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

**Reserved on : 26.04.2022**

**Pronounced on: 05.05.2022**

+ **BAIL APPLN. 994/2022 & CRL.M.A. 5749/2022**

**MD IRSHAD**

..... Petitioner

Through: Mr. Rahul Sharma, Mr. Prabhash, Ms. Abhilasha Sehrawat, Mr. Kartik Malhotra, Mr. Akshat Maheshwari, Mr. Rishabh Sharma, Ms. Nishtha Khurana, Advocates

versus

**STATE NCT OF DELHI**

..... Respondent

Through: Mr. Hirein Sharma, Ld. APP  
SI Arvind Kumar, Spl. Staff, East District, Delhi

**CORAM:**

**HON'BLE MR JUSTICE JASMEET SINGH**

**J U D G M E N T**

**JASMEET SINGH, J**

1. This Application has been preferred by the applicant under section 438 of the Cr.P.C. seeking grant of anticipatory bail in FIR No. 234/2022 registered at PS Kalyan Puri u/s 21 NDPS Act. The anticipatory bail of the applicant has been dismissed by the Special Judge, NDPS, East, Karkardooma Courts, Delhi on 21.02.2022.
2. The brief facts of the case are as under:
  - a) On 30.01.2022, ASI Pramod Singh, posted at Special Staff East District, received an information that a person, who procures the contraband 'smack' from Badaun/Bareilly, Uttar Pradesh and

supplies it in parts of Delhi, would come near The Mother Mary Public School, Ghazipur Road, in the area of PS Kalyan Puri. The information was shared with other officers who decided to conduct a raid.

- b) The team laid a trap on Ghazipur Road, near Gate of the Mother Mary Public School, Kalyan Puri, Delhi and at about 9.10pm a man a bag on his back emerged on the spot who was pointed out by the informer, who later identified him as Mohd. Akleem. Mohd. Akleem was waiting at the gate when he was nabbed by the staff. On enquiry he stated his name and address as Mohd. Akleem S/o Shakil Ahmed R/o Vill-Bhasundra. Notice under section 50 Narcotic Drugs Psychotropic Substances Act (hereinafter '*NDPS Act*') were served to all apprehended persons.
- c) Interrogation was conducted of Mohd. Akleem after his arrest and he disclosed that he used to supply 'smack' to Applicant Irshad@Neta and that the Applicant is the resident of the same village as Mohd. Akleem. It is on this statement and during the course of the investigation that a notice u/s 67 NDPS Act was served to the Applicant, Md. Irshad to join the investigation.
- d) The Special Judge, NDPS, East Karkardooma Courts dismissed the anticipatory bail application of the Applicant on 21.02.2022 observing the following:

*“Keeping in view the fact that the recovery of smack from Mohd. Akleem is 300 grams which is commercial quantity, bar under section 37 of the NDPC Act regarding bail is attracted. Name of the applicant/accused Mohd. Irshad has been disclosed by Mohd. Akleem. Investigation of the*

***case is pending. Source and supply lines of the recovered contraband are to be identified.***

*In these facts and circumstances, this is not a fit case for grant of pre-arrest bail. Accordingly, the application for grant of pre-arrest bail of applicant/accused Mohd. Irshad is dismissed.”*

3. The Applicant had filed this application apprehending arrest in a false case of the complainant filed against the Applicant. He further stated that he is a person of repute and enjoys an enviable reputation among the society and has been falsely implicated.
4. The Ld. Counsel for the Applicant has relied upon the following case laws for supporting his application:
  - a) On the Supreme Court judgment in CrI. Appl. No. 949/2018 dated 31.07.2018, ***Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence***, wherein the court has observed the following:

*“10. Even if we are to proceed on the premise that such statement under Section 67 of the NDPS Act may amount to confession, in our view, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. It is noteworthy that unlike Section 15 of Terrorist and Disruptive Activities Act, 1987 which specifically makes confession of a co-accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co-accused. The matter therefore has to be seen in the light of the law laid down by this Court as regards general application of a confession of a co-accused as against other accused.*

*14....On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused...”*

- b) Secondly, he has relied on the judgment of the Rajasthan High Court, ***Kishan Singh v. State of Rajasthan*** [1995 CriLJ 3947] dated 19.01.1995 wherein the High Court observed the following:

*“6....Section 29 of the Act proclaims that whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under the Act shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in Section 116 of the IPC, be punishable with the punishment provided for the offence. Thus, the abetment may take place either by instigation or conspiracy or by intentional act. But for the proof of abetment or conspiracy, there must be joining together two or more persons in the conspiracy and an act of illegal omission or commission of an offence must take place in pursuance thereof. Therefore, the actual complicity which preceded the actual commission of an offence or through some word or conduct which instigated the commission of the offence should be prima facie shown. It is true that formation of conspiracy can be inferred from circumstantial evidence or by conduct and act of parties because affirmative evidence is not always possible. **But for establishing the charge for abetment and criminal conspiracy Under Section 29 of the Act; the prosecution must adduce some independent, corroborative or affirmative legal evidence.”***

- c) Thirdly, in the judgment of High Court of Judicature at Bombay, **Abdul Mohammed Shaikh v. UOI & Anr.** [Crl. B.Appl. No. 102/2020], the court has observed the following:

