

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

BAIL APPLICATION NO. 1765 OF 2024

Imran Aslam Divkar	...	Applicant
Versus		
The Union of India & Anr.	...	Respondents

Mr. Dilip Mishra a/w Mr. Ayaz Khan, Ms. Zehra Charania and Ms. Mallika Sharma i/by Siddharth Tripathi and S.E. Kabadi for the Applicant.

Mr. Shreeram Shirsat a/w Ms. Karishma Rajesh, Mr. Nikhil Daga and Mr. Shekhar Mane for Respondent No.1-NCB.

Ms. R. V. Newton, APP for Respondent No.2-State.

**CORAM: MANISH PITALE, J.
DATE : 21st OCTOBER 2024**

P.C. :

. Heard learned counsel for the applicant and learned counsel appearing for the respondent No.1-Union of India through the Narcotics Control Bureau (NCB).

2. The applicant is seeking bail as he was arrested on 28th March 2023 in connection with C.R. No. 04 of 2023 registered by the Narcotics Control Bureau (NCB) in Special Case No. 132 of 2023 pending before the Special NDPS Court at Bhiwandi. The chronology of events relevant for considering the present bail application is as follows :

(i) According to the respondent-NCB, information was

received at 15:00 hours on 27th March 2023 that a vehicle carrying contraband in the form of cough syrup containing codeine would reach at Sagar Hotel, Bhiwandi Road, Thane, from Gujarat between 11:00 hours and 12:00 hours on 28th March 2023. It was recorded in the information note that the delivery was to be received by a person named Imran and the mobile number recorded in the information note pertained to the applicant (accused No.2).

- (ii) On 28th March 2023 at 8:00 a.m. itself, the vehicle, as per the information received, was intercepted, wherein accused No.1-Fakaruddin Momin and another person were found. The vehicle was found to be containing 3195 bottles of the aforesaid cough syrup, which amounted to commercial quantity of the contraband codeine. The *panchanama* was executed, which started at 8:00 a.m. and continued till 16:40 hours on 28th March 2023.
- (iii) According to the respondent-NCB, accused No.3-Ankil Kolwadwala and accused No.4-Giridhar Chatury, both were apprehended on the same day i.e. 28th March 2023. It is relevant to note here that in the aforesaid *panchanama*, there is no reference to the accused Nos. 3 and 4 being apprehended. It is further the case of the respondent-NCB that the search of the house of the applicant was carried out at 18:15 hours in the evening and it continued till 19:50 hours. No contraband was found in the house and the

applicant was not present in the house. Nonetheless, it is the case of the respondent-NCB that the applicant i.e. accused No.2-Imran Aslam Divkar was also apprehended on 28th March 2023.

- (iv) In other words, accused Nos. 1, 2 and 4 were arrested on 28th March 2023 and their statements under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) were recorded by the NCB. It is relevant to note that the applicant was said to have been apprehended from Sagar Hotel, Bhiwandi Road, Thane.
- (v) Accused No.5-Jagdish Kholwadwala who is the father of the accused No.3-Ankil Kholwadwala, was apprehended on 29th March 2023, as he was alleged to be the supplier of the aforementioned contraband.
- (vi) The investigation was completed and charge-sheet was filed. Accused nos. 4 and 5 were granted bail by the Sessions Court by order dated 16th March 2024. Remaining accused persons, including the applicant, have remained behind bars.

3. The learned counsel appearing for the applicant submitted that in the present case, there is no material at all to link the applicant with the recovery of the aforesaid contraband. It is asserted that in the present case, since respondent-NCB could not locate and apprehend a person named Imran, as per their

information note, the applicant was wrongly treated as the person named Imran, who was supposed to receive the contraband supplied from Gujarat. It was submitted that the chronology of events indicates glaring discrepancies and gaps, demonstrating that the respondent-NCB picked up the applicant without having any connection with the said contraband and thereupon, created material in order to justify its action. The absence of any reference to the accused Nos.3 and 4 being apprehended on 28th March 2023, while recording the said *panchanama* between 8:00 a.m. and 16:40 hours, was severely criticized. It was submitted that there is no material on record to indicate as to when and from where the applicant was apprehended. It was submitted that the claim of the respondent-NCB that the applicant went to Sagar Hotel, Bhiwandi Road, Thane, when he was arrested, is unbelievable because it is the case of the respondent-NCB itself that accused No.4 had already informed the applicant that the contraband allegedly meant for him had been intercepted and accused No.1 had been apprehended at Sagar Hotel, Bhiwandi Road, Thane, itself.

