



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2336 OF 2024**

Santosh Prajapati s/o late Shayam Lal Prajapati	...	Applicant
versus		
The State of Maharashtra and Anr.	...	Respondents

Ms. Anjali Patil for Applicant.
Mr. H.J.Dedhia, APP for State.
Ms. Ameeta Kuttikrishnan, for Respondent No.2.

CORAM: N.J.JAMADAR, J.

DATE : 10 OCTOBER 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in NDPS Special Case No.907 of 2022 arising out of NCB MZU CR No.30 of 2022, Mumbai, for the offences punishable under Sections 21(c), 25, 27, 27(a), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge him on bail.
3. On 18th August 2022, Mr. Vijay Shinde, Intelligence Officer, NCB, received an information that Santosh Jain (A6), a resident of Varanasi, was involved in supply of Chlorpheniramine Maleate & Codeine Phosphate Phensirest Cough Syrup (CBCS) bottles (Brand name 'Phensirest') in huge quantity from Varanasi to Pune and eventually those bottles were transported to Mumbai. Santosh Prajapati (A5) – the applicant, regularly booked those

parcels by train from Mughalsarai, U.P. to Pune, where those parcels were collected by Nitin Bhosale (A4). One such consignment was likely to reach Avinash Cargo Pvt. Ltd. (ACPL), MIDC, Andheri, where it was to be collected by Mohd. Hussain @ Babool Bhai (A7) or his associates Arabshah Sayyed (A1) on behalf of Sandeep Khedekar (A3).

4. A team of NCB, on the basis of the disclosure statement of Arabashah Sayyed (A1), Nazare Alam Salman (A2), Sandeep Khedekar @ Rajesh (A3), Nitin Bhosale (A4), intercepted the applicant and Santosh Jain @ Chhotu (A6). 7488 bottles of CBCS were recovered under a panchanama dated 21st August 2022 at Varanasi.

5. Investigation revealed that Santosh Jain (A6) was involved in the illegal business of purchasing and selling Phensirest. Santosh Jain (A6) procured the contraband from Mannu Sharma of Varanasi. The applicant used to carry the boxes from Nati Imli to Sarainandan in his vehicle, packed those boxes and booked the parcels. Upon learning that the applicant was arrested, Santosh Jain (A6) had shifted 52 boxes of CBCS bottles packed in 26 bundles from his godown to the house of one of his friend, namely, Rajkumar Jaiswal. From the house of Rajkumar Jaiswal, contraband was seized. Santosh Jain (A6) was called at the house of Rajkumar Jaiswal and, thereupon, Santosh Jain (A6) came to be accosted.

6. Learned Counsel for the Applicant submitted that the applicant is

entitled to be enlarged on bail on the ground of parity. Attention of the Court was invited to an order dated 9 May 2024 passed in BA No.2000 of 2023 whereby co-accused Mohd. Hussain Ahmed Shaikh @ Babool Bhai (A7) and Sandeep Khedekar (A3) were enlarged on bail. Taking the Court through the said order, learned Counsel for the Applicant submitted that this Court had noted that Santosh Jain (A6) was the principal accused and the role attributed to the applicant is that of carrying the parcels and booking those parcels at Mugalsarai for transportation to Pune.

7. Ms. Anjali Patil submitted that the applicant is a small transporter of the goods. For the transportation charges of Rs.500/- per consignment, the applicant used to transport and book the parcels at the instructions of Santosh Jain (A6). There is no material to indicate that the applicant was privy to the illicit drug trade.

8. Ms. Amita Kuttikrishnan, learned Special PP for Respondent No.2, countered the submissions on behalf of the applicant. Attention of the Court was invited to the booking receipts (pages 421 and 422) which indicate that the applicant had booked those parcels containing the contraband substance. In addition, in the statements of the applicant as well as Santosh Jain (A6), recorded under Section 67 of the Act, 1985, the fact that the applicant had transported and booked the parcels containing the contraband substance, becomes abundantly clear. As the applicant was in regular touch with

Santosh Jain (A6), as has been noted by this Court in the aforesaid order dated 9 May 2024, whereby the application of Santosh Jain (A6) came to be rejected, the learned Special PP submitted that the interdict contained in Section 37 of the Act, 1985, comes into play and the applicant does not deserve to be enlarged on bail.

9. Prima facie, there is material to indicate that the applicant had transported and booked the parcels containing the contraband substance at Mugalsarai Railway Station. In a sense, the said fact is not sought to be controverted on behalf of the applicant. A submission was canvassed that the applicant had transported the parcels, as he was made to believe that those parcels contained medicines as is evident from the booking receipts. To implicate the applicant as privy to the offences, or for that matter a confederate in the conspiracy, the prosecution primarily banks upon the statements of the applicant and co-accused Santosh Jain (A6) recorded under Section 67 of the Act, 1985 and the CDR.

