

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

BAIL APPLICATION NO. 2000 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Date: 2024.05.10
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Mohd. Hussain Ahmed Shaikh @ Babool
Bhai

...Applicant

Versus

State of Maharashtra

...Respondent

WITH

BAIL APPLICATION NO. 2174 OF 2023

Santosh Jain s/o Rajendra Jain

...Applicant

Versus

The Union of India and anr.

...Respondents

WITH

BAIL APPLICATION NO. 3558 OF 2023

Sandeep Dnyaneshwar Khedekar @ Rajesh

...Applicant

Versus

Union of India and anr.

...Respondents

Mr. Arun Rajput, a/w Tohid Shaikh, i/b Anjali Patil, for the
Applicant in BA/2000/2023.

Mr. Harekrishna Mishra, a/w Vivek Arote, for the Applicant
in BA/2174/2023.

Mr. Anil Lalla, a/w Aryan Kotwal, i/b Lalla & Lalla, for the
Applicant in BA/3558/2023.

Mr. S. R. Aagarkar, APP for the State/Respondent No.1 in
BA/2000/2023, Respondent No.2 in BA/2174/2023
and BA/3558/2023.

Mr. Ashish Chavan, for UOI/Respondent No.1 in
BA/3558/2023.

Ms. Manisha Jagtap, a/w Ishan Paradkar, for UOI/NCB –
Respondent No.2 in BA/2000/2023 and for
Respondent No.1 in BA/2174/2023.

CORAM: N. J. JAMADAR, J.

Reserved On: 4th APRIL, 2024

Pronounced On: 9th MAY, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicants, who are arraigned in NDPS Special Case No.907 of 2022 arising out of NCB MZU CR No.30 of 2022, Mumbai, for the offences punishable under Sections 21(c), 25, 27, 27(a), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act, 1985"), have preferred these applications to enlarge them on bail.
3. On 18th August, 2022 Mr. Vijay Shinde, Intelligence Officer, NCB, received an information that Santosh Jain (A6) – applicant in BA/2174/2023, a resident of Varanasi, was involved in supply of Chlorpheniramine Maleate & Codeine Phosphate Phensirest Cough Syrup (CBCS) bottles (Brand name 'Phensirest') in huge quantity from Varanasi to Pune and eventually those bottles were transported to Mumbai. Santosh Prajapati (A5) regularly took those parcels and sent them by train from Mughalsarai, UP, to Pune, where those parcels were collected by Nitin Bhosle (A4). The consignment was forwarded by Nitin Bhosle (A4) to Sandip Khedekar alias Rajesh (A3), the applicant in BA/3558/2023. One such consignment was likely to reach Avinash Cargo Pvt. Ltd. (ACPL), MIDC, Andheri, where it was to be collected by Mohd

Hussain alias Babool Bhai (A7) the applicant in BA/2000/2023 or his associates Arabshah Sayyed (A1) on behalf of Sandeep Khedekar (A3).

4. After complying with the statutory requirements, three teams of NCB Officers/officials were formed. On 19th August, 2022, a team of NCB intercepted a parcel having GC No.2202003858 at MIDC-Andheri and seized 1152 bottles of CBCS. Arabshah Sayyed (A1) was intercepted while taking delivery of said parcel.

5. During follow-up action another team of NCB, Mumbai, seized 5184 bottles of CBCS under panchnama dated 19th August, 2022 at parcel office, Pune Railway Station, Pune Nitin Bhosle (A4) was intercepted while taking delivery of the said contraband. On a further input, the said team of NCB seized 3456 bottles of CBCS under panchnama dated 20th August, 2022 at parcel office at Pune Railway Station, Pune.

6. Another team of NCB, on the basis of the disclosure statement of Arabashah Sayyed (A1), Nazare Alam Salman (A2), Sandeep Khedekar alias Rajesh (A3), Nitin Bhosle (A4), intercepted Santosh Prajapati (A5) and Santosh Jain @ Chhotu (A6). 7488 bottles of CBCS were recovered under a panchnama dated 21st August, 2022 at Varanasi.

