

Bombay High Court

Rhea Chakraborty vs Union Of India And Anr on 7 October, 2020

Bench: S. V. Kotwal

1

1.3-BA-st-2386-2020

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION (STAMP) NO. 2386 OF 2020

Rhea Chakraborty,]
Age: 28 years, Actress,]
Residing at : 101, Primrose Apartments,]
Near Ajivasan Hall, Next to SNDT College,]
Juhu Road, Santacruz (West),]
Mumbai - 400 049]
(Currently lodged at Byculla Prison)] Applicant

Versus

1. The Union of India]
(Through Intelligence Officer,]
Narcotics Control Bureau, Mumbai.)]
2. State of Maharashtra.] Respondents

Mr. Satish L. Maneshinde a/w. Anandini Fernandes, Namita Maneshinde & Nikhil Maneshinde, for the Applicant.
Mr. Anil C. Singh, Additional Solicitor General a/w. Sandesh Patil, Shreeram Shirsat, D.P. Singh, Amogh Singh, Aditya Thakkar, Pavan Patil, Ms. Apurva Gupte, Chintan Shah, Mayur Jaisingh, for Respondent No.1 - NCB
Mr. Swapnil S. Pednekar, APP, for Respondent No.2 - State.

CORAM : SARANG V. KOTWAL, J.

RESERVED ON : 29.09.2020

PRONOUNCED ON : 07.10.2020

2

1 / 70
1.3-BA-st-2386-2020

ORDER:

1. This is an application for bail preferred by the Applicant in connection with C.R. No.16/2020 registered with the Narcotics Control Bureau, Mumbai (hereinafter referred to as "NCB") for the offences punishable under Sections 8(c) read with 20(b)(ii), 22, 27A, 28, 29 and 30 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act"). The Applicant was arrested on 8.9.2020.

2. I have heard this application along with Bail Applications (Stamp) No.2184/2020, 2201/2020, 2205/2020 & 2387/2020. Since all these Applications involve common questions of law and since all these questions were raised and argued in this application, I am treating this application as the lead application in this group for deciding the questions of law. Therefore, the submissions advanced on the questions of law in other applications are also incorporated in this order.

3. I have heard Mr. Satish L. Maneshinde, learned Counsel for the Applicant in present application and also for the Applicant in Bail Application (St.) No.2387/2020, Mr. Taraq Sayed, learned 2 / 70 3 1.3-BA-st-2386-2020 Counsel for the Applicant in Bail Application (St.) No.2184/2020, Mr. Rajendra Rathod, learned Counsel for the Applicant in Bail Application (St.) No.2201/2020 and Mr. Subodh Desai, learned Counsel for the Applicant in Bail Application (St.) No.2205/2020.

4. Respondent No.1, in this Application, is Union of India (through Intelligence Officer, NCB), as described in the title of this Application. I have heard learned Additional Solicitor General Mr. Anil C. Singh, appearing for Respondent No.1 in all these Applications.

5. This application cannot be decided without addressing the questions of law argued before me. Therefore, I have heard all the learned Counsel extensively on the questions of law as well as on facts.

BRIEF FACTS AND CASE OF THE INVESTIGATING AGENCY

6. The allegations against the present Applicant, according to the investigating agency's case are set out in the affidavit-in- reply dated 28.9.2020 filed on behalf of Respondent No.1. The facts mentioned in that affidavit-in-reply are as follows.

3 / 70

4

1.3-BA-st-2386-2020

a) On 28.08.2020, acting on a secret information, a

team of NCB apprehended one Abbas Ramzan Ali Lakhani possessing 46 grams of Mariguana/Ganja at Old Kurla Gaon. Abbas told the team that he had purchased the drug from one Karn Arora, resident of Powai. On this basis, Karn Arora was apprehended and 13 grams of Ganja was recovered from his possession. Both of them were arrested.

b) Based on the disclosures made by Abbas Lakhani and Karn

Arora, premises of one Zaid Vilatra was searched. Indian currency of Rs.9,55,750/- and foreign

currency of 2081 Us Dollars, 180 UK Pounds and UAE 15 Dirhams was seized under panchanama dated 1.9.2020. Zaid Vilatra's statement was recorded. Zaid Vilatra disclosed that the seized amount was the sale proceeds of the contraband and that he had supplied Marijuna, Ganja, Bud and psychotropic substances to many persons. Zaid Vilatra disclosed few names with their details. In Zaid Vilatra's voluntary statement, name of Abdel Basit Parihar (Applicant in B.A.(Stamp) No.2184/2020) as a receiver of Ganja/Marijuana, was revealed.

