HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 5479 OF 2024

Chand Shahjada Sayyad .. Applicant (Org. Accused No.1)

Versus

The State of Maharashtra .. Respondent

WITH

BAIL APPLICATION NO.122 OF 2025

Aftab Ahmed Ashpak Ahmed Siddiqui .. Applicant (Org. Accused No.1)

Versus

State of Maharashtra .. Respondent

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- Mr. Shailesh Chavan a/w Mr. Sumitkumar Nimbalkar a/w Ms. Kalpana Chate i/b Mr. Govind Mundhe, Advocates for Applicants.
- Mr. Hitendra J. Dedhia, APP for Respondent – State in both Bail Applications.
- Mr. R.V. Londhe, API, ANC, Ghatkopar Unit, Mumbai.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 23, 2025

P.C.:

1. Heard Mr. Chavan, learned Advocate for Applicants and Mr. Dedhia, learned APP for Respondent – State.

2. The Applicants in both these Applications are seeking Regular Bail under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 in connection with C.R.No. 73 of 2023 registered with ANC, Ghatkopar Unit for offences punishable under Sections 8 (c) read with Sections 22 and 29 of Narcotic Drug and Psychotropic Substances Act, 1985 (for short 'NDPS').

3. Applicant in Bail Application No. 5479 of 2024 is arraigned as Accused No. 1. Applicant in Bail Application No. 122 of 2025 is arraigned as Accused No. 2. Both the Applicants are arrested on 19.08.2023 and are incarcerated for the past 1 year 8 months 4 days pending trial.

4. Case of prosecution is that the Prosecution Officers on 18.08.2023 at 22:45 hours while patrolling near Rajendra Prasad Nagar, Matunga, noticed both Applicants – Accused persons behaving suspiciously. They approached them and questioned them about their details, Applicants gave evasive answers which led them to call for two panchas. It is prosecution case that at about 02:30 hours two panchas alongwith PI Kharade reached the incident spot. The two panchas were appraised about the procedure of search, seizure and arrest. Thereafter Applicants were appraised of their rights under Section 50 of the NDPS and were asked if they wanted to be searched before a Gazetted Officer or Magistrate and accordingly arrangement would be made to which they denied. On search, two zip lock bags containing 40 grams and 50 grams of white powder was recovered from Accused No.1 and 100 grams of white powder was recovered from Accused No. 2. It is prosecution case that due to non-availability of field test kit, the raiding party presumed that the white powder was a narcotic substance namely Mephedrone (commonly known as 'MD') and informed the same to the two panchas present at the spot. According

to prosecution both Applicant - Accused persons confirmed the white powder to be MD this is so stated in the panchanama. Thereafter the contraband was sealed and marked as 'A' 'B' and 'E' and crime was registered under Sections 8 (c), 22 (c) and 29 of the NDPS Act.

5. Mr. Chavan, learned Advocate for the Applicants in both Bail Applications would submit that Applicants have been falsely implicated in the present case. He would submit that there is *prima facie* non-compliance of Section 43 of the NDPS Act. He would submit that the Investigating Officer at the time of search and seizure failed to perform field testing of the substance in question due to non-availability of field testing kit during the search and seizure process. He would submit that NDPS Act being a special law mandates strict compliance with procedural safeguards as laid down under Section 43 of the NDPS Act. He would submit that Investigating Officer presumed the alleged white powder to be a narcotic substance and registered a crime under the NDPS Act. He would draw my attention to the panchanama appended at page No. 40 of the Application which confirms the aforementioned fact as stated therein thereby casting a doubt on the prosecution case.

5.1. He would submit that in the absence of presumptive test i.e. field test, the Investigating Officer lacked 'reason to believe' that the seized substance was indeed a narcotic drug or a psychotropic substance as required under Section 43 of the NDPS Act. He would

submit that the formation of such belief cannot be on the basis of mere presumption or suspicion. He would submit that failure to conduct a field test, casts a serious doubt on the identification and legitimacy of the seized substance and thereby renders the seizure arbitrary in law.

