



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO. 54 OF 2023

MUKESH RAJARAM CHAUDHARI ..APPLICANT
VS.
THE STATE OF MAHARASHTRA ..RESPONDENT

Mr. Mithilesh Mishra for the Applicant.
Ms. Rutuja Ambekar, APP for the State.

CORAM : M. S. KARNIK, J.
RESERVED ON : SEPTEMBER 13, 2023
PRONOUNCED ON : SEPTEMBER 27, 2023

JUDGMENT:

1. Heard learned counsel for the applicant and learned APP for the State.
2. This is an application for bail in respect of the offence punishable under Sections 8(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, ('NDPS Act' for short) registered on 17.09.2021 vide C.R. No.83 of 2021 with Anti Narcotic Cell, Ghatkopar Unit, Mumbai.
3. The date of the incident is 17.09.2021. A secret information was received by the investigating agency on 17.09.2021 that around 2:00 p.m. a person carrying

contraband Codeine and Chlorpheniramine mixed with cough syrup will be coming near Ghatkopar Mankhurd link road public toilet for the purpose of selling the contraband. The investigating agency arranged for 2 persons to act as panchas. They left for the place where the accused was supposed to come with the contraband as per the secret information. A person resembling the description that the police had received, arrived near the Ghatkopar Mankhurd link road public toilet. The person was carrying a khaki coloured gunny bag. The officer in charge of the raiding party approached the said person. The said person tried to flee but the police officer succeeded in apprehending him who is the present accused/applicant herein. Upon searching the applicant a sum of Rs.2000/- was recovered. After taking a search of the gunny bag, it revealed that the applicant was carrying with him 200 bottles of cough syrup which came to be recovered. The label pasted over the bottles of the cough syrup mentioned that it is Chlorpheniramine Maleate and Codeine Phosphate Syrup 100 ml. Further reading of the label revealed that every 5

ml of syrup contained 10 milligram of Codeine Phosphate. The applicant could not give any satisfactory answer as to where he got the contraband from. On the basis of these accusations, the offence came to be registered against the applicant.

4. The applicant was produced before the remand court and was initially remanded to police custody. During the police custody, the applicant made a disclosure that he was hiding a huge quantity of cough syrup in the shop that he had taken on rent. The police called 2 panchas and after preparing a memorandum panchanama took the applicant from the lock-up to the place where he kept the hidden contraband. The shop was situated at Barfpada, Virar East, Palghar. The lock was opened by the applicant with a key which was kept nearby. The police found 26 gunny bags lying in the shop which had in all 7700 bottles having the same label as the label on the earlier seized cough syrup bottles.

Submissions of learned counsel for the applicant:-

5. There is no compliance of Section 52A of the NDPS Act. The provisions of the NDPS Act are extremely stringent, coupled with various presumptions raised against the accused and stringent bail conditions, all made the NDPS Act a very stringent measure of legislation, which, the more stringent it is, must contain necessary safeguards against arbitrary search, seizure and arrest, or else it would fall foul of the fundamental rights chapter of the constitution and hence, the same requires a strict adherence to the law and procedures. The so-called technicalities of the NDPS Act are the only safeguards available to anyone prosecuted under the NDPS Act. That, these safeguards are the only remedies available to the innocent person to prove his innocence. The Hon'ble Supreme Court in Union of India Vs. Mohanlal and Anr.¹, had directed all the investigating agencies to draw the representative samples that are supposed to be sent to the Central Forensic Science Laboratory ('CFSL' for short) for determination of the contraband before the Magistrate. The

1 2016 3 SCC 379

same has not been done in the present case. Reliance is placed on paragraph Nos. 15 to 18 in Union of India Vs. Mohanlal and Anr. Pursuant to the directions of the Supreme Court in Union of India Vs. Mohanlal and Anr., the Government after 6 years accepted the mandate of Section 52A of the NDPS Act as interpreted by the Supreme Court. The rules called Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 ('NDPS Rules 2022' for short) were brought into force. Further reliance is placed on the decisions of the Supreme Court in the case of Bothilal Vs. The intelligence Officer, NCB², Simranjit Singh Vs. The State of Punjab³, Mangilal Vs. The State of Madhya Pradesh⁴ to submit that the appellants therein are acquitted due to non-compliance of Section 52A of the NDPS Act.

