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

CRIMINAL BAIL APPLICATION NO. 256 OF 2022

Shameem Bano Gulam Kureshi .. Applicant

Vs.

Union of India & Anr. .. Respondents

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Mr. Taraq Sayed a/w Ashwini Achari, Alisha Parekh for the applicant

Mr. A.A. Palkar, APP for the respondent State

Mr. Shreeram Shirsat, Special P.P. a/w Janvi Mate, Janveer Khan, Karishma Rajesh and Shekhar Mane for the respondent – UOI, NCB

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CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 2nd FEBRUARY, 2024

PRONOUNCED ON : 5th FEBRUARY, 2024

P.C.

1. The applicant is one of the four accused, who seeks her release on bail in connection with alleged offences punishable under Sections 8(c) r/w 20(b)(ii)C, 27A and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

2. The prosecution case in brief goes like this.

3. Pursuant to a secrete information received by the Narcotics Control Bureau (NCB) that two Indian nationals namely Aftab Ail Hishamoddin Shaikh (Aftab), Sabir Ali Azhar Sayyed (Sabir) are travelling from Hazarat Nizamuddin to LTT, Kurla, Mumbai by Train No.02172 in Coach No.B9, seat nos. 51 and 57 along with substantial quantity of Narcotics Drugs in their luggage trolley bag.

4. When the said train reached LTT, Kurla, Mumbai on 12th December 2020, the officials of the respondent – NCB accosted Aftab and Sabir whose description matched with the information received by it. The train arrived around 22:45 hours on Platform No.2. Aftab and Sabir were accosted when they were about to alight from B9 coach along with the four ladies and two children with two trolley bags. It is alleged that accused - Aftab had a red and maroon colour Italian Tourist trolley bag while accused – Sabir had a brown colour Elegant company trolley bag.

5. During interrogation of those two persons, the raiding team noticed four ladies and two children accompanying the two accused namely Shameem Bano Gulam Qureshi, Nilofer Korabu, Yasmin Iqbal Payak, S. Tahmeena Sabir Ali Sayyed, Sayyad Sidra and

Sayyad Sidiya.

6. During search of a bag carried by accused – Aftab, the team noticed dark coloured round shape substance purported to be Charas weighing 3.095 kgs. Upon searching another bag, the team noticed cylindrical shaped dark brown substance purported to be Charas weighing 3.531 kgs. The contraband was seized under the panchanama. All the accused were served with a summons under Section 67 of the NDPS Act. Accused nos. 1 and 2 namely Aftab and Sabir were placed under arrest. Statement of the applicant was recorded and she was also placed under arrest.

7. After investigation, respondent filed a chargesheet in the Special Court against all the four accused under Sections 8(c) r/w 20(b)(ii)C, 27A and 29 of the NDPS Act. The applicant preferred an application for bail before the Sessions Court, Mumbai which came to be rejected on 8th November 2021 and, therefore, now she has approached this Court.

8. I heard Mr. Sayed, learned Counsel for the applicant as well as Mr. Shirsat, learned Special Public Prosecutor for the respondent at a considerable length.

9. At the outset, Mr. Sayed would argue that the applicant being a poor lady has been made a scapegoat by rest of the accused. She is innocent and was unaware as to how she was lured to accompany them to Hazarat Nizamuddin. She was paid petty amount of Rs.5,000/-. He would argue that the information note of the NCB does not indicate whether the applicant, in fact, is a co-traveller with the accused since there is no proof in the form of train ticket or any other material in the form of reservation chart indicating that the applicant did travel with the co-accused.

10. The contraband was found from the possession of accused – Aftab and Sabir and, therefore, there is no material to connect the applicant with the alleged crime. The Counsel would also invite my attention to the statement of one Sayyad Masur Hasan @ Firoz, who had stated in his statement under Section 67 of the NDPS Act that the amount of Rs.3 lac, which he had given to the applicant were in fact toy currency notes. Mr. Sayed would argue that the applicant was unaware of this fact also. As such, he submits that since the contraband has not been recovered from the actual and conscious possession of the applicant as well as the fact that the applicant being an illiterate lady is unable to understand English

language, she was totally ignorant of the entire proceedings conducted by the respondent in English language.

11. It is contended that since the accused no.4 – Firoz has already been released on bail by the Sessions Court who was arrested on the basis of statement of the co-accused, the applicant also deserves to be released on the ground of parity.

12. Mr. Shirsat, learned Special Public Prosecutor on the other hand, invited my attention to the observations made by the trial Court while rejecting the application for bail *qua* the applicant where it has been observed that the applicant was travelling with the main accused in the same train and in the same coach from Delhi to Mumbai who alighted at LTT, Kurla, Mumbai together and were intercepted by the respondent at the same point of time. Even though nothing has been found in her possession, namely commercial quantity of Charas, the same was found in the possession of the main accused with whom the applicant was travelling. Mr. Shirsat would argue that the applicant was in constructive possession of the contraband and, therefore, she being a part of the entire network, very well knew that the contraband

was being transported from Delhi to Mumbai.

