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

Judgment Delivered on: 13.09.2023

+ **BAIL APPLN. 1716/2023**

DEEPAK NAGIYA

..... Petitioner

Through: Mr Mir Akhtar Hussain and Ms Sonia
Goswami, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Amol Sinha, ASC for the State
with Mr Kshitiz Garg, Mr Ashvini
Kumar and Ms Chavi Lazarus,
Advocate with SI Om Prakash, PS
ANTF, Crime Branch.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. This is an application under Section 438 CrPC read with Section 482 CrPC seeking anticipatory bail in FIR No.0077/2023 under Sections 21/25/29 of the NDPS Act registered at PS Crime Branch.
2. The case of the prosecution as borne out from the status report dated 08.07.2023 filed by the State in the present bail application is as under:-

“1. Briefly stated, facts of the case are that on 21.03.2023, ASI Neeraj Rana along with staff had departed for developing information about crime and criminals in the area of Delhi vide GD No.91A, P.S Crime Branch. At about 03.30 p.m., when the



police team reached near Industrial Area, Pump house, Mangolpuri Railway Station, the secret informer met the ASI and informed that at about 04:00 PM to 04:30 P.M, one person namely Surender Singh@ Bhalu r/o J.J. Colony Hastal, Uttam Nagar, age 48/49 years, who indulges in supply of contraband Heroin in Delhi would be coming at unauthorized parking opposite side of Jiwan Charitable Hospital, R- Block Mangolpuri, Delhi to deliver Heroin to someone & if raid is conducted both of them can be apprehended. The secret information was noted down by the ASI in compliance of Section 42 NDPS Act and the same was communicated to Insp. Jai Bhagwan, Anti-Narcotics Task Force, Crime Branch through mobile phone, who further passed on the information to Sh. Naresh Kumar, ACP/AGS, Crime Branch. Approval was given by ACP/AGS, Crime Branch to take necessary action and the same was conveyed back by Insp. to ASI Neeraj Rana. A GD entry vide No. 133 A dated 21.03.2023, PS Crime Branch was made in this regard by Insp. Jai Bhagwan, in further compliance of Section 42 NDPS Act. ASI Neeraj Rana gave the information to Insp. Jai Bhagwan, ANTF through mobile phone, who further passed the information to Sh. Naresh Kumar, ACP AGS, Crime Branch. Approval was given by ACP/AGS, Crime Branch to take necessary action and Insp Jai Bhagwan lodged this information vide GD No.0135 A in compliance of 42 NDPS Act. Thereafter, Insp. Jai Bhagwan called ASI Neeraj Rana through Mobile phone laid a trap at the place of information. At about 04.15 P.M, after reaching at the place of information, one person was found standing in the parking and he was identified as Surender @ Bhalu by secret informer. He was apprehended by the raiding team and during enquiry, his identity was revealed as Surender @ Bhalu S/o Sh. Mahipal R/o 8-504 JJ Colony, Hastal, Uttam Nagar, Delhi, age 49 years. ASI Neeraj Rana gave him introduction and that of the raiding team members. He was also informed about the secret information. Then, the apprehended person was informed by ASI that there were chances of recovery of contraband from his personal search but prior to his search, he can take the search of police team as well as vehicle of team, to which he denied. He was



also informed about his legal rights that if he so requires, he can be taken before any nearest Gazetted officer or Magistrate for his personal search and notice u/s 50 NDPS Act was served upon him. He was explained the meaning of Gazetted officer and Magistrate. However, Surender Singh @ Bhalu refused to be searched before any Gazetted officer or Magistrate & wrote his refusal on the notice and signed it in Hindi. Efforts were made by the ASI to rope in public witnesses. However, none joined the police raid.

