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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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CRL.REF.1/2015

Reserved on : 3rd November, 2015
Judgment dated: 26th February, 2016

ATHAR PERVEZ Appellant
Through: Mr.A.J. Bhambhani, Sr. Advocate
(Amicus Curiae) with Ms.Lakshita Sethi, Adv.

versus

STATE Respondent
Through: Mr.Rahul Mehra, Standing Counsel
(Criminal) along with Mr.Sanyog Bahadur &
Mr.Shekhar Budakoti, Advocates for GNCTD.
Mr.Rajesh Manchanda and Mr.Rajat Manchanda,
Advocates for respondent - WCB

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K. GAUBA

SANJIV KHANNA, J.

1. This order would dispose of the criminal reference made by the Single Judge in Bail Application No.983/2015, titled *Athar Parvez vs. State NCT of Delhi*. The aforesaid order records and makes reference to two earlier decisions of the Single Judge of this Court in *Pushpa Rani vs. Narcotic Control Bureau*, 122 (2005) DLT 68, and *Atik Ansari vs. State (NCT of Delhi)*, 131 (2006) DLT 463, and notices perceptive

divergence on the question; whether the Courts can grant "interim" bail when the conditions for grant of bail under Section 37 of the Narcotics and Psychotropic Substances Act, 1985 ('NDPS Act' for short) are not satisfied. In other words, the issue is whether the provisions and conditions of Section 37 of the NDPS Act would apply only to cases of "bail" or would also apply when the accused seeks "interim" bail.

2. We have had the advantage of hearing arguments by Mr. A.J. Bhambhani, learned Senior Advocate, who was appointed as an Amicus Curiae, Mr. Rahul Mehra, Standing Counsel (Criminal) who had appeared for the Government of NCT of Delhi and Mr. Rajesh Manchanda, Advocate for the Narcotics Control Bureau.
3. Section 37 of the NDPS Act reads as under:

“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 2 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.”

Two important limitations and fetters imposed by Section 37 of the NDPS Act are; (i) there should be reasonable grounds for believing that the accused is not guilty of such offence, and (ii) the accused is not likely to commit any offence while on bail. The negative pre-conditions are authoritatively binding and would curtail the discretion to grant bail.

4. The Supreme Court in **Narcotic Control Bureau vs. Kishan Lal & Ors.**, (1991) 1 SCC 705, has accentuated on the importance of the *non-obstante* mandate of Section 37, notwithstanding anything contained in the Code of Criminal Procedure, 1973 ("Code" for short). An accused facing prosecution under NDPS Act for the offences mentioned in clause (b) to sub-section 1 to Section 37 should be released on bail only when the conditions of Section 37 of the NDPS Act are strictly satisfied. NDPS Act, a special enactment incorporating stringent provisions for the control and punishment of crimes relating to narcotics and psychotropic substances, incorporate particular and purpose built conditions. The stipulations in Section 37 of the NDPS Act are negative for they intend to restrict the power to grant bail under the Code. Subsequent decision in **Union of India vs. Ram Samujh & Anr.**, (1999) 9 SCC 429, affirms and reiterates this ratio. Thus, grant of bail, when an accused is charged with the specified offences under the NDPS Act, is impaired and circumscribed by the rigorous negative pre-conditions adumbrated in Section 37 of the NDPS Act.

5. An order granting bail to a person facing prosecution under the specified offences under the NDPS Act must abide and confirm the said ratio. It should satisfy the positive conditions in Section 439 of the Code and also the negative stipulations of Section 37 of the NDPS Act. The question which would still arise is whether the term 'bail' used in Section 37 of the NDPS Act would include "interim" bail and, therefore, by necessary implication "interim" bail cannot be granted unless the negative stipulations in Section 37 of the NDPS Act are not satisfied. Is "interim" bail different from regular bail? And whether requisites of Section 37 would equally apply and bind a Court when it considers a prayer for grant of "interim" bail?
6. The term 'bail' is not defined in the Code, although the expression 'bailable offence' has been defined in Section 2(a) of the said Code. The term 'bail' was given a judicial interpretation by the Supreme Court in **Moti Ram & Ors. vs. State of M.P.**, (1978) 4 SCC 47 as judicial release from *custodia juris*. Bail is granted on one's own bond, with or without surety and includes release on recognizance. Bail, sometimes referred as regular bail, is granted during the course of trial or after the conviction when the sentence is suspended, and is usually till the final pronouncement and decision by that Court. On the question as to the nature of an order deciding a bail application, in **Usmanbhai Dawoodbhai Menon vs. State of Gujarat**, (1988) 2 SCC 271, the Supreme Court held that an order granting or refusing bail is an "interlocutory order" since no finality is attached to such order.
7. In **Moti Ram** (supra) explaining jurisprudential aspects of bail provisions, has observed that concept of bail though blurred by

