

Ajay

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

CRIMINAL BAIL APPLICATION NO. 4307 OF 2024

Aafaque Fayyaz Khan

.. Applicant

Versus

The State of Maharashtra

.. Respondent

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- Dr. D.S. Hatle a/w. Mr. Deepak Jamsndekar and Ms. Nirmiti K. Lawane, Advocates for Applicant.
 - Ms. Savita M. Yadav, APP for Respondent – State.
 - Mr. Vinod Shendkar, PSI – Bhoiwada Police Station present.
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CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 10, 2025.

P.C.:

1. Heard Dr. Hatle, learned Advocate for Applicant and Ms. Yadav, learned APP for Respondent – State.

2. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Regular Bail in connection with C.R.No.132 of 2023 registered with Bhoiwada Police Station, Bhiwandi, District Thane for the offence punishable under Sections 8(c), 21(c) and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short “**NDPS Act**”) and Section 142 of the Maharashtra Police Act, 1951.

3. Applicant before me is Accused No.2 in C.R. No.132 of 2023. He has been arrested six months after filing of the FIR. FIR is filed on

22.06.2023 and he is arrested on 14.12.2023.

4. Dr. Hatle, learned Advocate for Applicant would submit that Accused No.1 in FIR stated that he procured alleged contraband which was seized from his house from the Applicant. Save and except the statement of co-accused there is nothing placed on record by the prosecution to show the nexus of the Applicant with Accused No.1.

5. The direct role of the Applicant is not attributable from the material presented in the FIR. Though in earlier point of time in December 2023 it was stated that investigation was on but the position remains the same even today. It is seen that when the Applicant's house was searched on 15.12.2023 one day after his arrest 4 bottles of Codeine Phosphate and Triprolidine Hydrochloride Cough syrup were recovered from his house. In any event the alleged contraband recovered from the house of Applicant is of intermediate quantity and for such recovery rigors of Section 37 of the NDPS Act would not apply. However it is seen that prosecution has not shown the nexus of the Applicant with Accused No.1. Applicant admittedly does not have any criminal antecedents.

6. Dr. Hatle has referred to and relied upon the order of the Supreme Court in the case of *Puranmal Jat Vs. State of Rajasthan*¹ wherein the Supreme Court has held considering recovery of

¹ Criminal Appeal arising from SLP (CrL.) No(s).10670 of 2023 – decided on 02.11.2023.

intermediate quantity of contraband, the restriction on grant of bail under Section 37 does not apply and hence continuing detention trial is not necessary. In the above case since the quantity of the contraband in question was intermediate quantity, accused was granted bail by the Supreme Court.

7. Ms. Yadav, learned APP would vehemently submit that the offence is of a serious nature as recovery of the alleged contraband is of intermediate quantity coupled with the facts of the case that Applicant should not be released on bail as such he would be a menace to the Society as there is no guarantee that he would not re offered and would repeat the offence.

8. I have considered the rival submissions of both the Advocates which are delineated herein above and perused the record of the case.

9. The Supreme Court in the case of *Tofan Singh Vs. State of Tamil Nadu*² Court held that statements recorded by NDPS officers could be construed as statements 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 also held that officers under the NDPS Act should be construed as 'police officers'

² (2021) 4 SCC 1

under Section 25 of the Evidence 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.

10. In the case of *Phundreimayum Yas Khan Vs. State (NCT of Delhi)*³ the Delhi High Court 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.”

11. 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.”

12. In the case of *State Vs. Pallulabid Ahmad Arimutta*⁵, the Supreme Court held that CDR details of the 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 statement given under Section 67 of the NDPS Act, 1985 cannot be considered at the stage of bail.

13. 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 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.

14. From the above statement of co-accused and his nexus without any corroboration or *prima facie* material on record cannot be a ground for arrest. Since the quantity of the alleged contraband recovered from the Applicant is intermediate namely 4 bottles of Codeine Phosphate and Triprolidine Hydrochloride Cough syrup, incarceration of Applicant is not necessary in these facts, hence Applicant is allowed bail.

15. In view of the above, bail is granted on the following terms

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

⁶ (2021) 20 SCC 50

and conditions:

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond of Rs.25,000/- (Rs. Twenty Five Thousand only) with one or two sureties of the like amount;
- (ii) Applicant shall report to the Investigating Officer at Bhoiwada Police Station, Bhiwandi once a month on the first Sunday of the month between 10:00 a.m. and 12 noon for the first six months and thereafter as and when called by the Investigating Officer;
- (iii) 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;
- (iv) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (v) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner;
- (vi) Applicant shall keep the Investigating Officer informed of his current address and mobile contact number and /

or change of residence or mobile details, if any, from time to time, as applicable; and

(vii) Any infraction of the conditions shall entail prosecution to apply for cancellation of bail granted to the Applicant.

16. It is clarified that the above observations in this order are limited for the purpose of granting bail only and I have not made any observations on the merits of the case and the trial shall proceed uninfluenced by the present order.

17. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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