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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 10th April 2023

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BAIL APPLN. 1409/2020 & CRL.M.A. 9051/2021

MANISH MOHAN

..... Petitioner

Through: Ms. Tanya Aggarwal, Advocate.

versus

I.O. NARCOTICS CONTROL BUREAU THROUGH COUNSEL

..... Respondent

Through: Mr. Raghav Bansal, Advocate.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition under section 439 of the Code of Criminal Procedure, 1973 ('Cr.P.C') read with section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'), the petitioner seeks regular bail in proceedings arising from complaint case bearing SC No. 81/2019 titled '*NCB vs. Gaurav Mehta & Ors*' under sections 21/23 and 29 of the NDPS Act pending before the learned Special Judge, Patiala House Courts, New Delhi.

2. The matter arises from a complaint bearing No. NCB/24/DZU/2018 filed by the Narcotics Control Bureau ('NCB') under sections 8(c), 21(c), 23 and 29 of the NDPS Act alleging that based on certain secret information, the petitioner and two co-accused persons, by name Gaurav Mehta and Bhasker Khatnani, were suspected of engaging in the sale and purchase of psychotropic tablets.

3. A brief conspectus of the allegations leading-up to the filing of the present bail petition is as follows :
 - 3.1 According to the NCB, on 16.08.2018, secret information was received by the Superintendent, NCB that certain parcels lying at the office of DHL Express Pvt. Ltd, Kirti Nagar, New Delhi ('DHL Office') contained commercial quantities of psychotropic tablets, which were being couriered by one Gaurav Mehta. Pursuant to this information, on 17.08.2018 at about 9:00 a.m. a team of NCB Officers went to the DHL Office and conducted search and seizure proceedings in relation to 02 parcels found there. The 02 parcels were both being shipped by one '*Desi Global E-mart*' in New Delhi to certain locations in the United State of America and Canada. The parcels seized contained pharmaceutical preparations which fall within the list of contraband in the Schedule to the NDPS Act;
 - 3.2 Thereafter, on the same day, upon Gaurav Mehta's verbal disclosure, a team of NCB Officers went to the residence of Bhasker Khatnani in Gurgaon; and on searching the house, more psychotropic tablets were found;
 - 3.3 Furthermore, it is the NCB's case that Bhasker Khatnani disclosed to them that on that day the petitioner *i.e.* Manish Mohan was sending to him parcels which were to be received at Gate No.2 of Laxmi Nagar metro station between 8:00 p.m. and 9:00 p.m. Based on this information, the NCB set-up surveillance at Laxmi Nagar metro station, where at around 8:50 p.m. two men carrying 02 parcels came and stood near Gate No. 2 of the metro station.

Upon enquiry by the Investigating Officer, NCB ('I.O.') the two men stated that one Manish Mohan from Vinay Medical Store had given them the parcels to hand-over to a person at the metro station, whose location was to be revealed to them over the phone. The I.O. offered that the two men should become independent witnesses to the search and seizure, which, the NCB says, they agreed to;

- 3.4 According to the NCB, the parcels were addressed to one K.K. Pharma Solutions in Mumbai, and contained 2000 strips of *Hydrocodone* tablets, 168 strips of *Lorazepam* tablets, 1000 strips of *Phentermine K-25* tablets and 300 strips of *Zolpidem* tablets, which were all seized;
- 3.5 Thereafter, a notice under section 67 of the NDPS Act was issued to the petitioner to appear before the NCB; which he did on 18.08.2018; whereupon his statement was recorded and he was consequently arrested.
4. The court has heard Ms. Tanya Aggarwal, learned counsel for the petitioner as well as Mr. Raghav Bansal, learned counsel for the NCB.
5. Ms. Aggarwal submits, that the petitioner is not involved in the matter and his arrest was unfounded, hasty and bad in law, *inter-alia* for the following reasons :
 - 5.1 It is clear from the narrative sought to be propounded by the NCB, that the petitioner was not named in the so-called secret information provided to them on 16.08.2018, basis which the complaint came to be made and the co-accused were indicted;

