



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2485 OF 2024**

Mohd. Arshad Mohd. Akram Shaikh ... Applicant
versus
State of Maharashtra ... Respondent

Mr. Anil G. Lalla with Mr. Anjan K. Kotwal i/by Lalla and Lalla for Applicant.
Mrs. Mahalaxmi Ganpathy, APP for State.
PSI Nagesh Chikane, ANC Ghatkopar Unit, Crime Branch, present.

CORAM: N.J.JAMADAR, J.

**RESERVED ON : 19 JULY 2024
PRONOUNCED ON : 23 JULY 2024**

P.C.

1. The applicant, who is arraigned in C.R.No.99 of 2021 registered with Anti Narcotic Cell, Ghatkopar Unit, Mumbai, 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.

2. On 1 December 2022, while Anti Narcotic Cell Police were on patrolling duty, the Applicant (A1) was found moving in suspicious circumstance, carrying a plastic gunny bag. The applicant was accosted. In the search, 120 bottles of EMCOFF TM Cough Syrup 100 ml. containing Codeine Phosphate were found. The contraband substance was seized and two sample bottles were collected as A1 and A2. The applicant made a disclosure and led the police party to Room No.A-34, 4th Floor, Nasim Manzil, Dongri, Mumbai. The applicant opened the lock by the key which he

was carrying. 10 gunny bags containing three cartons boxes, each, in turn, containing 120 bottles, labelled with EMCOFF TM Cough Syrup 100 ml., were found. In all 3460 bottles were found. Samples bottles were collected as B1 to K2. The applicant came to be arrested.

3. On 4 December 2021, pursuant to the discovery made by the applicant, 20 boxes containing 2400 bottles of EMCOFF TM Cough Syrup 100 ml. were recovered from the godown of Bombay Bangalore Freight Carriers Pvt. Ltd., Vyapar Bhavan, P. D'Mello Road, Mumbai. Contraband substance was seized and sample bottles were collected as L1 to U2.

4. The investigation further revealed that the applicant had obtained the contraband substance from Lokesh (A2). Thereupon, Lokesh (A2) came to be arrested. Further investigation revealed that Lokesh (A2) had procured the contraband substance and supplied the same to Sadanand Rane (A4). Post completion of investigation, chargesheet came to be lodged.

5. Mr. Lalla, learned Counsel for the Applicant, submitted that the co-accused Lokesh (A2) who had allegedly supplied the contraband substance has already been released on bail. Likewise, Sadanand Rane (A4) another co-accused has also been released on bail. Though, the prosecution alleges that about 6000 bottles of EMCOFF TM Cough Syrup 100 ml. containing Codeine Phosphate have been recovered from the possession or at the instance of the applicant, yet, the material on

record does not establish that the applicant was in exclusive possession of the said substance and that the applicant can be attributed with the authorship of storing the contraband substance.

6. In any event, according to Mr. Lalla, the prosecution case suffers from a serious infirmity as the proceedings under Section 52-A of the Act, were not held scrupulously. Before the learned Special Judge, a submission was made on behalf of the prosecution that the inventory panchanama was conducted before the Magistrate on 19 November 2022, well past one year of the alleged seizure. Therefore, the said proceedings under Section 52-A of the Act, is of no assistance to the prosecution.

7. It was further submitted that as the applicant has been in custody since more than two and half years, the applicant deserves to be enlarged on bail.

8. Learned APP resisted the prayer for bail. It was submitted that huge quantity of 6000 bottles of cough syrup containing Codeine Phosphate has been recovered from the possession of the applicant. Therefore, the interdict contained in Section 37 of the Act, 1985, comes into play with full force. Learned APP made an endeavour to urge that the inventory under Section 52-A of the Act was held before the learned Magistrate on 19 November 2022. The aspect of delay in conducting the proceedings under Section 52-A of the Act, would be a matter for adjudication at the trial. The applicant has an antecedent. Thus, the applicant does not deserve to be enlarged on bail.

