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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 3703 OF 2024

Fakruddin Momin

.. Applicant

Versus

Union of India and Anr.

.. Respondents

.....

- Mr. Girish Wani a/w. Mr. Firoj A. Shirpurkar and Mr. Jay Raundale, Advocates i/by Mr. K.M. More for Applicant.
- Mr. Shreeram Shirsat, Special PP a/w. Ms. Karishma Rajesh, Mr. Nikhil Daga and Mr. Shekhar Manee and Madhur Salkar, Advocates for Respondent No.1 – Union of India.
- Ms. Shilpa K. Gajare – Dhumal, APP for Respondent No.2 – State.

CORAM : MILIND N. JADHAV, J.

DATE : APRIL 01, 2025.

P.C.:

1. Heard Mr. Wani, learned Advocate for Applicant; Mr. Shirsat, learned Special PP for Respondent No.1 – Union of India and Ms. Gajare – Dhumal, learned APP for Respondent No.2 – State.

2. This is an Application under Section 439 of the Code of Criminal Procedure, 1973 seeking Regular Bail in connection with C.R.No.NCB/MZU/CR No.4 of 2023 registered by Intelligence Officer of Narcotics Control Bureau Mumbai Zonal Unit, Mumbai for the offence under Sections 8(c), 21(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “**NDPS Act**”).

3. After hearing learned Advocate for Applicant and the learned Prosecutors on 27.03.2025, the following order was passed:-

"1. Heard Mr. Wani, learned Advocate for Applicant. Mr. Shirsat, learned Special PP for Respondent No.1 – Union of India and Ms. Gajare – Dhumal, learned APP for Respondent No.2 – State.

2. In the present crime, Applicant is arraigned as Accused No.1. There are 5 accused persons in the present crime. It is an offence under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS') for the Applicant having been apprehended in his tempo which was seized with 32 boxes of the alleged contraband namely Chlorpheniramine Meleate and Codeine Phosphate Monoecoff-Plus Cough Syrup. According to the prosecution case, Accused Nos.2, 4 and 5 have been enlarged on bail by the Court. Accused No.2 was supposed to be the recipient and beneficiary of the alleged contraband. Accused No.1 is a tempo driver and he was contacted by Accused No.3 to transport the alleged contraband from the hospital premises / clinic of one Dr. Patel from Surat in Gujarat to a location in Bhiwandi.

3. According to the prosecution case, Applicant took his tempo bearing registration No. CJ-05-CT-2484 to Surat and under the instructions of Accused No.3 loaded the said tempo with the alleged contraband contained in 32 boxes and ferried the same to Bhiwandi where it was intercepted and he was apprehended.

4. Mr. Wani, learned Advocate for Applicant would persuade me to consider the fact that Applicant was a tempo driver who was completely unaware of the contents of the boxes and unconnected with present crime in question of which prosecution had received intel. He would submit that he was paid an amount of Rs.5,000/- as transport charges for the purpose of transferring the medicine boxes from Surat to Bhiwandi and was instructed to hand over the boxes to Accused No.2 who would meet him near Sagar Hotel in Bhiwandi. He would submit that Applicant had purchased the said tempo on his name by taking bank loan one year prior to the date of his arrest and he was repaying the bank loan on the same but because of his arrest and detention for the past two years, the said tempo has been confiscated and seized as also the Applicant is in jail.

5. He would submit that the role of the Applicant needs to be ascertained by the Court on the reading of the statement of the Accused No.3 recorded by the prosecution. He has placed on record a compilation of documents from the charge-sheet. A copy of the same has been given to Mr. Shirsat. Perusal of page No.135 of the said compilation is the statement of Accused No.3 which the prosecution has recorded during his inquiry under Section 67 of the NDPS Act. Though the learned prosecutor Mr. Shirsat would persuade the Court to not consider the said statement as it is a statement recorded under Section 67 of the NDPS Act and it would not have any evidentiary value at this

stage considering the provisions of Sections 25 and 26 of the Indian Evidence Act, 1872, *prima facie*, I need to read that statement in order to ascertain the *modus operandi* in which the alleged contraband was transferred by the subject vehicle tempo belonging to the Applicant which was driven by him to Bhiwandi. The entire *modus operandi* right from booking of the alleged contraband by Accused No.3 has been stated in the said statement. Not only this, the said statement can be used to corroborate the case of the Applicant because it is duly supported by substantive documentary evidence which is *prima facie* part of the charge-sheet itself.

