HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Criminal Miscellaneous Bail Application No. 14176/2024

Hanumanaram@ Hadmanram S/o Lunaram, Aged About 50 Years, R/o Bhakri, P.S. Lohawat, Dist Phalodi (Raj.). (Presently Lodged In Sub Jail Bilara, Dist., Jodhpur)

----Petitioner

Versus

State Of Rajasthan, Through PP

----Respondent

For Petitioner(s)	:	Mr. Ashok Khilery
For Respondent(s)	:	Mr. N.K. Gurjar, AAG assisted by Mr. Surendra Bishnoi, AGA

HON'BLE MR. JUSTICE FARJAND ALI

Order

09/01/2025

1. The jurisdiction of this Court has been invoked by way of filing an application under Section 439 Cr.P.C. at the instance of accused-petitioner. The requisite details of the matter are tabulated herein below:

S.No.	Particulars of the Case	
1.	FIR Number	368/2023
2.	Concerned Police Station	Bilara
3.	District	Jodhpur Rural
4.	Offences alleged in the FIR	Under Section 8/15 of the NDPS Act and Sections 3/25 & 27 of the Arms Act and Section 307 of IPC
5.	Offences added, if any	--
6.	Date of passing of impugned order	23.10.2024

2. It is contended on behalf of the accused-petitioner that no case for the alleged offences is made out against him and his incarceration is not warranted. There are no factors at play in

the case at hand that may work against grant of bail to the accused-petitioner and he has been made an accused based on conjectures and surmises.

3. Contrary to the submissions of learned counsel for the petitioner, learned Public Prosecutor opposes the bail application and submits that the present case is not fit for enlargement of accused on bail.

4. I have considered the submissions made by both the parties and have perused the material available on record.

5. Upon consideration of the submission that co-accused Shrawan has already been enlarged on bail by this Court vide order dated 08.10.2024 passed in S.B. Criminal Miscellaneous 2nd Bail Application No.10563/2024. For ready reference the relevant part of the said order is reproduced hereinunder:-

> *2. The first bail application being SBCRLMB No.5256/2024 was dismissed as not pressed by this Court vide order dated 14.05.2024 but a liberty was afforded to the petitioner to renew the prayer for bail after recording the statement of Bhanwar Lal, Sub-Inspector. Now, Sub-Inspector Bhanwar Lal has been examined in the trial as P.W. 1. Hence, the instant bail application.*
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> *3. Briefly stated the facts of the case are that on 25.09.2023 the SHO, PS Bilara received a telephonic information from ASI Manphool, CID, CB, Jaipur that huge quantity of poppy husk would be illegally transported in a White Creta Car bearing registration No. RJ45 CP6019 and a White Swift Desire Car bearing registration No.OD10 P3168 coming from Beawar to Jodhpur. On the basis of the said information, the SHO, PS Bilara alongwith his team during nakabandi at about 1:10 p.m. on seeing the police party, the drivers of the*

said Creta Car (Shrawan) and Swift Car along with one other turned down and tried to escape from the spot in high speed. During that course, the accused left their vehicles and run towards the dirt road. At some distance, the SHO Pipar caught one person who disclosed his name as Shrawan, while escaping he received injury on his leg. The other two persons were having 12 bore gun in their hands were also apprehended. They disclosed their names as Hadman Ram and Mahesh. All the accused persons were detained and during search 11 bags of poppy husk weighing 252.300 grams were recovered from Creta Car RJ45 CP6019 and 9 bags of poppy husk and Rs.56,090/- were recovered from the rear seat of Swift Car. After search and seizure, Seizing Officer took samples, marked them and sent the same to the FSL for chemical examination and a case under Section 8/15 of the NDPS Act, Section 3/25 and Section 27 of the Arms Act and Section 307 of the IPC got registered. The accused were arrested.

4. It is contended on behalf of the accused-petitioner that no case for the alleged offences is made out against him and his incarceration is not warranted. There are no factors at play in the case at hand that may work against grant of bail to the accused-petitioner and he has been made an accused based on conjectures and surmises. He further submits that the accused was taken into custody on 25.09.2023 and since then he is behind the bars. Now, more than one year has been elapsed but the trial is not going to be culminated and still it seems that further long time shall be taken in conclusion of the same, thus, he may be enlarged on bail.

