

HIGH COURT OF CHHATTISGARH, BILASPURMisc. Criminal Case No.7358 of 2021

Smt. Rashmiraj Jayswal, W/o Vijay Kumar Singh, aged about 40 years, R/o Ward No.3, Uttam Nagar, Near Santoshi Shitla Mandir, Delhi, Thana Uttam Nagar, District Delhi

(In Jail)
---- Applicant

Versus

State of Chhattisgarh, Through Station House Officer, P.S. Bagbahara, District Mahasamund (C.G.)

---- Non-applicant

For Applicant: Mr. C.R. Sahu, Advocate.
For Non-applicant / State: -
Mr. Sunil Otvani, Additional Advocate General and
Mr. Sudeep Verma, Deputy Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

23/11/2021

1. The accused/applicant has moved this bail application under Section 439 of the Code of Criminal Procedure, 1973 for releasing her on regular bail during trial in connection with Crime No.261/2019, registered at Police Station Bagbahara, Distt. Mahasamund for the offence punishable under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985.
2. This is the second bail application filed on behalf of the applicant.
3. Case of the prosecution, in brief, is that from the possession of the applicant and co-accused Akash Adiwasi, 60 Kgs. of Ganja was recovered.
4. Mr. C.R. Sahu, learned counsel appearing for the applicant, would submit that co-accused Akash Adiwasi has been enlarged on bail by

order dated 9-9-2021 passed by a coordinate Bench of this Court in M.Cr.C.No.6011/2021, as the seizure witnesses have turned hostile. Therefore, the applicant, who is in custody since 23-11-2019, is entitled for grant of bail.

5. Mr. Sunil Otwani, learned Additional Advocate General appearing for the State, would submit that in view of the bar contained in Section 37(1)(b) of the NDPS Act, merely because the independent witnesses / seizure witnesses namely, Gajendra Kumar Sahu and Tekuram Dewangan have turned hostile, the prosecution case cannot be thrown-out, even otherwise, seizure can be proved by the police witnesses. He placed reliance upon the judgment of the Supreme Court in the matter of Safi Mohammed v. State of Rajasthan¹ to buttress his submission.

6. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also went through the record with utmost circumspection.

7. Section 37(1)(b) of the NDPS Act states 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 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

¹ (2013) 8 SCC 601

such offence and that he is not likely to commit any offence while on bail.”

8. A careful perusal of the aforesaid provision would show that power and jurisdiction of the court considering the application for grant of bail under the provisions of the NDPS Act is circumscribed by the provision of Section 37 of the NDPS Act, in the case of a person accused of an offence punishable under Section 19(2), under Section 24(3), under Section 27-A(4) and also of offences involving commercial quantity. These limitations are in addition to those prescribed under the CrPC or any other law in force on the grant of bail. It can be considered and granted only in a case where there are reasonable grounds for believing by the court concerned that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The above-stated statutory requirements are mandatory to be complied with while releasing the accused on bail.
9. The Supreme Court in the matter of Union of India v. Ram Samujh and another², considering the issue held that conditions imposed under Section 37(1)(b) of the NDPS Act are mandatory and observed as under: -

“8. To check the menace of dangerous drugs flooding the market, 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 the 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 Parliament, after due deliberation, has amended.”

10. The Supreme Court in the matter of **State of M.P. v. Kajad**³ held that negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1) of the NDPS Act and 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.
11. The aforesaid legal position stands reiterated in the matters of **Sami Ullaha v. Superintendent, Narcotic Central Bureau**⁴ and **Union of India v. Rattan Mallik alias Habul**⁵ in which it has been clearly held by their Lordships of the Supreme Court that when a prosecution / conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, such provisions cannot be ignored while dealing with such an application. It has been observed in paragraph 9 of **Rattan Mallik's** case (supra) as under: -

“9. The broad principles which should weigh with the court in granting bail in a non-bailable offence have been enumerated in a catena of decisions of this Court and, therefore, for the sake of brevity, we do not propose to reiterate the same. However, when a prosecution/ conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail,

3 (2001) 7 SCC 673

4 (2008) 16 SCC 471

5 (2009) 2 SCC 624

these provisions cannot be ignored while dealing with such an application.”

