

\$~12

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

+ BAIL APPLN. 574/2020

JAI BHAGWAN @ BHEDHA BHAI Petitioner

Through: Mr Sumit, Advocate.

versus

N.C.B. (NARCOTICS CONTROL BUREAU) Respondent

Through: Mr Subhash Bansal, Senior
Standing Counsel for NCB
along with Mr Shashwat
Bansal, Advocate for NCB.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

11.08.2020

[Hearing held through video conferencing]

VIBHU BAKHRU, J

1. The petitioner has filed the present petition seeking bail in SC No. 311/2019 under Section 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) captioned "*Narcotic Control Bureau v. Bhagwan Singh and Anr.*".

2. The Narcotic Control Bureau (NCB) filed a complaint alleging that on 11.01.2019, secret information was received by one of the Intelligence Officers that one person named Bhagwan Singh, aged

about 35 years, would come to Anand Vihar Bus Stand New Delhi in Bus No. UK07PA1517 and would be carrying a huge quantity of *charas*. It is stated that the said information was reduced to writing and placed before the concerned Superintendent, NCB, Delhi Zonal Unit. He directed Sh. Deepak Atri, Intelligence Officer to constitute a team and take the necessary action and in accordance with law.

3. In compliance with the aforesaid direction, Sh. Deepak Atri constituted a team comprising himself and seven other officials. He collected the field testing kit and other items and then proceeded to Anand Vihar Bus Terminal, Delhi. He reached there at 10:30 hours on 11.01.2019. The Bus bearing no. UK07PA1517 arrived from Haldwani at 13:05 hours and one of the passengers, who matched the description of Bhagwan Singh, was accosted. The Driver and the Conductor of the said bus also joined the proceedings as independent witnesses. According to the NCB, a notice under Section 50 of the NDPS Act was served to Bhagwan Singh and his rights to be searched before a Magistrate or a Gazetted Officer were explained to him. He did not desire to be searched before a Gazetted Officer or a Magistrate and, accordingly, was searched at the spot. Nothing incriminating was found on his person. He was carrying a bag (*pitthu* bag), which was checked and one plastic bag containing three plastic pouches containing a dark brown colour substance was found. On inquiries, Bhagwan Singh informed the team that the said substance was *charas*. A small quantity of the same was taken out and was checked on a field testing kit and the substance tested positive for *charas*. Small

quantities of substance drawn from the three polythene bags were tested and the tests results were positive for *charas*. Since the substances in the three polythene bags were similar in colour and smell, the same were collected in one transparent polythene bag and weighed. The total weight of the said contraband was found to be seven kgs.

4. NCB states that its samples were drawn and were put inside separate white colour envelopes marked as A-1 and A-2. The remaining contraband and other material was kept back in the same *pitthu* bag and a *pullanda* was prepared with a white cloth and was marked as 'A'. The three packets – packets marked as A-1, A-2 and A – were pasted with a white paper slip bearing the signatures of the IO, the accused Bhagwan Singh and independent witnesses, and were sealed with hot wax official seal of NARCOTICS CONTROL BUREAU DZU-5.

5. The *panchnama* was prepared and the possession of the case property was taken by the IO for further inquiry/investigation.

6. The summons under Section 67 of the NDPS Act were immediately served on Bhagwan Singh and he was directed to appear in the office of NCB, DZU forthwith to tender his voluntary statement. Similar summons were also issued to Sh. Dinesh Chand Bhandari (conductor) and Sh. Jasbir Singh (Driver), who had joined the proceedings as independent witnesses.

7. According to the NCB, summons under Section 67 were issued

to Bhagwan Singh and he appeared before Sh. Deepak Atri, IO on that date (that is, on 11.01.2019) and tendered his statement. According to NCB, he admitted to the recovery of contraband from his possession and disclosed that the said contraband (*charas*) was to be supplied to one Bheda Bhai, whose mobile number was disclosed as 9813752042. He also disclosed that he had supplied *charas* to Bheda Bhai earlier as well. Sh. Bhagwan Singh was arrested on 11.01.2019 at 22:00 hours, that is, after his statement under Section 67 of the NDPS Act was recorded. He was produced before the learned Duty Magistrate on 12.01.2019 and on an application moved by the NCB, was remanded to department's custody for a period of three weeks. After completion of the said period, the accused Bhagwan Singh was remanded to judicial custody. It is alleged that the sample marked as A-1 was sent to the Chemical Examiner, CRCL Pusa and the test report furnished by CRCL Pusa confirmed that the substance was *charas*.