6. Reliance is then placed on decisions of this Court in Rahmat Yusuf Pathan Vs. The State of Maharashtra⁵ and Karla Pinto Iris Vs. The State of Maharashtra⁶ to submit that

2 2023 SCC Online SC 498

3 Criminal Appeal No. 1443 of 2023

4 Criminal Appeal No. 1651 of 2023

5 Bail Application No. 657 of 2022

6 Bail Application no. 2077 of 2022

following the dicta in Union of India Vs. Mohanlal and Anr., this court enlarged the accused therein on bail for non-compliance with the provisions of Section 52A of the NDPS Act.

7. The Delhi High Court in Kashif Vs. Narcotic Control Bureau⁷ after placing reliance on the standing order 1 of 1988 and in Union of India Vs. Mohanlal and Anr. (supra) had further interpreted the term “forthwith” under section 52A of the NDPS Act as a period within 72 hours. The Delhi High Court enlarged the applicant on bail due to inordinate delay in following the procedure prescribed under section 52A of the NDPS Act. The Supreme Court in Ranjitsing Brahmajeetsing Sharma Vs. State Of Maharashtra & Anr⁸, held that the duty of the court at this stage of bail is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. The drawing of the samples at the time of seizure of the contraband is impermissible and such drawing of samples is in the teeth of section 52A of the NDPS Act.

7 Bail Application No. 253 of 2023 decided on 18.05.2023

8 Appeal (crl.) No. 523 of 2005

Submissions of the learned APP:-

8. Learned APP justified the action of the police in drawing samples at the time of the seizure. The samples were drawn in the presence of the panchas. The samples were immediately sent to the State Forensic Science Laboratory (FSL) for analysis. The examination report of the FSL reveals that the contraband has Codeine and Chlorpheniramine which falls under the NDPS Act. The decisions of the Supreme Court relied upon by the learned counsel for the applicant is not of assistance to the applicant as the same is rendered upon appreciation of evidence adduced during the trial and is not at the stage of bail. At the stage of considering the bail application, the twin conditions prescribed by Section 37 of the NDPS Act will have to be satisfied. There is nothing in the NDPS Act which prohibits the drawing of the samples at the time of the seizure. The varacity of drawing samples post seizure on the spot is to be tested at the stage of trial. The samples were drawn in the presence of the independent panchas and immediately sent to the FSL which confirmed that the

substance was contraband. The reasons for the delay for not forwarding the samples to the FSL in compliance with Section 52A is the subject matter of the trial as the primary evidence in terms of Section 52A in the form of samples is available. The Hon'ble Supreme Court has, in the context of considering bail application, not held that the samples drawn at the time of seizure in the presence of panchas and forwarding the same to the FSL have to be discarded altogether but on merits after considering the evidence adduced which was led found unreliable.

Consideration:-

9. The contraband was seized on 17.09.2021 from the shop pursuant to the disclosure made by the applicant while in police custody. It was a huge commercial quantity. The samples were drawn at the spot in the presence of panchas. Samples were forwarded to the chemical analyser by letter dated 20.09.2021 in the form prescribed. The chemical analysis report was received on 03.03.2022. The inventory application was sent by an empowered officer to the Magistrate in terms of Section 52A of the NDPS Act. The

inventory was conducted by a Magistrate for disposal in accordance with the procedure prescribed in Section 52A of the NDPS Act.

10. The procedure of drawing samples on the spot for being sent to the chemical analysis, according to the learned counsel for the applicant, is impermissible having regard to the mandate of Section 52A of the NDPS Act. It is thus submitted by the learned counsel for the applicant that as the samples are not sent for chemical analysis in terms of Section 52A of the NDPS Act, the materials in the form of sampling done at the spot will have to be completely discarded even at the stage of consideration of the bail application. Such seizure is rendered suspicious which should enure the benefit of the applicant for enlarging him on bail as there is a breach of mandatory compliance of Section 52A of the NDPS Act.

