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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 3620/2023**
ARUN KUMAR AZAD Applicant

Through: Mr. Aditya Aggarwal, Mr.
Mohd. Yasir & Mr.
Naveen Panwar, Advs.

versus

NARCOTICS CONTROL BUREAU Respondent

Through: Mr. Subhash Bansal, SSC
with Mr. Shashwat Bansal,
Adv.

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

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02.04.2024

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeking regular bail in Crime No. VIII/69/DZU/2021, registered for offences under Sections 20(c)/27(a)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (**NDPS Act**).

2. The brief facts of the case are as follows:

2.1 On 08.11.2021, secret information was received that eight parcels were lying at Professional Courier, Naraina, New Delhi and it was suspected that the parcels contained narcotic drugs. On the basis of the said information, 306 Kg of Ganja was seized from the concerned parcels.

2.2 It is alleged that the Operational Manager informed the NCB officers that he had received a phone call to deliver the said parcels to one person, namely, Rajesh, at the Office of Professional Courier, Karol Bagh. He also provided a mobile phone number of Rajesh. It is alleged



that the NCB team also found that the said parcels had been sent by one person, namely, Vikas.

- 2.3 It is alleged that since the name of the receiver came into the knowledge of the NCB Officers, therefore, in order to intercept the accused Rajesh, the delivery of the said parcels was done under the supervision of the NCB team.
- 2.4 It is alleged that accused persons Rajesh and Vakil Singh came to the Courier Office and enquired about the parcels. The said persons were intercepted. It is alleged that accused persons Rajesh and Vakil Singh disclosed that the parcels had to be delivered near PP Jewellers, Karol Bagh.
- 2.5 It is alleged that thereafter, the NCB team along with accused Rajesh went near PP Jewellers, Karol Bagh. It is alleged that the applicant reached the spot and co-accused Rajesh identified the applicant and started a conversation with him. The applicant was then intercepted.
- 2.6 It is alleged that the applicant disclosed that he is involved in the illicit business of Ganja and stated that he had been instructed by co-accused Ajay to collect the concerned parcels.
- 2.7 It is alleged that due to the place near PP Jewellers being very crowded, the NCB team decided to conduct the seizure proceedings at the NCB Delhi Zonal Unit.
- 2.8 It is alleged that co-accused persons Vakil Singh and Rajesh Singh in their disclosure statements stated that they were involved in the business of transporting Ganja for monetary incentives.



- 2.9 It is alleged that the applicant in his disclosure statement disclosed about his involvement in drug trafficking. It is alleged that the applicant further disclosed that the parcel had to be delivered to co-accused Pradeep Mandal.
- 2.10 It is alleged that co-accused Pradeep in his disclosure statement disclosed that the parcels had to be further delivered to co-accused Lagnu Mahto.
- 2.11 Pursuant to the disclosure statement of co-accused Pradeep, the house of co-accused Lagnu Mahto was searched and 1.4 Kg of Ganja was recovered from there. It is alleged that during search, a sum of ₹4,90,000/- was also recovered.
- 2.12 The learned Additional Sessions Judge, NDPS, Patiala House Courts, New Delhi *vide* order dated 05.10.2023 dismissed the bail application of the applicant on account of the bar under Section 37 of the NDPS Act.
3. The learned counsel for the applicant submits that the investigation in respect of the applicant is complete and nothing incriminating has been recovered from the applicant. He further submits that the applicant has been in custody since 09.11.2021 and no purpose would be served keeping him in further incarceration.
4. He submits that it is the admitted case of the respondent that no recovery has been effectuated from the possession of the applicant.
5. He submits that the applicant has been indicted in the present case merely at the behest of co-accused persons Rajesh and Vakil who had allegedly come to collect the contraband. He



submits that the applicant was not apprehended while taking the delivery.

6. He submits that the disclosure statement of the applicant made under Section 67 of the NDPS Act is *per se* insubstantial and has no evidentiary value, as the same is not corroborated by any recovery. He places reliance on the judgment passed by the Hon'ble Apex Court, in the case of *Tofan Singh v. State of Tamil Nadu : (2021) 4 SCC 1*, in this regard.

