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IN THE HIGH COURT OF ORISSA; CUTTACK

CORAM :- **HON'BLE SHRI JUSTICE S.PUJAHARI**

BLAPL NO.729 OF 2020

Jagamohan Kanhar.

..... Petitioner

-Versus-

State of Odisha ..... Opp.party

For the Petitioner :- M/s.S.K. Baral, S.Kanhar, G. Khilar, D. Mishra, A. Das., N.Behera, J. Sahoo

For the State:- Addl. Standing counsel

O R D E R

05. 26.08.2020 The petitioner being in custody in G.R. Case No.26 of 2016, arising out of Gochhapada P.S. Case No.17 of 2016, has filed this petition for his release on bail as his prayer for bail has been refused by the learned Addl. Sessions Judge-cum-Special Judge, Phulbani vide the impugned order dated 17.01.2020. The petitioner has been indicted in the aforesaid case for the alleged commission of offences punishable under Sections 307, 323, 353/34 of I.P.C. and Section 20(b)(ii)(C) of the N.D.P.S. Act.

2. In the wake of the Pandemic Covid-19, the case was taken up through Video Conferencing and I have heard learned counsel appearing for the petitioner and

learned Addl. Standing counsel appearing for the State.

3. It appears that the petitioner had earlier approached this Court being aggrieved by the order of the learned Sessions Judge-cum-Special Judge, Phulbani, but the same was withdrawn. Thereafter, the petitioner has again approached the learned Sessions Judge-cum-Special Judge, Phulbani for his release on bail, but the same having been refused, the petitioner has challenged the same by filing this bail application.

4. It is alleged that the accused-petitioner along with co-accused persons was engaged in transportation of 'Ganja' and commercial quantity of 41 Kgs. of 'Ganja' was recovered from a Bolero vehicle while the petitioner and the co-accused persons were engaged in transporting the same. It is further alleged that the petitioner and his crime associates had hatched a conspiracy to carry on such clandestine transportation, and to cause hurt and do away with lives of the Police or Excise personnel whoever came to obstruct them. It is further alleged that when Sri Mrutyunjaya Pradhan, O.I.C., Gochhapada Police Station and his staff conducted the raid, the accused-petitioner and his associates assaulted them causing injuries. On the report of the O.I.C., Sri Mrutyunjaya Pradhan, a case was registered, and on completion of investigation, charge-sheet has been submitted against the petitioner and the co-accused persons for the offences indicated above.

5. In support of the bail plea, the learned counsel appearing for the petitioner submitted, inter-alia, that with the available materials on record, the alleged recovery and seizure of the contraband articles can not be attributed to physical and conscious possession of the petitioner nor can it be prima-facie held that there was any conspiracy or pre-concert of mind of the petitioner with the co-accused persons for causing the alleged hurt to police personnel. It is his further contention that since the co-accused persons, namely, Lokanath Sahu and Rabindra Dhalachatra have already been released on bail by this Court vide orders passed in BLAPL Nos.2051 of 2016 and 7646 of 2016, the petitioner who is in custody for more than four years, should be released on bail.

6. Learned Addl. Standing counsel appearing for the State has opposed the prayer for bail of the petitioner on the ground of the nature and gravity of the indictment. According to him, in the facts and circumstances of the case, the petitioner cannot be taken at par with the co-accused persons who have been granted bail.

7. Since the petitioner has been implicated in an offence under the N.D.P.S. Act for transporting 'Ganja' of commercial quantity and sought for bail in this case, it would be apposite to have a look to Section 37 of the N.D.P.S. Act as the same deals with the limitations

prescribed with regard to grant of bail to a person indicted in an offence under Section 20(b)(ii)(C) of the NDPS Act. The said Section reads as thus;

> "**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.]"

