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

CRIMINAL BAIL APPLICATION NO. 2237 OF 2022

Manzar Din Mohammad Shaikh .. Applicant

Vs.

The State of Maharashtra .. Respondent

.....

Mr. Dilip Mishra i/b Mr. Ayaz Khan for the applicant
Ms. Anamika Malhotra, APP for the respondent – State
Mr. R.V. Londhe API, ANC Ghatkopar Unit, Crime Branch,
Mumbai present

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

**RESERVED ON : 12th FEBRUARY, 2024.
PRONOUNCED ON : 14th FEBRUARY 2024.**

P.C.

1. The applicant has been arrested on 14.10.2020 by the Officers of the respondent in connection with Crime No.23 of 2020 for the alleged violation of the provisions of Section 8(c) r/w 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act').

2. The Special Judge, NDPS Court, Mumbai by an order dated 21.04.2022 had rejected the bail application of the applicant.

3. Briefly stated, it is alleged that on 14.10.2020 around 11:30 hours, Mr. Patil, Head Constable, attached to Anti-Narcotic Cell, Ghatkopar Unit received a secrete information in respect of the description of the applicant and about his likelihood to come at Aakhil Bharatiya Kunchi-Korave Nagar, Dharavi, for selling Heroin to his prospective customers. The information, as received, was conveyed to the seniors and a trap was laid. When the raiding party arrived at the scene of occurrence, they noticed the applicant who's persona matched with the description received by them. The applicant was accosted and inquired about his details. He was also appraised of his right in view of Section 50 of the NDPS Act. During his personal search, a black coloured cloth bag was found in his right hand, which contained some gray colour powder weighing about 1 kg 200 grams. Upon testing with the help of testing kit, it gave positive result for the contraband "Heroin".

4. Two samples of 5 grams each were drawn and put into two separate transparent pouches. Those were duly sealed by affixing labels. An FIR came to be lodged. Statements of the witnesses were recorded and a charge-sheet came to be filed.

5. I heard learned Counsel for the applicant at a considerable length and so also the learned APP.

6. Apart from various grounds of non-compliance of Section 50 and 52-A of the NDPS Act as well as placing reliance on several decisions in that regard from either side, learned Counsel for the applicant has also invited my attention to the fact that though the raiding party while testing the alleged contraband on the spot found it to be positive for Heroin, however, the report of the Forensic Science Laboratory reflects that the alleged drug is positive for 'Alprazolam'. He would argue that the contraband seized during the raid has been tampered with and is replaced with something else. In view of this grave discrepancy, learned Counsel prays for release of the applicant on bail as according to him the trial would definitely end into his acquittal.

7. He also drew my attention to the statement of the carrier of contraband, which is in sharp contrast with the prosecution case. What has been seized on the spot appears to be a gray colour powder. However, the Analyzer's report reveals that it was a brownish colour powder.

8. Learned Counsel submits that the applicant who is a permanent resident of Mumbai will not abscond or tamper with the prosecution evidence. He has completed almost 2 years in custody with no hope of trial being concluded in the near future. He further submits that the applicant is ready to abide by any terms and conditions which would be imposed by the Court.

9. *Per contra*, learned APP strongly objected release of the applicant on the ground that there was due compliance of Sections 50 and 52-A of the NDPS Act. There is no question of non-compliance of Section 50 as the contraband was not recovered from the person of the applicant.

10. Learned APP has placed reliance on a judgment of the Supreme Court in the case of **Kallu Khan Vs. State of Rajasthan**, (2021) 9 SCR 700 as well as **State of Punjab Vs. Baldev Singh** (1999) 6 SCC 172.

11. Learned APP has also placed reliance on a judgment of the Supreme Court in the case of **Mangilal Vs. State of Madhya Pradesh**, (*Criminal Appeal No.1651 of 2023, decided on 12.07.2023*).

