



NEUTRAL CITATION NO. 2024:MPHC-
IND:271241

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 13th OF SEPTEMBER, 2024

MISC. CRIMINAL CASE No. 37588 of 2024

BABURAM
Versus
UNION OF INDIA

Appearance:

Shri Abhishek Rathore – counsel for the applicant.

Shri Manoj Kumar Soni – counsel for the respondent/NCB.

ORDER

1] They are heard. Perused the case diary / challan papers.

It is seen that in the cases involving the NDPS Act, almost all the times, varied decisions of the Supreme Court are cited by the parties, either allowing the bail or dismissing the same, and depending upon which judgement weighs in, the fate of the case is decided, either in favour or against the accused, resulting in inconsistency in the orders passed by this court. Hence, with a view to follow a consistent view, parties were directed to address on the issue of grant of bail in the cases involving the NDPS Act, by referring to the relevant case laws.

2] This is the **fifth** bail application under Section 439 of Criminal Procedure Code, 1973 (483 of Bhartiya Nagrik Suraksha Sanhita, 2023), as he is implicated in connection with Crime No.2/2022



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registered at Police Station NCB, Mandsaur, District Mandsaur (MP) for offence punishable under Section 8/15, 25 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The applicant is lodged in jail since 15/03/2022.

3] His first bail application M.Cr.C. No.30104/2022 was dismissed as withdrawn on 02/12/2022, and last three applications viz., M.Cr.C. No.59391/2022, 47878/2023 and 29537/2024 have already been dismissed by this Court on merits vide orders dated 13/03/2023, 01/11/2023 and 31/07/2024 respectively.

4] Allegations against the applicant are that he was also involved in the aforesaid case wherein 470 kg of poppy straw was recovered from the possession of co-accused Ajay and Raju. It is alleged against the applicant, on the basis of memo prepared under Section 27 of the Evidence Act given by co-accused, that the present applicant was the person to whom the aforesaid contraband was to be delivered.

5] Counsel for the applicant has submitted that the present application has been filed only on the ground of period of incarceration as the applicant is lodged in jail since 15/03/2022, and only 3 witnesses have been examined in the trial Court out of 24 witnesses. It is also submitted that although two other cases of NDPS Act have also been registered against the applicant, but in both these cases, he has already been granted bail. In one case, he was arraigned on the basis of memo of 27 of the Evidence Act, whereas in the other case, he was found in possession of 10 kg of poppy straw. Thus, it is submitted that the bail application be allowed as the conclusion of the trial is likely to take



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sufficient long time. In support of his submission, counsel for the applicant has relied upon the decision rendered by the Supreme Court in the case of *State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta and another passed in SLP (Crl.) No.242 of 2022 dated 10/01/2022* wherein, the Supreme Court has allowed the bail application of the accused person who was arraigned only on the basis of memo under Section 67 of the NDPS Act despite the fact that there was CDR available and criminal antecedents of the accused. Counsel has also relied upon the recent decision rendered by the Supreme Court in the case of *Ankur Chaudhary vs. State of M.P. in SLP (Crl.) No.4648/2024 dated 28/05/2024* wherein, the Supreme Court has also taken into account the statutory embargo created under Section 37(1) (b) of the NDPS Act, holding that the fundamental rights guaranteed under Article 21 of the Constitution of India would override the such statutory embargo, and the applicant therein Ankur Chaudhary who had spent around two years of incarceration was released on bail. Thus, it is submitted that the application may be allowed.

6] Shri Manoj Soni, learned counsel for the respondent / NCB, on the other hand, has vehemently opposed the prayer and it is submitted that no case for grant of bail is made out looking to the fact that the applicants earlier bail applications have already been dismissed on merits looking to his involvement in the case, and the last application was also dismissed on merits only on 31/07/2024. Counsel has also drawn the attention of this Court to the decision rendered by the Supreme Court including that of *State of Meghalaya v. Lalrintluanga*



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Sailo, 2024 SCC OnLine SC 1751, decided only on 16.07.2024, as also the *Union of India vs. Ajay Kumar Singh @ Pappu passed in Criminal Appeal arising out of SLP No.2351/2023 dated 28/03/2023* wherein, taking into account the mandatory provision of Section 37 of the NDPS Act as also Article 21 of the Constitution of India, and also relying upon the decision of the Supreme Court in the case of *Satender Kumar Antil vs. CBI in SLP No.5191/2021 reported as (2022) SCC Online SC 825*, the appeal filed by the Union of India has been allowed and the order of bail, passed by the High Court of judicature at Allahabad, has been cancelled.

