IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2177 OF 2024

Rahul Kumar Verma s/o. Premnarayan Verma … Applicant

Vs.

Union of India and another … Respondents

Mr. Anil G. Lalla i/b. Lalla and Lalla for Applicant.

Mr. Shreeram Shirsat a/w. Ms. Karishma Rajesh, Mr. Shekhar Mane and Mr.Nikhil Daga for Respondent No.1-NCB.

Mr. Mayur S. Sonavane, APP for Respondent No.2-State.

WITH

BAIL APPLICATION NO.4385 OF 2021

Vikrant Jayantilal Jain @ Vicky Jain
s/o. Jayantilal Jain … Applicant

Vs.

State of Maharashtra … Respondent

Mr. Taraq Sayyed i/b. Mr. Apoorv V. Singh and Mr. Manish Mazgaonkar for Applicant.

Mr. Shreeram Shirsat a/w. Ms. Karishma Rajesh, Mr. Shekhar Mane, Mr.Nishad Mokashi and Mr. Nikhil Daga for Respondent-NCB.

WITH

BAIL APPLICATION NO.332 OF 2022

Haris Faizanullah Khan … Applicant

Vs.

Narcotics Control Bureau and another … Respondents

Mr. Ashok P. Mundargi, Senior Advocate i/b. Mr. Taraq Sayed and Mr. Subir Sarkar for Applicant.

Mr. Shreeram Shirsat a/w. Ms. Karishma Rajesh, Mr. Shekhar Mane, Mr.Nishad Mokashi and Mr. Nikhil Daga for Respondent No.1-NCB.

Ms. Rutuja A. Ambekar, APP for Respondent No.2-State.

CORAM : MANISH PITALE, J.
DATE : AUGUST 19, 2024

P.C. :

. These three applications concern the same case i.e. NDPS Special

Case No.497 of 2021 pending before the Special Judge (NDPS) Thane, for offences under various provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The aforesaid case arises out of FIR No.7 of 2021 registered with the NCB office at Mumbai Zonal Unit, Mumbai. The applicant - Rahul Kumar Verma in Bail Application No.2177 of 2024 is accused No.2. The applicant - Vikrant Jayantilal Jain @ Vicky Jain in Bail Application No.4385 of 2021 is accused No.5 and the applicant - Haris Faizanullah Khan in Bail Application No.332 of 2024 is accused No.8. There are total 15 accused persons in the present case and it appears that accused No.1 - Parvez Naserullah Khan @ Chinku Pathan and accused No.6 - Mohammed Arif Bhujwala are the main accused persons. The applicant - accused No.2 was arrested on 21.01.2021; applicant - accused No.5 was arrested on 24.01.2021; and applicant - accused No.8 was arrested on 30.05.2021. They have remained incarcerated since their respective dates of arrest.

2. The complainant, in the present case, is an intelligence officer of the Narcotics Control Bureau (NCB), Mumbai. It is stated that on specific information received on 20.01.2021, a team was constituted and residence of accused No.1 was searched. He was identified by his wife Nazia Khan. Accused No.1 is a history-sheeter and the aforesaid search resulted in recovery of contraband said to be 2.95 gms of *heroin*, 52.2 gms of *mephedrone* (MD), a black colour pistol with five live rounds, cash amount etc.

3. Pursuant to the said action taken by the NCB, Mumbai, the said FIR was registered and follow-up action was taken, resulting in successive search and arrest of the accused persons and ultimately, 15 accused persons were named in the present case. The investigation was completed and on 30.08.2023, the Special Judge (NDPS) Thane framed charge against the accused persons. It is relevant to note that while

contraband was not recovered from some of the accused persons, it was indeed recovered from the remaining accused persons and the total recovery came to a huge amount of commercial quantity. According to the investigating authority, all the accused persons have acted together and hence, they are all responsible for the offences that have been registered in the present case.

