

**IN THE HIGH COURT OF MANIPUR
AT IMPHAL**

BAIL APPLICATION No. 12 of 2024

Harshal Desai aged about 55 years, S/o Praful Desai
resident of A-801, Suncity Apartment, Near Bhulka
Bhavan/Surya flats, Adajan, Surat, Gujarat – 395001.

.... Petitioner

- Versus -

The Narcotics Control Bureau (NCB) Imphal through its
Intelligence Officer, CPWD Quarters, Changangei,
Kongba Uchekon, Imphal West, Manipur – 795008.

.... Respondent

BEFORE
HON'BLE MRS. JUSTICE GOLMEI GAIPHULSHILLU

For the petitioner : Mr. Osbert Khaling, Advocate
For the respondents: Mr. W. Darakishwor, Sr. PCCG
Date of hearing : 22.08.2024
Date of judgment &
order : **13.12.2024**

JUDGEMENT & ORDER
(CAV)

[1] Heard Mr. Osbert Khaling, learned counsel appearing for the petitioner and Mr. W. Darakishwor, learned senior PCCG appearing for the respondent.

[2] The present application has been filed on behalf of Harshal Desai under Section 439 of the Cr.P.C. 1973 with the following prayers:

- (i) To issue notice to the respondent.
- (ii) To grant regular bail u/s 439 Cr.P.C., 1973 to release the petitioner namely, Harshal Desai in connection with NCB Crime No. 02/NCB/Imp/2023, dated 03.03.2023 U/s 8© & 9A read with Sec. 21©, 25A, 25 & 29 of the ND & PS Act, 1985, and Additional Complaint dated 03.10.2023, U/s 9A, 25A, 26 and 29 of the ND & PS Act.
- (iii) Pass any order/direction which the Hon'ble Court deems fit and proper in the facts and circumstances of the case as to meet the end of justice.

[3] Brief facts of the case are that upon receiving secret information on 03.03.2023, the Superintendent of NCB raid the house of Jangminthang Guite, a resident of Moreh, Tengnoupal, 533 numbers of plastic packets of Pseudoephedrine tablets labelled with Cetrixine Hydrochloride Tablets 10 Mg Levocet manufactured by Sunview Biotech, Gandhinagar were found from the kitchen of the house. Since the said

Jangminthang Guite was not present in the house at the time, his mother namely, Mrs. Nemkhohat Guite was arrested.

In the statement of Nemkhohat Guite, the contraband was received from one Sultani and her husband Abdul Wakil of Delhi. Further, in the statement of Abdul Wakil, he obtained the said contraband from Ahmedabad based firm namely, M/s Recover Healthcare located at Sarkhej, Ahmedabad, Gujarat on 31.01.2023.

[4] Upon being conducted the M/s Recover Healthcare premises, the NCB arrested 3 (three) persons namely, Mr. Nitin Panchal, Mr. Anil Nayaka and Bhadresh Patel who was the owner of M/s Recover Healthcare and other 2 (two) employees of the firm.

In the statements of Mr. Nitin Panchal, Mr. Anil Nayaka and Bhadresh Patel, on 19.01.2023 the said contraband was sent by Ardor Drugs Pvt. Ltd., village Songadh, District Tapi along with goods, official and e-way bills issued by Ardor Drugs Pvt. Ltd. showing Admos-SR tablets.

Further, in the statement of Bhadresh Patel, Hetal Shah rejected the goods received from Ardor Drugs Pvt. Ltd., to whom the same were tried to sell out. Thereafter, Bhadresh Patel worked with Abdul Wakil for the same labelling with Levocet in lieu of any Pseudoephedrine content tablets for free transit. For the said deal of 15 lakhs Pseudoephedrine tablets, Abdul Wakil made payment of Rs. 11.68 lakh in the bank account of M/s Recover Healthcare with Bank of Baroda and Bhadresh Patel paid Rs. 5 lakhs to Ardor Drugs Pvt. Ltd. in the account of Bank of India. Further, transportation of the said goods was made from Delhi to Imphal. Part of

the goods was exported to Myanmar and the remaining to Moreh from where the same was seized by NCB, Imphal Manipur.

[5] On many occasions, Harshal Desai who is the managing director of Ardor Drugs Pvt. Ltd. issued bogus invoices to M/s Recover Healthcare and Bhadresh Patel, owner of the M/s Recover Healthcare got commission upon such invoices without actual supply of goods. Bhadresh Patel has been known to Abdul Wakil and they have done similar deal successfully long time back. In connection with the alleged offence, Harshal Desai along with its employee Mehul Desai were arrested by NCB, Imphal, Manipur and presently in the judicial custody at Manipur Central Jail, Sajiwa.

[6] According to the petitioner, on 13.08.2023, the petitioner/accused and another accused, Mehul Desai made a voluntary statement under Section 67 of the NDPS and on the same day, the petitioner has already retracted his so-called statement by letter of retraction dated 13.08.2023 which has already been submitted on record of Special Judge (NDPS), Manipur.