6. *Prima facie* it is seen that the Company called G-Next belonging to one Dr. Patel was a proprietary concern and he had appointed the Accused No.3 to undertake the operation for supply of medicines. However sometime in the month of July 2022 when Dr. Patel had a reasonable apprehension that there was something fishy in the dealings of Accused No.3, he directed Accused No.3 to shut down the operations of the said proprietary concern G-Next. Appropriate correspondence was entered into by Dr. Patel himself to ensure that the drugs licence and registration of G-Next was cancelled by the Statutory Authorities. To that effect, all such details are enumerated by him on the basis of documentary evidence appended to the charge-sheet in his voluntary statement which is also appended to the charge-sheet. Once this is the case it was incumbent upon Accused No.3 to not have operated under the name and pretext of G-Next in supplying any medicines to any person.

7. *Prima facie*, it is seen that in the first quarter of 2023 Accused No.3 has undertaken several correspondence for supply of medicines and the alleged contraband by impersonating himself as a Doctor when he was a mere medical representative on behalf of G-Next and entered into several transactions. The role of the present Applicant in transporting the goods after receiving his hire charges of Rs.5,000/- is not *prima facie* seen as being connected to or having any nexus with Accused No.3.

8. In that regard, Mr. Shirsat, learned Special PP would persuade the Court to consider the CDRs. He would submit that the CDRs in this case would show that Applicant was in constant touch with Accused No.3 which would imply his complicity in the crime. It is but natural that if Accused No.3 has indulged in any operation of supplying a consignment and hired services of Applicant and his tempo to ferry the said consignment from Surat in Gujarat to Bhiwandi, he would be in constant touch with the Applicant. The CDRs which are placed on record by Mr. Shirsat do not establish live link between parties having nexus to the crime as envisaged by the Supreme Court in the case of **Bharat Chaudhary Vs. Union of India**¹, wherein the Supreme Court held that printouts of WhatsApp messages downloaded from the mobile phone or device seized cannot be treated as

1 (2021) 20 SCC 50

sufficient material to establish link between the accused persons under the NDPS Act at the stage of bail. It also held that statement of co-accused cannot be relied upon which was recorded under Section 67 of the NDPS Act at the interim stage of bail.

9. There is another submission made by Mr. Shirsat under Rule 67 of the NDPS Rules, 1985 and he would submit that there is no consignment note which the Applicant had carried in his tempo which is required to be issued in Form No.6. It needs to be remembered that if the said transaction would have been a valid transaction, undoubtedly the consignor and consignee of the said transaction would have issued a valid consignment note in Form No.6. But prima facie it was not so. Despite G-Next having been shut down by its proprietor, despite its drug licence being cancelled, Accused No.3 fraudulently acted on its behalf. Question before the Court is whether the present Applicant, driver and owner of the tempo had knowledge of the crime.

10. As delineated herein above and in the facts and circumstances of the present case, considering the role of the Accused No.3 who booked the consignment when he was not authorized to do so under the name and pretext of G-Next proprietary concern belonging to Dr. Patel, the submission made by Mr. Shirsat cannot be countenanced. All that is seen is that there was a delivery challan which was given to the Applicant and a direction was given to him to hand over the consignment to Accused No.2 who has been released on bail by the Court. In view of the above, prima facie, Applicant has made out a case for grant of bail.

