

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Bail App no.72/2020

Reserved on: 21.08.2021

Pronounced on: 01 .10.2021

Mohammad Tajamul Masoodi

..... Petitioner(s)

Through: Mr Bilal A. Khan, Advocate

Versus

Union Territory of Jammu and Kashmir

.....Respondent(s)

Through: Ms Asifa Padroo, AAG

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Grant of bail in case FIR no.54 of 2017 registered in police station Uri under Sections 8/21, 29 NDPS Act, is prayed for in the instant application.
2. Application for grant of bail, as is coming to fore from perusal of file, had been filed by present applicant/petitioner before Principal Sessions Judge, Baramulla. The said application vide order dated 20th June 2020, has been rejected. It is in consequence thereof, that instant application has been filed.
3. The case set up by applicant is that applicant is a businessman and partner of M/s Adab Traders, doing business of trading goods from Kashmir to other parts of India for last many years and is also engaged in Cross Border Trading under the guidelines issued by Government of India and there is one more firm M/s Kaloo Traders, which is owned by Shri Gul Azhardin Gauhar, which is also doing cross border. It is stated that criminal Challan No.5/2017 having its title State vs. Syed Yousuf Shah and others, which is arising out of FIR No.54/2017, is pending disposal before the court of Additional Sessions Judge, Baramulla and in the said challan applicant has been arrayed as accused No.3. It is submitted that the police have set up the whole case against accused on the behest of owner of M/s Kaloo Traders by planting one receipt of consignment, of which the contraband was part of, by alleging that the same receipt was signed and handed over by accused no.2 to the driver of the truck

Bail App no.72/2020

(accused No.1), which is impossible in the light procedure followed in Cross LOC Trade as the same does not allow any person to come in contact with the vehicle and its driver before it is inspected and verified by the concerned agencies. According to applicant, in terms of Standing Operating rules, inspection of trucks coming from POK is done at Kaman Post, India, where J&K Police checks the seal of incoming vehicles and escort the vehicle to trade facilitation centre (TFC) Salamabad, 15 kilometres away in a convoy. On reaching TFC, Trade Facilitation Officer (TFO) verifies the seal and cargo manifest whereafter custodian arranges for unloading of goods. It is maintained that truck was checked at all checking posts properly sealed wherein it was carrying a consignment containing 129 units/nags of unstitched embroidered suits. The said vehicle entered India at Kaman Post, and was escorted to TFC Salamabad by J&K Police in a convoy where TFO verified the seal which was intact and thereafter ordered to unload the goods which were counted to be 149 units/nags whereas as per the gathered details, the consignment sent from POK contained 129 units/ nags, which increased by 20 units in the midway. It is also averred that since the case registered by police apparently seems to be false and fabricated one and applicant, being innocent immediately after his arrest, moved an application for grant of bail before this Court which was rejected as the investigation was going on and but after the presentation of challan, applicant filed petition under Section 561-A Cr.P.C. No.110/2018 along with Cr.M.C. No.388/2018 before this Court and the petition was disposed of vide order dated 3rd October 2018, with a direction to the court below to hear and conclude trial of the case expeditiously, preferably within two months. It is also stated that applicant filed bail application No.108/2019 before this Court, which was dismissed as withdrawn with liberty to file fresh.

4. Objections have been filed by respondents, in which it is stated that on 21st July 2017, acting on an information received from SSP, Baramulla, police party of Sub Division Uri along with security wing and Custom Department officials, deployed at TFC Salamabad for Cross LOC trade checking, recovered 1332 packets/sachets of contraband apparently Heroin/Brown Sugar, concealed/hidden in 333 suit boxes, which were carried from Chakoti Muzaffarabad in a truck bearing registration No.AJ&KXA-267, driven by one POK resident driver, namely, Syed Yousef Shah S/o Syed Ali Akbar Shah R/o Charwaya, Tehsil & District Muzaffarabad. The consignment was sent by M/s J. K. International, Muzaffarabad, to M/s Kuloo Suppliers, Srinagar and in this

