

Shailendra Kumar Gupta @ Shailu vs State Of U.P. on 5 March, 2020

Author: Jayant Banerji

Bench: Jayant Banerji

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

RESERVED

Court No. - 44

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 3515 of 2020

Applicant :- Shailendra Kumar Gupta @ Shailu

Opposite Party :- State of U.P.

Counsel for Applicant :- Rajiv Lochan Shukla, Pramod Kumar Dwivedi

Counsel for Opposite Party :- G.A.

Hon'ble Jayant Banerji, J.

1. This application has been filed to release the applicant on bail in case crime no. 574 of 2019, under Section 8/21 of the Narcotic Drugs and Psychotropic Substance Act, 1985, P.S. Shahpur, District Gorakhpur. An amount of 1 Kg 17 gm of charas is alleged to have been recovered from the possession of the applicant which is above the commercial quantity.

2. Notice of the present bail application was served on the Government Advocate on 8.1.2020. However, no counter affidavit has been filed.

3. When the matter was being heard on 4.2.2020, learned Additional Government Advocate (AGA) placed before the court a recent judgement of the Supreme Court dated 24.01.2020 passed in Criminal Appeal No. 154-157 of 2020 (State of Kerala Vs. Rajesh)² to contend that in view of the provisions of Section 37(1)(b)(ii) of the NDPS Act, since the offence involves recovery of the narcotic drug in excess of the commercial quantity, the Court is required to record its satisfaction that there are reasonable grounds for believing that the applicant is not guilty of such offence and that the applicant is not likely to commit any offence while on bail.

4. Apart from the learned counsel for the parties, the Court also requested Shri Imran Ullah and Dr. Arun Srivastava, learned counsel to assist the Court as amicus curie on the legal issues involved in the matter. On the date fixed, the case was heard at length.

5. Learned counsel for the applicant, Shri Rajeev Lochan Shukla, has relied upon a judgement of the Supreme Court in the case of Sujit Tiwari Vs. State of Gujarat and Another in Criminal Appeal No. 1897 of 2019, whereby the bail application filed by one of the accused who was charged under the NDPS Act in respect of the recovery of 1445 Kg of heroin was allowed after imposing stringent conditions. It is contended that by the learned counsel that the Apex Court took note of the prosecution case at the highest and observed that the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money of Rs. 50 crores cannot be made otherwise. It is stated by Shri Shukla that in that case before the Supreme Court the provisions of Section 37 of the N.D.P.S. Act were specifically considered. While referring the judgement of the Supreme Court in State of Kerala, Shri Shukla has contended that the Apex Court has dealt with the expression "reasonable grounds" appearing in Section 37 of the Act as meaning something more than prima facie grounds. He contends that the expression "reasonable grounds" contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. It is contended that "reasonable grounds" appearing in Section 37 of the Act would not entail a finding to be recorded by the Court regarding its satisfaction beyond reasonable doubt but to an extent more than prima facie. It is contended that the Court while exercising its jurisdiction for grant of bail or otherwise has to take into account the overall facts of the case and the compliance of the mandatory provisions of the N.D.P.S. Act before coming to a finding. The contention is that this Court may, accordingly, grant bail in view of the facts of the present case.

6. Shri Imran Ullah, learned counsel (amicus curie) while referring to paragraph nos. 7 and 22 of the judgement of the Apex Court in the case of State of Kerala has contended that the Court is required to record a finding mandated under Section 37 of the N.D.P.S. Act which is a sine qua non for grant of bail to the accused under the N.D.P.S. Act. With regard to bail, learned counsel has referred to the judgements of the Apex Court in the matters of Sanjay Chandra Vs. Central Bureau of Investigation³, Union of India Vs. Shiv Shanker Kesari⁴, State of M.P. Vs. Kajad⁵, Union of India Vs. Ram Samujh and another⁶, Union of India Vs. Thamisharasi⁷ and Dataram Singh Vs. State of Uttar Pradesh and another⁸. It is contended by the learned counsel that refusal of bail is the rule and its grant an exception in view of Section 37(1)(b)(ii). Liberal approach in the matter of bail under the NDPS Act is uncalled for. He contends that Section 37 of the NDPS Act starts with a non-obstante clause and therefore, the provisions of Section 437/439 of the Code of Criminal Procedure would not be applicable with regard to a person accused of an offence punishable under

Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity of contraband. The words "reasonable grounds" also appear in clause (i) of Section 437 of Cr.P.C. but the authority given to a High Court or a Court of Session under clause (a) of Section 439 permitting release on bail of any person accused of an offence would be curtailed in view of the stringent provision of Section 37(1)(b)(ii) of the NDPS Act. The limitations prescribed under the NDPS Act on granting of bail are in addition to the limitations under Cr.P.C. or any other law for the time being in force. It is further contended that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of not guilty. With reference to the phrase "reasonable grounds for believing", the learned counsel has referred to paragraph no. 37 of the judgement of the Supreme Court in the case of Sanjay Chandra (supra) to contend that the legislature has used the the words 'reasonable grounds for believing' instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge.

7. Dr. Arun Srivastava, learned counsel has referred to the judgement of the Supreme Court in the case of Arif Khan @ Agha Khan Vs. State of Uttarakhand⁹. In that case the Supreme Court has held that compliance of the requirements of Section 50 of the NDPS Act are mandatory and therefore the provisions of Section 50 have to be strictly complied with. It is contended that where, in case the applicant is not informed of his right under Section 50 of the NDPS Act, conviction of the accused would be vitiated.

8. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 and as further amended by Act 9 of 2001, is as follows:

"37. Offences to be cognizable and non-bailable.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

SUMMARY OF THE PRINCIPLES WITH REGARD TO BAIL UNDER THE NDPS ACT WITH REFERENCE TO A PERSON ACCUSED under Section 19 or Section 24 or Section 27A and also for OFFENCES INVOLVING 'COMMERCIAL QUANTITY'

9. It is no longer res nova that in view of Section 37(1)(b) of the NDPS Act, refusal of bail is the rule and its grant an exception and, that too after, inter alia, providing the Public Prosecutor an opportunity to oppose the application for such release. The law with regard to grant of bail in matters under the NDPS Act is quite well settled. However, some of the principles may be summarized as follows:-

i) Powers of the High Court to grant bail under section 439 Cr.P.C are subject the limitations contained in Section 37 of the NDPS Act.

While considering the scope of Section 439 of the Cr. P.C. with respect to Section 37 of the NDPS Act, the Supreme Court, in the case of Narcotics Control Bureau v. Kishan Lal¹⁰, looked into the provision of S.37 of the NDPS Act as amended in the year 1989 and held:

"For all the aforesaid reasons we hold that the powers of the High Court to grant bail under Section 439 are subject to the limitations contained in the amended Section 37 of the NDPS Act and the restrictions placed on the powers of the court under the said section are applicable to the High Court also in the matter of granting bail".

ii) The total period of custody under the NDPS Act of the accused permissible during investigation is to be found in Section 167 CrPC read with Section 36A of the NDPS Act.

In the case of Union of India Vs. Thamisharasi⁷, the Supreme Court held that Section 37 of the NDPS Act does not exclude the application of the proviso to sub-section (2) of Section 167 of the Code, even in respect of persons who are accused of offences under the NDPS Act, and observed as follows:

"13. Accordingly, provision in Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the corresponding provisions in the Code and imposes limitations on granting of bail in addition to the limitations under the Code of Criminal Procedure as expressly provided in sub-section (2) of Section 37. These limitations on granting of bail specified in sub-section (1) of Section 37 are in addition to the limitations under Section 437 of the Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding the applicability of the proviso to sub-section (2) of Section 167 CrPC which operates in a different field relating to the total period of custody of the accused permissible during investigation.

14. In our opinion, in order to exclude the application of the proviso to sub-section (2) of Section 167 CrPC in such cases an express provision indicating the contrary intention was required or at least some provision from which such a conclusion

emerged by necessary implication. As shown by us, there is no such provision in the NDPS Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 CrPC which is expressly applied. The absence of any provision inconsistent therewith in this Act is significant."

However, after insertion of S. 36A by the Act 2 of 1989 and its substitution by Act 9 of 2001, sub-section (4) of Section 36A reads as under:

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

iii) After the charge-sheet is filed, an accused under the NDPS Act cannot exercise the right to be released on bail on failure of the prosecution to file the charge-sheet within the time prescribed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet.