5. Contrary to the submissions of learned counsel for the petitioner, learned Public Prosecutor opposes the bail application and submits that the present case is not fit for enlargement of accused on bail.

6. Have heard and considered the submissions made by both the parties, Investigating Officer and have

perused the challan papers and the other material available on record.

7. The specific plea has been taken regarding non-compliance of Section 42 of the NPDS Act which is a mandatory provision in nature. Admittedly the Sub-Inspector Bhanwar Lal conducted search and seizure in the matter was not a posted SHO rather at the relevant point of time three Sub-Inspectors were posted at the Bilara Police Station. In the entire file not a single paper is there in record to establish the fact that Bhanwar Lal was posted as SHO of the Police Station Bilara. The law in this regard is no more res-integra that only those Sub-Inspectors are authorised to conduct search and seizure under the NDPS Act who are posted as SHO of the Police Station. The Standing Order of 1986 is very much clear on this aspect. While dealing with the identical issue, this Court vide order dated 09.11.2023 in the matter of Satya Narayan @ Sattu Vs. State of Rajasthan at the time of deciding the second bail application being SBCRLMB No.3678/2023 has passed the following order:-

1. The jurisdiction of this court has been invoked by way of filing an instant application under Section 439 CrPC at the instance of accused-petitioner. The requisite details of the matter are tabulated herein below:

S.No.	**Particulars of the Case**	
1.	FIR Number	189/2021
2.	Concerned Police Station	Gangrar
3.	District	Chittorgarh
4.	Offences alleged in the FIR	Sections 8/15 of NDPS Act.
5.	Offences added, if any	--
6.	Date of passing of impugned order	13.01.2022

2. The Second bail application of petitioner came to be dismissed as not pressed by a this Court vide order dated 21.12.2022. Now, seizure officer has been examined, hence the present second bail applications are filed.

3. It is contended on behalf of the accused-petitioner that no case for the alleged offences is made out against him and his incarceration is not warranted. There are several flaws and laches in the case of the prosecution. He submits that the seizing officer, while undertaking proceedings for search and seizure, was not posted as S.H.O. of the concerned police station. He vehemently contended that sub-section (1) of Section 42 of NDPS Act enumerates the power of officers specified therein who are duly empowered by the Central Government or the State Government as the case may be and as per the law, Sub Inspector is not empowered to effect search, seizure and arrest under the NDPS Act as the notification dated October 16, 1986 empowers only those Sub Inspectors of Police to exercise the powers under Sec. 42 of NDPS Act who are posted as State House Officers. Learned counsel for the petitioner vehemently submits that the mandatory provisions of NDPS Act have not been complied with, thus, on this count, the recovery of the contraband is vitiated. There are no factors at play in the case at hand that may work against grant of bail to the accused-petitioner and he has been made an accused based on conjectures and surmises.

4. Per contra, learned Public Prosecutor opposes the bail application and submits that the alleged recovered contraband is way above the demarcated commercial quantity, thus, the impediment contained under Section 37 of NDPS Act will be attracted in the factual situation of the present case.

5. Heard and perused the material available on record. It is the case of defence that the Seizing Officer was neither posted as SHO nor any charge of the concerned Police Station was given to him. PW.1 Lakshmilal, the Sub-Inspector who conducted the

search and seizure has been examined in the trial and he has categorically stated in cross-examination that one Shivraj was the SHO posted at the concerned police station. He has further admitted that there is nothing in writing, neither on record nor in the Roznamcha, which can prove the fact that the SHO handed over the charge of the police station to him. Now, this court deems it appropriate to discuss the law prevalent in the matter.

6. The NDPS Act is a statute comprising of stringent provisions which need to be followed in letter and in spirit and non-compliance of any stipulations specially the ones relating to the procedure followed during search, seizure and arrest, cannot be overlooked.

