

Sayali Upasani

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

BAIL APPLICATION NO. 2477 OF 2023

Miraj Hasim Shaikh @ Sabul Biswas ...Applicant

Vs.

The State of Maharashtra ...Respondent

Ms. Ashwini Achari with Mr. Taraq Sayed, for Applicant.

Mr. S.R. Agarkar, APP for State-Respondent.

Mr. M. Qazi, PSI, ATS Thane Unit, Present.

CORAM:- N. J. JAMADAR, J.

DATED:- 27th FEBRUARY, 2024.

ORDER:-

1) The applicant, who is arraigned in CR No. 10 of 2019, registered with ATS Kalachowki Police Station, Mumbai, for the offences punishable under Sections 20 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985), Sections 420, 465, 468 and 471 of the Indian Penal Code, 1860, Section 3 (2) (A) of the Foreigners Order, 1948, Section 14 of the

Foreigners Act, 1946 and Section 12 (1A) (a) of the Passports Act, 1967, has preferred this application to enlarge him on bail.

2) On 28th November, 2019, pursuant a specific information that a Bangladeshi National was to come near Sibi Machine Craft Company, Road No. 21, Wagale Industrial Estate, Thane (W), to sell a drug, "Yaba", after compliance with the statutory requirement, the ATS team conducted a surveillance. At about 2.05 am., the applicant, whose features matched with the description furnished in the information, approached at the said spot. He was accosted. The applicant was apprised of his right to be searched in the presence of a gazetted officer or Magistrate under section 50 of the NDPS Act, 1985. Thereafter, in the personal search of the applicant in the right side pocket of his trouser, one small plastic pouch containing 8 purple color pouches consisting of 1550 pills was recovered. The said substance appeared to be Methenamine. It weighed 155 grams. Thereupon, the applicant came to be arrested.

3) The learned Counsel for the applicant submitted that the search and seizure stood completely vitiated as there was non-compliance with the mandate contained in Section 50 of the Act, 1985. Secondly, the search was conducted by an official, who is

not empowered under Section 42 of the Act, 1985. Therefore, the prosecution which solely rests on the ground of possession of the alleged contraband article by the applicant, becomes unsustainable. The learned Counsel further submitted that there is non-compliance with the provisions contained in Section 52A of the Act, 1985, also.

4) The learned Counsel for the applicant would also urge that the applicant has been in custody since 29th November, 2019. It is unlikely that the trial can be concluded within a reasonable period. Therefore, the applicant deserves to be enlarged on bail.

5) The learned APP submitted that since the trial has commenced, at this juncture, the prayer for bail may not be considered and instead a direction for expeditious completion of the trial may serve the ends of justice.

6) The learned Counsel for the applicant joined the issue by canvassing a submission, that having regard to the number of witnesses the prosecution proposes to examine, it is extremely unlikely that the trial can be expeditiously concluded. It was submitted that in the face of a clear breach of the mandatory provisions, further detention of the applicant would be wholly unjustifiable.

7) I find substance in the submission of the learned Counsel for the applicant. It is trite that the provisions contained in Section 50 of the NDPS Act, 1985 incorporate a valuable right of the suspect, where his “person” is searched. Scrupulous compliance with the provisions contained in Section 50 of the Act, is thus warranted. A plea of substantial compliance of the said right to be searched in the presence of a Gazetted Officer or Magistrate cannot be entertained.

8) In the case at hand, from the perusal of the FIR as well as seizure panchanama, it becomes evident that API Mr. Chavhan professed to ensure compliance with Section 50 by declaring that he was a Gazetted Officer and he had the right to conduct the personal search of the applicant. It is true that API Chavhan went on to further apprise the applicant that he had a right to be searched before another Gazetted Officer or Magistrate.

9) The aforesaid appraisal has been held to be not in consonance with the true spirit of the provisions contained in Section 50 of the Act, 1985. A declaration by a member of the raiding party that he himself is a Gazetted Officer and, therefore, authorized in law to conduct search has the effect of giving an impression that the suspect cannot insist for being searched

before another Gazetted Officer, as the member of the raiding party himself is a Gazetted Officer. Such a declaration has the propensity to dissuade the suspect from exercising his statutory right under Section 50 of the Act, 1985.

10) Secondly, the submission on behalf of the applicant that the search was conducted by a person who was not authorized also carries substance. From the perusal of the seizure panchanama it becomes evident that the applicant was searched by Police Naik Jadhav, albeit on the directions, of API Chavhan,. However, such search by an unauthorized person even in the presence, or on the direction of the authorized Officer does not constitute a valid search.

11) The learned Counsel for the applicant placed reliance on the orders of this Court in the cases of **Haji Mohd. Abdul Kadar Bhumedia Vs. The State of Maharashtra in Bail Application No. 378 of 2022 dated 23rd August, 2022, Aarif Akram Shaikh Vs. The State of Maharashtra in Bail Application No. 3158 of 2021 dated 7th February, 2023 and Mohammed Jafar Mohammed Babar Shaikh Vs. The State of Maharashtra in Bail Application No. 3122 of 2022 dated 21st June, 2023.**

12) In the aforesaid orders, this Court has held that a search by a Police Naik even under the directions of an authorized Officer may not be a valid search.

13) In terms of the Notification issued by the State Government in the exercise of the power of Sub Section (1) of Section 42 of the NDPS Act, 1985, inter alia, all police officers of and above the rank of Head Constable in the State of Maharashtra are empowered for the purposes of Sub Section (1) of Section 42 of the NDPS Act, 1985. In the case at hand, prima facie, the search was conducted by an official who had not been empowered to carry out the search. Resultantly, the validity of the search and seizure becomes suspect.

14) In the aforesaid view of the matter, the Court may be justified in drawing an inference that the applicant may not be guilty of the offences punishable under the NDPS Act, with which he has been charged. The Court is not informed that there are antecedents.

15) In any event the applicant has been in custody since 29th November, 2019. More than four years have elapsed. It is extremely unlikely that the trial can be concluded within a reasonable period.

16) As the twin conditions envisaged under Section 37 of the NDPS Act, stand satisfied, I am inclined to exercise the discretion in favour of the applicant.

17) Hence, the following order.

: O R D E R :

(i) The application stands allowed.

(ii) The applicant Miraj Hasim Shaikh @ Sabul Biswas be released on bail in CR No. 10 of 2019, registered with ATS Kalachowki Police Station, Mumbai, for the offences punishable under Sections 20 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 , Sections 420, 465, 468 and 471 of the Indian Penal Code, 1860, Section 3 (2) (A) of the Foreigners Order, 1948, Section 14 of the Foreigners Act, 1946 and Section 12 (1A) (a) of the Passports Act, 1967, on furnishing a P.R. Bond in the sum of Rs.1,00,000/- with one or two sureties in the like amount, to the satisfaction of the trial Court.

(iii) The applicant shall mark his presence at the ATS Kalachowki, Mumbai, on the first Monday of every month between 10.00 am to 12.00 noon for a period of

two years or till conclusion of trial, whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to the witnesses and any of the persons acquainted with the facts of the case.

(v) The applicant shall not indulge in the identical activity for which he has been arraigned in this case.

(vi) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of 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.

[N. J. JAMADAR, J.]