semantics, has to be read to ensure that there is no arbitrariness in the deprivation of liberty and the Courts must adhere to the mandate of fair procedure, which has a creative connotation. Bail jurisprudence countenances this dictum. Different meanings can be perceived for the term bail, but the exact connotation has to be deciphered and gathered from the context in which the word is used. The Courts while interpreting a statute, would be equally conscious that the Fundamental Rights guaranteed in the Constitution including Article 14 and Article 21, reinforce and protect the right to life and liberty.

8. In ***Mukesh Kishanpuria Vs. State of West Bental***, (2010) 15 SCC 154, the Supreme Court pronounced that a detainee may apply for regular bail before the concerned Court and along with the said application may file an application for interim bail, pending disposal of the regular bail application. In this context, it was observed that the power to grant regular bail includes the power to grant interim bail, pending final disposal of the regular bail application. This power lies inherent with the Court particularly in view of Article 21 of the Constitution.
9. In ***Sunil Fulchand Shah Vs. Union of India & Ors.*** (2000) 3 SCC 409, the Supreme Court observed that personal liberty is the most cherished freedom and perhaps more important than other freedoms guaranteed under the Constitution, yet at times, it becomes necessary to place a person under preventive detention without trial for security of the State and /or for maintenance of public order. There are situations when liberty of an individual must give way to the larger interest of the State. Significantly, this decision discerningly delineates

the judicial difference between bail and parole, and holds that the two have different connotation in criminal jurisprudence, though both have practically just about the same effect. Referring to section 12(6) of the Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act ('COFEPOSA Act' for short), it was observed that the word "otherwise" used in the said provision would cover even parole and, therefore, parole like bail cannot be granted by way of judicial intervention. Parole could be granted by way of temporary release under Section 12(1) and 12A of the COFEPOSA Act by the Government or its functionaries in accordance with the parole rules or administrative instructions framed by the Government. There is no statutory provision dealing with the grant of parole and administrative instructions have been framed by different States. In this context it was observed:

“The Courts cannot, generally speaking, exercise the power to grant temporary release to detenus, on parole, in cases covered by COFEPOSA during the period an order of detention is in force because of the express prohibition contained in clause (6) of [Section 12](#). Temporary release of a detenu can only be ordered by the Government or an Officer subordinate to the Government whether Central or State. I must, however, add that the bar of judicial intervention to direct temporary release of a detenu would not effect the jurisdiction of the High Courts under [Article 226](#) of the Constitution or of this Court under Articles 32, 136 or 142 of the Constitution to direct the temporary release of the detenu, where request of the detenu to be released on parole for a specified reason and/or for a specified

period, has been, in the opinion of the Court, unjustifiably refused or where in the interest of justice such an order of temporary release is required to be made. That jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the Court leaves it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu.”

In this manner the Supreme Court balanced the two conflicting interests and recognized that in an extreme and deserving case, a detenu suffering preventive detention can be released on parole when compelling circumstances warrant and require temporary release. While at the first instance the bar under Section 12(6) would apply and the detenu must seek relief from the authorities. *Albeit* the High Court under Article 226 or the Supreme Court under the Articles 32/136/142 of the Constitution would have the power to check erroneous and arbitrary denial of parole by the administration in a given case. Such power is to be sparingly exercised and the court should leave it to the administration/jail authorities to prescribe conditions and terms.

10. The Supreme Court in *Dadu @ Tulsidas vs. State of Maharashtra*, (2000) 8 SCC 437, had interpreted Section 32A of the NDPS Act, as an issue and controversy had arisen whether the said section would affect the Court's power to grant parole. Section 32A of the NDPS Act, reads as under:

"32A. No suspension, remission or commutation in any sentence awarded under this Act.- Notwithstanding anything contained in [the Code](#) of Criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than [Section 27](#)) shall be suspended or remitted or commuted."

