

Bail Application No. 1096/2021
State Vs. Navneet Kalra
FIR No. 116/2021
PS- Lodhi Colony (Crime Branch)
U/s 3 & 7 of the Essential Commodities Act, Section 3 of the
Epidemic Diseases Act, 1879 & Section 420/188/120-B/34 IPC

13.05.2021.

The present application has been received by way of transfer pursuant to order dated 12.05.2021, passed by the court of Ld. Principal District & Sessions Judge, South East District, New Delhi and is taken up through Video Conferencing.

Present: Sh. Atul Srivastava, Sh. Mohd. Iqrar, Ld. Addl. PPs for the State with ACP, Crime Branch and IO SI Kamal Kumar.

Sh. Vikas Pahwa, Senior Advocate with Sh. Vineet Malhotra, Sh. Vishal Gohri, Sh. Harsh Sethi, Sh. Hemant Shah, Sh. Shubhendu Kaushik, Sh. Sumer Singh Boparai, Sh. Shadman Siddiqui, Sh. Arham Masud, Sh. Abhishek Pati and Mrs. Raavi Sharma, Ld. Counsels for applicant/accused.

The present application, under Section 438 Cr.P.C. seeking grant of anticipatory bail, has been filed on behalf of applicant/accused Navneet Kalra.

It is emphatically contended by Ld. Senior Counsel for applicant/accused that the applicant / accused is in profession of operating Optical stores and Restaurants. He is a married person having family consisting of senior citizen parents, two major children and wife. The safekeeping of his family during pandemic of Covid-19 is upon the applicant / accused.

The applicant / accused had accidentally fell down and was sustained about 20 stitches at AIIMS Hospital on 19.04.2021. Thereafter, he also underwent surgery of his jaw at Medanta Hospital on 05.05.2021. The applicant / accused has clean antecedents and has never been involved in any criminal

case whatsoever, but he is now being implicated in a false and frivolous complaint made by third party. The applicant / accused is being implicated on account of business and personal rivalry by third party against whom, the applicant / accused had filed complaint with police authorities suspecting black marketing of machines, which applicant company was selling.

One M/s Matrix Cellular (International) Services Ltd. was importing Oxygen concentrators and thermal imagery during the pandemic for wide-spread distribution and making the Oxygen concentrators available to the public at large, vide advertisements on internet, Apps and all social media platforms. The applicant/accused had also requested M/s Matrix Cellular (International) Services Ltd. to supply some concentrators so that the applicant/accused can also be involved in wide-spread distribution of the same in order to save lives during pandemic of Covid-19.

All the sales were being made only through Banking Channels. On 28.04.2021, the applicant had lodged a complaint through an e-mail with SHO, PS Fatehpur Beri, against one Mr. Sujeet, who wanted to purchase one Oxygen concentrator. Mr. Sujeet was creating a ruckus outside the office of Dayal Opticals, Khan Market, New Delhi. When the e-mail bounced, the complaint was sent to SHO, PS Fatehpur Beri through WhatsApp. If the applicant/accused would have indulged in some kind of the black marketing, he would have not lodged that complaint.

The present FIR was lodged on 05.05.2021 alleging black-marketing of Oxygen concentrators, thermal imagery and KN-95 masks U/s 420/188/34 of IPC, Section 3 r/w Sec. 7 of the Essential Commodities Act and Sec. 3 of the Epidemics Act,

against the applicant / accused which prescribes maximum punishment for seven years. Four of the employees of applicant / accused were arrested from Nege & Ju restaurant on 05.05.2021.

As per the Judgment of the Hon'ble Supreme Court of India in *Arnesh Kumar Vs. State of Bihar (2014) 8 SCC 273*, the applicant is ready and willing to join investigation. The applicant/accused should not be arrested as the maximum punishment prescribed is 7 years. As per minutes of meeting dated 04.05.2021 of High-Powered Committee, guidelines laid down in Arnesh Kumar's judgment are to be followed.