11. So far as this Court is concerned, I find that there is a difference of opinion on the question of giving weightage to the samples drawn at the spot sent for chemical analysis in the context of considering an application for bail. The

learned Judge in Shakil Shafi Memon @ Chikna Vs. State of Maharashtra⁹ took a view that sending the spot samples for chemical analysis without following the mandatory procedure under Section 52A of the NDPS Act creates a doubt about the prosecution case resulting in enlargement of the applicant on bail. However, the same learned Judge in Mohammad Maqbool Abdul Gafar Bhat Vs. State of Maharashtra¹⁰, after referring to his earlier decision in Shakil Shafi Memon @ Chikna took a view that merely because spot samples are taken, it does not violate the provisions of Section 52A. In Karla Pinto Iris Vs. The State of Maharashtra another learned Judge observed that drawing samples at the time of seizure is not in conformity with the law laid down in the case of Union of India Vs. Mohanlal and Anr. (supra).

12. I, therefore, found it appropriate to hear the arguments extensively and give my own reasons while agreeing with the view of this Court in Mohammad Maqbool Abdul Gafar Bhat (supra). In Karla Pinto Iris (supra) no

9 Bail Application No. 1017 of 2022 decided on 28.06.2023

10 Bail Application No. 1804 of 2023 decided on 11.08.2023

ratio is laid down which will become a binding precedent and bind another Single Judge. As is well settled bail order by itself does not create a precedence.

13. I now proceed to analyse the aforesaid decisions of this Court in some detail. In Shivraj Gorakh Satpute Vs. State of Maharashtra¹¹, the learned Single Judge of this Court in, in paragraph No. 10 observed thus:

“10. The records further indicate that the Investigating Agency had taken samples of the contraband without taking recourse to Section 52(A) of the NDPS Act. In the case of ***Simranjit Singh Vs. State of Punjab (Criminal Appeal No.1443 of 2023)*** the Apex Court has observed that drawing samples from all the packets at the time of seizure is not conformity with the law laid down in ***Union of India Vs. Mohanlal and Anr. (2016) 3 SCC 379*** and the same creates a serious doubt about the prosecution case that substance recovered was a contraband.”

14. A reading of Shivraj Gorakh Satpute (supra) in its entirety would reveal that apart from what is said in paragraph No.10 quoted above, this Court observed that the search and seizure is in contravention of the mandatory provision of Section 42 of the NDPS Act which *prima facie*, makes the recovery doubtful. It is in these facts and

11 Bail Application No. 2865 of 2022 decided on 15.09.2023

circumstances the court was of the opinion that a reasonable doubt about the involvement of the applicant in the aforesaid crime is created. Various other factors are taken into consideration while enlarging the applicant on bail.

15. In the case of Abdul Kadir Ghogari Vs. Union of India and Anr.¹², this court in paragraph Nos. 20 and 21 observed thus:

"20. The records reveal that though the contraband was seized on 27.3.2021, an application for drawing sample was made before the Magistrate only on 23.7.2021. The sample was drawn and forwarded to CFSL on the same day i.e. on 23.7.2021. There is inordinate delay in making an application / drawing of sample and certification, and forwarding the sample to the CFSL for analysis. This is not in consonance with the dictum of the Apex Court in ***Union of India vs. Mohanlal (2016) 3 SCC 379***, wherein the Apex Court has held that application for sampling and certification ought to be made without undue delay. Though the Hon'ble Supreme Court has not prescribed a time frame, it has been emphasized that such process has to be completed within reasonable time. In the instant case, the application for sampling and certification was made after four months, which prima facie cannot be considered as reasonable time.

