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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 14th September, 2023**

+ BAIL APPLN. 841/2021, CRL.M.A. 4101/2021, CRL.M.A. 8306/2021, CRL.M.A. 8307/2021 and CRL.M.A. 17463/2023

MANU KHOSLA

..... Petitioner

Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Amit Chadha, Mr. Tarun Khanna, Mr. S.S. Das, Ms. Swati Chawla, Ms. Aeshana Singh and Ms. Smriti Shrivastava, Advocates.

versus

DIRECTORATE OF REVENUE INTELLIGENCE

..... Respondent

Through: Mr. Satish Aggarwala, Senior Standing Counsel for the DRI alongwith Mr. Gagan Vaswani, Advocate.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA J.

1. The present application under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') has been filed on behalf of the applicant seeking regular bail in case SC No. 7256/2016, arising out of a complaint filed by the Directorate of Revenue Intelligence (hereinafter referred to as 'DRI') for offences



under sections 22(c), 29 and 30 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

2. Briefly stated, the facts relevant for adjudication of the present application are as under:

- i. On 15.04.2013, on the basis of specific information, the officers of the DRI intercepted a green colored three-wheeler Mahindra Champion luggage carrier, having registration number DL 1 LN 7074, near the red light of Sir Ganga Ram Hospital, Shankar Road, New Delhi. The vehicle was occupied by Mr. Babloo Ram and Mr. Anil Kumar, who was running a courier company in the name of M/s Cruze Courier at House No. 374 (basement), Sant Nagar, East of Kailash, New Delhi. A search of the said vehicle resulted in the recovery of a white colored crystalline substance, suspected to be 'Methaqualone', weighing 272.800 kg, packed in 11 white colored duly stitched HDPE bags.
- ii. During further investigation, 33.450 kg of white crystalline substance suspected to be 'Methaqualone' was recovered and seized from the Office premises of Mr. Manu Khosla (the applicant), M/s Magic Vibration India Pvt. Ltd., situated at 611, 6th floor, Pragati Tower, Rajendra Place, New Delhi and 951.350 kg. of white crystalline substance suspected to be 'Methaqualone' was recovered and seized from a white colored Toyota Fortuner car having registration No. DL 13 CA



1800, owned by one Mr. Amit Kumar and his wife, Ms. Nupur Singh.

- iii. It is alleged that in total, 1257.600 kg of the substance has been recovered and seized from the possession of the present applicant and his co-accused, i.e., Anil Kumar and Amit Kumar.
- iv. As per the reports of Central Revenue Control Laboratory, New Delhi and the Central Forensic Science Laboratory, New Delhi, the details of the recoveries effected are as under:
 - 747.400 kg seized from Toyota Fortuner car having registration No. DL 13 CA 1800, owned by Amit Kumar and his wife, Ms. Nupur Singh was confirmed to be 'Ketamine Hydrochloride'.
 - 272.800 kg seized from the three-wheeler luggage carrier, having registration number DL 1 LN 7074, owned by Anil Kumar was confirmed to be 'Ketamine Hydrochloride'.
 - 23.400 kg seized from the premises owned by the applicant was confirmed to be 'Ketamine Hydrochloride'.
 - 150 kg seized from the Toyota Fortuner car having registration No. DL 13 CA 1800, owned by Amit Kumar and his wife, Ms. Nupur Singh was confirmed to be 'Methamphetamine'.



- 53.95 kg seized from the Toyota Fortuner car having registration No. DL 13 CA 1800, owned by Amit Kumar Singh and his wife, Ms. Nupur Singh was confirmed to be 'Phenylpropanolamine'.
 - Report in respect of the remaining 10.05 kg of substance seized from the office premises of the applicant reads as "*General Narcotic Drugs and Psychotropic Substances like Heroin, Morphine, Codeine, Cocaine, Amphetamine, Methamphetamine, MDMA, Methaqualone, Diazepam, Lorazepam, Clonazepam, Ketamine Ephedrine have not been detected*".
- v. As per the case of the prosecution, 'Ketamine Hydrochloride' is a psychotropic substance listed at serial no. 111 read with serial no. 110 A of the Schedule to the NDPS Act. 'Methamphetamine' which is a psychotropic substance listed at serial no. 19 of the Schedule to the NDPS Act, 1985 and serial no. 30 of the Schedule II to the Narcotics Drugs and Psychotropic Substances Rules, 1985. 'Phenylpropanolamine' is a controlled substance under Schedule B & C of the Narcotics Drugs and Psychotropic Substances (Regulation of Controlled Substances) Order, 2013.
- vi. A complaint for commission of offences under sections 22, 27A, 29 and 30 of the NDPS Act was filed by the DRI on 06.09.2014 against the present applicant and co-accused, Anil Kumar and Amit Kumar Singh.



