

**HIGH COURT OF MADHYA PRADESH**  
**BENCH AT GWALIOR**

**:SINGLE BENCH:**

{HON'BLE SHRI JUSTICE ANAND PATHAK}

**MISCELLANEOUS CRIMINAL CASE NO.31747/2021**

**Gopal Krishna Gautam alias Pandit**  
**Vs.**  
**State of Madhya Pradesh & Anr.**

-----  
Shri Vijay Dutt Sharma, learned counsel for applicant.  
Shri G.P. Chaurasiya, learned Public Prosecutor for respondent  
No.1/State.  
Shri Praveen Kumar Newaskar, learned Assistant Solicitor General  
for respondent No.2/CBN.  
-----

**Whether approved for reporting : Yes**

**Law laid down:**

1. Sections 35, 54 and 66 under NDPS Act raise presumptions (which are rebuttable) over accused to prove his innocence, although the standard of proof required for the accused to prove his innocence is Preponderance of Probability which accused shall have to establish. NDPS Act carries reverse burden of proof under Sections 35 and 54. **Noor Aga Vs. State of Punjab, (2008) 16 SCC 417** relied.
2. An initial burden exists upon the prosecution and when it stands satisfied, then legal burden would shift over accused to establish his case for innocence.
3. Meaning of Presumption as rule of evidence. Explained.
4. Statement under Section 67 of NDPS Act cannot be taken into account in order to convict an accused and enquiry under Section 67 of NDPS Act is a stage prior to investigation as per

Section 53 of NDPS Act or said enquiry is distinct from the enquiry under Section 53-A of NDPS Act which is during the course of investigation of offences. Judgment of Apex Court in the case of **Tofan Singh Vs. State of Tamilnadu (2021) 14 SCC 1** relied and discussed.

5. Implications of Section 27 of Evidence Act regarding discovery of information or recovery of articles/documents/equipments are still available to trial Court to reach to the truth.

\*\*\*\*\*

**ORDER**  
**(Passed on 28<sup>th</sup> day of July, 2021)**

The applicant has filed this first bail application u/S.439 of Code of Criminal Procedure, 1973 for grant of bail. Applicant has been arrested on 10-04-2021 by Police Station Central Bureau of Narcotics, District Gwalior in connection with Crime No.02/2021 registered for offence punishable under Sections 8/18(c) and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

2. It is the submission of learned counsel for the applicant that he is suffering confinement since 10-04-2021 and private complaint has been filed by the department, therefore, now chance of tampering with evidence or witnesses is remote. Learned counsel referred the statement of prime accused Laxminarayan alias Lachchhi dated 08-03-2021 and 09-03-2021 as well as of Ranvir Singh dated 08-03-2021 and 09-03-

2021 who are allegedly prime accused in the case but they did not refer name of the present applicant. They referred names of other persons who were allegedly involved in illegal cultivation of opium. Statement of applicant was recorded later on and on the basis of his statement, he has been arrested.

3. It is the submission of learned counsel for the applicant that only on the basis of his statement taken by respondent authority purportedly under Section 67 of NDPS Act he has been implicated. Scope of Section 67 *vis-a-vis* Section 53 and 53-A of NDPS Act, has been considered by recent judgment of the Apex Court in the case of **Tofan Singh Vs. State of Tamilnadu (2021) 14 SCC 1** wherein it has been held that statement under Section 67 of NDPS Act can only be construed as confessional statement as per Section 25 of the Indian Evidence Act before the police officer and therefore, on such statement accused cannot be convicted.
4. Learned counsel for the applicant Shri Vijay Dutt Sharma referred the statement of applicant to submit that the land in question (Khasra No.87) wherein alleged illegal cultivation of opium carried out is a vast stretch of land in which some part of the land has been purchased by him around 10 years back in which many persons are owners of the said land including his two brothers and he was not cultivating the opium over his land. It was the land under the possession of Munni Devi W/o late Radha Govind and many other persons,

therefore, he cannot be fastened with the liability. He further referred Annexure A/7 filed with the complaint under Section 36-A of NDPS Act by respondent department in which description of Khasra No.87 through tentative map has been depicted in which land of applicant appears to be far distant than the land where alleged cultivation took place. Since charge-sheet/complaint under Section 36-A of NDPS Act has already been filed and applicant does not bear any criminal record, therefore, chance of tampering with evidence is remote.