21. The panchnama and the complaint indicate that the total weight of the substance and the

12 Bail Application No. 1646 of 2022 decided on 15.09.2023

plastic bag, seized by the investigating agency, was 55 grams and when weighed separately, the weight of the contraband was 52 grams, and that of the plastic bag was 3 grams. The certificate under Section 52A(2) of the NDPS Act issued by the Metropolitan Magistrate reveals that the weight of the contraband and the plastic pouch was 57.7 grams. Prima facie, there is discrepancy in the weight of the contraband which was seized and the weight of the contraband that was forwarded to the Magistrate under Section 52A of the NDPS Act. The reply filed by the intelligence officer does not offer any explanation for the delay in making an application before the Magistrate for drawing the sample and certification or the discrepancy in the weight of the substance seized from the Applicant. The above discrepancies prima facie raise a reasonable doubt about the involvement of the Applicant in the aforesaid crime. Consequently, the rigour of Section 37 of the NDPS Act would not be applicable. It is stated that the Applicant has no criminal antecedents. He is in custody since last two years and considering the large pendency of the cases and the fact that the charge is not yet framed, the trial is not likely to be concluded within a reasonable time. In such circumstances, prolonged incarceration and deprivation of personal liberty would be violative of the fundamental rights conferred by Article 21 of the Constitution of India. Reliance is placed on the decision in ***Rabi Prakash Vs. The State of Odisha in Special Leave to Appeal (Crl.) No.4169 of 2023*** wherein the Hon'ble Supreme Court has observed that "*The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must verriide the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.*"

16. It is pertinent to note that in the above case of Abdul Kadir Ghogari this court also, *prima facie*, opined that there is no compliance with Section 50(1) of the NDPS Act. Having carefully perused the order, I find that there is nothing to indicate that the samples which were drawn at the spot were sent for chemical analysis. The decision, therefore, is distinguishable on facts.

17. The decision of this Court in Suresh Hetram Vs. The State of Maharashtra¹³ in which the samples were opened before the learned Magistrate were found to be of lesser quantity than the ones taken earlier. Further there was also an issue where the samples having a seal of the magistrate was sent for analysis. This Court found that there was, *prima facie*, doubt about the identity of the samples.

18. In the case of Karla Pinto Iris Vs. The State of Maharashtra (supra) this court while enlarging the applicant on bail in paragraph No. 4 observed thus:

"4. It is not in dispute that the prosecution has not complied with the provisions under Section 52A of the NDPS Act. In the case of ***Simranjitsingh Vs. The State of Punjab, RCR 2022(4) Cri. 462***, the Apex Court set aside conviction for non-compliance of the

13 Bail Application No. 4430 of 2021 decided on 03.02.2022

Section 52A of the NDPS Act. The Apex Court relied upon the decision in **Union of India Vs. Mohanlal & Anr., (2016)3 SCC 379** and reiterated that there is no provision under the NDPS Act that mandates taking of a sample at the time of seizure. It was observed that drawing samples from all packets at the time of seizure is not in conformity with the law laid down in the case of **Mohanlal**. The same creates a serious doubt about the prosecution case that substance recovered was a contraband. In the instant case, the samples were not drawn in presence of the Magistrate and have not been certified by the Magistrate. Non-compliance of the mandate under Section 52A prima facie makes the recovery suspicious. The Applicant is a lady. She is in custody for almost five years. It is stated that charge is not yet framed. In such circumstances, it is evident that there is no possibility of the trial concluding within a reasonable period. In **Rabi Prakash Vs. The State of Odisha in Special Leave to Appeal (Cri.) No. 4169 of 2023**, the Hon'ble Supreme court has observed that "The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act."

(emphasis mine)

19. Learned Single Judge of this Court in **Shakil Shafi Memon @ Chikna Vs. State of Maharashtra (supra)** while enlarging the applicant on bail, in paragraph No. 5 observed thus:

"5. However, in this case, the provisions of Section 52-A of NDPS Act which are mandatory

in nature, they are not followed. So, even though spot samples are taken and even though they are sent to Chemical Analyzer having positive report, there is defect in this procedure as observed in case of ***Union of India V/s.Mohanlal and Anr.***¹. There is also reliance on the judgment recently delivered by the Hon'ble Supreme Court in case of ***Simranjit Singh V/s. State of Punjab***² wherein, it is observed that the act of drawing of samples at the time of seizure is not in conformity with the law laid down by this Court in case of ***Union of India V/s. Mohanlal and Anr. (supra)***, it creates serious doubt about Prosecution case that substance recovery as contraband (Para No.9)."

20. However, in a later decision rendered on 11.08.2023 in Mohammad Maqbool Abdul Gafar Bhat Vs. State of Maharashtra (supra), the same learned Judge who decided Shakil Shafi Memon @ Chikna (supra) has observed thus:

"11. It is true that Hon'ble Supreme Court has reproduced "para 2.2 of the standing order in para no.12". So also it is true that Hon'ble Supreme Court in para no.13 noted down the practice of most of the states not taking the samples at the spot except the directorate of revenue intelligence. At this stage it is submitted that in fact in State of Maharashtra there was a practice of taking spot samples. That is why submission is made while giving predominance to notification dated 16th January, 2015 over standing order, the provisions of sampling as per 1989 standing orders were not superseded.

