

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 4535 OF 2024

Mohammed Ishaq Suleman Shaikh .. Applicant

Versus

The State of Maharashtra .. Respondent

.....

- Mr. Sherali S. Khan for Applicant
- Ms. Shilpa K. Gajare-Dhumal, APP for State

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CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 10, 2025

P. C.:

1. This Application is filed under Section 439 of Code of Criminal Procedure, 1973 for seeking regular bail in C.R. No. 1162 of 2023 registered with Virar Police Station, Palghar for offences punishable under Sections 8(c), 21(c) and 29 of the Narcotics Drugs and Psychotropic Substance Act, 1985 (for short '**NDPS Act**').

2. The factual matrix of the case in hand reveals that on 21.12.2023 at about 14:45 hours Virar Police Station received information that two persons were arriving near Mohak City Manvelpada, Virar (East) for the purpose of selling contraband Mephredrone (commonly known as 'MD'). Upon receiving information, the same was conveyed to the Superior Officer and a crime detection squad was constituted to conduct a raid. A letter was forwarded to Assistant Commissioner of Police, Virar Division seeking

permission to proceed with the raid alongwith a copy of the station diary entry recording the information received. Two panchas were brought and were appraised of the search, seizure and arrest procedure under the NDPS Act, panch witnesses conducted a search of the police personnel and a pre-trap panchanama was prepared. At 5:00 p.m. a trap was laid and at about 5:10 p.m. a bullet motorcycle with two persons arrived at the spot. Raiding party found their behaviour suspicious, raiding party intercepted them and upon questioning they failed to answer. Mr. Madke – Police Inspector appraised them of their rights under Section 50 of the NDPS Act in writing and asked them if they wanted to be searched in the presence of a Gazetted Officer or Magistrate. However he claimed himself to be a Gazetted Officer who was empowered to conduct the search and before whom the Applicant was required to be searched. This is recorded in the Panchanama itself. The Accused persons agreed to be searched. Upon conducting the search, Accused were alleged found in possession of commercial quantity of 97 grams of MD. The contraband was duly seized, sealed in an envelope and marked as 'Article-A' and offence was registered under Sections 8 (c), 21 (c) and 29 of NDPS Act.

3. Mr. Khan, learned Advocate appearing for the Applicant would submit that there is non-compliance of the mandatory

provisions of Section 50 of the NDPS Act. He would submit that although the Accused were informed of their right to be searched before a Gazetted Officer or Magistrate, Mr. Madke –Police Inspector, one of the officials of the raiding party himself claimed to be a Gazetted Officer and proceeded with the search and seizure. This action of Mr. Madke –Police Inspector is itself arbitrary in nature as it defeats the purpose of Section 50 of the NDPS Act. To support his submission he has referred to and relied upon a recent decision of the Supreme Court in the case of *State of NCT of Delhi Vs. Modh. Jabir*¹

3.1. That apart he would submit that there is non-compliance of Section 42(1) of the NDPS Act that mandates the information received to be reduced in writing which has not been complied with in the present case. He would submit that search and seizure was carried out on 21.12.2023 however the Inventory Panchanama under Section 52A of NDPS Act was prepared only on 31.01.2024 after an unexplained delay of more than 41 days, casting doubt on the prosecution case. He would submit that the Chemical Analysis Report of the alleged contraband has not been filed till date, adding to the suspicion. He would submit that Applicant has no criminal antecedents. He would submit that Applicant was arrested on 21.12.2023 and he is incarcerated in jail for the past 1 year 1 month

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

and 17 days. Hence he would urge the Court to allow the present Application.

4. **PER CONTRA**, Ms. Gajare-Dhumal, learned APP would vehemently oppose the present Application. She would submit that there is recovery of 97 grams of MD which is a commercial quantity. She would submit that the bar of Section 37 has to be overcome by the Applicant. She would submit that the Court while granting bail must be fully satisfied that there are reasonable grounds for believing that Applicant is not guilty of such offence and he is not likely to commit any offence while on bail. She would submit that such offences are offences against the society at large and will have to be viewed by the Court very strictly without any leniency. She would submit that the fact that Accused persons arrived at the spot with the intent to sell the contraband itself raises a strong doubt regarding involvement of other individuals in the illegal drug trade. Furthermore, there exist a likelihood of Applicant tampering with evidence and influencing witnesses if released on bail. Hence she would urge the Court to reject his Bail Application

5. Heard Mr. Khan learned Advocate appearing for the Applicant and Ms. Gajare-Dhumal learned APP for Respondent – State. I have perused the material placed on record.

6. It is *prima facie* seen that there is non-compliance of Section 50 of NDPS Act. It is seen that Mr. Madke –Police Inspector, one of the officials of the raiding party himself claimed to be a Gazetted Officer before whom the Applicant was required to be searched. The same is confirmed and recorded in the trap panchanama appended at page No. 58 of the Application. In fact it is seen from the trap panchanama that all the officials of the raiding party claimed to be Gazetted Officers on the basis of which they obtained consent of the Applicant which is *prima facie illegal and* arbitrary in nature which defeats the purpose of Section 50 of NDPS Act. The provisions of Section 50 of the NDPS Act are mandatory in nature and must be strictly complied with. It is categorically held in the recent judgment of the Supreme Court in the case of *Mohd. Jabir (1st Supra)* that intent behind the said provision of Section 50 of NDPS Act is to ensure that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. For reference the relevant unnumbered paragraph Nos. 4 and 5 of the said judgement read as under:-

“It is obvious that the intent behind the provision is to ensure that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. Use of the expression “nearest” refers to the convenience as the suspect is to be searched. Delay should be avoided, as is reflected from the use of the word “unnecessary delay” and the exception carved in sub-section (5) to Section 50 of the NDPS Act. Nothing more is articulated and meant by the words used, or the intent behind the provision.

