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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : 3rd February,2016*

\+ **BAIL APPLN. NO.1771/2015**

FASIH MAHMOOD ..... Petitioner
Through: Mr.N.Hariharan, Senior Advocate with Mr.M.A.Niazi, Mr.Siddharth S.Yadav, Mr.Vaibhav Sharma and Mr.Varun Deswal, Advocates.

versus

STATE (NCT OF DELHI) ..... Respondent
Through: Mr.Rajesh Mahajan, ASC with Ms.Parul Jamwal, Advoctes.

PRATIBHA RANI, J. (Oral)

1. The petitioner Fasih Mahmood is facing trial in case FIR No.54/2011 registered at PS Special Cell, Lodhi Colony and has been charged for committing the offence punishable under Section 20 of Unlawful Activities (Prevention) Act, 1967.

2. The first bail application filed by the petitioner before learned Trial Court has been dismissed on 15.09.2014. The second bail application filed thereafter has been dismissed vide order dated 06.06.2015 whereby after referring to the first order dismissing the bail application of the petitioner, the prayer has been declined on the ground that there is no change in any material circumstances in favour of the petitioner after the dismissal of first bail application.

3. The petitioner has approached this Court for his release on regular bail mainly on the following grounds:-

4. (i) The petitioner has not been named in the FIR No.54/2011 under Section 20 of Unlawful Activities (Prevention) Act, PS Special Cell, Lodhi

Colony and his name has surfaced only in the disclosure statement of the co-accused persons made in case FIR No.65/2010 under Sections 16/18/20 of Unlawful Activities (Prevention) Act, under Sections 307/120-B IPC and under Section 27 Arms Act, PS Jama Masjid, Delhi.

(ii) Except the disclosure statement of the co-accused, there is no other material evidence against the present petitioner to connect him with the offence for which he has been charged.

(iii) As per the contents of the disclosure statement of co-accused Gauhar Aziz Khomani, he allegedly disclosed about his meeting with the petitioner and Ahmed and he being influenced by the thoughts which created hatred in him against non-muslims. He allegedly disclosed that they created the feeling of *Jihaad* in him and after he completed his engineering Course in the year 2005, he went away to Dubai and met Ahmed at a sports good store near his house where Ahmed was working; that he came to know the full name of Ahmed as to be Ahmed Siddi Bappa who introduced him to Tariq Anjum Ahsan, resident of Nalanda Bihar and they became friends and that Fasih was doing a job in Dubai; He also disclosed that While Khalil, Fakih, Sultan @ Abdul Qadir, Fasih Mahmood, Afif and Anwar were assigned the work of collecting funds by staying in Dubai itself and to provide logistics to people who came to gulf country from India, Pakistan and Bangladesh to recruit for organisation and to bring them on the line of *Tanzeem,* Ahmed had assured them to give all kind of help in India. This is falsified from the passport of the petitioner which shows that he had never served in Dubai nor had taken any visa to visit Dubai.

(iv) There is no other allegation against the petitioner or material to connect him with the crime except the disclosure statement which is inadmissible in evidence.

(v) The petitioner is a trained engineer having deep roots in the society.

(vi) The petitioner is not connected with the activities of Indian Mujahideen in any manner whatsoever. Even as per the chargesheet, no act of violence has been attributed to him, hence he may be released on bail.

5. On behalf of petitioner, Mr.N.Hariharan, learned Senior Advocate has submitted that the petitioner has been arrested only on the basis of disclosure statement of the co-accused made in case FIR No.65/2010, PS Jama Masjid, Delhi. Learned Senior Advocate for the petitioner has submitted that the alleged disclosure statement made by the co-accused accused Gauhar Aziz Khomani in FIR No.65/2010 under Sections 16/18/20 of Unlawful Activities (Prevention) Act, under Sections 307/120-B IPC and under Section 27 Arms Act, PS Jama Masjid, Delhi, is wrong and contrary to the record as it discloses about the job, residence and illegal activities of the petitioner in Dubai whereas the petitioner had never visited or got employment in Dubai. Even his passport is not having any visa stamping for Dubai. It has been further submitted that the petitioner is an Engineer and had been working in Saubi Arabia since 2007 till his arrest in India on 22.10.2012 and there is no record available with the prosecution that the petitioner, had visited Dubai.

6. Mr.N.Hariharan, learned Senior Advocate for the petitioner has submitted that during investigation, the prosecution had seized the laptop and mobile phone of the petitioner but nothing incriminating was found. Even the said laptop and mobile phone of the petitioner have been sent to CFSL three years back but no report has been received till date. Mr.N.Hariharan, learned Senior Advocate for the petitioner has submitted that the disclosure statement made by the co-accused before the police, on the basis of which the petitioner has been arrested, is inadmissible in evidence. It is the question of liberty of the petitioner and he cannot be

allowed to be detained in judicial custody on the basis of inadmissible evidence, hence the petitioner may be released on bail.