An Oxygen concentrators and Thermal imaging machine have not been notified as Essential Commodities and therefore, Essential Commodities Act, Epidemic Diseases Act and Section 188 IPC could not have been invoked. There is no recovery of KN-95 masks from applicant/accused. There is no cap/ceiling price for the Oxygen concentrators or thermal imaging machines set by the Central or State Government and the price of liquid Oxygen/Oxygen cylinder has only been notified by the Central Government. Even Hon'ble High Court was informed on 06.05.2021 that cap/ceiling price for these products had not been notified by the Central and State Governments.

The applicant/accused allegedly dealt with Oxygen concentrators and not with liquid Oxygen Cylinders. There are no allegations of false / fraudulent representation / misrepresentation against the applicant/accused and therefore, invocation of Sec. 420 IPC is not justifiable. Applicant / accused was conducting sales openly and making / receiving payments through banking channels. Admittedly, he had not imported the Oxygen concentrators and other goods. The applicant / accused is

being portrayed as a criminal in the social media and his photograph is being circulated which is causing grave prejudice to the applicant / accused. Applicant/accused is ready and willing to join investigation and he is squarely covered by the observations of the HPC Minutes dated 04.05.2021 in respect of strict compliance of *Arnesh Kumar Vs. State of Bihar (2014) 8 SCC 273*.

Vide order dated 12.05.2021, the court of Ld. CMM, South East has granted regular bail to four co-accused persons. The applicant/accused undertakes to abide by all conditions as may be imposed by this court. There is neither any violation of Essential Commodities Act, 1955 & Epidemic Diseases Act, 1897, nor applicant / accused has committed any offence under provisions of Indian Penal Code. The applicant/accused / his company has bought the machines through legal method i.e. through cheques and there is no illegal hoarding of the machines.

There is no violation of any directions issued by the Central Government either U/s 3 or 7 of the Essential Commodities Act, 1955 or Section 3 of Epidemic Diseases Act, 1897, as alleged. The allegations against the applicant/accused, as per FIR are that he had permitted the Oxygen concentrators to be delivered to third parties from his premises where he was running restaurant under the name of 'Neji ju'. As far as incriminatory statements of co-accused are concerned, the confessional statements made to a "*police officer*", are not admissible U/s Section 25 of the Evidence Act.

Self-incriminatory / disclosure statements cannot be read against the applicant/accused at this juncture as the same would be required to be proved with cogent and corroborative evidence during trial. He is absolutely innocent and has deep

roots in the Society. There is no likelihood of his absconding. The applicant / accused undertakes to join and cooperate with investigating agency and appear before the Court as and when required. Therefore, the applicant/accused be released on anticipatory bail.

Reliance is placed upon judgments delivered by Hon'ble Supreme Court in the cases of Prakash Babu Raghuvanshi Vs. State of MP (2004) 7 SCC, In Re : Contagion of Covid-19 Vs. In Prisons Suo Motu Writ Petition (C) No. 1/2020, Chirag Indravadan Shah Vs. State of Gujarat, 2020 SCC Online GUJ 2263 and Sagar Somnath Mutekar Vs. State of Maharashtra 2020 SCC Online BOM 7937; judgment delivered by Hon'ble High Court of Gujarat in cases of Deviben Bharabhai Khimani Vs. State of Gujarat, Criminal Misc. Application (For Anticipatory Bail) No. 17 of 2018, Rameshbhai Arjanbhai Gohil Vs. State of Gujarat, Criminal Misc. Application (For Anticipatory Bail) No. 24926 of 2017, Mukesh Vrajlal Halani Vs. State of Gujarat, Criminal Misc. Application No. 13955 of 2008, Rizwan Usman Mansuri Vs. State of Gujarat, R/Criminal Misc. Application No. 18497 of 2020; judgment delivered by Hon'ble High Court of Patna in case of Md. Eltaf @ Md. Eltaf Raza Vs. The State of Bihar, Criminal Misc. No. 14488 of 2020 and judgment delivered by Hon'ble High Court of Delhi in case of Gaurav Yadav & Anr. Vs. Union of India & Ors., W.P.(C) No. 5222/2020 decided on 13.08.2020.

