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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 15th July, 2021

Decided on: 24th August, 2021

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BAIL APPLN. 1030/2021

MAHMOOD KURDEYA Petitioner

Represented by: Mr. Anoop Kumar Gupta, Adv.
versus

NARCOTICS CONTROL BUREAU Respondent

Represented by: Mr. Subhash Bansal, Sr Standing
Counsel for NCB with Mr. Shashwat
Bansal, Adv.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition the petitioner seeks regular bail in Sessions Case No. 156/2019 under Sections 22/23/29 NDPS Act on a complaint filed by the respondent/ NCB.

2. Learned counsel for the petitioner contends that the petitioner is a 23 old, Syrian national staying in Delhi as refugee pursuant to the registration and verification by the UNHCR since 2015 and has been falsely implicated in case No. VIII/28/DZU/2018 of the respondent. Being a refugee there is no likelihood that the petitioner can flee this country. The petitioner is in custody since 27th September, 2018 and the trial is likely to take a lot of time. No recovery has been made from the petitioner and thus no case is made out against the petitioner. Even on the personal search and search of

the house of the petitioner nothing incriminating was recovered.

3. Learned counsel for the petitioner contends that the only evidence linking the petitioner to the contraband recovered is the statement recorded under Section 67 of the NDPS Act by the officer of the respondent which in view of the decision of the Hon'ble Supreme Court in Toofan Singh Vs. State of Tamil Nadu (2021) 4 SCC 1 is inadmissible in evidence and cannot be used to implicate the petitioner. The statement made by the co-accused Arjun Elawadi stands retracted. The co-accused Arjun Elawadi who was the alleged manufacturer and supplier of the banned substance who ultimately, financially gained from the alleged transaction has already been granted regular bail by the Court and hence on parity the petitioner is also entitled to bail. Further the so-called voluntary statement recorded by the NCB under Section 67 of the NDPS Act cannot be voluntary for the reason the petitioner neither understands Hindi nor English and admittedly no translator was made available to the petitioner at the time of recording of the statement. While granting regular bail to Arjun Elawadi, the learned Special Judge noted that the said applicant has not indulged in manufacture, sale or purchase of the contraband tablet after the notification dated 13th July, 2018 and since the drug has allegedly been manufactured and sold prior to the date of notification, no offence can be made out.

4. Case of the prosecution is that on 24th September, 2018 a secret information was received by NCB officer that a Turkish national, namely, Erbil Han aged about 27 years is departing from IGI Airport by Turkish Airlines flight 717 at 0615 hours and was suspected to have concealed huge quantity of narcotics or psychotropic drugs in his baggage. After necessary permission from Superintendent, a team was deputed and Erbil Han was

intercepted, however nothing was recovered from his personal search. When his red colour trolley bag was opened it was found full of tablets which were kept in bundles of 10 strips and bound with rubber band. One of the strips was taken out and examined. It contained Tramadol Hydrochloride tablet with manufacturing date of July 2017 and expiry date of June 2020. In total 6500 strips with each strip containing 10 tablets were recovered. One strip weighed around 4 grams. Thereafter, two samples of two strips each containing 10 tablets were taken out and put in a zip lock pouch which was then kept in a white colour envelope separately and marked as 'A-1' and 'A-2'. Remaining tablets were put inside the same red colour trolley bag and put in a gunny bag and marked as 'A'. Thereafter, another black colour trolley bag of Erbil Han was opened which also contained 1900 strips of 10 tablets each with manufacturing of July 2017 and expiry of June 2020. The said tablets were of Tramadol X – 225. Similarly, two strips were kept as samples and rest of the recovery was kept back in the trolley bag and kept in a gunny bag duly sealed and marked as 'B'.

5. Statement of Erbil Han under Section 67 of the NDPS Act was recorded in the presence of a translator. He disclosed the name of the petitioner who allegedly gave him tablets on the night of 23rd September, 2018. Erbil Han had a photograph of the petitioner which he identified and put his signature thereon. Four guarantee cards were found in the bags which revealed that the bags were purchased from Shagoon Emporium, Arya Samaj Road, Karol Bagh from where inquiry was conducted about the purchase of the bag showing the guarantee cards. According to the said shop owner, the bags were purchased from his shop by the petitioner. The shop owner Mr. Arvind Birla was shown the photograph of the petitioner which

he identified stating that the petitioner purchased the bag. Owner of the shop was asked to inform as and when the petitioner again comes or is seen. Within two hours of the NCB leaving the shop, owner of the shop made a phone call that the petitioner was present in the market.