12. On the other hand, learned Counsel for the applicant has placed reliance upon multiple decisions, however he emphasized on the judgment of the Supreme Court in case of **Union of India Vs. Mohanlal & Anr. (2016) 3 SCC 379.**

13. The seizure panchanama dated 14.10.2020 reveals that when the raiding team accosted the applicant, he was informed about his right to be searched before an Gazetted Officer or Magistrate in view of Section 50 of the NDPS Act. It appears that the applicant had stated in Hindi “मुझे मेरी तलाशी के हक के बारे में पुलिस ने समझाया पुलिस मेरी तलाशी ले सकती है!” and thereafter put his signature, meaning thereby, he declined to get himself searched before any Gazetted Officer or Magistrate. Nevertheless, as per several pronouncements on this particular aspect by the Supreme Court, the applicant ought to have been taken to the Gazetted Officer or Magistrate for effecting his personal search in view of Section 50 of the NDPS Act and, therefore, there is non-compliance of the said mandate.

14. The respondent alleged to have seized 1 kg 200 grams of Heroin powder as per the seizure panchanama. Two samples of 5

grams each were tested on the spot with the help of a testing kit brought by the raiding team. After putting the reagent into the seized samples, firstly, the colour became light pink and thereafter turned into dark violet. The team, therefore, concluded that the contraband was Heroin. Interestingly, Forensic Science Laboratory's Report dated 08.07.2021 reveals result of the analysis that it was Alprazolam, Chlorzoxazone, Accetaminophen and Acetanilide. The table in the NDPS Act does not indicate any International Nonproprietary Name of the said Narcotic Drug or Psychotropic Substance. Be that as it may. This glaring discrepancy creates a reasonable doubt about the alleged raid and seizure of contraband.

15. Learned APP, during the course of argument has placed a copy of an order passed by the Metropolitan Magistrate, 64th Court, Esplanade, Mumbai indicating due compliance of Section 52-A of the NDPS Act. It is interesting to note that contraband was alleged to have been seized on 14.10.2020, however the compliance of Section 52-A appears to have been done on 11.10.2023 i.e. almost after 3 years by the learned Magistrate. It would be apposite to refer para 15 to 19 of the judgment in case of Mohanlal (supra),

which reads thus :-

“15. It is manifest from Section 52A(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 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.

18. Be that as 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. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. Mr. Sinha, learned Amicus, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the

application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.”

16. It is needless to reiterate the observations made by the Hon’ble Supreme Court in the said decision, however, suffice it to say that in view of Sub-section (3) of Section 52-A of the NDPS Act, the Magistrate shall as soon as may be allow the application. It 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-bond to approach the Magistrate** for the purposes mentioned above including grant of permission to draw representative samples in his presence. The samples will then be enlisted and the correctness of the list of the samples so drawn certified by the Magistrate. Inordinate delay in the case at hand for taking the samples to the Magistrate for the purpose of compliance of Section 52-A is indeed proceed against the genuineness of the seizure in view of the

judgment of the Supreme Court in case of **Simranjit Singh Vs. State of Punjab** (Criminal Appeal No.1443 of 2023, decided on 09.05.2023) considering the earlier judgment in the case of Mohanlal (supra).

17. In another judgment of the Supreme Court in the case of **Bothilal Vs. Intelligence Officer, NCB** (Criminal Appeal No.451 of 2011, delivered on 26.04.2023), the Supreme Court had an occasion to again deal with para 15 and 17 of the Mohanlal (supra) wherein the Supreme Court has reiterated the mandatory requirement of Section 52-A of the said Act and consequently set aside the conviction of the appellants by acquitting them of the charges under Section 8(c) r/w Section 21(c), 27A, 28 and 29 of the NDPS Act.

18. Learned APP has placed reliance upon a judgment of the Supreme Court in the case of **Mangilal Vs. The State of Madhya Pradesh** (Criminal Appeal No.1651 of 2023). While acquitting the accused of the offences punishable under Section 8(b) r/w Section 15(c) of the NDPS Act, the Supreme Court has expounded the scope of Section 52-A of the NDPS Act. It is worthwhile to

mention that the reason behind this provision is to inject fair play in the process of investigation. This section is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn. Para 5 of the said judgment can be quoted for advantage, which reads as under :-

“5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.”