9. I have carefully perused the material on record and given anxious consideration to the submissions canvassed across the bar. At the outset, it is necessary to note that the fact that the co-accused Lokesh (A2) and Sadanand Rane (A4) have been enlarged on bail may not enure to the benefit of the applicant to the extent desired by the applicant. The role attributed to Lokesh (A2) and Sadanand Rane (A4) appears to be quite distinct. Prima facie, it does not appear that either Lokesh (A2) or Sadanand Rane (A4) was found in possession of any contraband substance. On the contrary, the applicant was allegedly found in possession of a huge quantity of 6000 bottles of EMCOFF TM Cough Syrup 100 ml. containing Codeine Phosphate.

10. The endeavour of Mr. Lalla to draw home the point that the applicant cannot be attributed with exclusive knowledge of the contraband, which was stored at Room No.A-34, 4th Floor, Nasim Manzil, Dongri, Mumbai and a godown at P.D'Mello Road, does not merit consideration, at this stage. Whether the direct seizure pursuant to the disclosure made by the applicant or recovery pursuant to the discovery under Section 27 of the Evidence Act, merit acceptance, can be properly adjudicated at the stage of trial on the basis of the evidence which the prosecution may adduce.

11. The ground of non-compliance of the provisions contained in Section 52-A of the Act, however, prima facie, appears to carry substance. From the perusal of the search and seizure panchanama dated 1 December 2021, it becomes abundantly

clear that upon the recovery of 120 bottles of EMCOFF TM Cough Syrup 100 ml., the Investigating Officer had collected sample bottles A1 and A2 and, post recovery of 3460 bottles of EMCOFF TM Cough Syrup 100 ml., at the pointing out by the applicant, again sample bottles were collected at Exhibit B1 to K2 at the time of the seizure itself. Forwarding letter dated 2 December 2021 (page 96) indicates that all those sample bottles (Exhibit A1 to K1) were forwarded for analysis to FSL. CA Report (page 171) indicates that the very same samples (A1 to K1) were analysed and Codeine and Chlorpheniramine were detected therein.

12. Similarly, the seizure memo dated 4 December 2021 indicates that upon the alleged recovery of 2400 bottles of EMCOFF TM Cough Syrup 100 ml., samples (L1 to U2) were collected at the spot itself. Those samples were forwarded for analysis under forwarding letter dated 6 December 2021 (page 192). CA report (page 328) indicates that those very same samples (L1 to U1) were analysed and Codeine and Chlorpheniramine were detected therein.

13. Learned APP tendered the inventory panchanama conducted on 19 November 2022 for the perusal of the Court. It appears that the learned Magistrate has certified the correctness of the inventory under sub-Section (3) of Section 52-A of the Act. Evidently, there is a delay of almost one year in conducting panchanama before the jurisdictional Magistrate under Section 52-A. The delay is inordinate by any standard.

14. It is also imperative to note that the inventory panchanama and the certificate issued by the learned Magistrate under Section 52-A (3) of the Act do not indicate that fresh samples were drawn before the learned Magistrate and forwarded for analysis to the FSL.

15. The situation which thus obtains is that the prosecution case rests on the analysis of the samples collected at the time of the seizure itself. The inventory proceedings, thus, conducted before the learned Magistrate under Section 52-A of the Act, prima facie loses evidentiary value.

16. In a line of decisions, the Supreme Court has emphasized that collection of the samples of contraband article at the time of seizure itself is not envisaged by the provisions contained in NDPS Act, 1985. The provisions contained in section 52A of the NDPS Act, 1985 have been held to be mandatory in nature. A profitable reference in this context can be made to the decision of the Supreme Court in the case of **Union of India V/s. Mohanlal and Anr.**¹, wherein the Supreme Court held that the procedure prescribed in Section 52-A is of mandatory nature and it was obligatory to prepare an inventory of seized contraband and then make an application to the Magistrate for the purpose of getting its correctness certified. The observations in paragraphs 15 to 17 read as under :

“15.It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to

1 (2016) 3 SCC 379

the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

17. In the case of Yusuf @ Asif V/s. State², the Supreme Court after following the decision in the case of Union of India V/s. Mohanlal (supra), enunciated, as under:

² Cri.Appeal 3191 of 2023 Dt.13/10/2023.