5

4 / 70

1.3-BA-st-2386-2020

c) Abdel Basit Parihar's statement was recorded. He stated that he purchased and sold Marijuana/ Ganja

through Zaid Vilatra and others. He used to supply drugs from Zaid Vilatra and one Kaizan Ebrahim as per instructions of Showik Chakarborty (Applicant in B.A.(Stamp) No.2387/2020). There were other instances when Abdel Basit Parihar facilitated supply of drugs. He was in contact with Samuel Miranda (Applicant in B.A.(Stamp) No.2205/2020) and Showik Chakarborty. As per the NCB's case, Abdel Basit Parihar is an active member of a drug syndicate connected with high-profile personalities and drug suppliers. He used to pay and receive money via credit cards/cash and payment gateways. Abdel Basit Parihar was arrested on 3.9.2020. In his voluntary statement, Abdel Basit Parihar disclosed the name of Kaizan Ebrahim as a supplier of Charas/Hashish.

d) Based on disclosure by Abdel Basit Parihar; Kaizan Ebrahim's premises were searched. During the search, NCB recovered 0.5 Grams of dark brown substance suspected to be Hashish/Charas. Kaizan Ebrahim's voluntary statement was 5 / 70 6 1.3-BA-st-2386-2020 recorded and he was arrested.

e) Kaizan Ebrahim in turn disclosed that Showik Chakarborty used to direct him to deliver contraband to Dipesh Sawant (Applicant in B.A.(Stamp) No.2201/2020). Voluntary statements of Kaizan Ebrahim and Abdel Basit Parihar revealed the name of Samuel Miranda.

f) Samuel Miranda's voluntary statement was recorded and he was arrested on 4.9.2020.

g) Showik Chakarborty's voluntary statement was recorded wherein he has allegedly disclosed that Abdel Basit Parihar provided drugs to Dipesh Sawant through Kaizan Ebrahim. On the basis of this material, Showik Chakarborty was arrested on 4.9.2020.

h) Dipesh Sawant's name was revealed in the statements of Kaizan Ebrahim and Abdel Basit Parihar. Dipesh Sawant's statement was recorded. He has stated that he got contact details of a

Weed and Hashish dealer from Showik Chakraborty and Kaizan. Even Dipesh Sawant was arrested on 5.9.2020.

i) In his voluntary statement, Kaizan Ebrahim disclosed the

7

6 / 70

1.3-BA-st-2386-2020

name of Anuj Keshwani as a supplier of Ganja/Marijuana. In his statement, he mentioned about purchase and sale of Marijuana/ Ganja, Charas and LSD. NCB's case is that Anuj Keshwani used to procure drugs from Rigel Mahakala for selling them to Kaizan Ebrahim. There were instances where Anuj Keshwani facilitated supply of drugs and he was in contact with Kaizan Ebrahim. Anuj Keshwani's statement was recorded and he was arrested on 7.9.2020.

j) The affidavit-in-reply further mentions that from Anuj Keshwani, 585 grams of Charas, 270.12 grams of Ganja, 3.6 grams of THC and 0.62 grams (0.1 gram was commercial quantity) of LSD; apart from cash of Rs.1,85,200/- were recovered.

k) This recovery from Anuj Keshwani is important, because according to NCB, the entire case, therefore, is based on recovery of commercial quantity of LSD and, hence, it is not a case of recovery of small quantity of narcotic drugs or psychotropic substance.

l) The affidavit further mentions that Showik Chakraborty's statement revealed that he used to facilitate delivery of drugs 7 / 70 8 1.3-BA-st-2386-2020 through Abdel Basit Parihar from Kaizan Ebrahim and Zaid. These deliveries used to be received by the aides of Sushant Singh Rajput. It is the case of NCB that every such delivery and every payment made in that behalf was in conscious knowledge of the present Applicant. Samuel Miranda's statement mentions that he used to procure drugs on directions of Sushant Singh Rajput and the present Applicant. According to him, the financial matters in this regard were dealt by the Applicant and Sushant Singh Rajput.

m) In his statement, Dipesh Sawant has disclosed that he used to receive drugs for Sushant Singh Rajput on his directions on several occasions and the present Applicant also gave similar instructions. According to him, financial issues for purchase of drugs were dealt by Sushant Singh Rajput and the present Applicant. Dipesh Sawant himself used to receive drugs along with Samuel Miranda for consumption by Sushant Singh Rajput.

n) Based on these disclosures, the Applicant was summoned and her voluntary statement under Section 67 of NDPS Act was 8 / 70 9 1.3-BA-st-2386-2020 recorded on 6.9.2020, 7.9.2020 and 8.9.2020. According to NCB, the Applicant acknowledged the statements of these accused and explained her own role. It is the case of NCB that during her statement, the Applicant revealed about her involvement in procurement of drugs and financing of illicit drug dealing. Her statement also mentions instructions given to Samuel Miranda, Dipesh Sawant and Showik Chakraborty in this regard. Thus, according to NCB, the Applicant was an active member of a drug syndicate connected

with drug supplies. She was a prominent member of supply chain of drugs to Sushant Singh Rajput and she was handling finances also. It is, therefore, NCB's case that the Applicant used to procure drugs for Sushant Singh Rajput and that she used to manage finances along with Sushant Singh Rajput for drug procurement. Based on this material, the Applicant was arrested on 8.9.2020.

