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

**BAIL APPLICATION NO.5299 OF 2024**

Kurban Shamshud Shaikh ... Applicant

versus

The State of Maharashtra … Respondent

Mr. Dilip Mishra with Mr. Ayaz Khan for Applicant.
Mr. A.A.Naik, APP for State.

**CORAM: N.J.JAMADAR, J.**

**DATE : 10 FEBRUARY 2025**

**P.C.**

1. Heard the learned Counsel for the parties.

2. The Applicant, who is arraigned in C.R.No.31 of 2023 registered with Anti Narcotic Cell, for the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, 1985), has preferred this application to enlarge him on bail.

3. On 19 April 2023, while Anti-Narcotic Cell Police were on patrolling duty, near Jail Road, Dongri (E), Mumbai, the applicant and Akbarali Shaikh (A2) were found moving suspiciously. The applicant and the co-accused were accosted. The applicant was apprised of his right under Section 50 of the Act, 1985. Thereafter, in the presence of the panch witnesses, personal search of the applicant was conducted. A transparent plastic pouch was found in the

right pocket of the trouser of the applicant. It contained light brown powder. The said substance appeared to be Mephedrone (MD). It weighed 150 gms. Akbarali (A2), the co-accused, was found in possession of 20 gms of MD. Post completion of investigation, chargesheet came to be lodged.

4. Mr. Mishra, learned Counsel for the Applicant submitted that the co-accused AkbarAli (A2) and Roma (A3) have been enlarged on bail. Though the applicant does not claim parity as the commercial quantity was allegedly found in the possession of the applicant, yet, the infirmity in the search and seizure and the discrepancy in the identity of the substance which was allegedly recovered from the possession of the applicant and the sample which was sent for analysis to the FSL renders the interdict contained in Section 37 of the Act 1985 inapplicable.

5. Amplifying the submission Mr. Mishra, urged that the search of the applicant was vitiated as Mr. Suresh Bhoye, API, who was the member of the raiding party, had called Sanjay Chauha, I/c Police Inspector, a Gazetted Officer, to take search, though Mr. Suresh Bhoye was himself empowered to take the search. As a Gazetted Officer was called, the compliance of the provisions contained in Section 50 of the Act, 1985 was vitiated. Secondly, when the statement of Mr. Sandesh Mohite (Police Constable No.070983) was recorded, he did not disclose anything about the raid, though he was a member of the raiding party. Thirdly, what was allegedly found in possession

of the applicant was light brown powder. But what was sent for analysis was dark brown crystalline powder. This discrepancy completely erodes the sanctity of the search and seizure, urged Mr. Mishra.

6. Mr. Mishra further submitted that as the applicant has been in custody since 20 April 2023, and the trial is not likely to conclude in the near future, the applicant deserves to be enlarged on bail.

7. Mr. Naik, the learned APP, resisted the application. It was submitted that none of the grounds are sufficient to satisfy the twin tests prescribed under Section 37 of the Act, 1985.

8. I am persuaded to agree with the submission of Mr. Naik, the learned APP. None of the grounds urged by Mr. Mishra can qualify as the substantial probable ground to believe that the applicant is not guilty of the offences for which he has been arraigned.

9. A bare perusal of the appraisal memo indicates that the applicant was clearly apprised of his right to be searched before the nearest Magistrate or Gazetted Officer under Section 50 of the Act, 1985. There is no reference in the said appraisal memo or Panchanama that the choice of the applicant was impaired by informing him that the Gazetted Officer was already a member of the raiding party.

10. The next ground of the absence of particulars of the search and seizure in the statement of Mr. Sandesh Mohite, who was allegedly a member of the

raiding party, also does not carry much substance. The said statement of Sandesh Mohite was recorded in the capacity of the carrier of the seized property.

11. The third ground of discrepancy in the seized substance and the sample sent for analysis also does not advance the cause of the submission on behalf of the applicant. A slight difference in the shade of the colour of the seized property, i.e. light brown in the seizure panchanama and dark brown in the CA Report, does not seem to be of such a nature as to prima facie vitiate the search and seizure. At any rate, the said ground does not qualify as a substantial probable ground to believe that the applicant may not be found guilty of the offences at the trial.

12. Resultantly, the interdict contained in Section 37 of the Act, operates with full force and vigour. The applicant, thus, does not deserve to be enlarged on bail.

13. Hence, the following order :

ORDER

(i) The Application stands rejected.

(ii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and co-accused and the trial

Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

**( N.J.JAMADAR, J. )**