In the case of Dr. Bipin Shantilal Panchal Vs. State of Gujarat¹¹, the Supreme Court while considering an appeal against rejection of bail of the appellant who was accused of offences under the NDPS Act, observed as follows:

"4.Therefore, if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet....."

iv) Detention made as a sequel to the arrest would become unlawful beyond the period of 24 hours without the order of a Magistrate.

In the case of Manoj Vs. State of Madhya Pradesh¹² the appellant was arrested in connection with a case involving NDPS Act registered by police in Rajasthan. Later, in another case under the NDPS

Act in Madhya Pradesh involved the appellant who was recorded as arrested. Though an order granting bail was passed by the Rajasthan High Court, the appellant did not execute the bond since his arrest in Madhya Pradesh case became a stonewall for his release from custody. His application for bail before the Madhya Pradesh High Court, after the Sessions Judge rejected his bail application, was rejected. After 90 days of his arrest in the Madhya Pradesh case, he moved an application before the Special Judge, Kota (Rajasthan) for bail under the proviso to S. 167 (2) of the Cr. P.C as no charge-sheet was filed in the Madhya Pradesh case. But the Special Judge rejected the application saying that he was never produced before the court after formal arrest and no order as regards the first remand was ever passed and therefore, the question of completion of investigation within a period of 90 days does not arise. The High Court also did not enlarge the applicant on bail. The Supreme Court observed as follows:

"12. If the police officer is forbidden from keeping an arrested person beyond twenty-four hours without order of a Magistrate, what should happen to the arrested person after the said period? It is a constitutional mandate that no person shall be deprived of his liberty except in accordance with the procedure established in law. Close to its heels the Constitution directs that the person arrested and detained in custody shall be produced before the nearest magistrate within 24 hours of such arrest. The only time permitted by Article 22 of the Constitution to be excluded from the said period of 24 hours is "the time necessary for going from the place of arrest to the court of the Magistrate". Only under two contingencies can the said direction be obviated. One is when the person arrested is an "enemy alien". Second is when the arrest is under any law for preventive detention. In all other cases the Constitution has prohibited peremptorily that "no such person shall be detained in custody beyond the said period without the authority of a Magistrate".

13. When the State of Madhya Pradesh, whose police made the arrest of the appellant in connection with the M.P. case on 7-8-1998, admitted that after arrest he was not produced before the nearest Magistrate within 24 hours, its inevitable corollary is that detention made as a sequel to the arrest would become unlawful beyond the said period of 24 hours."

v) Liberal approach in the matter of bail under the NDPS Act is uncalled for.

Then, in the case of State of M.P. Vs. Kaja⁵, the Supreme Court was considering an appeal against an order of the High Court allowing the second bail application of the respondent who was accused under the NDPS Act (as it stood prior to its amendment in the year 2001). The Supreme Court held:

"5. Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of

Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for.

6.

7. In the instant case, the learned Single Judge of the High Court has granted the bail on his own sense of observation regarding the course of conduct adopted by the accused at the time of his interception and arrest. Merely because the accused was found to be continuing to hold bag containing opium during the period, the raiding party searched him in accordance with the provisions of the Act, the learned Judge was not justified to conclude "it is by itself unnatural". How the learned Judge concluded that the conduct of the accused or raiding party were unnatural is not discernible from the impugned order. A person, apprehended by a raiding party, who is sought to be searched is supposed to hold the goods in his possession unless he opts to flee from the place of occurrence or is advised to throw the container in which the offending substance is contained. Section 37 of the Act has been referred to in the impugned order not for the purposes of showing of its compliance but to justify the passing of an apparently wrong order. If, besides referring to Section 37 of the Act, the learned Judge would have referred to its provisions, he would not have fallen a prey to the ulterior designs of the respondent-accused."

vi) On merits, no person shall be granted bail unless the two conditions are satisfied, that is, the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail.

The Supreme Court in the case of Union of India Vs. Shiv Shanker Kesari⁴, while considering an appeal against bail which was granted to the respondent by this Court on the ground that the recovery was not from the exclusive possession of the accused-respondent and other members of the family are involved in the case and that the respondent had no criminal history, observed as follows:

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37 (1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

.....

.....

.....

11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion."

Earlier, in the case of Babua v. State of Orissa¹³, the Apex Court held:

"3. In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view."