Rejecting the contention that Section 32A would completely and entirely control the grant of parole, it was held that Section 32A takes away the right of the Court to suspend the sentence awarded to a convict, but it would not affect the power and authority of the Court to grant parole or furlough even when a person is convicted and sentenced under the NDPS Act, and his appeal has been dismissed. A convict can apply for parole and his prayer should be considered and disposed of in accordance with the statutory provision, if any; Jail Manual, or government instructions, without strictly applying Section 32A of the NDPS Act. To articulate and pronounce the said axiom, the Supreme Court referred to the distinction between "parole" and "bail" to hold that "parole" cannot be equated with "bail" and "suspension of sentence" for the said terms have acquired different meanings. If a person applies for suspension of sentence or bail, he has to comply with Section 32A or 37 of the NDPS Act, as the case may be. The aforesaid decision clearly illustrates that the bar of section 32A, would not prohibit grant of "parole" when it is justified and necessary and parole applications should be dealt with and examined in accordance with the statutory framework or Jail Manual or Government Instructions. The aforesaid decision was referred to in *Atik Ansari*

(supra) and "interim bail" was granted to the applicant for a period of two weeks from release. The Single Judge in the reference order has highlighted the counsel's contention that when a convict under the NDPS Act can be granted parole, there is no reason or justification to hold that an accused or convict under the NDPS Act cannot be granted "interim" bail.

11. We are conscious and aware of the fact that the expression 'bail' and "parole" have different connotations in law. Parole does not amount to suspension of sentence or stay of conviction. There are appropriate observations by a Division Bench of this Court in the order dated 19.12.2011 in WP(C) No.5128/2011 ***Rajesh Kumar vs. Govt. of NCT of Delhi and Anr.***. This decision notices the legal effect and nuances of bail, parole and furlough. At the same time, in effect, we should accept that bail, suspension of sentence, parole or furlough involves release of the person from detention or custody. The Division Bench has observed that when an appeal of a convict is pending, it is always open for him to seek suspension of sentence or interim bail on the grounds provided for regular bail and the High Court can take those grounds into consideration.
12. In ***Som Mittal Vs. Government of Karnataka***, (2008) 3 SCC 753, Markandey Katju, J., in his partly concurring as well as disagreeing judgment, has observed that the Courts do not have power to grant anticipatory bail under Section 438 of the Code in the State of Uttar Pradesh and this has resulted in filing of petitions under Section 482 of the Code in the High Court praying for stay of arrest. Thus, power to grant anticipatory bail is different and distinct from the power to grant

regular bail under Section 439 of the Code. Hon'ble Judge also referred to the decision of Seven Judges Full Bench of the Allahabad High Court in *Amarawati Vs. State of U.P.*, 2004 (57) ALR 390, which accepts that a Court while considering a bail application under Section 439 of the Code can grant interim bail till final disposal of the former application.

13. In *Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others*, (2011) 1 SCC 694, the scope and ambit of Section 438 of the Code was examined and it was noticed that provision for grant of anticipatory bail was introduced in the new Code enacted in 1973 and the earlier Code i.e. Code of Criminal Procedure, 1898 did not contain any specific provision of anticipatory bail. Under the old Code, there was a sharp difference of opinion amongst various High Courts on the question whether the Courts had inherent power to pass an order of bail in anticipation of arrest. The preponderance was of the view that the Courts did not have such power. Pertinently, the Courts have been granting "interim" bail/suspension of sentence without such power being questioned or challenged and as held in *Mukesh Kishanpuria* (supra).
14. Referring to the decision of the Constitution Bench of the Supreme Court in *Gurbaksh Singh Sibbia Vs. State of Punjab* (1980) 2 SCC 565 in *Siddharam Satlingappa Mhetre* (supra), it has been held that any direction that an accused released on anticipatory bail, must submit himself to custody and thereafter only apply for regular bail would be contrary to Article 21 of the Constitution, for directing an accused to surrender to custody even for a limited period, amounts to

deprivation of personal liberty. Referring to *Sibbia's Case*, it was observed as under:-

"106. It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this section could be granted. We deem it appropriate to reproduce some observations of the judgment of the Constitution Bench of this Court in the Sibbia's case (supra).

"10.....The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. therefore, while determining the scope of Section 438, the Court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned Counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision."

