

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO.4467 OF 2024

Shiyad A. K.	...Applicant
<i>Versus</i>	
The State of Maharashtra	...Respondent

Mr. Tukaram Shendge, for the Applicant.
Ms. Anuja S. Gotad, APP, for the Respondent.

CORAM: MADHAV J. JAMDAR, J.
DATED : 7th FEBRUARY 2025

PC:-

1. Heard Mr. Tukaram Shendge, learned Counsel appearing for the Applicant and Ms. Anuja Gotad, learned APP appearing for the Respondent-State.

2. This is the second Bail Application filed under Section 439 of the Code of Criminal Procedure, 1973(“**CrPC**”). The first Bail Application bearing Criminal Bail Application No.1983 of 2023 has been allowed to be withdrawn with liberty to file a fresh Bail Application after a period of six months, in case there is no substantial progress in the trial. Pursuant to the said liberty, the present Bail Application has been filed.

3. The relevant details are as follows:-

1.	C. R. No.	101 of 2022
2.	Date of registration of F.I.R.	01/03/2022
3.	Name of Police Station	Ratnagiri City Police Station
4.	Section/s invoked	8(c) and 21(c) of the NDPS Act, 1985
5.	Date of incident	01/03/2022
6.	Date of arrest	01/03/2022

4. It is the submission of Mr. Tukaram Shendge, learned Counsel appearing for the Applicant that the Applicant is incarcerated since 2 years and 11 months. The mandatory requirement of Section 42 and 50 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (“**NDPS Act**”) are not complied with. It is his submission that as per the prosecution case police got information about alleged crime through PSI Manoj Bhosale at 05:00 a.m.. PSI Manoj Bhosale visited the concerned hotel for 10-15 minutes around 04:30 a.m. on receiving the information from the Informant. Written notice is given to only hotel owner and not to the Applicant. The said PSI Manoj Bhosale arranged panch-witnessess and thereafter, Spot Panchnama is carried out, therefore, the raid is planned raid and not a chance recovery. Spot

Panchnama was started at 07:15 a.m., however, surprisingly Narcotic Detection Team left the Police Station for detecting the narcotic substance at 07:09 a.m. even before panchnama started. From this aspect also it is clear that alleged recovery is not chance recovery and hence provisions of NDPS Act ought to have been followed. It is further submitted that the Investigating Officer has taken out 25 grams Methadone (“MD”) from seized muddemal which is not permissible. It is submitted that Inventory Certificate produced is of some other crime i.e. C.R. No.555 of 2021 which is not the present FIR in question. There is variation in weight of contraband already sealed at spot and contraband produced before the Magistrate for Inventory Certificate. Panch witnesses are members of raiding party and not independent witness. Gazetted Officer is member of raiding party and not independent Gazetted Officer, he is not Competent Officer since he cannot be held as an independent officer to ensure search. It is further submitted that it is admitted that MD is recovered in the present offence. There is nothing on record to show that the Applicant has come to Ratnagiri for the purpose of selling the contraband in Ratnagiri. Report under Section 57 of the NDPS Act has not been submitted by the Investigating Officer to his superior. The FIR and statement

of Informant and witness are afterthoughts, concocted and doubtful therefore, information ought to have been taken down into writing in view of Section 42 of the NDPS Act. There are no antecedents against the Applicant. Considering the delay in trial, long incarceration and non-following mandatory provisions of the NDPS Act, the bar under Section 37 of the NDPS Act will not come in way for granting bail to the Applicant.

5. On the other hand, learned APP strongly opposed the Bail Application. She submitted that the Applicant is resident of Kerala and he was found in hotel at Ratnagiri, Maharashtra with contraband MD of 99 grams. The same is recovered from the possession of the present Applicant. She submitted that more than 50 grams of MD is commercial quantity. She further submitted that the trial has considerably progressed and 6 witnesses have already been examined and as per her instructions only 5 more witnesses will be examined. She submitted that the trial is likely to conclude expeditiously. She submitted that as the Applicant was found in the possession of contraband/MD 99 grams, which is commercial quantity, the Applicant is not entitled to be released on bail in view of Section 37 of the NDPS Act.

