

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1596 OF 2024

Frank Chibuzor Nandi	.. Applicant
Versus	
Intelligence Officer & Anr.	.. Respondents

WITH
BAIL APPLICATION NO. 5332 OF 2024

Augustin Sunderraj Nadar	.. 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 in BA 1596/24
 - Ms. Munira Palanpurwala a/w Mr. Kainat Sayed, Ms. Sunaiya Khan & Ms. Deepa Amati for Applicant in BA 5332/24
 - Ms. Ruju R. Thakker, Special PP for Respondent No. 1 in BA 1596/24
 - Ms. Rajeshree V. Newton, APP for State in BA 1596/24
 - Ms. Megha Bajoria, Special PP for Respondent No. 1 in BA 5332/24
 - Mr. Dinesh J. Haldankar, APP for State in BA 5332/24

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 25, 2025

P. C.:

1. Heard.
2. This is a group of two Bail Applications. In Bail Application No. 1596/24, Applicant - Frank Chibuzor Nandi is a foreign national whereas in Bail Application No. 5332/24, Applicant - Augustin Sunderraj Nadar is an Indian national. Augustin is arraigned as

accused No. 1 and Frank is arraigned as accused No. 2 in the crime in question. Both the Applicants are indicted in an NDPS offence. Accused No. 1 was intercepted on 30.01.2023 at the airport while travelling from Ethiopian Airlines to Mumbai. From his person and conscious possession, nothing was recovered but since there was intelligence information on the basis of which he was intercepted, his trolley bag was seized and searched which led to recovery of two packets of contraband. In the first packet, there were 12 small box packets of "Odour Control soap, Bio-Oil" which were recovered and they were marked as "W-1 to W-12" whereas in the second packet, 4 similarly placed white coloured small box packets having printed female face and legs photo and other details in foreign language printed in green colour were recovered having the contraband. Case of the prosecution is that accused No. 1 smuggled the alleged contraband i.e. Cocaine in the said soap packets embedded inside the soaps. From the seizure panchnama, it is *prima facie* seen that prosecution undertook the exercise of ascertaining the veracity of the alleged contraband and after scrapping the wax from each of the soaps removed and tested the alleged contraband found inside each of the soap packets in the affirmative and thereafter it is stated in the seizure panchnama that officers of the prosecution broke the said 12 soaps into a powder, mixed them and thereafter sealed the same in

accordance with law. Similar exercise was undertaken by the prosecution with respect to the 4 other soaps found in the second packet also.

3. The first point of contention raised by Mr. Khan, learned Advocate for Applicant in BA 1596/24 is *prima facie* violation of the provisions of Rule 3 of the Narcotics Drug and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022. He would submit that if the said Rules are seen, then prosecution and its action of breaking the soaps after ascertaining the contraband from each of the soap box and mixing them *prima facie* contravenes the said statutory provisions and therefore it vitiates the seizure of the alleged contraband as also vitiates the trial. He would next submit that at the time of drawing the samples at inventory stage, there is no certification of the sample which has been seized by the prosecution pursuant to its seizure in the present case. He would submit that Rules 8 and 18(1) read with the provisions of Section 52-A(2) and (3) are *prima facie* violated in the present case and there is no certification of the samples which can be seen from the certificate of Magistrate appended at page No. 215 of the Application. Neither the said certificate is issued in Form 5 on the statutory Application filed as required by the Rules. He would submit that this transgression is

covered by the decision of this Court in the case of *Chandrabhan Janardhan Yadav v. State of Maharashtra*¹.

3.1. Next Mr. Khan would persuade me to consider the role of the Applicant. He would submit that according to the prosecution case and as stated in the seizure panchnama in order to apprehend Applicant - accused No. 2, the statement of accused No. 1 was recorded under Section 67 of the NDPS Act and it is stated therein that it was accused No. 2 who had facilitated the travel of accused No. 1, paid for his tickets and that accused No. 2 would be meeting the Applicant outside the airport. He has specifically pointed to the narration and noting in the seizure panchnama with respect to a video call having been given by making a video call by accused No. 1 to accused No. 2 who was waiting outside the airport to receive him but in the chargesheet and all further statutory documentation, prosecution has not placed on record any material to support the said theory of the video call having been given made. He would submit that this is crucial and critical at this stage because it is the prosecution case that present Applicant - accused No. 2 was apprehended immediately alongwith accused No. 1 as soon as he stepped outside and met the Applicant. However he would submit that contrary to this the Applicant is arrested on 02.02.2023 and not as claimed by the