- vii. The learned Special Judge, NDPS, Saket Courts, *vide* order dated 20.07.2013, granted bail to the present applicant and Amit Kumar (co-accused) under Section 167 of the CrPC, on the ground that the contraband recovered was not covered under the NDPS Act. A learned single judge of this Court set aside the aforesaid order *vide* judgment dated 23.09.2014, titled '*Directorate of Revenue Intelligence v. Anil Kumar*' and directed the applicant and Anil Kumar (co-accused) to surrender before the Trial Court.
- viii. The Hon'ble Supreme Court *vide* order dated 15.12.2014, dismissed the SLP filed on behalf of the applicant.
- ix. On 03.05.2016, learned Special Judge framed charges *qua* the applicant and other co-accused persons under Sections 22(c)/29/30 of the NDPS Act.

Submissions on behalf of the Applicant/Manu Khosla

3. Learned Senior Counsel appearing on behalf of the applicant submitted that the case of the prosecution is full of material contradictions. It is submitted that apart from the confessional statements recorded under Section 67 of the NDPS Act, which are inadmissible in view of the pronouncement of Hon'ble Supreme Court in **Tofan Singh v. State of Tamil Nadu 2020 SCC OnLine SC 882**, the other material relied upon by the prosecution is inconclusive and therefore, the benefit of doubt should be given to the applicant at this stage for grant of bail. Learned Senior Counsel submitted that recovery effected from the office premises owned by the present applicant, i.e., M/s Magic Vibration India Pvt. Ltd.,



situated at 611, 6th floor, Pragati Tower, Rajendra Place, New Delhi, is highly doubtful inasmuch as the substance which was recovered at the spot, on testing with the help of the testing kit was found to be 'Methaqualone'. However, the CRCL report with respect to the said recovered substance concluded that the same was 'Ketamine Hydrochloride'. It was submitted that apart from that, the signatories to the *panchnama*, namely Gagan and Shravan were not cited as witnesses by the prosecution and the other two witnesses cited by the prosecution namely, Sameer Sahni and Umesh Rai, were later dropped from the list of witnesses, without giving any explanation. It is further pointed out that the seizing officer, namely Ashok Kumar (PW-6) who was examined in chief, in part, on 05.03.2018, has not come to depose further even after a gap of five years and is presently not traceable. Therefore, it was submitted that except for Ashok Kumar (PW-6), there is no witness to prove the seizure of the contraband from the office premises of the applicant.

4. It was pointed out that it is the case of the prosecution that the Toyota Fortuner car which was searched in pursuance of the statement made by the present applicant under Section 67 of the NDPS Act was found parked unattended behind his residence in a locked condition, covered with a car cover. It is alleged that the said vehicle was towed with the help of a crane and taken to the office of DRI. Thereafter, on opening the same, search of the said vehicle was conducted, resulting in the alleged recovery of the contraband.

5. It was further submitted that co-accused Amit Kumar Singh had registered an FIR dated 18.04.2013, bearing number 210/2013,



under Section 379 of the IPC, P.S. Kotwali, Bulandshahar (Uttar Pradesh) with regard to theft of his white color Toyota Fortuner, car bearing registration number DL 13 CA 1800 from outside LIC office, Thana Kotwali, Bulandshahar (Uttar Pradesh). It was submitted that in view of this coupled with the testimony of the other public witnesses who were alleged to be present at the spot, recovery from the aforesaid Toyota Fortuner becomes highly doubtful.