“16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

18. In the case of Simaranjit Singh V/s. State of Punjab³, the Supreme Court after extracting the observations in paragraphs 15 to 17 (extracted above) in the case of Union of India V/s. Mohanlal (supra), observed that the act of the officer drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by Supreme Court Court in the case of Mohanlal (supra). That creates a serious doubt about the prosecution case that substance recovered was a contraband, and the Supreme Court, thus, set aside the judgment of conviction and sentence.

19. In the face of the aforesaid enunciation of law, I am afraid to accede to the submission of Mrs. Ganapathy that non-compliance of the provisions contained in Section 52-A of the NDPS Act, 1985 does not detract materially from the prosecution. As is evident from own showing of the prosecution, the inventory was conducted after one year of the seizure. At any rate, the prosecution case rests on the C.A report based on the analysis of the samples collected at the time of alleged seizure.

20. In the case of Mohammed Khalid and another vs. The State of

3 2023 SCC Online SC 906.

Telangana⁴, the Supreme Court observed, inter alia, as under:-

22] Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P-11) is nothing but a waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20(b)(ii)(c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of ganja with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2.

(emphasis supplied)

21. The Supreme Court has enunciated that the CA report based on the samples which were not drawn in the presence of the Magistrate is bereft of any evidentiary value.

22. If appraised in the light of the aforesaid enunciation of law, the prosecution case, prima facie, suffers from twin infirmities. One, it rests on the analysis of the samples which were collected at the time of the alleged seizure. Two, there is an unreasonable delay in conducting the proceedings under Section 52-A of the Act. I am, therefore, inclined to hold that the prosecution will have to surmount the impediment of non-compliance of the mandate contained in Section 52-A of the

4 Criminal Appeal No(S).1610/2023, dtd.1/3/2024.

Act, at the trial. Resultantly, an inference becomes sustainable that, eventually, the applicant may not be found guilty of the offences for which he has been arraigned.

23. As regards the antecedents, the learned APP urged that the applicant has been arraigned in C.R.No.20 of 2020 registered with DCB (C.R.No.63 of 2020), Kurla Police Station for the offences punishable under Section 22, 29 read with Section 8(c) of the Act, 1985, for having been found in possession of 480 bottles of cough syrup containing Codeine Phosphate along with co-accused.

24. Mr. Lalla submitted that the applicant has been enlarged on bail in the said case. Attention of the Court was also invited to two orders passed by this Court in the cases of **Khan Abusufiyan Shakil Ahmed V/s. Union of India and Anr.**⁵ and **Smt. Salma Suleman Shaikh V/s. The State of Maharashtra**⁶ whereby, despite antecedents, the applicants therein were enlarged on bail.

25. Indeed, it appears that the applicant has an antecedent. Yet, the aspect of the antecedent deserves to be appreciated in the light of the nature of the infirmity in the prosecution case, which is prima facie evident on account of non-compliance of the mandate contained in Section 52-A of the Act, and the fact that the applicant has been in custody since December 2021. It is extremely unlikely that the trial can be commenced and concluded within a reasonable period. Moreover, having regard to the time lag and the fact that the applicant is stated to have been released on bail in the

5 BA 884 of 2023 dated 2 Nov. 2023

6 BA 1648 of 2018 dated 20 August 2018

said case, I am inclined to exercise discretion in favour of the applicant.

26. Hence, the following order :

ORDER

- (i) The Application stands allowed.
- (ii) The Applicant – Mohd. Arshad Mohd. Akram Shaikh be released on bail in C.R.No.99 of 2021 registered with Anti Narcotic Cell, Ghatkopar Unit, Mumbai, on furnishing a PR bond in the sum of Rs.1,00,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.
- (iii) The applicant shall mark his presence before ANC, Ghatkopar, Mumbai on first Monday of every month between 11 am to 1 pm for a period of three years or till the 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 surrender his passport before the jurisdictional Magistrate and shall not leave the country without prior permission of the Special

Court.

(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 disposed.

(N.J.JAMADAR, J.)