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

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BAIL APPLN. 3999/2023

SABBO ALIAS SAHABANA

..... Applicant

Through: Mr. Sunil Tiwari, Adv.  
(through VC)

versus

THE STATE NCT OF DELHI

..... Respondent

Through: Ms. Nandita Rao, ASC for  
the State.  
SI Sandeep Mathur, PS-  
Narcotics Cell, Outer  
North District.

**CORAM:**

**HON'BLE MR. JUSTICE AMIT MAHAJAN**

**ORDER**

**14.05.2024**

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1. The present application is filed under Section 438 of the Code of Criminal Procedure, 1973 ('CrPC') seeking pre-arrest bail in FIR No. 433/2023 dated 24.06.2023 registered at Police Station Narela, for offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'). Chargesheet has been filed in the present case.
2. The case of the prosecution is that, on 24.06.2023, on the basis of secret information, the accused, namely, Jakir Hussain, was apprehended and a recovery of 282 grams of Heroin was effectuated from him.
3. It is alleged that, during interrogation, accused Jakir Hussain disclosed that he and his wife, namely, co-accused Hasina, procured the recovered contraband from one person, namely, Rahul.
4. During investigation, co-accused Hasina was arrested and



40 grams of Heroin was recovered from her house.

5. During interrogation, co-accused Hasina allegedly disclosed that she used to supply the contraband to the applicant.

6. Subsequently, on 27.10.2023, a raid was conducted at the residence of co-accused Rahul and 50 grams of Heroin were recovered from there. He was also arrested in the present case.

7. It is alleged that initially, notice under Section 67 of the NDPS Act was served on the husband of the applicant but she did not join investigation. Thereafter, the applicant moved her application for anticipatory bail and joined investigation on 19.10.2023, in compliance of the order of the learned Trial Court.

8. The learned Trial Court dismissed the applicant's anticipatory bail application *vide* order dated 31.10.2023.

9. The learned counsel for the applicant submits that the applicant has clean antecedents and she has been falsely implicated in the present case.

10. He submits that no recovery has been effectuated from the applicant and there is no incriminating evidence against her that links her to the present offence.

11. He submits that the applicant has been indicted in the present case merely at the behest of co-accused Hasina. He submits that the disclosure statement of the co-accused person is *per se* insubstantial and has no evidentiary value, as the same is not corroborated by any recovery. He places reliance on the judgment passed by the Hon'ble Apex Court in the case of **Tofan Singh v. State of Tamil Nadu : (2021) 4 SCC 1** in this regard.

12. *Per contra*, the learned Additional Standing Counsel ('ASC') for the State opposes the grant of any relief to the applicant. She submits that the applicant was an active participant in the entire transaction.



13. She submits that the allegations against the applicant are serious in nature and the present case related to recovery of commercial quantity of contraband.

14. She submits that the applicant did not cooperate with the investigation and she had not disclosed the relevant information to the concerned Investigating Officer.

15. I have heard the learned counsel for the parties and perused the record.

16. *Prima facie*, the applicant has been implicated in the present case primarily on the basis of the disclosure statement of the co-accused. It is relevant to note that while the veracity of the disclosure statement of the co-accused is to be tested at the time of the trial, this Court cannot lose sight of the decision of the Hon'ble Supreme Court in **Tofan Singh v. State of Tamil Nadu** (*supra*), wherein it was held that a disclosure statement made under Section 67 of the NDPS Act is impermissible as evidence without corroboration. The relevant paragraphs of the said judgment is set out below:-

*“155. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any non obstante clause doing away with Section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.*

*156. The judgment in Kanhaiyalal then goes on to follow Raj Kumar Karwal in paras 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.*

*157. On the other hand, for the reasons given by us in this judgment, the judgments in Noor Aga and Nirmal Singh Pehlwan v. Inspector, Customs are correct in law. 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)*

17. A Coordinate Bench of this Court in ***Phundreimayum Yas Khan Vs. State (GNCT of Delhi) : 2023 SCC OnLine Del 135***, has held that when there is no material to link the applicant with the recovery of the commercial quantity from the co-accused persons, the rigors of Section 37 would not apply. It was further held that the disclosure statement of co-accused is per se not admissible without there being any corroboration.

18. It is pertinent to note that no recovery has been effectuated from the applicant in the present case. At this stage, *prima facie*, the material on record cannot be deemed sufficient to link the applicant to the alleged offence or other co-accused persons.

19. In such circumstances, this Court is of the opinion that the embargo of Section 37 of the NDPS Act does not come in the way of granting bail to the applicant.

20. It is also pertinent to note that the applicant was granted interim protection by this Court *vide* order dated 28.11.2023.

21. It is not disputed that the applicant has since joined the investigation. While it is submitted by the learned ASC that the applicant has not cooperated with the investigation after grant of interim protection by this Court, however, the Status Report filed on 12.05.2024 clearly indicates that during interrogation, the applicant provided her bank account number. It is stated that the



Bank Statement for the three years were analysed and no huge or suspicious transactions linking her to the co-accused persons or the offence were found.

22. Respondent No. 2, being a woman, is also undeniably entitled to special consideration while dealing with the question of bail, in terms of the proviso to Section 437 (1) of the CrPC.

23. It is also stated that the applicant is married and has three children.

24. It is not in doubt that order for bail cannot be passed in a routine manner so as to allow the accused to use the same as a shield. At the same time, it cannot be denied that great amount of humiliation and disgrace is attached with arrest. In cases where the accused has joined investigation and is not likely to abscond, the custodial interrogation should be avoided.

25. The learned ASC for the State has not expressed any apprehension of the applicant fleeing from justice or tampering with evidence. The apprehension, even otherwise, can be taken care of by putting appropriate conditions.

26. In view of the above, it is directed that the applicant, in the event of arrest, be admitted on bail on furnishing a bail bond for a sum of ₹20,000/- with one surety of the like amount subject to the satisfaction of the learned Trial Court, on the following conditions:

- a. The applicant shall join and cooperate with the investigation as and when directed by the IO;
- b. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- c. The applicant shall under no circumstances leave the



boundaries of the court, without the permission of the learned Trial Court;

- d. The applicant shall appear before the learned Trial Court as and when directed;
- e. The applicant shall provide the details of her address to the concerned IO/ SHO and shall not change the same without informing them;
- f. The applicant shall give her mobile number to the concerned IO/SO and shall keep her mobile phone switched on at all times.

27. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

28. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the Trial and also not be taken as an expression of opinion on the merits of the case.

29. The bail application is allowed in the aforementioned terms.

**AMIT MAHAJAN, J**

**MAY 14, 2024**