

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

BAIL APPLICATION NO. 4273 OF 2024

Mohd. Aasim Nayyare

Alam @ Nahir Alam

... Applicant

Versus

The State of Maharashtra

... Respondent

Mr. Nilesh S. Bangar a/w Kamlesh Satre for the Applicant.

Mr. Mayur S. Sonavane, APP for Respondent-State.

Mr. Amol S. Gavali, API, ANC, Azad Maidan Unit, Crime Branch,
Mumbai,

CORAM: MANISH PITALE, J.

DATE : 12th DECEMBER 2024

P.C. :

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

2. In this case, the applicant was arrested on 12th August 2021 in connection with FIR No.72 of 2021 dated 11th August 2021, registered with Anti-Narcotics Cell (ANC), Azad Maidan, Mumbai, for offences under Sections 8(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

3. According to the investigating authority, there are 3 accused persons from whom recoveries of contraband mephedrone (MD) were made. The *panchanama* shows that from the applicant, 253

grams of MD was recovered, which amounts to commercial quantity.

4. The learned counsel for the applicant submitted that in the present case, there is total non-compliance of Section 52A of the NDPS Act. He relied upon the documents on record, to support the aforesaid contention.

5. The learned APP is unable to show from the documents on record filed alongwith the charge-sheet, that inventory *panchanama* was conducted and samples were drawn, as mandatorily required under Section 52A of the NDPS Act.

6. In the case of ***Union of India Vs. Mohanlal and another, (2016) 3 SCC 379***, the Supreme Court, while discussing the aspect of seizure and sampling, with specific reference to Section 52A of the NDPS Act, held in paragraph Nos.15 to 19, as follows:

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

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. Mr. Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of

seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions."

7. The above-quoted portion of the judgment of the Supreme Court makes it clear that requirements of Section 52A of the NDPS Act, are mandatorily required to be followed by the investigating agency and failure to follow the same, can be said to be fatal.

8. In the present case, a perusal of the documents shows that the samples were prepared on the spot, when the seizure

panchanama was executed and the very same samples were sent to the concerned forensic laboratory for investigation. The chemical analysis report shows that the samples were received in the laboratory on 11th August 2021 and 12th August 2021. This obviously shows that there was non-compliance with the mandatory requirement of Section 52A of the NDPS Act. Even otherwise, there are no other documents on record to show any attempt on the part of the investigating agency to comply with the same.

9. In view of the above, the applicant has made out a strong *prima facie* case in his favour and the application deserves to be allowed.

10. 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.72 of 2021 dated 11th August 2021, registered with Anti-Narcotics Cell (ANC), Azad Maidan, Mumbai, on furnishing P.R. Bond of ₹50,000/- and one or two sureties in the like amount to the satisfaction of the trial court.

(ii) The applicant shall attend the office of the Anti Narcotics Cell, Azad Maidan, Mumbai, on first Monday of every month between 10:00 a.m. and 12:00 noon,

during the pendency of the 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 not tamper with the evidence in any manner. He shall not influence the informant, witnesses or any other persons concerned with the case.

(v) The applicant shall attend the proceedings before the Trial Court on every date, except when exempted, for reasons to be recorded in writing.

11. Needless to say, violation of any of the aforesaid conditions may lead to cancellation of the present order.

12. 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.

13. The application stands disposed of.

MANISH PITALE, J.