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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 3730 OF 2023

Irfan Alim Sayyad ...Applicant
Versus
State of Maharashtra ...Respondent

Mr. Rajendra Bidkar, for the Applicant.
Mr. Y. M. Nakhwa, APP for the State/Respondent.
API Vinayak Mane, Mumbar Police Station, present.

CORAM: N. J. JAMADAR, J.
DATED: 31th JANUARY, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant – accused No.1 preferred this application for bail in Special Case No.1074 of 2022 arising out of CR No.737 of 2022 registered with Mumbra Police Station, Thane, for the offences punishable under Sections 22 and 29 read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (“the NDPS Act”).
3. On 11th August, 2022, Mumbra Police were on patrolling duty. A secret information was received that two persons were selling MD near Prime Hospital, Kausa, Mumbra. A surveillance was conducted. The applicant and co-accused

Rajjak Rangrej came near 'Y' junction in front of Prime Hospital . They were accosted. After apprising the applicant and co-accused their right to be searched in the presence of Gazetted Officer or Magistrate, the applicant and co-accused were searched in the presence of panch witnesses. It is alleged, upon the search of the applicant, in the left pocket of the trouser of the applicant, a plastic pouch containing a white substance was found. It appeared to be MD. It weighed 72 gm. Contraband article was seized and samples were collected. The applicant came to be arrested on 12th August, 2022.

4. Mr. Bidkar, the learned Counsel for the applicant, submitted that the search of the applicant which is the linchpin of the prosecution case is vitiated on account of clear non-compliance of the mandate contained in Section 50 of the NDPS Act. The learned Counsel took the Court through the allegations in the FIR and the assertions in the seizure panchnama. In the FIR as well as the seizure panchnama, it has been recorded that the applicant and the co-accused were apprised that the empowered officer was himself a Gazetted Officer and if the applicant and the co-accused so opted, 'other' Gazetted Officer would be called.

Such appraisal, according to the learned Counsel for the applicant, cannot be said to be in conformity with the mandate of Section 50 of the NDPS Act.

5. The learned APP, on the other hand, submitted that there is necessary compliance of the mandate contained in Section 50 of the NDPS Act. An endeavour was made to bank upon the appraisal note dated 11th August, 2022 (page 35 of the application). Under the said appraisal note the empowered officer seem to have informed the applicant that he was a Gazetted Officer and if the applicant wanted to have his search conducted in the presence of 'other' Gazetted Officer apart from him, then, such a Gazetted Officer could be called.

6. Mr. Bidkar, the learned Counsel for the applicant, submitted that the aforesaid appraisal note does not advance the cause of the prosecution. On the contrary, the said appraisal note underscores the non-compliance.

7. I find substance in the submission of Mr. Bidkar. An impression that the empowered officer himself is a Gazetted Officer and thereby implying that the search would be legal has the effect of influencing the exercise of option by the person to be searched. The use of the expression, if so desired, the raiding party would call 'other' Gazetted Officer

has the propensity to give an impression to the person to be searched that the officer empowered to search, being a Gazetted Officer, he cannot exercise the right to be searched before the Gazetted Officer or Magistrate.

8. Secondly, the appraisal note (page 35) indicates that the applicant was not given the option to be searched in the presence of the Magistrate. It is true in the FIR and the seizure memo there is a reference to the fact if so desired the applicant can be searched before, 'other' Gazetted Officer or Magistrate. However, the matter is required to be considered from the perspective of effective exercise of the right to be searched before the Gazetted Officer or Magistrate.

9. It is well recognized that the compliance of the provisions contained in Section 50 of the NDPS Act is mandatory. Substantial compliance would not suffice and there must be strict compliance with Section 50(1) of the NDPS Act by the authorised officer.

10. It would be suffice to make a reference to the Constitution Bench judgment of the Supreme Court in the case of *Vijaysinh Chandubha Jadeja vs. State of Gujarat*¹, wherein the Supreme Court enunciated that the concept of

¹ 2011(1) SCC 609.

“substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in *Joseph Fernandes vs. State of Goa*² and *Prabha Shankar Dubey vs. State of M.P.*³, *Krishna Kanwar vs. State of Rajasthan*⁴ is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *State of Punjab vs. Baldev Singh*⁵. In *Baldev Singh* (supra) the Supreme Court emphasized that in so far as the obligation of the authorized officer under sub-section (1) of Section 50 of the NDPS Act is concerned it is mandatory and requires strict compliance. Failure to comply with that provision would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article with the person of the accused during such search.

11. The conspectus of the aforesaid consideration is that since the search appears to have been *prima facie* vitiated, an inference become justifiable that the applicant may not be guilty of the offence punishable under Section 21(b) read with

2(2000)1 SCC 707.

3(2004) 2 SCC 56.

4(2004) 2 SCC 608.

5(1999) 6 SCC 172.

Section 8(c) of the NDPS Act. The Court is not informed that there are antecedents of the applicant, which would justify an inference that, if released on bail, the applicant may indulge in identical offences.

12. The applicant is in custody since 12th August, 2022. It is unlikely that the trial can be concluded within a reasonable period. I am, therefore, impelled to exercise the discretion in favour of the applicant.

13. Hence the following order:

: O R D E R :

- (i) Application stands allowed.
- (ii) The applicant Irfan Alim Sayyad be released on bail in Special Case No.1074 of 2022 arising out of CR No.737 of 2022 registered with Mumbra Police Station, Thane, on furnishing a P.R. Bond of Rs.1,00,000/- with one or more sureties in the like amount.
- (iii) The applicant shall mark his presence at the Mumbra Police Station on the first Monday of every alternate month between 10.00 am. to 12.00 noon for the period of three years or till 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 not indulge in identical activities for which he has been arraigned in this case.
- (vii) The applicant shall regularly attend the proceedings before the jurisdictional Court.
- (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 trial Court shall not be influenced by any of the observations made hereinabove.

Application stands disposed.

[N. J. JAMADAR, J.]