6. Learned Senior Counsel drew the attention of this Court to the examination of some of the independent witnesses who were cited by the respondent/DRI and pointed out following contradictions in the case of the prosecution which have come on record during the course of examination of the said witnesses:

- i. **Babloo (PW-8):** The present witness was alleged to be sitting with co-accused Anil Kumar in a green color three-wheeler Mahindra Champion luggage carrier and was examined as PW-8. He did not support the case of the prosecution as he did not identify the co-accused Anil Kumar who was present alongwith him in the aforesaid Mahindra Champion vehicle. It is the case of the prosecution that the aforesaid witness was the driver of the Mahindra Champion vehicle from which the first recovery took place in the presence of the said witness.
- ii. **Gulfam Hassan (PW-19):** It is the case of the prosecution that the said witness was working as a driver of a crane at the relevant time whose owner was Khalid Hassan (PW-21). The aforesaid witness stated that on 17.04.2013, the owner of the crane received a call regarding requirement of a crane at Patel



Nagar. The said witness stated that on reaching the spot, he was informed that the vehicle was already taken by some other crane. However, the persons at the spot asked him to accompany them for his payment. He further stated that the vehicle which was brought by the crane was a white colour Toyota Innova. Learned Senior Counsel submitted that the aforesaid testimony of Gulfam Hassan (PW-19) completely vitiates the case of recovery from Toyota Fortuner belonging to Amit Kumar Singh.

- iii. **Khalid Hassan (PW-21):** It is the case of the prosecution that the said witness was the owner of the crane which was being driven by his driver, namely, Gulfam Hassan (PW-19). In his testimony before the learned Special Court, this witness has gone on record to state that the vehicle which was lifted from Patel Nagar and brought to the DRI office was a Toyota Innova car.
- iv. **Dalip Singh (PW-22):** The prosecution had cited this witness who stated that he was called to Patel Nagar area where he found one Toyota Innova car. He further stated that the driver side window pane of the car was broken and he had opened the said car by putting his hand inside the car through the said broken portion of the window pane. He further stated that since central locking of the car was not working, he manually opened the same. He further stated that the said car was towed to the office of DRI in the area of ITO.



7. It was further argued by the learned Senior Counsel that even the case property which was exhibited in the present case was found to be tampered with. Attention of this Court was drawn to the testimony dated 20.01.2017 and 13.02.2017 of Sh. Diwakar Joshi (PW3), wherein the following has been recorded:

“ 20.01.2017

PW3

**Statement of Sh. Diwakar Joshi, SIO, DRI HG, New Delhi
(Recalled for further examination-in-chief in continuation after
05.12.2016)**

On SA

Court Observation:-

Only two seals are visible on one side of the box. Rest of the seals are not visible. The lakh is out on the stitched portion of the cloth from all sides on the cloth. The seal affixed on the upper side are not visible and similarly seals on the other side of the box are not visible. The paper slip underneath the seal is also not available.

(At this stage, Sh. Sunil Kumar, Senior Intelligence Officer, and Sh. Hitesh Chawla, Intelligence Officer, have informed that few months ago, there was theft of psychotropic substance from the boxes kept in New Customs House and a case has been registered in this regard by the Crime Branch, Delhi. One custom officer namely, Puneet has been arrested in the said case. They both have submitted that they have noticed three boxes pertaining to the present case were also found in broken condition and tampered and one they have brought today in the Court and two will be brought to the Court on the next date of hearing. They also informed that there may be some more boxes which might have been tampered during the said incident in New Customs House.)

The two legible lakh seals of Directorate of Revenue Intelligence-10 affixed on the stitching of the cloth in such a manner that the box cannot be opened without disturbing the lakh seals of the DRI and the stitching of the cloth. There is writing on the cloth as “DRI.F.338/XVIII/30/2013 GI, seizure of 951.350 Kgs of Methaqualone by DRI (Hqrs.) on 16/17.04.2013 from a Toyota Fortuner reg. No. DL13CA1800, Diwakar Joshi, S.O. DRI (Hqrs.) New Delhi with black marker. The serial number of the box is also



mentioned as 9/39. The outer cloth having the details mentioned above is Ex. P-66. After removing the DRI seals and outer cloth, one trunk is taken out. It bears no. 9. On opening the trunk **one blue plastic polythene in open condition is found which contains another transparent polythene containing white powdery substance part of which is powdery and part of which is lump shapes. Witness states that this is not case property which was kept in box no. 9/39. He also informs that the case property in box no. 9/39 was kept in HDPE bag and not in blue colour polythene. The trunk is Ex. P-66A.**”