(emphasis by Court)

vii) Even in a criminal appeal against the order of conviction under the NDPS Act, the mandatory provisions of Section 37 of the Act cannot be ignored while suspending the sentence.

The Supreme Court in the case of Union of India v. Rattan Mallik¹⁴ observed as follows:

"10. As already noted, in the present case, the respondent has been convicted and sentenced for the offences under the NDPS Act and therefore, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for the offences under the Penal Code, 1860 the relevant provision in the said special statute in this regard had to be kept in view.

.....

.....

15. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are: (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years, and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Penal Code, 1860, etc. but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-section (1) of Section 37 of the NDPS Act.

16. Merely because, according to the learned Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the learned Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge."

viii) The seriousness of cases under the NDPS Act have to be viewed like this that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society.

The Supreme Court in the case of Union of India Vs. Ram Samujh and another⁶ has observed as follows:

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities

of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secy., Union Territory of Goa*. as under: (SCC p. 104, para 24) "24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

8. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended."

ix) Compliance or otherwise of Section 50 of the NDPS Act is a factual issue that can only be considered during trial.

The Supreme Court in the Constitution Bench judgments in the matters of *State of Punjab v. Baldev Singh*¹⁵ and *Vijaysinh Chandubha Jadeja v. State of Gujarat*¹⁶ has observed that compliance of Section 50 of the NDPS Act can be looked into during trial. Therefore, this aspect may not be looked into at the stage of grant of bail.

x) Compliance or otherwise of Section 42 of the NDPS Act is also a factual issue which can be considered during trial.

A Constitution Bench of the Supreme Court, in the matter of *Karnail Singh v. State of Haryana*, while looking into the mandate of Section 42 has observed:

"35. In conclusion, what is to be noticed is that *Abdul Rashid* [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of

Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

It, therefore, is reflected in this judgement that compliance of Section 42 is a question of fact. Thus, it is to be looked into by the Courts during trial and may not be looked into for consideration of a

bail application.

xi) Whether possession of the drug or substance is below or above the commercial quantity, has to be viewed in light of Note-4 appended to the Notification of the Central Government specifying small quantity and commercial quantity.

Note 4 was inserted at the foot of the Notification of the Central Government specifying small and commercial quantity by means of S.O. 2941(E) dated 18th November, 2009 which reads as follows:-

"The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

In the case of Harjit Singh v. State of Punjab¹⁷, while distinguishing the case of E. Micheal Raj¹⁸, and considering the aforesaid Note 4, the Supreme Court held:

"13. Notification dated 18-11-2009 has replaced the part of the Notification dated 19-10-2001 and reads as under:

"In the Table at the end after Note 3, the following Note shall be inserted, namely:

(4) The quantities shown in Column 5 and Column 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

14. Thus, it is evident that under the aforesaid notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18-11-2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned.

.....

21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant

being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry 92 becomes totally redundant.

22. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry 93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry 92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity.

23. The judgment in E. Micheal Raj [(2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558] has dealt with heroin i.e. diacetylmorphine which is an "opium derivative" within the meaning of the term as defined in Section 2(xvi) of the NDPS Act and therefore, a "manufactured drug" within the meaning of Section 2(xi)(a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case.

.....

25. The notification applicable herein specifies small and commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with heroin, Entry 77 deals with morphine, Entry 92 deals with opium, Entry 93 deals with opium derivatives and so on and so forth. Therefore, the notification also makes a distinction not only between opium and morphine but also between opium and opium derivatives. Undoubtedly, morphine is one of the derivatives of the opium. Thus, the requirement under the law is first to identify and classify the recovered substance and then to find out under what entry it is required to be dealt with. If it is opium as defined in clause (a) of Section 2(xv) then the percentage of morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (b) of Section 2(xv) of the NDPS Act, that the quantity of morphine contents becomes relevant.

26. Thus, the aforesaid judgment in E. Micheal Raj [(2008) 5 SCC 161 : (2008) 2 SCC (Cri) 558] has no application in the instant case as it does not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances. The material so recovered from the appellant is opium in terms of Section 2(xv) of the NDPS Act. In such a fact situation, determination of the contents of morphine in the opium becomes totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity. The entire substance has to be considered to be opium as the material recovered was not a mixture and the case falls squarely under Entry 92. Undoubtedly, the FSL report provided for potency of the opium giving particulars of morphine contents. It goes without saying that opium would contain some morphine which should not be less than the

prescribed quantity, however, the percentage of morphine is not a decisive factor for determination of the quantum of punishment, as the opium is to be dealt with under a distinct and separate entry from that of morphine."

