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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 10.03.2021

Pronounced on: 18.03.2021

+ BAIL APPLN. 4005/2020

JITENDER BHATI

..... Petitioner

Through: Mr.Yogesh Saxena, Advocate

Versus

NARCOTICS CONTROL BUREAU

..... Respondent

**Through: Mr. Rajesh Manchanda, Standing
counsel for NCB with Mr. Rajat
Manchanda, Advocate**

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. Petitioner has been accused of having committed offences under Sections 22(C), 23(C) & 29 NDPS Act and in this regard, a complaint case No. SC/110/2020, titled as “*NCB Vs. Jitender Bhati & Anr.*” has been filed before the Court of learned Special Judge. He is said to be in judicial custody since 11.10.2019.

2. The crux of the present case is that on 11.09.2019, on the basis of secret information received, a team of NCB/DZU-I was constituted and reached DHL Express Ltd, Rama Road, Kirti Nagar, New Delhi and

conducted search and seizure proceedings in the presence of independent witness with regard to a parcel bearing AWB No. 1427173425 and recovered 150 gms of *Amphetamine* as per field testing kit. The recovered substance was seized under the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985. During the investigation, petitioner- *Jitender Bhati* was served with the notice under Section 67 of NDPS Act and his voluntary statement was recorded on 11.10.2019. Besides petitioner's statement, there is statement of co-accused Dhruv Kulbe in which he has stated that every 2-3 days, he used to receive parcels of foreigners on the ID of Jitender Bhati and he had warned him not to do so. This witness- Dhruv Kulbe has also stated that their agency is not authorized to accept international parcels but Jitender Bhati used to accept these parcels. Similar is the version of Shyam Lal Bhati who has stated that on the asking of Jitender Bhati, he used to accept international parcels from African nationals and used to send it to Dhruv Kulbe.

3. Consequent upon recovery of 150 gms of Amphetamine and after recording petitioner's statement under Section 67 of NDPS Act on 11.10.2019, there were reasons to believe that he had committed offence under Sections 22/29 NDPS Act, therefore, petitioner was arrested on

11.10.2019.

4. The learned trial court, after hearing arguments advanced by both the sides, dismissed petitioner's bail application vide impugned order dated 07.11.2020 while holding as under:-

“The IDs of present accused is used in sending the alleged parcel concealing the contraband. The statement of Dhruv Kulbe categorically suggest that accused Jitender Bhati used to send the parcels of the co-accused on his own ID number of times and in this regard, he has also warned the accused. From the record, prima facie case is clearly made out against the present accused and the charges have already been framed. There is recovery of commercial contraband thus definite bar under Section 37 NDPS Act though the contraband belongs to co-accused Monye Alexander however at this stage, it cannot be inferred that present accused do not have the knowledge about the concealment of contraband at this stage. There are no reasonable grounds for believing that accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. In present facts and circumstances, I don not find any ground to release the applicant/accused Jitender Bhati on bail. Hence the present application is

dismissed.”

5. The present petition has been filed by the petitioner on the ground that he is innocent and has been falsely implicated in this case.

6. At the hearing, learned counsel for petitioner assailed the impugned order on the ground that the learned trial court has failed to take into consideration that the day on which parcel containing contraband was booked i.e. 09./10.09.2019 by Shyam Bhati, petitioner was on leave and his identification documents lying in the office have been misused by someone. It is further submitted that the parcel was booked by Monte Alexander, who was arrested by NCB on 14.10.2019 and apart from retracted confessional statement of petitioner, there is no other evidence on record to show that petitioner has committed offence under the NDPS Act. Since petitioner had not booked the parcel nor received it and also it was not in his knowledge that parcel contained contraband substance, he cannot be prosecuted for the offences under the NDPS Act. In support of petitioner's case, reliance is placed upon decision of Hon'ble Supreme Court in. ***Tofan Singh Vs. State of Tamil Nadu 2020 SCC OnLine SC 882*** and decisions of a Coordinate Bench of this Court in *Bail Application Nos. 2347/2017 & 505/2018*, titled as ***Ikechukwu Vs. Chukvubuikem Stanley & Anr. Vs. Narcotic Control Bureau***. Reliance is also placed upon decision of this Court in ***Kamaljit BAIL APPLN. 4005/2020***

Singh Vs. H.K.Pandey 2005 (3) JCC Narcotics 220.