13.02.2017**PW3****Statement of Sh. Diwakar Joshi, SIO, DRI HQ, New Delhi (Recalled for further examination-in-chief in continuation after 20.01.2017).*****On SA***

“At this stage, another sealed box duly wrapped in cloth is produced. There are 14 lakh seals of Directorate of Revenue Intelligence-10 affixed on the stitching of the cloth in such a manner that the box cannot be opened without disturbing the lakh seals of the DRI and the stitching of the cloth. Out of 4 seals, 12 DRI seals are readable and remaining two seals are partly readable. Out of two seals, one seal affixed on the paper slip is readable and intact condition and the other seal] on the paper slip is not available although its impression is there. There is writing on the cloth as “DRI.F.338/XVIII/30/2013 GI, seizure of 951.350 Kgs of Methaqualone by DRI (Hqrs.) on 16/17.04.2013 from a Toyota fortuner reg. N9. DL 13CA 1800, Diwakar Joshi, S.O. DRI (Hqrs.) New Delhi with blue marker. The serial number of the box is also mentioned as 12. The paper slip is removed and is now Ex. P-73, which bears my signature and that of accused Manu Khosla, of Dilip (car mechanic), Khalid, Gulfam Hasan and Shankar (Drivers and co-driver) at point A to F respectively. The outer cloth having the details mentioned above is ex. P-74. After removing the DRI seals and outer cloth, one trunk is taken out. It bears no.12. On opening the trunk one white colour HDPE bag having no. 12 is taken out. Mouth of HDPE bag is stitched. On opening the mouth, one plastic polythene bag containing white crystalline substance is taken out. The witness identifies the said substance alongwith the



plastic bags and HDPE bag. The same are collectively Ex. P-75. The trunk is Ex P-75A.

At this stage, another box of red colour is produced alongwith a white cloth in which it is partly wrapped with another off white colour cloth which has mark of sealing but none of the seal is visible except one seal of DRI. The seal of DRI which is visible is also little bit different shade then the mark of other seals. The witness also states that the box being produced was not sealed in a white cloth pullanda at the time of its sealing.

(At this stage, Sh. Sunil Kumar, Senior Intelligence Officer, and Sh. Hitesh Chawla, Intelligence Officer, have informed that few months ago, there was theft of psychotropic substances from the boxed kept in New Customs House and a case has been registered in this regard by the Crime Branch, Delhi. One custom officer namely, Puneet has been arrested in the said case. They also informed that there are more boxes which have been tampered during the said incident in New Customs House.)

There is writing on the cloth as “DRI.F.338/XVIII/30/2013 GI, seizure of 951.350 Kgs of Methaqualone by DRI (Hqrs.) on 16/17.04.2013 from Toyota Fortuner reg. No. DL13CA1800, Diwakar Joshi, S.O. DRI (Hqrs.) New Delhi with black marker. The serial number of the box is also mentioned as 13/39. The outer cloth having the details mentioned above is Ex. P-76. The box also bears no. 13. On opening the trunk one blue plastic polythene in open condition is found which contains another blue polythene further containing transparent polythene with white powdery substance part of which is powdery and part of which is lump shapes. **Witness states that this is not case property which was kept in box no. 13/39. He also informs that the case property in box no. 13/39 was kept in HDPE bag and not in blue colour polythene. The trunk is Ex. P-76A. Two blue plastic polythene containing white polythene with white powdery substance therein is collectively Ex.P-76B.** “

(emphasis supplied)

8. Learned Senior Counsel further submitted that the present applicant has been released on interim bail on medical grounds and has never misused the liberty granted to him. It was also stated that



the present applicant was granted interim bail on the grounds of his cardiac issues for which surgeries have been performed and six stents have been implanted. It was stated that out of forty-two witnesses cited by the prosecution so far only twenty have been examined. He again drew the attention of the Court to the fact that Ashok Kumar (PW-6), who was the seizing officer of the recovery from the office premises of the present applicant, is not traceable for last five years.

