



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2953 OF 2023**

Mehboob Aftab Khan
versus
State of Maharashtra

... Applicant
... Respondent

Ms. Puja Yadav with Mr. Shreerat Kamath, for Applicant.
Mrs. Geeta P. Mulekar, APP for State.

CORAM: N.J.JAMADAR, J.

DATE : 7 FEBRUARY 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant who is arraigned in C.R.No.22 of 2022 registered with Dongri Police Station 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 April 2022, Dongri Police intercepted a taxi bearing Registration No.MH-01/CJ-2256 laden with boxes which give rise to the suspicion. Co-accused Mohd. Basit Farooque Ansari was at the wheel of the said taxi. The goods being transported in the said taxi were stated to be belonging to Azim Mohd. Khan, accused No.2, who was travelling with the said goods in the said taxi. In the search of all the 22 boxes in the presence of public witnesses, 3168 bottles bearing label “Chlorpheniramine Maleate and Codeine Phosphate Syrup 100 ml. Phensirest” were

found. Each of the bottles contained 10 mg codeine phosphate, a contraband article. It was Schedule H1 drug. Accused Nos.1 and 2 had no licence to possess the said quantity of cough syrup containing codeine phosphate. They were arrested. During the course of interrogation, it transpired that accused Nos.1 and 2 had stored 7200 bottles of Phensirest at V Trans godown, Keshavji Naik Road. Those bottles were also seized.

4. Accused Nos.1 and 2 further disclosed that on 21 April 2022, the applicant was to come to the said godown to inquire as to whether contraband articles have been received. A surveillance was conducted and the applicant came to be apprehended. On 22 April 2022, while in custody, the applicant made a disclosure statement pursuant to which 4320 Phensirest bottles were recovered from V Trans godown.

4. Learned Counsel for the applicant submitted that there is no material to show that the applicant was arrested on 21 April 2022. No arrest panchanama was drawn. Secondly, there is a complete non-compliance of the mandate contained in Section 42 of the Act, 1985. The applicant came to be purportedly arrested pursuant to the disclosure made by the co-accused. Yet, there is no material to show that the information was taken down in writing and forwarded to the immediate official superior as mandated by Section 42 of the Act. The non-compliance of the mandatory provisions contained in Section 42, thus, renders search and seizure illegal and

eventually vitiates the prosecution. Therefore, the applicant deserves to be enlarged on bail.

5. To lend support to this submission, learned Counsel for the Applicant placed a strong reliance on the decision of the Supreme Court in the case of **Sarija Banu (A) Janarthani @ Janani and Anr. V/s. State through Inspector of Police**¹ and an order passed by this Court in the case of **Shivraj Gorakh Satpute V/s. State of Maharashtra**².

6. Learned Counsel for the applicant further submitted that there is nothing to indicate that the applicant had taken delivery of the contraband articles as alleged. The consignment note would indicate that the consignee was Shree Medical. Thus, the applicant cannot be fastened with the liability on the count that the applicant was in possession of the said goods. Lastly, it was submitted that there was an inordinate delay in conducting an inventory before the learned Magistrate, as envisaged by Section 52-A of the Act and on the said count as well, the applicant becomes entitled to be released on bail. Reliance was placed on an order passed by this Court in the case of **Venktesh Shiva Permal V/s. The State of Maharashtra**³ and a decision of the Delhi High Court in the case of **Kashif V/s. Narcotics Control Bureau**⁴.

1 (2004) 12 SCC 266

2 BA 2865 of 2022 dt 15 Sept 2023

3 BA 3784 of 2023 dt. 23 Jan 2024

4 BA 253 of 2023 dt. 18 May 2023

7. Mrs. Mulekar, the learned APP resisted the prayer for bail. It was submitted that there is a clear and cogent evidence to show that the goods containing the contraband were received by the applicant. Emphasis was laid on the memorandum of disclosure statement made by the accused leading to the recovery of the contraband as well as consignment note, which indicates that the applicant had accepted the delivery of the said consignment under his signature.