12. While making observations in para 31.1, the provisions of Section 52A of the NDPS Act are considered. No doubt it is true that Section

52A of the NDPS Act does not contain provision of taking samples at the spot. Those provisions find place only in standing order No.1 of 1989.

13. Submission on behalf of the Applicant is how this court can relook at observations of Hon'ble Supreme Court. Because this Court (Coram : Modak J, himself) has granted benefit earlier. It is true. But it is also true that submissions now made by learned APP were not made earlier. It is also true that observation are on the basis of submissions made and as understood to a particular judge. If new submission about true meaning of the observations of Hon'ble Supreme Court are made and if it appeals to the conscious of the Judge, the earlier view can certainly be changed. Considering the importance, even I have heard Advocate Shri Ayaz Khan.

14. I agree with learned APP that standing order No.1 of 1989 is superseded only for purpose of disposal, as observed in para 29. It can't be said that this standing order is superseded so far as other particulars of standing order are concerned. The presence of Magistrate at the time of following procedure under Section 52A is for purpose of disposal because prior to disposal there has to be certification by the learned Magistrate. So, what I gather is that the standing order contains provisions for taking samples at the time of seizure whereas Section 52A contain provisions for taking samples before learned Magistrate prior to disposal.

New Rules

15. As per the new 2022 Rules, now, different procedure is laid down. After seizure, the contraband needs to be produced before the Magistrate and then samples are to be drawn and then sent to the Chemical Analyser. Contention on behalf of Applicant is earlier lacunae was taken care in the Rules.

16. There was no need to send the samples which were drawn before the Magistrate to the Chemical Analyser, prior to 2022 Rules. Now the rules have cleared the controversy.

17. So, I feel that merely because spot samples are taken, it does not violate the provisions of Section 52A of the NDPS Act for the simple reason that it does not contain provision for taking samples at the spot but it deals with different situation. So, the contention raised in that on behalf of Applicant does not appeal to my conscience.

18. It is true that in case of *Simranjit Singh and Anr. vs. State of Punjab*² Hon'ble Supreme Court has refused to accept the evidence of drawing of samples at spot and conviction was set aside. My attention is also invited to judgment given by High Court of Punjab and Haryana in the same case wherein the samples were taken in the year 2005. That is much earlier to the observations in case of *Mohanlal*. We also are not aware what is the practice prevailing in that State. So also those observations are post trial observations. No doubt earlier this Court has also given benefit of observations in case of *Simranjit Singh* but it is very well true that *Simranjit Singh* is delivered after full fledged trial.

19. No doubt it is true that in case of *Quentin Decon vs. Customs*³ the samples were taken not at the spot but before learned Magistrate in the year 2021. There was certain defect noticed in that procedure so ratio in case of Quentin Decon relied by learned APP is on different aspect. Whereas the Division Bench of Calcutta High Court in case of *Manotosh Ghosh and Ors. vs. The State of West Bengal*⁴ in para 15 observed :

"Procedure engrafted in Section 52A is a post seizure exercise to ensure prompt

destruction of narcotic substance so that seized material may not be misused"

20. In case of State of Punjab vs. Makhan Chand^F, the Hon'ble Supreme Court observed :

"Section 52A does not empower the Central Government to lay down procedure for search of accused. But, deals only with disposal of seized narcotic drugs and psychotropic substances".

21. In that case conviction was challenged for the reason that at the time of trap, standing order was not followed. It was turned down.

22. In view of above discussion, there is no non-compliance of the provisions of Section 52A of the NDPS Act. The objection is unwarranted."

21. Having held that there is no non-compliance of the provisions of Section 52A of the NDPS Act, this Court in Mohammad Maqbool Abdul Gafar Bhat (supra) though had enlarged the applicant on bail but it was on the ground of long incarceration and not for the reason that there is non-compliance of provisions of Section 52A of the NDPS Act.