7. The applicants and the co-accused made voluntary statements under Section 67 of NDPS Act, 1985. It transpired that the applicant and co-accused were involved in a conspiracy to procure, possess, transport, sell-purchase finance and attempt to commit offences under the NDPS Act, 1985.

8. Investigation revealed that Santosh Jain (A6) was involved in the illegal business of purchasing and selling Phensirest. Santosh Jain (A6) procured the contraband from Mannu Sharma, of Varanasi. Santosh Prajapati (A5) used to collect the boxes from Nati Imli to Sarainandan in his vehicle, packed those boxes and booked the parcels. Upon learning that Santosh Prajapati (A5) was arrested, Santosh Jain (A6) had shifted 52 boxes of CBCS bottles packed in 26 bundles from his godown to the house of one of his friend namely, Rajkumar Jaiswal. From the house of Rajkumar Jaiswal, contraband was seized. Santosh Jain (A6) was called at the house of Rajkumar Jaiswal and thereupon Santosh Jain (A6) came to be accosted.

9. Sandeep Khedekar (A3) is alleged to be the main purchaser and seller of CBCS bottles from Varanasi based

suppliers and further supplied those bottles to his Mumbai based customers.

10. Mohd Hussain alias Babool Bhai (A7) is alleged to be the main receiver and seller of CBCS bottles. The accused were in regular touch with each other. The CDR details and the exchange of messages clearly make out a conspiracy for illicit drug trade.

11. The applicants claimed that no contraband article has been recovered from the possession of any of these applicants. They are roped in primarily on the basis of the statements of the applicants and the co-accused recorded under Section 67, of the NDPS Act, 1985. Those statements are not admissible in evidence. Apart from the statements under Section 67 there is no material to connect the applicants with the alleged offences. Co-accused Nazare Alam (A2) has been released on bail by the Court of Session. Thus, the applicants are entitled to the same dispensation.

12. Affidavits-in-reply are filed by respondent No.1 in opposition to the prayer for bail. It is contended that huge quantity of 21,888 bottles of CBCS have been seized. In addition to the disclosures made by the applicants and the co-accused and their voluntary statements under Section 67

of the NDPS Act, 1985, there is independent material in the form of CDR analysis, mobile forensic report and chemical analysis report which squarely incriminates the applicants and indicates that the applicants were confederates in the conspiracy. The suspicious call records amongst the applicants and the co-accused *prima facie* indicate the involvement of the applicants. As huge quantity of CBCS bottles has been recovered, the interdict contained in Section 37 of the NDPS Act applies with full force and, therefore, the applicants do not deserve to be enlarged on bail.

13. I have heard Mr. Lalla, the learned Counsel for the applicant in BA/3558/2023, Mr. Rajput, the learned Counsel for the applicant in BA/2000/2023, Mr. Mishra, the learned Counsel for the applicant in BA/2174/2023, Mr. Chavan, the learned Special PP for the UOI in BA/3558/2023 and Ms. Jagtap, the learned Special PP for the UOI in BA/2000/2023 and BA/2174/2023.

14. Mr. Lalla submitted that from very the inception, the prosecution case is fraught with illegality. The alleged information note (NCB1) dated 18th August, 2022 indicates that the information was gathered during a lawful interception. However, no material has been placed on record

to show that there was a lawful interception. In the absence thereof, the interception of telephonic conversations would fall foul of the judgment of the Supreme Court in the case of *People's Union for Civil Liberties (PUCL) vs. Union of India and another*¹.

15. Secondly, the reliance of the prosecution on the reports of a private laboratory in respect of the forensic analysis of the mobile phone handset is also fraught with infirmities. The said procedure is in the teeth of the standing instructions No.1/88 which provides that the seized articles be sent to the laboratories named therein. Thirdly, since the statements recorded under Section 67 of the NDPS Act, 1985 cannot be considered at all, even at this stage, the prosecution case based on CDR and WhatsApp messages etc., cannot form the material to deprive the personal liberty of the applicants. The veracity and reliability of such material is required to be tested at the trial. Lastly, Mr. Lalla further submitted that there was non-compliance of the provisions contained in Section 42(1) of the NDPS Act, 1985. The information note (NCB1) does not indicate that it was forwarded to an immediate official superior.