Per contra, it is contended by the Ld. Addl. PP appearing for the State has submitted that during patrolling by SHO, PS Lodhi Colony on 05.05.2021, a restaurant in the name and style of 'Nege & Ju' was found to be operating in Central Market, Lodhi Colony, New Delhi and during search of the said

restaurant, 32 boxes of Oxygen concentrators, with capacity of 09 Ltr. & 5 Ltr, one box of thermal scanner and KN-95 Masks were recovered. Thereafter, present case was registered and investigation was carried out.

On 05.05.2021, accused persons viz. 1). Gaurav Suri 2). Satish Sethi 3). Hitesh Kumar and 4). Vikrant were arrested. During their sustained interrogation, the accused persons disclosed that they used to purchase Oxygen concentrators and other Covid-19 treatment related equipments from various means and sold them at exorbitant price to needy persons, who were suffering from Covid. 387 Oxygen concentrators, 112 boxes containing KN-95 Masks and 95 Oximeters were recovered at the instance of accused persons from Matrix Cellular International Services Pvt. Ltd, 7 Khullar Farms House, Mandi Road, Fathepur Beri, New Delhi.

On 06.05.2021, during the PC remand of accused Hitesh, employee of applicant/accused Navneet Kalra, 09 Oxygen concentrators were recovered from Town Hall Restaurant, Khan Market, New Delhi at his instance. On 07.05.2021, 96 Oxygen concentrators were recovered from Khan Chacha Restaurant, Khan Market, New Delhi. Invoices in the name of Dayal Opticals for selling 250 Units of Oxygen concentrators were seized at the instance of accused Hitesh.

Accused Gaurav Suri, Business Head of Matrix Cellular had disclosed about selling those 250 Units of Oxygen concentrators to applicant / accused Navneet Kalra, who is the owner of Dayal Opticals. On 07.05.2021, accused Gaurav Khanna, CEO of M/s Matrix Cellular International Services Pvt. Ltd. was arrested, who was looking after the operations of M/s Matrix Cellular International Services Pvt Ltd, Khullar Farms,

Sultanpur, Mandi Road, Mehrauli, New Delhi and subsequently, investigation was transferred to ISC/Crime Branch, Chankyapuri, New Delhi on 08.05.2021.

Accused Gaurav Khanna had disclosed that due to Covid-19 global pandemic in year 2020, the work of the company was badly affected and therefore, they started dealing in Covid-19 items and imported some articles like Oximeters, Oxygen concentrates, Masks KN 95 and also procured some other articles. Accused Gaurav Khanna further disclosed that applicant / accused company had sold the Oxygen concentrators to the needy persons with profit / margin of Rs 40,000/- to 42,000/- per piece.

The delivery of some Oxygen concentrators was given by them from Khullar Farm (Sultanpur) & Nege & Ju restaurant, Lodhi Colony and they had sold around 300-350 Oxygen concentrators to applicant / accused, owner of Dayal Optical. The sale of recovered oxygen concentrators etc., was unauthorizedly operational from Nege & Ju restaurant at central market, Lodhi Colony, New Delhi during the lockdown.

The import of oxygen concentrators under applicable laws, the quality of the recovered Oxygen concentrators, in respect of payment and cash transaction involved in sale of Oxygen Concentrators and other equipments, importing and acquiring oxygen concentrators from third parties and thereafter, selling the same to customers, import / domestic acquisition of oxygen concentrators by Matrix are subject matter of verification and these aspects are being verified during investigation. As per report received from Shriram Institute, the output of Oxygen concentration, given by the concentrators being sold by applicant / accused, has been found to be merely 20.8 %.