On 14.08.2023 the petitioner filed a remand objection being registered as Cril. Misc. (B) No. 173 of 2023 before the Ld. Special Judge (NDPS), Manipur for releasing the accused on bail; however the case was rejected on the same day. Even though another remain objection was filed on 16.10.2023 being registered as Cril. Misc(B) No. 249 of 2023 before the same Court, the same was also rejected vide order dated 30.11.2023. Further, a bail application being Bail Appln. No. 7 of 2024 was filed before this High Court, but the same was withdrawn by the previous advocate on

05.02.2024 without entering into merit with liberty to file a fresh. Therefore, the petitioner/accused filed the present application on the following grounds:

- (i) The so-called purported confessional statement of the petitioner under Section 67 of NDPS Act is not the voluntary statement. The signature obtained upon the confessional statement has been taken by coercion and under duress and the same is given involuntarily and without the free will of the applicant who has been made to testify against his own self which is against the provisions of the law and barred by Section 25 and 26 of the Indian Evidence Act.
- (ii) All the statements given before the Investigating Officer during their custody are not admissible in evidence in view of clear provision of law under Section 25 and 26 of the Indian Evidence Act as well as law laid down by the Hon'ble Apex Court in the reportable judgment delivered in Criminal Appeal No. 152 of 2023 [Tofan Singh V. State of Tamil Nadu] and judgment of Hon'ble Apex Court reported in 1984 (1) SC 284. Even otherwise the statements of the co-accused and the present applicant do not amount to statements u/s 67 of NDPS Act.

- (iii) Except the so-called confessional statement, there is no material against the present applicant who has already retracted his so-called statement by letter of retraction dated 13.08.2023 which has already been submitted on record of Trial Court.
- (iv) In the godown of M/s Recover Healthcare, there were many other goods procured from other various parties.
- (v) The present applicant or any person from the Ardor Drugs Pvt. Ltd. were not in contact with any drug peddler or any other person namely, Abdul Wakil and has never communicated or even seen Mr. Abdul Wakil who is known to Bhadresh Patel from M/s Recover Healthcare.
- (vi) The present applicant nowhere attributed any role in the alleged transaction using false invoices as narrated by the prosecution case itself.
- (vii) According to Bhadresh Patel, this was not the first transaction. Not only that, they were in contact with each other through Trade India, a B2B business platform for a long time.
- (viii) The Call Detail Reports collected by the Investigating Agency reveals that the present applicant has neither talked with Abdul Wakil at any point of time

till today. There is nothing wrong or offensive in the certain periodical telephonic contact of the applicant with Bhadresh Patel, Mehul Desai. It is not even the case of prosecution that the applicant was having any contact with Jangminthang Guite and his wife Sultani.

- (ix) Prima facie cases can be made out only on the basis of the material which is legally admissible in evidence. Inadmissible and irrelevant material cannot be the basis of the prima facie case in criminal jurisprudence.
- (x) The Ld. Special Judge failed to deal with or even consider the applicant's written argument submitted in support of Bail Application being Cril. Misc.(B) No. 249 of 2023.
- (xi) The license of the Ardor Drug Pvt. Ltd. is still in existence, which has never been revoked or cancelled since the company has never breached any conditions mentioned in the license.
- (xii) The seized substances are neither the Narcotic nor Psychotropic substances but the same is a simple controlled substance and not governed by ND & PS Act and therefore, no commercial quantity or

otherwise is prescribed for such controlled substance.

- (xiii) Bar under Section 37 of the ND & PS Act would not be applicable in the present case and the same is only applicable to cases under provisions of Section 19, 24 and 27A.
- (xiv) Even Sections 9A, 25A, 26 and 29 of the ND & PS Act are also not applicable on prima facie case itself as there is no violation of license condition and there has been no complaint or even inquiry from the Tax Department. Furthermore, all the accounts and GST returns are tallied.
- (xv) It is well settled principle, that the bar under Section 37 of the NDPS Act would cease to exist and bail can be granted even if the quantity involve dis commercial quantity, if the Court is satisfied that prima facie no offence is made out against the accused after perusing the materials on record.
- (xvi) The applicant has in fact no criminal antecedents at all, however the applicant was implicated in false case of NDPS at Surat, Gujarat by DRI, wherein the applicant was released on bail by High Court of Gujarat. The order remained confirmed by the

Hon'ble Supreme Court of India since the SLP by DRI has been rejected by Apex Court.

- (xvii) The presence of the applicant can be secured by imposing suitable conditions upon him and for that purpose, his jail custody is not required. It is a settled principle of law that "bail is a rule ad jail is an exception". There is a big distinction between pre-trial custody and post trial custody.
- (xviii) The trial is likely to take a long time and keeping the applicant behind the bar for an uncertain long period would amount to pre-trial punishment to him which directly violates his fundamental right enshrined under Article 21 of the Constitution of India.

[7] Mr. Osbert Khaling, learned counsel appearing for the petitioner further submits that the petitioner was arrested on 05.08.2023 and first remanded to judicial custody on 09.08.2023 in connection with NCB Crime No. 02/NCB/Imp/2023, dated 03.03.2023 U/s 8(c) & 9A to be read with 21(c), 25(A), 25 & 29 of the ND & PS Act, 1985 and till dater the accused has been languishing at Manipur Central Jail, Sajiwa for nearly 14 months. When no prima facie case is made out, the accused must be released on bail, but, even if prima facie case is made out, the accused deserves to be enlarged on bail if his presence in the trial can be secured by imposing necessary conditions. Further, there is undue delay in trial and

till date no framing of charges has been done after a span of 11 months after having been filed the chargesheet.

After arrest, a person cannot be made a witness against himself as the same has been barred under Article 30(3) of the Constitution of India. Even otherwise, the other co-accused persons have already retracted their respective statements. The entire case of the prosecution against the applicant is fully based on the statement of co-accused Bhadresh Patel and confessional statement of applicant himself, while he was in custody. Both of these statements are not admissible in evidence and there is no admissible material available against the applicant. The present petitioner has been unnecessarily harassed by the respondent as to the fact that even after chargesheet, the petitioner was detained under PIT NDPS, just to keep him in jail even if bail is granted but the said detention was set aside by this High Court on 26.07.2024.