5. He fairly admits on query that Sections 35, 54 and 66 of NDPS Act raise certain presumptions against accused but it cannot run to the detriment of the accused because stringent provisions are made under NDPS Act and therefore, as per the mandate of the **State of Punjab Vs. Baldev Singh, (1999) 6 SCC 172** safeguards provided in NDPS Act are to be scrupulously followed.
6. Applicant undertakes to perform community service to purge his misdeeds, if any and will use his agriculture field for plantation of saplings as part of community service and to serve National/Environmental/ Social cause voluntarily, if bail is granted as per the spirit of judgment rendered in the case of **Sunita Gandharva Vs. State of M.P., in 2020 (3) MPLJ(Cri.) 247** by this Court.
7. Learned counsel for respondent No.1/State opposed the prayer

and prayed for dismissal of the bail application. According to learned counsel on the basis of documents made available at the instance of applicant, it appears that he was owner of the land in question. He prayed for dismissal of bail application.

- 8.** Learned counsel for respondent No.2/CBN Shri Newaskar opposed the prayer and submitted that applicant was found cultivating opium on vast stretches of land. He took land on lease/rent from Munni Bai and used his irrigation pump for irrigating the crop of opium. Many occupants of land vide survey No.87 revealed the fact in their statements about possession of land and cultivation of opium by applicant. His source of implication is also on the basis of his statement under Section 67 of NDPS Act as well other statements but beside that certain more documents have been filed in which it has been indicated that he was involved in illegal cultivation of opium and trial would crystallized the facts.
- 9.** It is further submitted that oral evidence in the trial would further strengthen the case of prosecution and looking to the serious nature of allegations against applicant, his case for bail be rejected. He prayed for dismissal of bail application.
- 10.** Heard learned counsel for the parties at length through video-conferencing and perused the documents appended thereto.
- 11.** In the case in hand, applicant has raised the point in respect of statement made purportedly under Section 67 of NDPS Act. Interplay of Section 67 *vis-a-vis* Section 53 and 53-A of

NDPS Act and their mutual effect has been elaborately considered by the Hon'ble Apex Court in a recent judgment in the case of **Tofan Singh (supra)** and crystallized the controversy while answering the reference.

12. The Apex Court in the case of **Tofan Singh (supra)** considered the word enquiry finding place in Section 67 of NDPS Act and held that information gathered at antecedent stage prior to commencement of investigation and therefore, question of its being admissible in trial as confessional statement against accused does not arise. Hence, the same cannot be taken into account in order to convict an accused for this foundational reason. It is further held that even if it is accepted for the sake of argument that a statement obtained under Section 67 of NDPS Act amounts to a confessional statement, permitting the same to be admissible against the accused would violate the Fundamental Right of such accused and Section 67 of NDPS Act would have to be read down accordingly.
13. Therefore, according to Apex Court, enquiry under Section 67 is a stage prior to investigation as referred in Section 53 of NDPS Act or said enquiry is distinct from the enquiry under Section 53-A of NDPS Act which is during the course of investigation of offences. Therefore, law so far as Section 67 *vis-a-vis* Sections 53 and 53-A of NDPS Act is concerned stands settled.

14. At the same time, NDPS Act contains some provisions in the form of Sections 35, 54 and 66 relating to presumptions and burden of proof on accused. These presumptions as contained in NDPS Act raise certain questions:

**First**, at what time, the applicability of rule of presumption will start and at which stage will it come into play and to what extent the original rule of criminal jurisprudence of innocence of accused until proven guilty beyond reasonable doubt is relaxed.

**Secondly**, what is the degree of proof required by the prosecution in the cases where they are aided with the provisions of presumptions and reverse onus.

**Thirdly**, when the presumption is raised against an accused and onus of proof is reversed then to what extent accused need to prove a fact so as to proving his innocence.

15. Meaning of “Presumptions” have been succinctly explained by the Apex Court in the case of **Izhar Ahmad Khan Vs. Union of India, AIR 1962 SC 1052**:

*“18. ....The term "presumption" in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted. Thus, according to Best, when the rules of evidence provide for the raising of a rebuttable or irrebuttable presumption, they are*

*merely attempting to assist the judicial mind in the matter of weighing the probative or persuasive force of certain facts proved in relation to other facts presumed or inferred.”*

Further it was held in the case of **State of West Bengal Vs.**

**Mir Mohammad Omar, (2000) 8 SCC 382:**

*“33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when [Section 114](#) is incorporated in the [Evidence Act](#). It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.”*

16. It is now well settled that presumption is rule of evidence which has evolved and is essentially invoked to plug certain gaps or remove lacuna in the evidence as observed by the Apex Court in **Narayan Govind Gavate Vs. State of Maharashtra, (1997) 1 SCC 133:**

*“21. In judging whether a general or a particular or special onus has been discharged, the Court*



*will not only consider the direct effect of the oral and documentary evidence led but also what-may be indirectly inferred because certain facts have been proved or not proved though easily capable of proof if they existed at all which raise either a presumption of law or of fact. Section 114 of the Evidence Act covers a wide range of presumptions of fact which can be used by Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. It is, therefore, said that the function of a presumption often is to "fill a gap" in evidence."*