7] Shri Soni has also relied upon the decision rendered by the Supreme Court in the case of *Union of India vs. Om Prakash Yadav and another in Criminal Appeal Nos.2026-2027 of 2024 dated 08/04/2024*. It is submitted that in the case of *Ajay Kumar Singh (supra)* the bail was granted by the High Court of Allahabad High Court and the Supreme Court, after considering all the aspects of the matter has set aside the order of Allahabad High Court and cancelled the bail of accused Ajay Kumar Singh, and similar bail application of co-accused Om Prakash Yadav, which was also allowed by the Allahabad High Court, has also been cancelled in subsequent criminal appeal in the case of *Om Prakash Yadav (supra)*. Counsel has submitted that both, in the cases of Ajay Kumar Singh and Om Prakash Yadav, the accused persons had already undergone more than one and half years of incarceration.

8] The attention of this Court has also been drawn by the counsel



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for the respondent in the case of ***Union of India (NCB) ETC. vs. Khalil Uddin ETC in CRA No.1841-1842 of 2022 dated 21/10/2022*** wherein, the order passed by Gauhati High Court has been set aside wherein the accused had already undergone around one year of incarceration, in which the Supreme Court has also taken into account the provisions of Section 67 of the NDPS Act and the earlier decision rendered by the Supreme Court in the case of ***Tofan Singh vs. State of Tamil Nadu reported as (2021) 4 SCC 1*** and ***State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta*** reported as 2022 Live Law (SC) 69.

9] Counsel for the respondent has also referred to the decision rendered by the coordinate Bench of this Court in M.Cr.C. No.46422/2023 in the case of ***Akash Singh Baghel @ Sonu vs. State of M.P.*** in which also, the bail application of the accused, who had undergone 1 year and 8 months of incarceration, was rejected, and when the aforesaid decision was challenged by said Akash Singh Baghel in the Supreme Court in SLP (Crl.) No.1789/2024, it has also been rejected by the Supreme Court vide its order dated 09/02/2024.

10] Reference is also made by the counsel for the respondent in the case of ***Jagtar Singh @ Jagga vs. State of Punjab in SLP (Crl.) No.9834/2024 dated 02/09/2024*** in which also, the accused had spent one year and three months of incarceration, and the Supreme Court has dismissed the application with a direction to the trial Court to expedite the matter and conclude the same within a period of six months as in the aforesaid case, only 2 out of 10 witnesses were examined.



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11] Similarly in the case of *Nikhil Kumar Pandey vs. State of M.P. in SLP (Crl.) No.16436/2023 vide order dated 12/01/2024*, the Supreme Court has also directed the trial Court to conclude the trial within six months time, and since the trial could not be concluded within six months, on a request made by the trial Court to the Supreme Court, the time has also been extended for a further period of six months. It is submitted that in the case of Nikhil Kumar Pandey, the accused was lodged in jail more than two years. Thus, it is submitted that looking to the decisions rendered by the Supreme Court, taking into account the mandatory provisions of Section 67 of the NDPS Act as also the fundamental rights enshrined under Article 21 of the Constitution of India, no case for grant of bail is made out.

12] Counsel for the respondent has also submitted that otherwise also, on merits, the applicant's location has also been traced along with the main accused Ajay, with whom, he has gone to bring the contraband from Jodhpur to Manasa, and the vehicle from which the contraband has been seized, was on finance, in which the applicant had stood as guarantor, directly connecting him and the other accused persons with the offence. It is also submitted that two other cases have also been registered against the applicant of similar nature, thus, the mandate of Section 37 would also be applicable in the present case.

13] Heard learned counsel for the parties and perused the case also and the documents filed on record.

14] In the case of *State of Meghalaya v. Lalrintluanga Sailo, 2024 SCC OnLine SC 1751* decided on *16.07.2024*, wherein the accused



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was an *HIV positive*, it has been held by the Supreme Court as under:-

“5. There cannot be any doubt with respect to the position that in cases involving commercial quantity of narcotic drugs or psychotropic substances, while considering the application of bail, the Court is bound to ensure the satisfaction of conditions under Section 37(1)(b)(ii) of the NDPS Act. The said provision reads thus:—

“37(1)(b)(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.”

6. While considering the cases under NDPS Act, one cannot be oblivious of the objects and reasons for bringing the said enactment after repealing the then existing laws relating to the Narcotic drugs. The object and reasons given in the acts itself reads thus:—

“An act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.”

In the decision in *Collector of Customs, New Delhi v. Ahmadalieva Nodira*¹, the three judge bench of this Court considered the provisions under Section 37(1)(b) as also 37(1)(b)(ii) of the NDPS Act, with regard to the expression “reasonable grounds” used therein. This Court held that it means something more than the *prima facie* grounds and that it contemplates substantial and probable causes for believing that the accused is not guilty of the alleged offence. Furthermore, it was held that the reasonable belief contemplated in the provision would require existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

As relates the twin conditions under Section 37(1)(b)(ii) of the NDPS Act, viz., that, firstly, there are reasonable grounds for believing that the accused is not guilty of such offence and, secondly, he is not likely to commit any offence while on bail it was held therein that they are cumulative and not alternative. Satisfaction of existence of those twin conditions had to be based on the ‘reasonable grounds’, as referred above.



