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

+ **BAIL APPLN. 2474/2023**

MEHBOOB KHAN

..... Petitioner

Through: Mr. Rahul Sharma, Mr. Shavej Khan,
Mr. Prabhash Kumar, Mr. Mohit Yadav, Ms. Jyoti
and Mr. Ganga Singh, Advocates

versus

STATE GNCT OF DELHI

..... Respondent

Through: Mr. Yudhvir Singh Chauhan, APP for
State with SI Sanjeev Kumar, ANTF/Crime
Branch.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

ORDER

09.02.2024

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1. This application has been filed under Section 439 Cr.P.C. on behalf of Applicant Mehboob Khan S/o Hamid Ali Khan, seeking grant of regular bail in case FIR No. 123/2023 dated 21.05.2023 registered under Section 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') at PS: Crime Branch.

2. Status report has been filed. Case of the prosecution is that on 21.05.2023, on instructions of Insp. Jai Bhagwan, ANTF Crime Branch, Daryaganj, a team under the leadership of SI Pankaj, ASI Kirorimal, SI Ram Kishan, ASI Sandeep, HC Sanwar Mal and W/HC Anita was constituted to collect information regarding Drug traffickers. The team along with necessary equipment departed towards West Delhi vide GD No.0024A dated



21.05.2023. At around 4.00 pm, ASI Kirori Mal was present near Keshavpur Mandi, Gate No.5, along with the staff, where a secret informer met him. He informed that a person namely Imran Khan @ Sahil was indulging in supply of heroin in wholesale and retail in Delhi/NCR and will arrive between 6.00 pm and 6.30 pm at Delhi Municipal Corporation toilet situated at Keshavpur Mandi, towards Khyala road, near Ambedkar Park Delhi, for supply of heroin and if the raid was conducted, he could be apprehended with the contraband. ASI Kirori Mal after satisfaction, recorded the secret information and at around 4:35 pm shared the same from his mobile with Insp. Jai Bhagwan. The secret information was recorded on CCTNS in compliance of Section 42 of NDPS Act.

3. It is further stated in the report that raid was conducted and Imran Khan @ Sahil was apprehended and informed of his legal rights. Notice under Section 50 of NDPS Act was served on him but he refused to avail his legal rights. Thereafter, search of Imran @ Sahil was made and one white transparent polythene was recovered from the right side pocket of the pant he was wearing. Polythene was found tied with a red coloured rubber band and after opening the same, light pink coloured powdery substance was found. Recovered substance was checked through field testing kit and was found to be heroin. Recovered heroin was weighed on the electric weighing machine and weighed 269 grams. Recovered contraband and the polythene were kept in a transparent plastic box and wrapped with a doctor's tape and sealed with seal of "KM".

4. It is stated that present FIR was thereafter registered on 21.05.2023 and further investigation was initiated. During investigation, ASI Sanjeev arrested accused Imran @ Sahil and he disclosed his involvement in the case



and further disclosed that he had received the contraband from Anwar and Mehboob, both residents of Bisaratanj, Bareilly. During further investigation, raid was conducted and co-accused Mehboob (present Applicant) and Anwar were apprehended at Bisaratanj, Bareilly. After following the procedure under Section 50 NDPS Act, their search was made but no narcotic or psychotropic substance was recovered from their possession. Therefore, 'Nil' recovery memo was prepared. On interrogation, both accused disclosed their involvement in the supply of contraband to Imran @ Sahil and were arrested and sent on judicial remand and thereafter to judicial custody. CDRs of the mobile phones of the three accused were analysed and it was found that the three had been speaking to each other. On 23.06.2023, sampling was done under Section 52 NDPS Act and exhibits were sent to FSL, Rohini for examination. FSL result is awaited.

5. Learned counsel for the Applicant submits that the Applicant is innocent and has been falsely implicated. No incriminating evidence is available against the Applicant at this stage and there is only a disclosure statement of the co-accused Imran, which is inadmissible in evidence without any corroboration, as held by the Supreme Court in *Tofan Singh v. State of Tamil Nadu*, (2021) 4 SCC 1 and by this Court in *Md Irshad v. State (GNCT of Delhi)*, 2022 SCC OnLine Del 1317 and *Amit Ranjan v. Narcotics Control Bureau, Delhi*, 2022 SCC OnLine Del 1532. Reliance by the prosecution on the CDR details is also misconceived as merely establishing that the Applicant was in communication with the co-accused on the mobile phone is not sufficient to link him to the alleged offence and moreover, evidentiary value of the CDRs can only be tested during the trial. Reliance is placed on the judgment of this Court in *Deepak Nagiya v. State*



(*NCT of Delhi*), 2023 SCC OnLine Del 5641, to contend that in the absence of any other incriminating material, CDR details cannot be a ground to deny bail. Charge sheet has been filed and investigation is complete. Applicant is not involved in any other case and has clean antecedents.