8. A perusal of the aforesaid section would go to show that Court while addressing the bail application of a person accused of the offences mention in Section 37(1)(b) of the N.D.P.S. Act, the Court must give an opportunity to the Public Prosecutor to object the prayer for bail and if he objects, should not grant bail without recording the satisfaction that there are reasonable ground for believing that the accused is not

guilty of the offence alleged and not likely to commit any offence if allowed to go on bail. Any offence has been held by the Apex Court to be an offence of similar nature. The aforesaid limitations are in addition to the limitations provided for grant of bail in the Cr.P.C. as well as in any other law.

9. In the case of ***Niranjan Singh and another vrs. Prabhakar Sajram Kharote and others, AIR 1980 SC 785,*** the Apex Court while dealing with the "law of bails" have held as follows;

> "The law of bails, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict the liberty of a man who is alleged to have committed a crime and the presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt. The granting of bail in the case of a non-bailable offence is a concession allowed to an accused person. In the case of a bailable offence, bail can be obtained as of right under Sec. 436(1), Cr.P.C., subject to restrictions under Sec. 436(2). While considering an application for bail, detailed discussion of the evidence and elaborate documentation of the merits is to be avoided. This requirement stems from the desirability that no party should have the impression that his case has been pre-judged. Existence of a prima-facie case is only to be considered. Elaborate analysis or exhaustive exploration of the merits is not required....."

10. In the case of ***State of Maharashtra vrs. Anand Chaintaman Digha, AIR 1990 SC 625,*** the Apex Court have held that where the offence is of serious nature the question of grant of bail has to be decided keeping in view the nature and seriousness of the offence, character of the evidence and amongst others the larger interest of the public.

11. In the case of ***Prahalad Singh Bhati vrs. NCT, Delhi, (2001) 4 SCC 280,*** the Apex Court have held as follows;

> "8..... While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviours, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or the State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words 'reasonable ground for believing 'instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy it (sic 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. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

12. With regard to grant of bail to accused-petitioner indicted for commission of offence as mandated in Section 37(1)(b) of the N.D.P.S. Act, the Apex Court in the case of ***Narcotics Control Bureau vrs. Dilip Pralhad Namade, (2004) S.C.C. 619***, dealing with the provisions of Section 37 of the N.D.P.S. Act at paragraphs-9, 10, 11 and 12 have held as follows;

> "9. As observed by this Court in *Union of India v. Thamisharasi* clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that 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.
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> 10. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present respondent-accused is concerned, are: (1) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence, and (2) that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. 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 and he is not likely to commit any offence while on bail. This nature of embargo seems to have been envisaged keeping in view the deleterious nature of the offence, necessities of public interest and the normal tendencies of the persons involved in such network to pursue their activities with greater vigour and make hay when at large. In the case at hand the High Court seeks to have completely overlooked the underlying object of Section 37 and transgressed the limitations statutorily imposed in allowing bail. It did not take note of the confessional statement recorded under Section 67 of the Act.
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> 11. A bare reading of the impugned judgment shows that the scope and ambit of Section 37 of the NDPS Act was not kept in view by the High Court. Mere non-compliance with the order passed for supply of copies, if any, cannot as in the instant case entitle an accused to get bail notwithstanding prohibitions contained in Section 37.
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> 12. The circumstances under which the bail can be granted in the background of Section 37 have been indicated above. The case is not one to which the exceptions provided in Section 37 can be applied."
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> *[Underlining by me]*

13. The materials collected by the Investigating Agency reveal a prima-facie case against the petitioner under Section 20(b)(ii)(C) of the N.D.P.S. Act, inasmuch as the vehicle in which the petitioner was an occupancy, commercial quantity of 'Ganja' was allegedly seized. The accusation is serious in nature, inasmuch as it is an offence against the Society. The punishment provided for the aforesaid offence on conviction is minimum imprisonment for ten years,