6. Section 37 of the NDPS Act concerning grant of bail in the NDPS offences 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 3 [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”.

7. Thus, as per Section 37 of the NDPS Act, the following requirements are mandatory 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 this Bail Application, the Respondent – State has filed affidavit opposing the Bail Application and Ms. Anuja Gotad, learned APP appearing for Respondent-State has opposed the Bail Application. Thus, requirement as set out in Clause (i) herein above is satisfied. Thus, now what is required to be seen is whether twin conditions as contained in Clause (ii) noted herein above are fulfilled and effect of the said twin conditions on the entitlement of the Applicant in getting bail.

9. Thus, this Court has to record satisfaction before granting bail to the present Applicant that there are reasonable grounds for holding that the Applicant is not guilty of such offence and he is

not likely to commit any offence while on bail. The Court has to record satisfaction regarding both these twin conditions.

10. As far as the second condition is concerned to the effect that the Applicant is not likely to commit any offence while on bail, it is required to be noted that the Applicant is resident of Kerala and the Applicant was found in the hotel at Ratnagiri, Maharashtra with narcotic substance. Thus, assuming that the satisfaction is recorded in respect of first condition out of twin conditions, in the facts and circumstances, it cannot be said that if the Applicant is released on bail, he is not likely to commit any offence while on bail.

11. As far as first condition out of said twin conditions is concerned, the Court has to record satisfaction that there are reasonable grounds for believing that the Applicant is not guilty of such offence, it is required to be noted that the Applicant who is resident of Kerala was found at Ratnagiri, Maharashtra in hotel. The commercial quantity of contraband was found in his possession.

12. Many contentions which have been raised by the learned Counsel appearing for the Applicant cannot be considered at this stage, as what is required to be seen at this stage is that *prima facie*, the Applicant is involved in the crime. The Court has to record satisfaction that the Applicant is not guilty of such offence. In the facts and circumstances of this case, at this stage, material on record do not permit the Court to record such satisfaction.

13. As far as the contention that the Applicant is incarcerated since long is concerned, it is required to be noted that the Supreme Court in the case of *Vijay Madanlal Chowdhary & Ors. vs. Union of India & Ors.*¹ has considered the said aspect with respect to the offence under the Prevention of Money Laundering Act, 2002 (“PMLA Act”), which is having similar provisions as Section 37 of the NDPS Act. The relevant observations of the Supreme Court in *Vijay Chowdhary* (supra) are as follows:

“412. As a result, we have no hesitation in observing that in whatever form the relief is couched including the nature of proceedings, be it under Section 438 of the 1973 Code or for that matter, by invoking the jurisdiction of the Constitutional Court, the underlying principles and rigors of Section 45 of the 2002 must come into

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play and without exception ought to be reckoned to uphold the objectives of the 2002 Act, which is a special legislation providing for stringent regulatory measures for combating the menace of money-laundering.

413. There is, however, an exception carved out to the strict compliance of the twin conditions in the form of Section 436A of the 1973 Code, which has come into being on 23.6.2006 vide Act 25 of 2005. This, being the subsequent law enacted by the Parliament, must prevail. Section 436A of the 1973 Code reads as under:

“[436A. Maximum period for which an undertrial prisoner can be detained.— Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.-In computing the period of detention under this section for granting bail, the period of

detention passed due to delay in proceeding caused by the accused shall be excluded.]