4. Mr. Anil Lalla, learned counsel appearing for the applicant / accused No.2 - Rahul Kumar Verma submitted that in the first place, admittedly, there is no recovery of contraband from the applicant. It was further submitted that the investigating authority has simply relied upon some Call Detail Records (CDRs) and certain alleged bank account entries to claim that there were financial transactions between the said applicant / accused No.2 and accused No.1. It was submitted that none of these documents were supported by proper certificates under Section 65-B of the Information Technology Act, 2000 (IT Act) issued by a Government authority. It was further submitted that the financial transactions were allegedly between the applicant / accused No.2 and the wife of accused No.1, yet, her statement was not recorded during the course of investigation. In any case, the financial transactions had no co-relation or connection with the alleged contraband. It was submitted that other than the statement of accused No.1 recorded under Section 67 of the NDPS Act, there is no material with the investigating authority to connect the applicant / accused No.2 with the present case. It was submitted that as per the settled law laid down by the Supreme Court in the case of *Tofan Singh Vs. State of Tamil Nadu*, **(2021) 4 SCC 1**, such a statement of a co-accused person is inadmissible.

5. It was further submitted that since the applicant accused No.2 has remained behind bars for three years and seven months, long period of incarceration was also a factor required to be taken into consideration. In

this regard, reliance was placed on judgement of the Supreme Court in the case of *Union of India Vs. K. A. Najeeb*, **(2021) 3 SCC 713** and recent order of this Court dated **22.07.2024** passed in **Bail Application No.3433 of 2021** (*Ahmed Abdul Hameed Mushraf Vs. Investigating Officer and another)*. Reliance was also placed on order of the Supreme Court dated **13.12.2021** passed in **SLP (Criminal) No.5703 of 2021** (*Bharat Chaudhary Vs. Union of India*), to contend that printouts of *WhatsApp* messages cannot be relied upon unless a live link is established. On this basis, he submitted that the application deserved to be allowed.

6. On the other hand, Mr. Shreeram Shirsat, learned counsel appearing for the contesting respondent - NCB submitted that absence of recovery of contraband cannot be a ground for claiming bail. It was emphasized that when Section 29 of the NDPS Act pertaining to abetment and criminal conspiracy has been specifically invoked in the present case, the fact that huge amount of contraband has been recovered from the co-accused persons, is a factor that cannot be ignored. It was further submitted that, other than the statement of accused No.1, there is enough material to corroborate the same and to demonstrate a *prima facie* link between the applicant / accused No.2 and the offences in question. It was submitted that CDRs and details of *WhatsApp* messages exchanged between applicant / accused No.2 and others, is relevant material for the purposes of considering the present application. It was emphasized that the applicant is required to satisfy the stringent twin test contemplated under Section 37 of the NDPS Act and in the face of the material available against applicant / accused No.2, it cannot be said that there is a reasonable possibility of this Court holding that the said applicant is not guilty. The seriousness of the offences registered against applicant / accused No.2, along with the other accused persons demonstrates that merely because the said applicant has undergone

incarceration for about three years and seven months, that cannot itself be a ground for granting bail. On this basis, it was submitted that the application deserved to be dismissed.

7. Mr. Taraq Sayyed, learned counsel appearing for the applicant / accused No.5 - Vikrant Jayantilal Jain @ Vicky Jain submitted that even if the entire material on record is taken into consideration, at worst, the said applicant can be hauled up for being a consumer of contraband. The material on record falls short of demonstrating that the said applicant is part of any conspiracy with the main accused persons i.e. accused No.1 and accused No.6. It was submitted that although it was claimed that 52.8 gms of MD was recovered from the said applicant, which constituted commercial quantity, the break-up shows that the said contraband was found mixed with *Rajnigandha* powder, thereby indicating that the actual quantity of contraband was less. It was further submitted that the documents pertaining to alleged transfer of amounts from the account of the said applicant are irrelevant, for the reason that the said applicant indulged in money lending activity and it had no concern with conspiracy to deal in the aforesaid contraband.

