarded to the Officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act, the Officer referred to in sub-section (1) of Section 52-A shall prepare the inventory of contraband / narcotic substance containing details and the description of the seized substance, like quality, quantity, mode of packaging, marks, number or such other identifying particulars of the contraband or packing in which they are packed, country of origin and other particulars, as may be found relevant and make the application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared and for taking photograph and certifying such photograph as true and for allowing to draw representative samples of such substance in the presence of such Magistrate and certifying the correctness of list of samples so drawn.

15. Sub-section (3) of Section 52-A enjoins the Magistrate to allow the application, as soon as may be. Sub-Section (4) of Section 52-A, which begins with non-obstante clause qua Indian Evidence Act and the Code of Criminal Procedure, 1973, provides that every Court trying an offence under the said 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.

16. In the case of **Union of India V/s. Mohanlal and Anr.**<sup>3</sup> the Supreme Court held that the procedure prescribed in Section 52-A is of mandatory nature and it was obligatory to prepare an inventory of seized contraband and then make an application to the Magistrate for the purpose of getting its correctness certified. The observations in paragraphs 15 to 17 read as under :

“15.It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of 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.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in

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3 (2016) 3 SCC 379

compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. 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.”

17. Following the aforesaid pronouncement, in the case of **Jabir Nader Ali (supra)**, the learned Single Judge of this Court (Bharati Dangre, J.) held that the non-compliance of Section 52-A, within a reasonable time, gives rise to an apprehension that the sample which is alleged to have been drawn and sent for analysis, could have been tampered with and in absence of certification from the Magistrate that the sample has been correctly drawn, the benefit of doubt must necessarily yield in favour of the applicant.

18. At this stage, it is necessary to make a reference to another decision of the learned Single Judge of this Court (M.S.Karnik, J.) in the case of **Mukesh Rajaram Chaudhari V/s. The State of Maharashtra**<sup>4</sup> wherein after an elaborate analysis of the provisions contained in the Act, 1985 and the judgments of the Supreme Court in the cases of **Union of India V/s. Mohanlal (supra)** and **Simaranjit Singh V/s. State of Punjab**<sup>5</sup> the learned Single Judge posed a question, whether those judgments completely take away the discretion of the Court while considering the grant or refusal of the bail to an accused under the NDPS Act and the

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4 BA No.54 of 2023 dt. 27 Sept. 2023

5 2023 SCC Online SC 906

rigours of Section 37 of the Act stand lifted ?

The learned Single Judge answered the question as under :

“37. It is undoubtedly true that when the investigating agency has not followed the procedure under Section 52A of the NDPS Act, the deeming fiction of photographs, samples etc., being treated as primary evidence as provided under Sub-section (4) of Section 52A would not be available. However, the question is, is this the only mode in which the prosecution can establish the charge against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52A and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provided under Section 52A before destroying or disposing off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52A of the NDPS Act. The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the goods have been destroyed with the permission of the Magistrate. In such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52A of the NDPS Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it. For example, if the process of taking samples may not be in the presence of the Magistrate, but is shown to be properly followed with the aid of the support of the panch witnesses which the court finds believable and reliable, I do not see how the prosecution case would be destroyed totally. In either of the scenarios noted above, it would be eventually a question of what evidence is brought on record and how such evidence is to be evaluated. Both the aspects are in

relation to conduct of trial. At the stage when the court is concerned with the question of granting or refusing bail, this cannot be the sole consideration. It may be one of the relevant considerations but cannot be the sole consideration on the basis of which the moment it is shown that the procedure under Section 52A of the NDPS Act is not followed, the accused automatically becomes entitled to bail as a matter of right. The rigors of Section 37 of the NDPS Act would continue to apply. Only when the bail court is satisfied that reasonable grounds of believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail, the bail would be granted. I, therefore, do not find any merit in the submission of learned counsel for the applicant that in the present case non-compliance of Section 52A would entitle the applicant to bail.”