- 5.2 It is evident that the petitioner has no connection with the recoveries alleged to have been made on 17.08.2018 viz. the parcels recovered at the DHL Office, Kirti Nagar. The petitioner is neither the consignee nor the consignor of those parcels;
- 5.3 There is nothing on record to connect the petitioner to co-accused Gaurav Mehta or Bhasker Khatnani, between whom connection was allegedly established;
- 5.4 The disclosure statement dated 18.08.2018 alleged to have been made by Bhasker Khatnani recorded under section 67 NDPS Act only mentions *one* 'Manish' without any particulars, specifics or identifying information which may point to the petitioner's involvement in the matter;
- 5.5 In any case, information contained in disclosure statements recorded under section 67 of the NDPS Act cannot be relied upon in light of the decision of the Supreme Court in ***Tofan Singh vs. State of T.N.***¹;
- 5.6 Most importantly, insofar as the alleged recovery made at Laxmi Nagar metro station is concerned, whereby the NCB claims that two men were found with parcels containing psychotropic tablets, the petitioner is admittedly neither of those two men; nor was their statement recorded in writing; nor were either of the two persons made accused in the matter. There is also no material and nothing on record to link the petitioner with those two persons. The parcels allegedly recovered at the metro station did not contain the

¹ 2021 4 SCC 1

petitioner's name, and no connection has been established between the petitioner and the intended receiver of the parcels viz. K.K. Pharma Solutions;

- 5.7 Nothing was recovered from the search of the petitioner's home;
- 5.8 Charges are yet to be framed and trial will take its own time since there are 22 witnesses whose statements are yet to be recorded; and
- 5.9 Two other co-accused, viz. Amit Ranjan and Pulkit Kumar, have already been granted bail by a Co-ordinate Bench and the learned trial court respectively *vide* orders dated 23.05.2022 and 30.05.2019 respectively.

6. On the other hand, opposing the grant of bail, Mr. Bansal, learned counsel appearing for the NCB submits that they have sufficient evidence to show the petitioner's involvement in trafficking of narcotics, *inter-alia* by way of the following material :

- 6.1 In his disclosure statement dated 17.08.2018 recorded by the I.O, Bhasker Khatnani has clearly stated that the parcels to be received on his behalf at Laxmi Nagar metro station were sent by the petitioner. The parcels were in fact recovered at that place and were also found to contain psychotropic substances;
- 6.2 The two men who were found with the parcels at the metro station also stated that it was the petitioner, Manish Mohan from Vinay Medical Store who had given them the parcels, with instructions to hand-over the same to a person at the metro station. Furthermore, the petitioner's call detail records ('CDR') and customer acquisition form ('CAF') details reveal that he was in

contact with one of the two men (Mithilesh) close to the time when the parcels containing the contraband were recovered from the metro station;

- 6.3 During investigation ‘mirror-images’ of the petitioner’s cell-phone and that of his co-accused Bhasker Khatnani were compared by a forensic laboratory, wherein chats revealing images of contraband tablets and consignment numbers of parcels containing psychotropic substances, were found;
- 6.4 Charges are yet to be framed by the learned trial court and the petitioner may seek discharge, if so advised ;and
- 6.5 As held by the Supreme Court, the rigours of section 37 NDPS Act must apply at the stage of bail for offences committed under that statute.
7. Since evidently, the petitioner is sought to be brought into the picture on the statement of co-accused Bhasker Khatnani and the two men who the I.O. says he met at the metro station, at this stage it is important to understand the position of law as expatiated by the Supreme Court in ***Tofan Singh*** (supra), in which a reference was answered by a three-Judge Bench of the Supreme Court as follows :

“158. We answer the reference by stating:

158.1. 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 provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. 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.

(emphasis supplied)

8. This would take us back to the seminal ruling of the Privy Council in ***Pulukuri Kottaya vs. King Emperor***² which laid down the principle that has been followed consistently by the courts as regards admissibility of a confessional statement made by an accused to a police officer, giving a conjoint interpretation of sections 25 and 27 of the Indian Evidence Act, 1872 ('Evidence Act'). The statutory provisions may be noticed first :

"25. Confession to police officer not to be proved.—No confession made to a police officer, shall be proved as against a person accused of any offence.

* * * * *

"27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

(emphasis supplied)

9. In ***Pulukuri Kottaya*** (supra) the Privy Council said this :

"Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as

² AIR 1947 PC 67

relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused.

