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

Date of decision: 03.03.2021

+ **BAIL APPLN. 371/2021**

ISHIKA Petitioner

Through Mr.Ajay Verma, Adv.

versus

STATE Respondent

Through Mr. Amit Chadha, APP for State.
SI Uday Singh PS Bawana.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT (ORAL)

1. Present petition has been filed under section 439 Cr.P.C. for grant of regular bail in pursuance to FIR No.261/2020 registered at Police Station Samaipur Badli for the offences punishable under sections 29/21/61/85 of Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Case of the petitioner is that bar of section 37 of NDPS Act is not applicable in the present case, therefore, this court may exercise its discretion and enlarged the petitioner on bail. The substance alleged to have been recovered from the petitioner is 112 gms. of heroin and 152 gms. from the co-accused Ravi Kiran. Accordingly, it is evident that the contraband

recovered from the petitioner was intermediate and as per the notification of intermediate quantity, the bar under section 37 of NDPS Act will not be attracted in the present case as the same is applicable only in offences involving commercial quantity.

3. Counsel for the petitioner further submits that both the accused persons were apprehended separately and the contraband was also recovered separately, wherein there was no element of abetment or criminal conspiracy between the petitioner and the co-accused to commit the alleged offence. To strengthen his arguments, counsel for the petitioner relied upon the case of ***Amar Singh Ramjibhai Barot vs. State of Gujarat: (2005) 7 SCC 550*** delivered by Hon'ble Supreme Court of India vide judgment dated 19.09.2005 in Crl.A.1218/2005 and relevant paras are reproduced as under:

“8. Although, at first blush, the argument of the learned counsel appeared attractive, on careful appreciation of the facts on record we are satisfied that the High Court judgment is fully justified and needs to be upheld. It is true that the High Court proceeded on the footing that there was a criminal conspiracy between the appellant and the deceased Danabhai Virabhai Rabari. In our view, however, there was no warrant for this conclusion at all as there is no evidence to suggest that there was any such abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act. The appellant and Danabhai Virabhai Rabari were found together, but individually carrying the recovered substances. Hence, it was not possible for the High Court to take the view that Section 29 was attracted.

9. The High Court was justified in its conclusion that the appellant could not have been punished under Sections 17 and 18 of the NDPS Act.

10. The High Court has not merely rested its conclusion on Section 29 and the fact of adding together the recoveries made from the appellant and the other accused, deceased Danabhai Virabhai Rabari, for the purposes of arriving at a quantity of recovery of opium more than the “commercial quantity”. The High Court has carefully analysed the facts before it and arrived at the right conclusions as we shall see presently.

11. The appellant was found in possession of 920 grams of black liquid which prima facie smelt of opium. The FSL report indicates that the substance recovered from the appellant was “opium as described in the NDPS Act” containing 2.8% anhydride morphine, apart from pieces of poppy (posedoda) flowers found in the sample.”

4. Case of prosecution is that the petitioner was arrested on 10.04.2020 and accordingly, search was conducted and one polythene containing heroine 112 gms was recovered from petitioner and 152 gms was recovered from co-accused Ravi Kiran. Both the accused persons had disclosed that they had come from Punjab to Delhi together only to buy drugs and they had bought the recovered drug from Dwarka Mor from a Negro and were going back to Punjab. The CDRs of mobile numbers of the accused persons was obtained and it was found that they came to Delhi in active connivance to purchase the contraband and were going back to Punjab. The mobile number

7527826081 was being used by the petitioner and the mobile number 6280652523 was being used by the co-accused and as per the call details and location record of both the above mentioned numbers, they were in regular touch. The location of both the mobile numbers also corroborates their connivance as they both travelled from Punjab to Delhi on early hours of 08.04.2020.

5. As per the CDRs record, it is evidently established that on 06.04.2019, the petitioner and co-accused were in Mohali and on 08.04.2020, their locations was at Wazirpur and thereafter in Uttam Nagar from where they procured the contraband and were going back to Punjab. The CDR also establishes the fact that there were 22 calls between the petitioner and co-accused which evidently establishes that they had conspired together to procure and transport substance to the other state.

6. On the similar facts, the Hon'ble Supreme Court in the case of *Saju v. State of Kerala*: 2001(1) SCC 378, held as under:

“8. ...It is a settled position of law that act or action of one of the accused cannot be used as evidence against other. However, an exception has been carved out under Section 10 of the Evidence Act in the case of conspiracy. To attract the applicability of Section 10 of the Evidence Act, the Court must have reasonable ground to believe that two or more persons had conspired together for committing an offence. It is only then that the evidence of action or statement made by

one of the accused could be used as evidence against the other.”

7. Further, it is relevant to quote that in ***Mir Nagvi Askari v. Central Bureau of Investigation: (2009) 15 SCC 643***, it was ruled that while drawing an inference from the materials brought on record to arrive at a finding as to whether the charges of the criminal conspiracy have been proved or not, it must always bear in mind that a conspiracy is hatched in secrecy and it is difficult, if not impossible, to obtain direct evidence to establish the same.

8. The Supreme Court in the case ***of Mohd. Amin v. CBI: (2008) 15 SCC 49*** has held as under:

“74. The principles which can be deduced from the above noted judgments are that for proving a charge of conspiracy, it is not necessary that all the conspirators know each and every details of the conspiracy so long as they are co-participants in the main object of conspiracy. It is also not necessary that all the conspirators should participate from the inception of conspiracy to its end. If there is unity of object or purpose, all participating at different stages of the crime will be guilty of conspiracy.”

9. Further, in ***Union of India v. Ram Samujh and Anr.: (1999) 9 SCC 429***, the Supreme Court observed as under:

“8. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on

bail during trial unless mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that accused is not guilty of such offence; and

(ii) that he is not likely to commit while on bail, are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in the dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended.”

10. The aforesaid dictum has been relied upon by this court in the case of ***Amit Ranjan vs. Narcotic Control Bureau, Delhi*** in Bail Apnl.1102/2019 decided on 05.07.2019. Accordingly, the judgment relied upon by the petitioner is not helpful in the facts and circumstances of the case in hand.

11. In view of above submissions, I find no ground to grant bail to the petitioner.

12. The same is, accordingly, dismissed.

**(SURESH KUMAR KAIT)
JUDGE**

MARCH 03, 2021/ab