2. Thereafter, during search of Surender @ Bhalu, one weighty ziplock polythene pouch containing brown color powdery substance was recovered from the right side pocket of his worn pant. The recovered substance was checked with the help of field testing kit and found to be contraband Heroin. Upon weighing, separately, the weight of Heroin and polythene pouch was found 350 gram & 3 gram respectively. Thereafter, recovered heroin was put back in the same polythene pouch. The polythene pouch was kept in a small plastic box and made a parcel/pulanda after wrapping it with Doctor tape. The parcel/pulanda was marked as 'A' and sealed the seal of N.K by ASI and it was taken into police possession through memo. Telephonic information about apprehension and seizure was given to Insp. ANTF by ASI and a computerized Tehrir along with seized case property with seizure memo Heroin was sent to P.S Crime Branch through HC Mahipal for registration of FIR with the direction to hand over the case property to SHO/Crime Branch for the compliance of Section 55 NDPS Act and Tehrir to Duty Officer. A case vide FIR No.77 /23, u/s 21/25NDPS Act, PS Crime Branch was registered and investigation was handed over to Asi Yashpal Singh, who arrested the accused in the present case. All the mandatory provisions of NDPS Act were duly complied with.

3. That, during interrogation, accused Surender Singh @ Bhalu disclosed that he used to sell Heroin in retail at the house of his Bhanji Neha R/ o Sultanpuri, Delhi, and Neha had directed him to deliver heroin to her known person at



unauthorized parking in front of Jiwan Charitable Hospital, R-Block, MangolPuri.

4. *On 29.03.2023, accused Neha wife of Vikram @ Bunty R/o Jhuggi No. B-128/F-6 Sultanpuri, Delhi age 32 years was apprehended from her sister's house and arrested u/s 29 NDPS Act on 29.03.2023 in the present case. During investigation, 45 gram Heroin and 521 gram Power cut was recovered from her house.*

5. *That, during investigation accused Neha disclosed that she used to procure heroin from one Nisha Maille W/o Ravi R/o Raghubir Nagar, Delhi at the cost of Rs. Ten thousand per ten gram and supply it in retail and wholesale basis.*

6. *Thereafter, source accused Nisha @ Nisha wife of Ravi Malik R/o H.No. A-823, J.J. Colony Khayala Delhi age 32 years was arrested on 11.04.2023 as source u/s 29 NDPS Act in the present case. During investigation, accused Nisha had disclosed that she used to procure heroin from one Deepak Nagia R/o Shakurpur, Delhi. Efforts were made to arrest Deepak Nagiya but he approached in the concerned NDPS Court, Rohini for interim protection."*

3. The learned counsel for the petitioner submits that the case of the prosecution is that on secret information being received accused Surender @ Bhalu was intercepted by the raiding team and upon his search 350 gm. of heroin was recovered from the pocket of his pant.

4. During interrogation, accused Surender @ Bhalu disclosed that he used to sell heroin in retail from the house of his niece (*bhanji*)/Neha. Based on the disclosure statement of Surender @ Bhalu, Neha was arrested on 29.03.2023 from her sister's house and 45 gm. of heroin and 521 gm. of powder/power cut was recovered.



5. During further investigation, accused Neha disclosed that she used to procure heroin from one Nisha Malik, wife of Ravi Malik. Accordingly, Nisha Malik was arrested on 11.04.2023.

6. Accused Nisha Malik disclosed that she used to procure heroin from Deepak Nagiya i.e the petitioner herein.

7. Learned counsel for the petitioner submits that no recovery has been made from the petitioner. He submits that the name of the petitioner as surfaced only in the disclosure statement of accused Nisha from whom also there is no recovery of contraband.

8. He submits that present is a case where the IO/ASI Rupesh along with one middleman, namely, Anurag along with other police personnel of ANTF, Crime Branch, Daryaganj, New Delhi unleashed a reign of extortion, bribery and false implication against accused persons. He invites the attention of the Court to the complaint dated 12.04.2023 made by one Anil Kumar, brother-in-law of accused Nisha, to the Superintendent of Police, CBI, ACB, New Delhi and the verification report dated 12.04.2023 to contend that a case has been registered against ASI Rupesh and middleman Anurag under Section 120B of the IPC and Sections 7 & 7A of PC Act, 1988, pursuant to which ASI Rupesh and Anurag were apprehended along with the bribe amount of Rs.10 lakhs. He submits that ASI Rupesh after speaking to higher officials had demanded Rs.30 lakhs for facilitating non implication of Ravi Malik and accused Nisha Malik in an NDPS case. However, the mother of Ravi Malik could only arrange a sum of Rs.12 lakhs and paid the same to the police personnel of ANTF, Crime Branch,



Daryaganj, New Delhi through ASI Rupesh and middleman Anurag after which they released Ravi Malik but implicated Nisha Malik for intermediate quantity of heroin.

