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

BAIL APPLICATION NO. 198 OF 2019

Shashikant Prabhu

.. Applicant

Vs.

1. Rahul Saini, Intelligence Officer
Narcotics Control Bureau, Mumbai.

2. State of Maharashtra

.. Respondents

WITH

CRIMINAL BAIL APPLICATION NO.1617 OF 2019

Harshad Chandrakant Gawde @Harry

...Applicant.

Vs.

1. State of Maharashtra
2. Narcotics Control Bureau, Mumbai

...Respondents.

Mr. Rajendra Shahasane Advocate for the Applicant in B.A. No.198.2019.

Mr. Vinay Nair a/w Ms. Janaki Ravi, Advocate for the Applicant in B.A.
No.1617.2019.

Ms. A.A. Takalkar, APP for the Respondent-State in both Bail Applications.

Mr. Rahul Tiwari, Special P.P. for N.C.B. in both Bail Applications.

CORAM : PRAKASH D. NAIK, J.

DATE : 21st DECEMBER, 2020

PC.

1 The applicants in both these applications were arrested by NCB Mumbai for offences under Section 8 (c) read with Sections 20 (c), 25, 28 and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short "NDPS"). The applicant in bail application no. 198 of 2019 was arrested on 06th April 2018 whereas the applicant in bail application No.1617 of 2019 was arrested on 09th April, 2018.

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2. The case of the prosecution is that specific information was received by NCB on 13th March, 2018 which was reduced into writing. As per the information, person named Ravi Kumar was to arrive at the main gate of Infinity Mall, Andheri (West) Mumbai with substantial quantity of Hashish kept in his bag. Person named Salim Naseem Khan would arrive at the same place to take delivery. Team was constituted and proceeded to Infinity Mall. One person alighted from Rickshaw and waited at the main gate of Infinity Mall. At that time, white coloured car Jeep arrived in which two persons were seated on front seats. One of them told the person who was waiting on the main gate to board the car. The said person boarded the car and handed over bag to the person sitting at the driver seat. When the person at driver seat was taking out the packets from the back pack bag, narcotics team encircled the vehicle and told the inmates in the car to come out with the bag. The person who came with the bag disclosed his name as Ravi Kumar (Accused No.1). The other persons who was in the car disclosed his identity as Salim Naseem Khan (Accused No.2). Third person disclosed his name Anup Gupta. The bag was opened by accused No.1 and 20 packets were removed. The accused No.2 disclosed that he has his office in his restaurant "Smoking Grill Kitchens" which is near the spot. All of them proceeded to said restaurant. It was found that the back pack bag was containing Hashish, narcotics drug. Weight of the narcotics drug was found to be 4.00 kg. The raiding team alongwith panchas

completed the procedural safeguards. Personal search of the accused No.1 was conducted and certain documents were recovered from him. Personal search of accused No.2 was also conducted and mobile phone, wallet, Aadhar Card and ATM Card were recovered from him. Similarly, personal search of accused No.3 was also conducted and ATM and other documents were also recovered. Search was also conducted of premises "Smoking Grill Kitchens". The contraband and the documents were seized. Statement of accused No.3 was recorded under Section 67 of NDPS Act. Search of house of accused No.2 was conducted. Statements of accused Nos.1 and 2 were recorded under Section 67 of NDPS Act. Accused Nos.1, 2 and 3 were arrested on 15th March 2018. Investigation proceeded. Applicant Shashikant Prabhu (accused No.4) was arrested on 06th April 2018. His statement was recorded under Section 67 of NDPS Act. Statement of Harshad Gawde (accused No.5) was recorded under Section 67 of NDPS Act. He was arrested on 09th April 2018. On completing investigation, complaint was filed before the Special Judge under the NDPS Act on 24th August 2018. The proceedings are pending before the Special Judge under the NDPS Act vide NDPS Special Case No. 170 of 2018.

3. Accused No.3 Anup Gupta was granted bail by the Special Court vide order dated 12th June 2018. The application for bail preferred by the applicant Shashikant Prabhu was rejected by Ld. Special Judge by order dated

01st December 2018. The application for bail preferred by applicant Harshad Gawde was rejected by Ld. Special Judge by order dated 23rd October 2018.

4 Learned Advocate for Applicant in bail application No.198 of 2019 submitted that the applicant has been falsely implicated in this case. There is no legally admissible evidence to show his involvement in the crime. There is no recovery of narcotics drugs from him. The case of the prosecution is based on the statements of applicant and the co-accused recorded under Section 67 of the NDPS Act, which is not admissible in evidence. Statement was retracted. There is no corroborative evidence to establish the involvement of the applicant except statement under Section 67 of the NDPS Act. There is no other evidence against him. Even after thorough investigation the respondent has failed to find any nexus between applicant and other accused. There are no bank transfers or money transactions between applicant and the other accused. No evidence is found against the applicant to corroborate his own retracted statements and role assigned to him by the co-accused. The statements under Section 67 are not admissible in evidence and the same cannot be used as confession against the applicant. Co-accused have also retracted the statements. There is no independent evidence to substantiate link of the applicant in the crime.

