Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1106 OF 2024

Shyam Pratap Rajder Gaud
@ Shyam Rajdev Pratap .. Applicant
Versus
Union of India & Anr. .. Respondents

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- Mr. Ayaz Khan a/w Mr. Dilip Mishra, Ms. Zehra Charania & Ms. Mallika Sharma for Applicant
- Mr. S.R. Ketkar, Special PP a/w Mr. Indraneel Nanoti for Respondent No. 1
- Ms. Megha Bajoria, APP for Respondent No. 2 - State

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 01, 2025

P. C.:

1. Heard Mr. Khan, learned Advocate for Applicant; Mr. Ketkar, learned Special PP for Respondent No. 1 - Union of India and Ms. Bajoria, learned APP for Respondent No. 2 - State.

2. Applicant - accused has filed the present Application for regular bail under Section 439 of the Code of Criminal Procedure, 1973 (for short, **"Cr.P.C."**) in connection with F.No. SG/Misc-11/2021-21/SIIB(X)GEN/INV/MISC/364/2021 (now Special Case No. 1984/2023) registered with Special Intelligence Investigation Branch (SIIB) for the offences punishable under Sections 8(c) r/w Sections 22(c), 23(c), 27-A, 28 and 29 of the Narcotic Drug and Psychotropic Substances Act, 1985 (for short **"NDPS Act"**).

3. Applicant is arrested by prosecution on 16.05.2023 in respect of crime registered on 21.11.2022 on the ground of alleged smuggling of contraband.

4. Facts of the present case will have to be delineated for consideration of the present Bail Application since the prosecution has heavily contested the same. Briefly stated on 08.12.2020, officers of Customs suspected smuggling and export of contraband in 10 packets through the postal service in a parcel which was submitted for export on behalf of an entity called M/s. Khushi Enterprises. On such suspicion, prosecution in presence of panchas opened the 10 packets and found loose tablets alleged to be some contraband cleverly kept hidden inside the pearl 'imitation malas' and packed neatly. The said packets were sent to the Asst. Drug Commissioner (ADC) who confirmed the tablets to be banned narcotic medicines - prohibited contraband. The tablets were thereafter repacked in light green colour envelopes from which they were retrieved and then wrapped in white colour plastic bag which were sealed with lac seal of Mumbai Customs and signatures of panchas appended thereon. The contraband packets were detained under the provisions of the Customs Act. Seizure panchanama took place on 08.12.2020 at 15:30 Hrs. On 09.12.2020, prosecution once again suspected another 8 packets attempted to be exported by the same entity M/s. Khushi Enterprises and once again followed the same seizure procedure. According to prosecution, contraband was detected in pearl "imitation malas" which was confirmed by the Asst. Drug Commissioner. Seizure panchanama was completed on 09.12.2020. On the following day i.e. 10.12.2020, prosecution once again suspected further 9 packets of the alleged contraband being attempted to be exported by the same entity M/s. Khushi Enterprises and the contraband in the said packets was seized and panchanama was carried out.

5. After the above seizure on 08.12.2020, 09.12.2020 and 10.12.2020, inventory panchanama under Section 52-A of the NDPS Act was carried out before the learned Magistrate on 25.06.2021 i.e. after a period of more than six months.

6. Thereafter on 12.04.2022 i.e. after a period of further 10 months search warrant was issued by the Dy. Commissioner of Customs (SIIB) for effecting search in the premises of M/s. Khushi Enterprises. The officers of the prosecution found out that office of M/s. Khushi Enterprises was locked, hence search warrant could not be implemented.

7. On 08.06.2022 summons was issued to the Applicant and his statement was recorded. Thereafter summons were issued to witnesses by the prosecution and their submissions were recorded.

8. On 16.05.2023 i.e. more than one year after summons was issued to Applicant, prosecution arrested Applicant on the basis of identification by one Ms. Nayana Bhoir, Counter Postal Assistant in the Foreign Post Office who identified the Applicant to be the person and representative of M/s. Khushi Enterprises who used to regularly book the parcels for export through the post office.

9. On 26.05.2023 search warrant was issued to search the house property and office of the Applicant and seizure of 2 laptops, 1 mobile phone and 6 box files was made.

