(2024) 11 BOM CK 0025

Bombay High Court

Case No: Criminal Bail Application No.3530 Of 2022

Kondiba Gunjal	APPELLANT
Vs	
Union Of India And Anr	RESPONDENT

Date of Decision: Nov. 28, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 439
- Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 37, 42, 67
- Evidence Act, 1872 - Section 25

Hon'ble Judges: Bharat P. Deshpande, J.

Bench: Single Bench

Advocate: Dr. Sujay Kantawala, Karan Jain, Agastya Desai, Thakker Ruju, Priyanshi Doshi, C. D. Mali

Final Decision: Disposed Of

Judgement

Bharat P. Deshpande, J.

1 Applicant who is Accused No.2 in the complaint filed by respondent no.1 before the Special Court, preferred the present application for bail under

Section 439 of Cr. PC.

2 Heard Dr. Sujay Kantawala for applicant, Mr. Thakker Ruju for Respondent no.1 and Mr. C. D. Mali, APP for State.

3 Learned Counsel for the Applicant would submit that present Applicant/ Accused No.2 was working as a Clearing Agent and that he is related to

Accused No. 1. He submits that the Accused No.2 only help the Accused No.1 in clearing some consignment. However, he had no connection at all

with respect to the drugs which are found in the said consignment.

4 He submits that Accused No.2 is alleged to have transported the said drugs and thus except the statements recorded under Section 67 of Narcotic

Drugs and Psychotropic Substances Act, 1985 (NDPS Act) there is no corroborative material to implicate present Applicant with the said offence.

5 Learned Counsel for the Applicant would further submit that though complaint is filed by NCB on 2nd February 2021 and cognizance of it was taken

by the concerned Special Court on 18th April 2022, there is no progress in the matter. He submits that total 54 witnesses are disclosed in the complaint

for the complainant to be examined. However, till date there is absolutely no progress in the matter though Applicant is in custody from 9th August

2021.

6 Learned Counsel for the Applicant would submit that the Applicant has already undergone 3 years in custody and there is no chance of conclusion

of the said trial in near future.

7 Learned counsel would further submit that Section 37 of the NDPS Act will have to be considered in view of long incarceration of the Applicant

without any progress in the trial. He submits that Applicant is having a right to a speedy trial and if such right is denied to him, rigors of Section 37 of

the NDPS Act cannot be made applicable. He would further submit that Applicant is ready and willing to abide by conditions while granting bail as he

was doing his business activity as a Clearing Agent and there is no criminal antecedents.

8 Per Contra, Learned Special PP appearing for the NCB would submit that Accused No.1 acted as an agent for clearing the consignment and on

receipt of the information from the customs, a team of the complainant visited Navkar Corporation wherein a container bearing No.INKU2267955

imported under the bill of entry dated 1st August 2020 was kept and search in presence of two panch witnesses and Accused No. 1. During the said

search, 191.60 kgs of heroin was detected and seized.

9 The learned Special PP would submit that statement of Accused No. 1 was recorded under Section 67 of NDPS Act and role of present Applicant /

Accused No.2 was revealed. Accordingly present Applicant was summoned and his statement was recorded on 8th September 2020. During the

recording of such statement, involvement of the Applicant was found along with Accused No.1 and other Accused persons.

10 Learned Special PP submitted that a sample taken from the said drugs were forwarded to the laboratory and the report is received showing the

presence of heroin. He submits that substance / quantity found during the search is huge and, therefore, bail should not be granted.

11 Learned Counsel for the Applicant has placed reliance on the following decisions:

1. Judgment in case of Javed Gulam Nabi Shaikh Vs. State of Maharashtra and Anothe rpassed by Apex Court in Criminal Appeal No.2787 of

2024.

2. Judgment in case of Ankur Chaudhary Vs. State of Madhya Pradesh passed by Apex Court in Special Leave to Appeal (Crl.) No.4648 of 2024.

