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

CRIMINAL BAIL APPLICATION NO. 3624 OF 2021

ARYAN SHAH RUKH KHANApplicant.
V/s
THE UNION OF INDIA & ANR.Respondents

**WITH
INTERIM APPLICATION NO. 2606 OF 2021
IN
CRIMINAL BAIL APPLICATION NO. 3624 OF 2021**

PRAKASH RAMANLAL VAKHARIYA Intervener

IN THE MATTER BETWEEN

ARYAN SHAH RUKH KHANApplicant.
V/s
THE UNION OF INDIA & ANR.Respondents

**WITH
INTERIM APPLICATION NO. 2605 OF 2021
IN
CRIMINAL BAIL APPLICATION NO. 3624 OF 2021**

SAURABH RAMESHCHANDRA MISHRAIntervener

IN THE MATTER BETWEEN

ARYAN SHAH RUKH KHANApplicant.
V/s
THE UNION OF INDIA & ANR.Respondents

**WITH
CRIMINAL BAIL APPLICATION NO.3625 OF 2021**

MUNMUN AMIT KUMAR DHAMECHA Applicant.
V/s
THE UNION OF INDIA AND ANR Respondents

**WITH
CRIMINAL BAIL APPLICATION NO.3642 OF 2021**

ARBAAZ A. MERCHANT Applicant.
V/s
THE UNION OF INDIA AND ANR Respondents

Mr. Mukul Rohatgi Sr. Counsel a/w Mr. Amit Desai Sr. Counsel, @ Mr. Satish Maneshinde @ Mr. Rustam N. Mulla @Ms. Anandini Fernandes @Ms. Ruby Singh Ahuja @Mr. Sandeep Kapur @Mr. Gopalakrishna Shenoy, @Mr. Harshad Gada @ Ms. Namita Maneshinde @Mr. Sohan Kinkhabwala @ Mr. Nikhil Maneshinde, @ Mr. Deepal Thakkar @Mr. Yuvraj Dhole @ Shanice Mansukhani i/by Ms. Anandini Fernandes, Advocates for Applicant in **BA/3624/2021.**

Mr. Ali Kaashif Khan Deshmukh @ Mr. Ravi P. Singh @ Mr. Harsh G. Sheth @ Ms. Riya Jain @ Ms. Halima Khan, Advocates for Applicant in **BA/3625/2021.**

Mr. Amit Desai, Sr. Counsel i/by Adv. Taraq Sayed @ Mr. Gopalkrishna Shenoy @ Mr. Advait Tamhankar @ Ms. Lochan Chandka @ Ms. Alisha Parekh @ Ms. Ashwini Achari @ Ms. Bhumika Gada @ Mr. Sachin Shete, Advocates for Applicant in **BA/3642/2021.**

Mr. Anil C. Singh, Additional Solicitor General @ Adv. Mr. Advait M. Sethna @ Mr. Shreeram Shirsat, @ Mr. Aditya Thakkar, @ Mr. Pranav Thakur @ Ms. Smita Thakur @ Mr. Amandeep Singh Sra, @ Miss Ruju Thakker @ Mr. Pranav Gohil and Mr. Tanay Mandot **for Respondent/ NCB in all the above BAIL APPLICATIONS.**

None for the Interveners.

CORAM: NITIN W. SAMBRE, J.

DATE: OCTOBER 28, 2021

P. C.:-

1] These Applications are under Section 439 of the Criminal Procedure Code for grant of regular bail in C.R. No. 94 of 2021 registered with non-applicant, for the offence punishable under Section 8(c) read with Section 20(b), Sections 27, 28, 29 and 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to for the sake of brevity as “NDPS Act”)

2] All the Applicants were apprehended on 2nd October, 2021 while they were about to board or had already boarded Cruise from Mumbai to Goa. From Accused No.2 – Arbaaz 6 grams of charas, and from Accused No.3 – Munmun 5 grams of charas was recovered. All the accused were subjected to custodial interrogation upto 7th October, 2021.

3] While trying to make out a case for grant of bail, Mr. Mukul Rohatgi, learned Senior Counsel appearing for Accused No.1 – Aryan, learned Senior Counsel Mr. Amit Desai appearing for Accused No.2 – Arbaaz, Mr. Ali Kaashif Khan Deshmukh, learned Counsel appearing for Accused No.3 – Munmun and Mr. Anil C. Singh, learned Additional Solicitor General appearing for Respondent/NCB agreed that these applications can be disposed

of by this common order.