19. It must also be noted that in the case of **Jabir Nader Ali (Supra)**, this Court noted the decision in the case of **Mukesh Rajaram Chaudhari (Supra)**, and yet, in the facts of the said case, found that an endeavour was made to comply with the mandate of Section 52-A in a perfunctory manner, and, thus, exercised the discretion to release the accused therein on bail.

20. The approach adopted by this Court in the case of **Mukesh Rajaram Chaudhari (supra)**, cannot be said to be unsustainable. The endeavour of the Court was to balance the object with which the interdict contained in Section 37 of the Act, 1985 has been enacted with the imperativeness of following the mandatory provisions of the Act, 1985 which provide in built safeguard against the possibility of planting or false implication. The insistence on scrupulous compliance of the provisions which incorporate the safeguards, is premised on the stringent punishment which the

offences entail and also a statutory bar in the matter of releasing the accused on bail.

21. A case of complete non-compliance of Section 52-A and the one with material to indicate that there was a substantial compliance or there was still possibility of compliance of Section 52-A of the Act, in my view, stand on different footings. It is in the aforesaid context, reference to the decisions of the Supreme Court in the case of Yusuf @ Asif V/s. State (supra), and Simaranjit Singh V/s. State of Punjab (supra), would be advantageous.

22. In the case of Yusuf @ Asif V/s. State (supra), the Supreme Court after following the decision in the case of Union of India V/s. Mohanlal (supra), enunciated, as under :

“16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

23. In the case of Simaranjit Singh V/s. State of Punjab (supra), the Supreme Court after extracting the observations in paragraphs 15 to 17 (extracted above) in the case of Union of India V/s. Mohanlal (supra), observed that the act of the officer drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by Supreme Court Court in the case of Mohanlal

(supra). That creates a serious doubt about the prosecution case that substance recovered was a contraband, and the Supreme Court, thus, set aside the judgment of conviction and sentence.

24. Reverting to the facts of the case, there is a total non-compliance of the provisions contained in Section 52-A of the Act. It is not even the case that the prosecution claims that it is in a position to comply with the mandate contained in Section 52-A of the Act, as the seized contraband in bulk is still available. In a situation of this nature, the decision of this Court in the case of **Jabir Nader Ali (supra)**, appears to govern the facts of the case.

25. The applicant is in custody since 9 December 2020. More than three years have elapsed. It is unlikely that the trial can be completed within a reasonable period. It is well recognized that a long period of incarceration without a realistic possibility of conclusion of the trial within a reasonable period, melt down the rigours of statutory restrictions in the matter of grant of bail.

26. In a recent pronouncement, in the case of **Rabi Prakash V/s. State of Odisha**<sup>6</sup> the Supreme Court observed as under :

“4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned Counsel for the Respondent – State has been duly heard. Thus, the 1<sup>st</sup> condition stands complied with. So far as the 2<sup>nd</sup> condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be

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formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

27. I am, therefore, impelled to hold that in the peculiar facts of the case, there are grounds to believe that the accused may not be guilty of the offences. The Court is not informed that there are antecedents of the applicant which justify an inference that if released on bail, the applicant would indulge in identical offences. The second condition can, therefore, be also said to have been fulfilled.

28. Resultantly, the application deserves to be allowed.

29. Hence, the following order :

#### ORDER

(i) The Application stands allowed.

(ii) The Applicant – Alpesh Kumar Suresh Kumar Jain be released on bail in C.R.No.48 of 2020 registered with DCB, CID Unit No.9 on furnishing a PR bond in the sum of Rs.1,00,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

(iii) The applicant shall mark his presence before DCB, CID Unit No.9 on first Monday of every month between 11 am to 1 pm for a period of two years or till the conclusion of the trial whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

(v) On being released on bail, the applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

(vi) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(vii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

**( N.J.JAMADAR, J. )**