

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

BAIL APPLICATION NO.3023 OF 2024.

Sunil Rajendra Pawar

...Applicant

Vs

Union of India

...Respondent

Mr. Anil G. Lalla a/w. Mr. Yash Pulekar, Ms. Ankita Rathod, Mr. Chirag Sawant i/b Lalla & Lalla Advocates for the Applicant.

Mr. Siddharth Chandrashekhar a/w. Ms. Megha Bajoria for Respondent-UOI.

CORAM: MANISH PITALE, J.

DATE : 13th JANUARY, 2025.

P. C.:

1. Heard learned counsel for the applicant and learned counsel appearing for respondent No.1-UOI through Special Investigating and Intelligence Branch, Mumbai.
2. Applicant in the present case is seeking bail in connection with Special Case Bi,1390/2022 pending before Special NDPS, Mumbai arising from F. No.SSG/INV-09/2022-23 registered at the instance of Inspector SiB, APSC, Customs Authority Zonal III.
3. This is a case initiated under Section 50A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) concerning power to undertake controlled delivery. This was based on an information received that a courier package addressed to co-accused Aashish Bharti

was received at the International Courier Terminal, Sahar Airport, Mumbai. As per the information received, the said courier package was containing contraband ganja. In that light, appropriate authorization was taken and the exercise of controlled delivery was undertaken. A panchanama dated 24th April 2022 was drawn at the Sahar Airport, which reflected that two such courier packages were received, one addressed to co-accused Aashish Bharti and the other addressed to co-accused John Montero. It was recorded that package addressed to the co-accused was opened and found to contain "Dry Round Balls of Green Plant Product purported to be Ganja/Marijuana". The aforesaid contraband was collected and removed for further action and a dummy package was prepared for delivery. Thereupon, the controlled delivery was carried out and controlled delivery report dated 28th April 2022 records that when the package was taken by the delivery staff of the courier service for delivery on the co-accused, upon the delivery staff asking for identity card, the co-accused produced the same and thereafter, the package was delivered to him and his signature was taken on the delivery receipt. The co-accused was accompanied by his friend Omkar Khadtare. Upon such delivery being effected, the officers of the respondent apprehended the co-accused. He was shown as arrested on 29th April 2022. The investigation was completed and the case is now pending before the

aforesaid NDPS Court.

4. It is the case of the respondent that after the courier packets were delivered to co-accused Ashish Bharti, the Investigating Authority was led to two ladies living in an apartment, who in turn told a boy to deliver the packet to the applicant. The said packet formed part of the controlled delivery exercise, which originally was said to have contained 4.595 kgs of ganja.

5. It is further the case of the respondent that at the behest of the applicant one flat and a shop were searched wherein 14.714 kgs of ganja along with 5.414 kgs of ganja powder and 162 gms of charas were recovered from the flat and 610 gms of charas was recovered from the shop. On this basis, upon cumulatively adding all the contents of the aforesaid contraband it is alleged that applicant is involved in dealing with commercial quantity of contraband.

6. Learned counsel appearing for the applicant submits that the aspect of controlled delivery and the extent of ganja i.e. 4.595 kgs. in the original courier packet can be dealt with on the basis of observations made by this Court while granting bail to co-accused Ashish Bharti by the order dated 11/10/2024 passed in Bail Application No.734/2024. It is submitted that additionally, it can be pointed out that panchanama was not drawn when the controlled delivery was actually executed on co-accused persons.

7. As regards recovery of contraband from the flat and shop it is submitted that even if the contents of the entire charge-sheet and the documents filed therewith are to be taken into consideration, there is nothing to link the applicant with the said flat and the shop thereby rendering the recovery meaningless. In support of the said submission, the learned counsel for the applicant relied upon the panchanamas executed in respect of recoveries made from the flat and the shop. It is further submitted that the arrest memos and *jama talashi* concerning the applicant and co-accused persons would show that such documents can be demonstrated to be falsely executed and that in any case *jama talashi* pertaining to the applicant refers to recovery of three mobile phones and there is no reference to keys of the flat or of the shop. It is further submitted that there is no panchanama executed with regard to the recovery of such keys from the person of the applicant. On this basis it is submitted that the case of the investigating authority is completely vitiated and since the applicant does not have any criminal antecedents the requirements contemplated under Section 37 of NDPS Act are duly satisfied and therefore this Court may consider granting bail to the applicant.

8. On the other hand, learned counsel appearing for the contesting respondent No.1 submits that the issues sought to be raised on behalf of the applicant are the matters of trial and that at this stage itself the

applicant cannot claim any benefit for being released on bail. It is further submitted that there is ample material to link the applicant, not only with the huge quantity of contraband that was recovered from the courier packet but, also huge quantity of contraband recovered from the flat and shop. On this basis it is submitted that the application may be dismissed.

9. Perused the material filed along with the charge sheet with the assistance of the learned counsel for the applicant and learned counsel for the respondent.

10. It will have to be examined as to whether the contentions raised on behalf of the applicant can be accepted, not only on the basis of order dated 11/10/2024 passed in Bail Application No.734/2024 whereby co-accused Aashish Bharti was granted bail, but upon appreciating the contents of the charge-sheet.