Having said so, we are unable to appreciate the reasoning given by the High Court in the impugned judgment, which states that use of the word 'any' does not satisfy the mandate of the 'nearest' Gazetted Officer and, hence, the respondent, Mohd. Jabir, is entitled to bail. The option given to the respondent, Mohd. Jabir, about to be searched, with reference to a Gazetted Officer or a Magistrate, does not refer to the authorized person in the raiding team itself.

7. It is settled law that a Court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the court for trial. There are other broad parameters also like gravity of offence, likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents which are required to be considered in such cases. However the metrics of judicial decision making gets amplified or rather shuttled to another facet when dealing with offences where Section 37 of NDPS Act is attracted. In such cases one has to satisfy itself with the rigors of the twin conditions as prescribed under Section 37 of the NDPS Act. Section 37 reads thus:-

***"37. Offences to be cognizable and non-bailable.:- (1)** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--*

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless:-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

8. It is settled law that from the reading of Section 37 of the NDPS Act, it becomes clear that the legislature intends to deny bail to accused alleged to be in possession of commercial quantity of contraband in absence of Court subscribing to a contrary view, however therefore if seen it does not rule out the facet of discretion of Court to grant bail. Furthermore the Court must be satisfied that the accused is unlikely to re-offend. It is seen that while dealing with Bail Applications the material available for consideration and adjudication is limited. In such cases, if we look realistically the provisions of Section 37 leave limited room for a possibility of granting bail to the accused. However employing such limitation would create a dichotomy in the current scenario where one common grievance is made before this Court repeatedly in matter after matter. It is seen that in such a case provisions of the NDPS Act regarding search and seizure are followed as per law. Any aberration in following the procedure laid down cannot be acceptable, since the conditions under Section 37 of the NDPS Act would be strictly liable in case of recovery of commercial quantity of contraband.

9. In some of the following decisions of the Supreme Court concerning detention and imprisonment of undertrial prisoner / accused on being apprehended with substantial commercial quantity of various contraband, the Court has exercised its unfettered jurisdiction in releasing an undertrial based on the facts of the said cases by using its discretionary power:-

9.1. In the case of *Nitish Adhikary alias Bapan Vs. State of West Bengal*² the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for 1 year and 7 months despite being alleged to be in possession of commercial quantity of contraband.

9.2. In the case of *Babor Ali Mondal Vs. State of West Bengal*³ the Supreme Court considering the long incarceration granted bail to an undertrial-accused who was incarcerated for 1 year and 4 months.

9.3. In the case of *Sukhvinder Singh Bittu Vs. State of Punjab*⁴ the Supreme Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year despite being alleged to be in possession of commercial quantity of poppy straw.

² 2022 SCC OnLine SC 2068

³ Criminal Appeal No. 3349 of 2024

⁴ Cri. Appeal No.1204 of 2024

10. In the present case as delineated hereinabove, there is an inherent flaw in carrying out the search and seizure operation by the Officers in complete violation of the mandatory provisions of Section 50 of the NDPS Act. Section 50 of the NDPS Act reads as under:-

“50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974). (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

11. The provision vide sub-section (1) mandates that when an officer duly authorized under Section 42 is about to search a person under the provisions of Sections 41, 42 or 43, he shall, if the person about to be searched so requires, take the person without unnecessary

delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

12. It is obvious that the intent behind the provision is to ensure that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. Use of the expression “nearest” refers to the convenience as the suspect is to be searched. Delay should be avoided, as is reflected from the use of the word “unnecessary delay” and the exception carved in sub-section (5) to Section 50 of the NDPS Act. Nothing more is articulated and meant by the words used, or the intent behind the provision. In this case the raiding party officials have themselves claimed to be Gazetted Officers and searched the Applicant. The requirements of Section 50 of the NDPS Act are mandatory and must be strictly complied with. Section 50 of the NDPS Act casts an obligation on the Police Officer to apprise the person intended to be searched that under Section 50, he is required to be searched only before a Gazetted Officer or a Magistrate. The requirement is that the authorized officer must make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate.

13. In the case in hand, I am satisfied on reading the trap panchanama that the above provisions under Section 50 of the NDPS

Act are not followed. Hence the recovery is vitiated even though it being a commercial quantity.

14. In view of the above, The Application is allowed in the following terms:-

- i. Applicant is directed to be released on bail on furnishing P.R. Bond of Rs.15,000/- (Rs. Fifteen Thousand only) with one surety of the like amount;
- ii. Applicant shall not influence any witness or tamper with the evidence in any manner;
- iii. Applicant shall report to the Investigating Officer of the concerned Police Station as and when called;
- iv. Applicant shall co-operate with the conduct of trial and attend the Trial Court on all hearing dates, unless specifically exempted and will not take any unnecessary adjournments. If he does so it will entitle the prosecution to apply for revocation of this order;
- v. Applicant shall not leave the State of Maharashtra without prior permission of Trial Court;
- vi. Applicant shall keep the Investigating officer informed of his current address and mobile contact number and /

or change of residence or mobile details, if any, from time to time, as applicable; and

- vii. Any infraction of the conditions shall entail cancellation of bail granted to the Applicant.

15. It is clarify that the observations in this order will not be treated as an expression of opinion on the merits of the case, which would be determined and decided on the basis of the evidence which is led. The trial Court will adjudicate and decide the prosecution's case as per law.

16. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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by RAVINDRA
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