4. It was further submitted that in this situation, when there is no material to link the applicant with the aforesaid contraband, the respondent-NCB is trying to rely only on Call Detail Records (CDRs) and statements recorded under Section 67 of the NDPS Act. It is submitted that such statements in terms of the certain settled position of law laid down by the Supreme Court in the case

of *Tofan Singh v/s. State of Tamil Nadu, (2021) 4 SCC 1*, are inadmissible even at the stage of the trial. As regards the CDRs, it was submitted that there is nothing to indicate any direct contact between the applicant and accused Nos.1, 3 and 5. The applicant could be said to have been in touch only with accused No.4, who has been already granted bail by the Sessions Court. As regards the contentions raised on behalf of the respondent-NCB that the applicant was in touch with another person called Imran partner and through him with the other accused persons, it was submitted that the fact that the said Imran partner has not been made an accused completely snaps the link as claimed by the respondent-NCB. It was further submitted that merely because the applicant has 3 criminal antecedents, in itself cannot be a ground to reject the bail application, so long as there is not an iota of material to link the applicant with the present case. On this basis, it is submitted that this Court may consider enlarging the applicant on bail.

5. The learned counsel for the applicant relied upon order dated 13th February 2023 passed by the Supreme Court in the case of *Bharat Chaudhary v/s. Union of India (order dated 13th December 2021 passed in Special Leave to Appeal (Crl.) No. 5703 of 2021)*, wherein, while referring to CDRs and WhatsApp messages, the Supreme Court has observed that the same would eventually be a matter for trial.

6. Similar, observations have been made by the Supreme Court

in the case of ***State by (NCB) Bengaluru v/s. Pallulabid Ahmad Arimutta & Anr.*** (order dated 10th January 2022 passed in Special Leave to Appeal (Crl.) No. 242 of 2022).

7. On the other hand, the learned counsel appearing for the respondent-NCB heavily relied upon the statements recorded under Section 67 of the NDPS Act, including the statement of the applicant himself. Reference was made to the CDRs to claim that the applicant very intelligently kept away from keeping direct contact with the co-accused persons and throughout, he was in touch with the said Imran partner, who in turn was relaying the the messages by being in contact with the co-accused persons. It was further submitted that apart from the mobile number, which admittedly belongs to the applicant, there was one more mobile number used by the applicant to remain in touch with the accused No.3-Ankil Kolwadwala and this was obvious from the statement of the said accused No.3 recorded under Section 67 of the NDPS Act. and the *WhatsApp* chats placed on record.

8. In order to support his contention that CDRs could be relied upon at this stage, reliance was placed on judgment of the Himachal Pradesh High Court in the case of ***Tara Chand v/s. State of Himachal Pradesh*** (order dated 23rd September 2020 passed in Cri.MP(M) No. 1526 of 2020). The judgments of the Supreme Court in the case of ***Narcotics Control Bureau v/s. Mohit Aggarwal*** (judgment dated 19th July 2022 passed in Criminal Appeal Nos.1001-1002 of 2022) and in the case of ***Union of India***

through Narcotics Control Bureau, Lucknow v/s. Md. Nawaz Khan, AIR 2021 SC 4476. Reliance was further placed on judgment of the Supreme Court in the case of *Union of India v/s. Ajay Kumar Singh @ Pappu* (judgment dated 28th March 2023 passed in Criminal Appeal arising out of SLP(Crl.) No. 2351 of 2023), as also in the case of *State by the Inspector of Police v/s. B. Ramu* (order dated 12th February 2024 passed in Criminal Appeal arising out of SLP (Crl.) No.8137 of 2022) and orders of this Court in the case of *Erum Mohammad Iqbal Bashey v/s. Union of India & Anr.* (order dated 18th April 2024 passed in Bail Application No. 3791 of 2023) and in the case of *Siraj Wakil Ahmad v/s. The Union of India & Anr.* (order dated 14th March 2023 passed in Bail Application No. 1393 of 2022).

9. This Court has considered the rival submissions in the light of the material available on record. The learned counsel appearing for the respondent-NCB tendered a compilation of documents for the sake of convenience. Reference was made to a number of documents contained in such convenience compilation. This Court has perused the said documents in order to appreciate the rival contentions.

10. The applicant is pressing for relief in the present application on the basis that there is no material to link him with the contraband allegedly recovered in the present case. It is emphatically claimed that when the respondent-NCB was unable to locate the real culprit, the applicant was picked up and material

was created, in order to implicate him in the present case. This is a serious allegation made against the respondent-NCB, which has been refuted, but at the same time, it needs to be examined thoroughly.