(emphasis by Court)

xii) Possession of narcotic drugs, controlled substances or psychotropic substances can be either 'physical' or 'constructive'. Courts require circumspection while considering issues of possession in a bail application in view of the presumption to be drawn under Section 54 during trials.

Under Section 54 of the NDPS Act it is provided as follows:

54. Presumption from possession of illicit articles.- In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.

Therefore, for purpose of bail, where such grounds are raised, the courts would be circumspect, as this aspect of the matter is a factual dispute which needs to be gone into during trial.

REFERENCES OF OTHER CASES

10. Dataram Singh Vs. State of Uttar Pradesh and another⁸ This case before the Supreme Court was not under the provisions of the NDPS Act. The Court observed that a humane attitude is required to be adopted by a Judge while dealing with an application for remanding a suspect or accused person to police custody or judicial custody. The Court observed that there are several reasons for this, including maintaining the dignity of the accused person howsoever poor that person might be, the requirements of Article 21 of the Constitution, and the fact that there is enormous overcrowding in prisons leading to social and other problems. However, the Supreme Court, in the opening paragraph of the judgement observed as follows:-

"1. Leave granted. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. "

Thus the Supreme Court, in Dataram Singh, has clearly excluded those offences under statutes (like the NDPS Act) which place a reverse onus on an accused.

11. State of Kerala The discretion exercised by the High Court in granting post arrest bail to the accused-respondent without noticing the mandate of Section 37(1)(b)(ii) of the NDPS Act and thereafter rejecting the application filed by the appellant under Section 482 Cr.P.C. for recalling the order of the post arrest bail was considered. The Learned Judge of the High Court without noticing Section 37 of the NDPS and taking notice of the fact that the other accused-persons in Crime No. 14 of 2018 had since been released on bail, granted him post arrest bail. The prosecution case was that the respondents and others were found to be in possession of 1.800 Kg of hashish oil. They were arrested and after investigation a chargesheet was filed. Their post arrest bail application was dismissed by the Sessions Judge whereafter they preferred the bail application before the High Court. The High Court by its order dated 10.5.2019 granted bail to the respondents and others in crime no. 19 of 2018 and observed that both the accused have completed 195 days in judicial custody and their further detention is not necessary as nothing remains to be investigated against them. The Supreme Court observed that Section 37 of the NDPS Act has been referred to by the learned Single Judge in the impugned order not for the purpose of showing its compliance, but to justify due application of mind in taking decision to grant post arrest bail under the order dated 10.5.2019. When a recall application was filed under Section 482 Cr.P.C by the appellant for recalling the order of the post arrest bail, the Single Judge observed that even if it was an erroneous order and it did not involve application of mind, still it was not open for the Court to reconsider the facts invoking Section 482 Cr.P.C. and expressed its view that the remedy of the State lies in assailing the orders of the Court before the superior forum, if so advised, and dismissed the application by the order dated 12.6.2019.

12. Among the contentions advanced on behalf of the respondents before the Supreme Court in State of Kerala the following points were raised:

(i) Accused nos. 1 to 4 were granted post arrest bail by the high Court in Crime No. 14 of 2018 but the prosecution has not taken any steps to challenge the grant of bail to all other accused persons.

(ii) Chargesheet was filed in both the cases, that is, in Crime No. 14/2018 and Crime No. 19/2018 and the matter is fixed for framing of charge. No further investigation is required from the accused respondents and the learned Judge under the impugned judgement has put stringent conditions while granting post arrest bail to the respondents, which was neither been misused nor violated and after affording due

opportunity of hearing and noticing Section 37 of the NDPS Act, satisfaction was recorded that the accused-persons deserved post arrest bail.

(iii) The High Court was cognizant of the fact that it could be a case of false implication on account of animosity of the office-colleagues of a person convicted under the Prevention of Corruption Act on the complaint of the respondent.