8. Attention of this Court was invited to the charge framed by the Special Judge (NDPS) Thane on 30.08.2023 and it was emphasized that charge, *inter alia*, is framed not for commercial quantity, which would indicate that even if convicted, the said applicant could be imprisoned for a term of upto ten years. The said applicant, having been arrested on 24.01.2021, has already remained incarcerated for about three years and seven months. On the basis of such a long incarceration and the law laid down by the Supreme Court in the case of **Union of India Vs. K. A. Najeeb** (*supra*) and judgements pronounced thereafter by the Supreme Court, bail can be granted even on the said ground.

9. Mr. Shreeram Shirsat, learned counsel appearing for the NCB in

the context of applicant / accused No.5, submitted that since the process of investigation initiated in terms of FIR No.7 of 2021 led to the said applicant also and since Section 29 of the NDPS Act has been specifically invoked, it cannot be claimed that the said applicant was merely a consumer and that his bail application ought to be considered on that ground. It was submitted that the theory of the said applicant, being a money lender, would be a matter for trial and the same cannot be accepted at this stage for consideration of bail. The material on record indicates that amounts were transferred at regular intervals by this applicant and the purchase of contraband can be co-related to make out a strong *prima facie* case against the said applicant. As regards the aspect of commercial quantity, it was submitted that while framing charge, it appears that specific charge under Section 22(c) of the NDPS Act has not been framed, but the same can be rectified. As long as there is material to show involvement of the said applicant along with the other accused persons in respect of commercial quantity, it cannot be said that the crucial first limb of the stringent twin test of Section 37 of the NDPS Act has been satisfied by the said applicant. Much emphasis was placed on CDRs, a chart showing conversation followed by transfer of amounts and other such material to contend that the said applicant does not deserve to be enlarged on bail.

10. Mr. Ashok Mundargi, learned senior counsel appearing for applicant / accused No.8 - Haris Faizanullah Khan submitted that the charge in the case of the said applicant is also not framed under Section 22(c) of the NDPS Act, thereby indicating that the said applicant is not even facing any prosecution for commercial quantity of contraband. In fact, it was emphasized that even according to the investigating authority, only 3 gms of MD was recovered from the said applicant and it was such a small quantity that samples could not be drawn for certification before the Magistrate under Section 52-A of the NDPS Act.

It was emphasized that the action taken by the investigating authority against the said applicant is clearly an independent transaction as he was arrested on 30.05.2021 i.e. more than four months after the FIR was registered and the other co-accused persons were arrested. Hence, on the face of it, the said applicant cannot be said to be a part of the larger conspiracy in the present case.

11. It was further submitted that the applicant could, at worst, be said to be a consumer and not involved in any larger conspiracy of sale and purchase of contraband. It was also submitted that even the aspect of financing would not apply and hence the charge under Section 27-A is not maintainable against the said applicant. It was submitted that chats exchanged by the said applicant with other accused persons do not show any clinching material. It was conceded that the said applicant has criminal antecedents, but only one other case pertains to the offences under the NDPS Act. It was also emphasized that the said applicant has also remained behind bars for more than three years and considering the charge levelled against him, he has undergone substantial part of the maximum sentence of ten years, that can be imposed, thereby indicating that he is entitled for the benefit of the aforesaid position of law pertaining to long incarceration pending trial.

12. On the other hand, Mr. Shreeram Shirsat, learned counsel appearing for NCB submitted that this particular applicant has number of criminal antecedents. He has eleven cases pending against him, wherein offences have been registered under the provisions of the IPC. There is another case wherein similar offences have been registered against the applicant under the provisions of the NDPS Act. He is a habitual offender and considering his record, the said applicant does not satisfy the crucial second limb of the stringent twin test contemplated in Section 37 of the NDPS Act. It is not possible for this Court to reach a

finding that the said applicant is not likely to commit any offence while on bail. Apart from this, it was submitted that the said applicant is connected with the main accused i.e. accused No.1. The charge could be rectified, as Section 29 of the NDPS Act has been invoked and huge amount of commercial quantity has been recovered from the co-accused persons, with whom the applicant has remained in constant touch. It was emphasized that bail applications of co-accused persons i.e. accused No.4 - Mohammed Salman Khan, accused No.7 - Md. Aun Javed Haider Sayed and accused No.9 - Mohammed Faaran Khan have already been dismissed, while their roles could be said to be similar to that of the present applicant.