10. In view of the Three Judge Bench judgment of the Supreme Court in the case of **Tofan Singh V/s. State of Tamilnadu**¹ the statements made under Section 67 of the Act, 1985, cannot be used as confession in a trial for the offences under NDPS Act, 1985. Nor such statement made by the accused constitutes a legal evidence qua the non-maker co-accused.

1 (2021) 4 SCC 1

11. In the case at hand, even if maximum latitude is given to the prosecution case and the statements of the applicant and Santosh Jain (A6) are looked into, discounting the challenge to their admissibility, yet those statements do not advance the cause of the prosecution to the extent desired by the prosecution. Neither Santosh Jain (A6) states that the applicant was privy to the alleged illicit trade, nor that an abnormally high amount was paid to the applicant for transportation and booking of the consignment. The applicant, in turn, stated that Santosh Jain (A6) used to pay him Rs.1000/- towards transportation per delivery, in addition to the booking amount. Prima facie, there is no material to indicate that the applicant was privy to the conspiracy to transport the contraband substance.

12. While releasing co-accused Mohd. Hussain Ahmed Shaikh and Sandeep D. Khedekar @ Rajesh, this Court had averted to the material in the form of CDR and data retrieved from the mobile phone handsets, which included whatsapp chats, photographs and other incriminating material. In that context, this Court considered the question as to whether the said material was sufficient to deprive the personal liberty of those accused ? After adverting to the decisions of the Supreme Court in the cases of **Bharat chaudhary V/s. Union of India**², **State V/s. Pallulabid Ahmad Arimutta**³ and **Narcotics Control of Bureau V/s. Mohit Aggarwal**⁴, this Court, inter

2 Spl Leave to Appeal (Crl) No.5703 of 2021 dt. 13 December 2021.

3 Spl Leave to Appeal (Crl) No.3242 of 2022 dt. 10 January 2022.

4 Cri. Appeal Nos.1001-1002/2022 dt. 19 July 2022

alia, observed as under :

“31. Reliance was placed on behalf of the accused on the observations of the Supreme Court in the case of **Bharat Chaudhary vs. Union of India**⁵, wherein with reference to the printouts of the WhatsApp messages, the Supreme Court, in the facts of the said case, observed that, “Reliance on the printouts of the WhatsApp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited.”

32. In the case of **Pallulabid** (supra), the Supreme Court *inter alia* observed that the CDR details of the some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial.

33. In contrast, the learned Special Prosecutors banked upon the decisions in the cases of **Mohit Agarwal** (supra) and **Md. Navaz** (supra). It is true that in both **Mohit Agarwal** (supra) and **Md. Navaz** (supra) the Supreme Court considered the CDR details as an incriminating circumstance. However, in my considered view, the decisions in those cases turned on the facts therein.

34. In the case of **Mohit Agarwal** (supra), the respondent therein had disclosed the address and location of the co-accused, who was arrested later on and the CDR details showed that they were in touch with each other. In the case of **Md. Nawaz** (supra), the respondent therein was travelling all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused, in the vehicle in which contraband was

5 Spl, Leave to Appeal (Crl) No.5703/2021, dtd.13/12/2021.

concealed and, in that context, the fact that the respondent was in regular touch with the other accused persons was taken into account.

35. In the case at hand, the material qua Sandeep Khedekar (A3) and Babool Bhai (A7) appears to be in the nature of CDR and the data retrieved mobile phone hand sets. The transcript of the conversation do indicate the nature of the conversation between the parties is not placed before the Court. The question as to the admissibility and reliability of a report of a private expert may also be a matter for adjudication at the trial. I am, therefore, inclined to hold that the material against Sandeep Khedekar (A3) and Babool Bhai (A7) is by and large of a similar nature as against Nazare Alam (A2), who has been released on bail.”

13. As the material pressed into service against the applicant is primarily CDR (between the applicant and Santosh Jain (A6), apart from the statements recorded under Section 67 of the Act, 1985, in my view, the aforesaid reasons apply with equal force to the claim of the applicant for bail. I am, therefore, inclined to hold that the interdict contained in Section 37 of the NDPS Act, may not be attracted qua the applicant. The Court is not informed that the applicant has antecedents.

14. The upshot of aforesaid consideration is that the applicant deserves to be enlarged on bail.

15. Hence, the following order :

ORDER

- (i) The Application stands allowed.
- (ii) The Applicant - Santosh Prajapati s/o late Shayam Lal Prajapati be released on bail in NDPS Special Case No. 295 of 2023 arising out of NCB MZU CR No.30 of 2022, Mumbai, on furnishing a P.R. Bond of Rs.1,00,000/-, each, with one or more sureties in the like amount to the satisfaction of the learned Special Judge.
- (iii) The applicant shall mark his presence at the NCB MZU, Mumbai, on the first Monday of every month between 10.00 a.m. 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 their contact numbers 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 they have 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.)