11. In order to do so, this Court perused the material on record and found that there are indeed certain circumstances, which appear to support the contentions raised on behalf of the applicant. There appear to be glaring discrepancies and gaps in the claims made by the respondent-NCB, insofar as the involvement of the applicant in the present case is concerned. As noted hereinabove, the exercise undertaken by the respondent-NCB was initiated on the basis of information note dated 27th March 2023, prepared at 15:00 hours, recording that contraband was to be received at Sagar Hotel, Bhiwandi Road, Thane, between 11:00 hours and 12:00 hours on 28th March 2023, to be delivered to a person named Imran. The mobile number of the applicant was also recorded therein, which is the very basis for the learned counsel for the respondent-NCB to claim that from the inception the involvement of the applicant was evident.

12. It is to be noted that while according to the information note, the vehicle carrying the contraband was to reach Sagar Hotel, Bhiwandi Road, Thane, between 11:00 hours and 12:00 hours, the vehicle was apprehended at 8:00 a.m. itself at the said place. The accused No.1, along with another person, were found in the vehicle along with 3195 bottles of cough syrup containing

codeine, which was more than commercial quantity. Accordingly, execution of the *panchanama* was undertaken and it continued from 8:00 a.m. till 16:40 hours.

13. It is to be noted that according to the respondent-NCB, accused Nos. 3 and 4 were apprehended on 28th March 2023. But, timings of their being apprehended are not found anywhere on the record. If they were apprehended during the daytime, the said fact could have been mentioned in the aforementioned *panchanama*, execution of which continued till 16:40 hours. But, the said facts are conspicuous by their in the *panchanama*. This does raise some serious doubt about the events as claimed by the respondent-NCB.

14. It is the case of the respondent-NCB that accused No.4 informed the applicant that the aforementioned contraband, which was to be received by him was already intercepted and *panchanama* was being executed. In such circumstances, it is against natural course of human conduct for the applicant to have surfaced at the very place, where the said contraband was intercepted and apprehended. It is also relevant to note that according to the respondent-NCB, the house of the applicant was searched and the *panchanama* in that regard was executed between 18:15 hours to 19:50 hours, when he was not found in the house. There was no recovery from his house at all. Yet, he is shown to have been arrested on 28th March 2023 itself and his statement was also recorded in the office of the NCB. These factors do create a serious doubt about the claims made by the

respondent-NCB, insofar as the involvement of the applicant is concerned.

15. In this backdrop, when specific queries were put to the learned counsel appearing for the respondent-NCB, as to what is the material linking the applicant with the co-accused persons and the aforesaid contraband intercepted at about 8:00 a.m. on 28th March 2023 at Sagar Hotel, Bhiwandi Road, Thane, the learned counsel heavily relied upon CDRs and statements recorded under Section 67 of the NDPS Act.

16. As regards reliance placed on statements recorded under Section 67 of the NDPS Act, as per the settled law laid down by the Supreme Court in the case of *Tofan Singh v/s. State of Tamil Nadu* (supra), such statements are not admissible in evidence at the stage of trial and therefore, it would not be safe for this Court to rely upon such statements alone, as factors indicating the involvement of the applicant. That leaves only the CDRs to link the applicant with the present case.

17. A perusal of the CDRs and the manner in which they were read by the learned counsel appearing for the respondent-NCB, shows that even according to the said respondent, the applicant was allegedly in touch with one Imran partner, who in turn was in touch with the co-accused persons. Therefore, there is nothing in the CDRs to show that the applicant was directly in contact with any of the accused persons except accused No.4. It is to be noted

that the accused No.4 is already granted bail by the Sessions Court.

18. The theory of the respondent-NCB that the applicant was in touch with accused Nos.1, 3 and 5 through the said Imran partner could have been considered by this Court, if the said Imran partner was also co-accused in the present case. The only explanation the learned counsel appearing for the respondent-NCB could offer in these circumstances was that said Imran partner is not traceable. He could at least have been arraigned as an absconding accused. In the absence of the aforesaid fact, the only tenuous link available with respondent-NCB to connect the applicant with the contraband and the co-accused persons in the present case, is found to have been snapped.

19. In such a situation, this Court finds *prima facie* substance in the contention raised on behalf of the applicant that when the respondent-NCB was unable to locate the real “Imran” in the present case, they picked up the applicant and then tried to demonstrate that the applicant was indeed involved in the present case.