- 17.** In our country, there are numerous statutes including POCSO Act, which have incorporated this principle of reverse burden in varying degrees. To mention a few, Sections 35, 54 and 66 of NDPS Act, Sections 7,11,20 of the Prevention of Corruption Act, 1988, Section 21 of the Prevention of Terrorist and Disruptive Activities (Prevention) Act, 1987 (now repealed), Section 43-E of the Unlawful Activities Prevention Act, 1967, Sections 118, 119, 137, 138, 139 of the Negotiable Instruments Act, 1881, Section 304-B of IPC, Sections 79 to 90A, 111-A, 113-A, 113-B, 114, 114-A of the Evidence Act etc. provide for presumption of guilt against the accused.
- 18.** Sections 35 and 54 of NDPS Act raise presumptions with regard to culpable mental state on the part of the accused and these provisions carry reverse burden of proof on the accused. Since NDPS Act carries stringent provisions as well as

punishments and at the same time it is promulgated for wider National and Social Interest, therefore, an ambivalent approach has been adopted by the Apex Court while interpreting the said provisions in the case of **Noor Aga Vs. State of Punjab, (2008) 16 SCC 417**. Relevant paragraphs deserve reiteration for clarity purpose:

*“40. The provision for reverse burden is not only provided for under the special acts like the present one but also under the general statutes like the Indian Penal Code. The Indian Evidence Act provides for such a burden on an accused in certain matters, as, for example, under Section 113A and 113B thereof. Even otherwise, this Court, having regard to the factual scenario involved in cases, e.g., where husband is said to have killed his wife when both were in the same room, burden is shifted to the accused. Enforcement of law, on the one hand and protection of citizen from operation of injustice in the hands of the law enforcement machinery, on the other, is, thus, required to be balanced. The constitutionality of a penal provision placing burden of proof on an accused, thus, must be tested on the anvil of the State's responsibility to protect innocent citizens. The court must assess the importance of the right being limited to our society and this must be weighed against the purpose of the limitation. The purpose of the limitation is the reason for the law or conduct which limits the right. While, however, saying so, we are not unmindful of serious criticism made by*

*the academies in this behalf.*

*56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., 'proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of 'wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused."*

**19.** Learned counsel for the applicant also referred the judgment

of Apex Court in the case of **Baldev Singh (supra)** in which the Apex Court has cautioned in following words:

*“28. ....It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.:*

20. Concluding the debate on presumption *vis-a-vis* NDPS Act, the Apex Court in **Noor Aga (supra)** explained in following words:

*“58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.”*

21. Same principle was reiterated in **Mohan Lal Vs. State of Punjab, (2018), 17 SCC 627** while interpreting the provisions of Section 35 and 54 of NDPS Act and in the recent judgment of **Gangadhar alias Gangaram Vs. State of Madhya Pradesh, (2020) 9 SCC 202**.
22. However, one thing which emerges from above discussion is that because of Sections 35 & 54 of NDPS Act, the standard of proof required for the accused under NDPS Act to prove his innocence is “Preponderance of Probability” at least which accused shall have to establish. Therefore, “presumption of culpable mental state” as per Section 35 and “presumption from possession of illicit articles”, as per Section 54(b) are to be countered by accused on the touchstone of Preponderance of Probability, at least.
23. An initial burden exists upon the prosecution and when it stands satisfied, then legal burden would shift over accused to lead evidence or establish his case for innocence as per the standard of proof required (Here, it is Preponderance of Probability). Accused cannot wriggle out from such liability and trial Court must weigh this aspect of “Presumptions” while appreciating evidence. Even implications of Section 27 of Evidence Act regarding discovery of information and/or recovery of articles/documents/equipments are still available to trial Court to reach to the truth.
24. CBN establishes the ownership of some part of land of an

accused, along with relevant documents like sale deed, Khasra entries etc., some part of land taken on lease through documents (or oral agreement) and use of irrigation pump -set of accused for irrigating opium crop and such other related proofs, then initial burden existed upon the prosecution would be satisfied and legal burden would shift over accused to discharge.

25. Even otherwise, the statements of other owners or occupants of the land of same survey number whether they are accused or not as well as seizure of crop also have material bearing. Discovery of information u/S 27 of Evidence Act is also to be seen with all these assorted pieces of evidence.
26. Coming to the facts of the case, here, the applicant *prima facie* facing prosecution on the basis of his statement purportedly under Section 67 of NDPS Act along with seizure of crop and statements of some occupants about his involvement as lease holder. As per the complaint, statement of Laxminarayan alias Lachchhi on dated 08-03-2021 and 09-03-2021 as well as statement of Ranvir Singh dated 08-03-2021 and 09-03-2021 did not refer the name of present applicant. Similarly statement of present applicant also refers the fact about vast stretch of land vide survey No.87 (filed as Annexure A/7) in which land of the applicant is mentioned but placed at some distance from where the opium was cultivated *prima facie*. Some of the co-owners of the land have been prosecuted and roles of some

