

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1506 OF 2024

Abdul Kayyum Abdul Majid Khan .. Applicant

Versus

State of Maharashtra .. Respondent

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- Mr. Altaf Khan a/w Mr. Mazhar Khan & Ms. Supriya Ghadge for Applicant
 - Ms. Shilpa K. Gajare-Dhumal, APP for State
 - Mr. Ramkrishna Bodke, API, Mira Road Police Station

.....
CORAM : MILIND N. JADHAV, J.

DATE : MARCH 27, 2025

P. C.:

1. Heard Mr. Khan, learned Advocate for Applicant and Ms. Gajare-Dhumal, learned APP for 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 Crime No. II-372/2021 registered with Mira Road Police Station for offences punishable under Sections 22(c) r/w 8(c) of the Narcotics and Psychotropic Substances Act, 1985 (for short "**NDPS Act**").
3. Applicant stands indicted in NDPS offence being apprehended with commercial quantity of the alleged contraband namely 60.9

grams of Mephedrone i.e. MD. Applicant is arrested on 02.11.2021 and as of today he is in detention for 3 years 4 months & 25 days.

4. Mr. Khan would persuade me to consider the appraisal letter issued by the prosecution officer under Section 50 of the NDPS Act which is appended at page No. 71 of the Application. He would submit that it is stated by the Investigating Officer (IO) in the said letter that under the law, he has a right to conduct the search of the Applicant when the Applicant was apprehended. He would submit that immediately thereafter the provisions of Section 50 of the NDPS Act have been stated and informed to the Applicant. He would submit that making such statement as done in the present case would amount to the IO having threatened and intimidated the Applicant and it would therefore be transgression of the provisions of Section 50 of the NDPS Act. That apart there are two other variations / discrepancies which are pointed out by Mr. Khan in the said appraisal letter. Firstly with respect to the date of the said letter being stated as 02.10.2021 when it ought to be 02.11.2021 when the Applicant was apprehended but that may be probably due to a pure typographical mistake or error. Secondly he would submit that signatures of the witnesses are not appended to the said appraisal letter. In fact, half signature of the second witness - Mr. S.N. Shah is seen on the said letter. He would also

persuade the Court to consider the fact that the said signature of the witness is appearing above the endorsement of the Applicant.

5. Learned APP would persuade the Court to consider the fact that the IO is the Assistant Police Inspector and also a Gazetted Officer and in that regard he has stated so in the appraisal letter. She would submit that if the present case merely involved the assertion of the Applicant's authority, Applicant's contention might have held merit. However, in the instant case, the Investigating Officer has also duly complied with the mandatory provisions of Section 50 of the NDPS Act by explicitly informing and apprising the Applicant of his substantive legal right to be searched before the nearest Gazetted Officer or Magistrate. It is only upon the Applicant's endorsement and acknowledgment thereof that the Investigating Officer proceeded to conduct the search. She would therefore persuade the Court to peruse the said letter from that perspective rather giving importance to the assertion which has been stated in the said letter. She would submit that Applicant has been apprehended with commercial quantity of the alleged contraband and thus rigours of Section 37 of the NDPS Act would apply and unless the Applicant makes out a case to the satisfaction of the Court that he is not guilty of the crime and the offence and the Court comes to such a *prima facie* opinion, the Applicant should not be released on bail. On the issue of prolonged

incarceration of the Applicant which has been advanced as a pivotal ground by the learned Advocate for the Applicant, she submits to the orders of the Court.

6. *Prima facie* it is seen that as on date Applicant is in custody for 3 years 4 months and 25 days pending trial. Charge has also not been framed till date. Thus the likelihood of the impending trial commencing or even being completed in the near foreseeable future appears to be highly uncertain. Needless to state that prosecution will be examining many witnesses in the trial. That apart the alleged discrepancy and dichotomy pointed out by Mr. Khan is a *sine qua non* of the prosecution case when search and seizure is effected and the person is apprehended. What is stated in the letter of appraisal is as follows:-

" कानूनी तौर पर मुझे आपकी तलाशी लेने का हक है "

6.1. This sentence appearing in the letter, *prima facie*, in my opinion, amounts to inducement of threat and intimidation to the person who is searched. Though the right of the person is subsequently made known to him under Section 50 of the NDPS Act in the same letter of appraisal, the inclusion of the aforementioned line in Hindi in the same letter was unwarranted and not required to be stated therein. Supreme Court in the case of *State of NCT of Delhi v. Mohd. Jabir*¹ has

¹ Cri Appeal No. 4931 of 2024 arising out of SLP (Cri) No. 1173 of 2024 decided on 02.12.2024

categorically held that the reason for intimating the provisions of Section 50 of the NDPS Act is to ensure that the accused is taken to a neutral third person for effecting search who would be a Gazetted Officer or a Magistrate. The effect of the word "nearest" is also explained by the Supreme Court in that case. The sentence wherein the IO himself states to the Applicant that under the law he also has the right to take search of the Applicant is not only intimidating but it ought not to have been found place in the said letter. This is *prima facie* transgression of the provisions of Section 50 of the NDPS Act due to inclusion of the said sentence in the said letter. This Court in the case of ***Mohammed Ishaq Suleman Shaikh v. The State of Maharashtra***² has taken cognizance of the appraisal letter given by the IO wherein the IO therein had stated that he himself is a Gazetted Officer and has a right to conduct the search. It was held that *Prima facie* this transgression is impressible since the stringent provisions of the NDPS Act and more specifically rigours of Section 37 would apply in the case of recovery of commercial quantity of the alleged contraband.

7. On the aforesaid *prima facie* observations and findings, Applicant has made out a case for grant of bail, as also even otherwise due to his long incarceration pending trial also, he deserves to be

2 Order dated 10.02.2025 passed in BA 4535/24

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.20,000/- with one or two sureties in the like amount;
- (ii) Applicant is permitted to furnish provisional cash bail of Rs.20,000/- for his release immediately and file undertaking that he will provide one or two sureties in the like amount of Rs. 20,000/- 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;
- (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.

8. 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.

9. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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Digitally signed
by RAVINDRA
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2025.03.28
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