

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

C.R.M. (NDPS) 43 OF 2022

Masidur Rahaman

VS.

Union of India

For the petitioner : Mr. Sourav Chatterjee

For the State : Mr. Y. J. Dastoor, ASG
Mr. Phiroj Edulji

Heard on : February 4, 2022

Judgment on : February 4, 2022

DEBANGSU BASAK, J.:-

1. Petitioner seeks bail under Section 439 of the Code of Criminal Procedure in connection with NDPS Case No.23 of 2018 arising out of NCB Crime No.23/NCB/KOL/2018 dated May 17, 2018 under Sections 8(c) read with Sections 21(c)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Learned Advocate appearing for the petitioner submits that the petitioner is in custody for more than three and half years. He relies upon the order dated February 7, 2020

passed by the Hon'ble Supreme Court in Criminal Appeal No(s).245/2020 (@ SLP(Crl.) No.8823/2019) (*Chitta Biswas alias Subhas vs. The State of West Bengal*) and submits that the Hon'ble Supreme Court granted bail to a person found in possession of narcotic substance of commercial quantity. He submits that in ***Chitta Biswas alias Subhas (supra)***, the Hon'ble High Court rejected the prayer for bail by an order dated July 30, 2019 passed in CRM 6787 of 2019 after discussing the applicability of Section 37 of the NDPS Act, 1985 to the facts of that case. In fact, the Hon'ble High Court rejected the prayer for grant of an anticipatory bail on the ground that commercial quantity of narcotics was seized from the joint possession of the petitioner and the co-accused and in view of the statutory restrictions of Section 37 of the NDPS Act, 1985. He relies upon the order dated October 19, 2020 passed in CRM 8187 of 2020 (In the matter of: *Shovon Nandi @ Mantu*) and submits that a coordinate Bench after noticing ***Chitta Biswas alias Subhas (supra)***, was pleased to grant bail to the petitioner therein although being found in possession of commercial quantity of codeine mixture.

3. Learned Additional Solicitor General appearing for the Union of India submits that 700 bottles of phensedyl was seized from the possession of the petitioner and the same is commercial quantity of narcotics within the meaning of the NDPS Act, 1985. He relies upon **2021 SCC Online Cal 2690 (Sonu Ansari vs. State of West Bengal)** and submits that, **Chitta Biswas alias Subhas (supra)** was considered by the High Court and in the facts of that case the prayer for bail was denied. He submits that discussions with regard to Section 37 of the NDPS Act, 1985 are mandatory when proceedings involve the provisions of the NDPS Act, for the purpose of considering a prayer for bail of an accused. In support of such contention, he relies upon **(2018) 13 Supreme Court Cases 813 (Satpal Singh vs. State of Punjab)** and **(2020) 12 Supreme Court Cases 122 (State of Kerala & Ors. Vs. Rajesh & Ors).**

4. In the facts of the present case, the petitioner was arrested and commercial quantity of phensedyl was seized from him. The provisions of Section 37 of the NDPS Act, 1985 are attracted in the facts of the present case. In **Chitta**

Biswas alias Subhas (supra), the Hon'ble Supreme Court granted bail to the accused. However, the Hon'ble Supreme Court did not discuss the provisions of Section 37 of the NDPS Act, 1985 therein.

5. **Chitta Biswas alias Subhas (supra)** was noted in **CRM 8187 of 2020 (In the matter of: Shovon Nandi @ Mantu)** and the bail was granted. Section 37 of the NDPS Act, 1985 is not discussed in **Shovon Nandi @ Mantu (supra)**.

6. A three Judge Bench of the Hon'ble Supreme Court in **Satpal Singh (supra)** is of the following view:

“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 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.”

7. In ***Rajesh and Others (supra)*** the Hon'ble Supreme Court noted various authorities on the provisions of NDPS Act, 1985 and particularly Section 37 thereof. It is of the view that:

“17. The jurisdiction of the court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. It can be granted in case 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. It is the mandate of the legislature which is required to be followed. At this juncture, a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and non-bailable. It reads 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 27-A 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.”

18. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in the offences under the NDPS Act. In Union of India v. Ram Samujh, it has been elaborated as under:

“7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier v. State (UT of Goa) as under: (SCC p. 104, para24)

‘24. With deep concern, we may point out that the organized activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.’

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.”

19. 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 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.

20. 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.

21. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act.”

8. **Sonu Ansari (supra)** considered **Chitta Biswas alias Subhas (supra)** after noting various authorities of the Hon’ble Supreme Court including **Rajesh and Others (supra)** held that provisions of Section 37 of the NDPS Act, 1985 are mandatorily required to be considered by the High Court while considering an application for bail involving commercial quantity of contraband.

9. Prayer for grant of bail is considered the parameters prescribed under Section 439 of the Criminal Procedure Code. When the provisions of the NDPS Act, 1985 are attracted there the additional parameters of Section 37 of the NDPS Act, 1985 are required to be considered. In a petition for bail involving the NDPS Act, 1985 in addition to the restrictions under Section 439 of the Criminal Procedure Code, the Court is

required to consider the limitation under Section 37 of the NDPS Act, 1985. The Court is required to apply the test while granting bail involving the NDPS Act, 1985 is whether there is reasonable grounds to believe that the accused did not commit the offence and whether he is likely to commit any while on bail. The Court is, however, not required to return final finding of not guilty or to pass a judgement of acquittal while considering an application for bail which attracts Section 37 of the NDPS Act, 1985.

10. ***Chitta Biswas alias Subhas (supra)*** states that it considered the facts and circumstances on record, apart from those noted therein and then proceeds to hold that case for bail was made out. The facts and circumstances of that case would obviously appear inter alia, from the case diary thereof. In absence of appreciation of the entire contours of the facts and circumstances of that case, it would not be advisable to hold that the facts of the present case are similar to that obtaining in ***Chitta Biswas alias Subhas (supra)***.

11. It can be contended that, a decision of the Supreme Court, even if said be made by involving the provisions of

Article 142 of the Constitution, can be applied. Such contention, with the deepest of respect, overlooks the fact that, the factual situations in the two cases under considerations needs to be indetical and that a petition for bail attracting the provisions of Section 37 of the NDPS Act, 1985 is required to be decided on the twin tests noted above.

12. In the facts of the present case, the petitioner is unable to overcome the restrictions imposed under Section 37 of the NDPS Act, 1985 in view of the fact that commercial quantity of narcotics was seized from the possession of the petitioner. There is no ground to believe that the petitioner did not commit the offence. We are, therefore, unable to grant bail to the petitioner.

13. Accordingly, the prayer for bail of the petitioner is rejected.

14. However, in view of the period of detention of the petitioner, it would be appropriate, in the interest of justice, to request the court *in seisin* of the trial to expedite the same and not grant any unnecessary adjournment to any of the parties.

15. **C.R.M.(NDPS) 43 of 2022** is dismissed.

(Debangsu Basak,J.)

I Agree.

(Bibhas Ranjan De, J.)