3. Judgment in case of Dheeraj Kumar Shukla Vs. State of Uttar Pradesh passed by Apex Court in Special Leave to Appeal (Crl.) No.6690 of

2022.

4. Judgment in case of Mahmood Kurdeya Vs Narcotic Control Bureau passed by Apex Court in Criminal Appeal No.1570 of 2021.

5. Judgment in case of Mohd. Muslim alias Hussain Vs State (NCT of Delhi)passed by Apex Court, Reported in 2023 SCC OnLine Supreme

Court 352.

6. Judgment in case of Surjit Singh @ Kala Vs State of Punjab passed by High Court of Punjab and Haryana on 09.11.2023 in CRM-M No.32558

of 2023.

7. Judgment in case of Vijay Mohan Pawara Vs. The State of Maharashtra passed by High Court of Bombay on 24.06.2024 in Bail Application

No.433 of 2024.

8. Judgment in case of Gudipati Subramaniam Vs. Union of India and Another passed by High Court of Bombay, reported in 2024 SCC Online

Bom 1350.

9. Judgment in case of Shashikant Prabhu Vs. Harshad Chandrakant Gawde @ Harry passed by High Court of Bombay on 21.12.2020 in Bail

Application No.422 of 2024.

12 Perusal of the complaint filed before the Special Court would clearly disclose that a container bearing No.INKU2267955 imported under the bill of

entry dated 1st August 2020 was detected by the Customs officers and found some creamish colour powder with pungent smell. The Customs officer

suspected that it could be a narcotic drug and accordingly intimation was given to NCB/DRI. Accordingly, a team was constituted for conducting the

raid after complying the provisions of Section 42 of the NDPS Act. Raiding team along with panch witnesses reached the Navkar Corporation at CFS

Raigad at around 11:15 p.m. on 7th August 2020. After identifying the container in presence of panchas and Accused No. 1, a joint examination was

carried out. The creamish colour powder was recovered from the wooden structure which was found testing positive for heroin. In all, various gunny

bags were found containing such creamish colour powder totally weighing 191.60 kgs. Entire contraband was attached under the panchnama and

seized. Accused No.1 was then taken into custody and his statement was recorded.

13 Accused No.1 during his statement under Section 67 of NDPS Act discloses that he is customs house agent of the consignment and a partner in

the customs broker from M/s M.B. Shipping and Logistics Services. He stated that Accused No.2, i.e., present Applicant accepted the job of

clearance of import consignment of M/s. Sarvim Exports, Delhi. The present Applicant/Accused No.2 is the partner in the said broker firm M/s M.B.

Shipping and Logistics Services. It also revealed from his statement that Accused No. 4 contacted Accused No.2 claiming to be head of M/s Servim

Exports and requested them for clearance of import consignment. For clearance of such consignment, Accused No.4 used to make payment through

bank accounts from Delhi. The statement also revealed that Accused No.1 received the concerned import documents for the import consignment of

M/s Sarvim Exports including bill of lading, packing list, country of origin etc., on his mobile phone from Accused No.2/Applicant.

14 Complaint further reveals that Accused No.2/Applicant was then summoned by the complainant and his statement was recorded under Section 67

of NDPS Act on 8th September 2020. During that statement, present Applicant discloses about his mobile phones and that he is working in M/s ARD

Logistics as customs house agent and doing customs docks clearance work. He also stated that Accused No.1 is his cousin and partner in M/s M. B.

Shipping and Logistics Services. He then discloses that Accused No.4 contacted him somewhere in June 2019 enquiring about clearance of import of

Mulethi (Liquorice Roots) from Afghanistan. Accused No.2/Applicant agreed to clear the imported consignments of Accused No.4.

15 Mobile phones of present Applicant were attached and CDR/SDR were called wherein it is found that Accused Nos.1 and 2 were in contact with

each other and even the documents were exchanged on mobile phones.