o) Further investigation revealed that in March 2020, the Applicant's brother Showik Chakraborty had told Samuel Miranda to get bud for Sushant Singh Rajput and arranged the contact of Zaid Vilatra through his associate Abdel Basit 9 / 70 10 1.3-BA-st-2386-2020 Parihar. For this drug consignment, the present Applicant's debit card of HDFC Bank was provided to Samuel Miranda. Using that debit card, Samuel Miranda withdrew Rs.10,000/- for the bud of 5 Grams.

p) It is the further case of NCB that on 16.3.2020, in pursuance to the conspiracy between the Applicant and Showik Chakraborty, they assessed the requirement of ganja for Sushant Singh Rajput. NCB has the WhatsApp chats to that effect. On 17.3.2020, Showik Chakraborty shared Samuel Miranda's contact number with Abdel Basit Parihar and drug was delivered to Samuel Miranda by Abdel Basit's contact, Zaid Vilatra, near Eat Around Corner in Bandra. On 15.4.2020, Showik Chakraborty facilitated delivery of charas in conspiracy with Samuel Miranda. Charas was delivered to Dipesh Sawant by Abdel Basit's contact Kaizan Ebrahim. According to NCB, Showik's disclosure showed that he used cash/card of the Applicant for purchase of drugs with knowledge of the Applicant. It is specifically mentioned in the affidavit that Showik was controlling the supply of drugs and financing of such illicit drug dealings, directly as well as 10 / 70 11 1.3-BA-st-2386-2020 indirectly with full knowledge of the Applicant. Showik Chakraborty had received delivery of weed from one Karamjeet (KJ) through his friend Suryadeep Malhotra at Showik and the Applicant's residence. Showik had received consignments of drugs from Samuel Miranda. The affidavit further mentions that Showik had bank transactions with drug supplier Dwayne Fernandes regarding drug purchase. NCB has bank account statement to that effect.

q) Thus, according to NCB, Showik Chakraborty was facilitating, dealing, financing and receiving the drug deliveries at his residence and at the residence of Sushant Singh Rajput.

r) Dipesh Sawant's statement revealed that on 17.3.2020, on the directions of Showik, he received the delivery of Bud/Ganja in Bandra from Zaid. At that time, Samuel Miranda was with him.

s) On 17.4.2020, Showik Chakraborty and the Applicant asked Dipesh Sawant to receive Charas/hashish from Kaizan. The delivery took place near Mont Blanc building. Dipesh Sawant has 11 / 70 12 1.3-BA-st-2386-2020 paid Rs. 7000/- to Kaizan which was given by the present Applicant.

t) On 1.5.2020, Showik asked Dipesh to receive Ganja from Dwyane and gave him Dwayne's contact number. On 2.5.2020, Dipesh Sawant received Charas from Dwayne. In the first week of June, Dipesh Sawant received Ganja from a delivery-boy by named Rishikesh Pawar for Sushant Singh Rajput and the Applicant.

u) It is alleged that the Applicant gave Rs.10,000/- to Dipesh Sawant which he paid to Dwayne outside Mont Blanc building and received two packets of Ganja of 25 grams each. Dwayne sent his

bank details to Dipesh Sawant, who in turn shared them with Showik Chakraborty for balance payment. The Applicant had told Dipesh Sawant that one of the packets would be taken by Showik Chakraborty.

7. Based on these allegations and material, NCB has stated in their affidavit that there was sufficient material against the present Applicant to show that she was involved in financing the illicit trafficking of drugs and was dealing in it. It is further 12 / 70 13 1.3-BA-st-2386-2020 their case that the Applicant was aware that Sushant Singh Rajput was engaged in consumption and, yet, she harboured him and concealed him whilst he was engaged in consuming drugs. According to NCB, this would amount to harbouring. It is their case that the applicant allowed her residence for drug storage and helped Sushant Singh Rajput in procuring drugs for consumption. The Applicant not only regularly dealt in, but, also financed illicit trafficking of drugs and that she was a conspirator with other accused in the present offence involving commercial quantity of contraband i.e LSD, which was recovered from co-accused Anuj Keshwani.