which may extend to twenty years and minimum fine of rupees one lakh which may extend to rupees two lakhs and, therefore, a stringent one. Besides the same, an attack was made on the police party while effecting the aforesaid seizure by one of the culprits. Hence, considering the character of incriminating materials, the quantum of punishment provided on conviction and the offence, which is against the Society, stated to have been committed, this Court is of the view that the petitioner has prima-facie made out no case for his release on bail overcoming the limitations for grant of bail under Section 439 of Cr.P.C. Otherwise also, the petitioner being indicted in a heinous and serious offence of drug trafficking of Narcotic drugs of commercial quantity and from the materials available on record, it being hard to record a satisfaction that there are reasonable grounds for believing that the petitioner is not guilty of the offence alleged or not likely to commit similar offence, if released on bail, the petitioner also has no case for his release on bail in view of the mandate of Section 37(1)(b) of the N.D.P.S. Act.

14. With regard to the contention of the learned counsel for the petitioner to release the petitioner on the ground of parity as this Court had already allowed the similarly situated co-accused persons, namely, Lokanath Sahu and Rabindra Dhalachatra on bail vide orders dated 12.06.2017 and 06.12.2016 respectively

passed in BLAPL Nos.2051 of 2016 and 7646 of 2016. For better appreciation of the contention advanced by the learned counsel for the petitioner, the orders passed in the aforesaid two bail applications are extracted hereunder;

> "**BLAPL No.2051 of 2016**
> Order dated 12.06.2017
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> Heard learned counsel for the petitioner and learned Additional Standing Counsel on th e application under section 439 Cr.P.C. praying for bail for the offence under sections 120(B) /307/341/353/323/324 I.P.C. and sections 20(b)(ii)(c)/29 of N.D.P.S. Act.
>
> Learned counsel for the petitioner submits that the there is no allegation as to which of the accused tried to cause assault upon the Officer conducting search and seizure. Apart from this the petitioner is a passenger in the vehicle from which the Ganja was seized. He further submits that the Ganja was not seized from his exclusive possession and the co-accused person in the similar footing have been released on bail by this Court and that the petitioner is a handicapped person, for which lenient view may be taken to release the petitioner on bail. Learned Additional Standing Counsel while opposing the prayer for bail, submits that there is nothing in the case diary as to which of the accused tried to assault the Officer conducting search and seizure.
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> Considering the submissions of learned counsel for the respective parties, regard being had to the facts and circumstances of the case including the fact that the case diary does not spell out about the exclusive conscious possession of the petitioner over the seized Ganja, fact that the case dairy is silent to show that the present petitioner was the driver, but no t a passenger and also the petitioner is a handicapped person. Fact that the charge sheet in t his case has been submitted and the petitioner is a local person having no chance of absconding or tampering with the prosecution evidence, let the petitioner be released on bail on furnishing bail bond of Rs.50,000/- (rupees fifty thousand) with two solvent sureties each for the like amount to the satisfaction of learned District & Sessions Judge-

cum-Special Judge, Kandhamal-Phulbani in G.R. Case No.26 of 2016 with the conditions that (i) he shall appear before the court in seisin over the matter on each date of posting; (ii) he shall not tamper with the prosecution witnesses directly or indirectly; and (iii) he shall not commit any offence while on bail.

Violation of any of the aforesaid terms shall entail cancellation of the bail.

Accordingly, the BLAPL is disposed of.

Urgent certified copy of this order be granted on proper application.

BLAPL No.7646 of 2016

Order dated 06.12.2016

Heard learned counsel for the petitioner and the learn ed State Counsel on the application under section 439 Cr.P.C. for release of the petitioner on bail who allegedly involved with the offence under Sections 120-B/307/341/353/323/324/ of the Indian Penal Code read with Sections 20(b)(ii)(c)/29 of the N.D.P.S. Act. 2.

Learned counsel for the petitioner submits that there is no material against t he petitioner except the statement of the co-accused person implicating the petitioner with th e commission of offence. He further submits that in the meantime charge sheet has been submitt ed for which he prays that a lenient view may be taken to release the petitioner on bail with any condition as deemed fit and proper. Learned counsel for the State opposes the prayer for bail. 3.