[8] Mr. W. Darakishwor, learned senior PCCG appearing for the respondents submits that the present petitioner (Harshal Desai) has masterminded the entire modus operandi of this illegal trade business by performing himself as the owner/director of M/S Ardor Drug Pvt. Ltd, Ahmedabad, Gujarat. The seized Pseudoephedrine tablets fake labelled as "CETRIZINE HYDROCHLORIDE TABLETS 10 MG LEVOCET" weighing 110.5kg was brought from Ahmedabad to Moreh via Delhi during the month of February 2023 in violation of the existing laws in force under the mastermind of the present petitioner, accused Harshal Desai, Bradesh Patel in conspiracy with the other co-accused. The accused Harshal Desai is the

main kingpin behind this inter-state trafficking of pseudoephedrine tablets from Gujarat to Myanmar, he was the main supplier who was directly supplying the drugs to Myanmar through his associates- Mehul Desai, Bradesh Patel, Abdul Wakil and other co- accused after misusing the unique registration number allotted to its company Ardor Drugs Pvt. Ltd., in lure of earning more money he diverted Pseudoephedrine to illicit channel.

The accused Harshal Desai is involved in the connivance with Mehul Desai and Bradesh Patel for generating bogus bill of various pseudoephedrine tablets. For such prior offences they had already been arrested by the Directorate of Revenue Intelligence, Surat under Crime No. 1 of 2020 and they were on bail during the execution of arrest of warrant issued by the Special Judge, ND & PS, Manipur.

It is also clear from the statement of one tempo driver as well as from the statement of Mehul Desai that under the instruction of Harshal Desai and Bradesh Patel 26 carton boxes were delivered from the Ardor Drugs Pvt. Ltd., Songadh-Ukai Road, Tapi to M/s Recover Healthcare, Sarkhej, Ahmedabad. There has been similar kind of seizure of 13 Lakh Pseudoephedrine tablets affected in Sagaing Region of Myanmar in August 2020. Again 39 lakhs of pseudoephedrine tablets in the brand Colzen containing Pseudoephedrine were seized in Champai, Mizoram in March, 2023.

The seized Pseudoephedrine tablets is not only controlled medicine, but it is the main raw material for processing of Methamphetamine (ATS) - a banned drug in neighbouring country

Myanmar. And as said earlier also, it is a cause of concern for National Security. The seized 533 packets in the present case are the part of 1500 packets of Pseudoephedrine tablets that was manufactured by Ardor Drugs Pvt. Ltd., Songadh, Tapi. The rest 967 packets got succeeded to go through Moreh border to Myanmar. Thus, this case is also having international linkage.

The present applicant is the main kingpin who has diverted the huge quantity of Pseudoephedrine tablets into illegal channel which has somehow crossed Myanmar border either from Mizoram side or Manipur side. The accused Harshal Desai has criminal antecedents and he is on bail in NDPS case No. 48/2020 registered at Principal District and Session Court, Surat, Gujarat.

This is the crime committed by the petitioner while being released on bail in connection with NDPS case no. 48/2020 registered at Principal District and Session Court, Surat, Gujarat which was initiated by DRI, Surat.

There is still various new aspects which are yet to be explored to ascertain the further linkage or the source of the seized 110.5 kg of Pseudoephedrine tablets, which will not be possible if the accused is granted bail at this juncture. During the course of investigation, house search at the residence of Nitin Panchal (one of the accused in the case from Gujarat) was conducted by NCB and recover some documents of M/s Elite medical store, Aizawl which surfaced in the instant case. Follow up was conducted at M/s Elite Medical Store, Aizawl, Mizoram by team NCB, Guwahati on

dated 03/11/2023 and statement of the proprietor of M/s Elite store recorded. Accordingly, letter vide NCB 02/NCB/Imp/2023 dated 03.11.2023 to the State Drug Controller, Mizoram, Aizawl was requested to enquire and take necessary action as per D&C act and other relevant laws against diversion of pseudoephedrine tablets. Directorate of Health Services-Food & Drugs Administration wing- Mizoram vide order dated 21st Feb, 2024 cancelled the Drug License of Elite Medical store.

The enquiry was conducted at NCB, Ahmedabad on 12.12.2023 regarding details of URN issued to M/s Ardor Drug Pvt. Ltd. Accordingly, letter issued to ZD, Ahmedabad on dated 19.12.2023 seeking details on the URN issued by NCB, Ahmedabad. Further, letter was also issued to the Zonal Director, NCB, Ahmedabad Zonal Unit on 15.03.2024 with a request to cancel the URN of M/s Ardor Drug Pvt Ltd issued by NCB Ahmedabad Zonal Unit or any other URN issued to the accused. Previously, NCB, Ahmedabad informed that proposal for cancellation of URN of M/s Ardor Drug Pvt Ltd in 2021 was sent to concerned DDG(R) for violation of the provision of RCS order 2013 as the company premises was raided by DRI, Surat, July 2020 and mismatch in quantities of Ephedrine and Pseudoephedrine found.

The statements of 6 (six) employees of M/s Ardor Drug Pvt. Ltd. was recorded at NCB, Ahmedabad on 12.12.2023 to 14.12.2023, all the 6(six) employees have stated that details of record of procurement / production/sales/marketing/transportatio of pseudoephedrine/ephedrine

are maintained and controlled by Harshal & Mehul Desai. All bills/invoices are generated by Harshal and Mehul which clearly show that the employees are made to work as per the instruction of Harshal and Mehul Desai.