13. This Court has considered the rival submissions in respect of the three applicants. The contentions raised on behalf of the each of the said applicants shall now be dealt with.

14. As regards applicant / accused No.2 - Rahul Kumar Verma, this Court finds that even as per the investigating authority, contraband was actually not recovered from the said applicant. But, there is substance in the contention raised on behalf of the respondent - NCB that this factor, in itself, cannot be a ground for granting bail. The material on record shows that the said applicant was constantly in touch with the co-accused person and that there were financial transactions with co-accused persons. The statement of co-accused person under Section 67 of the NDPS Act, in itself, would be inadmissible as per the position of law laid down in the case of **Tofan Singh Vs. State of Tamil Nadu** *(supra)*. But, at the stage of bail, the Court can certainly appreciate as to whether there is material, other than such a statement, which co-relates with the contents of such a statement, to examine as to whether in the face of such material, the Court can come to a finding that there are grounds to believe that the applicant accused is not guilty of the offence.

Such an examination is necessary as the said test is to be satisfied under Section 37 of the NDPS Act for the bail application of such an applicant accused to be considered favourably.

15. In that light, this Court has considered the material on record. There is material in the form of *WhatsApp* chats of the said applicant with co-accused persons. There is further material to show the financial transactions and transfer of amounts from the said applicant, which can *prima facie*, be broadly co-related with conversations concerning sale and purchase of contraband. There is material to indicate that amounts were transferred by the said applicant to the wife of accused No.1. Such material, at this stage, can certainly be looked at, to examine the question as to whether the said applicant deserves to be enlarged on bail. It is on broad probabilities that the Court has to reach a conclusion in such matters. Having perused the material on record, this Court is satisfied that there is a *prima facie* case made out against the said applicant and since Section 29 of the NDPS Act pertaining to abetment and criminal conspiracy has been invoked, it is not possible, at this stage, to reach a finding that the applicant has satisfied the stringent twin test contemplated under Section 37 of the NDPS Act.

16. The emphasis placed on absence of certificate under Section 65-B of the IT Act from a Government authority cannot be clinching material in favour of the applicant. This Court will have to reach a finding that the certificate under Section 65-B of the IT Act, presently produced by the investigating authority, is wholly unbelievable and inadmissible. Such a finding cannot be rendered at this stage and therefore, it would be a matter for trial.

17. There is substance in the contention raised on behalf of the respondent - NCB on the basis of Section 68-F of the NDPS Act. In the present case, the competent authority under the said provision had

passed an order holding that the said applicant failed to provide any material or make any submission to demonstrate that the balance amount in the bank accounts of the applicant was derived from legal sources of income. The competent authority recorded its sufficient belief that the amount had been acquired from illegal income through drug trafficking. This Court is of the opinion that the aforesaid material cannot be completely ignored while considering the bail application of the said applicant. This further indicates that the applicant has failed to satisfy the test under Section 37 of the NDPS Act for the application to be favourably considered.

18. As regards the said applicant having remained behind bars for about three years and seven months, that in itself, cannot be a ground to release the applicant on bail. There can be no quarrel with the proposition of law laid down by the Supreme Court in the case of **Union of India Vs. K. A. Najeeb** (*supra*) and subsequent pronouncements as regards the powers of the Constitutional courts to grant bail when the accused under-trial has undergone long period of incarceration and there is no reasonable possibility of the trial being completed. In the present case, by an order dated 08.05.2024 passed in Criminal Bail Application No.4257 of 2021, this Court directed the trial to be completed within a year i.e. by May 2025. The learned counsel for respondent No.2 - NCB has indicated that only 30 witnesses are proposed to be examined and that all efforts are being made to complete the trial even before expiry of the said period. Hence, the said applicant cannot claim relief of bail on the ground of having undergone incarceration for about three years and seven months. Accordingly, Bail Application No.2177 of 2024 of applicant / accused No.2 - Rahul Kumar Verma is dismissed.

