

# Avinash Sharma vs Narcotics Control Bureau on 28 March, 2023

**Author: Amit Sharma**

**Bench: Amit Sharma**

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IN THE HIGH COURT OF DELHI AT NEW DELHI

BAIL APPLN. 1867/2022, CRL.M.A. 20166/2022, CRL.M.A. 21402/2022, CRL.M.A. 22851/2022, CRL.M.A. 2542/2023, CRL.M.A. 7895/2023 & CRL.M.A. 8319/2023

AVINASH SHARMA

Through: Mr. Chetan Kumar, Mr. Chopra, Mr. Narender S Advocates.

versus

NARCOTICS CONTROL BUREAU

Through: Mr. Subhash Bansal, Se Counsel with Mr. Ragha Advocate.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA  
ORDER

% 28.03.2023 CRL.M.A. 2543/2023 (Exemption) CRL.M.A. 7896/2023 (Exemption)

1. Exemptions allowed, subject to just exceptions.
2. The applications are disposed of accordingly.
3. The present application under Section 482 of the Cr.P.C. seeks following prayers:

"It is most humbly prayed to this Hon'ble court may allow the present application and may appreciate the bail application no. 1867/2022 titled as "Avinash Sharma Vs. Narcotics Control Bureau" Crime No. VIII/10/DZU/2021 U/s: 8, 22 (c), 23 & 29 of NDPS Act, PS: Narcotics Control Bureau under only section 439 of CrPC instead of under section 439, read with section 167 (2) of CrPC, in the interest of justice."

4. Issue notice.
5. Learned Senior Standing Counsel for the respondent accepts notice and fairly does not oppose this application.
6. In view thereof and the averments made in the present application, the application is allowed and disposed of accordingly. The amended prayers are taken on record.

7. The present application under Section 439 of the Cr.P.C. seeks grant of regular bail in SC No. 244/2021 arising out of Crime No. VIII/10/DZU/2021, under Sections 8/22(c)/23/29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') registered at Narcotics Control Bureau ('NCB').

8. The case of the prosecution is that on the basis of secret information, on 13.03.2021, a team of the NCB reached DHL Express Courier Company ('DHL'), Kirti Nagar, New Delhi, and the supervisor at DHL produced the suspected parcel bearing airway bill number 4254071485 which was destined to USA and booked in name of one Muskan Singh. On opening the parcel, it was found that it contained three carton boxes. The first box contained a black colour plastic box in which 45 white boxes were found. One box contained 36 tablets with words GG249. All 45 boxes contained similar tablets, i.e, GG249 and all weighed 600 Grams and appeared to be Alprazolam. The second box contained 39 pouches consisting of yellow coloured tablets having words A215 which appeared to be Oxycodone Tablets. The said box weighed 1 Kg. 2. The third box contained GG249 tablets in 45 small boxes and all weighed 600 Grams which appeared to be Alprazolam. Seizure was effected vide panchnama dated 13.03.2021 in presence of independent witnesses.

9. During investigation, Muskan Singh, the alleged consignor tendered her statement wherein she disclosed that she had never booked the parcel under reference. During further investigation, it was revealed that the said parcel received at DHL was booked through Zephyr Express at CB-3858 Ring Road, Naraina, New Delhi. In follow-up, Sh. Anoop Singh of Zephyr Express tendered his voluntary statement on 17.03.2021 and revealed that said parcel bearing AWB No. 4254071485 was received from M/s Rightway Logistics Mahipalpur, New Delhi and further disclosed that Ashok Kumar of said courier company had informed him that 11 more such parcels are with him which shall be forwarded to him in near future for booking. On the basis of the said disclosure, a team of the NCB reached at the said place and enquired about the aforesaid 11 parcels from Mr. Ashok Kumar who informed that said parcel bearing AWB No. 4254071485 and 11 other similar parcels were booked through Mr. Ajay of Shyam Logistics Rangpur, Mahipalpur. On directions, Sh. Ashok Kumar telephonically informed Mr. Ajay Bhardwaj and called him at the Office of Rightways Logistics. After the NCB team shared the information regarding booking of the said parcels with Mr. Ajay, he revealed that said parcels had been booked by a person who introduced himself as Rohit, resident of Agra and said person had sent the ID of Muskan Singh for booking the parcels.

10. In the follow up of investigation, it was revealed that the actual name of Mr. Rohit is Mr. Kapil Aggarwal. The statement of Mr. Kapil Aggarwal under Section 67 of the NDPS Act was recorded, wherein he admitted his indulgence in exporting narcotics medicine illegally and in the said disclosure, he revealed the name of one Mr. Swami, with whom he was in touch on Skype, having an ID by the name of Jack Dalton.