415. *In Hussainara Khatoon v. Home Secretary, State of Bihar, Patna, this Court stated that the right to speedy trial is one of the facets of Article 21 and recognized the right to speedy trial as a fundamental right. This dictum has been consistently followed by this Court in several cases. The Parliament in its wisdom inserted Section 436A under the 1973 Code recognizing the deteriorating state of undertrial prisoners so as to provide them with a remedy in case of unjustified detention. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, the Court, relying on Hussainara Khatoon, directed the release of prisoners charged under the Narcotic Drugs and Psychotropic Act after completion of one-half of the maximum term prescribed under the Act. The Court issued such direction after taking into account the non obstante provision of Section 37 of the NDPS Act, which imposed the rigors of twin conditions for release on bail. It was observed:*

"15. ...We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh V. State of Punjab. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak, release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As

*we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that **deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21.** Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but **if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. ..."***

*416. The Union of India also recognized the right to speedy trial and access to justice as fundamental right in their written submissions and, thus, submitted that **in a limited situation right of bail can be granted in case of violation of Article 21 of the Constitution.** Further, it is to be noted that **the Section 436A of the 1973 Code was inserted after the enactment of the 2002 Act. Thus, it would not be appropriate to deny the relief of Section 436A of the 1973 Code which is a wholesome provision beneficial to a person accused under the 2002 Act.** However, Section 436A of the 1973 Code, does not provide for an absolute right of bail as in the case of default bail under Section 167 of the 1973 Code. For, in the fact situation of a case, the Court may still deny the relief owing to ground, such as where the trial was delayed at the instance of accused himself.*

*417. Be that as it may, in our opinion, this provision is comparable with the statutory bail provision or, so to say, the default bail, to be granted in terms of section 167 of the 1973 Code consequent to failure period of the investigating agency to file the chargesheet within the statutory and, in the context of the 2002 Act, complaint within the specified period after arrest of the person concerned. In the case of Section 167 of the 1973 Code, an infeasible right is triggered in favour of the accused the moment the investigating agency commits default in filing the chargesheet/complaint within the statutory period. **The provision in the form of Section 436A of the 1973 Code, as has now come into being is in recognition of the constitutional right of the accused regarding speedy trial under Article 21 of the Constitution. For, it is a sanguine hope of every accused, who is in custody in particular, that he/she should be tried expeditiously - so as to uphold the tenets of speedy justice. If the trial cannot proceed even after the accused has undergone one-half of the maximum period of imprisonment provided by law, there is no reason to deny him this lesser relief of considering his prayer for release on bail or bond, as the case may be, with appropriate conditions, including to secure his/her presence during the trial.***

*418. Learned Solicitor General was at pains to persuade us that this view would impact the objectives of the 2002 Act and is in the nature of super imposition of Section 436A of the 1973 Code over Section 45 of the 2002 Act. He has also expressed concern that the same logic may be invoked in respect of other serious offences, including terrorist offences which would be counterproductive. So be it. We are not impressed by this submission. **For, it is the constitutional obligation of the State to ensure that trials are concluded expeditiously and at least within a reasonable time where strict bail provisions apply. If a person is***

detained for a period extending up to one-half of the maximum period of imprisonment specified by law and is still facing trial, it is nothing short of failure of the State in upholding the constitutional rights of the citizens, including person accused of an offence.

419. Section 436A of the 1973 Code, is a wholesome beneficial provision, which is for effectuating the right of speedy trial guaranteed by Article 21 of the Constitution and which merely specifies the outer limits within which the trial is expected to be concluded, failing which, the accused ought not to be detained further. Indeed, Section 436A of the 1973 Code also contemplates that the relief under this provision cannot be granted mechanically. It is still within the discretion of the Court, unlike the default bail under Section 167 of the 1973 Code. Under Section 436A of the 1973 Code, however, the Court is required to consider the relief on case-to-case basis. As the proviso therein itself recognises that, in a given case, the detention can be continued by the Court even longer than one-half of the period, for which, reasons are to be recorded by it in writing and also by imposing such terms and conditions so as to ensure that after release, the accused makes himself/herself available for expeditious completion of the trial.