22. In my opinion, the decision of the Delhi High Court in the case of Kashif (supra) has no application in the present case because the question which fell for determination was "What is a reasonable time to make an application to the

Magistrate under section 52A NDPS and the effect of delay, if any?”, which is not so in the present case.

23. It is pertinent to mention that the seizure effected whereupon the spot samples were taken and sent for chemical analysis was prior to the NDPS Rules 2022 coming into force. A reference to Section 37 of the NDPS Act would be material. Section 37 reads thus:

“37. Offences to be cognizable and non-bailable. --

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 1[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.”

24. In the context of understanding the scope of Section 37 of the NDPS Act, a useful reference may be had to the decision of the Hon'ble Supreme Court in the case of Narcotics Control Bureau Vs. Mohit Aggarwal¹⁴. In paragraph Nos. 11 to 15, Their Lordships observed thus:

“11. It is evident from a plain reading of the non-obstante clause inserted in sub-section (1) and the conditions imposed in sub-section (2) of Section 37 that there are certain restrictions placed on the power of the Court when granting bail to a person accused of having committed an offence under the NDPS Act. Not only are the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973 to be kept in mind, the restrictions placed under clause (b) of sub-section (1) of Section 37 are also to be factored in. The conditions imposed in sub-section (1) of Section 37 is that (i) the Public Prosecutor ought to be given an opportunity to oppose the application moved by an accused person for release and (ii) if such an application is opposed, then the Court must be satisfied that there are reasonable grounds for believing that the person accused is not guilty of such an offence. Additionally, the Court must be satisfied that the accused person is unlikely to commit any offence while on bail.

14 Criminal Appeal Nos. 1001-1002 of 2022

12. The expression "reasonable grounds" has come up for discussion in several rulings of this Court. In **"Collector of Customs, New Delhi v. Ahmadalieva Nodiras"**, a decision rendered by a Three Judges Bench of this Court, it has been held thus :-

"7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence." [emphasis added]

13. The expression "reasonable ground" came up for discussion in **"State of Kerala and others Vs. Rajesh and others"** and this Court has observed as below:

"20. The expression "reasonable

grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for." [emphasis added]

14. To sum up, the expression "reasonable grounds" used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.

15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is

expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.”

25. It is necessary to bear in mind the observations of the Hon’ble Supreme Court in the case of Hirasingh and Anr. Vs. Union of India and Anr.¹⁵ In paragraph 8.5 Their Lordships observed thus:

“8.5. 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, 1857. The 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 NDPS Act. As observed herein above, 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

¹⁵ Criminal Appeal No. 722 of 2017

trafficking is an important one but its preventive part is more important. Therefore, prevention of illicit traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 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 NDPS Act are required to be interpreted keeping in mind the object and purpose of 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."

26. The Hon'ble Supreme Court in Union of India through NCB, Lucknow Vs. Md. Nawaz Khan¹⁶ while testing the decision of the High Court regarding the non-compliance of the procedural requirement of Section 42 of the NDPS Act, in paragraph Nos. 27 and 28, observed thus:

"27 Another submission that has been raised by the counsel for the respondent both before the High Court and this Court is that due to non-compliance of the procedural requirement under Section 42 of the NDPS Act²⁰, the respondent should be granted bail. Section 42

16 Criminal Appeal No. 1043 of 2021

provides that on the receipt of information of the commission of an offence under the statute, the officer will have to write down the information and send it to a superior officer within 72 hours. It has been submitted by the respondent that though the information was received by the Zonal Director, the information was put down in writing by an officer who was a part of the team constituted on the receipt of the information. The written information was then sent to the Zonal Director. This Court **Karnail Singh v. State of Haryana**²¹ held that though the writing down of information on the receipt of it should normally precede the search and seizure by the officer, in exceptional circumstances that warrant immediate and expedient action, the information shall be written down later along with the reason for the delay:

“35. [...] (c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of subsections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or

evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

28 Further, it was held that the issue of whether there was compliance of the procedure laid down under Section 42 of the NDPS Act is a question of fact. The decision in **Karnail Singh** (supra) was recently followed by this Court in **Boota Singh v. State of Haryana**²²."