15. Alluding to *Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly and Aother* (1986) 3 SCC 156, the Supreme Court in *Siddharam Satlingappa Mhetre* (supra) observed that law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just, and unless there is anything contrary to the statute, the Court must take cognizance of that fact and act accordingly. The opening preface

of the judgment in *Siddharam Satlingappa Mhetre* (supra) records that the question raised involved issues of great public importance pertaining to personal liberty and society's interest. Interest of the society is of vital importance because every criminal offence is an offence against the State, yet an order granting or refusing bail must reflect a perfect balance between conflicting interests, namely, sanctity of the individual liberty and interest of the society. The law of bails dovetails two conflicting interests, namely; requirements of shielding the society from hazard from those committing crimes or potentiality of repeating the crime while on bail; and individual liberty.

16. In the light of Section 37 of the NDPS Act, right or discretion to grant regular bail is exactly restricted, for the specified offences under the NDPS Act have serious repercussions on the society and are pernicious. The balance, therefore, mandates that regular bail should not be granted unless the negative stipulations of Section 37 of the NDPS Act are satisfied and mere satisfaction of conditions of Section 437 of the Code are not sufficient. However, we must accept that there can be, at times, circumstances where even in cases of grave and serious offences covered by the NDPS Act, where the accused or the convict should be granted a limited indulgence by way of "interim" bail. The extenuating and extreme circumstances may somewhat tilt the balance. On this aspect reference can be made to *Dadu @ Tulsidas* (supra), which interprets Section 32A of the NDPS Act and upholds right to parole even when an accused stands convicted. Courts are bound by statutes which regulate their exercise of discretion and power to grant bail, and they equally interpret these statutes, when

there is an ambiguity and doubt regarding their application, restriction etc.. Interpretation must elucidate the meaning which should be given to the statutory provisions, keeping in view the language used in the provision and if necessary adopt purposive interpretation when the language is capable of different interpretations. Legal interpretation is required in consonance with the statute and also the principles of bail jurisprudence.

17. The expression "interim" bail is not defined in the Code. It is an innovation by legal neologism which has gained acceptance and recognition. The terms, "interim" bail /"interim" suspension of sentence, have been used and accepted as part of legal vocabulary and are well known expressions. The said terms are used in contradistinction and to distinguish release on regular bail during pendency of trial or appeal till final adjudication. Applications for "interim" suspension or bail are primarily moved and prayed for, when the accused or convict is not entitled to or cannot be granted regular bail or suspension of sentence, or the application for grant of regular bail is pending consideration and is yet to be decided. "Interim" bail entailing temporary release can be granted under compelling circumstances and grounds, even when regular bail would not be justified. Intolerable grief and suffering in the given facts, may justify temporary release, even when regular bail is not warranted. Such situations are not difficult to recount, though making a catalogue would be an unnecessary exercise.
18. We have referred to the terms "bail" and "interim" bail and have set out the difference between the two, for this distinction is of

significance and importance when we decide the question under reference. Thus, when the nomenclature "bail" and "interim" bail are not defined by statute or when such terms can connote and have different meanings, the "bail" and "interim" bail could have contrasting and dissimilar implications.

19. By its very nature, "interim" bail is a temporary liberation for a fixed period of time. It is a bail on pro-tem basis. [See ***Sunil Fulchand Shah*** (Supra) and ***Mukesh Kishanpuria*** (Supra)]. "Interim" bail should not and cannot be a substitute and an alternative for regular bail. It should be granted for the minimal time deservedly necessary.
20. Having considered the case law on the subject, we are inclined to answer the reference in the following manner:

[1] The trial or the appellate Courts after conviction are entitled to grant "interim" bail to the accused/ convict when exceptional and extra-ordinary circumstances would justify this indulgence. The power is to be sparingly used, when intolerable grief and suffering in the given facts may justify temporary release.

[2] While rejecting or accepting an application for grant of "interim" bail, the trial / appellate Courts will keep in mind the strict provisions of Section 37 /32A of the NDPS Act and only when there are compelling reasons which would justify and require the grant of "interim" bail, should the application be allowed. The Court must take into account whether or not the accused/convict is likely to commit or indulge in similar violations.

[3] While examining the question of grant of "interim" bail, the Court would consider whether sending accused / convict in police custody would be suffice and meets the ends of justice, keeping in view the nature of the offence with which the accused is charged or/and the past conduct of the accused.

[4] Where "interim" bail should be given, it would be granted for minimal time deservedly necessary and can be subject to certain conditions. Interim bail is interim or for a short duration.

The reference is accordingly disposed of.



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SANJIV KHANNA
(JUDGE)

-sd-

R.K. GAUBA
(JUDGE)

FEBRUARY 26, 2016
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