Further investigation and financial investigation is going on to trace and break the chain of illegal trade considering the gravity of the offense committed by the petitioner which are serious in nature. Therefore, considering the key role being played by the accused in the instant case, mere long incarceration of an accused in judicial custody should not be a ground to release the accused on bail as it will frustrate the whole objective of stringent law laid down by the parliament to combat illegal trafficking of drugs and will perpetuate to further crime, the same principle has been laid in a plethora of cases.

The present petitioner/accused, Harshal Desai has admitted in his statement during investigation that he used to generate tax invoice in the name of Recover Healthcare but the products mentioned in the tax invoice were supplied to some other parties. He repeatedly used to generate false bills with the name of some other products for the supply of pseudoephedrine-based tablet to Bradesh Patel to sell the said Pseudoephedrine tablets. For the said purpose he paid 10 lakhs as commission to Bradesh Patel which is corroborated with the bank account statement.

[9] Furthermore, Mr. W. Darakishwor, learned senior PCCG appearing for the respondent contended that the petitioner/accused Harshal Desai has criminal antecedent and he is on bail in ND & PS Case

No. 48 of 2020 registered at Principal District and Session Court, Surat, Gujarat. While the petitioner was on bail, he has committed the present offence which was registered under NCB Crime No. 02/NCB/Imp/2023 U/s 8(c) & 9A R/w S. 21(c), 25A, 25 & 29 of ND & PS Act by the NCB, Division Unit Imphal, Manipur. Because of being an antecedent criminal, the petitioner/accused was detained under PIT, NDPS Act by issuing a detention order dated 28.02.2024 through the Joint Secretary, Ministry of Finance and the said detention order was confirmed from the Advisory Board.

The offences under the ND & PS Act are considered non-bailable offences due to the serious nature of crime. Therefore, granting bail under these sections is very complex and often depends on the specific circumstances of the case.

In this regard, the learned senior PCCG appearing for the respondent relied upon the following judgments:

W.P.(Cril) No. 11 of 2024 passed by the Division Bench of the High Court of Manipur dated 26.07.2024 –

"[4] Mr. PN Lakhani, learned counsel appearing for the petitioner raised only one ground in assailing the impugned detention orders. The learned counsel submitted that the detaining authority has knowledge that the petitioner was in judicial custody in connection with a criminal case involving seizure of a commercial quantity of contraband drugs, however, while passing the impugned detention order, nothing has been mentioned or indicated in the said detention order as well as in the grounds of detention that the petitioner was likely to be released on bail. It has been submitted that there was no cogent material before the detaining authority to arrive at its subjective satisfaction that there was/is a real possibility of the petitioner being released on bail, the face of the provisions of Section 37 of ND&PS Act, 1985. The learned strenuously submitted that there was total non-appliance of mind on the part of the detaining authority and the impugned detention order had been passed in the mechanical manner and as such, the same is liable to be quashed and set aside.

[7] *In the present case, the petitioner was already arrested and kept in judicial custody in connection with the seizure of a commercial quantity of narcotic drugs and therefore, Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 would have application and grant of bail would be subject to the stringent conditions provided thereunder. Nothing is mentioned in the impugned detention order that the detaining authority has arrived at his subjective satisfaction that the petitioner is likely to be released on bail. Only in the grounds of detention, the detaining authority merely referred to the fact that a bail application had been filed without deciding whether there was a likelihood of the petitioner being released on bail, notwithstanding the applicability of section 37 of the ND&PS Act and passed the impugned detention order. Accordingly, we are of the considered view that the detaining authority passed the impugned detention order without application of mind and in a mechanical manner and on this ground alone, the impugned detention orders are liable to be quashed and set aside."*

PR Despande V. Maruti Balaram Haibatti [(1998) 6 SCC

507] -

[5] *Relying on those decisions Agrawal, J speaking for the two-judge bench in RN Gosain v Yashpal Dhir has observed thus: (SCC Ppp. 687-88 para 10)*

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantages."

Asante Pinket Owusu V. Narcotics Control Bureau [(1994)

6 SCC 731] -

3. *At the outset, learned counsel appearing on behalf of the applicant submitted that rigors of Section 37 of the NDPS Act will not apply to the present case, since the recovery is that of a controlled substance.*

4. *The learned counsel submitted that the complaint has been filed and charges have been framed by the learned Trial Court, and till date only three witnesses have been examined. So far as, material witnesses are concerned, none have been examined till date. He stated that the way and the manner in which the trial is proceeding it is likely to take substantial time.*

5. *The learned counsel submitted that the applicant is in incarceration since the date of arrest, i.e., 05.11.2018, which is more than five years.*

20. It is also crucial to note that maximum punishment, without any minimum, provided for in Section 25A of the NDPS Act is imprisonment for a term which may extend to 10 years with fine which may extend to 1,00,000/-.

21. The Hon'ble Supreme Court, while taking note of the delay in disposal of cases under the NDPS Act, had issued certain directions, subject to general conditions, in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India: (1994) 6 SCC 731 which are reproduced as under:

"15.....

(i) Where the under trial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an under trial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the under trial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an under trial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs. 50,000 with two sureties for like amount.

(iii) Where the under trial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an under trial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an under trial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order."

22. Section 436A of the CrPC provides that if an accused has undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence under

that law, he shall be released by the Court on his personal bond with or without sureties. Section 436A of the CrPC reads as follows:

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

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties: Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under the law.