11. It is to be noted that in the order granting bail to the co-accused person, this Court found that the mandatory exercise contemplated under Section 52A of NDPS Act cannot be said to have been substantially complied with. It was recorded that there was considerable time gap between seizure of the contraband and its sampling for forwarding the same to the laboratory, thereby *prima facie* indicating that it was beyond the concept of reasonable time as laid down by Supreme Court in the case of ***Union of India Vs. Mohanlal***

(2016) 3 SCC 379. Apart from this, it was found in the said case that the only material against said co-accused person appeared to be his statements recorded under Section 67 of the NDPS Act. By applying the position of law laid down in ***Tofan Singh vs. State of Tamil Nady, (2021) 4 SCC 1***, this Court granted benefit to the co-accused person.

12. At this stage learned counsel for the applicant fairly submitted that as per the latest judgment of the Supreme Court in the case of ***NCB vs. Kashif in Criminal Appeal No.5544/2024 dated 20/12/2024***, it has been held that non compliance of Section 52A of the NDPS Act cannot be a ground for granting bail. Therefore, this Court is not considering the said aspect and matter while testing the contentions raised on behalf of the applicant.

13. But, it is highlighted on behalf of the applicant that when the controlled delivery was actually executed in the present case, on the co-accused person to whom the courier packet was addressed, no panchanama was executed by the Investigating Authority. Perusal of the charge-sheet and the documents on record indeed indicate that no such exercise was carried out and therefore, there is substance in the contention of learned counsel for the applicant that when the execution of controlled delivery of the packet itself *prima facie* appears to be doubtful in the absence of panchanama being executed in presence of independent witnesses, the benefit of the same ought

to be given to the applicant herein. Therefore, the contraband found in the courier packet i.e. 4.595 kgs. of ganja cannot be a factum held against the applicant while considering the bail application. In any case, the said amount does not qualify as commercial quantity of contraband.

14. The basis on which investigating authority claims that the applicant can be held responsible for dealing in commercial quantity of contraband concerns the contraband found in the aforesaid flat and the shop.

15. In this regard when the panchanama executed with regard to recoveries made from the flat and shop are perused it is found that panchanama records that the officers who actually carried out the raid leading to recoveries used keys allegedly recovered from the applicant himself. It is an admitted position that neither the flat nor the shop belong to the applicant and that the applicant is not even a lessee thereof. It is mentioned that the flat in question was leased out to Mr.Omkar Rajendra Pawar, said to be brother of the applicant, and one Mr. Wagh. Neither the statements of the owner of the flat nor the aforesaid two persons have been recorded by the Investigating Authority. Likewise, as regard the shop there are no such statements recorded and admittedly the applicant is neither the owner nor the lessee. *Prima facie* there is no material to connect the applicant to the

flat and shop in question. It is also not the case of the Investigating Authority that the applicant upon his arrest led the officers to the flat and shop, thereby resulting in recovery of the contraband from the two places.

16. It is also relevant to note that there is no panchanama executed with regard to the procedure adopted by the Investigating Authority while carrying out search of the person of the applicant, which allegedly led to recovery of the keys. Instead, the arrest memo dated 29/4/2022 and *jama talashi* concerning the applicant executed under the signature of an officer and in the presence of two witnesses show that three mobile phones were recovered from the applicant. There is no reference to recovery of any keys. It is also relevant to note that while the applicant is said to have been arrested on 29/4/2022 at 11.00 a.m. with *jama talashi* also have been conducted at the same time, the panchanama concerning visit to the flat and opening the flat with the keys allegedly recovered from the applicant commenced at 10.30 a.m. itself on 29/4/2022.

17. This raises serious doubts about the claims of the Investigating authority as regards recoveries made from the flat and the shop.

18. Learned counsel for the applicant has also argued in respect of authenticity of the arrest memos concerning the arrest of the accused persons in the present case by claiming that dates and time recorded

therein showing that such arrests were made in the presence of the very same two witnesses is a matter upon which this Court need not comment, as the above mentioned discussion persuades this Court to hold that a *prima facie* case is indeed made out by the applicant in his favour that there is scant material to link him with the contraband in question. The applicant has indeed made out a *prima facie* case on merits. Since the applicant does not have any criminal antecedents, this Court finds that both the limbs of the twin test contemplated under Section 37 of the NDPS Act are satisfied. Therefore, the application deserves to be allowed.

19. Accordingly, the application is allowed in the following terms:

(a) The applicant shall be released on bail in connection with FIR No. Special Case No. 1390 of 2022 pending before the Special NDPS, Mumbai, arising from F. No.SSG/INV-09/2022-23, registered at the instance of Inspector SIIB, APSC, Customs Authority Zonal III, on furnishing P.R. Bond of Rs. 50,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

(b) The applicant shall report to the office of SIIB, APSC, Customs Authority Zonal III, on first Monday of every month between 10:00 a.m. and 12:00 noon, during the pendency of the trial. The applicant shall attend the Special Court on each and

every date, unless specifically exempted by the Special Court, for reasons to be recorded in writing.

(c) The applicant shall not tamper with the evidence of the prosecution and he shall not influence the informant, witnesses or any other person concerned with the case.

20. Needless to say, in case of violation of any of the aforesaid conditions, the bail granted to the applicant shall be liable to be cancelled. It is also clarified that the observations made in this order are limited to the disposal of the present bail application. The concerned Court shall proceed further in the matter without being influenced by the observations made hereinabove.

21. The application is disposed of.

[MANISH PITALE, J.]