19. As regards applicant / accused No.5 - Vikrant Jayantilal Jain @ Vicky Jain, much emphasis was placed on the charge framed against the

said applicant. It was submitted that there was no mention of charge under Section 22(c) of the NDPS Act, because no commercial quantity of contraband can be said to be associated with the said applicant. This was countered by the learned counsel appearing for the respondent-NCB by stating that the charge could certainly be rectified. In this regard, this Court is of the opinion that the entire material on record has to be appreciated to examine as to what nature of offences can be alleged against the accused person. In the present case, apart from the fact that 52.8 gms of MD was recovered from the said applicant, it cannot be forgotten that Section 29 of the NDPS Act has been invoked pertaining to abetment and criminal conspiracy. It is the specific case of the prosecution that the said applicant along with the other accused persons are all responsible for the offences in the present case. The amount of contraband that has been recovered from the other accused persons is huge. For instance, from accused No.6, 5.375 kg of MD has been recovered, and therefore, the said applicant cannot claim that in the absence of a specific charge under Section 22(c) of the NDPS Act, the applicant deserves to be enlarged on bail.

20. The emphasis placed on behalf of the said applicant about he being merely a consumer is also misplaced because the material on record does indicate the manner in which the said applicant has been in contact with other accused persons. There are financial transactions between them. The transfer of amounts is sought to be explained by saying that the said applicant is into money lending. Such a defence could be decided at the stage of trial. But so long as there is material to demonstrate a *prima facie* case of monies being transferred and semblance of material to show that it can be co-related with supply of contraband, the defence of money lending cannot be accepted at this stage itself. In fact, the case of the NCB is that the said applicant had also pumped in finances in the present case. Charge under Section 27-A

of the NDPS Act has been framed against the said applicant. It provides for a minimum sentence of imprisonment of ten years and maximum of twenty years, thereby indicating that the applicant having undergone about three years and seven months of imprisonment cannot come to his aid as a ground for being released on bail. As noted hereinabove, the position of law clarified by the Supreme Court regarding the power of Constitutional courts to enlarge under-trials on bail cannot apply to the facts of the present case. The trial is to be completed by May 2025, and only 30 witnesses are to be examined. It cannot be said that the trial will not be completed within a reasonable period of time. In any case, incarceration of three years and seven months for a possible maximum sentence of imprisonment for twenty years cannot qualify the applicant for being released on bail.

21. Apart from this, there is material in the form of CDRs and bank account statements, showing transfer of amounts from the applicant's bank account to the co-accused persons, indicating his role in the larger conspiracy of the activities of the accused persons. The position of law laid down by the Supreme Court in the case of *Hira Singh and another Vs. Union of India and another*, **(2020) 20 SCC 272** is correctly relied upon by the learned counsel for the respondent-NCB, to contend that even if contraband MD was found in possession of the said applicant mixed with *Rajnigandha* powder, the entire quantity recovered i.e. 52.8 gms of MD would have to be taken into consideration. Hence, no ground is made out for positively considering the present bail application and accordingly, Bail application No.4385 of 2021 of applicant / accused No.5 - Vikrant Jayantilal Jain @ Vicky Jain is also dismissed.

22. As regards applicant / accused No.8 - Haris Faizanullah Khan, similar emphasis was placed on the charge framed against the said applicant. It was emphasized that charge under Section 22(c) of the

NDPS Act has not been specifically raised against the said applicant. As noted hereinabove, this, in itself, cannot be a ground for granting bail to the said applicant, considering the entire material on record and the fact that against the said applicant, Section 29 of the NDPS Act pertaining to abetment and criminal conspiracy has been invoked. Similarly charge under Section 27A of the NDPS Act is also raised, thereby indicating that *prima facie*, he can be said to be a part of the larger conspiracy of activities of all the accused persons in the present case. Merely because 3 gms of contraband is recovered from the said applicant, cannot be a ground to favourably consider his case. Since the investigation was initiated in January 2021 and as a follow-up action, even the said applicant was apprehended in May 2021, it cannot be said that the case of the said applicant is to be treated as a separate and independent transaction or case. The argument raised on behalf of the said applicant that he could, at worst, be said to be only a consumer is also not tenable for reasons already recorded hereinabove in the context of contentions raised on behalf of the applicant / accused No.5. The existence of material to show chats between the said applicant and the co-accused persons does indicate the involvement of the applicant. The contention raised on behalf of the said applicant that such chats cannot be said to be clinching material, also cannot be accepted as the same would be a matter for trial.