11. However at the request of Mr. Shirsat and considering the fact that the compilation of documents is given to him today, he is granted time till Monday to study the same and respond to the same.

*12. List the Bail Application on Board on **01st April, 2025 at 02:30 p.m.** on the 'Supplementary Board'. To be treated as 'Part-Heard'."*

4. Today, submissions are made by Mr. Shirsat in reply and at the outset he would persuade the Court to peruse the statement of the Applicant recorded by the NDPS Officers / Prosecution Officers under Section 67 of the NDPS Act with respect to the seizure of the alleged contraband Chlorpheniramine Codeine Phosphate Monoecoff-Plus Cough Syrup bottles as delineated in the panchnama dated 28.03.2023

from his custody and possession. He would submit that on bare perusal of the said statement, it would reveal that Applicant was fully aware of the contents of the alleged contraband which was being transported by him in his vehicle on instructions of other co-accused persons.

4.1. In this regard, he would refer to and rely upon the answers given to Question Nos.6 and 8 in the said statement wherein Applicant has *prima facie* confessed that he used to earn money by giving on rent or transporting the Codeine Phosphate Syrup occasionally and he did so to earn quick money and for luxurious life. *Prima facie* the said statement as seen is recorded by Prosecution Officers under Section 67 of the NDPS Act. The evidentiary value of the said statement at the interim stage unless proved under the Evidence Act has been determined by the Supreme Court in the case of ***Tofan Singh Vs. State of Tamil Nadu***². The Supreme Court has held that statements recorded by NDPS officers could be construed as statements given to police officers given their duties and responsibilities in preventing and detecting crime under the NDPS Act. It held that right against self-incrimination and right to privacy under Article 20(3) and Article 21 of the Constitution apply to confessions recorded under Section 67 of the NDPS Act. It has also held that officers under the NDPS Act should be construed as 'police officers' under Section 25 of the Indian Evidence

² (2021) 4 SCC 1

Act to prevent coercion in recording confessions and that confessions made before such officers are inadmissible as evidence to protect fundamental rights under Articles 20(3) and 21 of the Constitution of India.

5. The Delhi High Court in the case of *Phundreimayum Yas Khan Vs. State (NCT of Delhi)*³ has observed that disclosure statement of co-accused is *per se* not admissible without there being any corroboration thereof. Relevant paragraph No.24 of the said judgement reads thus:-

“24. The case of the prosecution, in so far as the applicant is concerned, is circumstantial, i.e. based solely on disclosure statement of the co-accused Sayed Javed Hussain which is per se not admissible without there being any corroboration. The prosecution has not been able to establish any connection between the subject offence and the location/CDRs of the accused persons, where the applicant is alleged to be present at the time when the contraband was collected by Sayed Javed Hussain. Merely because the applicant had been having frequent calls with the co-accused, would not be sufficient to hold that applicant is guilty of the subject offence.”

6. In the case of *Jasbir Singh Vs. Narcotics Control Bureau*⁴ the Delhi High Court in paragraph Nos.63, 67 and 68 of its judgment while interpreting Section 67 of the NDPS Act *vis-a-vis* Sections 25 and 27 of the Indian Evidence Act, 1872 held as under:-

“63. As statements recorded under Section 67 NDPS Act are inadmissible being hit by Section 25 IEA, the only way to make any part of such statements admissible, is by way of Section 27 IEA which creates an exception and allows only such part of a confessional statement, being information leading to discovery

3 2023 SCC OnLine 135

4 (2023) SCC OnLine Del 134

of some fact not previously in the knowledge of the police officer. In the present case, none of the statements of the Applicant lead to any discovery of a fact", and hence, the statutory bar to their admissibility and reliability is attracted.