The details of customers, who had purchased the Oxygen concentrators through online mobile application 'X Factor' are being obtained and investigation is yet to be carried out regarding the manner of sale and purchase. Investigation is yet to be carried out in respect of delivery of Oxygen concentrators, either directly or through its distributors and their details / mode of payment etc. Accused persons were taking undue advantage of the situation created by second wave of Covid pandemic and they made wrongful pecuniary gains by fraudulently representing that they were selling premium portable oxygen concentrators manufactured with German collaboration, which were sufficient to meet requirement of two persons.

As a matter of fact, the concentrators being sold by applicant / accused were not manufactured with German collaboration and were manufactured in China. Accused persons have admitted the procurement price of the medical equipment ranging between Rs. 12,500/- to Rs. 20,669/- and selling these equipments for upto Rs. 70,000/- and above. On 02.05.2021, during hearing of W.P.(C) No. 4984/2021 titled as M/s. Bram Health Care Private Ltd. Vs. Union of India & Anr., the Hon'ble Delhi High Court had ordered as below:

"During the course of hearing, we have been informed that Oxygen gas cylinders, Oxygen flow meters, and medicines required for treatment of Covid-19 disease are being sold in the black market at a much higher price above the Maximum Retail Price (MRP). We direct the State to ensure that none of the equipments, or medicines used in the treatment of Covid-19 disease are sold at prices above the MRP. Any person found indulging in malpractice of either hoarding the equipments or medicines, or selling the same at prices above the MRP shall

be booked, and brought to the notice of this Court for initiating of independent contempt action against all such persons. "

The relevant notifications under the Essential Commodities in respect to Oxygen Concentrators are as follows:

(i) Office Memorandum of Government of India vide File No. 20 (8)/09/2019/ Div.III/ NPPA dated 29th June 2020, wherein it has been directed that "This is in reference to Notification No. 1232 (E) dated 31st March 2020 issued by this Office for regulation of Medical Devices under Drugs (Prices Control) Order, 2013 read with Essential Commodities Act 1955 w.e.f. 1st April 2020. Accordingly, Maximum Retail Price of Medical Devices cannot be increased more than ten percent (10%) in a year.

In order to monitor the price movements of critical Medical Equipments required in clinical management of Covid-19, it has been decided to call for MRP details for the following Medical Devices viz. (i) Pulse Oximeters and (ii) Oxygen Concentrator in the prescribed format. All the manufactures / importers of (i) Pulse Oximeters and (ii) Oxygen Concentrators are hereby directed under Para 29 of the DPCO, 2013 to submit the MRP details in the prescribed format within 10 days of issue of this O.M. A soft copy of the same shall also be sent to the following e-mail id mandatorily: medicaldevices-nppa@gov.in. In view of the above, all Manufacturers/Importers of aforesaid Medical Devices are hereby advised to ensure compliance of the provisions of Para 20 of the DPCO, 2013 failing which action may be initiated for violation of provisions of DPCO, 2013 read with Essential Commodities Act 1955.

(ii) Office Memorandum of Government of India vide File No. X.11035/281/2018-DRS dated 11th February 2020,

herein it has been notified that "S.O. 64B (E). - In pursuance of sub-clause (iv) of clause (b) of section 3 of the Drugs and Cosmetics Act; 1940 (23 of 1940), the Central Government, after consultation with the Drugs Technical Advisory Board, hereby specifies the following devices intended for use in human beings or animals as drugs with effect from the 1st day of April 2020, namely: - All devices including an instrument, apparatus, appliance, implant, material or other article, whether used alone or in combination, including a software or an accessory, intended by its manufacturer to be used specially for human beings or animals which does not achieve the primary intended action in or on human body or animals by any pharmacological or immunological or metabolic means, but which may assist in its intended functions by such means for one or more of the specific purpose of –

- i. Diagnosis, prevention, monitoring, treatment or alleviation of any disease or disorder;
- ii. Diagnosis, monitoring, treatment, alleviation or assistance for, any injury or disability;
- iii. Investigation, replacement or modification or support of the anatomy or of a physiological process;
- iv. Supporting or sustaining life;
- v. Disinfection or medical devices; and
- vi. Control of conception."