1 (1997) 1 Supreme Court Cases 301.

16. Mr. Rajput submitted that nothing has been recovered from the possession of the applicant - Babool Bhai (A7). The applicant is, thus, entitled to claim parity with Nazare Alam (A2), who has since been released on bail.

17. Mr. Mishra submitted that no contraband was recovered from the possession of Santosh Jain (A6). Rajkumar Jaiswal from whose house the contraband substance was recovered has not been made an accused. Mannu Sharma from whom the applicant Santosh Jain (A6) allegedly procured the contraband has not been apprehended. In fact, no investigation has been carried out by the investigating agency to trace Mannu Sharma. Therefore, the applicant deserves to be released on bail.

18. Mr. Chavan, the learned Special PP, submitted Sandeep Khedekar (A3) is the main procurer and seller of the contraband substance. The challenge to the prosecution based on the non-compliance of the provisions contained in Section 42 of the NDPS Act, 1985 was stated to be wholly misconceived as the information was received under Section 41(2) of the NDPS Act, 1985. The authorization (page 81) was issued by a Gazetted Officer. Mr. Chavan further submitted that the thrust of the submission on behalf of the applicants

that since no contraband was recovered from the possession of any of the applicants their complicity cannot be established, is equally misconceived.

19. It was submitted that it is not an immutable rule of law that a statement under Section 67 is not to be considered at all. In any event, in addition to the statement under Section 67, there is ample material in the form of CDR, WhatsApp chat and retrieval of data from the mobile phones, which substantiate the indictment against the applicant. In addition, there is a financial transaction in the nature of payment to the wife of accused No.4. The investigating agency has also collected material from the devices to show the *hawala* transaction.

20. Ms. Jagtap, the learned Special PP, supplemented the submissions of Mr. Chavan, Ms. Jagtap and Mr. Chavan placed reliance on the decisions of the Supreme Court in the cases of *Narcotics Control Bureau vs. Mohit Aggarwal*², *UOI through NCB vs. Md. Nawaz Khan*³, *UOI vs. Ajay Kumar*

2 Cri.Appeal Nos.1001-1002/2022, dtd.19/7/2022

3 (2021) 10 Supreme Court Cases 100.

*Singh alias Pappu*⁴ and *UOI vs. Rattan Mallik alias Habul*⁵, to lend support to the aforesaid submissions.

21. I have carefully perused the material on record and given anxious consideration to the submissions canvassed across the bar.

22. To begin with, it is necessary to note that the prosecution does not claim that any of the applicants were found in actual physical possession of the contraband substance. Santosh Jain (A6) is alleged to be the main supplier of the contraband substance from Varanasi. Sandeep Khedekar (A3) and Babool Bhai (A7) are alleged to be the receivers of the contraband substance for further sale to their customers in Mumbai. Arabshah Sayyed (A1) was allegedly intercepted when he was to collect the contraband substance for Sandeep Khedekar (A3). The applicants are, thus, sought to be implicated as the suppliers/procurers and confederates in the conspiracy to indulge in illicit drug trade.

23. Evidently, a major portion of the material against the applicants constituted the statements of the accused – applicants and the co-accused recorded under Section 67 of

4 SLP (Cri) No.2351 of 2023, dtd.28/3/2023.

5 (2009)2 Supreme Court Cases 624.

the NDPS Act, 1985. In view of the three Judge Bench judgment in the case of *Tofan Singh vs. State of Tamil Nadu*⁶ the statements made under Section 67 of the NDPS Act, 1985 cannot be used as confession in a trial for the offences under NDPS Act, 1985. Nor such statement constitute a legal evidence qua the non-maker co-accused. The reliance placed by Mr. Lalla on the judgment of the Supreme Court in the case of *State vs. Pallulabid Ahmad Arimutta*⁷, to support the submission that those statements cannot be considered even at the stage of bail, appears well founded.

24. Before advertng to consider whether there is independent material other than statement under Section 67 of the NDPS Act, 1985, it may be appropriate to note the restrictions in the matter of grant of bail, where commercial quantity of contraband article is involved.