Explanation.--In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding cause by the accused shall be excluded.]"

23. *Undisputedly, the applicant in the present case has undergone detention for a period in excess of one-half of the maximum period of imprisonment specified for the offence under Section 25A of the NDPS Act."*

Union of India V. Prateek Shukla [(2021) 5 SCC 430] -

"4. It has been alleged that the disclosure revealed that a huge quantity of the controlled substance, acetic anhydride, was purchased and diverted to a godown situated at Village Karheda, Ghaziabad. During the search and seizure of the premises, a quantity of 9650 kg of acetic anhydride was alleged to have been recovered and empty drums of acetic anhydride were also found. Notices under Section 67 of the NDPS Act were also issued to one Shamsuddin and Bismillah Khan Ahmadzai. It has been alleged that the respondent, the co-accused Himanshu Rana and Shamsuddin disclosed that Bismillah Khan Ahmadzai is a Director of the company involved in its day to day affairs. Bismillah Khan Ahmadzai was apparently residing in the US and was arrested on his return to India. The residential premises of Shamsuddin Qarizada were searched and 500 gm of acetic anhydride was allegedly recovered.

8.1. *The respondent is alleged to be a part of an international syndicate involved in a diversion of a controlled substance.*

8.2. *The respondent is a Director of Altruist Chemicals Pvt. Ltd.*

8.3. *Having regard to the incriminating material which has been recovered during the course of the investigation, as set out in the complaint, the involvement of the respondent prima facie has been shown to exist.*

8.4. *In a matter involving serious violations of the NDPS Act, the Single Judge of the High Court was not justified in granting bail.*

8.5. *Under the NDPS Act, the burden of proof lies on the accused and not the prosecution and the High Court has wrongly reversed the burden of proof.*

8.6. *Absolutely no valid reasons have been indicated in the judgment¹ of the Single Judge for the grant of bail.*

12. *Ex facie, there has been no application of mind by the High Court to the rival submissions and, particularly, to the seriousness of the allegations involving an offence punishable under the provisions of the NDPS Act. Merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind by the Single Judge¹ of the High Court to the basic question as to whether bail should be granted. The provisions of Section 37 of the NDPS Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. There has been a serious infraction by the High Court of its duty to apply the law. The order granting bail is innocent of an awareness of the legal principles involved in determining whether bail should be granted to accused of an offence under the NDPS Act. The contention of the respondent a person that he had resigned from the company, Altruist Chemicals Pvt. Ltd., must be assessed with reference to the allegations in the criminal complaint which has been filed in the Court of the District and Sessions Judge. Gautam Budh Nagar (Annexure P-6). The relevant part of the complaint reads as follows:*

"18. That during investigation of the case, letter dated 27-11-2018 was sent to the Registrar of Companies for providing details of the Directors, etc. of the company in question i.e. M/s Altruist Chemicals Pvt. Ltd. and vide its report dated 3-12-2018 Registrar of Companies provided the said information and from the perusal of said information/documents, it reveals that accused Prateek Shukla and Bismillah Khan are the Directors. Accused Himanshu Rana was also Director but he has resigned from the directorship. From the perusal of the documents, it also reveals that they had registered the company i.e. Altruist Chemical Pvt. Ltd. at 001. Block Ab-Sector-45, Noida, which is a residential area and accused persons also obtained

Unique Registration No. from the NCB on the abovesaid premises."

14. *For the above reasons, we are of the view that the High Court has misapplied the law to the facts in arriving at a decision for the grant of bail to the respondent. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 7-5-2019. As a consequence, the bail which has been granted by the High Court to the respondent shall stand cancelled. The respondent shall surrender forthwith as a result of the cancellation of bail by the present order of this Court."*

Bail Application No. 5030 of 2012 [Karuthan Ponnaiya & Anr. V. Senior NCB, State of Kerala] passed by the High Court of Kerala –

"5. *It is not disputed that Ephedrine is a controlled substance. There is no categorization of small quantity or commercial quantity so far as it relates to controlled substances. As can be seen from the definition of commercial quantity in Section 2 (viii) of the Act it is clear that it applies only to narcotic drugs or psychotropic substances. Section 9A deals with the power to control and regulate controlled substances, which reads:*

"(1) If the Central Government is of the opinion that, having regard to the use of any controlled substance in the production or manufacture of any B.A. No: 5030/2012 narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the power conferred by sub-section(1), an order made thereunder may provide for regulating by licenses, permits or otherwise, the production, manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption, use, storage, distribution, disposal or acquisition of any controlled substance."

The contravention of orders made under section 9A is made punishable under section 25A. The punishment prescribed is rigorous imprisonment for a term which may extend to ten years and fine which may extend to one lakh B.A. No: 5030/2012 rupees.

8. *The fact that the rigour mentioned in section 37 (1)(b) of the Act is not applicable to the facts of the case, does not automatically lead to any conclusion that the B.A. No: 5030/2012 petitioner is entitled to get bail. Section 37(2) makes it clear that 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 or any other law for the time being in force, for the granting of bail.*

Therefore, it is manifest that even if the rigour under section 37(1)(b) is not applicable, the Court can refuse bail, if the Court is of the view that the accused persons are likely to flee or will become unavailable to put them to trial or if there are other circumstances justifying negation of bail. It is pointed out that the final report in this case was filed on 22.06.2012 and it is now pending before the Sessions Court as S.C. No: 681/2012. It is also pointed out that the petitioners are actually carriers or peddlers of the controlled substance and that, it was not carried by them innocuously without knowing the gravity of the offence. It is also pointed out that the petitioners are from Tamil Nadu and are B.A. No: 5030/2012 persons having international connections and so once they are released on bail it would be practically impossible to secure their presence to put them to trial.