8. The NCB claims that they have ample material including electronic evidence that the Applicant was involved in drug trafficking. She had facilitated in drug deliveries and payment through credit card / cash / payment gateways for the contraband and, therefore, the Applicant was not entitled for bail. It is mentioned that if she was released on bail at this crucial stage of investigation, it would hamper further investigation. It is specifically mentioned that the drugs which were financed by her 13 / 70 14 1.3-BA-st-2386-2020 were not meant for her personal consumption. The drugs were supplied for consumption by some other person. Thus, according to NCB, Section 27A of NDPS Act was squarely applicable.

9. It was pointed out by the learned Counsel for the Applicant that the Applicant's statements were allegedly recorded on 6.9.2020, 7.9.2020 and 8.9.2020. According to him, she retracted such statements on 8.9.2020 and 9.9.2020.

10. The Applicant had preferred Criminal Bail Application No.1871/2020 before the Special Court for NDPS at Greater Mumbai for her release on bail. This Application was rejected by the learned Special Judge vide his order dated 11.9.2020. The learned Judge specifically observed that Section 27A operated against her and at this stage it was not possible to observe that her statement was recorded under coercion and hence was inadmissible. The learned Judge referred to Section 37 of NDPS Act. He also referred to recovery of commercial quantity of LSD from accused Anuj Keshwani. It was further observed that the investigation was at a preliminary stage and from the available record, it could not be said that, there were no reasonable grounds 14 / 70 15 1.3-BA-st-2386-2020 to connect the Applicant/Accused. According to the learned Judge, bar under Section 37 of NDPS Act operated and, therefore, she was not entitled for release on bail. It was also observed that if she was released on bail, then she would alert others involved in the offence and that they would destroy the evidence. According to the learned Special Judge, there was possibility of tampering of evidence. On these reasons, her bail application was rejected.

11. In this background, the Applicant has approached this Court for her release on bail.

SUBMISSIONS ON BEHALF OF THE APPLICANT

12. Following are the submissions made by Mr. Maneshinde in support of this Application. These submissions will be discussed, in detail, at their proper place in the following paragraphs when I give my reasons.

i. Mr. Maneshinde basically submitted that no contraband was recovered from the Applicant. She cannot be connected with recovery of any commercial quantity of any contraband. She 15 / 70 16 1.3-BA-st-2386-2020 cannot be connected even with an intermediate quantity of any contraband. At the highest, there are allegations that she was connected with the offence because she helped in procuring drugs for personal consumption by Sushant Singh Rajput. There was nothing to show that such consumption allegedly facilitated by the present Applicant, exceeded small quantity of contraband. Therefore, according to Mr. Maneshinde, the offences are bailable as far as the present Applicant is concerned, and hence, she is entitled to be released on bail as a matter of right. ii. Mr. Maneshinde submitted that Section 27A is not applicable against the present Applicant. She cannot be said to have financed any illicit traffic of drugs. She cannot be said to have harboured any such person mentioned under Section 27A of NDPS Act. Sushant Singh Rajput had enough funds and he did not need financial help from the Applicant to procure drugs. He further submitted that when she was arrested, NCB did not even seek her custody for investigation purposes and she was straightway remanded to judicial custody. This shows that her custody for investigation purposes was not required.

17

16 / 70
1.3-BA-st-2386-2020

iii. Mr. Maneshinde further submitted that Anuj Keshwani has no connection with the Applicant or her brother Showik Chakraborty. Therefore, recovery effected from him can not be held as a circumstance against the present Applicant. iv. Mr. Maneshinde pointed out that even as per NCB's case, Sushant Singh Rajput was the only consumer of drugs in the house. There were four others staying with Sushant Singh Rajput from March to June, 2020, namely, Dipesh Sawant, Samuel Miranda, one Neeraj who was a cook and one Peethani who was a friend of Sushant Singh Rajput.

v. Sushant Singh Rajput's phone was not collected. Hence, one material link is missing.

vi. It was not NCB's case that Sushant Singh Rajput became addicted to drugs only after the Applicant came in his life. According to Mr. Maneshinde there was material to show that he was already addicted to drugs. The affidavit-in-reply of the Respondent, at the highest, shows that the Applicant had spent about Rs.27,000/-. There was nothing to show that such money was actually used for procuring drugs. The contraband was not 17 / 70 18 1.3-BA-st-2386-2020 seized from Sushant Singh Rajput's house and there is no trace of any such delivery of contraband.

vii. Mr. Maneshinde submitted that Sushant Singh Rajput was financially sound. He was residing in his own house. Therefore, by no stretch of imagination, can it be said that the Applicant harboured him or that she gave him shelter.

viii. According to Mr. Maneshinde, at the highest, the Applicant's role was that of an abettor in the main offence of consumption. In case of consumption of small quantity, the consumer can be granted immunity. Therefore, the abettor in such cases cannot be punished more severely.

ix. Lastly, Mr. Maneshinde submitted that NCB had no authority to conduct the investigation in this case as the order passed by the Hon'ble Supreme Court transferring the case involving death of Sushant Singh Rajput to CBI bars investigation by any agency other than CBI.