7. On the other hand, learned counsel Standing Counsel for NCB supported the impugned order dismissing petitioner's bail application and submitted that it is well merited and is not required to be interfered with. Learned Standing Counsel submitted that huge commercial quantity has been recovered in this case and there is an embargo of Section 37 NDPS Act and petitioner fails the test of both requirements stipulated under the aforesaid Section and, therefore, this petition deserves rejection.

8. Learned Standing Counsel submitted that the plea of presumption under Section 35 of NDPS Act cannot be taken into consideration at this stage and has to be tested at trial. He further submitted that since petitioner was actively involved in the commission of offence of trafficking of psychotropic substance and charge under Section 29 of NDPS Act has already been framed and that petitioner fails to fulfil the twin conditions prescribed under Section 37 of NDPS Act, petitioner does not deserve concession of bail.

9. I have heard counsel representing both the sides and gone through the material placed on record and decisions relied upon.

10. The foremost plea taken by petitioner is that at the first available

opportunity he had retracted from the confessional statement recorded under Section 67 of NDPS Act.

11. Recently, the Hon'ble Supreme Court, by majority view while answering to a reference with regard to the evidentiary value of Section 67 of NDPS Act in ***Tofan Singh (Supra)*** held *"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"*. Reciting a dissenting view in ***Tofan Singh (Supra)***, Hon'ble Ms. Justice Indira Banerjee observed that *"she was unable to agree that a statement recorded under Section 67 of the NDPS Act cannot be used against an accused offender in the trial of an offence under the NDPS Act"*.

12. Pertinently, besides confessional statement recorded under Section 67 of NDPS Act, no other evidence is available on record to show petitioner's involvement in the offence in question. No recovery has been made at the instance of petitioner. Since petitioner has retracted from his confessional statement so recorded, its' worth has be proved at trial by the prosecution.

13. The next plea taken by petitioner is that he fulfils the conditions stipulated under Section 37 of NDPS Act. The provisions of Section 37 of NDPS Act read as under:-

“37. Offences to be cognizable and non-bailable—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) —

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]”

14. In the present case, no recovery has been made from petitioner. Admittedly, on the day his ID was used, he was on leave and no other similar case is pending against him. No material such as call detail record etc. has been placed by the prosecution to establish that petitioner was in contact with the main accused, namely, Monte Alexander. Accordingly, this Court has a reason to believe that petitioner is not likely to commit the offence if released on bail. Charge under Section 29 NDPS Act has already

been framed by the trial court against the petitioner and thereby, prosecution has an opportunity to prove its case during trial. Hence, requirements under Section 37 of NDPS Act are fulfilled.

15. The plea of presumption under Section 35 of NDPS Act has also been raised by respondent/ NCB. The provisions of aforesaid Section read as under:-

“35. Presumption of culpable mental state—

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Explanation—In this section “culpable mental state” includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

16. In ***Noor Aga Vs. State of Punjab (2010) 3 SCC (Cri) 748***, while dealing with a case under the NDPS Act, the Hon’ble Supreme Court has held as under:-

“58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”

17. With the afore-noted observations, the Hon’ble Supreme Court in **Noor Aga (Supra)** held that the provisions of Sections 35 & 54 of the Act are not ultra vires the Constitution of India, however, procedural requirements laid down therein are required to be strictly complied with.

Applying the dictum of **Noor Aga (Supra)** to the facts of this case, I find

that the burden is on the prosecution to prove that accused is guilty and also on the accused to prove his innocence and this recourse can only be taken during trial. However, keeping in view the majority view taken by the Hon'ble Supreme Court in *Tofan Singh (Supra)*, coupled with the fact that petitioner fulfils the conditions stipulated in Section 37 NDPS Act, I am inclined to release petitioner on bail.

18. Accordingly, without commenting on the merits of the case, petitioner is directed to be released forthwith on his furnishing personal bond in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of trial court/duty magistrate subject to the condition that:-

- (i) Petitioner shall not directly or indirectly tamper with the evidence or influence the witnesses of the case;
- (ii) Petitioner shall provide his mobile number to the IO and ensure that he is reachable.

19. The petition is accordingly allowed and disposed of.

20. A copy of this order be transmitted to the Jail Superintendent concerned and trial court for information and necessary compliance.

(SURESH KUMAR KAIT)
JUDGE

MARCH 18, 2021

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