regard case FIR No.54/2017 was registered in police station Uri. During investigation, while completing other requires formalities, the samples of contraband had been submitted to FSL Srinagar/CFSL, Chandigarh, for analysis/examination. Report obtained from FSL, Srinagar, reveals the contraband as Di-Acetyl Morphine (Brown Sugar), but the expert opinion from CFSL is also received reveals that the samples contain diacetyl morphine (heroin) and monoacety hnmorphine, dextromethorphan, acetylclodeine and caffeine. The investigation of the case had been closed as challaned and produced before the court of Additional Sessions Judge, Baramulla, on 23rd November 2017. As regards present applicant/accused, it is stated by respondents that he used to do cross LoC trade jointly with his nephew, namely, Musadiq Afzal Masoodi, and assigned him the job of crossing of vehicles at TFC Salamabad, Uri, and himself used to dispose of the material reached to him from Pak/Pok to Srinagar/Delhi/ Surat etc., with the active participation of accused, namely, Nayeem Rasool Bhat.

5. I have heard learned counsel for parties and considered the matter. I have gone through the record on the file.
6. Learned counsel appearing for applicant has stated that since the investigation in the case is over, detention of applicant for any more period would amount to conviction. It is contended that applicant has not committed any offence, rather the case is based on doubt and conspiracy, implicating him falsely inasmuch as nothing has been recovered from physical, conscious possession of applicant. It is stated that the consignment loaded in the seized truck was in favour of Kolu Traders, Srinagar, which is owned by Gul Azhar Din Gowhar, but not the applicant and that the prosecution has alleged that A-2 forged the sign and seal of Kolu Traders whereas, as per Standard Operating Procedure of Cross LOC Trade, accused no.2 could not have received the consignment, which can be received only by authosied representative or a person of Kolu Traders as he could not have contacted the driver of the truck and that accused no.2 on the day of occurrence had not gone for receiving of consignment of Kolu Traders, but had gone to collect the consignment of his own firm, M/s Adab Traders, which as per the prosecution was found clean.
7. It is pertinent to mention here that certainly, accused, as an individual, has a right to life and liberty, however, that right to life and liberty can be curtailed according to the procedure prescribed by the law. While considering application for bail, it is necessary to take into account, firstly whether the accused would take up the trial without hampering it and secondly, whether he

would subject himself to the verdict of the Court. The Court must also consider other factors, such as, serious nature of crime and gravity of circumstances under which such an offence is alleged to have been committed; the position and status of accused with reference of the victim and witnesses, of repeating the offences; of jeopardizing his own life and other relevant grounds.

8. It is the duty of parties as well as the Court to see that at the stage of deciding bail application, the Court is not dragged into minute details and in an area of conjectures or hypothesis. It cannot be said that the Court should never enter into the details if arguments are specifically advanced on the strength of details. It is common experience that whatever has been observed in the bail application is never taken for granted in order to come to a proper decision of that case on overall appreciation of evidence led during the trial. But apparently, sometimes one may feel that he has been prejudiced, so the Court must while deciding bail application touch the barest minimum facts necessary to come to conclusion about existence or otherwise of a prima facie case, and if necessary, may mention arguments advanced and reject the same if they require the Court to go into details which merely lead to the conclusion based on some facts and assumptions.
9. In the present case, it is alleged that 65 kgs of contraband has been recovered from offending truck, which admittedly is of commercial quantity. The allegation applicant is that he happens to be partner of M/s Adaf Trading Company and he is also dealing with the cross LOC trade. As can be seen in the objections filed by respondents, it has been alleged that applicant used to do cross LoC trade jointly with his nephew, namely, Musadiq Afzal Masoodi, and assigned him the job of crossing of vehicles at TFC Salamabad, Uri, and himself used to dispose of the material reached to him from Pak/Pok at Srinagar, Delhi, Surat etc., with the active participation of accused namely, Nayeem Rasool Bhat. It has also been maintained by respondents that the firm Adaf Trading Co. was being run jointly on the basis of partnership by him and his nephew as per the details available in TFC Salamabad, Uri and on 20th July 2017, accused, Musadiq Afzal Masoodi met him in the office of Adaf at Srinagar, and both discussed about the trade to be done on 21st July 2017 and thereby accused, Musadiq, left for TFC Salamabad Uri on same day. The accused, Musadiq, is stated to have sent him the photo of receipt which he gave to the Pok driver and thereby made him aware about the reaching/unloading of consignment well before the checking process and printout of his WhatsApp chat stood accordingly seized in the case. The applicant is stated to have

