

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 428 OF 2024**

Mehboob Usman Shaikh	...	Applicant
vs.		
The State of Maharashtra	...	Respondent

Mr. R. S. Vidyarthi a/w. Mr. Shasvat Vidyarthi, Mr. Mohit Turakhia and Mr. Nikhil Verma for applicant.

Mr. Sagar R. Agarkar, APP for respondent-State.

Mr. S. D. Patil, PSI, Shivaji Nagar Police Station, Mumbai.

**CORAM : MANISH PITALE, J.
DATE : 03rd SEPTEMBER, 2024**

P.C. :

. Heard learned counsel for the applicant and the learned APP for the respondent-State.

2. The applicant is seeking bail as he was arrested on 14.05.2022 in the context of FIR No.0565 of 2022 registered on 14.05.2022 at Shivaji Nagar Police Station, Mumbai for offences under Sections 8(c) and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

3. The statement leading to registration of FIR records that the applicant was found in a suspicious condition transporting 3 cartons containing certain bottles at about 04:05 a.m. on 14.05.2022. The patrolling party confronted the applicant and it was found that the 3 cartons contained 70 bottles each of cough syrup Rextas *inter alia* containing codeine phosphate and chlorpheniramine. The said boxes were seized and seizure *panchanama* was

executed in the presence of two *panchas*. The said *panchanama* recorded the aforesaid facts.

4. Thereupon, further steps were taken for executing inventory *panchanama* and obtaining certificate from the Magistrate under Section 52A of the NDPS Act and eventually, one bottle each as sample from the 3 cartons were identified, marked as exhibits and sent to the laboratory for chemical analysis. The chemical examination report recorded the exhibits that were received and result of the analysis indicated that the 3 samples did contain codeine phosphate and chlorpheniramine, which is the contraband in the present case.

5. The learned counsel for the applicant submitted that this is a case of chance recovery. The applicant has no criminal antecedents. Some doubt was sought to be raised with regard to the manner in which the applicant was apprehended. But, in support of the present application, the main contentions raised on behalf of the applicant were that the process of preparing inventory *panchanama* and obtaining certificate from the Magistrate under Section 52A of the NDPS Act, was belated, simply for the reason that the seizure was carried out on 14.05.2022 and the inventory *panchanama* was prepared after four months i.e. on 14.09.2022. It was further submitted that while the seizure *panchanama* and spot *panchanama* recorded seizure of 3 cartons containing 70 bottles each of Rextas cough syrup containing codeine phosphate and chlorpheniramine syrup, the inventory *panchanama* executed on 14.09.2022 recorded 70 bottles each in the 3 cartons of Corex cough syrup containing codeine as the contraband. The chemical examination report of the concerned laboratory recorded receipt of exhibits/samples of Rextas cough syrup containing codeine

phosphate and chlorpheniramine and the result showed the presence of the aforesaid contraband. It was submitted that the glaring discrepancy of the bottles on one hand containing Rextas cough syrup and on the other hand, in the inventory *panchanama* containing corex cough syrup, raises serious doubt about the case of the investigating authority.

6. It was further submitted that only one bottle was picked up from each of the 3 cartons and was sent for chemical examination, although the entire quantity ought to have been sent for chemical analysis in respect of which, reliance was placed on the judgment of the Supreme Court in the case of *Gaunter Edwin Kircher vs. State of Goa, Secretariat Panaji, Goa [(1993) 3 SCC 145]*. It was further submitted that the applicant has already undergone incarceration for almost 2 years and 4 months and this factor may also be taken into consideration.

7. On the other hand, the learned APP vehemently opposed the present application. It was submitted that mere mention of corex cough syrup in the inventory *panchanama*, at this stage itself, cannot inure to the benefit of the applicant as the inventory *panchanama* specifically records 70 bottles each of codeine in the 3 cartons that were seized from the applicant. It was submitted that such contention ought to be considered at the stage of trial and no advantage can inure to the benefit of the applicant.

8. It was further submitted that the entire set of 210 bottles are not expected to be sent for chemical analysis and therefore, it cannot be said that the procedure adopted by the investigating authority, in any manner, violated the mandatory requirement under the NDPS Act and Rules. As regards the judgment of the Supreme Court in the case of **Gaunter Edwin Kircher vs.**

State of Goa, Secretariat Panaji, Goa (*supra*), it was submitted that the same was concerned with an appeal after the trial was completed on merits and the appeal thereagainst was decided on merits in the High Court. Hence, the contention sought to be raised on behalf of the applicant needs to be considered at the stage of trial and bail ought not be granted, considering the huge quantity of contraband recovered from the applicant in the present case.

9. This Court has considered the rival submissions, in the light of the material on record. The mandatory requirement of Section 52A of the NDPS Act, as elaborated by the Supreme Court in the case of *Union of India Vs. Mohanlal and another* [(2016) 3 SCC 379], requires the process of certification mandatorily to be undertaken under Section 52A of the NDPS Act, within a reasonable period of time. In paragraph No.15 to 19 of the said judgment, the Supreme Court has laid down the law pertaining to the mandatory nature of requirement under Section 52A of the NDPS Act and the strict compliance expected from the investigating authority. In paragraph No.19 of the said judgment, it is indeed observed that no timeline is specified under Section 52A of the NDPS Act to move the jurisdictional Magistrate for certification, yet it is observed that the concerned authority is expected to move without any delay and in any case, within reasonable period of time.