(iv) There being no prior case against the respondent under the NDPS Act except two aforesaid cases, and the judicial discretion having been exercised, no interference is called for by this Court.

13. The Supreme Court observed that the contraband recovered is more than the commercial quantity and held as follows:

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

22. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act.

23. The submission made by learned counsel for the respondents that in Crime No. 14/2018, the bail has been granted to the other accused persons(A-1 to A-4), and no steps have been taken by the prosecution to challenge the grant of post-arrest bail to the other accused persons, is of no consequence for the reason that the consideration prevailed upon the Court to grant bail to the other accused persons will not absolve

the act of the accused respondent(A-5) from the rigour of Section 37 of the NDPS Act.

24. The further submission of the learned counsel for the respondents that they have been falsely implicated in Crime No. 19/2018 for the reason that the batchmates of the excise official, Babu Varghese was convicted in the corruption case on the trap being laid down by the respondent-Shajimon (A-1) is only a conjecture of self-defence, and no inference could be drawn of false implication, more so when in Crime No. 19/2018 and 14/2018, charge-sheets have been filed after investigation and the matter is listed before the learned trial Judge for framing of the charge where the accused respondents certainly have an opportunity to make their submissions."

(emphasis by Court)

14. Accordingly, the Supreme Court allowed the appeals of the State of Kerala and the order passed by the High Court releasing the respondents on bail was set aside.

15. Sujit Tiwari Vs. State of Gujarat and Another¹⁹ This case of the Supreme Court has been relied upon by the learned counsel for the applicant. The facts of the case were that the brother of the appellant, one Suprit Tiwari, who was the master of a ship (MV Hennry) and the crew members of that ship, when intercepted by the Indian Coast Guard, could not produce any documents pertaining to departure from last port of call i.e. Abu Dhabi in UAE or for the next port of call i.e. Bhavnagar in Gujarat. Suprit Tiwari when questioned, admitted that they were carrying contraband substance in the nature of narcotics substance and he identified the locations and 1445 Kg of narcotics substances (heroin) in 1526 packets were recovered from the ship which was intercepted on 29.7.2017. The Narcotic Control Bureau carried out its investigation and after completion filed a complaint before the Special Judge, NDPS Court at Porbandar in Gujarat on 22.12.2017 against the Master and the 7 crew members and against five other persons including the appellant Sujit Tiwari who is the brother of Suprit Tiwari. Suprit Tiwari revealed that he had informed his brother Sujit Tiwari about some illegal activity in which he was to make huge amount of money and he also told Sujit that he would get Rs. 50 crores through hawala. The appellant was arrested on 4.8.2017 with the allegation that he was party of the conspiracy to smuggle the huge quantity of contraband into India. On behalf of the appellant two arguments were advanced, firstly, that there is no material to connect the appellant with the crime and, secondly that the appellant is entitled to a default bail since the investigation has not been completed within the period prescribed under Section 167 of the Code of Criminal Procedure, 1973, read with Section 36A of the NDPS Act. The Supreme Court went through the statement made by the appellant under Section 67 of the NDPS Act. While noticing that the question whether the statement so made is admissible or not having been referred to a larger Bench, for the purpose of the case, the Supreme Court took the statement into consideration even though the appellant had resiled from the same.

16. The Supreme Court observed as follows:

"10. The prosecution story is that the appellant was aware of what his brother was doing and was actively helping his brother. At this stage we would not like to

comment on the merits of the allegations levelled against the present appellant. But other than the few WhatsApp messages and his own statement which he has resiled from, there is very little other evidence. At this stage it appears that the appellant may not have even been aware of the entire conspiracy because even the prosecution story is that the brother himself did not know what was loaded on the ship till he was informed by the owner of the vessel. Even when the heroin was loaded in the ship it was supposed to go towards Egypt and that would not have been a crime under the NDPS Act. It seems that Suprit Tiwari and other 7 crew members then decided to make much more money by bringing the ship to India with the intention of disposing of the drugs in India. During this period the Master Suprit Tiwari took the help of Vishal Kumar Yadav and Irfan Sheikh who had to deliver the consignment to Suleman who had to arrange the money after delivery. The main allegation made against the appellant is that he sent the list of the crew members after deleting the names of 4 Iranians and Esthekhar Alam to Vishal Kumar Yadav and Irfan Sheikh through WhatsApp with a view to make their disembarkation process easier. Even if we take the prosecution case at the highest, the appellant was aware that his brother was indulging in some illegal activity because obviously such huge amount of money could not be made otherwise. However, at this stage it cannot be said with certainty whether he was aware that drugs were being smuggled on the ship or not, though the allegation is that he made such a statement to the NCB under Section 67 of the NDPS Act.