8. Mrs. Mulekar further submitted that the arrest panchanama / memo evidences the arrest of the applicant on 21 April 2022, and, therefore, the submission that there was nothing to show that the applicant was arrested on 21 April 2022 does not merit acceptance. The non-compliance of the mandate contained in Section 42 of the Act, according to the learned APP, also does not merit countenance as the applicant came to be arrested and recovery effected during the course of investigation. Whether the alleged non-compliance of Section 42 of the Act, resulted in mis-carriage of justice, in the facts of the case at hand, is a matter for adjudication at the trial and, therefore, the applicant does not deserve to be released on bail.

9. I have carefully perused the material on record. Evidently, the applicant came to be apprehended when the applicant had allegedly come to ascertain as to whether the goods were delivered at the godown. The arrest of the accused is evidenced by the arrest memo which purports to have been drawn on 21 April 2022 (pages 116 to 119 of the application).

10. This takes me to the submission of non-compliance of Section 42 of the NDPS Act, 1985. In the case of **Sarija Banu** (supra), in the context of a contention that there was failure to comply with Section 42 of the Act, the Supreme Court enunciated that compliance of Section 42 was a relevant fact which should have engaged attention of the Court while considering the bail application.

11. In the case of **Shivraj Gorakh Satpute** (supra), a learned Single Judge of this Court, in the context of a contention that the seizure therein was a case of chance seizure and, thus, compliance of Section 42 was not possible, observed that, in the facts of the said case, accused No.1 who was allegedly found in possession of contraband had made a disclosure statement to show the place and the person from whom he had purchased the contraband, and pursuant to the said disclosure statement, 10 kgs of Ganja was recovered from the possession of accused No.2, who, in turn, disclosed that he was willing to show his house where contraband was kept and, thereupon, 50 kgs. of Ganja was recovered. In the backdrop of the aforesaid facts, it was observed that the co-accused had disclosed the name of the applicant therein, and, thus, prima facie it was was not a case of chance recovery or seizure in the normal course of investigation. Moreover, search and seizure was conducted after sunset and there was no record to indicate that the authorized officer had recorded reasons in terms of proviso to sub-section(1) of Section 42 of the Act. Resultantly, there was non-compliance of Section 42 of the Act rendering the recovery prima facie doubtful.

12. The facts of the case at hand, however, appear to be materially distinct. Prima facie, it appears that the co-accused had not disclosed that the applicant had stored the contraband in the godown. Information that was given by the co-accused was that the applicant was to come to the said godown to inquire as to whether the goods had reached. It is on the basis of the said information, the applicant came to be arrested on 21 April 2022. Recovery of the contraband articles on 22 April 2022 was pursuant to the disclosure statement made by the applicant during the course of interrogation.

13. In a situation of this nature, where no information was apparently given about the goods containing contraband having been stored, kept or concealed at a particular place, the aspect of non-compliance of Section 42 of the Act, appears debatable. Therefore, the said question merits adjudication at the trial.

14. I find substance in the submission of Mrs. Mulekar that the consignment note, prima facie, establishes the complicity of the applicant as the goods thereunder were acknowledged by the applicant for A.R.Pharmacy.

15. In the face of such material, it would be difficult to accede to the submission on behalf of the applicant that the applicant had no nexus with the contraband articles. Evidently, the applicant does not claim to hold any license to possess that quantity of cough syrup. Nor the applicant claims that the said bottles were to be used for therapeutic practice.

16. In the facts of the case at hand, whether the delay in conducting the inventory before the learned Magistrate was of such a nature as to vitiate the search and seizure, again appears to be a matter for adjudication at the trial.

17. The Court cannot lose sight of the fact that there is a similar antecedent against the applicant. The applicant was arraigned in C.R.no.301 of 2019 registered with the very same Dongri Police Station for the offences punishable under Section 20 and 29 of the Act, 1985. It seems that the applicant was released on bail, in the said case, on the ground that the contraband found in possession of the applicant was not of commercial quantity.

18. Nonetheless, there is prima facie material to show that the applicant was indulging in the activities of drug trafficking. It would, therefore, be difficult to draw an inference that the applicant will not indulge in identical activities if released on bail.

19. For the foregoing reasons, I am inclined to hold that the rigor contained in Section 37 of the Act, 1985 is attracted and the twin test is not satisfied. Resultantly, the application deserves to be rejected.

20. 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.

(N.J.JAMADAR, J.)