13. He placed reliance on a judgment of the Supreme Court in the case of **Mohan Lal Vs. State of Rajasthan, (2015) 6 SCC 222**. The Hon'ble Supreme Court was dealing with an appeal by the accused against his conviction for the offence under Section 18 of the NDPS Act. The Supreme Court held that possession for the purpose of Section 18 of the NDPS Act is basically connected to "actus of physical control and custody". The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. The Hon'ble Supreme Court has surveyed several decisions on this aspect. However, considering the material placed on record in the instant case, it would be difficult to construe that the applicant had the animus or intent *qua* the contraband.

14. Learned Special Public Prosecutor would further emphasize on rigours of Section 37 of the NDPS Act. He has placed reliance upon a few decisions of this Court which shall be referred to hereinafter. While concluding, he vehemently urged to reject the

application *inter alia* submitting that at the most the trial can be expedited.

15. Law as regards a statement in the form of confession recorded under Section 67 of the NDPS Act is inadmissible and the said issue is no more *res integra* in view of the well known judgment of the Supreme Court in case of **Tofan Singh Vs. State of Tamil Nadu, AIR (2020) SC 5592**. It is held that even the statement of a co-accused under Section 67 of the NDPS Act cannot form the basis for rejecting an application for bail. Indubitably, the applicant in her statement recorded under Section 67 of the NDPS Act stated in Hindi that she had a talk with accused – Firoz on 7th December 2020, who informed her to accompany accused – Aftab and Sabir to Delhi in order to bring the contraband. She was paid Rs.5000/- by Firoz who had already been released on bail by the trial Court. It is a matter of record that what had been received by the applicant at New Delhi is in the form of purported currency notes, which are used by children (toy currency notes). Her statement under Section 67 of the NDPS Act further indicates that bags containing contraband – Charas was kept on seat no.57 by the accused – Sabir and another bag was kept on seat no.51 by accused – Aftab.

Admittedly, nothing came to be seized from the possession of the applicant and, therefore, it cannot be said that she was in conscious possession with animus, custody or dominion over the prohibited substance which could only be proved during trial.

16. If six of them were travelling from Hazarat Nizamuddin to LTT, Kurla, Mumbai how come there were only two reserved tickets in coach no. B9 with seat nos. 51 and 57?

17. It creates a doubt about the authenticity of the raid conducted by the respondent as to why the other ladies travelling with the accused have neither been intercepted nor their statements were recorded under Section 67 of the NDPS Act in order to find out the truth. How come so many persons were found travelling only on the basis of two tickets in Coach No.B9 Seat nos. 51 and 57? How the applicant could travel without a valid ticket all the way from Delhi to LTT, Kurla, Mumbai in a reserved coach? It is not the case of the prosecution that the applicant has antecedents to her discredit.

18. The arrest report *qua* the applicant dated 13th December 2020 appears to be drafted in a mechanical way as it appears that the

Zonal Director, Superintendent and Investigating Officers stated in the said report “he was communicated his grounds of arrest to the applicant” who is a female. Be that as it may.

19. It is not the case of the prosecution that the applicant is liable for a punishment for consumption of any Narcotic drug or psychotropic substance as provided in Section 27 of the NDPS Act. Insofar as Section 27A is concerned, which indicates indulgence of an accused in financing, directly or indirectly, any of the activities specified in sub-clauses (i) to (v) of [clause (viii) of section 2] or harbours any person engaged in any of the aforementioned activities, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years. What has been surfaced from the record of the prosecution is that those were toy currency notes, in the sense, those were meant for children’s game and as such *prima facie* the applicant does not appear to be involved in financing either directly or indirectly any activities in respect of the Narcotic drugs or psychotropic substances.

20. As already stated, since nothing has been found in the possession of the applicant and merely because she was a co-

traveller that too *sans* valid travelling tickets, would not *ipso facto* mean that she abetted or had entered into any criminal conspiracy with the prime accused. The observations made by a single Judge of this Court case of **Jitendra Jain Vs. NCB & Anr.** (Bail Application No.2682 of 2021, decided on 26th July 2022) (Coram: Bharati Dangre, J.), therefore, can be distinguished accordingly. In the said case, cash amount in the form of Indian Currency, US Dollars, Pounds and Dirhams were recovered under the panchanama. The applicant in that case was found to have received money through his girl friend in google account. There was tangible evidence enclosed with the complaint as regards drug trafficking and procuring, possessing and purchasing as well as consumption of Charas. It, therefore, cannot be a *ratio decidendi* to be looked into in view of peculiar facts of this case.

21. Insofar as the rigours of Section 37 of the NDPS Act are concerned, certain restrictions have been placed on the powers of this Court while granting bail to a person accused of having committed an offence under the NDPS Act. The limitations on granting of bail specified in clause (b) of sub-section (1), are, of course in addition to the limitations under the Code of Criminal

Procedure.