11. At this stage, without going into the merits, we feel that the case of the appellant herein is totally different from the other accused. Reasonable possibility is there that he may be acquitted. He has been behind bars since his arrest on 04.08.2017 i.e. for more than 2 years and he is a young man aged about 25 years. He is a B.Tech Graduate. Therefore, under facts and circumstances of this case we feel that this is a fit case where the appellant is entitled to bail because there is a possibility that he was unaware of the illegal activities of his brother and the other crew members. The case of the appellant is different from that of all the other accused, whether it be the Master of the ship, the crew members or the persons who introduced the Master to the prospective buyers and the prospective buyers."

Therefore the Supreme Court directed bail to the appellant, Sujit Tiwari, after imposing some stringent conditions.

CONSIDERATION OF THE PRESENT CASE

17. Coming to the facts of the instant case, the FIR dated 24.11.2019 was lodged by the Station Officer stating that on 24.11.2019 the informant and other police personnel, for purpose of inspecting the area and for maintaining law and order were busy in Basharatpur area when an special informant informed them that one person who engages in purchase and sale of narcotic substance is standing in the wait for someone near H.N. Singh Crossing of Basharatpur area. If hurried, the person can be nabbed along with the substance. Believing that information, the

informant and others after taking physical search of each other to ensure that nobody had any unauthorized substance with them, they reached H.N. Singh Crossing. The special informant indicated a person standing near the graveyard near Metro Hospital that he is that person. Then the police personnel surrounded that person and apprehended him. When that person was asked his name and address, he started stammering out of fear and said that his name was Shailendra Kumar Gupta @ Shailu s/o Ramashray Prasad Gupta, in whose hand there was a solid substance in a plastic bag. When that person was subjected to rigorous interrogation, he said that he purchases and sells charas and other narcotic substance for profit and that he was standing there holding charas in his hand to sell it. After informing the applicant about his right and then taking a consent letter from him for taking his search, his search was taken and thereafter two solid rectangular pieces wrapped in brown plastic were found in a plastic bag which he was holding in right hand. The bag was opened. On opening it was smelt and found that it was a substance like charas. Thereafter, one constable was asked to get an electronic weighing scale for taking the weight of the solid substance. When the recovered rectangular pieces were weighed on the electronic weighing scale then 1 Kg 17 grams of the substance was recovered. When the documents pertaining to the recovered charas were asked for, the apprehended person did not show them. Thereafter, the offence under Section 8/21 of the NDPS Act was explained to that person and he was arrested by the police and the recovered charas was seized. From the recovered substance, in the presence of the accused, 9 grams were taken out and were sealed in a white cloth. An arrest memo was prepared at the site on which the applicant signed. A recovery memo was also prepared, a copy of which was given to the applicant.

18. The contention of the learned counsel for the applicant is that the applicant has been falsely implicated in the case and the recovered contraband was planted on him. It is contended that the applicant has serious enmity with one Smt. Guddi Devi who is the mother of a leader of the ruling political party at Gorakhpur. That leader professes to be close to the Chief Minister of the State. A suit between the aforesaid Smt. Guddi Devi and the father of the applicant being O.S. No. 882 of 1992 is pending in the court of Additional Civil Judge (Junior Division) F.T.C., Gorakhpur. In view of this enmity another police case being case crime no. 123 of 2019 was got registered on fake and trumped up charges against the applicant as well as others for allegedly indulging in public gambling and the applicant is on bail in that case. It is alleged that in case crime no. 123 of 2019, the applicant has been falsely implicated at the behest of one Sandeep Kumar who is the son of Smt. Guddi Devi. It is contended that the wife of the applicant, Smt. Sunita Gupta had lodged a complaint against Sandeep and his associates on 23.10.2019 for "Jan Sunwai" before the Senior Superintendent of Police, Gorakhpur. It is contended that in the present case the applicant is absolutely innocent and has not committed any crime nor has he indulged in trafficking of any narcotic drug. No independent witness of the alleged recovery is there even though the alleged incident occurred in a heavily populated area.