10. Applicant filed Bail Application before Trial Court which was rejected on 08.02.2024. Being aggrieved, present Application is filed by Applicant.

11. Mr. Khan, learned Advocate for Applicant after taking me through the *prima facie* facts of the present case delineated herein above, has made the following submissions:-

(i) At the outset, he would submit that the delay in prosecution case is writ large on the face of record. He would submit that on the seizure of the alleged contraband there is *prima facie* delay in carrying out the seizure itself and thereafter conducting the inventory panchanama under Section 52-A and the delay is humongous;

(ii) He would submit that there is no provision under the NDPS Act for drawing inventory panchanama in presence of the Magistrate;

(iii) He would submit that the certificate issued by the Magistrate under Section 52-A(3) of the NDPS Act is not in consonance with the provisions of Rules 8 and 18(1) of the Narcotics Drug and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 (for short **"Rules 2022"** as *prima facie* it can be seen that there is material discrepancy in carrying out search and seizure of the alleged contraband which is stated in the seizure panchanama as compared to and juxtaposed with the inventory panchanama. He would submit that the learned Magistrate has not noticed this material discrepancy which vitiates the prosecution case and has blindly certified the correctness of the inventory placed before him;

(iv) He would submit that carrying out of the inventory panchanama is *prima facie* contrary to the statutory provisions namely Chapters II and III of the Rules 2022.

12. Apart from the aforesaid submissions, he would submit that prosecution has failed to establish a live link of complicity of the present Applicant with the alleged contraband. He would submit that this is so because the inventory panchanama nowhere states about marking of samples by the prosecution officer but the forwarding letter given to DYCC clearly reflects the marking having been made on the respective sample envelopes. This dichotomy vitiates the prosecution case *prima facie.* He would submit that there is no incriminating material placed on record to establish nexus between Applicant and the entity M/s. Khushi Enterprises to prove that it is the Applicant who dealt with the export of the alleged contraband. He would submit that entire case of prosecution is based on witness statements recorded in enquiry conducted under Section 67 of the NDPS Act which are exculpatory in nature. He would submit that delay in the present case goes to the root of the matter as it is only after the period of 2 years and 6 months after interception of the parcel, panchanama is drawn at the office of the prosecution SIIB wherein the Counter Postal Assistant namely Ms. Nayana Bhoir has in her statement i.e. questions and answers put to her has identified the Applicant being the person to book the parcels in the name of M/s. Khushi Enterprises. Apart from her statement which is recorded in the enquiry under Section 67, no test identification parade was carried out by the prosecution to enable Ms. Nayana Bhoir to identify the Applicant and the Applicant was immediately arrested on the same day i.e. 16.05.2023. He would submit that Applicant is proprietor of two companies namely Angel Pharmaceuticals and Pari Enterprises having registered and valid licenses for import and export of the medicines. He would submit that neither any activity with respect to Pari Enterprises relates to import and export of imitation jewelry. He would submit that the company called Angel Pharmaceuticals is established prior to the date of the export of the alleged contraband but registration certificate of Pari Enterprises is dated 02.07.2021 i.e. eight months after the seizure which is effected in the present case. He would therefore submit that there is no nexus whatsoever of Applicant to the present case and he has been falsely indicted and most importantly *prima facie* there is no material placed on record to show direct or indirect nexus of the Applicant to the present crime. He would therefore persuade the Court to consider granting of bail to the Applicant.

13. *Per contra,* Mr. Ketkar, learned Special PP for prosecution i.e. Custom Department has vehemently opposed granting of bail to the

Applicant in the present case due to his complicity in the present crime. He has made following submissions:-

(i) At the outset, he has referred to and relied upon the statement of Counter Postal Assistant Ms. Nayana Bhoir whose statement was recorded on 16.03.2023 and appended at page No. 323 of the Application. He would submit that her statement of the Asst. Postmaster is also recorded on 27.04.2023. He would submit that answers to Q. No. 2 recorded on 16.08.2023 and Q. Nos. 1 to 4 recorded on 27.04.2023 *prima facie* identify and indict the Applicant as the person who booked the parcels for export in the name of M/s. Khushi Enterprises with the post office. He would submit that at page Nos. 422 to 424, prosecution has placed on record the Goods and Service Tax of Web print of M/s. Pari Enterprises which shows that it deals in imitation jewelry business and thus Applicant cannot wriggle out of the situation and claim that he is not involved in the crime. However, he in his usual fairness would submit that parcels have been booked by an entity called M/s. Khushi Enterprises and not M/s. Pari Enterprises.