remained absconding for a long time after the date of occurrence, during which he might have destroyed the requisite evidence, including the required WhatsApp chats from his mobile phone. When applicant presented himself before the police, he could not justify the supposed disposal of numerical parcels from which the brown sugar was recovered, nor he disclosed the parties, namely, (Akhter and Abass) to whom such parcels were supposed to be delivered and it seems that the names (Akhter and Abass) had been used as codes and the actual persons were someone else which the accused did not disclose. It has also been maintained and alleged by respondents that as per the statement of accused, Nayeem, it was the applicant who received the details of consignment mentioning the names of (Akhter and Abass) for numerical parcels from Pakistan and thereby sent the same to Nayeem, who on the insist, sent the same to accused, Musadiq, but nothing such chat was available in the mobile phone of applicant as he had deleted the same before presenting himself before the police.

10. A vehement submission in the present case on behalf of learned counsel for petitioner, as also claimed in the application, is that applicant was not having conscious possession of the consignment – contraband seized. This contention does not sound convincing. In this regard it relevant to notice that Section 2(viii), 2(viiiib), 2(xxiv), 2(xxv), 2(xxviii) of NDPS Act define the words “conveyance”, “illicit traffic”, “to import inter-State” and “to transport” as under:

“Section 2 (viii):- "Conveyance" means a conveyance of any description whatsoever and includes any aircraft, vehicle or vessel;

Section 2 (viiiib):- " illicit traffic", in relation to narcotic drugs and psychotropic substances, means -

- (i) cultivating any coca plant or gathering any portion of coca plant;
- (ii) cultivating the opium poppy or any cannabis plant;
- (iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transshipment, of narcotic drugs or psychotropic substances;
- (iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in sub-clauses (i) to (iii); or
- (v) handling or letting out any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv); other than those permitted under this Act, or any rule or order made, or any condition of any licence, term or authorisation issued, thereunder, and includes
 - (1) financing, directly or indirectly, any of the aforementioned activities;
 - (2) abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities; and
 - (3) harbouring persons engaged in any of the aforementioned activities;

Section 2 (xxiv):- "to import inter-State" means to bring into a State or Union territory in India from another State or Union territory in India;

Section 2 (xxv) "to import into India", with its grammatical variations and cognate expressions, means to bring into India from a place outside India and includes the bringing into any port or airport or place in India of a narcotic drug or a psychotropic substance intended to be taken out of India without being removed from the vessel, aircraft, vehicle or any other conveyance in which it is being carried.

Explanation. —For the purposes of this clause and clause (xxvi), "India" includes the territorial water of India;

Section 2 (xviii):- "to transport" means to take from one place to another within the same State or Union Territory”

11. Section 35 of the NDPS Act provides for presumption of culpable mental state and Section 8 (c) of the Act prohibits the possession, sale, purchase and transport of any contraband. The concept of possession has been explained by the Supreme Court in the case of *Mohan Lal Vs. State of Rajasthan, 2015 (6) SCC 222*; the relevant part thereof reads as under:

“12. The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. One of the definitions of "possession" given in Black's Law Dictionary is as follows:

"Possession.--Having control over a thing with the intent to have and to exercise such control. *Oswald v. Weigel* [219 Kan 616 : 549 P 2d 568 at p. 569 (1976)] . The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint."

In the said Dictionary, the term "possess" in the context of narcotic drug laws means:

"Term 'possess', under narcotic drug laws, means actual control, care and management of the drug. *Collini v. State* [487 SW 2d 132 at p. 135 (Tex Cr App 1972)] . Defendant 'possesses' controlled substance when defendant knows of substance's presence, substance is immediately accessible, and defendant exercises 'dominion or control' over substance. *State v. Hornaday* [105 Wash 2d 120 : 713 P 2d 71 at p. 74 (Wash 1986)] ."