(emphasis supplied)

10. The two critical aspects to be noted with regard to admissibility of a confessional statement made to a police officer, therefore are :
 - 10.1 That *only so much* of the confessional statement is admissible as *leads distinctly to the discovery of a fact*; and
 - 10.2 *Only that portion* of the confessional statement, as *leads distinctly to the discovery of a fact*, may be proved against the person making the statement.
11. As a matter of fact, in ***Pulukuri Kottaya*** (supra) the Privy Council was considering the following confessional statement made by an accused (Inala Sydayya) in custody :

“About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Boddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of PulukuriKotayya.”

(emphasis supplied)

In the context of the foregoing statement, the Privy Council held that the mere mention of the name Pulukuri Kottaya by a co-accused would not make that part of the statement admissible in evidence or permit it to be read against the co-accused even though that statement led the investigators to Pulukuri Kottaya. Since that statement was held not admissible against the co-accused making it, it was most certainly not admissible against Pulukuri Kottaya himself.

12. The purport of Bhasker Khatnani's statement in the present case is the same as that of the statement of the co-accused, Inala Sydayya in ***Pulukuri Kottaya*** (supra) inasmuch as merely because the I.O. says that Bhasker Khatnani named Manish Mohan (the petitioner) in his disclosure statement, and that led the I.O. to summon Manish Mohan by notice sent under section 67 of the NDPS Act, that would not make that part of Bhasker Khatnani's statement admissible in evidence. Moreover, such statement could *at worst* be read against Bhasker Khatnani; but not against Manish Mohan, since the latter did not make it.
13. Furthermore, the contours of the satisfaction required for purposes of section 37 of the NDPS Act have recently been clarified by the Supreme Court in its most recent decision in ***Mohd. Muslim @ Hussain vs. State (NCT of Delhi)***³ This is what the Supreme Court said:

"20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not

³ 2023 SCC Online SC 352

guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

“21. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”

(emphasis supplied)

14. Though there may be some arguments for and against the proposition that the statements alleged to have been recorded by the I.O. implicating the petitioner, were not ‘confessional’ statements by the persons who made them, what is clear is that such statements are *per-se* inadmissible in evidence in view of sections 25 and 27 of the Evidence Act *unless* some recovery is made pursuant to such statements. And even then, such statements would be admissible only against the persons who made such statement.

15. This court is also conscious that it must address the twin conditions contained in section 37 of the NDPS Act, viz. that before admitting a person accused of any offence under the NDPS Act to bail:
- 15.1 this court must be satisfied that there are “ *...reasonable grounds for believing that he (petitioner) is not guilty ...*” of the offence charged; and
- 15.2 that he is “ *...not likely to commit any offence while on bail.*”
16. However, for the twin conditions to apply, the petitioner must *in the first place*, be in the *picture* in relation to the offences alleged.
17. In the present case, the two supposedly incriminating pieces of evidence cited by the NCB against the petitioner are :
- 17.1 The statement of co-accused Bhasker Khatnani, reduced into writing by the I.O., which says that a parcel containing contraband is to be delivered for Bhasker Khatnani by a boy at the metro station *and that the parcel has been sent by the petitioner Manish Mohan*;
- 17.2 That acting on such statement of Bhasker Khatnani, the I.O. did find two boys with two parcels containing contraband at the metro station, who (the boys) said that the parcels had been sent by the petitioner Manish Mohan, which parcels were found to contain contraband.
18. However, it is the conceded position that the statements of the two boys, supposedly named Mithilesh and Pankaj Pandit, were never recorded. The two boys were never arrested. They have only been placed in the list of witnesses along with the chargesheet. Their whereabouts are presently unknown. One of the parcels so recovered

carried the name of one K.K. Pharma Solutions as the consignor. No consignee was named on the parcels; nor was there any mark or signification showing that the parcels were sent by the petitioner Manish Mohan. Moreover, Manish Mohan was not found present at the metro station.