9. It was submitted that the present applicant is not previously involved in any other case of the NDPS Act. As per the nominal roll dated 21.07.2023 received from the Office of the Superintendent of Prison Central Jail No.8/9, Tihar, New Delhi, the present applicant has been in custody for more than 3 years and 10 months.

10. Learned Senior Counsel placed reliance on the following judgments:

- i. Boota Singh & Ors. v. State of Haryana, 2021 SCC OnLine SC 324.
- ii. Thana Singh v. Central Bureau of Narcotics, 2010 SCC OnLine SC 944.
- iii. M. Buhari v. The State of Tamil Nadu, 2010 SCC OnLine Mad 3726.
- iv. Sridhar Punachithaya K v. Intelligence Officer, Directorate of Revenue Intelligence, Bangalore Zonal Unit, Bangalore, 2016 SCC OnLine Kar 8595.
- v. Rajesh Sharma v. Directorate Of Revenue Intelligence, 2018 SCC OnLine Del 12372.



vi. Mohit Aggarwal v. Narcotics Control Bureau, 2021 SCC OnLine Del 1220.

Submissions on behalf of the Respondent/DRI

11. *Per contra*, learned Senior Standing Counsel ('Sr. SC') for the DRI submitted that apart from the recovery of the contraband from the office premises of the present applicant, the recovery from the Toyota Fortuner car was at his instance and therefore, would be recovered under Section 27 of the Indian Evidence Act, 1872. Learned Sr. SC for the DRI submitted that the public witnesses, who have turned hostile, cannot be believed at this stage as they have deposed contrary to the documents signed by them at the spot. It was further pointed out that some of the case property has been tampered with, however, the remaining case property has been produced which has not been tampered with and the same is a subject matter of trial to be determined by the learned Special Court. He further submitted that the conduct of the present applicant will also be relevant for consideration of the present bail application, inasmuch as that after the bail granted to him by the learned Special Judge was cancelled, the applicant did not surrender and absconded. He was declared a proclaimed offender *vide* order dated 26.02.2015. It was further submitted that the FIR registered at the instance of co-accused Amit Kumar Singh with regard to the alleged theft of his Toyota Fortuner is a false defence engineered by the accused persons regarding which appropriate proceedings have been initiated by the DRI before the Hon'ble High Court of Judicature at Allahabad. It was further stated apart from the above, other evidence in form of Call Detail Records



(‘CDR’) has also been relied upon by the prosecution for the present trial.

12. It was submitted that the rigors of Section 37 of the NDPS Act would be applicable in view of the recovery of ‘Ketamine Hydrochloride’ which is psychotropic substance under the Act.

13. In support of his contentions learned Sr. SC placed reliance on the following judgments:

- i. Babua @ Tazmul Hossain v. State Of Orissa, (2001) 2 SCC 566.
- ii. State of Madhya Pradesh v. Kajad, (2001) 7 SCC 673.
- iii. State Of U.P. v. Krishna Gopal & Another, (1988) 4 SCC 302

Rejoinder on behalf of the Applicant/Manu Khosla

14. In rebuttal, it was submitted that after being declared as a proclaimed offender, the applicant had been granted interim bail on various occasions and each time, he surrendered after complying with the conditions of the interim bail. It was further pointed out that the CDR, without any transcription is of no help to the prosecution. It was submitted that there is no CDR connecting the applicant with co-accused Amit Kumar Singh.

Analysis and Findings

15. Heard learned counsel for the parties and perused the record.

16. The case of the prosecution is with respect to three recoveries:

- i. recovery from a green colored three-wheeler Mahindra Champion luggage carrier;



- ii. recovery from the office premises of the present applicant, M/s Magic Vibration India Pvt. Ltd., situated at 611, 6th floor, Pragati Tower, Rajendra Place, New Delhi, and
- iii. recovery from the Toyota Fortuner having registration No. DL 13 CA 1800, owned by one Mr. Amit Kumar (co-accused) and his wife, Ms. Nupur Singh.