are yet to be enquired/investigated and they are yet to be prosecuted. Applicant who is saddled with presumptions as per Sections 35, 54 and 66 of NDPS Act would have to discharge such presumptions in the trial as per the provisions of the statute and mandate of Apex Court in this regard. From the documents collected (or may be produced during trial) by the prosecution regarding ownership of land in question if would be seen in juxtaposition to statements of applicant and other accused/witnesses and articles/equipments recovered then it all would also have material bearing. Therefore, applicant does not bring home the analogy advanced for getting bail on the basis of Section 67 of NDPS Act only because it is not a case based upon statement under Section 67 of NDPS Act only. Some more layers are present into it. Nevertheless, applicant still made out a case for grant of bail because of reasons assigned in succeeding paragraphs.

27. Applicant in the present case is aged 52 years and from the facts it appear that he is first time offender without any previous criminal record and is a land owner and family man residing in District Gwalior, therefore, chance of absconsion is remote. Besides that, complaint under Section 36-A of NDPS Act has already been filed by the respondent in which many witnesses are official witnesses (Government employees), therefore, cumulatively chance of tampering with witnesses/evidence is remote. He already suffered more than 3

months of incarceration which amounts to pretrial detention. **Above all, applicant himself has expressed his intention to perform community service and therefore, a chance be given to reform himself as per the spirit echoed in Sunita Gandharva (supra) so that instead of cultivating “Misery and Death”, he may be directed to plant saplings of “Life and Hope”.** Therefore, on these grounds, this Court intends to allow the application. It is hereby directed that applicant shall be released on bail on his furnishing personal bond of **Rs.1,00,000/- (Rupees One Lac only)** along with **two solvent sureties of the like amount** to the satisfaction of trial Court.

This order will remain operative subject to compliance of the following conditions by the applicant:-

1. The applicant will comply with all the terms and conditions of the bond executed by him;
2. The applicant will cooperate in the investigation/trial, as the case may be;
3. The applicant will not indulge himself in extending inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or to the Police Officer, as the case may be;
4. The applicant shall not commit an offence similar to the offence of which he is accused;
5. The applicant will not seek unnecessary adjournments



during the trial;

6. The applicant will not leave India without previous permission of the trial Court/Investigating Officer, as the case may be; and
7. Applicant would not commit same nature of offence during trial and would not indulge in any criminal activity in future.
8. Applicant shall not tamper with the evidence or witnesses in any manner and shall not be a source of embarrassment and harassment to any witnesses in any manner.
9. Applicant shall not allow his piece of land for cultivation of any contraband material in illegal manner and would not help by providing water facility or any other raw material or labour to produce such contraband material over his piece of land till conclusion of trial.
- 10(a). As per the undertaking given by the applicant and as per the spirit echoed in case of **Sunita Gandharva (supra)**, it is hereby directed that applicant shall plant **10 saplings (either fruit bearing trees or Neem/ Peepal) alongwith tree guards or has to make arrangement for fencing for protection of the trees** because it is the duty of the applicant not only to plant the saplings but also to nurture them. "वृक्षारोपण के साथ, वृक्षापोषण भी आवश्यक है।" He shall plant saplings/ trees preferably of

6-8 ft., so that they would grow into full fledged trees at an early time. For ensuring the compliance, he shall have to submit all the photographs of plantation of trees/saplings before the concerned trial Court alongwith a report within 30 days from the date of release of the applicant. The progress reports shall be submitted by the applicant before the trial Court on expiry of every two months for three years.

(b) It is the duty of the trial Court to monitor the progress of the trees because human existence is at stake because of the environmental degradation and Court cannot put a blind fold over any casualness shown by the applicant regarding compliance. Therefore, trial Court is directed to submit a report regarding progress of the trees and the compliance made by the applicant by placing a short report before this Court every quarterly (every three months), which shall be placed under the caption "Direction" before this Court.

(c) It is expected from the applicant that he shall submit photographs by downloading the mobile application (App) prepared at the instance of High Court for monitoring the plantation through satellite/Geo-Tagging.

(d) The applicant shall be at liberty to plant these saplings/ trees at any place of his choice if he intends to

protect the trees on his own cost by providing tree guards or fencing.

(e) This direction is made by this Court as a test case to address the Anatomy of Violence and Crime by process of Creation and a step towards Alignment with Nature. The natural instinct of compassion, service, love and mercy needs to be rekindled for human existence as they are innately engrained attributes of human existence.

(f) **"It is not the question of Plantation of a Tree but the Germination of a Thought."**

**28. Bail Application stands allowed and disposed of in above terms.**

**29. E- copy of this order be sent to the trial Court concerned for compliance, if possible for the office of this Court.**

C.C. as per rules.

Anil\*

**(Anand Pathak)  
Judge**