9. The police personnel has promised the family of Ravi Malik that once balance amount of Rs.18 lakhs are paid, they will facilitate the bail of Nisha Malik. However, as the family did not want to pay any further bribe, the aforesaid Anil (brother-in-law of Nisha Malik) made a complaint to CBI on 12.04.2023.

10. He submits that the petitioner was granted interim protection by the learned Special Judge vide order dated 29.04.2023, thereafter the petitioner joined the investigation on 02.05.2023 from 5:30 PM to 7:15 PM and again on 03.05.2023 at 2:00 PM. To buttress his contentions, he has invited the attention of the Court to the notice under Section 91 CrPC as well as notice under Section 67 NDPS Act which bears the endorsement to the effect that the petitioner has joined investigation and also produced a mobile phone instrument.

11. Inviting the attention of the Court to the order dated 17.04.2023 passed by the learned Special Judge, NDPS, learned counsel for the petitioner contend that the accused Neha who was arrested on 23.03.2023 and from whom intermediate quantity of contraband was recovered, has been enlarged on bail. Further, inviting the attention of the Court to the order dated 27.04.2023 passed by the learned Special Judge, NDPS, he contends that the accused Nisha Malik, who was arrested on 14.04.2023 and from whom no recovery of contraband was made, was also enlarged on bail.



12. Inviting the attention of the Court to the order of the learned Special Judge dated 12.05.2023, he submits that one of the grounds on which the anticipatory bail application of the petitioner has been dismissed is that the mobile phone, which was produced by the petitioner during investigation, had been formatted by him before handing over the same to the Investigating Officer. He submits that notice under Section 91 CrPC was given to the petitioner on 03.05.2023 and on the same date, the petitioner submitted his mobile phone in five minutes to the IO hence, there was no occasion for the petitioner to format the phone. He further submits that whether the mobile phone had been formatted or not is a question to be tested during trial based on FSL report.

13. In view of the above, it is urged by the learned counsel for the petitioner that the petitioner be granted concession of anticipatory bail.

14. *Per contra*, learned ASC for the State submits that the petitioner was granted interim protection till 12.05.2023 by the Special Judge with a direction to join the investigation.

15. The petitioner was interrogated on 02.05.2023, 03.05.2023 and 10.05.2023 but did not cooperate and tried to mislead the investigation. He submits that CDR analysis of the mobile numbers reveals that petitioner's family was found in touch with accused Nisha through mobile phone. He, therefore, contends that anticipatory bail of the petitioner be dismissed.

16. I have heard the learned counsel for the petitioner, as well as, the learned ASC for the State and have perused the record.



17. It is not in dispute that the petitioner's name has been mentioned by accused Nisha Malik but undisputedly neither any recovery of contraband has been made from Nisha Malik nor from the present petitioner.

18. A perusal of the order dated 27.04.2023, whereby the accused Nisha Malik has been granted regular bail shows that Nisha Malik has been granted bail on the ground that no recovery of contraband was made from her. Further, recovery from accused Neha, who had named Nisha Malik, was also of intermediate quantity and that there is nothing on record to connect Nisha Malik to the main accused Surender @ Bhalu.

19. As per the case of the prosecution, the recovery is from Surender @ Bhalu and from Neha. Both the accused have not mentioned the name of the petitioner. There is no material on record to connect the present petitioner to the said accused persons.

20. The only incriminating material against the petitioner is the disclosure statement of accused Nisha Malik and CDRs showing the petitioner's family being in touch with said Nisha Malik. Though disclosure statement of co-accused Nisha Malik under Section 67 of the NDPS Act is not admissible *per se* in view of the decision of the Supreme Court in ***Tofan Singh vs. State of Tamil Nadu***: (2021) 4 SCC 1, but even if the advantage of the same is not extended to the petitioner at this stage of considering his anticipatory bail application in view of the decision of Supreme Court in ***State of Haryana vs. Samarth Kumar***: (Crl.A.1005/2022), wherein it has been observed that the advantage of ***Tofan Singh*** (*supra*) perhaps can only be taken at the time of arguing the regular bail application or at the time of final hearing after



conclusion of the trial but not at the stage of anticipatory bail, still it cannot be overlooked that co-accused Nisha, who has named the present petitioner has already been granted regular bail on the ground that no recovery of contraband has been made from her.