10. I have carefully examined the entire available records and particularly the allegations levelled against the accused. The nature and gravity of the offence, possibility B.A. No: 5030/2012 of the accused to flee from justice and the likelihood of their indulging in commission of similar offences as alleged by the prosecution are also taken note of. Considering all these aspects, I am not inclined to grant bail to the accused, and hence this application is dismissed. The learned trial Judge is directed to try and dispose of the case at the earliest."

[10] In support of the present case, Mr. Osbert Khaling, learned counsel appearing for the petitioner relied upon the following judgments:

Niranjan Jayantilal Shah V. Directorate of Revenue Intelligence [2013 SCC OnLine 4608] -

"6. During the course of arguments, it was fairly conceded by learned counsel for the respondent that bar of Section 37 of the NDPS Act is not attracted in the present case since as per the prosecution 100 kgs. of Pseudoephedrine was recovered which is a controlled substance within the meaning of Section 2(vii) (b) of the Act. Pseudoephedrine is not a narcotics drug as envisaged under Section 2(vii)(a) of the Act. In N.C. Chellathambi (supra) one tonne of ephedrine was recovered, in Ajay Aggarwal (supra) recovery was of 1600 liters of Acctic Anhydride, In Rajiv Kumar Sukha (supra) recovery was of 25 kgs powder ephedrine hydrochloride, in Falyaz Ahmed Rasool Shaikh (supra) and another recovery was of 290 kgs of pseudoephedrine, in Chakrapani Dutt (supra) recovery was of 100 liters of Acctic Anhydride, and in all these cases since the accused had remained in custody for certain period, they were released on ball. As regards Rizwan Ahmed, where the bail application was dismissed, it is fairly conceded by learned counsel for DRI that DRI had not taken any plea that the petitioner was not entitled to bail due to rigour of Section 37 of the NDPS Act on which ground alone the application was dismissed, however, it was

submitted that since the SLP has been dismissed, therefore, the petitioner is not entitled for bail. In Department of Customs (supra) relied upon by learned counsel for the petitioner, it was observed that the judgment in Rizwan Ahmad is contrary to the explicit language of Section 37 of NDPS Act and the same is per incuriam.

7. Keeping in view the totality of facts and circumstances of the case, coupled with the fact that the petitioner is in custody since 15th December, 2011, he is admitted to bail on his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of the concerned Trial Court. Petitioner shall deposit his passport, If any, with the Trial Court and shall not leave the country without the permission of the concerned Trial Court. He is further directed to furnish his current address to DRI and in case of any change in address, DRI be informed immediately."

Rafael Palarox Garcia V. Union of India & Anr. [2008 SCC OnLine Bom 1353 : (2008) 6 AIR Bom R. 709 : (2009) 2 AIR Jhar R (NOC 518) 177 : 2009 Cri LJ 446] -

"29. There is extensive amendment introduced in N.D.P.S. Act. The offence falling under Section 9-A read with Section 25-A is punishable with imprisonment which may extend to 10 years and also fine which also may extend to Rs. one lac. There was an embargo on the powers of the Court in granting bail under the old provisions of Section 37(1)(b) of the Act. From Section 37(1)(b) the term "imprisonment of five years or more" has been deleted and substituted by "for offence under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity", the case of the Applicant is no more covered by Section 37(1)(b) of the Act. The concept of commercial quantity does not apply to controlled substance in view of the provisions relating to commercial quantity specially Section 2(viia) and Section 2(vild) of the Act and the notification issued by the Government specifying the small quantities and commercial quantities also shows that this concept is peculiar to Narcotic Drugs and Psychotropic Substances.

30. In view of the above legal position and the decision in the case of Shreeniwas Bansidhar Somani (supra), I am inclined to grant bail to the Applicant.

31. The Applicant Rafael Palafox Garcia to be released on bail in the sum of Rs.1,00,000 (Rs. one lac Only) with one or two sureties to make up the said amount. The sureties shall be local sureties. Before being released on bail the Applicant shall inform the NCB office the address at which he will reside during the period that he is on bail. Any change in the address shall also be communicated to the NCB within two days. The Applicant shall report to the NCB office once in a week, till conclusion of the trial."

Sanjeev Chandra Agarwal & Anr. V. Union of India [(2021)

20 SCC 57] -

"3. The factual position is that no narcotic drugs or psychotropic substances were recovered from the premises of the two appellants. As per the prosecution, 4 kg of Acetic Anhydride (Controlled Substance) was allegedly found from the premises of the appellants located at Gyan Scientific Agency, Varanasi. The High Court was not correct in relying on the statements made by other accused under Section 67 of the NDPS Act, in light of the judgment of this Court in Tofan Singh v. State of T.N.2 It is pointed out that the charges under Sections 9-A and 25 of the NDPS Act have been framed and to this extent there is no challenge and dispute."

State of Haryana V. Samarth Kumar [2022 SCC OnLine SC

2087] –

"7. The order of the Special Court granting regular bail to the respondents shows that the said order was passed in pursuance of the anticipatory bail granted by the High Court. Therefore, the same cannot be a ground to hold that the present appeals have become infructuous."