6. *Per contra*, learned APP on behalf of the State opposes the bail application on the ground that co-accused Imran in his disclosure statement has disclosed that he had received the contraband from Anwar and Mehboob and the quantity of heroin recovered from the co-accused is 269 grams of heroin, which is a commercial quantity. It is further stated that though charge sheet has been filed, one of the co-accused is absconding and the Applicant does not have a permanent residence in Delhi.

7. I have heard the learned counsel for the Applicant and the learned APP for the State.

8. As per the case set up by the prosecution, there was no recovery of the contraband from the Applicant and he was arrested only pursuant to a disclosure made by Imran, the co-accused. The disclosure statement cannot be taken at this stage to deny bail to the Applicant in view of the observations of the Supreme Court in *Tofan Singh (supra)* and of this Court in *Amit Ranjan (supra)*. In *State of Haryana v. Samarth Kumar*, 2022 SCC OnLine SC 2087, the Supreme Court has observed that advantage of the law laid down in *Tofan Singh (supra)* can be availed of by the accused at the stage of arguing a regular bail application. Another important facet of this case is that admittedly, despite search of the Applicant, no recovery of any narcotic or psychotropic substance was made from the Applicant or his premises or at his instance. This Court in *Phundreimayum Yas Khan v. State (NCT of Delhi)*, 2023 SCC OnLine Del 135, has held that where there



is no recovery from or at the instance of the accused and there is no corroborating material to link the accused to the recovery of commercial quantity from the co-accused, rigours of Section 37 of NDPS Act would not apply. As far as the call details record, which allegedly shows that the Applicant was in touch with the co-accused prior to the date of apprehension is concerned, firstly there is no recorded conversation with respect to the calls and therefore, at this stage, this evidence can at best only raise a suspicion. *Sans* the disclosure statement, if one examines the CDR, there is nothing on record to link the calls to the recovery in question from the co-accused. Secondly, the probative and evidentiary value of the CDR has to be tested at the stage of trial. In this context, it would be useful to refer to a few passages from a judgment of this Court in **Deepak Nagiya (supra)**, where the Court had granted anticipatory bail to the Applicant as the only incriminating evidence was a disclosure statement of a co-accused and heavy reliance had been placed by the prosecution on the CDRs. Relevant paragraphs are as under:-

“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 v. 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 v. 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 Surrender @ Bhalu on the other hand.

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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 v. Pallulabid Ahmad Arimutta*, (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 v. 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)

9. It would be instructed and illuminating to refer to the judgment of this Court in ***Amit Ranjan (supra)***, where the contentions of the Applicant were similar to those in the present case, i.e. no recovery; disclosure statement of co-accused inadmissible and CDR details cannot form the basis to deny bail. The Co-ordinate Bench admitted the Applicant therein to regular bail on the ground that apart from the voluntary statement of the Applicant under Section 67 of NDPS Act, which he retracted and disclosure statements made by co-accused which were inadmissible, there was no other incriminating material and admittedly, no recovery was effected from the Applicant.

10. Coming to the facts of the present case, there is no recovery of the contraband from the Applicant or at his instance. The incriminating evidence relied upon by the prosecution are the CDRs and disclosure statement of co-accused Imran. In view of the law laid down by the Supreme Court, as referred to above, none of these can help the prosecution at this stage. Charge sheet has been filed and thus the investigation stands completed. Nominal roll indicates that he is not involved in any other case and has clean antecedents.



11. In response to the objection by the prosecution that the Applicant is not a resident of Delhi, learned counsel for the Applicant, on instructions, from the brother of the Applicant, states that Applicant be bound down to furnish surety of one of the family members, who permanently resides at Delhi.

12. For all the aforesaid reasons, this Court is satisfied that there are reasonable grounds for believing that the Applicant is not guilty of commission of the offence alleged and is not likely to commit any offence under the NDPS Act while on bail. It is, therefore, directed that the Applicant be released on regular bail on furnishing a personal bond in the sum of Rs.50,000/- with one surety of the like amount by one of Applicant's family members, who is permanent resident of Delhi, to the satisfaction of the learned Trial Court and further subject to the following conditions:-

- i. Applicant shall not leave India without prior permission of the Trial Court;
- ii. He shall furnish his permanent residential address to the concerned IO and shall intimate the IO as well as the Trial Court by filing an affidavit regarding any change in the residential address;
- iii. He shall provide his mobile number to the IO concerned and shall keep the same active at all times and the number shall not be changed without prior intimation to the IO and the Trial Court;
- iv. He shall not directly or indirectly tamper with evidence or make an attempt to influence the witnesses in any manner and/or intimidate them;



- v. He shall appear on every date of hearing before the Trial Court unless exemption is sought and granted by the Court on any given date; and
 - vi. He shall report to concerned SHO/IO once in a month.
13. Needless to state that nothing stated in this order shall tantamount to expression of opinion on merits of the case.
14. Application is allowed and disposed of.
15. Copy of the order be sent to the concerned Jail Superintendent for information and necessary compliance.

JYOTI SINGH, J

FEBRUARY 09, 2024/kks