7. He further submits that the applicant does not know the co-accused persons who disclosed his name and identified him. He submits that there is no monetary transaction, calls or link of any kind between the applicant and the alleged commission or the co-accused Rajesh (alleged consignee of the commission), and Vikas (alleged consignor of the commission).

8. He submits that the prior antecedents of the applicant cannot act as a hindrance in considering his present bail application. He submits that the applicant is already on bail in the other case. He places reliance on the judgment of the Hon'ble Apex Court in the case of *Prabhakar Tewari v. State of U.P. : (2020) 11 SCC 648*, where it was held that the involvement of the accused person in other criminal cases cannot be the sole ground of denial of bail.

9. He further submits that there was an inordinate delay of 12 days in filing of the application under Section 52 A of the NDPS Act. He submits that standing order 1/88 mandates that the drawn samples have to be sent to FSL for examination within 72 hours of seizure. He submits that non-compliance of Section 52 A of the Act is fatal to the case of the prosecution.

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10. He submits that co-accused Lagnu Mahto has already been granted bail by the learned Trial Court.

11. He further submits that Section 37 of the NDPS Act is not attracted *qua* the applicant in the present case, and his bail applicant ought to be considered without applying the rigours thereof.

12. *Per contra*, the learned Senior Standing Counsel ('SSC') for the NCB submits that the learned Trial Court has rightly dismissed the applicant's bail application by order dated 05.10.2023. He states that all the grounds of the applicant, including the contention that no recovery was effectuated from the applicant directly and there is no CDR connectivity between the applicant and co-accused persons, have been effectively dealt by the learned Trial Court and requires no interference.

13. He submits that the applicant was apprehended during controlled delivery when the applicant allegedly came to take delivery of the contraband from co-accused persons Rajesh and Vakil.

14. He submits that many bank deposit slips were recovered from the seized mobile of the applicant in which money was deposited in his account. He further submits that photographs of the alleged contraband were allegedly sent by the applicant to co-accused Pradeep Mandal.

15. He further submits that the applicant is also involved in another case of a similar nature. He further submits that there is recovery of commercial quantity of the contraband and thus the



bar under Section 37 of the NDPS Act would act against the applicant in the present case.

ANALYSIS

16. I have heard the learned counsel for the parties.

17. *Prima facie*, the applicant has been implicated in the present case primarily on the basis of the disclosure statement of the co-accused. It is relevant to note that while the veracity of the disclosure statement of the co-accused is to be tested at the time of the trial, this Court cannot lose sight of the decision of the Hon'ble Supreme Court in *Tofan Singh v. State of Tamil Nadu* (*supra*), wherein it was held that a disclosure statement made under Section 67 of the NDPS Act is impermissible as evidence without corroboration. The relevant paragraphs of the said judgment is set out below:-

“155. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any non obstante clause doing away with Section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.

156. The judgment in Kanhaiyalal then goes on to follow Raj Kumar Karwal in paras 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.

157. On the other hand, for the reasons given by us in this judgment, the judgments in Noor Aga and Nirmal Singh Pehlwan v. Inspector, Customs are correct in law. 158. We answer the reference by stating: 158.1. That 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, as a result of



which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

(emphasis supplied)

18. A Coordinate Bench of this Court in *Phundreimayum Yas Khan Vs. State (GNCT of Delhi) : 2023 SCC OnLine Del 135*, has held that when there is no material to link the applicant with the recovery of the commercial quantity from the co-accused persons, the rigors of Section 37 would not apply. It was further held that the disclosure statement of co-accused is per se not admissible without there being any corroboration.

19. It is pertinent to note that no recovery has been effectuated from the applicant in the present case and the applicant was intercepted when co-accused Rajesh allegedly identified the applicant and started a conversation with him. It is not alleged that the applicant was intercepted in the present case while taking the delivery of the contraband. It is alleged that the accused Rajesh pointed towards the applicant and was talking to him but no delivery was made to the applicant.

