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

BAIL APPLICATION NO.4457 OF 2021

Kurban Ali S/o Daud Ali

...Applicant

vs.

Intelligence Officer,
Narcotics Control Bureau & Anr.

...Respondents

Mr. Raunak Naik with Mr. Advait Tamhankar i/b Ms. Lochan
Chandka for the Applicant.

Mr. Shriram Shirsat for Respondent No.1.

Mr. H. J. Dedhia APP for Respondent No.2.

CORAM : S. M. MODAK, J.

DATED : 5TH JULY 2023

P. C. :

1. Heard learned Advocate Mr. Naik for the Applicant, learned
Advocate Mr. Shirshat for Respondent No.1 and learned APP Mr.
Dedhia for Respondent No.2.

2. On 21st June 2023, I have heard both the sides and today, it
is again kept further for hearing. Learned Advocate Mr. Shirshat for
Respondent No.1 argued on the point of corroborative materials. He
based his submission on the following two grounds :

- (i) Even though particular accused is not found with the contraband, still his bail can be refused, if there is evidence about conspiracy and his involvement.
- (ii) Statement recorded under section 67 of the NDPS Act cannot be brushed aside totally, but still the Court can look into the corroborative materials.

3. As noted on the last date, submission of the Applicant is that except call details report, there are no other materials showing involvement of the Applicant. Learned Advocate Mr.Shirshat has invited my attention to the following materials :

- (a) Information recorded on 21st August 2019, about possible arrival of suspect Mohammed Haider-accused No.1 and for purpose of giving delivery of “Charas” to another suspect Sharfudeen Ansari, who is accused No.2 (page 108).
- (b) Statement under section 67 of the NDPS Act recorded of accused No.1-Mohammed Haider on 21st August 2019, (page 120).
- (c) The present Applicant called Mohammed Haider to Ajmer and present Applicant handed over a bag containing “Charas” to

Mohammed Haider and he sat in bus for traveling to Mumbai.

- (d) There is reference of mobile No.**70142 70542**. In that statement some mobile number was found to be of one Mohammed Asfhaque. When inquired, Mohammed Asfhaque disclosed that he has lost his sim card one year ago, however, during further inquiry he could not produce copy of police report and identity proof (para 37 on page 97 of reply). (e) When the correspondence is made with Airtel company, it was found that Cell No.70142 70542 does not belong to Airtel, (page 304).
- (f) Cell number **88983 24322** stands in the name of present Applicant as is informed by the Airtel company (page 304).
- (g) Call details report about this cell number and cell number of accused Nos.1 and 2.
- (h) There is statement of present Applicant recorded on 12/10/2020 (page 600) and 13/10/2020 (page 602).

4. It is submitted by Mr. Shirshat that all these Applicants were running drug cartel and even though the Applicant was not found in possession of the contraband, above materials are sufficient to show

his complicity. Mr. Shirshat relied upon the following judgments in order to buttress his submission as to how the Court have dealt with similar situation.

5. Union of India Vs. Md. Nawaz Khan¹, wherein the Hon'ble Supreme Court has canceled bail granted by the High Court, and the circumstances against the Respondent are narrated in para 30 of the said judgment. Circumstance No.2 deals with CDR analysis showing that the Respondent was in regular touch with the other accused persons. Learned Advocate for the Applicant tried to differentiate this judgment for the reason that in the said judgment, the Respondent was found traveling with co-accused and in that car contraband was found.

6. Manik Das Vs The Narcotics Control Bureau², wherein the High Court at Calcutta has turned the objection taken about production of certificate under section 65-B of the Evidence Act. This objection can be taken at the time of trial. The bail was refused and the circumstance of analysis of CDR were considered in order to show complicity. In that case, mobile number was used by the Applicant

1 Cri.Appeal 1043/2021 dt. 22/09/2021 SC

2 CRM No.6135/2021 dt. 28/01/2022 High Court of Calcutta

therein.

7. Tarachand vs. State of Himachal Pradesh³, therein also the evidence of Call Details Report was there. It was considered as one of the circumstance in order to prove conspiracy under section 29 of the NDPS Act. It was observed that the burden lies on the accused to repel the said circumstance [para 9(b)].

8. Abdel Basit Parihar Vs. Union of India⁴, Contention was raised that there was no recovery at the instance of the Applicant. Mr. Shirshat explained this circumstance by contending that in a given case dealer may have given contraband to another person and that is how, it is passed on from one person to another person and in such eventuality the dealer cannot go scott free just because he was not found in possession of the contraband. Learned Advocate for the Applicant tried to distinguish the facts with those case from present facts for the reason that in case cited, there was evidence that the Applicant was to receive amount through google pay.

9. Showik Chakraborty Vs. Union of India & Anr.⁵, this Court has refused to lift ban under section 37 of the NDPS Act just because the commercial quantity of the contraband was recovered from the co-

3 Cr.MP(M) No.1526/2020 dt. 22/09/2020 High Court of Himachal Pradesh

4 Cri.Bail Application St.No.2184/2020 dt.7/10/2020 High Court of Bombay

5 Cri.Bail Application St.No.2387/2020 dt.7/10/2020 High Court of Bombay

accused and not from the Applicant (para 26).

10. Mohammed Aun Javed Haider Sayed Vs. Union of India⁶, this Court has considered various circumstances and refused to grant bail. Certificate under Section 65B of the Evidence Act was not produced. In that case there was no recovery but still the Court has not granted bail considering presence of other evidence about conspiracy (para 6). The Hon'ble Supreme Court has also refused to grant bail in the said matter.