16 Complainant further submits that Accused Nos.3, 4 and 5 were then arrested. However, Accused No.4 expired after the complaint was filed

before the Trial Court.

17 It is there for clear that a case of the complainant though show that a contraband was found in the said consignment for which Accused No.1 has

acted as a Clearing Agent, the involvement of Accused No.2 is on the basis of statement made by Accused No.1 under Section 67 of NDPS Act.

18 Similarly the contention of the complainant as far Accused No.2/Applicant is concerned is again based on statement under Section 67 of NDPS

Act. It is no doubt true that there are call details and WhatsApp records which show that Accused No.2/Applicant was in contact with Accused

Nos.1 and 4 and documents for clearance of the consignment was forwarded by the present Applicant to Accused No. 1.

19 As far as confessional portion recorded under Section 67 of the NDPS Act is concerned, it is now well settled and as held by the Apex Court in

the case of Toofan Singh Vs. state of Tamilnadu that statement under Section 67 of NDPS Act cannot be used as confessional statement in the trial

of an offence under the provisions of the NDPS Act since the officers who are invested with powers under Section 53 of the NDPS Act are police

officers within the meaning of Section 25 of the Evidence Act and as a result of which any confessional statement made to such police officer would

be barred under the provisions of Section 25 of the Evidence Act and cannot be taken into account in any inquiry or trial. Thus it is clear that any

statement of the present Applicant recorded under Section 67 of the NDPS Act cannot be used against him as confession or admission as the case

may be for the purpose of trial. Similarly, statements of other Accused persons recorded under Section 67 of the NDPS Act, also cannot be used

against the Applicant.

20 Apart from such so called confessional statement, material which has been relied upon in the complaint qua the present Applicant is only in

connection with the call details of the Applicant while using his two mobile phones with that of Accused No.1 and forwarding of some documents on

WhatsApp chat to Accused No.1 for clearance of consignment.

21 It is the contention of the Applicant and also mentioned in the complaint filed by respondent that Applicant is Acting as a Clearing Agent. Thus

possessing documents of a consignment for the purpose of processing of custom clearance, is but natural.

22 Admittedly the record show that present Applicant and Accused No. 1 were partners in a firm dealing with clearing of the consignment. It is also

claimed that Accused No.1 and the present Applicant are related with each other. In such circumstance, phone calls between Accused Nos. 1 and 2

are but natural, on personal front as well as on business transaction.

23 Sending the documents of a consignment for clearance to Accused No.1 through WhatsApp chat cannot be suspected as tried to be canvassed on

behalf of Respondents. It is also necessary to note that since the Applicant was Acting as Clearing Agent, he is bound to receive his fees for the

purpose of clearing of the consignment. The transactions which have been pointed out on behalf of the respondent are only with regard to charge of

fees with regard to clearance of the consignment. Such amounts are only in few thousand and not having any suspicion with regard to the contention

of dealing in drugs.

24 The Clearing Agent or a person who is facilitating the agent to clear the consignment is not supposed to know an exact material which is found in

the said consignment though such bills required to be mentioned about it. Admittedly such consignment was received from a foreign country and it

requires customs clearance since the customs authorities suspected some foul play, they alerted the DRI and accordingly raid was conducted.

25 Applicant was not present when the consignment was opened and search was carried out. It was Accused No.1, who was present during the

search of the said consignment and he was responsible for clearing the said consignment though claimed for and on behalf of Accused Nos.2 and 4.

Thus the material which has been collected by the complainant qua the present Applicant is not enough to sufficiently corroborating the case and

existence of the call details and forwarding of the bills to Accused No.1 cannot be considered as presumption of the knowledge of the Applicant about

the drugs concealed in the said consignment.

26 The case so far put forth against present Applicant would go to show that it mostly rest on the statement under Section 67 of the NDPS Act and

there is no corroborative evidence to substantiate the avernments in his statement so as to detain him further. Hence the embargo under Section 37 of

the NDPS Act would not cause any impediment in the present matter.