7. Mr.Rajesh Mahajan, learned ASC for the State has resisted the prayer of the petitioner seeking release on bail.

8. At the outset, Mr.Rajesh Mahajan, learned ASC for the State has submitted that the case of the prosecution is not based on the visit of the petitioner to Dubai, hence reference to the passport in this regard is not material at this stage. Learned ASC for the State has further submitted that whatever was stated by the arrested accused persons in their disclosure statements was religiously recorded by the Investigating Officer. Whether the version given by the co-accused persons in his disclosure statement was fully correct or not could not have been verified by the Investigating Officer at that stage. Thus, the absence of visa stamping on the passport of the petitioner or whether he has served in Dubai or met the co-accused in Dubai cannot be considered a ground for his release on bail especially when there is sufficient material to connect him with the offences complained of.

9. Mr.Rajesh Mahajan, learned ASC for the State has submitted that the petitioner has been chargesheeted for committing the offence punishable under Section 20 of Unlawful Activities (Prevention) Act. Indian Mujahideen is a 'Terrorist Organization' as specified in the First Schedule enlisting the terrorist organizations. Thus, the bail application of the petitioner has to be considered as per the provisions of Section 43D (5) & (6) of Unlawful Activities (Prevention) Act and the petitioner in order to seek bail has to satisfy the conditions laid therein. The learned Trial Court has framed the charge against the accused persons after forming an opinion that a prima facie case exists against them to frame charge.

10. Learned ASC for the State has contended that apart from the

disclosure statement, there is enough material against the present petitioner to connect him with the offence complained of. While referring to the disclosure statement made by the present petitioner about his presence in India at the time of various blasts i.e. blasts in Jaipur-Ahmedabad in 2008, German Bakery Blast in Pune on 13.02.2010, Chinnaswami Stadium Blast at Bangalore on 17.04.2010, Jama Masjid Blast in Delhi on 19.09.2009, learned ASC for the State has submitted that the fact of his being in India during above period was subsequently confirmed from the immigration details taken from the concerned authorities and this evidence being in the nature of 'fact discovered' is admissible in evidence within the meaning of Section 27 of Evidence Act. The role of the petitioner also finds mention in the disclosure of Ahmed Siddibappa @ Yasin Bhatkal and his disclosure corroborates the disclosure of the petitioner.

11. Mr.Rajesh Mahajan, learned ASC for the State has further submitted that apart from the disclosure statements, an analysis of the login/logout details of the email IDs of the petitioner, it was revealed that the petitioner was using proxy or ghost servers to conceal the real/actual place from where the same was being accessed. He has further submitted that while the petitioner was in India, the IP address found in the usage logs of his mail accounts were found to be showing China as the country of access and this practice of IP masking was to conceal the actual location of the accused persons.

12. Learned ASC for the State has relied upon ***Golan Daulagupu vs. National Investigating Agency (2013) 2 Gau LR 791, OInam Monitan Singha vs. Natinal Investigating Agency 2012 Law Suit (Gau) 963, Y.Brajabidhu Singh vs. National Investigation Agency in Crl.A. No.117/2014 Gauhati High Court, Mohammad Navas vs. Deputy***

Superintendnt of Police, National Investigation Agency 2011 SCC Online Ker 3222, Jayanta Kumar Ghosh & Ors. vs. State of Assam & Anr. (2010) 6 Gau LR 727, National Investigation Agency, Hyderabad vs. Devendra Gupta & Anr. 2013SCC Online AP 136 and ***Mehboob Ali & Anr. vs. State of Rajasthan 2015 (!2) SCALE*** in support of his contention and prayed for dismissal of the bail application.

13. While refuting the contentions raised by learned ASC for the State, Mr.N.Hariharan, learned Senior Advocate for the petitioner has submitted that as required under Section 43D (5) of Unlawful Activities (Prevention) Act, notice has already been given to the State. Learned Senior Advocate for the petitioner has further submitted that there is absolutely no material against the present petitioner except the disclosure statement, which is inadmissible in evidence. He has further submitted that the order on charge has already been impugned by filing a revision petition, which is pending disposal, hence it cannot be said that a prima facie case is made out against the petitioner. Mr.N.Hariharan, learned Senior Advocate has submitted that there is no material to establish that the petitioner was using proxy or ghost servers to conceal the real/actual place from where the same was being accessed, hence the petitioner cannot be kept in confinement just for the reason that charge has been framed against him.