5 The respondents have opposed the application for bail. Affidavit on behalf of the respondent is on record. Learned counsel for the respondent submitted that, the offence is of serious in nature. The involvement of the applicant is established during the course of investigation. The applicant was actively involved in transaction of narcotics drugs with accused No.2 and accused No.5. He was part of a drug syndicate operated by co-accused. He played pivotal role in distribution of drugs to the consumer. In his statement under Section 67 of the NDPS Act recorded on 06th April 2018, the applicant has maintained that he was working for accused No.2 since September 2017 and his primary job was to sell "Charas" also known as Hashish to various users. It is submitted that accused No.2 used to give Hashish to accused No.5 to make packets of 10 grams each and the applicant used to sell the best quality "Charas". The applicant has admitted that he used to sell drugs worth Rs. 80,000/- to various users. There is call data record which shows that applicant was in touch with accused No.2 and they had exchanged about 30 calls in span of 2.5 months. The statement of accused Nos.2 and 5 shows involvement of applicant. The applicant and the co-accused have entered into conspiracy and abetted each other to procure, store, sell, export and transportation of narcotic drugs and committed the alleged offences. The effect of statement under Section 67 will be looked into at the appropriate stage. Other than the statement under Section 67 of the NDPS Act, there is

evidence showing involvement of the applicant.

6. Learned Advocate for the applicant in Bail Application No.1617 of 2019 submitted that there is no evidence against the applicant. There is no independent evidence against the applicant. There is no recovery of narcotic drugs from the applicant. The statement under Section 67 of the NDPS Act is inadmissible in evidence. The prosecution is relying on the bank statements and other documents to show the involvement of the applicant in the alleged transactions. The applicant was working with accused No.2. Hence, the bank transactions cannot be considered as incriminating evidence to show the involvement of the applicant. There is nothing on record to establish that the amount reflected in the bank statements was derived from narcotic drugs transactions. The applicant has no role to play in the recovery. There is nothing on record to establish that the applicant was involved with contraband which is recovered from the co-accused on 14th March 2018. The applicant is in custody from 09th April 2018. Thus, for a period of about 32 months the applicant is in custody.

7 The respondents have opposed the application by filing an affidavit-in-reply. Learned advocate for the respondent submitted that the offence is of serious in nature. The applicant is an integral part of a drug syndicate which was primarily operated by accused No.1 and accused No.2. In

his statement, the applicant has admitted that he was manager of accused No.2 handling his drugs business. The statement of accused No.2 and 4 implicated him. The accused No.2 had opened establishment for the purpose of turning black money collected from drugs trade to white money. The applicant has admitted that he used to make packets of 10 grams. Accused No.4 used to sell the drugs in the market. On instructions of accused No.2 applicant used to deposit money in different bank accounts. He had deposited money in various bank accounts. The applicant and the other accused have entered in the criminal conspiracy and abetted each other to procure, store, sell, export and transportation of narcotic drugs. Other than the statement under Section 67 of NDPS Act, there is independent evidence against the applicant showing his involvement in the crime. The document relating to bank transactions is incriminating evidence against the applicant. Hence, bail may not be granted to the applicant.

8 Undisputedly, information was received by the intelligence Officer on 13th March 2018 which was reduced in writing. Information was relating to visit of accused No.1 at Infinity Mall with Hashish. Information also referred to visit of accused No.2 at the spot to accept delivery of contraband. Pursuant to the receipt of information, the respondent arranged team for conducting raid. Accused No.1, 2 and 3 were arrested. Contraband was

recovered from the bag which was found to be containing Hashish. Thus, the information did not refer to involvement of the applicants in aforesaid transaction. The respondents are relying upon the statement of accused No.2 which was recorded during the course of investigation after recovery of the narcotics drugs. In the said statements the co-accused i.e. accused No.2 has stated that applicants were party to the transactions relating to drugs business conducted by him. It is pertinent to note that, there was no cogent evidence to establish that the applicants had any point of time transported, sold, delivered the drugs at the instance of accused no.2. The prosecution is relying upon the call data record to show the link of accused No.4 with accused No.2. The prosecution is relying upon the bank transaction to establish link of accused No.5 with accused No.2. Bank transaction also referred to the depositing the amount into account of other persons. The accused No.2 himself has stated that the applicants were working with him. Merely on account of call exchanged between accused No.4 and accused No.2, no inference could be drawn, showing his involvement in the crime. The bank transactions relied upon by the prosecution to show the involvement of accused No.5 would not lead to inference of his involvement in the crime. Prima facie, there is nothing to indicate that the amount was relating to sell or procurement of drug. No other incriminating evidence to show involvement of the applicants is on record. There is no recovery from the applicants. Accused

No.5 was working as manager with accused No.2 as stated by him show assuming that bank transaction prima facie, it may not lead to the inference of commission of crime. The statements under Section 67 appear to have been retracted. Sans statements of the applicant and the co-accused which were recorded under section 67 of the NDPS Act, apparently, there is no cogent evidence against the applicants to show their involvement in the crime. Learned Advocates for both the applicants have heavily relied upon the decision of the Apex Court in the case of **Tofan Singh Vs. State of Tamil Nadu** delivered in Criminal Appeal No. 152 of 2013. In the said decision the majority opinion is as follows:-

“155. We answer the reference by stating:

(i) 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 provision of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) 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.” .

9 Thus, the Apex Court has held that the statement under Section 67 of the NDPS Act cannot be relied upon. In any case, there is no corroborative evidence to substantiate the averment in the statements of the

accused. Hence, the embargo under Section 37 of the NDPS Act would not cause impediment for granting bail to the applicants. Hence, the following order :-

ORDER

- i) Bail Application Nos. 198 of 2019 & 1617 of 2019 are allowed.
- ii) The applicants are directed to be released on bail in connection with NDPS Special Case No.170 of 2018 registered with Narcotics Control Bureau, Mumbai on executing P.R. bond in the sum of Rs.30,000/- each with one or more sureties in the like amount;
- iii) The applicants shall report to Narcotics Control Bureau, Mumbai, once in a month on first Saturday of the month between 11.00 a.m. to 1.00 p.m. till further orders;
- iv) Applications stand disposed of accordingly.

10. It is clarified that the observations made in this order are only for considering the applications for bail and the trial Court shall not be influenced by the same during the trial.

11. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(PRAKASH D. NAIK, J.)