19. The Supreme Court raised serious doubt with respect to the seizure as well as mechanical reliance placed by the Courts below on the FSL report while taking the statement of PW-11 as a gospel

truth. The Supreme Court, as such, acquitted the accused of all the charges.

20. The learned APP also placed reliance upon a judgment in the case of **Kallu Khan Vs. State of Rajasthan (2021) 9 SCR 700**. It was essentially on the compliance of a Notice under Section 50 of the NDPS Act. The body as well as the motorcycle of the accused was searched by the raiding team. During personal search, no incriminating substance was recovered, whereas in search of motorcycle, a polythene bag beneath the seat of motorcycle was found containing brown substance resembling smack which was burnt on a paper and, from its smell, it was confirmed to be smack.

The Supreme Court in para 15 observed thus :-

“15. Simultaneously, the arguments advanced by the appellant regarding non-compliance of Section 50 of NDPS Act is bereft of any merit because no recovery of contraband from the person of the accused has been made to which compliance of the provision of Section 50 NDPS Act has to follow mandatorily. In the present case, in the search of motor cycle at public place, the seizure of contraband was made, as revealed. Therefore, compliance of Section 50 does not attract in the present case. It is settled in the case of Vijaysinh (supra) that in the case of personal search only, the provisions of Section 50 of the Act is required to be complied with but not in the case of vehicle as in the present case, following the judgments of Surinder Kumar (supra) and Baljinder Singh

(supra). Considering the facts of this Court, the argument of non-compliance of Section 50 of NDPS Act advanced by the counsel is hereby repelled.”

21. However, it would be essential to emphasize on the ratio laid down by the Supreme Court in the case of **State of Rajasthan Vs. Parmanand and Anr. (2014) 5 SCC 345**. The Supreme Court in para 15 and 16 observed thus :-

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in State of Punjab V. Baldev Singh, (1999) 6 SCC 172; 1999 SC (Cri.) 1080, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only Respondent No.2 – Surajmal is stated to have signed for

himself and for Respondent No.1 – Parmanand.
Respondent No.1 Parmanand did not sign.”

22. In essence, if a person is to be searched to ascertain possession of any contraband, compliance of Section 50 is mandatory even if, nothing was found during the personal search. This is irrespective of the fact whether any contraband was found outside of his person. The ratio laid down by the Supreme Court in the case of Kallu Khan (supra), therefore, can be distinguished in view of the observations made in Parmanand (supra) and the law pronouncement of the supreme Court on the said aspect.

23. The applicant has been incarcerated ever since his arrest on 14.10.2020. The charge has not yet been framed and therefore, there is no possibility of the trial being concluded in the near future. Consequently, the applicant is entitled to be released on bail.

24. Now to the order :-

ORDER

(a) The application is allowed.

(b) The applicant be released on executing a P.R. bond in the sum of Rs.50,000/- with one or two sureties in the like

amount to the satisfaction of the Special Court in Special Case No.436 of 2021 for the offence punishable under Sections 8(c) r/w 21(c) of the NDPS Act.

(c) The applicant shall not leave the jurisdiction of the Special Court until conclusion of the trial.

(d) The applicant shall report the office of the ANC, Ghatkopar Unit, Mumbai on first Saturday of every month between 10.00 a.m. to 1.00 p.m. till the conclusion of the trial.

(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 latest place of residence and contact details forthwith to the respondent and the Special Court. In case of change of residential address or cell number (contact details), the same shall be forthwith informed to the respondent as well as the Special Court.

(g) The applicant shall attend the trial scrupulously unless exempted.

(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.

(i) The applicant shall surrender his passport with the respondent forthwith.

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

(PRITHVIRAJ K. CHAVAN, J.)