

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.1632 OF 2024

Rajesh Kanhaiyalal Gupta

...Applicant

Versus

Union of India & Ors.

...Respondents

Mr. Shailesh Chavan a/w Ms. Kalpana Chate, Mr. Sumitkumar Nimbalkar i/by Mr. Mayur Sanap, Advocates, for the Applicant.

Mr. Shreeram Shirsat a/w Mr. Shekhar Mane, Mr. Nikhil Daga, Advocates, for Respondent No.1-NCB.

Mrs. Rajeshree V. Newton, APP, for the Respondent No.2-State.

CORAM: MADHAV J. JAMDAR, J.

DATED : 28th August 2024

P. C.:

1. Heard Mr. Chavan, learned Counsel for the Applicant, Mr. Shreeram Shirsat, learned Counsel for Respondent No.1- NCB and Mrs. Newton, learned APP for the Respondent-State.

2. This regular Bail Application is preferred under Section 439 of the *Code of Criminal Procedure, 1973*. The relevant details are as follows:-

1.	C. R. No.	NCB/MZU/CR-01/2023
2.	Date of registration of F.I.R.	02/02/2023

3.	Name of Police Station	NCB, Mumbai Zonal Unit
4.	Section/s invoked	8(c), 21(c), 22(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act")
5.	Date of incident	02/02/2023
6.	Date of arrest	14/02/2023
7.	Date of filing of Charge-sheet	27 th July 2023

3. The present Bail Application is opposed by the Respondent No.1-NCB by filing Affidavit dated 11th June 2024 of Mr. Satish Kumar, Investigating Officer, Intelligence Officer. The prosecution case is set out in paragraph No.3 of the said Affidavit. The said paragraph 3 reads as under :

*“ (i) The present **Applicant has been arraigned as Accused No.4** in connection with CR bearing NCB/MUZ/CR-01/2023 registered by the Narcotics Control Bureau, Mumbai, Zonal Unit for allegedly having committed the offences punishable under Sections 8(c) r/w 21(c), 22(c), 28 and 29 of the NDPS Act, 1985.*

*(ii) One specific information was received by the Respondent agency that a courier parcel of Alprazolam Tablets having L.R. No. 1063240103 is lying at O/o the VRL Logistic, Kalamboli and **one person by name Santosh Yadav (A-1)** will come to collect the parcel at*

the said Office on 02/02/2023. The officers of NCB Mumbai conducted surveillance and intercepted the said person and effected a seizure of total 132000 tablets of Alprazolam in Commercial Quantity, a psychotropic substance covered under NDPS Act, 1985 at Office of the VRL Logistic Ltd., Godown-3, COMPT-1A, Cotton Corporation of India, Ware housing, Complex, Plot No. S5, Sect-KWC- Kalamboli, Navi Mumbai- 410218 under panchanama dated 02/02/2023.

(iii) In a follow up action, as revealed by Santosh Harilal Yadav (A-1), the Respondent agency also effected a seizure of 2400 bottles of Codeine based Onerex cough syrups in commercial quantity in front of Road No.-3, Veer Jijamata Bhosale Marg, Yashwant Rao Chavan, Ektanagar, Mankhurd (West) under panchanama dated 02/02/2023.

(iv) As revealed by Santosh Harilal Yadav (A-1) further input was developed and on 07.02.2023, a team of NCB, Mumbai again effected a seizure of 1440 bottles of Codeine Based Phensirest Cough Syrup in commercial quantity at M/s Gati Kintestsu Express Pvt. Ltd., Warehouse-4d Cement Merchant KWC, Kalamboli, Maharashtra under panchanama dated 07/02/2023. Santosh Harilal Yadav (A-1) was arrested on 03/02/2023 in connection with the above said seizure under NDPS Act, 1984 and was produced before the Ld. Sessions Court at Panvel.

(v) Based on the further inputs that were received, Saddam Hussain Qureshi (A-2) and Rajesh Shyambali Gupta (A-3) were arrested on 02/02/2023 at 18.30 hrs. and on 13/02/2023 at 18.45 hrs. respectively at NCB office, Mumbai.