Considering the submission of the learned counsel for the respective parties, regard being had to the facts and circumstances of the case including the fact that there is n o other material against the petitioner except the statement of the co-accused person, fact th at in the meantime charge sheet has been submitted and the fact that the petitioner being a lo cal person, there is no chance of his absconding and tampering the prosecution witnesses, let the petitioner be released on bail in connection with G.R. Case No.26 of 2016 (T.R. No.39 of 2 016) pending in the court of learned District and Sessions Judge-cum-Special Judge, Kandhamal, Phulbani on furnishing bail bond of Rs.50,000/- (rupees fifty thousand) with two solvent su reties each for the like amount to the satisfaction

> of the Court in seisin over the matter wit h the conditions that (i) The petitioner shall appear before the Court in seisin over the mat ter on each date of posting; (ii) He shall not tamper with the prosecution witnesses directly or indirectly; and (iii) He shall not commit any offence while on bail.
>
> Violation of any of the aforesaid terms shall entail cancellation of the bail.
>
> Accordingly, the BLAPL is disposed of.
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> Urgent certified copy of this order be granted on proper application."

It appears from the aforesaid orders that a Bench of this Court in exercise of its discretionary jurisdiction to grant bail in the Code of Criminal Procedure taking note of the facts and situation in the case relating to the petitioners therein, has exercised its jurisdiction to grant bail as aforesaid. The petitioners therein are undisputedly co-accused of the present petitioner and similarly situated with the present petitioner. But, I humbly disagree with the contention advanced that the aforesaid orders enure to the benefit of the petitioner on the rule of parity inasmuch as, if I may be permitted to say so, in the aforesaid orders the mandate of law provided in Section 37 of the NDPS Act has not been addressed to while releasing them on bail, more so in view of the ratio laid down in the case of ***Narcotics Control Bureau (supra),*** so also a decision of this Court in the case of ***Sudam Karan vrs. State of Odisha,*** (2014) 58 OCR 747 wherein this Court has also taking note of the decisions in the cases of ***Narcotics Control Bureau (supra), Chander alias***

Chandra Chandra vrs. State of U.P., 1998 CRI.L.J. 2374 and Gopi @ Gopal Rout vrs. State of Orissa passed in BLAPL No.983 of 2013 with regard to the application of the rule of parity in granting bail to the co-accused persons, refused to extend the benefit of rule of parity to the petitioner therein, in similar facts and situations.

In the case of ***Chander alias Chandra (supra),*** a Bench of the Allahabad High Court has held that if the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity, so also a Judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant factors essential for granting bail. So also, a Bench of this Court taking note of the aforesaid decision of Allahabad High Court, in the case of ***Gopi @ Gopal Rout (supra)*** in paragraph-17, held as follows;

> "Keeping in mind the gravity of offence, materials available on record and the above principles of law, now I have to consider the present petition for grant of bail. Undoubtedly, in the present case, accusations are of serious in nature. In a broad daylight, the petitioner along with other co-accused persons entered into the house of the informant on the pretext of courier agent. On the point of pistol and knives, they took the godrej almirah keys from the informant, committed dacoity and took

> away cash, gold and silver ornaments. The materials already on record are recovery of stolen property from the possession of the accused-petitioner and identification of the accused-petitioner in T.I. parade. The petitioner has criminal antecedents as he is involved in five other criminal cases. The order granting bail to the co-accused Kunia is not supported by any reasons. Therefore, the same cannot form the basis for granting bail to the petitioner on the ground of parity."

15. For the reasons stated above, the prayer for bail of the petitioner is devoid of merit and stands rejected.

Accordingly, the BLAPL stands disposed of being dismissed.

As lock-down period is continuing for COVID-19, learned counsel for the petitioner may utilize the soft copy of this order available in the High Court's website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020.

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S.Pujahari, J.

MRS