SUBMISSIONS ON BEHALF OF INVESTIGATING AGENCY/RESPONDENT NO.1

13. As against the arguments advanced by Mr. Maneshinde, learned ASG made his submissions on facts based on the affidavit filed on behalf of Respondent No.1. He relied on the facts mentioned in the affidavit, which are reproduced hereinabove, to contend that all the serious offences are made out against the present Applicant and, therefore, she is not entitled to be released on bail.

14. The learned ASG strenuously made his submissions on various aspects of law which I shall deal with, when I discuss those questions of law.

15. Learned ASG submitted that the contention of Mr. Maneshinde that NCB was not authorized to conduct investigation is not correct. According to learned ASG, the investigation in this case was entirely on a different subject matter. Consumption of drugs by Sushant Singh Rajput was only one of the angles of entire investigation; and that angle was totally unconnected with his death. He submitted that the Court will have to look at the totality 19 / 70 20 1.3-BA-st-2386-2020 of the case. The drug abuse has to be controlled and stopped in every field. People have to be encouraged to maintain good health. He submitted that the offence under NDPS Act is worse than murder or culpable homicide and it should be dealt with severely.

16. Learned ASG submitted that this investigation is started by arrest of Abbas Lakhani, who was totally unconnected with Sushant Singh Rajput. According to learned ASG, the youth of this country look at their role models for inspiration and when they are involved in such offences, they should be punished severely so that it would be a lesson for everyone else.

17. Learned ASG relied on the statement of Objects and Reasons of the main Act and its subsequent amendments. He also relied on interpretation of the Hon'ble Supreme Court in many cases emphasizing the Objects and Reasons of the Act. He submitted that, as of today, twenty accused are arrested and they are all inter-linked with each other. According to learned ASG, recovery of contraband was not an absolute requirement for proceeding with investigation and prosecuting the accused. At this stage, the statements recorded under Section 67 of NDPS Act were 20 / 70 21 1.3-BA-st-2386-2020 sufficient and could be relied on for conducting further probe. According to learned ASG, the Applicant was actively giving instructions, making payments and facilitating procurement of drugs. Her acts fell within the meaning of 'financing' and 'harbouring' as mentioned under Section 27A of the NDPS Act.

REASONING

18. As Mr. Maneshinde has raised the basic issue as to whether NCB was competent to conduct this investigation, this issue needs to be decided first. According to Mr. Maneshinde, the Hon'ble Supreme Court has transferred the investigation related to Sushant Singh Rajput's death to CBI. Mr. Maneshinde's contention is that all other cases registered in connection with that incident are required to be transferred to CBI and that CBI alone was the proper agency who could have investigated the subject matter of this investigation conducted by NCB. Mr. Maneshinde relied on the directions given by the Hon'ble Supreme Court in the case of Rhea Chakraborty Vs. State of Bihar & Ors. 1 Paragraph-41 of the said order dated 19.8.2020 reads thus :

1 Decision of Hon'ble Supreme Court dated 19.8.2020 in Transfer Petition (Crl.) No.225/2020 21 / 70 22 1.3-BA-st-2386-2020 "41. In such backdrop, to ensure public confidence in the investigation and to do complete justice in the matter, this Court considers it appropriate to invoke the powers conferred by Article 142 of the Constitution. As a Court exercising lawful jurisdiction for the assigned roster, no impediment is seen for exercise of plenary power in the present matter. Therefore while according approval for the ongoing CBI investigation, if any other case is registered on the death of the actor Sushant Singh Rajput and the surrounding circumstances of his unnatural death, the CBI is directed to investigate the new case as well. It is ordered accordingly."

19. On the other hand, learned ASG strongly urged that the Hon'ble Supreme Court has directed that the CBI should investigate any other case registered on the death of actor Sushant Singh Rajput and the surrounding circumstances of his unnatural death. According to learned ASG, the present investigation does not relate to the death of Sushant Singh Rajput and it does not even relate to the surrounding circumstances of his unnatural death. He also submitted that the investigation in this case has started after secret information was received and the first person, namely, Abbas Lakhani was arrested. The investigation led to various disclosures and recoveries. Consumption of drugs by Sushant Singh Rajput was only one part of the investigation. The investigation ran deep 22 / 70 23 1.3-BA-st-2386-2020 into uncovering a chain of illicit traffic in drugs.

20. In my opinion, the contentions raised by learned ASG will have to be accepted. The subject matter of the investigation conducted by the NCB is different. It started after receipt of information and after arrest of Abbas Lakhani. During the course of this investigation, incidentally it was found

that Sushant Singh Rajput used to procure drugs. For that purpose, many others helped him. This investigation led to arrest of many other dealers in illicit traffic of drugs who are unconnected with the death of Sushant Singh Rajput. In this view of the matter, I do not find any force in the submissions of Mr. Maneshinde that NCB is not empowered to investigate into this offence, which is a totally different subject matter.