(ii) He would submit that there is a letter dated 16.03.2022 issued by the Office of the Superintendent of Post office, Palghar Division to the Dy. Commissioner of Customs appended at page No. 305 of the Application. By this letter, it is revealed that the address of the Applicant and M/s. Khushi Enterprises is the same as confirmed by the postman from the post office in Palghar. He would submit that in the past 18 months prior to the registration of the present crime, there have been bookings of several similarly placed parcels on the name of M/s. Khushi Enterprises which were booked by the Counter Postal Assistant Ms. Nayana Bhoir and all such records of the registration from the parcel department relating to foreign articles have been provided to the prosecution.

(iii) He would submit that the signature and handwriting of the Applicant on his arrest memo and his statement has been compared with his handwriting on the parcel bill of the export document filed for export of the imitation jewelry in the name of M/s. Khushi Enterprises and it has been sent for handwriting analysis to the Director, CSFL, Pune on 31.10.2023 by the prosecution. He would submit that if at all there is any delay on the part of the prosecution as pointed out by the Applicant's Advocate, the same needs to be considered and excluded due to the Covid-19 pandemic period during the then time. He would submit that prosecution has scrupulously followed the standard operating procedure in respect of import and export of the parcels through the postal channel in the present case and would contend that complicity of the Applicant is *prima facie* established.

13.1. In support of his above submissions, Mr. Ketkar has relied upon the decision of the Supreme Court in the case of ***NCB Vs. Kashif*[1] *and*** more specifically paragraph 39 of the said judgment wherein it is held by the Supreme Court that any procedural irregularity or illegality found to have been committed in conducting the search and seizure during the course of investigation or thereafter, would by itself not make the entire evidence collected during the course of investigation inadmissible. He would submit that Supreme Curt has held that the Court would have to consider all circumstances and find out whether any serious prejudice has been caused to the accused. He would submit that any lapse or delay in compliance of Section 52-A by itself would neither vitiate the trial nor would entitle the accused to be released on bail. He would submit that considering the huge quantity

1 2024 SCC OnLine SC 3848

of contraband recovered in the present case and the specific role of the Applicant having been *prima facie* established in attempting to export the said contraband from India amounts to a serious offences under the NDPS Act for which the maximum punishment may extend upto 20 years and therefore there is every possibility of the Applicant tampering with the evidence or the Applicant jumping the bail and absconding which cannot be ruled out in the facts of the present case. He would therefore persuade the Court to reject the Bail Application and allow the prosecution to complete the trial.

14. I have heard the learned Advocates at the Bar and with their able assistance perused the record of the case.

15. At the outset, it is seen that Applicant was arrested on 16.05.2023. Genesis of the present case originated on 08.12.2020. There is no doubt that the interregnum period was affected by Covid-19 pandemic but *prima facie* it is seen that the delay is substantial and writ large on the face of record. Be that as it may considering the imprimatur of the Supreme Court in the case of ***Kashif*** *(supra)*, even if the delay is required to be disregarded insofar as carrying out the inventory procedure under Section 52-A is concerned, there are certain other *prima facie* glaring issues which are seen on the face of record.

16. According to the prosecution case, total 27 numbers of packets have been confiscated on 08.12.2020, 09.12.2020 and 10.12.2020 and examination of the said packets has led to recovery of the alleged contraband. According to the prosecution case as seen from the record on 08.12.2020, following loose tablets purported to be the alleged contraband of the following denominations were seized:-

Tramadol 50 mg-219	(85 gms)
Zolfresh-201	(50 gms)
Tramadol-200	(75 gms)
Tramadol 100 mg- 269	(105 gms)
Tramadol 100 mg-80	(25 gms)
Zolfresh-185	(50 gms)
Tramadol-204	(75 gms)
Tramadol-150	(55 gms)
Tramadol 100 mg-236	(95 gms)
Tramadol - 100	(40 gms)