23. But, the most crucial aspect in the present case is that the said applicant has a number of criminal antecedents. He has 11 cases registered against him for offences under the provisions of the IPC. There is one more case registered against him for offences under the NDPS Act. *Prima facie*, the said applicant appears to be a habitual offender and in such circumstances, a finding cannot be given in his favour as regards the second limb of the stringent twin test contemplated under Section 37 of the NDPS Act. As per the second limb of the said

test, to enlarge such an applicant on bail, this Court would have to give a positive finding that he is not likely to commit any offence, while on bail. In the light of the aforesaid material on record, which is not disputed on behalf of the said applicant, this Court is unable to reach such a positive finding and on this ground also, the application deserves to be dismissed.

24. It is to be noted that while considering bail applications, concerning offences under the NDPS Act, this Court cannot be oblivious of the object of the NDPS Act. The whole object of the NDPS Act is to make stringent provisions for controlling the menace of drugs, which is polluting the youth and thereby seeking to destroy the very backbone of the country and its economy. In fact, the Supreme Court, in the case of **Hira Singh and another Vs. Union of India and another** (*supra*), took specific note of the purpose for which the NDPS Act has been enacted and the approach that the Court has to adopt while interpreting the provisions of the said Act. In paragraph 10.5 of the said judgement, the Supreme Court has held as follows:-

> "10.5. The problem of drug addicts is international and the mafia is working throughout the world. It is a crime against the society and it has to be dealt with iron hands. Use of drugs by the young people in India has increased. The drugs are being used for weakening of the nation. During the British regime control was kept on the traffic of dangerous drugs by enforcing the Opium Act, 1857the Opium Act, 1875 and the Dangerous Drugs Act, 1930. However, with the passage of time and the development in the field of illicit drug traffic and during abuse at national and international level, many deficiencies in the existing laws have come to notice. Therefore, in order to remove such deficiencies and difficulties, there was urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances, which led to enactment of the NDPS Act. As observed hereinabove, the Act is a special law and has a laudable purpose to serve and is intended to combat the menace otherwise bent upon destroying the public health and national health. The guilty must be in and the innocent ones must be out. The punishment part in drug trafficking is an important one but its preventive part is more

> important. Therefore, prevention of illicit traffic in the Narcotic Drugs and Psychotropic Substances Act, 1985 came to be introduced. The aim was to prevent illicit traffic rather than punish after the offence was committed. Therefore, the courts will have to safeguard the life and liberty of the innocent persons. Therefore, the provisions of the NDPS Act are required to be interpreted keeping in mind the object and purpose of the NDPS Act; impact on the society as a whole and the Act is required to be interpreted literally and not liberally which may ultimately frustrate the object, purpose and Preamble of the Act. Therefore, the interpretation of the relevant provisions of the statute canvassed on behalf of the accused and the intervener that quantity of neutral substance(s) is not to be taken into consideration and it is only actual content of the weight of the offending drug, which is relevant for the purpose of determining whether it would constitute 'small quantity or commercial quantity', cannot be accepted."

25. In view of the above, the application of applicant / accused No.8 - Haris Faizanullah Khan bearing Bail Application No.332 of 2022 is also dismissed.

26. At the same time, the respondent-NCB is directed to make sure that the trial is completed well within the extended time granted by this Court i.e. on or before May 2025. All necessary steps for expediting the trial shall be taken by the said respondent. The accused persons are also directed to co-operate with the Special Judge (NDPS) Thane so that the trial can be completed within the stipulated period of time.

27. Accordingly, all the three bail applications are dismissed.

(MANISH PITALE, J.)

Minal Parab