11. Sambhav Parakh Vs. State of Chattisgarh and Ors.⁷ Bail was refused. There were statements recorded under section 67 of the NDPS Act, and other accused persons were named therein. As they were part of a bigger drug cartel/mafia, their act was not considered in isolation.

12. Muhammed Asardudheen Vs. State of Kerala & Anr.⁸, wherein the observations in the case of Thofan Singh Vs. State of Tamil Nadu was considered (para 5). It was observed that said confessional statement can be used as corroborative piece of evidence provided that there are other materials available (para 9).

6 Cri.Bail Application No.3041/2021 dt. 15/10/2021 High Court of Bombay

7 Petition for SLA (Cri.) No.1775/2022 dt. 29/08/2022 SC

8 Bail Application No.7752/2020 dt. 14/01/2021 High Court of Kerala

13. Arjun Kumar Vs. Union of India⁹, wherein the observations in case of Tofan Singh are also considered. However, this confessional statement can definitely be used as corroborative piece of evidence provided there are other materials available (para 11).

14. State of Kerala & Ors. Vs. Rajesh & Ors.¹⁰, wherein the Hon'ble Supreme Court has canceled the order of bail granted by the High Court. It is for the reason that the High Court has failed to arrive at satisfaction as to how bar under section 37 of the NDPS Act is not applicable.

15. Narcotics Control Bureau Vs. Mohit Aggarwal¹¹, there is reference of the observations in the case of Tofan Singh in paragraph 16. Apart from the confessions, there was disclosure made by the Respondent and has intimated NCB team to arrive at godown of the co-accused and finally it has resulted into recovery of large amount of psychotropic substance (para 16).

16. As against this learned Advocate for the Applicant relied upon the following judgments :

(a) Shaikh Ashpak s/o Shaikh Abdul Vs. Union of India & Ors.¹²,

9 Cri. Misc. Bail Application No.44778/2020 dt.12/04/2022 High Court of Allahabad

10 (2020) 12 SCC 122

11 Petition for Special Leave to Appeal (Cri.) No.6128-29/2021 dt.19/07/2022 SC

12 Bail Application No.723/2021 dt.19/09/2022 High Court of Bombay

wherein learned Single Judge of this Court after considering case in *Tofan Singh* has granted bail to the Applicant as there was only material of Call Details Report (para 7)

(b) Iran Khan vs. The State of Maharashtra¹³, wherein learned Single Judge of this Court was pleased to discharge the Applicant and only circumstance was the statement of co-accused and telephone calls made by co-accused to the Applicant.

(c) Ranjan Shaam Mawar Vs. State of Maharashtra¹⁴, wherein only circumstance was about 1067 and 252 calls from two mobiles and there was no recovery of the contraband.

(d) State of (NCB) Bengaluru Vs. Pallulabid Ahmad Arimutta & Anr.¹⁵, wherein there is discussion in para 11 about observations in the case of *Tofan Singh Vs. State of Tamil Nadu*. CDRs details of some of the accused were to be considered at the stage of trial (para 11).

Consideration

17. So it is true that even after pronouncement in *Tofan Singh* (supra) judgment, various Courts have occasion to deal with these

13 CRA No.11/2007 dt. 28/03/2007 High Court of Bombay

14 Bail Application No.3880/2021 dt. 11/10/2022 High Court of Bombay

15 2022 SCC Online SC 47

observations vis-à-vis facts of particular case. No doubt it is true that just because there is no recovery of contraband and accused claims bail as a matter of right, it cannot be accepted. Ultimately, the Court has to see what is the material to show his complicity as a conspirator.

18. In this case, after considering the observations in *Tofan Singh*, we cannot consider statement given by accused No.1 so also we cannot consider statement given by present Applicant, in isolation.

19. Learned Advocate for the Applicant invited my attention to the a house search panchnama conducted on 22nd August 2019, belonging to the present Applicant, (page 69). His emphasis is that nothing was found. It is true that his wife has disclosed both the cell numbers i.e. 70142 70542 and 88983 24222. As stated above, cell number 88983 24222 stands in the name of present Applicant whereas another cell number was not issued by Airtel company (page 304). Admittedly, the prosecution is not relying upon the CDR in respect of Cell number 88983 24222. They are relying upon CDRs pertaining to cell number 70142 70542. The mobile containing this sim card was not seized from the present Applicant, except reference given by wife of the Applicant about this cell number, no

material is pointed out to show connection of this cell number with the present Applicant. There is reference of this cell number in the statement of accused No.1 but it cannot be considered. So it is difficult to accept these call details report so as to warrant detention of this Applicant.

20. For the above reasons, I do not think that rigors under Section 37 of the NDPS Act cannot be made applicable. No antecedents are pointed out to me. The Applicant has made out a case for grant of bail. Hence, the following order is passed :

ORDER

- (a) The Applicant-Kurban Ali be released on bail in connection with File No.NCB/MZU/CR-27 of 2019, registered with NCB, Mumbai Zonal Unit, Mumbai for the offences punishable under Sections 8(C), 20(c), 28, 29 and 60(3) of the NDPS Act, on furnishing personal bond and surety bond of Rs.50,000/-.
- (b) The Applicant shall not threaten the prosecution witnesses or allure them in any manner.
- (c) The Applicant shall give attendance to the NCB, Mumbai Zonal Unit, Mumbai on every second and fourth Saturday of every

month from 10 am to 12 noon for one year.

(d) Needless to say, violating of the condition above will make the Applicant liable for cancellation of bail, after notice to the Applicant.

21. Application is disposed of accordingly.

22. These are my prima facie observations and the trial Court may not be influenced by that.

23. All the parties to act on an authenticated copy of this order.

[S. M. MODAK, J.]