27 Besides, Applicant was arrested on 9th August 2021 and since the last 3 years he is in custody. Complaint would go to show that there are 54

witnesses which the complainant would be examining during the trial. It is submitted that till date even the charge is not framed and thus there is no

possibility of concluding of the trial in the near future.

28 In the case of Javed Gulam Nabi Shaikh (supra), the Apex Court while deciding the matter on 3rd July 2024 observed that long incarceration

clearly defeat the fundamental right under Article 21 of the Constitution to have a speedy trial. While placing Reliance in the case of Union of India

Vs. K. A. Najeeb reported in (2021) 3 SCC 7131, it was observed that even the matter under UAPA would be considered if there is inordinate delay

in conducting the trial. Similarly in the case of Satender Kumar Antil Vs. Central Bureau of Investigation reported in (2022) 10 SCC 51, the Apex

Court has observed that prolong incarceration and inordinate delay engaged in the conclusion or the trial would certainly affect the right of Accused of

speedy trial and in such circumstance, Section 37 of NDPS Act or such provisions under the Special Acts would not be an impediment to grant bail.

The Apex Court further observed that the person seeking bail is still an Accused and not a convict and thus he is entitled for a speedy trial and if it is

not possible to decide his case as enshrined under Article 21 of the Constitution and if he is kept inside without any progress in the matter, such

Accused is certainly entitled to be released on bail.

29 Similar observations are found in the case of Ankur Chaudhary (supra) by the Apex Court which consider the embargo under Section 37 of the

NDPS Act. The Apex Court found that failure to conclude trial within a reasonable period resulting in prolong incarceration militates against the

precious fundamental right guaranteed under Article 21 of the Constitution of India and as such, conditional liberty overriding the statutory embargo

created under Section 37 of the NDPS Act could be considered.

30 In the case of Dheeraj Kumar Shukla (supra) the Apex Court granted bail to the Accused even though he was found with the commercial quantity

and since there is no progress in the trial.

31 In the case of Mohd. Muslim alias Hussain (supra) the Apex Court while dealing with Section 37 of the NDPS Act observed that the court would

look at the material in a broad manner and reasonably see whether the AccusedÃ¢â‚¬â„¢s guilt may be proved. It does not call for meticulous examination

of the material collected during investigation.

32 Coming back to the matter in hand, it is no doubt true that a huge commercial quantity of heroin was found in the container, but except statement

under Section 67 of NDPS Act which is otherwise not admissible in evidence as far as admissions/ confessions of the present Applicant are

concerned, there is hardly any corroborative evidence. Thus the provisions of Section 37 of the NDPS Act would not be considered as an embargo in

the present matter even though commercial quantity was detected and seized.

33 ApplicantÃ, isÃ, inÃ, custodyÃ, fromÃ, lastÃ, 3Ã, yearsÃ, andÃ, tillÃ, dateÃ, thereÃ, is absolutely no progress in the said matter. The

conclusion of trial in near future is again a remote possibility. Accordingly, I am of the considered opinion that the Applicant is entitled for the bail in

connection with the present matter. However, on strict conditions.

34 Bail application is therefore allowed. Applicant shall be released on furnishing a personal bond of Rs.1 Lakh with two solvent sureties in the like

amount to the satisfaction of the Learned Special Court and on the following conditions:

(1) Applicant shall not tamper with the prosecution witnesses directly or indirectly or showing inducement, threat or promise to any person acquainted with the fact

of the case so as preclude him from disclosing the fact to the court.

(2) Applicant shall not leave India without prior permission of the Learned Special Court.

(3) Applicant shall deposit his passport, if any, with the Learned Trial Court.

(4) Applicant shall attend the Trial Court proceedings regularly and shall not ask for exemption unless it is necessary to do so.

35 The observations made in the above order are only restricted to grant of bail to the Applicant/Accused No.2 and based on a material placed before

this court.

36 Bail Application stands disposed of in the above terms.