

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPLICATION (ABA) NO.322/2023

Khusal @ Pappu s/o Ratiram Agade

..VS..

The State of Mah., thr.PSO PS Gondia (City), District Gondia.

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders

Court's or Judge's Order

.....
Shri R.M.Daga, Counsel for the Applicant.

Shri A.M.Kadukar, Counsel for the Non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 08/06/2023

PRONOUNCED ON : 13/06/2023

1. By this application, the applicant is seeking anticipatory bail in respect of Crime No.98/2023 registered with Gondia City Police Station, Gondia for offences punishable Sections 8(c), 20, and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. The applicant is apprehending his arrest at the hands of the police as crime is registered on the basis of report lodged by Police Inspector Dinesh Labde. As per the allegations, on 19.2.2023 the police officers received a secret information that the applicant has stored contraband articles (ganja) at the house of Rakeshsingh @ Banti Khatwa (Thakur) at Vajpayee Ward, Gautam Nagar, Gondia. Accordingly, the police officials conducted a raid at the premises of the house of said Rakeshsingh and found 33 kilograms ganja stored in 30

small bags. After following due process, the police have seized said ganja and arrested accused Rakeshsingh. During investigation, co-accused Rakeshsingh disclosed that the said contraband is owned by the applicant and kept at his house for sale. On the basis of confessional statement of co-accused Rakeshsingh, the applicant is also arraigned as an accused and, therefore, he is apprehending his arrest and filed this application for grant of bail in the event of his arrest.

3. As per the contentions of the applicant, except the confessional statement of co-accused Rakeshsingh, there is no other material against the applicant to show that the said seized article belongs to the applicant. Only on the basis of Call Detail Records (CDRs), the applicant cannot be implicated in the present case as no other incriminating is seized from the applicant. His custodial interrogation is not required and hence he be released on bail.

4. The said application is strongly opposed by learned Additional Public Prosecutor Shri A.M.Kadukar for the State on the ground that during the investigation, the investigation agency has collected CDRs of the applicant which show that during 14.2.2023 to 16.2.2023 the applicant travelled to Orissa State and returned to Gondia on 16.2.2023. The investigating

agency is also taking search of suspected accused Sushant Kumar Linka against whom an offence is already registered vide Crime No.104/2022 at Sasan Police Station, Sambalpur under the provisions of the NDPS Act. It is further contended by the investigating agency that the applicant and the suspected accused were in touch with each other and the applicant has brought the said ganja at Gondia. Moreover, the applicant is habitual offender as the similar type of crime is registered against him previously. If the applicant is released on anticipatory bail, there is every likelihood that he would commit the similar type of the offence and will tamper the prosecution evidence.

5. Heard learned counsel Shri R.M.Daga for the applicant. He submitted that the entire contraband is seized from the house of Rakeshsingh. The applicant is implicated only on the basis of confessional statement of the co-accused. Though the investigating officer has collected CDRs, the same are not sufficient to show the involvement of the applicant in the alleged offence. He submitted that in view of the judgment of the Honourable Apex Court in the case of **Tofan Singh vs. State of Tamil Nadu, reported in (2021)4 SCC 1** wherein as per majority decision, a confessional statement recorded under Section 67 of the NDPS Act has been held to be inadmissible in

the trial of an offence under the NDPS Act. In support of his contentions, he placed reliance on the decision of the Honourable Apex Court in the case of **Bharat Chaudhary vs. Union of India and Raja Chandrasekharan vs. The Intelligence Officer, Directorate of Revenue Intelligence, in Special Leave Petition Nos.5703 and 8919/2021** wherein it is held that in absence of any psychotropic substance found in the conscious possession of accused No.4, we are of opinion that mere reliance on the statements made by A1 to A3 under Section 67 of the NDPS is too tenuous a ground to sustain the impugned order dated 15.7.2021. It is held that despite the fact that in a recent judgment of this Court in the case of **Tofan Singh vs. State of Tamil Nadu** cited *supra* wherein the majority view is that a confessional statement is not admissible in evidence which has been followed in Criminal Appeal No.1273/2021 (Sanjeev Chandra Agarwal vs. Union of India). Accused No.4 has been dragged into the matter solely on the confessional statement and released him on bail. Learned counsel Shri R.M.Daga for the applicant further placed reliance on the decision of this Court in the case of **Abdul Mohammed Shaikh @ Abdul Thane vs. Union of India, in Criminal Bail Application No.273/2020** decided on 5.5.2021 wherein this Court has referred the judgment of **Tofan Singh vs. State of Tamil Nadu**