5.2. He would submit that there is an unexplained delay of 13 days from the time of search and seizure dated 19.08.2023 till the preparation of Inventory panchanama on 01.09.2023. He would submit that delay coupled with absence of field test creates a serious doubt as to whether the samples are true representative samples of the alleged contraband recovered from the Applicants which are ultimately sent for forensic analysis, hence tampering, mixing and substituting of the allegedly recovered substance / contraband cannot be ruled out.

5.3. He would submit that there is non-compliance of Section 52A of the NDPS Act on face of the record as Certification by Magistrate under Section 52A(3) of NDPS Act is in continuity with the Inventory Panchanama itself appended at page No. 52 which is not in consonance with the statutory provisions of Section 52A (2), 52A(3), Rules 8 and 18 of the Narcotics Drugs & Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 and in Form 5 as prescribed. Hence he would submit that non-compliance of mandatory provisions vitiates the prosecution case and recovery thereby casting a doubt on prosecution case.

5.4. He would draw my attention to the appraisal letters issued under Section 50 of the NDPS Act appended at page Nos. 46 and 47 of the Application wherein it is seen that Accused No. 1 has appended his endorsement, however on perusal of Accused No. 2's appraisal letter it is surprising to see that it does not bear the written endorsement of the Applicant - Accused No. 2 on his appraisal letter on page No.47. This is *prima facie* transgression of the statutory provisions as contemplated in Section 50 of the NDPS Act.

5.5. He would submit that Applicants are sole breadwinners of their respective families and have deep roots in the Society, having no criminal antecedents to their discredit. He would submit that Applicants are arrested on 19.08.2023 and incarcerated since then pending trial. He would submit that investigation is completed and chargesheet is filed, however charge is not framed till date. Commencement and completion of trial in the near foreseeable future is bleak. Hence he would urge the Court to allow the Applications.

6. Mr. Dedhia, learned APP for Respondent – State would oppose the present Bail Applications. He would submit that commercial quantity of contraband is found in possession of the Applicants. He would submit that both Applicants confirmed the alleged substance to be MD in the presence of the panchas. He would submit that samples were drawn in the presence of the panchas. The

samples were then sent to the State Forensic Science Laboratory (FSL) for analysis. The examination report of the FSL appended at page No. 71 reveals the contraband to be Mephedrone which falls under the NDPS Act. He would submit that as commercial quantity of contraband is recovered from Applicants, Section 29 is invoked in the chargesheet and rigours of Section 37 will hence apply to the present case. Hence he would urge the Court to reject the Applications.

7. With the able assistance of the learned Advocates at the bar, I have perused the record of the case.

8. *Prima facie* it is seen that Applicants are apprehended at the time of patrolling however there is a clear dichotomy on the face of record. *Prima facie* on perusal of the Seizure panchanama appended at page No. 38 it is seen that the field test was not performed with regard to the seizure of the alleged substance from the Applicants. *Prima facie* from the prosecution record it is seen that the Inventory panchanama appended at page No. 49 was prepared after an unexplained delay of 13 days which further casts a doubt whether the samples are true representative samples of the alleged contraband recovered from the Applicants which are ultimately sent for forensic analysis. In the present case the alleged contraband being MD and non-availability of field testing kit coupled with non-performance of the field test vitiates the prosecution case. In the absence of presumptive test i.e. field test

the Investigating Officer lacked 'reason to believe' that the seized substance was indeed a narcotic drug or a psychotropic substance as required under Section 43 of the NDPS Act. He would submit that the formation of such belief cannot be on the basis of mere presumption or suspicion. It is *prima facie* seen that there is a clear transgression of statutory provisions of Section 43 of the NDPS Act.

