



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2869 OF 2023**

Abdul Sattar Mohammed Iqbal Ansari	...	Applicant
versus		
State of Maharashtra	...	Respondent

Mr. M.B.Shirsat with Fehmida Ahmed, Mr. Deepak Thakur, for Applicant.
Mr. S.R.Aagarkar, APP for State.
PSI V.T.Pawar, Nizampura Police Station, Bhiwandi, present.

CORAM: N.J.JAMADAR, J.

DATE : 5 MARCH 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant who is arraigned in C.R.No.71 of 2023 for the offences punishable under Sections 328, 273, 276 read with Section 34 of the Indian Penal Code, Sections 18(A), 18(a)(VI), 18(C), 27(b)(ii) and 27(d) of Drugs and Cosmetics Act and Sections 8(c), 22(b) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge him on bail.
3. On 23 February 2023, Nilkanth S. Khadke, attached to the Nizampura Police Station, received a confidential information that two persons were to arrive at Talavali Naka, Bhiwandi, to sell cough syrups containing narcotic substances. Bhiwandi police conducted a surveillance. At about 4.00 p.m., the applicant and co-accused Sandeep Kanojia came thereat carrying two plastic bags. As their movements

appeared suspicious, they were accosted. In the search, 450 bottles of cough syrups Codirem (PX Chlorpheniramine Maleate and Codeine Phosphate Syrup) were found in possession of the applicant and the co-accused. They had no licence to possess those bottles of cough syrup. Incriminating articles were seized and samples were collected. The applicant and co-accused were arrested.

4. Mr. Shirsat, learned Counsel for the Applicant, submitted that the search and seizure of the alleged incriminating articles is vitiated on account of non-compliance of the mandatory provisions contained in Sections 42 and 50 of the Act. It is the stated case of the prosecution that the raid was conducted pursuant to an information received by the first informant Mr. Khadke. However, there is no material to indicate that the said information was reduced in writing and its copy forwarded to the immediate official superior. Secondly, the search was conducted even before the applicant and the co-accused were apprised of their right to be searched in the presence of gazetted officer or Magistrate under Section 50 of the Act. Therefore, the search stood vitiated on account of non-compliance of mandate contained in Section 50 of the Act.

5. Learned APP countered the submissions on behalf of the Applicant. He submitted that, in the facts of the case, Section 50 of the Act was not required to be complied with as the contraband articles were not found on the person of the applicant but in the bags which the applicant and the co-accused were carrying. After finding

the contraband articles in the bag which the applicant was carrying, the personal search of the applicant was conducted. Thus, there is no substance in the contention that the search stood vitiated on account of the non-compliance of Section 50 of the Act.

6. Mr. Aagarkar further submitted that PSI Marne had made an entry in the station diary, being G.D.No.24 dated 23 February 2023, which constitutes sufficient compliance of the provisions contained in Section 42 of the Act.

7. Prima facie, the material on record indicates that the information was received by Mr. Khadke. There is no material to indicate that the person who received the information had recorded the same into writing and forwarded its copy to the immediate official superior. The station diary entry G.D.No.24 dated 23 February 2023 gives an impression that the information was received by Mr Marne, which was not the case. Nor the station diary entry records the fact that Mr. Khadke had apprised PSI Marne about the said information having been received.

8. In the case of **Sarija Banu (A) Janarthani @ Janani and Anr. V/s. State through Inspector of Police**¹ the Supreme Court inter alia observed that the compliance of Section 42 was mandatory and that was a relevant fact which should have engaged attention of the Court while considering the bail application.

9. In the case at hand, apart from G.D.No.24, there does not appear any

1 (2004) 1 SCC 266

other material to substantiate the claim that the provisions contained in Section 42 of the Act, were complied with.

10. This leads me to the ground of non-compliance of Section 50 of the Act. FIR as well as the seizure panchanama indicate that when the applicant and co-accused were accosted, the members of the raiding party inquired with the applicant about the contents of the bags they were carrying. It is further recorded that the police constable Shaikh opened the bags which the applicant and the co-accused were carrying in the presence of police staff and panch witnesses. The bags contained Codirem cough syrup. After such search operation, it seems, the steps were taken to apprise the applicant and the co-accused of their right to be searched in the presence of a Gazetted Officer or Magistrate. The said fact is borne out by the allegations in the FIR, narration in the seizure panchanama and the contents of the appraisal memo under Section 50 of the Act.