(vi) The voluntary statement of Rajesh Shyambali Gupta (A-3), brought the role of the Applicant i.e. Rajesh Kanhaiyalal Gupta (A-4) to the fore, and subsequently a notice under Section 67 of the NDPS Act, 1985 was issued to him.

(vii) On the basis of his voluntary statement of the Applicant and the seizure effected, he was placed under arrest on 14/02/2023 at 18.30 hrs. at NCB office, Mumbai under Sections 8(c), 21(c), 22(c), 28 and 29 of the NDPS Act, 1985 in conspiracy with the others for procurement, possession, transport, selling purchasing and attempt to commit offence under NDPS Act, 1985.

(Emphasis added)

4. It is the submission of Mr. Chavan, learned Counsel for the Applicant that the Applicant was arrested on 14th February 2023 and the Charge-sheet is filed on 27th July 2023. He states that the Applicant was arrested only on the basis of the statement of co-Accused recorded under Section 67 of NDPS Act. He submitted that the said statement is not admissible evidence. He submitted that there is no direct evidence to show actual possession of the contraband found as far as the present Applicant is concerned. There is no recovery of contraband articles from the possession of the present Applicant. He submitted that the prosecution is relying on the voluntary statement recorded under Section 67 of NDPS Act, however, the said statement of the Applicant recorded when

the Applicant was in custody and the same cannot be said to be voluntarily statement and said statement is not admissible in evidence. He submitted that the co-Accused i.e. Accused No.2 Saddam Hussain Qureshi having same role has been released on bail by this court by Order dated 17th April 2024 passed in Criminal Bail Application No.2894 of 2023. He submitted that the Applicant has no antecedents and therefore, the Applicant be released on bail.

5. On the other hand, Mr. Shirsat, learned Counsel for Respondent No.1 has strongly opposed the Bail Application. He pointed out Affidavit-in-Reply dated 11th June 2024 of Mr. Satish Kumar, Investigating Officer. He pointed out voluntarily statement of the present Applicant (Page-49 of the compilation). He submitted that the said voluntarily statement shows that the present Applicant is involved in the crime and he has played major part in the crime. He pointed out Section 29 of the NDPS Act and submitted that whoever abets, or is a party to the criminal conspiracy to commit, an offence punishable under Chapter II is liable for same punishment as provided for the offences. He therefore submitted that although contraband is not found in

possession of the present Applicant still he is liable for the offence under Sections 8(c), 21(c), 22(c), 28 and 29 of the NDPS Act. He therefore submitted that the Bail Application be rejected.

6. Mrs. Newton, learned APP for the Respondent No.2-State adopted the submissions of Mr. Shirsat, learned Counsel for the Respondent No.1-Union and strongly opposed the Bail Application.

7. Section 37 of the NDPS Act is as follows:-

“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.”

(Emphasis added)

Thus, as per Section 37 of the NDPS Act, following requirements are mandatorily to be complied with before releasing the Accused on bail:-

(i) The Public Prosecutor is to be given an opportunity to oppose the application seeking bail;

(ii) Where the Public Prosecutor opposes the application:-

(a) The court is required to record satisfaction that there are reasonable grounds for believing that the Applicant is not guilty of such offence;

(b) The Court is required to record satisfaction that the Applicant is not likely to commit any offence while on bail.

8. In the present case, Respondent No.1-NCB has filed Affidavit-in-Reply of Mr. Satish Kumar, Investigating Officer dated 11th June 2024 and Mr. Shirsat, learned Counsel for the

Respondent No.1 has opposed the Bail Application. Therefore, the first requirement is complied with.

9. Thus, what is required to be considered is whether this Court is satisfied that there are reasonable grounds for believing that the Applicant is not guilty of such offence and that he is not likely to commit any offence while on bail.