64. ***

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67. With regards to applicability of Section 27 IEA, the fact so discovered is admissible when accompanied by the recovery of a material object and does not include purely mental or psychological facts. It is relevant to note the observations of this Hon"ble Court in State v. Navjot Sandhu @ Afsan Guru Crl. A. No. 80/2003 wherein this Hon"ble Court, after placing reliance on Pulukuri Kottaya and Ors v. The King-Emperor 1946 SCC OnLine PC 49, and several other judgments of the Hon"ble Supreme Court and other courts, summarized the law governing Section 27 IEA as follows:

"396. We, therefore, hold that in order that Section 27 may be brought in aid, the prosecution must establish:—

1. That consequent to the information given by the accused, it led to the discovery of some fact stated by him.

2. The fact discovered must be one which was not within the knowledge of the police and the knowledge of the fact was for the first time derived from the information given by the accused.

3. Information given by the accused must lead to the discovery of a fact which is the direct outcome of such information.

4. The discovery of the fact must be in relation to a material object and of course would then embrace within its fold the mental condition i.e. the knowledge of the accused of the place from where the object was produced and the knowledge that it was there.

5. Only such portion of the information as is distinctly connected with the said discovery is admissible.

6. The discovery of the fact must relate to the commission of some offence.

68. Therefore, for any part of the alleged disclosures of the Applicant to be admissible, it was necessary that such disclosure led the Respondent to recovery of any contraband, or any other 'fact' related to the alleged offences. Given that none of the disclosures of the Applicant, except (at best for the recovery of a contraband involving quantity lesser than small quantity) led to the discovery of any object, or a "new fact" thereby, such

disclosures under section 67 NDPS Act are held inadmissible in evidence.”

7. Another limb of Mr. Shirsat’s submissions is that the Applicant in the present case was in constant touch with Accused No.3 under whose instructions he was ferrying the alleged contraband from Surat, Gujarat to Bhiwandi for handing it over to Accused No.2. I have already dealt with the aforesaid issue in the previous order and need not reiterate it.

8. In the case of *State Vs. Pallulabid Ahmad Arimutta*⁵, the Supreme Court held that CDR details of some of the accused or allegations of tampering of evidence by accused is an aspect that can be examined at the stage of trial. Hence it is clear that statement given under Section 67 of the NDPS Act, 1985 cannot be considered at the stage of bail.

9. Further in the case of *Bharat Chaudhary Vs. Union of India*⁶, the Supreme Court held that printouts of WhatsApp messages downloaded from the mobile phone or device seized cannot be treated as sufficient material to establish live link between the accused persons under the NDPS Act at the stage of bail. It also held that statement of co-accused cannot be relied upon under Section 67 of NDPS Act.

⁵ SLP (Cri.) No. 3242 / 2022 dated 10.01.2022

⁶ (2021) 20 SCC 50

10. In view of the above *prima facie* observations made in the order dated 27.03.2025 and today's order, considering the role of the present Applicant and the ignominy of the Applicant suffering pending trial, Applicant can be enlarged on bail.

11. Hence, Bail Application is allowed subject to the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs.25,000/- with one or two sureties in the like amount;
- (ii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;
- (iii) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (iv) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and/or non Court working day, the Applicant shall mark presence on the next working day;

- (v) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;
- (vi) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (vii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner;
- (viii) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.
- (ix) Applicant is permitted to approach Trial Court to make the Application for seeking release of his seized tempo bearing registration No.GJ-05-CT-2484 by making Application in that regard in accordance with law. If such Application is made, it shall be determined by the Trial Court immediately within two weeks from the date of its filing after hearing all parties and on conditions deemed fit by the Trial Court. Needless to state that that if the seized tempo is released by the Trial Court,

Applicant will have to undertake not to dispose of off until completion of trial and present the same, if so required during the trial; and

- (x) All parties including the Trial Court shall act on a server copy of this order and shall not insist on a certified copy of the order.

12. It is clarified that the observations made in this order are limited for the purpose of granting bail only and I have not made any observations on merits of the case. The trial shall be adjudicated on the strength of the evidence led and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

13. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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by AJAY
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Date: 2025.04.03
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