20. When the said conclusions are reached, it becomes evident that the reliance placed on plethora of judgments by the learned counsel appearing for the respondent-NCB, can be of no avail. The judgment in the case of *Tara Chand v/s. State of Himachal Pradesh* (supra), in the case of *Narcotics Control Bureau v/s.*

Mohit Aggarwal (supra) and in the case of ***Union of India through Narcotics Control Bureau, Lucknow v/s. Md. Nawaz Khan*** (supra), all pertain to the significance of CDRs at the stage of bail. The view adopted by the High Court of Himachal Pradesh can, at best, be only of persuasive of value, but this Court is not persuaded to accept the said view. Insofar as the judgment of the Supreme Court in the case of ***Narcotics Control Bureau v/s. Mohit Aggarwal*** (supra) is concerned, it is to be appreciated in the backdrop of the fact that the voluntary statement of the accused in the said case had actually led to recovery of huge amount of contraband and it was in that context, that the Supreme Court found the CDRs relevant to the extent that the applicant therein was in constant touch with the co-accused person. In the present case, there is no recovery at the behest of the applicant and admittedly, there is no recovery from his house. Even the CDRs are sought to be linked with the applicant through one Imran partner, who is conspicuously missing from the array of accused persons.

21. As regards the judgment in the case of ***Union of India through Narcotics Control Bureau, Lucknow v/s. Md. Nawaz Khan*** (supra), a perusal of paragraph 30 shows that the Supreme Court relied upon four circumstances against the accused, one of which happened to be the CDR analysis of the accused persons, showing that they were regularly in touch with each other and the other factors, included the fact that accused therein was travelling

in the vehicle along with the co-accused throughout the journey and contraband of commercial quantity was recovered from that very vehicle. In the present case, no such factors exist to link the applicant with the contraband and as noted hereinabove, the CDRs connection is only through the said Imran partner, who is completely missing in the facts of the present case.

22. The judgments of the Supreme Court in the case of ***Union of India v/s. Ajay Kumar Singh @ Pappu*** (supra) and ***State by the Inspector of Police v/s. B. Ramu*** (supra), pertain to a situation where a huge quantity of contraband was recovered and there was material to link the accused with the same. In such backdrop, the Supreme Court found that the High Court had erred in enlarging the applicant on bail. The said judgments are factually distinguishable from the present case. The orders of this Court in the case of ***Erum Mohammad Iqbal Bashey v/s. Union of India & Anr.*** (supra) and in the case of ***Siraj Vakil Ahmad v/s. The Union of India & Anr.*** (supra), can also not be a much assistance to the respondent-NCB, simply for the reason that reference to CDRs in the said cases was in conjunction with other factors demonstrating a strong *prima facie* case against the accused persons in the said case. But, as concluded hereinabove, the applicant has made out a strong *prima facie* case to claim that the respondent-NCB has sought to link the applicant with the present case without any material available on record.

23. The applicant has clearly made out a strong *prima facie* case

in his favour. As regards the criminal antecedents on which much emphasis is placed by the learned counsel appearing for the respondent-NCB, suffice it to say that the said factor in itself may not come to the aid of the said respondent, while opposing the present bail application, so long as there is absence of material to link the applicant with the seizure and recovery of contraband in the present case. It is to be noted that in the said earlier cases registered against the applicant, he was enlarged on bail.

24. In view of the above, this Court is of the opinion that the applicant has been able to satisfy the test contemplated under Section 37 of the NDPS Act. He has undergone incarceration for a period of about 1 year and 7 months. Hence, this Court is inclined to allow the present application.

25. Accordingly, the application is allowed in the following terms :

- (a) The applicant shall be released on bail in connection with C.R. No. 04 of 2023 registered by the Narcotics Control Bureau (NCB) in Special Case No. 132 of 2023 pending before the Special NDPS Court at Bhiwandi, on furnishing P.R. Bond of Rs. 50,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.
- (b) The applicant shall report to the office of NCB, Ballard Peir, Mumbai, on first Monday of each month between

10:00 a.m. and 12:00 noon, during the pendency of the trial.

- (c) The applicant shall cooperate with the trial Court and he shall attend each and every date, unless exempted by the trial Court, for reasons to be recorded in writing.
- (d) The applicant shall not tamper with the evidence of the prosecution and he shall not influence the informant, witnesses or any other person concerned with the case.
- (e) The applicant, upon being released on bail, shall place on record of the trial Court the details of his Contact Number and residential address with updates in case of any change.

26. Needless to say, in case of violation of any of the aforesaid conditions, the bail granted to the applicant shall be liable to be cancelled. It is also clarified that the observations made in this order are limited to the disposal of the present bail application. The concerned Court shall proceed further in the matter without being influenced by the observations made hereinabove.

27. The application is disposed of.

MANISH PITALE, J.