(emphasis supplied)

27. Bearing in mind these principles I now proceed further. Section 52A of the NDPS Act which is at the heart of the controversy reads thus:

"52A. Disposal of seized narcotic drugs and

psychotropic substances.--

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances] or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

28. Chapter V of the NDPS Act pertains to procedure. Section 51 contained in the said Chapter provides that the provisions of the Code of Criminal Procedure ('Cr.P.C.' for short) shall apply in so far as they are not inconsistent with the provisions of the Act to all the warrants issued and arrests, searches and seizures made under the NDPS Act. Thus, unless there is anything contrary provided in the

NDPS Act, in relation to all the warrants issued and arrests, searches and seizures carried out by the investigating agency during the course of investigation, the provisions of the Cr.P.C. would apply.

29. Section 52 of the NDPS Act pertains to disposal of persons arrested and articles seized. Sub-section (2) of Section 52 provides that every person arrested and articles seized under the warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. Sub-section (3) of Section 52 provides that every person arrested and article seized under sub-section (2) of Sections 41, 42 or 43 or 44 shall be forwarded without unnecessary delay (a) to the officer in-charge of the nearest police station; or (b) to the officer empowered under Section 53. Sub-section (4) of Section 52 which is of importance, provides, that the authority or officer to whom any person or article is forwarded under Sub-section (2) or sub-section (3) shall with all convenient dispatch take such measures as may be necessary for the disposal according to

law of such person or article. It is in this context that Section 52A comes into play. The Section pertains to disposal of seized narcotic drugs and psychotropic substances. Sub-section (1) of Section 52A provides that the Central Government may having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration in respect to narcotic drugs or psychotropic substances specify such substances which shall as soon as may be after the seizure be disposed off by such officer and in such manner as the government may from time to time determine after following the procedure hereafter specified. Sub-section (2) of Section 52 prescribes the procedure for preparation of inventory etc., of the seized substances and enables the competent officer to apply to the Magistrate for the purpose of (a) certifying the correctness of inventory; or (b) taking in presence of the Magistrate photographs of such drugs, substances or conveyances and certifying such photographs as true; or (c) allowing to draw representative samples of such drugs or substances in the presence of

such Magistrate and certifying the correctness of any list of samples so drawn. Sub-section (3) of Section 52A provides that when an application is made under sub-Section (2) the Magistrate shall as soon as may be allow the application. This is significant since this sub-section does not leave any discretionary powers in the Magistrate to grant or not to grant an application so made under sub-Section (2). It only requires the Magistrate to allow the application as soon as possible. Sub-section (4) of Section 52A is of great importance. It provides that notwithstanding anything contained in the Indian Evidence Act or the Cr.P.C., every court trying an offence under the NDPS Act shall treat the inventory, the photographs of narcotic drugs, psychotropic substances or controlled substances or conveyances and any list of samples drawn under sub-Section (2) and certified by the Magistrate as primary evidence in respect of such offence.

30. Perusal of Section 52A would show that the provisions contained therein are in connection with disposal of seized narcotic drugs and psychotropic substances etc. Considering

hazardous nature, vulnerability to theft or substitution and constraint of proper storage space of such substances and seized conveyances, the legislature desires that such substances or conveyances may be disposed off as soon as possible. For doing so, an application is to be made to the Magistrate who has to grant it as provided under sub-Section (3). As per Sub-section (4) of Section 52A when such procedure is followed, notwithstanding anything contained in the Evidence Act or Cr.P.C., the inventory, photographs of the substances and conveyances and any list of samples drawn and certified by the Magistrate would be treated as a primary evidence. What is of significance here is that Sub-section (4) of Section 52A provides for a deeming fiction. Though the seized articles may have been disposed off and destroyed during the trial, so that the prosecution is not hampered for want of production of the original substance so seized, this provision makes a deeming fiction under which as long as the procedure laid down under Section 52A is followed, the inventory, photographs or samples would be treated as primary

evidence.