12. The Supreme Court in Rattan Malik's case (supra) and further, in the matter of Union of India and another v. Sanjeev V. Deshpande⁶, explained the true import of Section 37 of the NDPS Act. Paragraph 12 of the report of Rattan Malik's case (supra) is as follows: -

“12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".”

13. In the matter of Union of India v. Niyazuddin SK. and another⁷, their Lordships of the Supreme Court reiterating the requirement of Section 37(1)(b) of the NDPS Act to be mandatory, held as under: -

“6. Section 37 of the NDPS Act contains special provisions with regard to grant of bail in respect of certain offences enumerated under the said section. They are :

- (1) In the case of a person accused of an offence punishable under Section 19,
- (2) Under Section 24,
- (3) Under Section 27-A and
- (4) Of offences involving commercial quantity.

⁶ (2014) 13 SCC 1

⁷ (2018) 13 SCC 738

7. The accusation in the present case is with regard to the fourth factor, namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of CrPC or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; (2) That person is not likely to commit any offence while on bail.

8. There is no such consideration with regard to the mandatory requirements, while releasing the respondents on bail.”

14. Recently, in the matter of State of Kerala Etc. v. Rajesh Etc.⁸, their Lordships followed the principles of law laid down in Ram Samujh's case (supra) and clearly held that Section 37 of the NDPS Act commences with non-obstante clause and the conditions enumerated in Section 37(1)(b) have to be complied before admitting the accused on bail of the aforesaid offence under the Act in case of commercial quantity. Their Lordships explained the meaning of “reasonable grounds” in paragraph 21 of the report by holding as under in paragraphs 20 and 21 of the said report: -

“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.”

15. Reverting to the facts of the case, undisputedly, from the possession of the present accused / applicant and the co-accused, 60 Kgs. of Ganja was recovered which is more than commercial quantity (10 Kgs.), therefore, the rigour of Section 37(1)(b) of the NDPS Act are to be satisfied before granting bail.
16. The submission of learned counsel for the applicant is that because the two independent witnesses have turned hostile, the prosecution case is weak and there no is chance of conviction, therefore, the applicant is entitled for bail.
17. The Supreme Court in Safi Mohammed (supra) [though it is a case of the Official Secrets Act, 1923], has held that the police witnesses can prove the seizure of the documents from the house of the appellant therein and merely because the independent witnesses have turned hostile, the prosecution case cannot be held to be bad in law.
18. The next ground the applicant has pressed into service is the ground of parity.
19. The ground of parity cannot be the sole ground for grant of bail, it is one of the grounds for consideration of application for grant of bail. The accused coming within the scope of Section 37(1)(b) of the NDPS Act has to satisfy the court firstly that he fulfills the statutory

requirements under the special Act like Section 37(1)(b) and then he can press into service the principle of parity (equality). Merely on the basis of equality dehors the statutory requirement contained in Section 37(1)(b) of the NDPS Act, an accused of the criminal case for the offence punishable under the NDPS Act having found in possession of commercial quantity of narcotic drugs is not entitled to be released on bail on the ground of parity.

20. As already noticed herein-above, in Rattan Malik's case (supra), the Union of India filed an appeal before the Supreme Court challenging the order of the Allahabad High Court in suspending the sentence awarded by the trial Court to the accused for having committed offences under Sections 8 read with Section 27-A and 8 read with Section 29 of the NDPS Act and granting bail, considering the limitation imposed in clause (b) of sub-section (1) of Section 37 of the NDPS Act, and it was held that grant of bail without considering Section 37 of the NDPS Act clearly violates the mandatory requirement of Section 37 and the bail order was set-aside with liberty to decide afresh in the light of the limitation imposed.
21. Similarly, the Orissa High Court in the matter Deepak Parida and another v. State of Odisha⁹ when co-accused was granted bail in ignorance of Section 37(1)(b) of the NDPS Act, declined to grant bail in the light of Section 37(1)(b) of the said Act by observing as under: -