10. In the present case, there is no document to indicate as to the date on which the investigating authority moved the application under Section 52A of the NDPS Act for sampling and certification. Documents on record show an order passed by the concerned Magistrate on 14.09.2022, which refers to an application moved by the concerned API for such sampling and certification. The inventory *panchanama* in respect of which the said

Magistrate has issued the certificate on 14.09.2022, shows that the said exercise was undertaken on 14.09.2022 itself. The said material indicates that the exercise before the concerned Magistrate appears to have been undertaken on 14.09.2022, which is four months after the date on which the contraband was allegedly seized from the possession of the applicant. If that be so, it is doubtful whether the time period of four months elapsing between the two, could be said to be indicative of the investigating authority having taken necessary steps mandatorily required under Section 52A of the NDPS Act within “reasonable time”.

11. But, apart from this, inconsistency is found in the documents available on record. While the seizure *panchanama* and spot *panchanama* specifically record that the 3 cartons seized from the applicant on 14.05.2022 contained 70 bottles each of the codeine phosphate and chlorpheniramine maleate syrup 100 ml. Rextas cough syrup, the inventory *panchanama* executed on 14.09.2022 records that 3 cartons contained 70 bottles each of corex cough syrup containing codeine. There is no doubt about the fact that the contraband codeine is indeed mentioned in the inventory *panchanama*, but at the same time, it cannot be ignored that the said *panchanama* specifically records corex cough syrup containing codeine in the bottles found in the 3 cartons allegedly seized from the applicant.

12. It is also relevant to note that the chemical examination report of the concerned laboratory records the description of articles received for chemical analysis as Rextas cough syrup – codeine phosphate and chlorpheniramine maleate syrup. In other words, while documents pertaining to initial stage of the action undertaken by the investigating officer i.e. the seizure *panchanama* and spot *panchanama* record seizure of Rextas cough syrup

containing codeine phosphate and chlorpheniramine and the same fact is mentioned in the chemical examination report of the concerned laboratory, the crucial stage in the interregnum, pertaining to the mandatory exercise to be undertaken under Section 52A of the NDPS Act i.e. execution of inventory *panchanama*, records that 70 bottles each of the “corex cough syrup with codeine” were found in the 3 cartons allegedly recovered from the applicant on the date and time of the seizure. This *prima facie* is a glaring discrepancy, which must inure to the benefit of the applicant. It may appear that technical arguments are adopted at the stage when bail applications are pressed in such matters and accepting such arguments may appear to be in the teeth of the object of the NDPS Act, it cannot be forgotten that the consequences of such allegations levelled against the applicant under the provisions of NDPS Act are drastic. The more drastic the consequences, the more stringent the Court is supposed to be, to ensure that the procedure is followed scrupulously by the investigating officer.

13. In the facts of the present case, this Court finds the said discrepancy to be going to the root of the matter and hence, on broad probabilities, it can be said that the applicant has satisfied the first limb of the stringent twin test contemplated under Section 37 of the NDPS Act. The applicant has no criminal antecedents and this is said to be a case of chance recovery and hence, the second limb of the twin test can also be said to be satisfied.

14. The applicant has already suffered incarceration for about 2 years and 4 months and this is also a factor taken into consideration by this Court, while disposing of the present application. The contention pertaining to judgment of the Supreme Court in the case of **Gaunter Edwin Kircher vs. State of Goa, Secretariat Panaji, Goa** (*supra*), can be considered at the stage of trial.

15. In view of the above, the application is allowed in the following terms:

- (i) The applicant shall be released on bail in connection with FIR No.0565 of 2022 registered on 14.05.2022 at Shivaji Nagar Police Station, Mumbai, on furnishing PR Bond of ₹ 50,000/- and one or two sureties in the like amount to the satisfaction of the trial Court;
- (ii) the applicant, upon being released on bail, shall report to Shivaji Nagar Police Station on first Monday of every month between 10:00 a.m. and 12:00 noon during the pendency of trial;
- (iii) upon release, within one week, the applicant shall inform the Investigating Officer as well as the trial court about his contact number and residential address and update the same in case of any change;
- (iv) the applicant shall co-operate with the trial Court in completing the proceedings expeditiously and attend the proceedings before the trial Court on each and every date, unless specifically exempted;
- (v) the applicant shall not tamper with the evidence of the prosecution in any manner. He shall not undertake any action that may influence the informant, witnesses and other persons concerned with the case.

16. The applicant shall be liable to face proceedings for cancellation of bail, in the event any of the aforesaid conditions are violated.

17. It is also clarified that the observations made in this order are limited to the disposal of the present bail application and the trial court shall proceed further in the matter without being influenced by the observations made hereinabove.

18. The application is disposed of.

(MANISH PITALE, J)