8. On 14.01.2019, Bhagwan Singh's house was searched and this court is informed that nothing incriminating was found.

9. NCB officials analysed the call details of the mobile phone number used by Bhagwan Singh and those provided by him. NCB states that from perusal of the CAF of the mobile number 9813752042 – the mobile number allegedly used by Bhedha Bhai – it was revealed that the same was registered in the name of one Joravar Singh S/o Shri Inder Singh, Village Gharwal (3), Gohana, District Sonapat, Haryana-131302. Thereafter, on 23.05.2019, summons were issued in the name of "Joravar Singh (Bhedha Bhai)" directing him to appear before the

NCB office for recording of his statement. It is stated that pursuant to the said summons, the petitioner appeared before the concerned official on 31.05.2019. He was accompanied by one Baljit Singh. The petitioner's statement was recorded under Section 67 of the NDPS Act. According to NCB, the said statement was dictated by the petitioner but written by the said Baljit Singh. It is contended by NCB that the said statement was voluntarily given and it incriminates the petitioner.

10. Summons under Section 67 of the NDPS Act were issued to the petitioner once again on 06.06.2019. Pursuant to the said summons, the petitioner appeared at the NCB office on 14.06.2019 and his statement was recorded for the second time. According to NCB, the said statement was also voluntarily given and incriminates the petitioner.

11. Apart from the alleged voluntarily statements of Bhagwan Singh and the petitioner, NCB also relies on the call detail records, which indicates that the accused Bhagwan Singh had connected (received as well as dialled) with mobile phone number 9813752042, which was at the material time allegedly used by the petitioner.

12. The complaint filed by the NCB indicates that the petitioner had acknowledged that he was referred to as Bhedha Bhai and he had also mentioned the name of one Virender. NCB states that investigation in this regard is, as of yet, inconclusive.

13. The petitioner was arrested on 14.06.2019 after his statement

had been recorded at the NCB office. He was produced before the concerned court on the same date and has remained in judicial custody since that date.

14. The status report indicates that inquiries regarding the antecedents of the petitioner were made and it was found that the petitioner is involved in several other cases.

15. Mr Sumit, learned counsel appearing for the petitioner has stoutly disputed that the petitioner was involved in the offence for which he is charged.

16. Mr Sumit had also submitted that there were no incriminating materials against the petitioner. He contended that the petitioner was not named in the secret information on the basis of which Bhagwan Singh had been apprehended. He further contended that no incriminating material was found in possession of the petitioner. Although, the accused Bhagwan Singh had stated that he had brought the *charas* to supply to another person and he had described this person as 'Bhedha Bhai', he submitted that 'Bhedha Bhai' is a common expression and means big brother or elder brother. Therefore, it could not be assumed that the petitioner is involved in the offence merely on the basis of his description as Bhedha Bhai. He stated that although the petitioner (Bhagwan Singh) had also disclosed the mobile phone number but there is little evidence that the said mobile phone was being used by the petitioner at the material time.

17. Mr Sumit also drew the attention of this Court to two statements

of the petitioner recorded under Section 67 of the NDPS Act. He submitted that the same are not incriminating. Lastly, he submitted that in any event, these statements were retracted by the petitioner on the first available opportunity. In addition, he submitted that Baljit Singh who had allegedly written down the said statements was not included in the list of witnesses to be examined. Thus, the NCB could not establish that the statements relied upon by them were given voluntarily.

18. He further stated that the allegation that the petitioner was involved in any other case was erroneous. In view of the above, this Court had further directed that further inquiries be made from the SHO/officer incharge of the police station, Baroda, Sonapat, Haryana.

19. Mr Bansal, learned counsel appearing for the NCB submits that such inquiries were conducted and it appears that the petitioner does not have any criminal record at the concerned police station. Although, another person, who has similar name as that of the petitioner does have the criminal record at the said police station. He further submitted that the confusion was also caused because the name of the petitioner's father was also similar to name of the father of that person.

20. Mr Bansal further contended that in terms of Section 37 of the NDPS Act, no person who is accused of an offence punishable under the NDPS Act and involves commercial quantity, can be released on bail unless (a) the public prosecutor has been given an opportunity to

oppose such application; (b) the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of any such offence; and (c) that the court believes that the accused is unlikely to commit any offence while on bail.

21. He submitted that in the present case, the quantities recovered from Bhagwan Singh were commercial quantities and, therefore, in terms of Section 37 of the Act, the petitioner could not be released on bail unless this Court concluded that there were reasonable grounds to believe that he was not guilty of the offence for which he is charged.

22. It is apparent from the above that the NCB's case rests, essentially, on the statements of Bhagwan Singh and the petitioner recorded under Section 67 of the NDPS and the analysis of their call records. It is, thus, necessary to examine the statements made by the petitioner under Section 67 of the NDPS Act.

23. At the outset, it is necessary to refer to the alleged voluntarily statements of the petitioner recorded under Section 67 of the NDPS Act.