7. While enacting Section 42 of NDPS Act, the legislature put a complete ban on authorities beyond the ones mentioned in the Section to carry out the functions under the Act. The legislature has clearly empowered the persons mentioned therein and it has also been specified through the notification No. F. 1(3) FD/EX/85-I, dated 16-10-86 as to who are authorised to do so.

8. Chapter V of the NDPS Act specifically provides that only the officers mentioned and empowered therein can give an authorisation to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. As per Section 42, only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. The specific rank of the officer and 'reason to believe' are two important requirements that are needed to be complied with necessarily. Firstly, the Magistrate or the Officers

mentioned therein are empowered and secondly, they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the Act. So far as the first requirement is concerned, it can be seen that the legislature intended that only certain Magistrates and certain Officers of higher rank are empowered and can act to effect the arrest or search.

9. The notification No. F. 1(3) FD/EX/85-I, dated 16-10-86, published in Rajasthan Gazette Part IV-C (II) dated 16-10-86 on page 269 reads as:-

S.O. 115.- In exercise of the powers conferred by section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No 61 of 1985) the State Government hereby authorise all Inspectors of Police, and Sub-Inspectors of Police, posted as Station House Officers, to exercise the powers mentioned in Section 42 of the said Act with immediate effect:

Provided that, when power is exercised by Police Officer other than Police Inspector of the are a concerned such officer shall immediately hand over the person arrested and articles seized to the concerned Police Inspectors or S.H.O. of the Police Station concerned.

10. Hon'ble the Supreme Court passed a landmark judgment in the case of ***Roy V.D. Vs. State of Kerala*** *reported in* ***AIR 2001 SC 137*** *wherein, in a similar situation, it was observed as under:-*

16. Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) of the Narcotic Drugs & Psychotropic Substances Act or

make a complaint under Clause (d) of Sub-section (1) of Section 36A of the Narcotic Drugs & Psychotropic Substances Act. If follows that any collection of material, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorised officer under Section 41(2) of the Narcotic Drugs & Psychotropic Substances Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the Narcotic Drugs &Psychotropic Substances Act and use of such a material by the prosecution vitiates the trial.

18. It is well settled that the power under Section 482 of the Cr.P.C. has to be exercised by the High Court, inter alia, to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence bases on such material butal so the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused. In our opinion, exercise of power under Section 482 of the Cr. P.C. to quash proceedings in a case like the one on hand, would indeed secure the ends of justice.

11. In light of the judgments cited above, the notification passed by the State government in this

regard as well as the provision contained in Section 42 of the NDPS Act, this Court is of the view that the non-compliance of mandatory provisions of the NDPS Act has to be dealt with a strict hand and it is imperative upon the courts to be cautious while adjudicating such matters where seizure is concerned under the NDPS Act as no accused should be able to walk scot-free for want of proper implementation and following of the procedure established by law.

12. This Court is cognizant of the provisions contained in Section 37 of the NDPS Act but considering the submissions made by learned counsel for the accused-petitioner regarding non-compliance of statutory procedure, this court is of the opinion that it is a fit case for grant of bail to the accused petitioner. Needless to say, none of the observations made herein under shall affect the rights of either of the parties during trial and this Court refrains from commenting on the niceties of the matter.

13. Accordingly, the instant bail application under Section 439 Cr.P.C. is allowed and it is ordered that the accused-petitioner shall be enlarged on bail provided he furnishes a personal bond in the sum of Rs.50,000/- with two sureties of Rs.25,000/- each to the satisfaction of the learned trial Judge for his appearance before the court concerned on all the dates of hearing as and when called upon to do so.