19. Learned counsel for the applicant has referred to the statement of the first informant and the statement of the Sub-Inspector and the constable which have been enclosed as Annexure No. 2 and 3 to the affidavit to contend that the arrest of the applicant was admittedly done at 4:10 PM in the afternoon in broad daylight. The statements of the police personnel themselves reveal that at the time of recovery and arrest of the applicant several members of the public were standing around. Learned counsel has referred to the site plan prepared by the police which is enclosed as Annexure

No. 4 to the affidavit in an attempt to demonstrate that in a crowded area in broad day light, the applicant has been shown standing on the roadside holding 1 Kg 17 grams of charas in his right hand in a plastic bag. It is contended that the presence of the applicant at that point of time holding onto 1Kg 17 grams of charas is highly improbable and unbelievable. The consent for taking the physical search of the applicant which is not in the hand writing of the applicant, was taken by forcing him to sign on a blank sheet of paper. However, learned counsel has fairly conceded that he is not pressing this application on the ground of non-compliance of Section 50 of the NDPS Act as the applicant was alleged to have been holding on to a packet of charas in his right hand and not concealed in his clothes. It is contended that since, in the case of Sujit Tiwari, the Supreme Court granted bail, imposing stringent conditions, where a massive quantity of heroin was recovered, this Court may also grant bail in this case with stringent conditions. It is finally contended that if the applicant is enlarged on bail, he will not abscond or tamper with the evidence nor intimidate the witnesses and is ready to furnish reliable sureties to the satisfaction of the court concerned.

20. Shri Nagendra Kumar Srivastava, learned A.G.A. on the other hand while opposing the bail application, he has referred to the judgements of the Supreme Court in Satpal Singh Vs. State of Punjab²⁰, Union of India Vs. Ram Samujh and others⁶ and Union of India Vs. Shri Shiv Shanker Kesari⁴. It is his contention that the amount recovered from the possession of the applicant is above the commercial quantity and as such the rigour of Section 37(1)(b)(ii) would be applicable in the present case. He states that a perusal of the FIR reveals that the applicant is guilty of the offence and, given his criminal history, is likely to commit offence while on bail. The charge-sheet has been filed on 12.01.2020.

21. The case of Satpal Singh²⁰, referred to by the learned A.G.A. is essentially a case arising out of proceedings under Section 438 of the Cr.P.C having its own set of facts that would not apply in the present case. The other cases referred to by the learned A.G.A. have already been discussed above.

22. Perusal of the FIR and statements recorded of the informant and other policemen, site plan of the place of occurrence as well as the order dated 4.1.2020 passed by the Incharge Additional Sessions Judge, reveal that an amount of 1 Kilogram and 17 grams of charas was allegedly recovered from the applicant who is stated to have been carrying in his right hand in a bag. The commercial quantity of charas is 1 Kg. The contention of the learned counsel for the applicant that the presence of the applicant at that point of time holding on to the narcotic substance being highly improbable and unbelievable, is wholly a factual issue and thus is a matter to be considered during trial. No finding can be recorded by the Court with regard to allegations of motivated action by the police in framing the applicant at the stage of bail given the facts and material on record of the present case. While considering the broad probabilities, given the documents on record, it is not possible for this Court to record its satisfaction that there are reasonable grounds for believing that the applicant is not guilty of the offence and that he is not likely to commit any offence while on bail.

23. The judgement of the Supreme Court in the matter of Sujit Tiwari¹⁹, that has been relied upon by the learned counsel for the applicant, cannot be of any assistance to the applicant as that case is based on its own unique facts, with the Supreme Court observing that the case of the appellant therein was totally different from the other accused. There is no dilution of the principles for grant

of bail in such cases.

24. In view of the aforesaid facts and circumstances, this bail application is rejected at this stage.

25. It is clarified that the observations with regard to the case of the applicant, made in this order are strictly confined to the disposal of this bail application and must not be construed to have any reflection on the ultimate merits of his case.

26. Given the fact that the applicant is in jail since 25.11.2019 the trial of the case is expedited.

Order Date :- 5.3.2020 A. V. Singh (Jayant Banerji, J.)