*“16. In the light of the observation of the Apex Court in the case of Tofan Singh (supra) the submissions of learned counsel for the respondent cannot be accepted. In the case of Muhammed Asarudheen Vs. State of Kerala decided by High Court of Kerala vide order dated 14.01.2021, it was observed that the accused had made repeated applications for bail. The contention was raised that Section 50 was not complied and the statement under Section 67 is not admissible in evidence. The Kerala High Court has observed that the confessional statement can be used as corroborative piece of evidence, provided that there are other materials available. The facts of this case indicate that there was a recovery of contraband. There is no other cogent material to corroborate statement under Section 67 of NDPS Act in the present case. The observation that confession statement can be used as corroborative piece of evidence is contrary to ratio of the aforesaid decision and well established principles of law....”*

- d) The Ld. Counsel for the Applicant also relied upon the judgment of High Court of Allahabad, **Rajveer Singh v. Union of India** [MANU/UP/1517/2021] and judgments of High Court of Punjab and Haryana at Chandigarh in **Amrik Singh v. State of Punjab**, CRM-M No. 48484/2017 dated 15.01.2018; **Laddi Singh @ Charna v. State of Punjab**, CM-M No. 1607/2019, dated 07.02.2019; and **Satish v. State of Haryana**, CRM-M No. 3240/2017 dated 17.02.2017.

5. Additionally, Mr. Rahul Sharma, Ld. Counsel for the Applicant states he is not the seller nor was he caught with the drugs. The applicant has

no past antecedent and the offence as alleged, would be his first offence.

6. Opposing the bail, the Ld. APP, Mr. Hirein Sharma has placed reliance on Section 29 of the NDPS Act, which according to him is invoked in the present case. Section 29 of the NDPS Act states the following:

***“29. Punishment for abetment and criminal conspiracy***

*(1) Whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.*

*(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India, abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which-*

*(a) would constitute an offence if committed within India; or  
(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India.”*

7. He states that the applicant has been named by the arrested accused Md. Akleem, whose confession discloses a link between the accused and the applicant, where Md. Akleem is stated to have supplied Smack to the Applicant. The Status Report discloses that the Applicant and the arrested accused belong to the same village. Furthermore, the report

states that the sample exhibits were drawn from the illegal smack and on 17.02.2022, the same has been sent to FSL, Rohini, Delhi and final opinion/result of the same is awaited.

8. Additionally, the Status Report opposes the anticipatory bail on the ground that, *“Activities of such drug cartels are highly alarming and undesirable for the society at large as they are spreading the poison of drugs in the society leading to the serious health hazards to the public”* and therefore, the Applicant/petitioner is to be interrogated at length to unearth the chain of supply of smack particularly in Delhi/NCR.
9. I have heard the Ld. Counsels for the Applicant and the State.

#### **ANALYSIS:-**

10. Any application for bail or anticipatory bail for offences under the NDPS Act would have to be met with the rigours of section 37 of the NDPS Act.
11. In my analysis, this court will have to determine whether the Applicant meets the pre-conditions of Section 37 of the NDPS Act for grant of anticipatory bail.
12. The Supreme Court in *Union of India v. Rattan Mallik*<sup>1</sup> while considering Section 37 of the NDPS Act for grant of bail, has observed the following:

*“12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed*

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<sup>1</sup> (2009) 2 SCC 624.

*offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on “reasonable grounds”.*

*13. The expression “reasonable grounds” has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide Union of India v. Shiv Shanker Kesari [(2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505] ). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.*

*14. We may, however, hasten to add that while considering*

*an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of “not guilty”. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.”*

13. In the present case, it is important to note that except the confessional statement of the arrested accused, Md. Akleem, there is no other evidence. The gist of the judgments relied upon by the Applicant state as under:
- a) It has been held in **Surinder Kumar Khanna** (Supra) that confessional statement cannot be the only substantive evidence and it is only to assist the court.
  - b) In **Kishan Singh** (Supra), it is observed that to make out a case against the applicant/petitioner the prosecutor must ‘*adduce some independent, corroborative or affirmative legal evidence*’.
  - c) In **Abdul Mohammed Shaikh** (Supra), it was concluded that confessional statement can be used as corroborative statement when there are other evidences available.

14. Keeping the above judgements in mind, there is no other independent, corroborative or affirmative legal evidence against the Applicant except the confessional statement of the arrested accused, Md. Akleem. Additionally, the applicant does not have any past antecedents. This court has no reason to believe, *prima facie*, that the accused is part of a larger conspiracy.
15. This court is also of the view that for the reasons stated above there are reasonable grounds that the accused is not guilty of the offence as alleged. Further, I am also of the view that the applicant is not likely to commit an offence under the Act while on bail. Additionally, the APP has been given an opportunity to oppose the application for bail.
16. This court, therefore, in view of hereinabove, is inclined to grant anticipatory bail to the Applicant herein, subject to the following conditions:
  - A) The Applicant in the event of his arrest in FIR no. 234/2022 registered at Kalyan Puri dated 31.01.2022 shall be released on bail subject to furnishing a personal bond in the sum of Rs. 20,000/- to the satisfaction of the Investigating Officer concerned.
  - B) The Applicant is directed to deposit his passport with the Investigating Officer.
  - C) The Applicant shall cooperate and join investigation as and when directed by the Investigating Officer.
  - D) The Memo of Parties show that the Applicant is residing at R/o Village Bhasundhra, Post Rijola, Buduan, Uttar Pradesh – 243641.

In case of any change of address, the Applicant is directed to inform the same to the Investigating Officer.

E) The Applicant will not cause hindrance to the investigation in the present case.

F) The Applicant shall not, directly, or indirectly, tamper with evidence or try to influence the witnesses in any manner.

17. It is to be noted that observations made in this order are only for grant of anticipatory bail and not on merits of this case.

18. The application stands disposed off along with all pending applications, if any.

**MAY 05, 2022 / 'ms'**

**JASMEET SINGH, J**



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