19. As extracted above, in *Tofan Singh* (supra) the Supreme Court has laid down clearly that an NCB officer conducting an investigation is a 'police officer' and any statement made to him is inadmissible in evidence in view of section 25 of the Evidence Act, subject of course to the provisions of section 27 thereof. The Supreme Court has further held that a statement recorded under section 67 of the NDPS Act cannot be treated as a confessional statement; and therefore cannot be the basis of convicting the person making it, let alone some other person named in such statement.
20. Applying the well settled principles enshrined in sections 25 and 27 of the Evidence Act, it is seen that in the present case, the only purported 'recovery' made upon the statement of Bhasker Khatnani was that of two parcels containing contraband. Taken in literal terms, the NCB's own case is that Bhasker Khatnani disclosed to them the name of Manish Mohan from Vinay Pharmaceuticals; and that pursuant thereto, the NCB issued to the petitioner a notice under section 67 of the NDPS Act, requiring him to appear before them and that Manish Mohan, the petitioner, appeared in compliance of the said notice. This run of events cannot be construed as the NCB having made any 'recovery' pursuant to a disclosure statement by Bhasker Khatnani. One would venture to think, that had the NCB issued a similar notice under section 67 to any

person, such person would be duty-bound to appear before them as per the mandate of the law. Furthermore, the statement purportedly made by Bhasker Khatnani can at best be read against him *i.e., against Bhasker Khatnani and not against Manish Mohan.*

21. The NCB also contends that the CDRs and the CAFs of Manish Mohan link him to Bhasker Khatnani and to the two boys who they say they found at the metro station. However, only the CDRs of Manish Mohan are on the record; while the CDRs of the other persons named are not. Besides, no CAFs are on the record, which makes it impossible to correlate whether any conversations happened between the petitioner and any of the other persons named. Also, to be sure, even if such correlation was established by producing CDRs and CAFs of the relevant phone numbers, that would not give any insight into what the conversations were about; and whether the conversations were incriminating against the petitioner.
22. Insofar as the alleged incriminating communications/chats between Manish Mohan and Bhasker Khatnani are concerned, they allegedly relate to certain tracking numbers or ‘image numbers’ pertaining to ‘contraband tablets’. Again, such chats may not, in and of themselves, be incriminating, since these chats refer to certain pharmaceutical products; and it is the admitted position that the petitioner was engaged in the pharmaceuticals business.
23. In the circumstances, to persuade this court that the petitioner is not “not guilty” of an offence under the NDPS Act in terms of the twin-conditions contained in section 37 of the NDPS Act, the NCB must at the very least show material to support its contention that the petitioner

is in the picture in relation to the offending act. It may be observed, that the law is clear, that at this stage, the court is not required to make a granular assessment of the material or the evidence on record; and any finding or inference of guilt must be strictly abjured. If, however, the NCB is unable to place material on record to show the petitioner's involvement in the offence, this court has no option but to draw a *prima-facie* inference that the petitioner is *not guilty* of such offence; and consequently, that he is not likely to commit any offence while on bail.

24. In the opinion of this court, before invoking section 37 NDPS Act, the NCB must first lay before the court the foundational material to bring the petitioner into the picture. There is, however, no material on record with which the NCB can build such foundation. As things stand, if instead of Manish Mohan, the NCB had alleged that Bhasker Khatnani had named 'John Doe' as the sender of the parcels, that allegation would be just as credible as the one against Manish Mohan. There is not a shred of evidence, *other than clearly inadmissible evidence viz.* the statement of the co-accused, that brings the petitioner into the picture.

25. As a sequitur to the foregoing, this court is persuaded to admit the petitioner Manish Mohan to regular bail pending trial, on the following conditions :

25.1 The petitioner shall furnish a personal bond in the sum of Rs.01 lac (Rs. One Lac Only) with 02 sureties in the like amount from family members, to the satisfaction of the learned trial court;

- 25.2 The petitioner shall furnish to the Investigating Officer/S.H.O a cell-phone number on which he may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;
- 25.3 If the petitioner has a passport, he shall surrender the same to the learned trial court and shall not travel out of the country without prior permission of the learned trial court;
- 25.4 The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.
26. Nothing in this judgment shall be construed as an expression of opinion on the merits of the pending matter.
27. A copy of this judgment be sent to the concerned Jail Superintendent *forthwith*.
28. Petition stands disposed-of in the above terms.
29. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

APRIL 10, 2023/uj/ds