21. Since this is an application for bail in respect of offences punishable under the NDPS Act, the provisions of that Act are required to be considered carefully. The bail provisions under the NDPS Act are mentioned under Section 37 of that Act. Section 37 reads thus :

23 / 70 24 1.3-BA-st-2386-2020 "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 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless--

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

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

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

22. As per requirements of this Section, the Court has to give opportunity to the Public Prosecutor to oppose the application for such relief. Such opportunity is given in the present case as I have heard learned ASG extensively. He has opposed this application. The second requirement is that, the Court should be satisfied about the two conditions. There should be reasonable 24 / 70 25 1.3-BA-st-2386-2020 grounds for believing that the Applicant is not guilty of such offence and the Applicant is not likely to commit any offence while on bail. Therefore, the Court will have to consider whether these two conditions are satisfied. However, these requirements are applicable only where the rigours of Section 37 mentioned in Clause (b) of Sub-Section (1) of Section 37 are applicable in the case. This view is consistently taken by the Hon'ble Supreme Court. The Hon'ble Supreme Court in the case of Union of India Vs. Rattan Mallik alias Habul² has dealt with this aspect in Paragraphs- 12, 13 & 14. They are as follows:

"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 2 (2009) 2 SCC 624 25 / 70 26 1.3-BA-st-2386-2020 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 v. Shiv Shanker Kesari, (2007) 7 SCC 798). 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."

. Based on these guidelines and observations, I am deciding the present Application.

23. I need to decide following questions in this application.

I. Whether the offences alleged against the Applicant are bailable. This question needs to be decided because the Applicant is claiming her release on bail as a matter of right.

II. If the offences are non-bailable, then, as to whether rigours mentioned in Section 37(1)(b) of NDPS Act are applicable.

III. If such rigours are not applicable and if the offences are non-bailable then whether the Court should exercise its discretion to grant or refuse bail.

WHETHER ALL THE OFFENCES UNDER NDPS ACT ARE NON-BAILABLE

24. The applicant has vehemently contended that the allegations, at the highest, show that the offence is a bailable offence and the Applicant could not have been detained in custody since the Applicant was ready and willing to furnish bail.

25. This issue is important and, therefore, I am examining this issue in detail. In support of his contention that the offences 27 / 70 28 1.3-BA-st-2386-2020 involving small quantities are bailable, Mr. Maneshinde relied on a judgment of a Single Judge of this Court in the case of Stefan Mueller Vs. State of Maharashtra³. In this case, it was held that the offences involving small quantities of contraband were bailable offences.

. This judgment in the case of Stefan Mueller (supra) was relied on by a Division Bench of High Court of Delhi in the case of Minnie Khadim Ali Kuhn Vs. State NCT of Delhi and others⁴. The learned Single Judge Bench of this Court in Stefan Mueller (supra) has observed that the heading or the marginal note of Section 37 reads as "Offences to be cognizable and non- bailable". However, the language of Section 37 itself mentions that every offence punishable under this Act shall be cognizable, but, there is no such similar sentence mentioning that every offence punishable under NDPS Act shall be non-bailable. . The learned Single Judge referred to a few judgments explaining that marginal note, heading or title of a Section has a 3 Passed in Criminal Writ Petition No.2939/2009 decided on 23.6.2010 [Bombay High Court]. It is also reported in 2010 SCC OnLine Bom 1974 4 Passed in WP (CRL) No.338/2012 & CRL. M.A. No.2824/2012 [Delhi High Court] 28 / 70 29 1.3-BA-st-2386-2020 limited role to play in the construction of statutes. In cases of conflict between the plain language of the provisions and the meaning of the heading or title, the heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder.

. The learned Judge has observed that since the Legislature has not declared specifically under Section 37 that all the offences under the Act shall be non-bailable, the provisions of Cr.P.C. are required to be looked into to find out whether the offences under NDPS Act are bailable or not. The learned Single Judge thereafter referred to Part-II of the Schedule to the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C. '), which gives classification of offences against other laws declaring them to be bailable or non-bailable. This classification under Part II of the Schedule to Cr.P.C. mentions that the offences in other laws are bailable if they are punishable with imprisonment for less than three years or with fine only. Therefore, according to the learned Judge, since the offences involving small quantity of the contraband were punishable for sentences less than three years, 29 / 70 30 1.3-BA-st-2386-2020 these offences would be bailable. In the same judgment, it was further held that in bailable offences, even conditions cannot be imposed on the

accused in view of provisions of Section 436 of Cr.P.C..