16.1. *Prima facie*, from the above it is seen that loose tablets of the alleged contraband Tramadol & Zolfresh having distinct weight and denomination have been seized. Similarly on 09.12.2020, following loose tablets of the alleged contraband have been seized:-

Tramadol 100 mg JPDOL 100 mg - 497	(165 gms)
Tramadol 100 mg JPDOL 100 mg - 268	(99 gms)
Tramadol 100 mg JPDOL 100 mg - 30	(20 gms)
Dizy Diazepam- 200	(40 gms)

Tramadol 100 mg JPDOL 100 mg - 222	(70 gms)
Tramadol 100 mg RADOL 100 mg - 190	(75 gms)
Tramadol 100 mg RADOL 100 mg - 129	(55 gms)
Tramadol 100 mg - 180	(75 gms)

16.2. Thereafter on 10.12.2020, following loose tablets of the alleged contraband have been seized:-

Tramadol 100 mg - 496	(160 gms)
Tramadol 100 mg JPDOL 100 mg - 377	(125 gms)
Alprazolam-195	(50 gms)
Tramadol 100 mg JPDOL 100 mg - 489	(160 gms)
JPDOL 100 mg-199	(45 gm)
JPDOL 100 mg-492	(195 gms)
Tramadol 100 mg JPDOL 100 mg - 60	(25 gms)
Zolfresh 10 mg - 90	(25 gms)
Alprazolam - 199	(50 gms)

16.3. From the above it is seen that loose tablets of the alleged narcotic contraband namely Tramadol, Zolfrsh, Dizy Diazepan, Alprazolam, JPDOL in different denominations and weight have been seized. This prosecution case emanated from its seizure panchanama. Seizure panchanama which is carried out on 08.12.2020, 09.12.2020 and 10.12.2020.

16.4. *Prima facie* in the above facts, the delay has occurred on three counts; namely after interception and investigation, then for the purpose of seizure and arrest of the Applicant and then during inventory. As argued by Mr. Khan, the sampling rules under Chapter II of the NDPS Rules 2022 will not be applicable to the present case considering the seizure has been effected prior to the said rules coming into force, what intrigues is the long hiatus of recording the statement of the person (Ms. Nayana Bhoir), the Counter Postal Assistant who received the parcels after a period of more than 3 years 3 months and this period of delay vitiates the prosecution case. This delay is not on account of the procedure for taking the inventory under Section 52-A. It pertains to the period taken by the prosecution for indicting and arresting the Applicant on the basis of the witness statement after a period of 3 years and 5 months after the seizure of the alleged contraband. Thus this delay is writ large on the face of record.

17. It is seen that the case of prosecution against Applicant is *prima facie* based on the statement recorded of the Asst. Postmaster Ms. Nayana Bhoir who had examined the parcels when they were submitted to her for export. Her statement is recorded for the first time by the prosecution on 16.03.2023 after 08.12.2020 i.e. after 3 years 3 months and 8 days. This statement is appended at page No. 321 of the Application. From this statement, it is *prima facie* seen that she has categorically stated that her previous statement was recorded in 2022 by the Departmental Officers but no such statement is placed on record by the prosecution in the chargesheet to show what was recorded in her statement in 2022. The delay in recording the witness statement on the basis of which prosecution case rests solely is humongous and fraught with suspicion on the face of record. Mere delay in carrying out the 52A procedure would not make the entire evidence collected during the course of investigation inadmissible. This is what *NCB Vs. Kashif* (*supra) has held.* But how this principle would apply to the above facts is not understood. The Counter Post Assistant ascertains the contents as imitation jewelry in December 2020. Her Departmental statement is recorded in 2022, but not produced in the chargesheet. Then her statement is recorded on March 2023 for the first time according to prosecution. Followed by two more supplementary statements and Applicant is arrested on 16.05.2023 solely on the basis of her statement that it was the Applicant according to her memory who had booked the parcels for export. No test identification parade is held to identify the Applicant. Save and except she stating that her statement was recorded in the year 2022, no specific date of that statement is neither given by her or by the prosecution. She has also in her statement dated 16.03.2023 categorically stated that when she had examined the parcels which were received for export, they contained imitation jewelry and she has stated that no contraband was seen by her. In this very statement she has also stated that she did not know M/s. Khushi Enterprises and only came to know when her statement was recorded earlier but she contradicts her version by stating that she knew the Applicant as he used to come to the post office every 15-20 days to book parcels in the name of M/s. Khushi Enterprises. Further in her said statement, when CDR with the Applicant is shown to her, she has stated that the said calls are of the year 2021 but she does not remember any conversation details of those calls with the Applicant. *Prima facie* it is seen that the said calls are after the date of the alleged seizure of the contraband in the present case. Thereafter her supplementary statement rather second statement is recorded by the prosecution on 27.04.2023. In that statement, she has categorically stated that the subject parcels were booked by the Applicant in the name of M/s. Khushi Enterprises and for doing the same, Applicant handed over his KYC at the time of parcel booking to her. In this statement again, she has stated that parcels pertained to imitation jewelry only . Insofar as her statement stating that Applicant had handed over her is KYC i.e. address at the time of parcel booking, the prosecution has not placed on record the KYC of the person who had booked the parcels in the chargesheet. This is a crucial piece of evidence for *prima facie* consideration. Since if parcels for export are booked they have to be booked with KYC documents only.