8. The facts appearing in this case making it abundantly clear that as per the mandate of law the Seizing Officer Sub-Inspector Bhanwar lal was not authorised to conduct search and seizure and as such, any recovery made by an unauthorised officer cannot be countenanced. Where a power is given to do a certain

things in a certain way, the thing must be done in that way or not at all; and that all other methods of performance are necessarily forbidden. Affecting search and seizure by an authorised officer vitiates the recovery of contraband and now a question would arise whether a an accused can be kept detained for an indefinite period for the charge; the foundation of which is laid in direct contrast to the mandatory legal provision. In this case, the trial is going on but only one or two witnesses have been examined. In the case of ***Roy V.D. Vs. State of Kerala reported in AIR 2001 SC 137*** *the Hon'ble Apex Court has even propounded to exercise inherent powers vested in the High Court under Section 482 Cr.P.C. for stifling and quashing of such unathorised recoveries. Here is a case of bail only in which an accused is incarcerated for a long time. On this count alone, when the judicial proceeding can be quashed then in my view, there should be no bar in granting bail to the accused.*

9. In light of the judgments cited above, the notification passed by the State government in this regard as well as the provision contained in Section 42 of the NDPS Act, this Court is of the view that the non-compliance of mandatory provisions of the NDPS Act has to be dealt with a strict hand and it is imperative upon the courts to be cautious while adjudicating such matters where seizure is concerned under the NDPS Act as no accused should be able to walk scot-free for want of proper implementation and following of the procedure established by law.

10. Now coming to the another legal aspect. The samples were taken by the Sub-Inspector Bhanwar Lal at the time of making search and seizure of the contraband and the same samples were sent to the FSL for detection of contraband. Admittedly, no samples were taken in the presence of Magistrate whereas the samples taken at the spot were sent to the FSL. In this view of the matter it can be said that the samples sent to the FSL and the

report of the FSL in this regard is nothing but is a waste paper as propounded in a judgment titled as ***Mohammed Khalid and another Vs. The State of Telangana*** *passed by Hon'ble the Supreme Court in Criminal Appeal No(S). 1610 Of 2023 dated 01.03.2024, it was held that since no proceedings were undertaken for preparing of inventory and drawings of samples as per Section 52-A of NDPS Act, thus, the FSL was considered to be waste and was not considered worthy of being read in evidence on the basis of this inter alia other aspects, Hon'ble the Apex Court acquitted the appellants of all charges. The relevant paragraph of the above judgment is reproduced as under:-*

> *"22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P11) is nothing but a waste paper and cannot be read in evidence."*

11. Perusal of the record revealing that till date out of 40 witnesses only few witnesses could have been examined. A further perusal of the statement of P.W. 1 Bhanwar Lal revealing that the samples were taken at the spot, the same were marked and were sent to the FSL for detection of contraband. Meaning thereby, the samples were not collected in the presence of Magistrate. Not making inventory in accordance with the guidelines issued by the Government vide Standings Order Nos.1/1988 & 1/1989 as well as the mandate of law contained under Section 52-A of the NDPS Act is a serious question which if decided in favour of the accused, then his conviction cannot be made. When there appears reasonable ground to presume that certain

infirmity or legal defect would be fatal to the prosecution still not exercising power of granting bail would mean not honoring the guarantee of the Constitution given to every individual regarding protection of his liberty.

12. In this instant matter too, the alleged contraband was seized on 25.09.2023, and Section 52-A of NDPS Act has not been complied with after the seizure of the contraband and no samples drawn in the presence of magistrate were sent for scientific investigation, thus, the requisite compliance of Section 52-A of NDPS Act has not been made.

13. This Court feels that though there is embargo contained under Section 37 of the NDPS Act regarding grant of bail in mattes pertaining to commercial quantity and some others and true it is that bail can only be granted when the twin conditions mentioned in the provision are satisfied but this Court feels that expressing final opinion to the effect that there are no reasonable ground to believe that the petitioner is not guilty may stifle or abort the judicial proceeding in the midway and then there would remain nothing for the trial Court to proceed further in the matter and as such, the moment, the bail is granted by observing the above in clear and express terms, it would be imperative for the trial Court to either discharge or acquit him. The continuation of the trial whereafter would be a futile exercise at one hand and on the other hand the same would amounts to an abuse of process of law. This Court is of the view that pending investigation or pending trial if a serious legal defect is observed in the case of the prosecution, which may prove fatal to the prosecution at the time of conclusion then instead of giving a definite opinion that he is not guilty of the offence, it would be suffice if the bail application is allowed by giving reasons regarding observance of legal defect only; but not by giving a final finding on that aspect. The view of this Court is based upon the gist of the judgment passed by