1 Order dated 04.03.2025 passed in BA No. 2254/2024 & Connected Bail Applications

prosecution and as stated in the seizure panchnama outside the airport on 30.01.2023 itself. Finally he would submit that statement of accused No. 1 is a statement recorded under Section 67 inquiry conducted by the prosecution and NDPS officers and the same is *prima facie* hit by the provisions of Sections 25, 26 and 27 of the Indian Evidence Act and as such in that view of the matter, in view of the decision of the Supreme Court in the case of ***Tofan Singh v. State of Tamil Nadu***² veracity of the said statement at bail stage needs to be considered for grant of bail. In this case it is held that statements recorded by NDPS officers could be construed as statements to police officers given their duties and responsibilities in preventing and detecting crime under the NDPS Act. It held that right against self-incrimination and right to privacy under Article 20(3) and Article 21 of the Constitution apply to confessions recorded under Section 67 of the NDPS Act. It also held that officers under the NDPS Act should be construed as 'police officers' under Section 25 of the Evidence Act to prevent coercion in recording confessions and that confessions made before such officers are inadmissible as evidence to protect fundamental rights under Articles 20(3) and 21 of the Constitution.

3.2. In the case of ***Phundreimayum Yas Khan Vs. State (NCT of Delhi)***³ the Delhi High Court has observed that disclosure statement of

² (2021) 4 SCC 1

³ 2023 SCC OnLine 135

co-accused is *per se* not admissible without there being any corroboration thereof. Relevant paragraph No.24 of the said judgement reads thus:-

“24. The case of the prosecution, in so far as the applicant is concerned, is circumstantial, i.e. based solely on disclosure statement of the co-accused Sayed Javed Hussain which is per se not admissible without there being any corroboration. The prosecution has not been able to establish any connection between the subject offence and the location/CDRs of the accused persons, where the applicant is alleged to be present at the time when the contraband was collected by Sayed Javed Hussain. Merely because the applicant had been having frequent calls with the co-accused, would not be sufficient to hold that applicant is guilty of the subject offence.”

3.3. In the case of *Jasbir Singh Vs. Narcotics Control Bureau*⁴ the Delhi High Court in paragraph Nos.63, 67 and 68 of its judgment while interpreting Section 67 of the NDPS Act *vis-a-vis* Sections 25 and 27 of the Indian Evidence Act, 1872 held as under:-

“63. As statements recorded under Section 67 NDPS Act are inadmissible being hit by Section 25 IEA, the only way to make any part of such statements admissible, is by way of Section 27 IEA which creates an exception and allows only such part of a confessional statement, being information leading to discovery of some fact not previously in the knowledge of the police officer. In the present case, none of the statements of the Applicant lead to any discovery of a fact”, and hence, the statutory bar to their admissibility and reliability is attracted.

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67. With regards to applicability of Section 27 IEA, the fact so discovered is admissible when accompanied by the recovery of a material object and does not include purely mental or

4 (2023) SCC OnLine Del 134

psychological facts. It is relevant to note the observations of this Hon"ble Court in State v. Navjot Sandhu @ Afsan Guru Crl. A. No. 80/2003 wherein this Hon"ble Court, after placing reliance on Pulukuri Kottaya and Ors v. The King-Emperor 1946 SCC OnLine PC 49, and several other judgments of the Hon"ble Supreme Court and other courts, summarized the law governing Section 27 IEA as follows:

"396. We, therefore, hold that in order that Section 27 may be brought in aid, the prosecution must establish:—

- 1. That consequent to the information given by the accused, it led to the discovery of some fact stated by him.*
- 2. The fact discovered must be one which was not within the knowledge of the police and the knowledge of the fact was for the first time derived from the information given by the accused.*
- 3. Information given by the accused must lead to the discovery of a fact which is the direct outcome of such information.*
- 4. The discovery of the fact must be in relation to a material object and of course would then embrace within its fold the mental condition i.e. the knowledge of the accused of the place from where the object was produced and the knowledge that it was there.*
- 5. Only such portion of the information as is distinctly connected with the said discovery is admissible.*
- 6. The discovery of the fact must relate to the commission of some offence."*

68. Therefore, for any part of the alleged disclosures of the Applicant to be admissible, it was necessary that such disclosure led the Respondent to recovery of any contraband, or any other 'fact' related to the alleged offences. Given that none of the disclosures of the Applicant, except (at best for the recovery of a contraband involving quantity lesser than small quantity) led to the discovery of any object, or a "new fact" thereby, such disclosures under section 67 NDPS Act are held inadmissible in evidence."