Criminal Appeal No. 2790 of 2024 [Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari V. State of Uttar Pradesh] passed by the Hon'ble Supreme Court –

"29. Going back to K.A. Najeeb (supra), this Court thereafter proceeded to hold that Section 43D(5) of the UAP Act does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Long incarceration with the unlikelihood of the trial being completed in the near future is a good ground to grant bail. This Court also distinguished Section 43D(5) of the UAP Act from Section 37 of the NDPS Act. It has been held as follows:

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

19. Yet another reason which persuades us to enlarge the respondent on bail is that Section 43-D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS Act. Unlike the NDPS Act where the competent court needs to be satisfied that prima-facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such precondition under UAPA. Instead, Section 43-D(5) of the UAPA merely provides another possible ground for the competent court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion, etc.

W.P.(Cril) No. 11 of 2024 passed by the Division Bench of the High Court of Manipur dated 26.07.2024 –

"[4] Mr. PN Lakhani, learned counsel appearing for the petitioner raised only one ground in assailing the impugned detention orders. The learned counsel submitted that the detaining authority has knowledge that the petitioner was in judicial custody in connection with a criminal case involving seizure of a commercial quantity of contraband drugs, however, while passing the impugned detention order, nothing has been mentioned or indicated in the said detention order as well as in the grounds of detention that the petitioner was likely to be released on bail. It has been submitted that there was no cogent material before the detaining authority to arrive at its subjective satisfaction that there was/is a real possibility of the petitioner being released on bail, the face of the provisions of Section 37 of ND&PS Act, 1985. The learned strenuously submitted that there was total non-appliance of mind on the part of the detaining authority and the impugned detention order had been passed in the mechanical manner and as such, the same is liable to be quashed and set aside.

[7] *In the present case, the petitioner was already arrested and kept in judicial custody in connection with the seizure of a commercial quantity of narcotic drugs and therefore, Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 would have application and grant of bail would be subject to the stringent conditions provided thereunder. Nothing is mentioned in the impugned detention order that the detaining authority has arrived at his subjective satisfaction that the petitioner is likely to be released on bail. Only in the grounds of detention, the detaining authority merely referred to the fact that a bail application had been filed without deciding whether there was a likelihood of the petitioner being released on bail, notwithstanding the applicability of section 37 of the ND&PS Act and passed the impugned detention order. Accordingly, we are of the considered view that the detaining authority passed the impugned detention order without application of mind and in a mechanical manner and on this ground alone, the impugned detention orders are liable to be quashed and set aside."*

Noor Aga V. State of Punjab & Anr. [(2008) 16 SCC 417] –

"67. *The appellant contended that the purported confessions recorded on 2-8-1997 and 4-8-1997 were provided by an officer of the Customs Department roughly and later the same were written by him under threat, duress and at gunpoint and had, thus, not been voluntarily made. The High Court should have considered the question having regard to the stand taken by the appellant. Only because certain personal facts known to him were written, the same by itself would not lead to the conclusion that they were free and voluntary.*

68. *Clause (3) of Article 20 of the Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. Any confession made under Section 108 of the Customs Act must give way to Article 20(3) wherefor there is a conflict between the two. A retracted confessional statement may be relied upon but a rider must be attached thereto, namely, if it is made voluntarily. The burden of proving that such a confession was made voluntarily would, thus, be on the prosecution. It may not be necessary for us to enter into the question as to whether the decisions of this Court that a Customs Officer is not a police officer should be revisited in view of the decision of this Court in Balkrishna Chhaganlal Soni v. State of W. B. 34, wherein it was stated: (SCC pp. 572-73, para 12) ..."*

Sanjay Chandra V. Central Bureau of Investigation [(2012) 1 SCC 40] –

"40. *The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary*

purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

41. This Court in Gurcharan Singh v. State (Delhi Admn.) observed that two paramount considerations, while considering a petition for grant of bail in a non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

42. When the undertrial prisoners are detained in jail custody for an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is: whether the same is possible in the present case.

43. There are seventeen accused persons. Statements of witnesses run to several hundred pages and the documents on which reliance is placed by the prosecution, are voluminous. The trial may take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that the accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet."

[11] It is admitted position of fact and law that the seized articles as mentioned in the present case are controlled drugs as such, Section 37 of the ND & PS Act is not applicable and the accused/petitioner and his co-accused are right now languishing in jail for about one and half years, but considering the nature of the case, the prosecution have taken the steps leading to the filing of charge sheet promptly and the Ld. Trial Court also conducted the case promptly without wasting time.

[12] Heard the learned counsels appearing for the parties at length and also perused the application and replied affidavit. The allegation against the two accused persons namely Mehul Desai and Harshal Desai, who are said to be a former Director as well as an employee and one of the Directors of the company viz, Ardor Drugs Pvt. Ltd respectively (hereinafter the applicant no. 1 and 2 respectively), is that they were actively involved in an illegal supply of Pseudoephedrine (a controlled substance under ND&PS Act) based tablets to the other accused Bhadresh Patel of M/S Recover Healthcare.

