

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

BAIL APPLICATION NO. 3858 OF 2023

SANTOSH
SUBHASH
KULKARNI

Digitally signed by
SANTOSH SUBHASH
KULKARNI
Date: 2024.02.21
19:21:37 +0530

Suraj Vijay Bahadur

Versus

...Applicant

State of Maharashtra
(DCB CID Unit 12)

...Respondent

Mr. Taraq Sayed, for the Applicant.

Mr. M. G. Patil, APP for the State/Respondent.

CORAM: N. J. JAMADAR, J.

DATED: 21st FEBRUARY, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in CR No.40 of 2021 registered with DCB CID Police Station, Mumbai, for the offences punishable under Sections 8(c), 20(b)(ii)(c) and 29 of the Narcotic Drugs and Pshychotropic Substances Act, 1985 ("the NDPS Act") has preferred this application to enlarge him on bail.
3. On 11th February, 2021, the police party attached to DCB CID, Unit-12, was patrolling at Kurar Malad (East) Mumbai. When the police party reached near BMC Garden, Appapada, Kurar, co-accused Kisan Gaud alias Sathe, accused No.2, who

was a known offender, was found moving in suspicious circumstances. When the police party approached accused No.2, he fled away. The applicant was accompanying accused No.2. The police party accosted the applicant.

4. The applicant was carrying a maroon cloth bag. After apprising the applicant of his right to be searched in the presence of the Gazetted Officer or Magistrate personal search of the applicant was conducted. The cloth bag contained a ball of black substance. The said substance was tested with drug detection kit. It turned out to be *charas*. It weighed 1.800 kg. The contraband article was seized and samples were collected. The applicant came to be arrested. Eventually, co-accused Kisan Gaud also came to be arrested on 12th February, 2021. Post completion of investigation, charge-sheet has been lodged.

5. The learned Special Judge declined to exercise the discretion to release the applicant on bail. Hence, this application.

6. I have heard Mr. Sayed, the learned Counsel for the applicant, and Mr. Patil, the learned APP for the State, at some length. With the assistance of the learned Counsel for the parties, I have perused the report under Section 173 of the Code

of Criminal Procedure, 1973 ("the Code"), documents annexed with it and the material on record.

7. Mr. Sayed urged multi-fold grounds in support of the prayer for bail. First and foremost, according to Mr. Sayed, there is a complete non-compliance of the mandate contained in Section 50 of the NDPS Act, 1985 as the FIR does not at all indicate that the applicant was apprised of his right to be searched in the presence of the Gazetted Officer or Magistrate. Secondly, the compliance of Section 50 of the NDPS Act appears to be doubtful as the appraisal memo qua the applicant (page 46) and accused No.2 Kisan Gaud (page 52) contain an exactly identical endorsement that the accused has no objection if the police conducted the search. Such exactly similar endorsements by both the accused create a doubt about the genuineness of the appraisal memo as well as the documents evidencing compliance of Section 50 of the NDPS Act, 1985. Thirdly, the seizure is also vitiated as the panchnama indicates that the samples were collected by mixing the substance after scraping the slabs by knife. The mixing of the substance, according to Mr. Sayed, rendered the sample not representative of the bulk allegedly recovered. Moreover, there is discrepancy as regards the particulars of the receptacles in which the samples were

collected and forwarded to the FSL for analysis. An endeavour was also made by Mr. Sayed to draw home the point that the entries in the station diary belie the prosecution version of search and seizure.

8. Mr. Patil, the learned APP, stoutly resisted the prayer for bail. It was submitted that there is a scrupulous compliance of the mandate contained in Section 50 of the NDPS Act, 1985. The samples were duly collected and forwarded to FSL, which has reported that the substance found in possession of the applicant was *charas* falling under Section 2(iii)(a) of the NDPS Act, 1985. Mr. Patil further submitted that the rest of the discrepancies in the alleged search and seizure are matters for adjudication at the trial. In any event, since the recording of evidence has commenced, the trial can be concluded within a reasonable period and, therefore, the applicant does not deserve to be enlarged on bail.

9. I have carefully considered the submissions canvassed across the bar. First, the alleged non-compliance of the mandate contained in Section 50 of the NDPS Act, 1985. The right under Section 50 of the NDPS Act, 1985 to be searched in the presence of a Gazetted Officer or Magistrate has been designedly conferred on a suspect, by way of a safeguard and as

a dyke against abuse of the power by the authorized officer/police and planting of contraband or foisting of false cases by the law enforcement agencies. The provisions of Section 50(1) are held to be mandatory warranting strict compliance. Failure to comply with the said mandate entails the consequence of vitiating the search and seizure and the eventual conviction, if the same is recorded only on the basis of recovery of contraband articles from the possession of the person of the accused.

10. At the same time, it is well recognized that the provisions contained in Section 50(1) come into play only when the person of the suspect is searched in contradistinction to the bag or other article carried by the suspect.