4] The contentions of learned Counsel appearing for respective parties can be, in brief, summarized as under:-

As far as all these Accused are concerned, there are no criminal antecedents of similar nature or otherwise. Accused No.1 - Aryan and Accused No.2 - Arbaaz are students, whereas Accused No.3 - Munmun is working in the field of modeling. It is claimed that Accused No.1 - Aryan is concerned but for irrelevant Whats-App chats noticed in his mobile, there is no material evidence to connect all these three Applicants with other co-accused on the issue of conspiracy. It is further claimed that confessional statements recorded by Investigating Officer are not binding in view of the prevalent position of law. It is also submitted that in the facts of this case, provisions of the NDPS Act prescribe maximum punishment of one year. (for small quantity of drugs) That being so, Applicants who were already subjected to custodial interrogation are entitled to be released. It is also claimed that in view of provisions of Section 41A of the Criminal Procedure Code having regard to maximum punishment prescribed, Applicants ought not to have been taken into custody

as they are very much available for investigation.

Section 27 provides for punishment for consumption of certain narcotic drugs. The said section also provides punishment for one year and fine. Similarly, Section 28 which provides for punishment for attempting to commit an offence, prescribes punishment for one year only. Section 29 provides for punishment for abetment and criminal conspiracy which is the same as prescribed above. Section 35 speaks of presumption of culpable mental state.

5] While countering the aforesaid submissions, Mr. Anil Singh, learned Additional Solicitor General appearing for Respondent/NCB would urge that during the investigation, material collected substantiates the angle of conspiracy hatched by the Applicants. According to him, there are justifiable reasons for invoking provisions of Section 29 of the NDPS Act. He would further claim that small quantity of charas was found from the custody of Accused No.2 - Arbaaz, whereas from the place which Accused No.3 - Munmun was occupying on the Cruise, 5 grams of charas was seized. There is sufficient material to infer that both these Applicants/Accused were possessing narcotic drugs, which

is an offence. Mr. Singh would further claim that other Accused who are named in the crime are found to be in possession of certain narcotic drugs which were seized. If cumulatively the quantity of seizure in investigation is appreciated, prosecution was justified in invoking the provisions of the NDPS Act for possessing commercial quantity. It is further claimed that even if confessional statement given to Investigating Officer is not binding, however, for the purpose of investigation, same can be taken into account. So as to substantiate the strong case of the prosecution against Accused No.1 – Aryan, reliance is placed on Whats-App chats between Accused No.1 – Aryan and Accused No.2 – Arbaaz and other individual persons.

6] For non-compliance of the procedure laid down under Section 41A of CrPC, it is urged that the very arrest of the Applicants is illegal. It is further claimed that complete and correct grounds of arrest were not communicated and that being so, arrest of the Applicants has been rendered illegal.

7] Further contentions of Mr. Singh are, grounds of arrest were duly communicated and the provisions of NDPS Act particularly Section 37 contemplates all offences to be cognizable and non-

bailable and that being so, Section 41A of CrPC has no applicability. He would further claim that for appreciating the case of the Applicants for grant of bail, there has to be more than a prima facie case demonstrating their non-involvement in the crime and the parameters of Section 37 of NDPS Act are required to be appreciated.

8] Accused no. 1 Aryan was not found in possession of any objectionable substance is not in dispute. Accused nos. 2 & 3 found to be in illegal possession (direct/indirect) of drugs which is covered under the provisions of NDPS Act. Such quantity of drugs which was seized from the possession of Accused nos. 2 & 3 if independently considered, is a small quantity is not disputed fact. However, Mr. Singh by relying on provisions of Section 29 (conspiracy) claims that cumulatively, commercial quantity of drugs was seized from Accused persons in the present case. It is worth to mention here that there are more than 11 Accused named in the present case.

9] As such, this Court is first required to ascertain whether there is enough material on record to prima facie infer that the Applicants have hatched a conspiracy and that the prosecution

was justified in invoking provisions of Section 29 of the NDPS Act at this stage.

10] For inferring the act of hatching conspiracy on the part of the Applicants and other co-accused, there has to be positive evidence about an agreement to do an unlawful act or to do lawful act by unlawful means and such agreement must precede with meeting of minds. Of course, such agreement can be express or implied or in parts. As far as the case in hand is concerned, the fact remains that Applicant nos. 1 & 2 were travelling together whereas Applicant no. 3 had an independent travel plan which has no connection or relation with the travel of Applicant nos. 1 & 2. After having gone through the Whats-App chats extracted from Applicant/Accused no. 1's phone, nothing objectionable could be noticed to suggest that Applicant nos. 1 & 2 or all three applicants alongwith other Accused persons in agreement have meeting of minds and have hatched conspiracy committing the offence in question.

11] There is hardly any positive evidence on record to convince this Court that all the accused persons with common intention agreed to commit unlawful act. Rather the investigation carried

out till this date suggests that Applicant/Accused nos. 1 & 2 were travelling independent of Applicant/Accused no. 3 and there was no meeting of minds on the aforesaid issue.

12] So as to infer the case of conspiracy against the Applicants also, there is absence of material on record of them having such meeting of minds with other Accused who were named in the offence in question. Case of the prosecution that Applicants have admitted to commit an offence also amounts to an offence under the NDPS Act. Even if it is appreciated, the maximum punishment prescribed is not more than one year for such offence. Applicants have already suffered incarceration for almost 25 days. The Applicants were not even subjected to medical examination so as to determine whether at the relevant time, they had consumed drugs.