20. It is submitted by the learned counsel for the applicant that there are no monetary transactions or CDR that connects the applicant to the co-accused persons who came to collect the concerned parcels or the alleged commission. The learned SSC however has submitted that the applicant was in touch with co-accused Pradeep and the bank deposit slips recovered from the mobile of the applicant indicate that he received money in his account.

21. It is pertinent to note that no recovery has been effectuated
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from co-accused Pradeep. Further, no material has been placed on record yet to establish that the monetary transactions were in relation to the concerned parcel.

22. The probative value of any material, including forensic data recovered from the seized mobile of the applicant and bank deposit slips recovered from the mobile of the applicant, shall be tested during the trial. At this stage of considering the bail application of the applicant, *prima facie*, the material on record cannot be deemed sufficient to link the applicant to the alleged offence.

23. It is also relevant to note that co-accused Lagnu Mahto has already been granted bail in the present case.

24. This Court, in the case of *Dalip Singh v. State (NCT of Delhi) : 2019 SCC OnLine Del 6494*, had observed as under:

11. On perusal of the record, it is prima facie seen that there are two major missing links in the case of the prosecution. There is no link established by the prosecution between the petitioner with the alleged supplier Manoj. Further the entire case of the prosecution, in so far as petitioner is concerned is circumstantial i.e. based solely on disclosure statement of a co-accused which is per se not admissible without there being any corroboration. Prosecution has not been able to establish any connection between the subject offence and the bank accounts, where the petitioner is alleged to have been depositing money or with the holders of those accounts. Merely because the petitioner has been having telephonic conversation with the co-accused, would not be sufficient to hold that petitioner is guilty of the subject offence. There is no recovery made from the petitioner.

12. I am of the view that requirement of Section 37 of the NDPS Act are satisfied. In so far as the petitioner is concerned, there are reasonable grounds to believe that petitioner is not guilty of the said offence.

(emphasis supplied)

25. The Courts are not expected to accept every allegation



made by the prosecution as a gospel truth. The bar, as provided in Section 37 of the NDPS Act, cannot be invoked where the evidence against an accused appears to be unbelievable and does not seem to be sufficient for the purpose of conviction of the accused.

26. The Hon'ble Apex Court, in the case of ***Union of India v. Shiv Shanker Kesari*** : (2007) 7 SCC 798, has observed as under:

“11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.”

27. The Hon'ble Apex Court, in the case of ***Mohd. Muslim v. State (NCT of Delhi)*** : 2023 SCC OnLine SC 352, has reiterated the law in regard to Section 37 of the NDPS Act as under:

“20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever



the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.”

28. In view of the above, this Court is of the opinion that the embargo of Section 37 of the NDPS Act does not come in the way of granting bail to the applicant.

29. It is relevant to note that the order on charge was only passed on 24.01.2024. There are 27 witnesses who have to be examined in the present case. Speedy trial in such circumstances does not seem a possibility. The object of jail is to secure the appearance of the accused persons during the trial. The object is neither punitive nor preventive and the deprivation of liberty has been considered as a punishment without the guilt being proved. The applicant cannot be made to spend the entire period of trial in custody especially when the trial is likely to take considerable time.

30. The applicant is in custody since 09.11.2021. The Hon'ble Apex Court in the case of ***Man Mandal & Anr. v. The State of West Bengal : SLP(CRL.) No. 8656/2023*** had granted bail to the petitioners therein, in an FIR for offences under the NDPS Act, on the ground that the accused had been incarcerated for a period of almost two years and the trial was likely going to take considerable amount of time.

31. In the present case, the prosecution has been given an adequate opportunity to oppose the present application. In view of the facts of the case, in the opinion of this Court, the applicant has *prima facie* established a case for grant of bail.

32. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹20,000/- with two



sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

- a. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- b. The applicants shall under no circumstance leave the boundaries of Delhi without the permission of the learned Trial Court;
- c. The applicant shall appear before the learned Trial Court as and when directed;
- d. The applicant shall provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;
- e. The applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

33. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

34. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the Trial and also not be taken as an expression of opinion on the merits of the case.

35. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J

APRIL 2, 2024

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