10. Before considering the merits of the case, it is required to be noted that the Supreme Court of India in case of *Narcotics Control Bureau Vs. Pallulabid Ahmad Arimutta*¹ has held that confession/voluntary statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act and therefore, arrest made on the basis of such inadmissible evidence i.e. on the basis of confession/voluntary statement is not legal. The relevant paragraph Nos.11 and 12 of *Pallulabid Ahmad Arimutta* (supra) read as under:

“11. Having gone through the records along with the tabulated statement of the respondents submitted on behalf of the petitioner NCB and on carefully perusing the impugned orders passed in each case, it emerges that except for the voluntary statements of A-1 and A-2 in the

¹ (2022) 12 SCC 633

first case and that of the respondents themselves recorded under Section 67 of the NDPS Act, it appears, prima facie, that no substantial material was available with the prosecution at the time of arrest to connect the respondents with the allegations levelled against them of indulging in drug trafficking. It has not been denied by the prosecution that except for the respondent in SLP (Crl.) No. 1569 of 2021, none of the other respondents were found to be in possession of commercial quantities of psychotropic substances, as contemplated under the NDPS Act.

12. It has been held in clear terms in Tofan Singh v. State of T.N. [Tofan Singh v. State of T.N., (2021) 4 SCC 1 : (2021) 2 SCC (Cri) 246] , that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail.

(Emphasis added)

11. In the present case, even as per the prosecution case, only following circumstances are incriminating as far as the Applicant is concerned:-

(1) The Applicant was in direct contact with the wanted Accused person namely Siraj.

(2) The Applicant is sending money as per the instructions of Siraj.

(3) The Applicant has made a voluntary statement under Section 67 of the NDPS Act.

12. *Prima facie*, there is substance in the contention of Mr. Chavan, learned Counsel for the Applicant that the above three circumstances do not connect the Applicant with the offence in question. The role of wanted Accused person Siraj is not clear. There is no evidence to show that the money has been transferred by the Applicant to any other account. *Prima facie*, Voluntary statement of Applicant recorded under Section 67 of the NDPS Act is not admissible.

13. It is also required to be noted that there is no possession or recovery of contraband at the instance of the Applicant and that Accused No.1 was intercepted and found in possession of the contraband in question.

14. Thus, there are reasonable grounds for believing that the Applicant is not involved in the said offence.

15. Mr. Chavan, learned Counsel for the Applicant submitted that there are no other antecedent including under the NDPS Act. The Applicant does not have any criminal antecedents including under the NDPS Act. Thus, the second requirement is also fulfilled

and this Court can record satisfaction that the Applicant is not likely to commit any offence while on bail.

16. The Applicant does not appear to be at risk of flight.

17. Accordingly, the Applicant can be enlarged on bail by imposing conditions.

18. In view thereof, the following order:-

ORDER

(a) The Applicant – Rajesh Kanhaiyalal Gupta be released on bail in connection with C.R. No.NCB/MZU/CR-01/2023 registered with Narcotics Control Bureau (NCB), Mumbai on his furnishing PR. Bond of Rs.1,00,000/- with one or two local solvent sureties in the like amount.

(b) On being released on bail, the Applicant shall furnish his cell phone number and residential address to the Investigating Officer and shall keep the same updated, in case of any change thereto.

- (c) The Applicant shall report to the Narcotics Control Bureau (NCB), Mumbai once a week on every Wednesday between 11:00 a.m. and 1:00 p.m. until the conclusion of the trial.
- (d) The Applicant shall not directly or indirectly make any inducement, threat, or promise to any person acquainted with the facts of the case, so as to dissuade such a person from disclosing the facts to the Court or to any Police personnel.
- (e) The Applicant shall not tamper with the prosecution evidence and shall not contact or influence the Complainant or any witness in any manner.
- (f) The Applicant shall attend the trial regularly. The Applicant shall co-operate with the Trial Court and shall not seek unnecessary adjournments thereat.
- (g) The Applicant shall surrender his passport, if any, to the Investigating Officer.

19. The Bail Application is disposed of accordingly.

20. It is clarified that observations made herein are *prima facie*, and the Trial Court shall decide the case on its merits, uninfluenced by the observations made in this order.

(MADHAV J. JAMDAR, J.)

BHALCHANDRA
GOPAL DUSANE

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