25. In the case of *State of Kerala vs. Rajesh*⁸, the Supreme Court enunciated that the expression, “reasonable grounds” used in Section 37(1)(b) means something more than *prima facie* ground. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offences.

6 (2021) 4 Supreme Court Cases 1.

7 Special Leave to Appeal (Cri) No.3242/2022, dtd.10/1/2022.

8 (2020) 12 SCC 122.

The reasonable belief contemplated in the provisions requires existence of such facts and circumstances as are sufficient in themselves to justify a satisfaction that the accused is not guilty of the alleged offence.

26. On the aforesaid touchstone, the first ground urged on behalf of the Sandeep Khedekar (A3) regarding the non-compliance of the mandatory provisions in Section 42(1) and (2) of the NDPS Act, 1985 deserves consideration. The information note (page 80 NCB1) indicates that Mr. Vijay Shinde, IO, had gathered the information, noted down the same in writing and forwarded the same to the Zonal Director, NCB, Mumbai Zonal Unit, Mumbai. The latter, in turn, seems to have issued an office order on 18th August, 2022 (page 81) constituting three different teams for taking necessary actions.

27. Though Mr. Lalla placed reliance on a number of judgments to draw home the point that the failure to comply with the provisions contained in Section 42 merits grant of bail and Mr. Chavan countered with equal tenacity that the information was received under Section 41(2) of the NDPS Act, 1985, I do not deem it necessary to delve into this aspect

of the matter elaborately since a *prima facie* view is required to be taken.

28. As there is material to indicate that the officer, who received the information, recorded the same and forwarded the same to the immediate official superior, there is substantial compliance of the provisions contained in Section 42 of the NDPS Act, 1985. The decision of the Constitution Bench of the Supreme Court in the case of ***Karnail Singh vs. State of Haryana***⁹ *ex facie* governs the facts of the case at hand. Paragraph 35 of the judgment in ***Karnail Singh*** (supra) reads as under:

“35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajjan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the

9 (2009) 8 Supreme Court Cases 539.

information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

(emphasis supplied)

29. In my considered view, in the facts of the case, whether there is adequate or substantial compliance with Section 42 or not, appears to be a question of fact which merits adjudication at the trial.

30. As noted above, apart from the statements under Section 67, and the disclosure statement of the applicants

and the co-accused, the prosecution banks upon the CDR analysis, mobile forensic report and chemical analysis report to establish the nexus of the applicants in commission of the alleged offences. The CDR analysis reveals that Sandeep Khedekar (A3) was in contact with Santosh Jain (A6), Nitin Bhosle (A4) and Mohd Hussain Shaikh alias Babool Bhai (A7). Santosh Jain (A6) was in direct contact with Sandeep Khedekar (A3) and Santosh Prajapati (A5). Mohd Hussain Shaikh alias Babool Bhai (A7) was in direct contact with Arabshah Sayyed (A1), Nazer Alam (A2), Sandeep Khedekar alias Rajesh (A3) and Nitin Bhosle (A4). The prosecution claims to have retrieved data from the mobile phone handsets which indicates the WhatsApp chats, photographs and other incriminating material. At this stage, the pivotal question is: Whether this material is sufficient to deprive the personal liberty of each of the applicants?

31. Reliance was placed on behalf of the accused on the observations of the Supreme Court in the case of ***Bharat Chaudhary vs. Union of India***¹⁰, wherein with reference to the printouts of the WhatsApp messages, the Supreme Court, in the facts of the said case, observed that, “Reliance on the

10 Spl, Leave to Appeal (Crl) No.5703/2021, dtd.13/12/2021.

printouts of the WhatsApp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited.”

32. In the case of *Pallulabid* (supra), the Supreme Court *inter alia* observed that the CDR details of the some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial.

33. In contrast, the learned Special Prosecutors banked upon the decisions in the cases of *Mohit Agarwal* (supra) and *Md. Navaz* (supra). It is true that in both *Mohit Agarwal* (supra) and *Md. Navaz* (supra) the Supreme Court considered the CDR details as an incriminating circumstance. However, in my considered view, the decisions in those cases turned on the facts therein.

