

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

BAIL APPLICATION NO. 2510 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Felix John Baptist Machado

...Applicant

Versus

1. Union of India

2. State of Maharashtra

...Respondents

Mr. Taraq Sayed, a/w Ms. Ashwini Achari, for the Applicant.

Mr. Amit Munde, Special PP, for the UOI/Respondent No.1.

Mr. Shailesh Ghag, APP for the State/Respondent No.2.

CORAM: N. J. JAMADAR, J.

DATED: 4th MARCH, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in DRI/MZU/B/INT-102/2022 registered with Directorate of Revenue Intelligence, Mumbai Zonal Unit, Mumbai, for the offences punishable under Sections 21(b)(ii)(C), 23(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act") has preferred this application to enlarge him on bail.
3. The applicant is alleged to be a Director of M/s. Allied Shipping and Logistics Private Limited and engaged in day to day management of the affairs of the said company.

4. On 15th October, 2022 a specific intelligence was received that some narcotic substance covered under the provisions of the NDPS Act, 1985 had arrived at Mumbai Airport in two consignments vide two House Air Way Bills (HAWB) bearing Nos.6746476656 and 1188996491 issued by the courier DHL, and it would be attempted to be smuggled into India through courier mode. Thereupon, necessary authorization was obtained. A team accompanied by the panch witnesses visited the office of DHL and was furnished photocopies of two bills of Entry Nos.2885785 and 2876852. Pursuant to information, the raiding party located two wooden pallet boxes bearing House Way Bill Nos.6746476656 and 1188996491. Wooden pallet box HAWB 6746476656 contained 83 aluminum coloured plastic packets. Upon inspection, it was found that there were two inner packets. The innermost packet was found to contain a light green coloured substance in lump form. The substance was tested with field testing kit. The test answered positive for presence of *ganja*, a narcotic substance. There were in all 83 packets in the first box HAWB 6746476656. The packets were found to be packed similarly and contained similar light green substance which upon examination was found to be *ganja*.

Another pallet box contained 108 packets containing same substance. The contraband articles were seized.

5. As the name of the applicant was pasted on the box as an importer, notice was issued to the applicant. Since the investigation revealed the complicity of the applicant, as the applicant had imported 87.37 kg. contraband article, the applicant came to be arrested on 17th October, 2022.

6. Mr. Sayed, the learned Counsel for the applicant, initially made an endeavour to urge that the applicant cannot be said to have been found in conscious possession of the contraband article. Without controverting the fact that the consignment was imported under IEC No.AAVCA4131A in the name of M/s. Allied Shipping and Logistics Pvt. Ltd., Mr. Sayed attempted to persuade the Court to hold that the material on record indicates that the applicant had lent IEC number to co-accused Hemant Bangera for the purpose of import in consideration of Rs.5,000/- per import. Attention of the Court was invited to the statements of the applicant and Hemant Bangera recorded under Section 67 of the NDPS Act, 1985.

7. Subsequently, Mr. Sayed submitted that the search and seizure stands vitiated on account of flagrant violation of the procedure prescribed for collection of the samples. It was

submitted that the panchnama would indicate that the raiding party had mixed the contents of the packets and, thereafter, the samples were collected. Therefore, according to Mr. Sayed, the search and seizure stands vitiated as it cannot be said that the entire substance allegedly recovered constituted contraband article.

8. Mr. Munde, the learned Special PP, resisted the submission on behalf of the applicant, on both the counts. It was urged that a clear and watertight case of import of contraband article has been made out. Having regard to the mode of import and the quantity imported, there is no ground to urge that the applicant is not guilty of the offences punishable under NDPS Act, 1985. Mr. Munde submitted that the alleged defect in sampling is non-existent. Even otherwise, that would be a matter for adjudication at the trial. Therefore, at this stage, the applicant cannot draw any mileage from the said defect.

9. I have carefully considered the material on record and submissions canvassed across the bar. There is indeed a strong *prima facie* material which indicates that the consignment was imported by M/s. Allied Shipping and Logistics Pvt. Ltd. The name of the applicant was specifically mentioned as the

importer alongwith M/s. Allied Shipping. It would be simply impermissible, at this stage, to accede to the submission of Mr. Sayed that the applicant had merely lent IEC number in consideration of Rs.5,000/- per import. Reliance on the statement of the applicant recorded under Section 67 of NDPS Act, 1985, at this juncture, would be a self-serving exercise.

10. There is a statement of an employee, who was in-charge of Accounts Department of M/s. Allied Shipping and Logistics Pvt. Ltd., which throws light on the role of the applicant in importing the consignment in question. At any rate, the contention sought to be raised by the applicant is in the nature of a defence which the applicant would be required to bolster up at the trial to dislodge the presumptions which may be attracted. Therefore, I am not impelled to accede to the submission of Mr. Sayed.