(iii) Notification vide order No. PN/206/74/2020/F/F, No. 8(74)/2020DP/NPPA/Div.-II dated 31st March, 2020 it is ordered that-"S.O. 1232(E). - In pursuance of Notification No. S.O. 648(E) dated 11th February 2020 issued by Ministry of Health & Family Welfare, Government of India whereby Medical Devices intended for use in human beings or

animals have been notified as Drugs with effect from 1st April 2020; all Medical Devices shall accordingly be governed under provisions of the Drug (Price Control) Order, 2013."

(iv) Notification No. 4/2015-2020 New Delhi, Dated 30th April, 2021, it has been notified that -"Effect of the Notification: Para 2.25 of Foreign Trade Policy, 2015-20 is revised to include import of Oxygen Concentrator for personal use through post, courier or e-commerce portals in the list of exempted categories, where Customs clearance is sought as "gifts", till 31st July 2021."

(v) Order passed by Drugs Control Department circulated vide No F. 52/ DC. HOO/2020/199 dated 07.05.2021 wherein it is categorically directed that all the stakeholders viz. Retailers / Whole sellers / Distributors of these items not to sell these items over and above the notified price / MRP and also to refrain from dealing in these items in a manner which is not permitted or unauthorized and should not get indulged in what so ever in their black marketing.

In view of the said notifications, the Oxygen concentrators are covered in the definition of Essential Commodities and price of the same must be governed and regulated as per the directions of the Government issued and promulgated time and again through the above notifications. The accused persons had never informed the concerned authorities about the MRPs labeled or pasted over the Oxygen Concentrators boxes.

The Oxygen concentrators were procured and sold at exorbitant prices. As per statement of one aggrieved, the applicant/accused had firstly quoted the price of Oxygen concentrator as Rs. 49,999/- and on the next day, he forced him

to pay Rs. 55,000/- owing to his urgent requirement. The purchaser also pointed out that the purity of Oxygen was 48% at SL/min which is very low and does not serve the purpose.

It has come to notice during investigation through social media posts that applicant / accused had collected advance payments from several needy persons for supply of Oxygen concentrators and he kept on postponing the delivery on the pretext of shipment being held-up. He kept increasing the price of the same and eventually, he neither supplied the item to several persons, nor refunded their advance amount and is absconding.

A number of persons, who had bought Oxygen concentrator, found its performance much below the advertised benchmarks and demanded for replacement / refund from applicant / accused, but they were told that there is no policy of refund / replacement, whereas there was no mention to this effect in the brochure / representation made by the applicant / accused.

Investigation is still at initial stage and probability of many aggrieved and cheated persons emerging cannot be ruled out. The margin of profit, in comparison to cost, is very high, especially in view of ongoing pandemic. Moreover, Matrix company was selling these Oxygen concentrators clandestinely by using restaurants premises as cover and no information regarding storage and sale etc. was conveyed to any Govt. Authority.

The accused persons have hatched a deep-rooted conspiracy to gain wrongfully, using the painfully pathetic situation caused due to the pandemic and compelled the needy persons to part with their hard-earned money much in excess of the acceptable international market rates of oxygen concentrators.

32 Oxygen Concentrators have been recovered from Nege N Ju, Lodhi Colony, 9 Oxygen concentrators have been recovered from Town Hall Restaurant and 96 Oxygen concentrators have been recovered from Khan Chacha Restaurant, at the instance of his employee Hitesh. Several raids have been conducted at all the possible hideouts of the applicant/accused, but the same were found to be locked.

The applicant/accused has switched off his mobile phones and is deliberately avoiding the process of law. Investigation of the case is at very initial stage. 524 Oxygen concentrators have been recovered at the instance of arrested accused persons. Considerable recovery of Oxygen concentrators has been made from the three restaurants, owned by the applicant / accused and he is involved in black marketing of Oxygen concentrators during Covid-19 pandemic.

