



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2803 OF 2023**

Aftab Anwar Shaikh	...	Applicant
versus		
The State of Maharashtra	...	Respondent

Mr. Vikas Chavan with Mr. Kamlesh Satre for Applicant.
Mr. S.R.Aagarkar, APP for State.
Mr. Yogesh Gaikar, API, Bhoiwada Police Station, Bhiwandi Thane City, present.

CORAM: N.J.JAMADAR, J.

DATE : 28 FEBRUARY 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in C.R.No.59 of 2022 registered at Bhoiwada Police Station, Bhiwandi, for the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge him on bail.
3. On 15 March 2022, pursuant to a specific information, Bhoiwada Police conducted a surveillance, near 72 Gala, Vasai-Bhiwandi Highway. The applicant and co-accused who appeared on a AKTM motorcycle were pointed by the informant. The motorcycle was intercepted. Co-accused Harish R. Singh was riding the motorcycle and the applicant was the pillion rider. The applicant and the co-accused were accosted. The applicant and the co-accused were apprised of their right to be searched

before the Gazetted Officer or Magistrate. As the applicant and the co-accused declined to be searched before the Gazetted Officer or Magistrate, they were searched in the presence of the panch witnesses. In the search of co-accused Harish, a small weighing scale and a country made pistol were recovered. In the search of the applicant, a plastic bag containing another plastic pouch with white substance was found. The said substance appeared to be mephedrone (MD). It weighed 84 gms. The contraband article was seized and the applicant and co-accused were arrested. Post completion of investigation, chargesheet has been lodged.

4. Learned Counsel for the applicant submitted that the search and seizure stood vitiated on account of non-compliance of the mandatory provisions contained in the Act, 1985. It was urged that there was breach of the provisions contained in Section 50 of the Act, as the empowered officer had disclosed his identity as the gazetted officer before the applicant could exercise his right under Section 50 of the Act.

5. Secondly, there is a non-compliance of the mandatory provision contained in Section 52-A of the Act. It was further submitted that there is a discrepancy regarding the quantity of the contraband article allegedly found in possession of the applicant.

6. Learned APP resisted the prayer for bail. It was submitted that the applicant and the co-accused were searched in due observance of the statutory

requirements. As commercial quantity of MD was found in possession of the applicant, the bar contained in Section 37(1)(b)(ii) of the Act comes into play and there is no ground to believe that the applicant has not committed the offences under the NDPS Act, 1985. Thus, the applicant cannot be released on bail.

7. It is trite, the compliance of the provisions contained in Section 50 of the Act, where the person of the suspect has to be searched, is mandatory. Before the person of a suspect is to be searched, as distinct from articles carried by the suspect, scrupulous compliance of Section 50 is warranted. A submission of substantial compliance with the provisions contained in Section 50 of the Act, cannot be entertained. Where the empowered officer discloses that he himself is the gazetted officer and authorized to conduct the search, and, thereafter, he apprises the suspect that he has a right to be searched before another gazetted officer or Magistrate, ordinarily there cannot be said to be a scrupulous compliance of the mandate contained in Section 50 of the Act, in true spirit, as the suspect may get an impression that since a member of the raiding party is himself a gazetted officer, he cannot exercise the right to be searched before another gazetted officer or Magistrate.

8. In the facts of the case, however, the aforesaid principle does not apply. From the perusal of the seizure panchanama, it becomes abundantly clear that PI S.N.Chavan, the empowered officer, had first apprised the applicant and the co-accused of their right to be searched before the gazetted officer or Magistrate under

Section 50 Act both verbally and in writing. The applicant had declined to avail the said right. Thereafter, the Police Inspector Chavan has disclosed his identity and conducted the search. Evidently, after the applicant and co-accused declined to exercise their right under Section 50 of the Act, the empowered officer had disclosed his identity. Therefore, prima facie, it cannot be urged that there was breach of the provisions contained in Section 50 of the Act and, thus, the search stood vitiated.

9. The submission that there is non-compliance of the provisions contained in Section 52-A of the Act, is not factually correct. It seems that on the very next day of the seizure i.e. 16th March, 2022 a request was made to the learned Magistrate and an inventory was conducted on that day itself. The alleged discrepancy in the weight of the contraband article allegedly recovered under the seizure panchanama and recorded in the inventory panchanama, at this stage, does not advance the cause of the applicant.

10. The submission on behalf of the applicant that the drawing of the sample at the time of the seizure and not before the learned Magistrate, also vitiated the search and seizure, in the peculiar facts of the case, where the inventory was conducted on the following day of the alleged seizure, appears to be a matter for trial.

11. I find substance in the submission of the learned APP that the interdict contained in Section 37(1)(b)(ii) operates with full force. Prima facie, there is no ground which would justify an inference that the accused may not be guilty of the

offences under the Act, 1989 for which he has been arraigned.

12. Thus, the prayer for bail does not merit acceptance. Hence, the following order :

ORDER

(i) The 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.

Application disposed.

(N.J.JAMADAR, J.)