3.4. He would fairly submit that the prosecution can prove its case at the trial with respect to the complicity of Applicant. He would submit that there is one antecedent of the Applicant in which he has been acquitted by the Sessions Court by order dated 28.06.2019. Said order is placed on record. He would submit that Applicant - accused

No. 2 is a foreign national who is married to an Indian citizen (his wife) and has a child and is staying in India. Further Supreme Court in the case of *Sarija Banu Alias Janarthani Alais Janani and Anr. v. State through Inspector of Police*⁵ has held compliance of Section 42 is mandatory and it is a relevant fact required to be considered while considering a Bail Application. He would therefore persuade the Court to grant bail to the Applicant.

4. Ms. Palanpurwala, learned Advocate for Applicant in BA 5332/24 for Applicant - accused No. 1 would adopt the submissions and arguments made by Mr. Khan which for the sake of brevity are not reproduced herein. She would submit that considering the transgression of the statutory provisions as envisaged under the NDPS Act and NDPS Rules which have been *prima facie* argued and explained by Mr. Khan, the procedure adopted by the prosecution stands vitiated and is a suspect and Applicant should be given the benefit of doubt.

5. *Prima facie* it is seen that both the Applicants have been incarcerated from February 2023 onwards for a period of almost more than 2 years & 1 month pending trial. Investigation is completed and Chargesheet has been filed.

5 (2004) 12 SCC 266

6. Ms. Thakkar, learned Special PP for Respondent No. 1 in BA 1596/24 would draw my attention to the detailed affidavit in reply dated 30.07.2024 filed by Mr. K. Ashok Chakravarthy, Deputy Director of Revenue Intelligence, Mumbai Zonal Unit. At the outset, she would persuade me to consider that this is an offence under NDPS Act wherein accused No. 1 has been apprehended and arrested with commercial quantity of the alleged contraband which is Cocaine which has a high value in the international market and *modus operandi* used by the Applicant is to repeatedly arrange travel of persons to East African Countries and make them return back with the smuggled contraband. She would submit that present Applicant is a facilitator of the crime in question as he is running a travel agency and according to the prosecution repeatedly sending vulnerable people like accused No. 1 abroad in lure of giving them some extra money and through them smuggling the alleged contraband in question. Though she would submit that the statement of accused No.1 in the present case *prima facie* indicts and spells out the role of accused No. 2, therefore this Court should be cautious in granting bail as there is every chance that accused No. 2 will reoffered himself if he is released on bail considering the work that he is doing. She would submit that objections taken by prosecution in its affidavit in reply are with respect to application of the rigors of Section 37 to the present case in

view of recovery of commercial quantity of the alleged contraband which something that the Court should not loose sight off unless and until the Court comes to the reasonable *prima facie* conclusion that Applicant has not committed the crime and until such *prima facie* opinion is returned by the Court, Applicant cannot be entitled to be enlarged on bail. Hence, she prays for rejection of the Bail Application.

7. I have considered the submissions made by Mr. Khan, Ms. Panlanpurwala and Ms. Thakker.

8. At this juncture, Ms. Thakker informs the Court that Ms. Bajoria, Special PP has been directed to appear on behalf of the prosecution in BA No.5332/24. Ms. Bajoria is present in Court. She would persuade the Court to allow her to file affidavit in reply and also request her to grant sometime to get the affidavit vetted and approved by the Commissioner / Competent Authority to enable the prosecution to file the same.

9. Considering that Union of India was served on 04.03.2025, acknowledgment of which is placed before the Court by Ms. Palanpurwala, it was the duty of the Union of India to ensure that affidavit in reply was filed because in the case of the co-accused namely accused No. 2, the affidavit in reply has already been filed

rather a detailed affidavit in reply has been filed. On perusal of the same, *prima facie*, I find that prosecution has covered the role of both the accused persons. Be that as it may, in view of the request made by Ms. Bajoria, learned Special PP, I am inclined to give her time to prepare the affidavit in reply, however only request is that the same shall be filed at the earliest considering the hearing of the present Bail Applications having been done by the Court and the matter is part-heard. If the said affidavit in reply is filed by Mr. Bajoria, further order will be passed in both the Applications on the next date. Concerned Competent Authority who shall approve the affidavit is directed by the Court to ensure that the approval is given at the earliest so that same can be filed in the Court and served on the opposite side before the next date positively.

10. Stand over to **2nd April, 2025 at 2:30 p.m.** To be placed under the caption "**Part-Heard**".