420. However, that does not mean that the principle enunciated by this Court in Supreme Court Legal Aid Committee Representing Under trial Prisoners, to ameliorate the agony and pain of persons kept in jail for unreasonably long time, even without trial, can be whittled down on such specious plea of the State. If the Parliament/Legislature provides for stringent provision of no bail, unless the stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable

time, at least before the accused undergoes detention for a period extending up to one-half of the maximum period of imprisonment specified for the concerned offence by law. [Be it noted, this provision (Section 436A of the 1973 Code) is not available to accused who is facing trial for offences punishable with death sentence]

421. *In our opinion, therefore, Section 436A needs to be construed as a statutory bail provision and akin to Section 167 of the 1973 Code. Notably, learned Solicitor General has fairly accepted during the arguments and also restated in the written notes that the mandate of Section 167 of the 1973 Code would apply with full force even to cases falling under Section 3 of the 2002 Act, regarding money-laundering offences. On the same logic, we must hold that Section 436A of the 1973 Code could be invoked by accused arrested for offence punishable under the 2002 Act, being a statutory bail."*

(Emphasis added)

14. Thus, what has been held by the Supreme Court in above decision and other decisions can be summarized as follows:

- A)** If the period of deprivation pending trial becomes unduly long, the fundamental right of Accused of the speedy trial and fairness assured by Article 21 would receive a jolt. After the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would

be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters.

- B)** The provision in the form of Section 436A of the CrPC, as has now come into being is in recognition of the constitutional right of the accused regarding speedy trial under Article 21 of the Constitution. For, it is a sanguine hope of every accused, who is in custody in particular, that he/she should be tried expeditiously - so as to uphold the tenets of speedy justice. If the trial cannot proceed even after the accused has undergone one-half of the maximum period of imprisonment provided by law, there is no reason to deny him this lesser relief of considering his prayer for release on bail or bond, as the case may be, with appropriate conditions, including to secure his/her presence during the trial.
- C)** It is the constitutional obligation of the State to ensure that trials are concluded expeditiously and at least within a reasonable time where strict bail provisions apply. If a person is detained for a period extending up to one-half of

the maximum period of imprisonment specified by law and is still facing trial, it is nothing short of failure of the State in upholding the constitutional rights of the citizens, including person accused of an offence.

D) Section 436A of the CrPC, is a wholesome beneficial provision, which is for effectuating the right of speedy trial guaranteed by Article 21 of the Constitution and which merely specifies the outer limits within which the trial is expected to be concluded, failing which, the accused ought not to be detained further. Indeed, Section 436A of the CrPC also contemplates that the relief under this provision cannot be granted mechanically. It is still within the discretion of the Court, unlike the default bail under Section 167 of the CrPC. Under Section 436A of the CrPC, however, the Court is required to consider the relief on case-to-case basis. As the proviso therein itself recognises that, in a given case, the detention can be continued by the Court even longer than one-half of the period, for which, reasons are to be recorded by it in writing and also by imposing such terms and conditions so as to ensure that after release, the accused makes himself/herself available

for expeditious completion of the trial.

- E)** Right to life and personal liberty enshrined under Article 21 of the Constitution of India is overarching and sacrosanct. A constitutional court cannot be restrained from granting bail to an accused on account of restrictive statutory provisions in a penal statute if it finds that the right of the accused-undertrial under Article 21 of the Constitution of India has been infringed. In that event, such statutory restrictions like Section 37 of the NDPS Act would not come in the way.
- F)** The presence of statutory restrictions like Section 37 of the NDPS Act per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already

undergone has exceeded a substantial part of the prescribed sentence.

- G)** If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.
- H)** Notwithstanding the statutory embargo contained in Section 37 of the NDPS Act, the legislative policy against the grant of bail will melt down where there is no likelihood of trial being completed within a reasonable time. The courts would invariably bend towards 'liberty' with a flexible approach towards an undertrial, save and except when the release of such person is likely to shatter societal aspirations, derail the trial or deface the very criminal justice system which is integral to rule of law.

15. It is necessary to consider the present case on the touchstone of above parameters. In the present case, admittedly the maximum punishment is 20 years. The Applicant is incarcerated for two years and 11 months. In any case, the trial has substantially progressed and learned APP submitted that the same will be concluded expeditiously. She submits that 6 witnesses have already been examined and only 5 witnesses will be further examined.

16. Accordingly, no case is made out for granting bail. The Bail Application is disposed of accordingly.

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

[MADHAV J. JAMDAR, J.]

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