As per the Final Report, the said Ardor Drugs Pvt. Ltd prepares/manufactures pharmaceutical formulations including Pseudoephedrine containing formulations like Asifed, Phifed, etc. and that the two accused/applicants were actively involved in an illegal supply of a huge quantity of Pseudoephedrine based Phifed tablets. It is alleged that the accused/applicants were involved in supplying 15 lakhs of the said Phifed tablets inside 26 carton boxes to the said accused namely Bhadresh Patel, owner of M/S Recover Healthcare on 19/01/2023 under a fake billing of Admos-SR. It is alleged that the accused/applicants gave commission of Rs. 1 per strip of ten tablets of Pseudoephedrine to the said accused Bhadresh Patel for accepting the bogus billings/tax invoices. It is alleged that as per Stock Register of the company Ardor Drugs Pvt. Ltd, the company purchased a raw material namely, Pseudoephedrine Hydrochloride powder from one GC Chemie Pharmie Ltd., Mumbai Andheri for manufacture of said Asifed, Phifed and a scrutiny of the Tax invoices

Report from said GC Chemie Pharmie Ltd. revealed that there was unaccounted distribution of more than 2 crores Pseudoephedrine based drugs (Asifed, Phifed) by the Ardor Drugs Pvt. Ltd.

It is alleged that the accused was actively involved in supply of said Pseudoephedrine based tablets under bogus bills or by generating fake bills with the name of some other products and by actually supplying the products mentioned in the bills/tax invoices in the name of M/S Recover Healthcare to some other persons, for which an amount of Rs. 10 lakhs was paid to the account of M/S Recover Healthcare as a commission for accepting fake/bogus bills. It is also alleged that the Ardor Drugs Pvt. Ltd. used one "Bhavna Roadways" to show the transportation of drugs to the M/S Recover Health care looked genuine, but in that transportation, it sent only carton boxes without any medicinal stuffs mentioned in the invoices but filled with pieces of marbles and scraps to increase the weight. Photographs of such carton boxes containing pieces of marbles and scraps which were sent by the Ardor Drugs Pvt. Ltd to the M/S Recover Healthcare, having the stickers of Bhavna Roadways are said to have been produced by one Kirti Kumar Patel (apparently a staff of M/S Recover Health care), whose statement has been recorded under Section 67 of the NDPS Act. As per his said statement, M/S Recover Health care received only 1500 packets of Phifed tablets containing Pseudoephedrine, which were sent by the Ardor Drugs Pvt. Ltd in the billing of Admos-SR on 19/01/2023 and no other pharmaceutical drugs from 2020 till 2022 but the relevant record at M/S Recover Health care shows false entry for receipts of other pharmaceutical

drugs Asifed T, Bromofed and Prasma including Phifed from the Ardor Drugs Pvt. Ltd. when the latter has not actually supplied the said other drugs.

[13] On further perusal of the pleadings, it is also seen that the present accused/petitioner was involved in connivance with Mehul Desai and Bhadresh Patel for generating bogus bills of various Pseudoephedrine tablets and its salt. Because of this, they had already been arrested in one Directorate of Revenue Intelligence (DRI) Surat Crime No. NDPS 01/2020 and they were on bail during the execution of arrest warrant issued by the Ld. Special Judge (ND & PS), Manipur.

[14] The Ld. Special Court (ND & PS), after hearing the parties, rejected the bail application of the present accused and another Shri Mehul Desai and in consideration of the present application, this Court is of the opinion that the observation made in rejecting the said bail application needs to take consideration and for the same, the para No. 5 & 6 of the impugned order of the Ld. Special Judge (ND & PS), Manipur is reproduced herein below:

"5. It is the settled position of law that the provisions of the Drugs and Cosmetics Act, 1940 and the Narcotic Drugs and Psychotropic Substances Act, 1985 are in addition to the provisions of each other i.e. provisions of both the Acts are required to be simultaneously complied with in relation to pharmaceutical bulk drugs and pharmaceutical formulation which also fall under the ambit of the NDPS Act, 1985 (Mohd. Sahabuddin & Another V. State of Assam (2012) 13 SCC 491, Union of India and another V. Sanjeev V Deshpande (2014) 13 SCC 1). It is to be noted that mere holding a license under the Dugs and Cosmetics Act and the Rules framed thereunder does not provide any immunity from the rigors of the applicability of the NDPS Act and the Rules framed thereunder.

6. It appears prima facie from the materials on record including the statements of the witnesses under section 67 of the NDPS Act, that the accused persons/applicants, who are admittedly ex-Director/employee and one of the Directors of the company

namely Ardor Drugs Pvt. Ltd, are persons actively engaged for sale or for distribution of pharmaceutical formulations, which apparently include drugs and substances covered under the ambit of the Narcotic Drugs and Psychotropic Substances Act, 1985 and that they were actively involved in falsifying the accounts or records of the company by supplying the said Pseudoephedrine (controlled substance under ND&PS Act) based Phifed tablets in the name of another non-offending drug ADMOS-SR under a bogus or fake bill/tax invoices. It appears prima facie from materials on record that the two (2) accused persons are actively involved in trafficking of the said pseudoephedrine based pharmaceutical drugs. As per record, the stage of the case is production of the rest of the accused and charge hearing.”

[15] After going through the above observation made by the Ld. Special Judge (ND & PS), Manipur, I am of the considered view that the Ld. Special Judge’s observation and reasoning in dismissing the bail application of the accused/petitioner is reasonable enough considering the seriousness of the allegation made against the present accused.

[16] I have carefully examined the entire available records, impugned order of the Ld. Special Judge (ND & PS), Manipur and particularly, the allegations levelled against the accused as narrated above. In view of the nature and gravity of the offence, I am not inclined to allow the present bail application filed by the present accused/petitioner.

Hence, this application is dismissed with observation that the Ld. Trial Judge is directed to try and dispose of the case at the earliest. Liberty is given to the petitioner/accused to approach this Court, if the Trial Court failed to conclude the trial at the reasonable time.

JUDGE

FR/NFR

Bipin