31. With this background, let me refer to some of the decisions of the Hon'ble Supreme Court which are relevant. In the case of Union of India Vs. Mohanlal (supra), Their Lordships in light of possibility of pilferage of contraband goods and its return into the market for circulation, took help of amicus curiae and examined the issue of proper disposal of the same at considerable length. The prime focus of such exercise being of disposal of such contraband goods seized during the course of investigation. The focus of the entire judgment is on this issue. In paragraph 14, the Supreme Court has taken note of the statutory provisions contained in Section 52A of the NDPS Act. In paragraph 15 to 18, these provisions have been analyzed in detail. In paragraph 19, the Supreme Court has made certain interesting observations in this respect which read as under:

"19. Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and

certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions."

32. The Supreme Court thereafter gave certain directions

contained in paragraph 30 of the judgment. Perusal of the entire judgment would reveal that the focal issue under consideration before the Supreme Court in the said case of Mohanlal (supra) was with respect to proper disposal of contraband goods seized during the course of investigation. It is in this context, the observation made by the Supreme Court that the process of drawing samples has to be in the presence and under supervision of the Magistrate and the entire exercise has to be certified by him to be correct and that the question of drawing samples at the time of seizure which more of them not takes place in absence of the Magistrate does not in above scheme of things arise, have to be viewed.

33. In the case of Bothilal (supra), the Supreme Court was hearing an appeal against conviction under the NDPS Act. In this context, relying on the judgment in the case of Mohanlal (supra), while acquitting the accused, it was observed that drawing samples from packets at the time of seizure is not in conformity with what is held by the court in the case of Mohanlal (supra). It was therefore observed

that this creates a serious doubt about the prosecution case that the substance covered was contraband. Based on these observations and other evaluation of evidence on record, the court was pleased to acquit the accused.

34. Once again, in the case of Simranjit Singh, after referring to the decision in the case of Mohanlal, the Supreme Court observed that the fact that seizure was not in conformity with the law laid down by the court in the said case, creates a serious doubt about the prosecution's case that substance recovered was contraband.

35. In the case of Mangilal (supra), the Supreme Court observed that when there is non compliance of Section 52A of the NDPS Act, where certification of a Magistrate is lacking, any inventory or photographs or list of samples would not constitute primary evidence. Once again, these observations will be in relation to the provisions contained in Sub- section (4) of Section 52A of the NDPS Act. Thereafter, based on the assessment of evidence on record, the court was pleased to acquit the accused person.

36. The question however is would these judgments

completely take away the discretion of the court while considering the question of grant or refusal of bail to an accused under the NDPS Act and the rigors of Section 37 of the NDPS Act be lifted?

37. It is undoubtedly true that when the investigating agency has not followed the procedure under Section 52A of the NDPS Act, the deeming fiction of photographs, samples etc., being treated as primary evidence as provided under Sub-section (4) of Section 52A would not be available. However, the question is, is this the only mode in which the prosecution can establish the charge against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52A and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provided under Section 52A before destroying or disposing

off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52A of the NDPS Act. The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the goods have been destroyed with the permission of the Magistrate. In such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52A of the NDPS Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it. For example, if the process of taking samples may not be in the presence of the Magistrate, but is shown to be properly followed with the aid of the support of the panch witnesses which the court finds believable and reliable, I do not see how the prosecution case would be destroyed totally. In either of the scenarios noted above, it would be eventually a question of what evidence is brought on record and how such evidence is to be evaluated. Both the aspects

are in relation to conduct of trial. At the stage when the court is concerned with the question of granting or refusing bail, this cannot be the sole consideration. It may be one of the relevant considerations but cannot be the sole consideration on the basis of which the moment it is shown that the procedure under Section 52A of the NDPS Act is not followed, the accused automatically becomes entitled to bail as a matter of right. The rigors of Section 37 of the NDPS Act would continue to apply. Only when the bail court is satisfied that reasonable grounds of believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail, the bail would be granted. I, therefore, do not find any merit in the submission of learned counsel for the applicant that in the present case non-compliance of Section 52A would entitle the applicant to bail.

38. Though the learned counsel for the applicant was at pains to point out that there is a breach of Sections 42 and 50 of the NDPS Act, in my opinion, having perused the panchnama, the materials on record, I do not find any merit

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in the submission that there is breach or non-compliance with the provisions of Sections 42 and 50 of the NDPS Act.

39. The application, therefore, is rejected.

(M. S. KARNIK, J.)