17. Learned Senior Counsel for the applicant had submitted that so far as the recovery from the green colored three-wheeler Mahindra Champion luggage carrier is concerned, the only material to connect the present applicant with the same is the statement made by the co-accused Anil Kumar Singh under Section 67 of the NDPS Act which is inadmissible as evidence in view of the judgment of Hon'ble Supreme Court in **Tofan Singh v. State of Tamil Nadu, 2020 SCC OnLine SC 882**. It was also pointed out that the alleged co-passenger in the said vehicle, i.e., Babloo, examined as PW-8, has also not supported the case of the prosecution. As far as recovery from the office premises of the present applicant is concerned, it was stated that out of four independent witnesses, two were never cited and the other two that were cited were dropped by the prosecution and the remaining witness, i.e., the seizing officer Ashok Kumar (PW-6) is not traceable for the last five years. So far as the recovery from Toyota Fortuner is concerned, the independent witnesses examined before the learned Trial Court have not supported the case of the prosecution and have categorically stated that the car which was towed from Patel Nagar and taken to the Office of the DRI was in fact, a Toyota Innova and not a Toyota Fortuner.



18. So far as the fact that the independent witnesses did not support the prosecution case is concerned, it is relevant to take note of the following observations made by the Hon'ble Supreme Court in **Sanjeet Kumar vs. State of Chhatisgarh, 2022 SCC OnLine SC 1117:**

“18. But if the Court has — (i) to completely disregard the lack of corroboration of the testimony of police witnesses by independent witnesses; and (ii) to turn a Nelson's eye to the independent witnesses turning hostile, then the story of the prosecution should be very convincing and the testimony of the official witnesses notably trustworthy. If independent witnesses come up with a story which creates a gaping hole in the prosecution theory, about the very search and seizure, then the case of the prosecution should collapse like a pack of cards. It is no doubt true that corroboration by independent witnesses is not always necessary. But once the prosecution comes up with a story that the search and seizure was conducted in the presence of independent witnesses and they also choose to examine them before Court, then the Court has to see whether the version of the independent witnesses who turned hostile is unbelievable and whether there is a possibility that they have become turncoats.”

19. In the present case, admittedly, public witnesses cited by the prosecution have turned hostile with regard to the identification of the vehicle from which substantial recovery of contraband was made. The said witnesses in their testimonies recorded before the learned Special Court have come up with a totally different story which is in complete contrast to the case of prosecution. The witnesses have been cross-examined by the prosecution and have been confronted with the documents they have signed. The ultimate test of the veracity of the testimony of these witnesses would be determined by the learned



Special Judge but for the purpose of the present bail application, the contradictions in the case of the prosecution cannot be ignored.

20. As pointed out hereinbefore, the recovery from the office premises of the present applicant, recorded as per the *panchnama* dated 16.04.2013 drawn by the Intelligence Officer Sh. Ashok Kumar, DRI (Headquarters), New Delhi, reflects that apart from the present applicant there were five other people who were signatories to the said *panchnama*. Out of the aforesaid persons only one person, i.e., Ashok Kumar (PW-6), i.e., seizing officer, has been partly examined by the prosecution and who is admittedly not been traceable for the last five years. Out of the other four witnesses, two of them were not cited as witnesses and the other two who were cited were dropped by the prosecution.

21. It is an admitted case of the prosecution that some of the case property has been tampered with and whether that would have an effect on the sanctity of the remaining case property would be determined by the learned Trial Court after completion of the evidence in the present case. It is also pertinent to note, that all the contraband at the time of initial drawing of the sample while being tested with the drug testing kit was stated to be 'Methaqualone'. 'Methaqualone' is a psychotropic substance listed at serial no. 20 of the Schedule [in terms of clause (xxiii) of Section 2] of the NDPS Act. However, the CRCL report with regard to same was determined to be 'Ketamine Hydrochloride' which is a psychotropic substance listed at serial no. 111 read with serial no. 110 A of the Schedule to the NDPS Act, 'Methamphetamine' which is a psychotropic



substance listed at serial No. 19 of the Schedule to the NDPS Act, 1985 and serial No.30 of the Schedule II to the NDPS Rules, 1985 and 'Phenylpropanolamine' which is a Controlled Substance under Schedule B and C of the Narcotics Drugs and Psychotropic Substances (Regulation of Controlled Substances) Order, 2013.