And again:

"Criminal law.--Possession as necessary for conviction of offense of possession of controlled substances with intent to distribute may be constructive as well as actual, *United States v. Craig* [522 F 2d 29 at p. 31 (6th Cir 1975)] ; as well as joint or exclusive, *Garvey v. State* [176 Ga App 268 : 335 SE 2d 640 at p. 647 (1985)] . The defendants must have had dominion and control over the contraband with knowledge of its presence and character. *United States v. Morando-Alvarez* [520 F 2d 882 at p. 884 (9th Cir 1975)] .

Possession, as an element of offense of stolen goods, is not limited to actual manual control upon or about the person, but extends to things under one's power and dominion. *McConnell v. State* [48 Ala App 523 : 266 So 2d 328 at p. 333 (1972)] .

Possession as used in indictment charging possession of stolen mail may mean actual possession or constructive possession. *United States v. Ellison* [469 F 2d 413 at p. 415 (9th Cir 1972)] .

To constitute "possession" of a concealable weapon under statute proscribing possession of a concealable weapon by a felon, it is sufficient that defendant have constructive possession and immediate access to the weapon. *State v. Kelley* [12 Or App 496 : 507 P 2d 837 at p. 837 (1973)] ."

13. In *Stroud's Dictionary*, the term "possession" has been defined as follows:

""Possession' [Drugs (Prevention of Misuse) Act, 1964 (c. 64), Section 1(1). A person does not lose "possession" of an article which is mislaid or thought erroneously to have been destroyed or disposed of, if, in fact, it remains in his care and control (*R. v. Buswell* [(1972) 1 WLR 64 : (1972) 1 All ER 75 (CA)]).

14. Dr Harris, in his essay titled "The Concept of Possession in English Law" [Published in *Oxford Essays in Jurisprudence* (Edited by A.G. Guest, First Series, Clarendon Press, Oxford, 1968).] while discussing the various rules relating to possession has stated that "possession" is a functional and relative concept, which gives the Judges some discretion in applying abstract rule to a concrete set of facts. The learned author has suggested certain factors which have been held to be relevant to conclude whether a person has acquired possession for the purposes of a particular rule of law. Some of the factors enlisted by him are: (a) degree of physical control exercised by person over a thing, (b) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (c) the person's intention in regard to the thing, that is, "animus possessionis" and "animus domini", (d) possession of land on which the thing is lying, also the relevant intention of the occupier of a premises on which the thing is lying thereon to exclude others from enjoying the land and anything which happens to be lying there; and Judges' concept of the social purpose of the particular rule relied upon by the plaintiff.

15. The learned author has further proceeded to state that quite naturally the policies behind different possessory rules will vary and it would justify the courts giving varying weight to different factors relevant to possession according to the particular rule in question. According to Harris, Judges have at the back of their mind a perfect pattern in which the possessor has complete, exclusive and unchallenged physical control over the subject; full knowledge of its existence; attributes and location, and a manifest intention to act as its owner and exclude all others from it. As a further statement he elucidates that courts realise that justice and expediency compel constant modification of the ideal pattern. The person claiming possessory rights over a thing may have a very limited degree of physical control over the object or he may have no intention in regard to an object of whose existence he is unaware of, though he exercises control over the same or he may have clear intention to exclude other people from the object, though he has no physical control over the same. In all this variegated situation, states Harris, the person concerned may still be conferred the possessory rights. The purpose of referring to the aforesaid principles and passages is that over the years, it has been seen that courts have refrained from adopting a doctrinaire approach towards defining possession. A functional and flexible approach in defining and understanding the possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy. Thus, the word "possession" in the context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object.

16. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language

employed in Section 35 of the NDPS Act. The said provision reads as follows:

"35. Presumption of culpable mental state.--(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. — In this section 'culpable mental state' includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

21. From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others."

12. Law as laid down above by the Supreme Court, thus, provides that the term "possession" with reference to Section 18 of the NDPS Act, could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment.
13. In the present case, prosecution case is that 65 kgs of contraband has been recovered from offending truck, which admittedly is of commercial quantity. The allegation is that applicant happens to be partner of M/s Adab Trading Company and he is also dealing with the cross LOC trade. As can be seen in the objections filed by respondents, it has been alleged that applicant used to do cross LoC trade jointly with his nephew, namely, Musadiq Afzal Masoodi, and assigned him the job of crossing of vehicles at TFC Salamabad, Uri, and himself used to dispose of the material reached to him from Pak/Pok at Srinagar, Delhi, Surat etc., with the active participation of accused namely, Nayeem Rasool Bhat and that he is involved in the case. Hence, applicant is stated to have have the possession with dominion over the same as explained by the Supreme Court in the case of *Mohan Lal* (supra) and there not being any cogent material on the record to rebut the same. Accordingly, at this stage the plea of the learned counsel for the applicant regarding the applicant not having conscious possession does not have force and it is turned down.

14. Now, at this stage, this Court relegates itself to Section 37 of the NDPS Act to ascertain its mandate while considering an application for bail. Section 37 reads as follows:

“37. Offences to be cognizable and non-bailable. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), --

(a) every offence punishable under this Act shall be cognizable;
 (b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of subsection (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.”

15. Thus, from the perusal of aforesaid provision, it would be clear that no person who is accused of an offence punishable under Section 19, 24 or 27-A and also for offences involving commercial quantity, shall be released on bail or his own bond unless Public Prosecutor had been given an opportunity to oppose the bail application and where Public Prosecutor opposes bail application, the Court is required to satisfy itself that it has reason to believe that the applicant is not guilty of such offence and that he is not likely to commit the offence while on bail. The legislative mandate is required to be considered by the Court while considering an application for bail under NDPS Act. The aforesaid provision has been the subject matter of interpretation and consideration in a large number of cases.

16. In the case of *Union of India Vs. Ram Samujh and Another reported in 1999 (9) SCC 429*, the Supreme Court in paras 6 to 8 has held as under:

“6. The aforesaid section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

"Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt. (emphasis supplied)

7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that

in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved.

The Supreme Court, dealing with the contention with regard to punishment under the NDPS Act, has briefly observed about the adverse effect of such activities in *Durand Didier vs. Chief Secy., Union Territory of Goa (1990) 1 SCC 95*, as under:

“24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.”

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.”

17. Similarly, the Supreme Court in the case of *Union of India Vs. Shiv Shanker Kesari reported in 2007 (7) SCC 798*, has held as under:

“6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

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.

.....

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.

12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.”

18. The Supreme Court in the case of *Union of India Vs. Rattan Malik Alias Habul reported in 2009 (2) SCC 624*, in paras 12 to 15 has held as under:

“12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds”.

13. The expression "reasonable grounds" has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide *Union of India vs. Shiv Kumar Kesari* [(2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505]). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of "not guilty". At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

15. Bearing in mind the above broad principles, we may now consider the merits of the present appeal. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are: (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years, and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Penal Code, 1860, etc. but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-section (1) of Section 37 of the NDPS Act."

19. In *State of Kerala vs. Rajesh 2020 SCC OnLine SC 81*, the Supreme Court, after noticing the earlier decisions on the aforesaid point regarding grant of bail, has held as under:

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

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

20. In light of the facts of the instant case as well as in view of the legal exposition considered and discussed hereinabove, this Court, at this stage prima facie for the purpose of this bail application, is unable to form the required satisfaction that there are reasonable grounds for believing that applicant is not guilty of offence and hence this Court cannot persuade itself to accede to the prayer of applicant for being enlarged on bail. Accordingly, the application for bail is **rejected**. It is clarified that any observation made herein above may not be construed as an expression on the merits of case and is solely for the purpose of this bail application and shall not affect the trial.

21. **Dismissed.**

(Vinod Chatterji Koul)
Judge

Srinagar

01.10.2021

'Qazi Amjad, Secy'

Whether approved for reporting? Yes/No