wherein it is held that whether statement recorded under Section 67 of the NDPS Act can be used as confessional statement in the trial for an offence under the NDPS Act. In paragraph No.59 of the said judgment, it is observed that the marginal note to Section 67 indicates that it refers only to the power to "call of information" etc. It is further held by this Court that the said statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement and the accused are released on bail. He further placed reliance on the decision of the Honourable Apex Court in the case of **State (By NCB) Bengaluru vs. Pallulabid Ahmad Arimutta and anr, reported in (2022)12 SCC 633** along with connected matters wherein also it has been held that in clear terms in **Tofan Singh vs. State of Tamil Nadu** that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at

the stage of trial. Lastly, he relied upon the decision of this court in the case of Firoz @ Aabu s/o Aziz Khan vs. The State of Mah., thr.PSO PS Sakkardara, Nagpur in Criminal Writ Petition No.255/2020 decided on 12.2.2021 wherein also this court by placing reliance on the judgment of Tofan Singh vs. State of Tamil Nadu cited supra quashed and set aside the FIR and discharged the accused.

6. Per contra, learned Additional Public Prosecutor Shri A.M.Kadukar for the State submitted that CDRs collected during the investigation sufficiently show that there was contact between the applicant and suspected co-accused Sushant Kumar Linka. Moreover, several offences are registered against the applicant including the offence under the provisions of the NDPS Act. Thus, the present applicant is a habitual offender and the application deserves to be rejected.

7. In view of the submissions made by learned counsel Shri R.M.Daga for the applicant, I have perused entire investigation papers. It reveals from the investigation papers that Gondia Police Received the secret information and they have conducted the raid at the premises of Rakeshsingh and seized the contraband article of 33 kilograms. During the enquiry with the arrested accused, involvement of the applicant

revealed. Besides, the confessional statement of the co-accused, the investigating officer also recorded statement of Rahul Omkarkar which shows that there was some connection between the applicant and the suspected co-accused Sushant Kumar Linka. During the investigation, the investigation officer also collected CDRs of the mobile phone of the applicant and reveals that there was repeated communication between the applicant and the suspected co-accused. The suspected co-accused is yet to be arrested.

8. As per the reply filed by the State, 63 offences are registered against the applicant. Besides the same, three offences are registered against the applicant under the provisions of the Indian Penal Code. It shows that there were criminal antecedents against the applicant.

9. Learned counsel Shri R.M.Daga for the applicant placed reliance on decision of the Honourable Apex Court in the case of **Bharat Chaudhary vs. Union of India** cited *supra* wherein the court was considering the bail application under Sections 439 of the Code of Criminal Procedure and 37 of the NDPS Act. In criminal Bail Application No.270/2023 also the application was filed under Section 439 of the Code of Criminal Procedure. There is no dispute that the Honourable Apex Court

in **Tofan Singh vs. State of Tamil Nadu** cited *surpa* has adjudicated the issue whether the statement recorded under Section 67 of the NDPS Act can be used as confessional statement in the trial for an offence under the NDPS Act and observed that it refers only to the power to call for information etc.. The issue regarding whether the applicant can take advantage of the decision of in the case of **Tofan Singh vs. State of Tamil Nadu** seeking anticipatory bail before the Honourable Apex Court in the case of **The State of Haryana vs. Samarth Kumar, reported in 2022 LiveLaw (SC) 622** wherein the Honourable Apex Court held that the respondent may be able to take advantage of the decision in the case of **Tofan Singh vs. State of Tamil Nadu**, perhaps at the time of arguing the regular bail application or at the time of final hearing after conclusion of the trial. To grant anticipatory bail in a case of this nature is not really warranted. In this cited case also the facts were that no recovery was effected from the accused and that they had been implicated only on the basis of the disclosure statement of the main accused and the Honourable Apex Court made the above observations and held that anticipatory bail in a case of this nature is not really warranted and the appeals filed by the State are allowed.

10. In view of the above observations by the

Honourable Apex Court, in the present case also, the applicant is implicated on the basis of disclosure statement and the CDRs. Learned counsel Shri R.M.Daga for the applicant placed reliance on the decision in the case of **Tofan Singh vs. State of Tamil Nadu** and relied upon several judgments wherein the court has accepted the submissions while considering regular bail. The Honourable Apex Court also held that the respondent may be able to take advantage of the said decisions perhaps at the time of arguing regular bail application or at the time of final hearing after conclusion of trial and accordingly rejected the application. There is no reason for this court to take a different view. In view of the observations of the Honourable Apex Court, the criminal bail application deserves to be rejected and the same is rejected.

The criminal application stands disposed of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!