18. It is further seen that the prosecution has relied upon the documents pertaining to M/s. Pari Enterprises, a firm belonging to the Applicant. However it is seen from the said panchanama that the registration certificate of M/s. Pari Enterprises is dated 02.07.2024 which is *prima facie* 8 months after the date of seizure of the alleged contraband in the present case M/s. Pari Enterprises was not even existence during the time of seizure, hence there is no relevance for indicting that firm in the present crime. Further it is seen that the other company of the Applicant namely Angel Pharmaceuticals has a valid licence for import and export of medicines even as per the prosecution and the statement of one of the employee of Angel Pharmaceuticals namely Ms. Dakshata Rakesh Narkar has been recorded by the prosecution on 04.10.2023 wherein she has stated about the activities of Angel Pharmaceuticals of handling orders of medicines for import and export. Insofar as the activities of the Pari Enterprises are concerned, the record shows that even though it was registered for manufacture and export of the imitation jewelry but the said business never took of or was started by the Applicant, rather Pari Enterprises has been involved in software certification through licensed website and online advertising. On record prosecution has recorded three statements of the Applicant. First statement of the Applicant was recorded on 22.06.2022, second statement was recorded on 16.05.2023 and third statement was recorded on 19.10.2023. Said statements are appended at page Nos. 311, 330 and 429 of the Application. I have perused the said statement. *Prima facie* on going through the said statements, there is nothing incriminating borne out from the said statement to show that Applicant has *prima facie* nexus with M/s. Khushi Enterprises. Considering that investigation is complete in the present case,further custody of the Applicant is therefore not warranted in my opinion. Needless to state that complicity of the Applicant and his nexus with M/s. Khushi Enterprises and case of the prosecution against the Applicant can adequately be proved by leading appropriate evidence in trial.

19. Considering the above *prima facie* observations and long incarceration of the Applicant for the past 2 years pending trial and probability of the trial not being completed in the near foreseeable future and considering that the trial has not even commenced, Applicant can be enlarged on bail. Hence, Bail Application is allowed subject to the following terms and conditions:-

(i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs.50,000/- with one or two sureties in the like amount;

(ii) Applicant is permitted to furnish provisional cash bail of Rs. 50,000/- for his release immediately and file undertaking that he will provide one or two sureties in the like amount of Rs. 50,000/- within a period of four weeks after his release which shall be accepted by the Trial Court. Applicant shall provide sureties as directed;

(iii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;

(iv) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;

(v) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;

(vi) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;

(vii) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court; Applicant shall deposit his passport, if any, with the trial Court within 2 weeks from the date of release from prison;

(viii) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and

(ix) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

20. It is clarified that the observations made in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case. The trial shall be adjudicated on the strength of the evidence led and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

21. Bail Application is allowed and disposed.

Amberkar

[MILIND N. JADHAV, J.]

RAVINDRA MOHAN AMBERKAR

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