The complete sequence of procurement of recovered case property, its distribution, sale at exorbitant prices, verification and tracking of procurement of recovered material is yet to be conducted. Details of distributors / customers, who purchased the Oxygen concentrators from the applicant / accused are yet to be verified. The custodial investigation of the applicant / accused is required to bring on record the facts, manner of sale and amount involved.

During initial investigation, names of Classic Metal and Spice Healthcare have emerged which requires through investigation. Due to Covid-19 infection, many victims could not be joined in investigation till date. The applicant / accused is a very influential person and he may tamper with the evidence or influence the witnesses and hamper the pace of investigation. Custodial interrogation of the applicant/accused is required to

unearth the entire conspiracy. The applicant/accused may jump bail, if released and hamper the pace of investigation. The application deserves to be dismissed.

The court is of the considered view that the parameters governing anticipatory bail were laid down by a Constitution bench of the Hon'ble Supreme Court in the case of ***Gurbaksh Singh Sibbia Vs. State of Punjab (1980) 2 SCC 565*** wherein it was held that while considering grant or denial of bail, the court has to consider (1) Gravity of offence; (2) Nature of Evidence on record against the accused; (3) Likelihood of accused committing further offences; (4) Previous criminal antecedents; (5) Likelihood of accused absconding or evading process of law and (6) Larger interest of the public or the State.

The allegations levelled against the applicant/accused are serious i.e. he made fraudulent representation to the effect that he was selling premium portable oxygen concentrators, manufactured with German collaboration, which were sufficient to meet requirement of two persons. The applicant / accused collected advance payments from several needy persons for supply of Oxygen concentrators and he kept on postponing the delivery on the pretext of shipment being held-up. He kept increasing the price of the same and eventually, he neither supplied the product to several persons, nor refunded their advance amount.

There is prima facie incriminating evidence on record against the applicant / accused i.e. the concentrators being sold by applicant / accused were not manufactured with German collaboration and were manufactured in China. They were not having adequate output so as to meet requirement of even one person. As per reports dated 12.05.2021, submitted by Shriram

Institute for Industrial Research, New Delhi, in respect of two Oxygen concentrators seized from the premises of applicant / accused, the average output in terms of Oxygen purity is found to be 32.7 % & 38.2 %. With the laboratory room air, the Oxygen concentration was found to be merely 20.8 %.

As per statement of one aggrieved, the applicant/accused had firstly quoted the price of Oxygen concentrator as Rs. 49,999/- and on the next day, he forced him to pay Rs. 55,000/- owing to his urgent requirement. The purchaser also pointed out that the purity of Oxygen was 48% at SL/min which is very low and it does not serve the purpose for which it was purchased. The applicant / accused is reported to have collected advance payments from several needy persons for supply of Oxygen concentrators and he kept on postponing the delivery on the pretext of shipment being held-up. He kept on increasing the price of the same and eventually, he neither supplied the product to several persons, nor refunded their advance amounts.

The applicant/accused has not joined investigation till date. Investigation in the case is at its initial stage. Mobile phone of applicant / accused which reportedly contains incriminating WhatsApp chats with customers, details of calls made to co-accused persons and his accounts are required to be seized. Custodial interrogation of applicant / accused is required to be carried out to unearth the entire conspiracy hatched between him and a number of co-accused persons. Therefore, Section 41(1)(b)(ii) Cr.P.C. is applicable which empowers a police officer to arrest an accused for conducting proper investigation of the offence. This exception has been recognized by the Hon'ble Supreme Court in the case of Arnesh Kumar Vs.

State of Bihar (2014) 8 SCC 273 itself. The possibility of applicant/accused tampering with the evidence or intimidating the prosecution witnesses cannot be ruled out. Therefore, no case for grant of anticipatory bail is made out. The application is accordingly, dismissed.

Nothing expressed herein above shall tantamount to expression of opinion on merits of the case.

Copies of this order be sent to Ld. Addl. PP for the State, Ld. Counsels for applicant/accused and IO, through email forthwith.

Copy of this order be also uploaded on the website of the court.

(Sandeep Garg)
Additional Sessions Judge,
South East District,
New Delhi/13.05.2021