22. Admittedly, an opportunity has already been granted to the Special Public Prosecutor to oppose the application moved by the applicant. Insofar as satisfaction of this Court that there are reasonable grounds for believing that she is not guilty of such offence and that she is not likely to commit any offence while on bail, as already discussed hereinabove, nothing had been found in conscious possession of the applicant who appears to be a passenger in the same coach without any valid ticket. Reluctance of the respondent in not recording the statement of other women accompanied with the main accused and the applicant though it is stated that all were travelling together, would create a cloud of suspicion. As such, *prima facie*, there are reasonable grounds for believing that she is not guilty of such offence. As already stated, what had been transpired from the record is that the money which exchanged hands was nothing but toy currency notes.

23. The role of accused no.4 – Firoz is almost on the same pedestal to that of the applicant who has been granted bail by the trial Court. As already stated, it is needless to go into the aspect of

the expression “reasonable grounds” used in clause (ii) of subsection (1) of Section 37 of the NDPS Act, which would necessarily mean that there should be some credible, plausible grounds for the Court to believe that the accused is not guilty of the alleged offence. Of course, as already stated the ‘reasonable grounds’ herein are more than *prima facie* grounds.

24. Mr. Shirsat has, therefore, placed reliance on a decision of the Supreme Court in case of **State of Kerala and Ors. Vs. Rajesh and Ors. (2020) 12 SCC 122**. The Supreme Court has carved out scheme of Section 37 more particularly the expression “reasonable grounds” in para 20 to 23 of the judgment, which is extracted below :-

“20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression “reasonable grounds” means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the Cr.PC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

22. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a *sine qua non* for granting bail to the accused under the NDPS Act.

23. The submission made by learned counsel for the respondents that in Crime No. 14/2018, the bail has been granted to the other accused persons(A1 to A4), and no steps have been taken by the prosecution to challenge the grant of post arrest bail to the other accused persons, is of no consequence for the reason that the consideration prevailed upon the Court to grant bail to the other accused persons will not absolve the act of the accused respondent(A5) from the rigour of Section 37 of the NDPS Act.”

25. Indeed, recording of finding mandated under Section 37 of the NDPS Act is a *sine qua non* for granting bail to an accused under the NDPS Act. The findings as recorded hereinabove *qua* the applicant are not in the context of finding the applicant not guilty of the offence or whether the applicant has in fact committed or not

committed any offence under the NDPS Act but the entire exercise is only for the purpose of considering as to whether the applicant can be enlarged on bail or otherwise. In light of the aforesaid facts, there are reasonable grounds for believing that the applicant is not guilty of the offences with which she has been charged and is unlikely to commit any offence while on bail.

26. The Hon'ble Supreme Court in the case of **Narcotics Control Bureau Vs. Mohit Agarwal** (Criminal Appeal No.1001-1002 of 2022, decided on 19th July 2022) while cancelling the bail of the applicant even *dehors* the confessional statement of the respondent and the co-accused under Section 67 of the NDPS Act observed that there was other material brought on record by the NCB which ought to have dissuaded the High Court from exercising its discretion in favour of the respondent accused by concluding that there were reasonable grounds to justify that he was not guilty. In case of Mohit Agarwal (*supra*) it seems that the High Court had completely overlooked the fact that on the basis of a disclosure statement made by the respondent himself huge quantity of Narcotic drugs and injections were seized from the godown of the co-accused – Pramod Jaipuria who was subsequently arrested by the

Department. It is stated that the High Court has committed grave error by not applying the terms and conditions imposed under Section 37 of the NDPS Act and in view of the embargo placed in Section 37 of the NDPS Act, the respondent ought not to have been admitted to bail as it was a case of constructive / conscious possession of the contraband, psychotropic substances as well as active participation of the respondent in an organized gang that was involved in smuggling of the drug. As already stated, the ratio laid down in the Mohit Agarwal (surpa) can be distinguished in light of the facts discussed hereinabove.

27. Admittedly, the applicant has been incarcerated for more than 3 years ever since her arrest on 13th December 2020. The charge has not yet been framed. There is no likelihood of the trial being concluded within a reasonable period.

28. *Dehors* merits of the case and in view of various pronouncements referred to hereinabove, I am persuaded to release the applicant on bail *albeit* imposing certain conditions, which would take care of the apprehension expressed by the learned Special Public Prosecutor.

29. Consequently, the following order is expedient :-

ORDER

- (a) The application is allowed.
- (b) The applicant be released on executing a P.R. bond in the sum of Rs.30,000/- with one or two sureties in the like amount to the satisfaction of the Special Court in Special Case No. 652 of 2021 for the offence punishable under Section 8(c) r/w 20(b)(ii)C, 27A and 29 of the NDPS Act.
- (c) The applicant shall report the office of the NCB, Mumbai on first Saturday of every month between 10.00 a.m. to 1.00 p.m. till charge is framed.
- (d) After framing the charge, the applicant shall attend each date in the trial Court scrupulously.
- (e) The applicant shall not tamper with the evidence or attempt to influence or contact any of the witnesses or persons concerned with this case.
- (f) The applicant shall furnish her residential address and contact details forthwith to the respondent and the Special Court. The applicant shall inform in case of any change in her contact details or residential address

to the respondent as well as the Special Court.

(g) In case of two consecutive defaults either in attending the respondent or the trial Court or in case of breach of any of the aforesaid conditions, the prosecution shall be at liberty to seek cancellation of her bail.

30. The application stand disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)