22. The cumulative effect of the aforesaid facts and circumstances is relevant for the purpose of deciding the present application for bail in view of Section 37 of the NDPS Act. The Hon'ble Supreme Court, in **Union of India v. Shiv Shankar Kesari, (2007) 7 SCC 798**, while explaining the term 'reasonable ground' used in Section 37(1)(b)(ii) of the NDPS Act, held as under:

“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

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11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”

(emphasis supplied)



More recently, in **Mohd. Muslim alias Hussain v. State (NCT of Delhi), 2023 SCC OnLine SC 352**, the Hon'ble Supreme Court held as under:

“**21.** The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only *prima facie*, based on a *reasonable reading*, which does not call for meticulous examination of the materials collected during investigation (as held in *Union of India v. Rattan Malik*). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. *Satender Kumar Antil* supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”

23. The Hon'ble Supreme Court, in **Union of India v. K.A. Najeed, (2021) 3 SCC 713** observed that if a timely trial is not possible, courts are ordinarily obligated to release the undertrial on bail and statutory restrictions do not exclude the discretion of constitutional courts to grant bail on grounds of violation of fundamental rights enshrined in Part III of the Constitution. It was held as under:

“**15.** This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India* [*Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of*



India, (1994) 6 SCC 731, para 15 : 1995 SCC (Cri) 39] , it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. **However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.**

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17. It is thus clear to us that **the presence of statutory restrictions like Section 43-D(5) of the UAPA 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.** Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the



charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.”

(emphasis supplied)

Further, more recently, *vide* order dated 13.07.2023 passed in **Special Leave to Appeal (Crl.) 4169/2023** titled **Rabi Prakash v. The State of Orissa**, the Hon'ble Supreme Court held that prolonged incarceration of a person overrides the statutory restriction contained in Section 37(1)(b)(ii) of the NDPS Act. It was held as under:

“2. The prosecution case appears to be that the police party while on patrolling duty on 02.10.2019 at about 12.30 p.m. on Nandapur-Semiliguda road MDR-55, spotted one full body twelve wheeler Truck (Eicher) bearing No.EB-13-BD-5753 coming from Nandapur side at a high speed and accordingly they chased and detained the truck at Bodenga Chhak and found three persons boarded in the said truck including the driver. Eventually, 247 kg. Ganja was recovered from the truck. The petitioner was one of the occupants of the truck and was arrested at the spot. He has been in custody for more than three and a half years. There are no criminal antecedents against the petitioner.

3. We are informed that the trial has commenced but only 1 out of the 19 witnesses has been examined. The conclusion of trial will, thus, take some more time.

4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. **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 supplied)



24. As per the nominal roll dated 27.07.2023 received from Superintendent of Prison, Central Jail No.8/9, Tihar, New Delhi, the present applicant has been in custody for 3 years and 10 months. Out of the forty-two witnesses cited by the prosecution, so far twenty have been examined. Sh. Ashok Kumar (PW-6), who was the seizing officer of the recovery from the office premises of the present applicant, is not traceable for last five years. The applicant has been released on interim bail by the order of this Court on various occasions and has not misused the liberty granted to him and has duly surrendered in time.

25. In totality of the facts and circumstances of the case, the application is allowed.

26. The applicant is admitted to bail upon his furnishing a bail bond in the sum of Rs. 1,00,000/- alongwith two sureties of like amount to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions:

- i. The memo of parties shows that the applicant is residing at 5/11, Second Floor, East Patel Nagar, Delhi. In case of any change of address, the applicant is directed to inform the same to the learned Trial Court and the Investigating Officer.
- ii. The applicant shall not leave the NCT of Delhi without the prior permission of the learned Trial Court.
- iii. The applicant shall report shall report to the office of DRI twice in a week, i.e., on every Wednesday and Friday at 10:30



AM and the concerned officer is directed to release him by 11:00 AM after recording his presence and completion of all the necessary formalities.

- iv. The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
 - v. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witnesses in any manner.
 - vi. The applicant shall join the investigation, as and when required by the Investigating Officer.
 - vii. In case it is established that the applicant tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.
- 27.** The application stands disposed of along with all the pending application(s), if any.
- 28.** Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case.
- 29.** Let a copy of this judgment be communicated to the concerned Jail Superintendent.
- 30.** Judgment be uploaded on the website of this Court, *forthwith*.

AMIT SHARMA
JUDGE

SEPTEMBER 14, 2023/sn/nk