11. Mr. Shirsat urged that since the authorized officer professed to search both the person as well as the articles allegedly carried by the applicant and the co-accused, compliance of Section 50 was indispensable. Reliance was placed on the judgment in the case of **Dilip V/s. State of M.P.**² wherein the Supreme Court enunciated as under :

“16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned,

² (2007) 1 SCC 450

but, keeping in view the fact that the person of the appellants was also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done.”

12. Mr. Shirsat also invited attention of the Court to an order dated 24 January 2024 passed by this Court in **Jahid Mohd. Hanif Shaikh V/s. State of Maharashtra**³. In the said order, after adverting to the aforesaid judgment in the case of **Dilip and Anr. V/s. State of M.P. (supra)**, and **State of Rajasthan V/s. Parmanand and Anr.**⁴ I had observed that when the container and/or vehicle is searched along with the person, compliance of Section 50 of the Act, is necessary. In such a situation, merely because, no contraband article was found on the person of the accused and the contraband was found in the container and/or vehicle, does not imply that Section 50 of the Act need not to be complied with.

13. I must confess that when the aforesaid observations were made, I had not had the benefit of the three Judge Bench decision of the Supreme Court in the case of **State of Punjab V/s. Baljinder Singh and Anr.**⁵. In the said case, a three Judge Bench of the Supreme Court declared that the decision of the Supreme Court in the case of **Dilip and Anr. V/s. State of M.P. (supra)**, is not correct and opposed to the law laid down by the Supreme Court in **State of Punjab V/s. Baldev Singh**⁶ and other judgments. The observations of the Supreme Court in paragraphs 17 and 18

3 BA 2603 of 2023

4 (2014) 5 SCC 345

5 (2019) 10 SCC 473

6 (1999) 6 SCC 172

read as under :

“17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of concerned pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act, as far as “personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

18. The decision of this Court in Dilip case, however, has not adverted to the distinction as discussed hereinabove and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with. In our view, the decision of this Court in the said judgment in Dilip Case, is not correct and is opposed to the law laid down by this Court in Baldev Singh and other judgments.”

14. In view of the aforesaid three Judge Bench decision of the Supreme Court which has overruled the decision in the case of **Dilip and Anr. V/s. State of M.P. (supra)**, the observations made by me in the case of **Jahid Mohd. Hanif Shaikh V/s. State of Maharashtra (supra)**, were *per incuriam*. Thus, I find it difficult to accede to the submission of Mr. Shirsat that in the facts of the case, there was breach of the provisions contained in Section 50 of the Act.

15. Mr. Shirsat further urged that there is a complete non-compliance of the provisions contained in Section 52-A of the Act. The submission appears to be

factually impeccable.

16. Learned APP invited the attention of the Court to the Memo forwarded to the jurisdictional Magistrate upon the seizure of the property (page 81). The said memo is of no assistance to the prosecution to show the compliance of the mandate contained in Section 52-A of the Act.

17. In the case of Yusuf @ Asif V/s. State⁷ in the backdrop of the submission that the seizure and sampling of the alleged contraband article was in violation of the mandatory provisions contained in Section 52-A(2), after examining the provisions contained in Section 52-A of the Act and the decision in the case of Union of India V/s. Mohanlal and Anr.⁸ the Supreme Court, inter alia, observed as under :

“16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”
(emphasis supplied)

18. Prima facie, there is non-compliance of Section 52-A of the Act, 1985. In the circumstances of the case, whether for want of primary evidence, the trial may stand vitiated and there is also non-compliance of the provisions contained in Section

⁷ Criminal Appeal No.3191 of 2023 arising out of SLP(Cri.) No.3010 of 2023

⁸ (2016) 3 SCC 379

42, which has been held by the Supreme Court as a relevant consideration in the case of Sarija Banu (supra), the Court would be justified in drawing an inference that there are grounds to believe that the applicant may not be guilty of the offences. The court is not informed that the applicant has antecedents. Thus, the Court may also draw an inference that the applicant may not indulge in identical offences if released on bail. The twin conditions, thus, can be said to have been satisfied.

19. The applicant has been in custody for almost a year. The trial may also take some time. Thus, I am inclined to release the applicant on bail.

20. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Abdul Sattar Mohammed Iqbal Ansari be released on bail in C.R.No.71 of 2023 registered with Nimzapura Police Station on furnishing a PR bond in the sum of Rs.30,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

(iii) The applicant shall mark his presence at Nizampura Police Station on first Monday of every alternate month between 11 am to 1 pm for a period of three years or till the conclusion of the trial whichever is earlier.

(iv) The applicant 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.

(v) On being released on bail, the applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

(vi) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(vii) The applicant shall not indulge in identical activities for which he has been arraigned in this case.

(viii) 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 co-accused, and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N.J.JAMADAR, J.)