9. In this regard attention is drawn to the decision of the Constitution Bench of Supreme Court in the case of ***State of Punjab Vs. Baldev Singh***[1] in paragraph No. 28 on legitimacy of judicial process coming under the cloud if acts of lawlessness by the investigating agency are condoned during search operations held that if so done it may undermine the respect for law and may have the effect of unconsciously compromising the administration of justice which cannot be permitted. The Supreme Court concluded the above finding in the context of the NDPS Act and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It categorically held that it must be borne in mind that severer the punishment, greater has to be care taken to see that all the safeguards provided in statute are scrupulously followed. There is no reason as to why the empowered Officer / Investigating Officer should shirk or derelict from affording a real opportunity to the suspect and comply with the procedural safeguards contained in Section 50 of the

1 (1999) 3 SCC 977

NDPS Act to serve a dual purpose – to protect a person against false accusation and frivolous charges as also compliance of Sections 41, 42 and 43 of the NDPS Act.

10. The Supreme Court held that in every case the end result is important but the means to achieve it must remain board. It held that remedy cannot be worse than the disease itself. The NDPS Act provides for a stringent punishment where a statute confers such drastic powers and seeks to deprive a citizen of its liberty for not less than ten years as also makes stringent provisions for grant of bail, scrupulous compliance of the statutory provisions must be insisted upon. Hence where the Act and Rules lay down procedure for taking samples the prosecution Officer cannot disregard the same and act own his own whims and fancies.

11. *Prima facie* on perusal of the two appraisal letters issued under Section 50 of the NDPS Act it is seen that Applicant accused No. 1 has appended his endorsement however on perusal of appraisal letter of Accused No. 2 appended at page No. 47 it is seen that it does not even bear the written endorsement of Accused No.2. This is *prima facie* transgression of the statutory provisions as contemplated in Section 50 of the NDPS Act.

12. In this regard attention is drawn to the decision of the Supreme Court in the case of ***Ranjan Kumar Chadha Vs. State of***

Himachal Pradesh[2] wherein Supreme Court has laid down guidelines for compliance of provisions of Section 50 of the NDPS Act and taking endorsement of the Accused in his own handwriting is one of the guidelines laid down therein which has been violated in the present case. This Court in the case of ***Altamash Yusuf Shaikh Vs. The State of Maharashtra***[3]***; Nasrin Basir Shaikh Vs. The State of Maharashtra***[4]***;*** and ***Sharib Iqbal Ansari Vs. State of Maharashtra***[5] granted bail to the Accused persons for non-compliance of provisions of Section 50 of the NDPS Act.

13. Further it is *prima facie* seen that the Certificate issued by the Magistrate is in continuity with the Inventory Panchanama itself appended at page No. 52 which is not in consonance with the statutory provisions of Section 52A (2), 52A(3), Rules 8 and 18 of the Narcotics Drugs & Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 and in Form 5 as prescribed which is fatal to prosecution case at the *prima facie* stage of bail.

14. That apart with regard to Section 29 of the NDPS Act it is seen that *prima facie* no direct evidence or no cogent evidence placed on record to establish that the Applicants at any point of time were involved in selling or delivering the alleged contraband.

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2 2023 SCC OnLine SC 1262.
3 Criminal BA No.2203 of 2024 decided on 17.03.2025.
4 Criminal BA No.4150 of 2024 decided on 05.03.2025.
5 Bail Application No.363 of 2025 decided on 18.02.2025.

15. However, the fundamental principle, upon which the whole structure of Criminal Jurisprudence is based, is that burden of proving every essential ingredient of the offence lies upon the prosecution and the accused is presumed to be innocent till the offence is proved against him beyond all reasonable doubt. However in the present case it is seen that *prima facie* there is variance which has aided to the benefit of the Applicants. It is seen that Applicants are incarcerated for the past 1 year 8 months 4 days pending trial, absence of criminal antecedents investigation is completed, chargesheet is filed, commencement and completion of trial in the near foreseeable future being doubtful further persuades me to consider Applicants' case. Needless to state that complicity of the Applicants in the present crime shall be determined by the prosecution at the time of trial.