Hon'ble the Supreme Court in the matter of ***Mohd Muslim @ Hussain V. State (NCT OF DELHI) Vs. State (NCT of Delhi)*** *passed by Hon'ble the Supreme Court in Special Leave Petition (Crl.) No.915 of 2023 vide order dated 28.03.2023****,*** *wherein while discussing the parameters of Section 37 of the NDPS Act, it was held that the provision cannot be construed in a manner that would render the grant of bail impossible. The accused-appellant in the aforementioned case was directed to be enlarged on bail looking to the long period of incarceration. The paragraphs of* ***Mohd. Muslim @ Hussain (supra****) relevant to the present matter are reproduced below:*

> *"18. The conditions which courts have to be cognizant of are that 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. What is meant by "not guilty" when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 1 Special Leave Petition (CRL.) NO(S). 915 of 2023, decided on 28.03.2023. 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely*

to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws – be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act."

(Emphasis Supplied)

14. At the stage of hearing of a bail plea pending trial, although this Court is not supposed to make any definite opinion or observation with regard to the discrepancy and

legal defect appearing in the case of prosecution as the same may put a serious dent on the State's case yet at the same time, this Court can not shut its eye towards the non-compliance of the mandatory provision, more than two years of incarceration pending trial, failure of compliance with the procedure of sampling and seizure and the serious issue of competence of seizure officer. In the case of ***Mohd. Muslim @ Hussain*** *(Supra) it has been propounded that at the stage of hearing a bail application under Section 439 Cr.P.C., although it is not possible to make a definite opinion that they are not guilty of the alleged crime but for the limited purpose for the justifiable disposal of the bail applications, a tentative opinion can be formed that the material brought on record is not sufficient enough to attract the embargo contained under Section 37 of the NDPS Act. Though specific arguments have not been conveyed but looking to the fact that the accused is in custody, this court feels that the accused are not supposed to establish a case in support of his innocence rather his detention is required to be justified at the instance of the prosecution, therefore, this court went deep into the facts of the case and the manner in which the entire proceedings have been undertaken. If other surrounding factors align in consonance with the statutory stipulations, the personal liberty of an individual can not encroached upon by keeping him behind the bars for an indefinite period of time pending trial. Thus, in the peculiar circumstances of this case, I am of this view that the embargo contained under Section 37 of the NDPS Act would not come into the way of granting bail.*

6. The above mentioned bail has been granted by this Court holding that the sub-inspector Bhanwar Lal was not a posted SHO of Police Station Bhilara and he has admitted this fact in the trial. He candidly admits that there is not a single paper in the case file showing that he was the posted SHO. As per

the notification of 1986, only those sub-inspector who are posted as SHO are empowered to make search and seizure. Since the seizure is made by an unauthorized person so that the entire inquiry vitiates through a plethora of judicial pronouncements by Hon'ble the Supreme Court, ***Vijaysinh Chandubha Jadeja Vs. State of Gujrat*** reported in ***AIR 2011 SC 77*** decided on ***29.10.2010, State of Punjab vs. Balbir Singh*** reported in ***[1994 SCC (3) 299]*** decided on ***01.03.1994*** and ***Boota Singh vs The State Of Haryana*** reported in ***16 April, 2021 AIR 2021 SUPREME COURT 1913.***

7. There is high probability that the trial may take long time to conclude. In light of these facts and circumstances, it is deemed suitable to grant the benefit of bail to the petitioner in the present matter.

8. Accordingly, the instant bail application under Section 439 Cr.P.C. is allowed and it is ordered that the accused-petitioner as named in the cause title shall be enlarged on bail provided he furnishes a personal bond in the sum of Rs.50,000/- with two sureties of Rs.25,000/- each to the satisfaction of the learned trial Judge for his appearance before the court concerned on all the dates of hearing as and when called upon to do so.

(FARJAND ALI),J

98-Hanuman/-