11. It is the case of the prosecution that during further investigation, the identity of the aforesaid Jack Dalton was revealed as Jwala Prasad. Jwala Prasad @ Swami gave a statement under Section 67 of the NDPS Act, wherein he disclosed that he was involved in illegal drug trafficking with Kapil Aggarwal. In the said statement, he also named the present applicant, his brother Prajjwal Bharadwaj and one Gaurav Sharma @ Gary. Jwala Prasad @ Swami was arrested on 15.06.2021.

Co-accused Gaurav Sharma @ Gary was arrested and his statement under Section 67 of the NDPS recorded, wherein he also named the present applicant and Prajjwal Bharadwaj alongwith other co-accused persons. The present applicant and Prajjwal Bharadwaj were arrested on 26.06.2021. Subsequently, the applicant and Prajjwal Bharadwaj admitted their involvement in the illegal business of narcotics. After completion of investigation, the complaint was filed and is pending trial.

12. Learned counsel for the applicant submits that nothing incriminating was recovered at his instance. It is further submitted that the only evidence against the present applicant is the disclosure made by him and other co-accused persons in their statements under Section 67 of the NDPS Act, which cannot be considered as a confession for the purposes of a trial. In support of the said contention, learned counsel appearing on behalf of the applicant relied upon the judgement of the Hon'ble Supreme Court in Tofan Singh v. State of Tamil Nadu, 2013 SCC OnLine 931, wherein it has been held as under:

"152. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any non obstante clause doing away with Section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.

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155. We answer the reference by stating:

(i) That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

13. Learned counsel for the applicant further submitted that his brother and co-accused Prajjwal Bhardwaj has been granted regular bail vide order dated 06.10.2022, passed by a coordinate bench of this Court in BAIL APPLN. 982/2022. It is further pointed out that other co-accused persons, i.e., Kapil Aggarwal and Gaurav Sharma have also been granted bail by the learned Special Judge (NDPS Act), New Delhi.

14. Per contra, learned Senior Standing Counsel ('Sr.SC') appearing on behalf of the NCB submitted that the recovery in the present case is of a commercial quantity. Section 29 of the NDPS Act has been invoked with respect to the present applicant as he was involved in the conspiracy of dealing in illegal narcotic drugs and therefore, the rigours of Section 37 of the NDPS Act would be attracted in

the present case.

15. Learned Sr.SC further submitted that the case of the present applicant is on a different footing from his brother and co-accused Prajjwal Bharadwaj inasmuch as certain chats between the applicant and co-accused persons have been recovered which indicate his involvement in the illegal trade of narcotics.

16. Heard learned counsel for the parties and perused the record.

17. It is an admitted case that no recovery has been effected from the present applicant. The case of the prosecution primarily relies upon the statement of the present applicant and co-accused persons recorded under Section 67 of the NDPS Act. A perusal of the said statements reflects that nothing therein has been stated with respect to the alleged recovery which was effected on 13.03.2021 and is the subject matter of the complaint in which the present applicant is facing trial.

18. On a pointed query from this Court with regard to the chats relating to the present applicant, learned Sr.SC, on instructions from the Investigating Officer, submits that the same relates to the year 2019 and therefore there was no chat with respect to the aforesaid recovery in question.

19. As pointed herein before, co-accused Prajjwal Bharadwaj, who is similarly placed to the present applicant, has already been released on bail. The ratio in Tofan Singh (supra) squarely applies to the case of the applicant in the facts and circumstances of the present case. It is also an admitted case the present applicant is not involved in any other case under the NDPS Act.

20. The applicant is in judicial custody since 26.06.2021. In the facts and circumstances of the case, the requirements of Section 37 of the NDPS Act are satisfied.

21. In totality of the facts and circumstances of the present case, the application is allowed and the applicant is directed to be released on bail on his furnishing a personal bond in the sum of Rs. 1,00,000/- with one surety of the like amount to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions:

i. The applicant shall not leave the country without prior permission of the learned trial Court.

ii. The applicant shall intimate the learned trial Court by way of an affidavit and to the Investigating Officer regarding any change in residential address.

iii. The applicant shall appear before the Court as and when the matter is taken up for hearing iv. The applicant shall join investigation as and when called by the Investigating Officer concerned.

v. The applicant shall provide his mobile number to the Investigating Officer and intimate about any change.

22. The application is allowed and disposed of accordingly.
23. Pending application(s), if any, also stand disposed of.
24. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case.
25. Copy of this order be sent to the concerned Jail Superintendent for necessary information and compliance.
26. Order be uploaded on the website of this court forthwith.

AMIT SHARMA, J MARCH 28, 2023/ab