21. Further, recovery from the co-accused Neha was also of intermediate quantity and there is nothing on record to connect her to the petitioner on one hand and to the main accused Surender @ Bhalu on the other hand.

22. Though in the status report, it is mentioned that the petitioner has been previously involved in three criminal cases but the status of the said cases has not been disclosed in the status report. Further, a perusal of the status report shows that none of the alleged cases are under the NDPS Act.

23. Apart from there being no recovery from the petitioner, as well as from Nisha Malik, who had named the petitioner, this Court cannot shut its eyes to the fact that ASI Rupesh and one middleman Anurag, have been arrested by the CBI while accepting bribe amount of Rs.10 lakhs from Nisha Malik and her husband Ravi Malik in connection with the present case. Therefore, at this stage false implication of some of the accused including petitioner cannot be ruled out.

24. Insofar as the CDRs are concerned, I am of the view that the evidentiary value of the same shall be seen at the stage of the trial and it cannot be a ground to deny anticipatory bail to the petitioner at this stage. I am supported in my view by the judgment of the Supreme Court in ***State (by NCB) Bengaluru vs. Pallulabid Ahmad Arimutta & Anr.***: (2022) 12 SCC



633, the relevant paragraph of which reads as under:-

“12. It has been held in clear terms in Tofan Singh v. State of T.N. [Tofan Singh v. State of T.N., (2021) 4 SCC 1 : (2021) 2 SCC (Cri) 246] , 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 [Pallulabid Ahamad Arimutta v. State, 2019 SCC OnLine Kar 3516]’ [Mohd. Afzal v. Union of India, 2020 SCC OnLine Kar 3433]’ [Munees Kavil Paramabath v. State, 2020 SCC OnLine Kar 3431]’ [Abu Thahir v. State, 2019 SCC OnLine Kar 3517]’ [Mohd. Afzal v. Union of India, 2020 SCC OnLine Kar 1294]’ [Munees Kavil Paramabath v. State of Karnataka, 2020 SCC OnLine Kar 3432] 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. For the aforesaid reason, this Court is not inclined to interfere in the orders.....”

(emphasis supplied)

25. Likewise, a Coordinate Bench of this Court in ***Phundreimayum Yas Khan vs. State (NCT of Delhi)***: 2023 SCC OnLine Del 135 has observed that in the absence of any other incriminating material, the CAF/CDR details cannot be a ground to deny the bail. The relevant para reads as under:-

Existence of any conspiracy between the applicant and Sayed Javed Hussain based on the CDRs

a. It is stated by learned counsel for the Respondent that the call record details show that the applicant was in frequent contact with one Amarjit Singh Sandhu on 26.01.2021, i.e, the date when the Tramadol tablets were



collected by the co-accused Sayed Javed Hussain. He further states that according to the CAF/CDR details, location of the co-accused Sayed Javed Hussain and the applicant is also found to be in Rajouri Garden on 26.01.2021.

b. In my view, in the absence of any financial dealings, any recovery of narcotic substance or psychotropic substance from the applicant or from the premises of the applicant and/or at the behest of the applicant, the fact that the CAF/CDR details show calls between the applicant and Amarjit Singh Sandhu and the applicant and Sayed Javed Hussain, cannot be a ground to deny him the bail in the present matter.

c. It is for the prosecution to establish the guilt, abetment, conspiracy of the applicant beyond a reasonable doubt which is not borne out from the CAF/CDR details.

(emphasis supplied)

26. Considering the circumstances in totality, this Court is of the view that the petitioner has made out a case for grant of anticipatory bail. It is accordingly directed that in the event of his arrest, the petitioner may be enlarged on bail subject to his furnishing a Personal Bond in the sum of Rs.25,000/- and one Surety Bond of the like amount subject to the satisfaction of the Arresting Officer/SHO concerned and further subject to the condition that he will join the investigation as and when directed by the IO concerned.

VIKAS MAHAJAN, J.

SEPTEMBER 13, 2023
MK