14. I have considered the rival submissions and carefully gone through the record.

15. Section 43D of Unlawful Activities (Prevention) Act, 1967 modifies application of certain provisions of Code of Criminal Procedure and reads as under:-

> ***'[43D. Modified application of certain provisions of the Code. -*** *(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be*

deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),-

> *(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and*
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> *(b) after the proviso, the following provisos shall be inserted, namely:-*
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> *"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:*
>
> *Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.".*

(3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that-

> *(a) the reference in sub-section (1) thereof-*
>
> *(i) to "the State Government" shall be construed as a reference to "the Central Government or the State Government.";*

(ii) to "order of the State Government" shall be construed as a reference to "order of the Central Government or the State Government, as the case may be"; and

(b) the reference in sub-section (2) thereof, to "the State Government" shall be construed as a reference to "the Central Government or the State Government, as the case may be".

(4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.]

16. Vide order dated 07.06.2015 the learned ASJ, after forming an opinion that a prima facie case under Section 20 of Unlawful Activities (Prevention) Act is made out against the petitioner, ordered for framing of

charge and also framed a charge against him for the said offence.

17. Merely because the order on charge is under challenge, unless the order on charge is modified or set aside by the superior court, it remains in force and the trial has to proceed unless the proceedings before the learned Trial Court have been stayed.

18. As per the status report dated 02.11.2015 filed by the State, during the course of investigation in case FIR No.65/2010, PS Jama Masjid accused Gauhar Aziz Khomani disclosed about the petitioner Fasih Mahmood to be his cousin and one of the founding member of Indian Mujahideen. Thereafter NBWs were obtained against the petitioner. When it was revealed that at that time he was based in Saudi Arabia and involved in coordinating several terrorist activities of Indian Mujahideen, red corner notice against petitioner Fasih Mahmood was got issued. He was apprehended at IGI Airport. His disclosure statements have been recorded on 22.10.2012 and 28.10.2012. The disclosure statement of petitioner Fasih Mahmood was about his association with Indian Mujahideen since its formation and that during his visit from Saudi Arabia to India, he coordinated with the member of Indian Mujahideen and motivated them for the activities of the organization.

19. After noting as above, the status report reads as under:-

> *On analysis of the immigration details it was found that Fasih Mehmood visited India five times from May 2007 to October 2011. During his visit between February 2008 to June 2008, terrorist strike was committed in Jaipur i.e. 13.05.2008. During his visit from February 2010 to April 2010, a terrorist strike was committed on 13.02.2010 (German Bakery blast) and another terrorist strike was committed on 17.04.2010 (Chinnaswami Stadium blasts). During his visit of September 2010, terrorist strike was committed on 19.09.2010 near Jama Masjid, Delhi. This corroborates the facts disclosed by Fasih Mehmood that before any terrorist activity in India he cp-*

ordinated with the members of Indian Mujahedeen and motivated them for the activities of the outfit. The visits of accused/petitioner to India have been subsequently confirmed from FRRO records. Copies of the records are annexed herewith as ***Annex. R-3***

For ready reference, a chart is prepared below:

Date of arrival	*Date of departure*	*Date & place of blast*
24/02/2008	*21/06/2008*	*On 13/05/2008, Jaipur-Ahmedabad serial bomb blast were held.*
06/02/2010	*29/04/2010*	*1. On 13/02/2010, German Bakery bomb blast, Pune was held.* *2. On 17/04/2010, Chinnaswami Stadium serial bomb blast, Bangluru were held.*
02/09/2010	*25/09/2010*	*On 19/09/2010, Jama Masjid shootout & Bomb blast, Delhi was held.*

During analysis of login/logout details of Email Ids of Rediffmail, it came to notice that accused Fasih Mehmood was using it through proxy or ghost servers to conceal the real/actual place from where the same is being accessed. As *per his immigration details, while accused Fasih Mehmood was in India, the IP address found in the usage logs of his rediffmail account were found to be showing China as the country of access. This practice of IP masking has been found to be sporadic and not consistent, which is evidence of conduct and a particular frame of mind at particular periods where this practice was considered to be necessary by the accused so that his actual location could not be revealed. The log details of e-mail Ids were provided by Rediffmail over official mail. Certified copies are awaited.*

After completion of investigation, charge sheet against accused Fasih Mehmood was filed before the trial Court 20.01.2013. After due arguments before the Court, accused was charged with section 20 of Unlawful Activities (Prevention) Act.

20. The principles governing release on bail in a case registered under Unlawful Activities (Prevention) Act have been considered by the Supreme Court in the decision reported as ***Golan Daulagupu vs. National Investigating Agency, 2012 (5) GLT 739*** wherein it was observed :-

'31. Let us, now, determine as to what limitations the Special Court ran, in the present case, in the matter of granting of bail to the accused-appellant. While considering this aspect, it needs to be noted that the appellant herein is an accused of having committed offences under Sections 120(B)/121/121(A) IPC read with Sections 16, 17, 18 and 19 of the UA(P) Act.