16. In the following decisions of the Supreme Court and various High Courts concerning such long detention and imprisonment of undertrial prisoner / accused on being apprehended with commercial quantity of various contrabands, the Courts have in the backdrop of the aforementioned propositions exercised its unfettered jurisdiction in releasing an undertrial on bail on account of long incarceration by using its discretionary powers:-

17. In the case of ***Man Mandal and Anr. Vs. State of West Bengal*** [6] the Supreme Court considering long incarceration of an undertrial-

6 2023 SCC OnLine SC 1868

accused who was incarcerated for 2 years granted him bail despite being alleged to be in possession of commercial quantity of contraband.

18. In the case of ***Ankur Chaudhary Vs. State of Madhya Pradesh***[7] the Supreme Court considering long incarceration of an undertrial-accused granted him bail to an undertrial-accused who was incarcerated for about 2 years.

19. In the case of ***Nitish Adhikary alias Bapan Vs. State of West Bengal***[8] the Supreme Court considering long incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year and 7 months despite being alleged to be in possession of commercial quantity of contraband.

20. In the case of ***Babor Ali Mondal Vs. State of West Bengal***[9] the Supreme Court considering the incarceration of an undertrial-accused granted him bail who was incarcerated for 1 year and 4 months.

21. In the case of ***Sukhvinder Singh Bittu Vs. State of Punjab***[10] 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 the alleged contraband poppy straw.

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7 Petition for Special Leave to Appeal (Cri) No. 4648 of 2024
8 2022 SCC OnLine SC 2068
9 Criminal Appeal No. 3349 of 2024
10 Cri. Appeal No.1204 of 2024

22. In the case of ***Mohd. Mobin Jahurul Hasan Manihar Vs. State of Maharashtra***[11] - this Court on 20.01.2025 considering long incarceration of the under-trial accused granted him bail who was incarcerated for 1 year 11 months. The contraband in question was 220 gms of MD , the commercial quantity of which is 50 gms.

23. In all the above cases the right to speedy justice flowing from Article 21 of the Constitution of India and the foreseeable delay in completion of trial were considered as imminent grounds for grant of bail apart from the rigours of Section 37 of the NDPS Act in the facts of the said case.

24. Considering the above *prima facie* observations and in view of the above judicial pronouncements coupled with the transgression of statutory provisions of the NDPS Act, long incarceration and ignominy of Applicants being incarcerated further and no hope of trial commencing or concluding in the near foreseeable future, I am of the opinion that both Applicants can be released on bail.

25. Hence, both Bail Applications are allowed subject to the following terms and conditions:-

(i) Both Applicants are directed to be released on bail on furnishing P.R. Bond in the sum of Rs. 25,000/- each with one or two sureties in the like amount;

11 BA No.713 of 2024 decided on 20.01.2025

(ii) After their release from jail, Applicants shall report to the Investigating Officer as and when called for;

(iii) Applicants shall attend the trial Court on first Monday of every month between 11.00 a.m. and 1.00 p.m. to mark their presence. If the first Monday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;

(iv) Applicants 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 they do so, it will entitle the prosecution to apply for cancellation of this order;

(v) Applicants shall not leave the State of Maharashtra without prior permission of the Trial Court;

(vi) Applicants shall not influence with any of the witnesses or tamper with the evidence in any manner;

(vii) Before their actual release from jail, Applicants shall furnish their address where they proposes to reside after their release from jail, to the concerned Police Station and also to the trial Court; and

(vii) In case of any infraction of the above conditions and / or two consecutive defaults in marking their attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

26. It is clarified that the above observations in this order are limited for the purpose of granting bail only and I have not made any observations on the merits of the case and the trial shall be adjudicated on the basis of the evidence led by the parties uninfluenced by the present order and strictly in accordance with law.

27. Both Bail Applications are allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

HARSHADA HANUMANT SAWANT

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