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7. In the decision in *State of Kerala v. Rajesh*, after reiterating the broad parameters laid down by this Court to be followed while considering an application for bail moved by an accused involved in offences under the NDPS Act, in paragraph 18 thereof this Court held that the scheme of Section 37 of the NDPS Act would reveal that the exercise of power to grant bail in such cases is not only subject to the limitations contained under Section 439 of the Code of Criminal Procedure, but also subject to the limitation placed by Section 37(1)(b)(ii), NDPS Act. Further it was held that in case one of the two conditions thereunder is not satisfied the ban for granting bail would operate.

8. Thus, the provisions under Section 37(1)(b)(ii) of the NDPS Act and the decisions referred supra revealing the consistent view of this Court that while considering the application for bail made by an accused involved in an offence under NDPS Act a liberal approach ignoring the mandate under Section 37 of the NDPS Act is impermissible. Recording a finding mandated under Section 37 of the NDPS Act, which is *sine qua non* for granting bail to an accused under the NDPS Act cannot be avoided while passing orders on such applications.

9. The materials on record would reveal that earlier Smt. X was enlarged on bail by the High Court as per order dated 27.06.2023 in connection with FIR No. 22(03)2023, involving the quantity of 55.68 grams of Heroin, despite the opposition of the public prosecutor, taking note of her being HIV positive. In the said order it is stated thus:—

“30. Accordingly, on this ground alone, the application for grant of bail is hereby allowed.”

10. The subject FIR viz., FIR No. 06(02)23 under Section(s) 21(c)/29 of the NDPS Act, would reveal that the quantity of the contraband involved is 1.040 kgs of heroin. The impugned order granting bail to accused-Smt. X, dated 29.09.2023 would reveal, this time also, the bail was granted on the ground that she is suffering from HIV and conspicuously, without adverting to the mandate under Section 37(1)(b)(ii), NDPS Act, even after taking note of the fact that the rigour of Section 37, NDPS Act, calls for consideration in view of the involvement of commercial quantity of the contraband substance. When the accused is involved in offences under Section 21(c)/29 of NDPS Act, more than one occasion and when the quantity of the contraband substance viz., heroin is 1.040 Kgs, much above the commercial quantity, then the non-consideration of the provisions under Section 37, NDPS Act, has to be taken as a very serious lapse. In cases of like nature, granting bail solely on the ground mentioned, relying on the decision in *Bhawani Singh v. State of*



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Rajasthan would not only go against the spirit of the said decision but also would give a wrong message to the society that being a patient of such a disease is a license to indulge in such serious offences with impunity. In the contextual situation it is to be noted that in *Bhawani Singh's case* the offence(s) involved was not one under the NDPS Act. We have no hesitation to say that in the above circumstances it can only be held that the twin conditions under Section 37 of the NDPS Act, are not satisfied and on the sole reason that the accused is a HIV patient, cannot be a reason to enlarge her on bail. Since the impugned order was passed without adhering to the said provision and in view of the rigour thereunder the accused-Smt. X is not entitled to be released on bail, the impugned order invites interference.

11. Consequently, the impugned order is set aside. The accused-Smt. X shall surrender before the trial Court within a week from today and in case of her failure to do so, she shall be taken into custody in accordance with law. Upon such surrender/production of the accused before the trial Court, it shall cancel the bail bond of the accused and discharge the sureties.

12. In view of the indisputable fact that Smt. X is HIV positive she is entitled to the benefit under Section 34(2) of the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017, which reads thus:—

“34. ...

...

(2). In any legal proceeding concerning or relating to an HIV-positive person, the court shall take up and dispose of the proceeding on priority basis.”

13. In view of the said provision the trial Court shall take appropriate steps to expedite the trial on priority basis and to dispose of the case as early as possible.”

(emphasis supplied)

15] On due consideration of submissions and on perusal of the case diary as also the differing decisions rendered by the Supreme Court as aforesaid, it is true that there are conflict decision on the topic, however, this Court can fruitfully rely upon the aforesaid decision in



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which all the aspects of the NDPS Act have been taken into account.

16] So far as the decision relied upon by the counsel for the applicant in the case of *Pallulabid Ahmad Arimutta* (supra) and *Ankur Chaudhary* (supra) are concerned, it is found that they are rendered in the year 2022 and May of 2024, whereas the decision relied upon by the counsel for the respondents in the case of *State of Meghalaya v. Lalrintluanga Sailo, 2024 SCC OnLine SC 1751*, was decided on 16.07.2024, considering all the legal aspects of the NDPS Act. And, in the case of *Ajay Kumar Singh @ Pappu* where the Allahabad High Court granted bail to the accused by invoking Art.21 of the Constitution of India, has not deterred the Supreme Court to set-aside the said order, citing the mandate of s.37 of the NDPS Act.

17] In view of the same, no case for interference is made out, as there is no change in the circumstances.

18] Accordingly, M.Cr.C. stands *dismissed*.

Sd/-

(SUBODH ABHYANKAR)
JUDGE

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