26. In this view of the aforesaid reasoning, it is necessary to consider this question in little more detail.

27. When the Act was brought in force in the year, 1985, the preamble of the Act read thus:

"An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and for matters connected therewith"

28. At that time, Section 37 of that Act read thus:

"37. Offences to be cognizable.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be cognizable."

29. Thus, there was no mention in the Act itself as to whether the offences would be bailable or non-bailable. Therefore, obviously to consider this aspect, recourse needed to be taken to the provisions of Cr.P.C. i.e. Part II of its Schedule. It is important to 30 / 70 31 1.3-BA-st-2386-2020 note that the Act, as it stood then in 1985, Section 27 provided punishment for illegal possession in small quantity for personal consumption of a contraband and under that Section the maximum punishment was one year. Similarly Sections 26 and 31 provided lesser punishments. All the other offences, provided punishment of rigorous imprisonment for a term which was not less than ten years. Thus, there were bailable as well as non-bailable offences mentioned under the NDPS Act in 1985, applying Part II of Schedule of Cr.P.C..

30. Subsequently, the Legislature felt that though the major offences were non-bailable by virtue of level of punishment, on technical grounds the drug offenders were being released on bail. Therefore, it was felt necessary to make the offences cognizable and non-bailable. This is mentioned in the Statement of Objects and Reasons dated 29.11.1988 for amendments carried out in the Act. The opening paragraph of Statement of Objects and Reasons reads thus :

"In recent years, India has been facing a problem of transit traffic in illicit drugs. The spill-over from such traffic has caused problems of abuse and addiction. The Narcotic Drugs and Psychotropic Substances Act, 31 / 70 32 1.3-BA-st-2386-2020 1985 provides deterrent punishments for drug trafficking offences. 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."

. Clause (vii) of second paragraph of Statement of Objects and Reasons reads thus:

"2. A Cabinet Sub-Committee which was constituted for combating drug traffic and preventing drug abuse, also made a number of recommendations for strengthening the existing law. In the light of the recommendations of the Cabinet Sub- Committee and the working of the Narcotic Drugs and Psychotropic Substances Act, in the last three years, it is proposed to amend the said Act. These amendments, inter alia, provide for the following :-

XXXX XXXX XXXX XXXX

(vii) to provide that the offences shall be cognizable and non-bailable."

31. Accordingly, Section 37 was amended. The marginal note of the amendment reads "Offences to be cognizable and non-

bailable"; and the Section 37 after 1988 amendment (w.e.f. 29.5.1989) itself reads thus:

32 / 70 33 1.3-BA-st-2386-2020 "37. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,-

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

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless-

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

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

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

. Thus, for the first time there was reference to special provisions for bail for offences under NDPS Act. The rigours were introduced for offences punishable with imprisonment of five years or more. Sub-Section (2) mentioned that the limitations on granting bail were in addition to the limitations under Cr.P.C. or any other law for the time being in force.

32. Section 37 was further amended in the year 2001. At that time, sentencing structure was introduced depending on the quantity of drugs in respect of certain penal Sections of NDPS Act. The first paragraph of the Statement of Objects and Reasons of 2001 amendment reads thus :

"The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

. After this amendment in the year 2001, now Section 37 reads as mentioned hereinbefore.

33. Thus, it can be seen that in the year 1985, Cr.P.C. governed the provisions of bail for NDPS offences. By the amendment carried in the year 1989 (w.e.f. 29.5.1989), for the first time, the provisions of Cr.P.C. were excluded by specifically introducing a non obstante clause excluding application of Cr.P.C. for grant of bail. If there was inconsistency between the NDPS Act and Cr.P.C., the provisions of NDPS Act were to prevail.

34. In the year 2001, the Act was further amended. However, significantly the structure of Section 37 did not change. The only major difference was that the provisions for grant of bail were made less severe for offences involving quantities less than the commercial quantity of a contraband. In addition, of course, the rigours did apply to Sections 19, 24 and 27A. As observed by the learned Single Judge in Stefan Mueller (supra), there was no specific sentence categorically stating that every offence punishable under the NDPS Act was non-bailable. The title was - "offences to be cognizable and non-bailable". The same position existed before 2001 between 1989 to 2001 as well.

35. In the 1985 Act except Sections 26, 27 and 32, all other 35 / 70 36 1.3-BA-st-2386-2020 offences

were non-bailable as per the schedule of Cr.P.C. and yet necessity was felt to make offences non-bailable as mentioned in the Statement of Objects and Reasons. The concept of small quantity was already there in the then existing Section 27. Therefore, the amendment to Section 37 in the year 1989 and then in the year 2001 will not be affected by concept of "small quantity" introduced in sentencing structure of other penal sections.