32. Considering the fact that it is the proviso to Section 43D(5) of the UA(P) Act, which puts severe restrictions on the Special Court's power to grant bail, it is imperative to take note of what the proviso to Section 43D(5) conveys. For the sake of clarity, Sub-Section (5) of Section 43D, which is of utmost importance, is reproduced below:

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapter IV and VI of this Act shall, if in custody, be released on bail or on his own

bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

<u>Provided that such accused person shall not be released on bail or on his own bond if the Court on a perusal of the case diary or the report made under Section; 173 of the Code is of the opinion that there are reasonable grounds for, believing that the accusation against such person is prima facie true</u>.

(Emphasis is added)

33. A bare reading of Sub-Section (5) of Section 43D shows that apart from the fact that Sub-Section (5) bars a Special Court from releasing an accused on bail without affording the Public Prosecutor an opportunity of being heard on the application seeking release of an accused on bail, the proviso to Sub-Section (5) of Section 43D puts a complete embargo on the powers of the Special Court to release an accused on bail by laying down that if the Court, on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of offence or offences under Chapter IV and/or Chapter VI of the UA(P) Act, is prima facie true, such an accused person shall not be released on bail or on his own bond.

34. Thus, if the Special Court, on perusal of the case diary, forms an opinion that there are reasonable grounds for believing that the accusation, against an accused person, of the commission of offence or offences, under Chapter IV and/or Chapter VI, is prima facie true, it will not remain within the powers of the Court to grant bail in such a case.

35. The above position of law is further made clear by Sub-Section (6) of Section 43D, which lays down that me restrictions, on granting of bail specified in sub-section (5), are 'in addition to the restrictions under the Code of Criminal Procedure or any other law for the time being in force on grating of bail'.

36. The logical conclusion would, therefore, be that in a case, investigated by the NIA, when the Special Court; forms an *opinion that there are reasonable grounds for believing that the accused has committed an offence punishable with death or imprisonment for life, the Special Court would have no jurisdiction to grant bail to such an accused except as may be provided by law. In addition thereto, the Special Court shall also not be able to release an accused on bail if the Court, on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of offence or offences, under Chapter IV and/or Chapter VI of the UA(P) Act, is prima facie true.*

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76. In short, thus, on a bare reading of the materials, as may have been collected during investigation, if the Special Court finds that the materials, so collected, are sufficient to form, when assumed to be true, an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are prima facie true, the Special Court will be disempowered from releasing the accused on bail. At the stage of bail, no minute scrutiny or microscopic dissection of the materials, collected during investigation, shall be undertaken by the Special Court. Credibility or otherwise of the materials collected would not be the subject-matter of scrutiny. What, at best, the Special Court can do, and shall do, is to examine if the accusations made, on the basis of the materials collected, are wholly improbable. When the materials are, on examination by the Special Court, are found to be not wholly improbable and the Special Court finds, on assuming such materials to be true, that the accusations, made against an accused, as regards commission of an offence under Chapter IV and/or Chapter VI of the UA(P) Act, are prima facie true, such materials would be enough to attract the bar imposed by the proviso to Section 43-D(5).

21. When the case of the petitioner is examined in the light of above legal position, I am of the considered view that on the basis of material on record it cannot be claimed by the petitioner that the case of the prosecution is based only on the basis of disclosure statement of his co-accused or on his

own disclosure statement. The facts discovered pursuant to the disclosure statement as well the details obtained from immigration about alleged presence of the petitioner during various blasts in the country, the analysis of the laptop of the petitioner are the facts need to be proved during trial by the prosecution for the offences for which the petitioner has been charged. Thus, the contention raised on behalf of the petitioner that the case of the prosecution is based only on disclosure statement, which is inadmissible in evidence, needs to be rejected.

22. The learned Trial Court after forming an opinion about existence of a prima facie case against the petitioner, directed for framing of charge under Section 20 of Unlawful Activities (Prevention) Act for which he is facing trial.

23. The proviso to Section 43D(5) imposes a limitation in addition to the limitations, which Clauses (i) and (ii) of Section 437 (1) of the Code of Criminal Procedure, impose on the Court's power to release an accused on bail. Thus, the proviso to Section 43D(5) is an additional restriction on the Court's power to grant bail.

24. In view of the proviso to Section 43D of Unlawful Activities (Prevention) Act, when prima facie sufficient material is available against the petitioner, he cannot be ordered to be released on bail.

25. The bail application is dismissed.

26. Any observation made herein above is for the purpose of disposing of the bail application only and shall not be considered as an expression on merits.

PRATIBHA RANI, J.

FEBRUARY 03, 2016/‘st’