6. According to the respondent, petitioner was spotted in the market and immediately served with summons under Section 67 of the NDPS Act and directed to appear in the office of the respondent to tender his voluntary statement. It is the case of the respondent that the petitioner came in car bearing registration No. DL-1CL-5189. Petitioner's residence was also searched, however nothing incriminating was recovered. The petitioner was taken into custody on 26th September, 2018 and on 27th September, 2018 he was produced before the Sessions Judge who sent him to Police custody till 29th September, 2018. On 1st November, 2018 the third accused Arjun Elawadi who allegedly supplied and manufactured the banned substance Tramadol Hydrochloride was served with the notice and in his statement he stated that the said drugs were manufactured by M/s. Serve Pharmaceuticals and from thereon purchased by Imusi International. Arjun Elawadi was the director and partner of both M/s. Serve Pharmaceuticals and Imusi International and he was arrested on 19th March, 2019. The car in which the petitioner had gone to join the investigation was seized on the ground that it was the same car in which contraband was taken. The said car was registered in the name of one Mohammad Al-Kamel, which person has not been traced and apprehended till date. On 19th March, 2019 when Arjun Elawadi was arrested, he stated that he had sold the contraband to Mohammad Al-Kamel.

7. A perusal of the complaint filed by the respondent reveals that after

the voluntary statement of Erbil Han was recorded, the officers of the respondent reached Hotel Indira International and collected the CCTV footages thereof. As per the CCTV footages, the present petitioner is seen coming inside the hotel along with the two bags which were seized from Erbil Han. Erbil Han was helping the petitioner and both of them carried the bags inside the hotel. Further, the guarantee card recovered from the seized trolley bags also disclosed the name of the shop owner from where the two bags were purchased and the owner of the shop Arvind Birla identified the petitioner who purchased the bags and on his informing the petitioner was found in the market on 25th September, 2018.

8. Further, mirror image of the mobile phone of the petitioner was taken from which incriminating evidence in the form of photographs of weighing of trolley bags, photos of weighing of tablets, photos of recovered trolley bags, photos of Erbil Han counting cash, photo of hotel card, etc. were recovered which connect the petitioner with the illegal trafficking of Tramadol tablet and exporting thereof in violation of the provisions of the NDPS Act. Besides the CCTV footages, statement of hotel manager of Indira International Hotel was also recorded.

9. As held by the Hon'ble Supreme Court in Toofan Singh (supra) the statement recorded by the respondent under Section 67 of the NDPS Act can be used limited to the extent permissible under Section 27 of the Indian Evidence Act. However, at noted above, pursuant to the statement of Erbil Han, CCTV footage of the hotel showed the petitioner entering the hotel with the bags that contained the contraband. The said evidence can be used under Section 27 of the Evidence Act against Erbil Han and as substantive evidence in the form of CCTV footage against the petitioner. Further from

the mirror image of the phone of the petitioner, photos of weighing of bags, contraband and cash etc. was also recovered which is also substantive evidence against the petitioner.

10. Contention of learned counsel for the petitioner that no invoice, voucher, etc., of the sale of trolley bags were recovered would not be sufficient to discard the recovery of the guarantee cards which were found in the trolley bags and from which the petitioner could be traced.

11. Further, the petitioner cannot claim parity with Arjun Elawadi as the tablets were manufactured by M/s. Serve Pharmaceuticals run by Ugrasen, father of Arjun Elawadi, who sold to Imusi International run by Arjun Elawadi at Sarita Vihar, Delhi. According to the learned trial court manufacture and sale of the Tramadol tablet by Arjun Elawadi did not take place after the notification dated 13th July, 2018.

12. According to the petitioner when the matter was listed for framing of charge before the learned Trial Court both the petitioner and the co-accused Erbil Han had difficulty in understanding English language which shows that the statements recorded under Section 67 of NDPS Act were not voluntary. As noted above in the present case there is substantive evidence against the petitioner *dehors* the statement under Section 67 NDPS Act in the form of CCTV footages and the photos in the mobile phone of the petitioner.

13. Considering the fact that the petitioner is involved in trafficking of commercial quantity of contraband i.e. 50 kgs 800 gms and it cannot be said that there is no legally admissible evidence against the petitioner to show his complicity in the alleged offence, at this stage this Court finds no ground to grant bail to the petitioner.

14. Petition is dismissed.
15. Order be uploaded on the website of this Court.

(MUKTA GUPTA)
JUDGE

AUGUST 24, 2021
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