34. In the case of *Mohit Agarwal* (supra), the respondent therein had disclosed the address and location of the co-accused, who was arrested later on and the CDR details showed that they were in touch with each other. In the case

of *Md. Nawaz* (supra), the respondent therein was travelling all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused, in the vehicle in which contraband was concealed and, in that context, the fact that the respondent was in regular touch with the other accused persons was taken into account.

35. In the case at hand, the material qua Sandeep Khedekar (A3) and Babool Bhai (A7) appears to be in the nature of CDR and the data retrieved mobile phone hand sets. The transcript of the conversation do indicate the nature of the conversation between the parties is not placed before the Court. The question as to the admissibility and reliability of a report of a private expert may also be a matter for adjudication at the trial. I am, therefore, inclined to hold that the material against Sandeep Khedekar (A3) and Babool Bhai (A7) is by and large of a similar nature as against Nazare Alam (A2), who has been released on bail.

36. The case of Santosh Jain (A6) however stands on a different footing. Santosh Jain (A6) was specifically named in the information gathered by the intelligence officer. Apart from the statements of Santosh Jain (A6) and co-accused, there is a formidable dyke in the form of the statement of

Rajkumar Jaiswal, who stated that Santosh Jain (A6) had kept the contraband substances in his house on 21st August, 2022 and stated that he would move the same after a couple of days. Santosh Jain (A6) had informed him that the cartons contain medicines. There was no reason to suspect. On 21st August, 2022 when the team of NCB raided the house of Rajkumar Jaiswal, the latter called Santosh Jain (A6) on phone and thereupon Santosh Jain (A6) was apprehended. The fact that applicant Santosh Jain (A6) had shifted the contraband to the house of Rajkumar Jaiswal on 20th August, 2022 after Santosh Prajapati (A5) came to be apprehended at Varanasi cannot be said to be a matter of coincidence. It would be contextually relevant to note that in his application, Santosh Jain (A6) asserts that he was transporting the boxes containing the medicines unaware of its contents.

37. Thus, in the facts and circumstances of the case, applicant Santosh Jain (A6) can be said to have been *prima facie*, in conscious possession of the contraband substance which was stored at the house of Rajkumar Jaiswal as Santosh Jain (A6) exercised control over the said contraband substance. If the CDR and other material is considered in

conjunction a *prima facie* case can be said to have been made out against Santosh Jain (A6).

38. The conspectus of aforesaid consideration is that the interdict contained in Section 37 may not operate against Sandeep Khedekar (A3) and Babool Bhai (A7) as the material against them does not appear to be adequate and as they do not have antecedents, the interdict under Section 37 of the NDPS Act may not operate against them. However, qua Santosh Jain (A6) the bar operates with full force.

39. Hence, the following order:

: O R D E R :

- (i) Application of Santosh Jain s/o Rajendra Jain: BA/2174/2023 stands rejected.
- (ii) BA/2000/2023 and BA/3558/2023 stand allowed.
- (iii) Mohd. Hussain Ahmed Shaikh @ Babool Bhai, the applicant in BA/2000/2023 and Sandeep Dnyaneshwar Khedekar @ Rajesh, the applicant in BA/3558/2023, be released on bail in NDPS Special Case No.907 of 2022 arising out of NCB MZU CR No.30 of 2022, Mumbai, on furnishing a P.R. Bond of Rs.1,00,000/-, each, with one or more sureties in the

like amount to the satisfaction of the learned Special Judge.

- (iv) The applicants in BA/2000/2023 and BA/3558/2023 shall mark their presence at the NCB MZU, Mumbai, on the first Monday of every month between 10.00 a.m. to 12.00 noon for the period of three years or till conclusion of the trial, whichever is earlier.
- (v) The applicants 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.
- (vi) On being released on bail, the applicants shall furnish their contact numbers and residential address to the investigating officer and shall keep him updated, in case there is any change.
- (vii) The applicants shall not indulge in identical activities for which they have been arraigned in this case.
- (viii) The applicants shall regularly attend the proceedings before the jurisdictional Court.
- (ix) 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 stands disposed.

[N. J. JAMADAR, J.]