11. On the aspect of the alleged defect in sampling, Mr. Sayed would urge that the search and seizure panchnama indicates that the contents of only one packet were tested with the field testing kit and the contents in the rest of the packets were simply examined to draw an inference that those packets also contained the contraband substance. Mr. Sayed would urge that it was incumbent upon the authorized officer, who

conducted the search, to test the contents of each of the packets and collect sample from each packets. Mixing the contents of all the packets denuded the sample the representative character. To buttress this submission, Mr. Sayed invited attention of the Court to a recent judgment delivered by this Court in *Venktesh Shiva Permal vs. State of Maharashtra*¹.

12. In the said case, I had an occasion to analyse the provisions of Standing Order 1 of 1989 and the judgments of the Supreme Court in the cases of *Union of India vs. Bal Mukund*² and *Sumit Tomar vs. State of Punjab*³ and *Noor Aga vs. State of Punjab*⁴. It was observed as under:

“28. What should be the approach of the Court ? There can be no duality of opinion about the proposition that having regard to the stringent provisions against grant of bail and the severity of the punishment which the offences under NDPS Act, 1985 entail, the Court must insist scrupulous compliance of the Standing Instruction/Order. However, the nature of infraction is required to be kept in view and also the element of prejudice likely to have caused to the accused. Undoubtedly the officers are instructed that one sample from each package/container in case of seizure of more than one package/container be collected. However, the directive is preceded by the word “normally” and it is “advisable” These words, ordinarily, cannot be construed as peremptory. Since the Standing Instruction/Order use the qualifying words like “normally” and “advisable”, in my considered view, the correct approach would be to consider the impact of infraction of the directives as to the sampling alongwith other facts and circumstances of the case.

Laying down a too broad proposition that the moment the investigating agency is found to have mixed the contents

¹2024 SCC Online Bom 251.

²Cri.Appeal No.1397/2007 dt.31/3/2009.

³(2013) 1 SCC 395.

⁴(2008) 16 SCC 417.

of the containers and thereafter collected the sample, the entire seizure is vitiated would be taking an extreme view of the matter.

29. At the same time, the cases of non-compliance with the Standing Instructions/Order and search and sampling in flagrant violation of such Instructions, cannot be brushed aside as mere irregularities. There ought to be material to show that the Instructions have been substantially complied with.

30. The decision of the Supreme Court in the case of *Noor Aga V/s. State of Punjab and Anr.* illuminates the path. In the said case, the Supreme Court considered the aspect of contravention of the Standing Order. Adverting to the earlier decisions in the case of *South Central Railway V/s. G. Ratnam ((2007) 8 SCC 212)*, and the clarification thereof by a subsequent decision in the case of *Moni Shankar V/s. Union of India ((2008) 3 SCC 484)*, the Supreme Court enunciated in clear and unambiguous terms that the guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon.”

13. Reverting to the facts of the case, it is pertinent to note that the substance having been found to be *ganja*, the Clauses 2.4 and 2.5 of the Standing Order 1 of 1989 become relevant.

They read as under:

“2.4 In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package / container.

2.5 However, when the packages/container seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of *ganja* and hashish (*charas*), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.”

14. A conjoint reading of the aforesaid clauses would indicate that where a number of packages/containers are seized together, subject to the satisfaction that the packages are identical in all respect, packages/containers may be bunched in lots of specified packages/containers and for each lot of packages/containers one sample (in duplicate) may be drawn. Aforesaid clauses thus take care of the cases where a number of packages/containers are seized at the same time, like the case at hand.

15. In the aforesaid backdrop, if the contents of the seizure panchanam are perused, it becomes *prima facie* evident that the collection of the samples cannot be said to be in breach of the aforesaid standing order. The panchnama specifically records that the substance found in the first packet was tested with field testing kit. The authorized officer had examined the rest of the packets. Rest of the packets were found to be similarly packed like packet No.1. All said packets were found to contain similar light green coloured substance. The aforesaid narration in the panchnama, *prima facie*, indicates that the authorized officer had recorded the satisfaction that the packets were identical in all respects and, thereafter, samples were collected from each lot of the packets bunched together.

16. *Prima faice*, there does not appear to be such infirmity in the sampling as to vitiate the search and seizure. Resultantly, the second ground urged by Mr. Sayed also falls through.

17. The conspectus of aforesaid consideration is that the interdict contained in Section 37(1)(b)(ii) operates with full force and the Court may not be justified in drawing an inference that the applicant is not guilty of the offences for which he has been arraigned. Thus, the applicant does not deserve to be released on bail.

18. Hence, the following order.

: O R D E R :

- (i) Application stands rejected.
- (ii) 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.

[N. J. JAMADAR, J.]