11. In the case of *State of Punjab vs. Baljinder Singh and another*¹ where the personal search of the accused did not result in recovery of any contraband, but, in the search of the vehicle which the respondent therein was driving, seven bags containing poppy husk were found, a Three-Judge Bench of the Supreme Court after referring to the previous pronouncement held that the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there

¹ (2019) 10 SCC 473.

was non-compliance of Section 50 of the NDPS Act, 1985 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 teeth of conclusion (3) as recorded by the Constitution Bench in para 57 of its judgment in *State of Punjab vs. Baldev Singh*². The Three-Judge Bench went on to further observe that the earlier decision of the Supreme Court in the case of *Dilip vs. State of M.P.*³ had not adverted to the distinction between two situations and proceeded to confer advantage upon the accused even in respect of recovery from vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with. The decision in the case of *Dilip* (supra) is not correct and is opposed to the law laid down by Supreme Court in *Baldev Singh* (supra).

12. On the aforesaid anvil, reverting to the facts of the case, the material on record *prima facie* indicates that there was compliance of the mandate contained in Section 50 of the NDPS Act, 1985. The seizure panchnama records the fact that the applicant was apprised of the right to be searched before a Gazetted Officer or Magistrate under Section 50 of the NDPS

2 (1999) 6 SCC 172.

3 (2007) 1 SCC 450.

Act. The submission of Mr. Sayed that the endorsements on the appraisal memo of the applicant and co-accused Kisan Gaud alias Sathe renders the prosecution case doubtful, as they are similar, in my considered view, is a matter for consideration at the trial. From the mere similarity of the endorsement, the aspect of compliance cannot be thrown overboard as unbelievable or doubtful. It would turn on the evidence that may be adduced at the trial. The reliance placed by Mr. Sayed on the observations in the order dated 12th April, 2023 in *BA/17/2022 (Badshah Pallikal Abdul Adbus Samed vs. Anti Narcotics Cell, Bandra Unit and another)*, does not advance the cause of the applicant as, in that case, the Court primarily took into account the long period of incarceration of the applicant.

13. Moreover, in the circumstances of the present nature, where the applicant came to be apprehended while the police were on a patrolling duty and the case appeared to be that of a chance recovery especially from the bag, which the applicant was carrying, the very applicability of the provisions contained in Section 50(1) of the NDPS Act, 1985 appears debatable and can be adjudicated at the trial. Therefore, the submission that omission to mention the factum of the appraisal of the right under Section 50 of the NDPS Act, 1985 in the FIR, renders the

search and seizure completely illegal, does not merit countenance.

14. The ground of mixing of the contraband article and, thereafter, collection of the samples was premised on an endorsement in the search and seizure panchnama to the effect that the samples were collected by scraping the black ball. It was submitted that the collection of two samples constituted mixture of the bulk. Reliance was sought to be placed on an order passed by this Court in the case of *Mukesh Kumar Saha vs. The State of Maharashtra in BA/693/2023) dated 30th November, 2023*.

15. In the case of *Mukesh Kumar Saha* (supra), a learned Single Judge of this Court had found that the samples of *charas* collected from two blocks, allegedly found in the possession of the applicant therein, were mixed together and thus *prima facie* the rigor of Section 37 of the NDPS Act, 1985 did not attract.

16. I am afraid that the aforesaid order is of any assistance to the applicant. In the instant case, as alleged, only one ball made of black substance was found in the possession of the applicant and the samples were collected by scraping the same.

Prima facie, there were no two slabs or balls which were mixed together, wherefrom the samples were collected.

17. It was further submitted on behalf of the applicant that the question as to whether the very same sample which was allegedly collected under seizure panchnama dated 11th February, 2021 was forwarded to the FSL as the seizure panchama records that the pouch containing the sample was sealed with a staple pin and the CA Report indicates that the sample was received in a press sealed polythene bag. This submission is in the nature of a discrepancy in the record. Such a discrepancy, at this stage, cannot be extolled to such a pedestal as to jettison away the prosecution case of search and seizure. In any event, the said aspect is again a matter for trial.

18. In the aforesaid view of the matter, I am inclined to hold that there is a strong *prima facie* case against the applicant. There are no grounds to make the Court believe that the applicant is not guilty of the offences charged. Thus, the jurisdictional condition to release the applicant on bail envisaged by Section 37(1)(b)(ii) cannot be said to have been satisfied. I am, therefore, inclined to reject the application.

19. Hence, the following order.

: O R D E R :

- (i) Application stands dismissed.
- (ii) Since the recording of evidence has reportedly been commenced, the learned Special Judge is requested to make an endeavour to conclude the trial in Special Case No.942 of 2021 arising out of NCB/MZU/CR No.40 of 2021 as expeditiously as possible.
- (iii) 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.]