13] Mr. Singh, learned Additional Solicitor General was justified in relying on the Judgment of the Apex Court in the matter of **State of Orissa Vs. Mahimananda Mishra** reported in **(2018) 10 SCC 516** to claim that high degree of evidence is not required at this stage of the proceedings to establish the case of conspiracy, however, this Court is required to be sensitive to the

fact that there has to be presence of basic material in the form of evidence so as to substantiate the case of conspiracy against the Applicants. Merely because of Applicants were travelling on the cruise, that by itself cannot be termed as satisfying foundation for invoking provisions of Section 29 against the Applicants.

14] Having regard to the material brought on record by the Respondent on the issue of conspiracy, this Court prima facie has not noticed any positive evidence against the Applicants on the said issue. This Court is of the opinion that the claim put forth by the Respondent that Applicants should be considered to have intention to commit an offence under the NDPS Act, having found in possession of commercial quantity, in the backdrop of case of hatching conspiracy is liable to be rejected.

15] Section 67 of the NDPS Act provides for powers to call for information. Hence, it also empowers Investing Officer to record confessional statement of the Accused which has a binding effect. Prosecution has claimed that confessional statements given by Accused persons admitting to have committed offence alleged against them, however, such confessional statements are not having any binding effect in law as the said issue is squarely

covered by the Apex Court in the matter of **Toofan Singh Vs. State of Tamil Nadu** in **Criminal Appeal No. 152 of 2013**.

Once the confessional statement of the Applicants/Accused cannot bind them of the offence in view of the Judgment of Supreme Court in the matter of Toofan Singh [cited supra], the claim put forth by the Respondent that Accused persons have accepted their involvement in the crime is liable to be rejected.

16] However, in view of submissions made by Mr. Singh, it is worth to clarify here that such confessional statements can be considered by the investigating agency only for the investigation purpose and cannot be used as a tool for drawing an inference that Applicants have committed an offence under the NDPS Act as has been alleged against them.

17] Though Mr. Singh, Additional Solicitor General has resisted the case based on the requirement under Section 37 of the NDPS Act viz. cognizability and the non-bailable offence, provisions of said Section 37 prima facie will not be attracted in the case in hand as this Court has already observed that there is no material on record to infer that Applicants have hatched conspiracy to commit the offence. That being so, at this stage, it is difficult to

infer that Applicants are involved in an offence of commercial quantity. As such, parameters laid down under Section 37 of the NDPS act will be of hardly any consequence while considering the prayer for grant of bail of the Applicants.

As such, all these three Bail Applications are allowed.

In the result, following order is passed:-

ORDER

Applicants viz. Accused No.1 - Aryan Shah Rukh Khan, Accused No.2 - Arbaaz A. Merchant & Accused No.3 - Munmun Amit Kumar Dhamecha are directed to be released on bail in C.R. No.94 of 2021 registered with the non-applicant for the offence punishable under the NDPS Act, 1985 on the following conditions:-

(a) Each of the Applicants/Accused shall execute P. R. Bond of Rs. 1 lakh with one or more sureties in the like amount.

(b) Applicants/Accused shall not indulge in any activity similar to the activities on the basis of which the said CR stands registered against them for offences under the NDPS Act.

(c) Applicants/Accused shall not try to establish communication with co-accused or any

other person involved directly or indirectly in similar activities or make any call to any person indulging in similar activities as alleged against them, through any mode of communication.

(d) Applicants/Accused shall not undertake any action which is prejudicial to the proceedings before the learned Special Court (established under the NDPS Act)

(e) Applicants/Accused neither personally or through anyone make any attempt to influence witnesses nor tamper with the evidence.

(f) Applicants/Accused shall surrender their passport before the Special Court immediately.

(g) Applicants/Accused shall not make any statement regarding the aforesaid proceedings pending before the Special Court in any form of media i.e. print media, electronic media etc. including social media.

(h) Applicants/Accused shall not leave the country without prior permission from the Special Judge for NDPS at Greater Mumbai.

(i) If the Applicants/Accused have to go out of Greater Mumbai, they shall inform the

Investigating Officer; and shall give their itinerary to the Investigating Officer.

(j) Applicants/Accused shall attend the NCB Mumbai office on each Friday between 11:00 a.m. to 2:00 p.m. to mark their presence.

(k) Applicants/Accused shall attend all the dates in the Court unless prevented by any reasonable cause.

(l) Applicants/Accused shall join the investigation as and when called upon to do so before the authorities of NCB.

(m) Once the trial begins, the Applicants/Accused shall not in any manner try to delay the trial.

(n) If the Applicants/Accused violate any of these terms, NCB shall be entitled to straightaway apply to the Special Judge/Court for cancellation of their bail.

All these Applications are accordingly allowed and disposed of. As a consequence, all pending Interim Applications taken out therein are also disposed of.

(NITIN W. SAMBRE, J.)