“9. Section 37 of the N.D.P.S. Act opens with a non-obstante clause. Non-obstante clause must be given its due importance. The powers of the High Court to grant bail under section 439 Cr.P.C. are subject to the limitations contained in section 37 of the N.D.P.S. Act. Once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under section 37 of the N.D.P.S. Act, in case, the Court proposes to grant

bail to such a person, two mandatory conditions are required to be satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. The Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence and that he is not likely to commit any offence while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail. The expression "reasonable grounds" used in section 37(1)(b)(ii) of the N.D.P.S. Act connotes substantial probable causes which in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of such satisfaction. Whether the grounds are reasonable or not depend on the circumstances in a given situation. The Court while dealing with an application for bail is not called upon to record a finding of 'not guilty' but 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. 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.

10. Law is well settled that parity cannot be the sole ground for grant of bail but it is one of the grounds for consideration of question of bail. 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 has been passed in flagrant violation of well settled principle of law and the Judge ignores to take into consideration the relevant facts essential for granting bail. Such an order can never form the basis of claim of parity. It will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency."

22. Their Lordships of the Supreme Court rejected the plea of parity in respect of grant of bail governed by Section 37(1)(b)(ii) of the NDPS Act in the matter of **Satpal Singh v. State of Punjab**¹⁰ by holding that in cases covered under Section 37(1)(b) of the NDPS Act, de hors it, bail cannot be granted on the principle of parity, and observed as under: -

“Leave granted. The appellant Satpal Singh (in Crl. Appeal. No. 462 of 2018) is before this Court, challenging the order dated 4-10-2017 passed by the High Court of Punjab and Haryana at Chandigarh in *Sat Pal Singh v. State of Punjab*¹¹ rejecting his application for anticipatory bail. The High Court took note of the fact that the appellant was an accused in FIR No. 0053 dated 11-6-2017 under Sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short “the NDPS Act”), registered at Police Station Bhadson, District Patiala. Though it was argued that a coordinate Bench of the High Court had granted anticipatory bail to the co-accused, namely, Beant Singh and Gurwinder Singh, who are brothers of the appellant, as per order dated 21-9-2017¹², the learned Judge was not inclined to accept the contention since there was no question of parity as far as the bail is concerned and in view of the fact that the coordinate Bench had not taken note of the limitations under Section 37 of the NDPS Act. In our view, the learned Judge is perfectly right in his approach and in declining the protection under Section 438 of the Code of Criminal Procedure, 1973 (in short “CrPC”).

3. Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27-A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under CrPC or any other law in force on the grant of bail. In view of the seriousness of the offence, the lawmakers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court.

14. Be that as it may, the order dated 21-9-2017 passed by the High Court does not show that there is any reference to Section 37 of the NDPS Act. The quantity is

11 2017 SCC OnLine P&H 3802

12 Beant Singh v. State of Punjab, 2017 SCC OnLine P&H 3801

reportedly commercial. In the facts and circumstances of the case, the High Court could not have and should not have passed the order under Section 438 or 439 CrPC without reference to Section 37 of the NDPS Act and without entering a finding on the required level of satisfaction in case the Court was otherwise inclined to grant the bail. Such a satisfaction having not being entered, the order dated 21-9-2017 is only to be set aside and we do so.”

23. Reverting finally to the facts of the present case, this Court is of the considered opinion that the applicant is not entitled to be released on bail, as the accusation is of commercial quantity and the provisions of Section 37(1)(b)(ii) of the NDPS Act are not satisfied and merely because the independent witnesses have turned hostile, dehors of Section 37(1)(b) of the NDPS Act, the applicant is not entitled for grant of bail, on the basis of principle of parity, following the principles of law laid down by the Supreme Court in Satpal Singh (supra). Therefore, it cannot be held that there are reasonable grounds for believing that the applicant has not committed the said offence and she is not likely to commit any offence, if released on bail.

24. In view of the aforesaid analysis, I do not find any merit in the bail application. The application is accordingly rejected.

Sd/-
(Sanjay K. Agrawal)
Judge