24. First of all, it is necessary to ascertain that the said statement had been made voluntarily (see: *Mohammed Fasrin v. State: (2019) 8 SCC 811*). In the facts of the present case, the said issue is contentious one considering that the petitioner claims that he retracted the said statement at the first reasonable opportunity. Having stated that, it is also necessary to mention that a plain reading of the petitioner's statement indicates that he had expressly denied that he had any

knowledge of Bhagwan Singh carrying seven kilograms of *charas* on 11.01.2019. He had allegedly admitted that he had on one prior occasion purchased *charas* from the accused Bhagwan Singh but he categorically denied his involvement in the offence for which he is charged. The petitioner had also denied that he was in touch with Bhagwan Singh on that date and had stated that he had stopped using that mobile number for the past five months. In addition, he also stated that on 11.01.2019, the phone with the SIM of that mobile number was lost.

25. He was also questioned as to whom he had supplied the *charas* that was purchased by him on an earlier occasion. He stated that he did not know the name or the mobile number of that person but he mentioned the name of his village. *Prima facie*, it is difficult to accept that the petitioner can be convicted on the basis of his statement.

26. The petitioner's statement was recorded for the second time on 14.06.2019.

27. A plain reading of the said statements also indicates that the petitioner had not admitted or confessed that he was involved in the offence for which he is charged. However, he had admitted that on one previous occasion, he had purchased two kilograms of *charas* from Bhagwan Singh at a consideration ₹30,000/-. Insofar as the use of mobile phone number 9813752042 is concerned, he denied that he was using the same on 11.09.2019.

28. As noticed above, both these statements were retracted by the

petitioner.

29. It is well settled that a statement of a co-accused has limited evidentiary value and it is difficult to sustain a conviction solely on the basis of a statement/testimony of a co-accused. At best, the same can be used as a corroborative evidence (see: *Hari Charan Kurmi v. State of Bihar: (1964) 6 SCR 623*; *Kashmira Singh v. State of Madhya Pradesh: AIR 1952 SC 159*; *Mohammed Fasrin v. State: (2019) 8 SCC 811*). Thus, the alleged voluntary statement of Bhagwan Singh may not be sufficient to convict the petitioner of the alleged offence.

30. Undisputedly, no incriminating material was found from the petitioner. The NCB places reliance on two statements recorded under Section 67 of the NDPS Act.

31. In this regard, it is also relevant to mention that the issue whether a self-incriminating statement made by an accused under Section 67 of the NDPS Act is admissible in evidence is pending consideration before a larger Bench of the Supreme Court in *Tofan Singh v. State of Tamilnadu: (2013) 13 SCC 344*. Even if such a statement is considered as admissible, it is a weak evidence with limited evidentiary value.

32. Having stated the above, a plain reading of the petitioner's statement recorded under Section 67 of the NDPS Act indicates that he had expressly denied that he had any knowledge of Bhagwan Singh carrying 7 kgs of charas on 11.01.2019. He had allegedly admitted that he had, on one prior occasion, purchased *charas* from the accused

Bhagwan Singh but he categorically denied any involvement in the offence which is alleged in the complaint.

33. The petitioner had also denied being in touch with Bhagwan Singh on the day in question (that is, 11.01.2019) and had claimed that he had stopped using the mobile no. 9813752042 for the past five months. He also stated that on 11.01.2019, the phone with the said mobile number was lost.

34. Considering that the NCB's case rests substantially on the statements of the petitioner and that of the accused Bhagwan Singh, this Court is of the view that there are reasonable grounds to accept that that the petitioner may not be involved in the offence and he may be acquitted.

35. At this stage, it is not necessary to examine the evidence in any further detail. The entire evidence has not been led and the same would be evaluated by the concerned court at the stage of final arguments.

36. However, in view of Section 37 of the NDPS Act, this Court is required to examine the material on record for the limited purpose of considering whether to release the accused on bail. It is, thus, clarified that the observations made by this Court in this order are for the aforesaid limited purpose and the trial court shall consider the case on its merits, uninfluenced by any observations made herein.

37. In view of the above, this Court allows the present petition and

directs that the petitioner be released on bail on his furnishing a Personal Bond in the sum of ₹50,000/- and one surety of an equivalent amount to the satisfaction of the Trial Court/Duty Magistrate. This is also subject to the following further conditions:-

- a) the petitioner shall provide his contact number and ensure that he is reachable on it at all times;
- b) the petitioner shall telephonically mark his presence before the concerned IO and report his whereabouts on Monday of every other week/alternative week;
- c) the petitioner shall give prior information to the IO regarding any change in his residential address;
- d) the petitioner shall surrender his passport, if any, to the concerned IO; and
- e) the petitioner shall not contact any of the witnesses or the co-accused either directly or indirectly.

38. The petition is allowed in the aforesaid terms.

39. A copy of this order be communicated to the concerned Jail Superintendent electronically.

VIBHU BAKHRU, J

AUGUST 11, 2020
RK/MK