36. In my opinion, the situation is completely clarified by a Constitution Bench of the Hon'ble Supreme Court in the case of State of Punjab Vs. Baldev Singh⁵. The Constitution Bench was deciding the ambit and scope of Section 50 of the NDPS Act. The Court was deciding various facets of Section 50 of the NDPS Act. While deciding this issue, the Hon'ble Supreme Court considered as to why this Act was brought in force and also considered other provisions and as to how these provisions were interpreted. The entire scheme of the Act was considered in detail. For the purpose of deciding the present issue, two paragraphs can be advantageously reproduced here. Paragraphs-3 and 4 read thus :

5 (1999) 6 Supreme Court Cases 172

36 / 70

37

1.3-BA-st-2386-2020

"3. Drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. There is no doubt that drug trafficking, trading and its use, which is a global phenomena and has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. It has the effect of producing a sick society and harmful culture. Anti-drug justice is a criminal dimension of social justice. The United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances which was held in Vienna, Austria in 1988 was perhaps one of the first efforts, at an international level, to tackle the menace of drug trafficking throughout the comity of nations. The Government of India has ratified this convention.

4. Prior to the passing of the NDPS Act, 1985 control over narcotic drugs was being generally exercised through certain Central enactments though some of the States also had enacted certain statutes with a view to deal with illicit traffic in drugs. The Opium Act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy and manufacture of opium. The Opium Act, 1878 supplemented the Opium Act, 1857 and made possession, transportation, import, export, sale, etc. of opium also an offence. The Dangerous Drugs Act, 1930, was enacted with a view to suppress traffic in contraband and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf etc. The Act prescribed maximum punishment of imprisonment for three years with or without fine, insofar as the first 37 / 70 38 1.3-BA-st-2386-2020 offence is concerned and for the second or the subsequent offence the punishment could go up to four years'

RI. These Acts, however, failed to control illicit drug traffic and drug abuse on the other hand exhibited an upward trend. New drugs of addiction known as psychotropic substances also appeared on the scene posing serious problems. It was noticed that there was an absence of comprehensive law to enable effective control over Psychotropic substances in the manner envisaged by the International Convention on Psychotropic Substances, 1971. The need for the enactment of some comprehensive legislation on narcotic drugs and psychotropic substances was, therefore, felt. Parliament with a view to meet a social challenge of great dimensions, enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalties particularly for trafficking and various other offences. The NDPS Act, 1985 provides stringent penalties for various offences. Enhanced penalties are prescribed for the second and subsequent offences. The NDPS Act, 1985 was amended in 1988 w.e.f. 29-5-1989. Minimum punishment of 10 years' imprisonment which may extend up to 20 years and a minimum fine of Rs 1 lakh which may extend up to Rs 2 lakhs have been provided for most of the offences under the NDPS Act, 1985. For the second and subsequent offences, minimum punishment of imprisonment is 15 years which may extend to 30 years while minimum fine is Rs 1.5 lakhs which may extend to Rs 3 lakhs. Section 31(a) of the Act, which was inserted by the Amendment Act of 1988, has even provided that for certain offences, after previous convictions, death penalty shall be imposed, without leaving any discretion in the 38 / 70 39 1.3-BA-st-2386-2020 court to award imprisonment for life in appropriate cases. Another amendment of considerable importance introduced by the Amendment Act, 1988 was that all the offences under the Act were made triable by a Special Court. Section 36 of the Act provides for constitution of Special Courts manned by a person who is a Sessions Judge or an Additional Sessions Judge. Appeals from the orders of the Special Courts lie to the High Court. Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail. However, despite the stringent provisions of the NDPS Act, 1985 as amended in 1988 drug business is booming;

addicts are rapidly rising; crime with its role in narcotics is galloping and drug trafficking network is ever-growing. While interpreting various provisions of the statute, the object of the legislation has to be kept in view but at the same time the interpretation has to be reasonable and fair."

. As can be seen, the Hon'ble Supreme Court considered the amendment Act of 1988 in detail and in clear terms it is mentioned with no uncertainty that "Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail." This categorical statement shows that Section 37, firstly, makes all offences non- bailable; and, secondly, also lays down stringent conditions for grant of bail.

. The Hon'ble Supreme Court has further observed that

despite the stringent provisions of the NDPS Act, 1985, as amended in 1988, the drug business was

booming, addicts were rapidly rising, crime with its role in narcotics was galloping and drug trafficking network was ever-growing. While interpreting various provisions of the statute, the object of the legislature is required to be kept in view, but, at the same time the interpretation has to be reasonable and fair.

. The situation has not changed since 1999 when these observations were made by the Hon'ble Supreme Court. In fact, the situation has become worse. Therefore, these observations apply to today's scenario with more force.

37. It was argued on behalf of the Applicants that this judgment in Baldev Singh (supra) was delivered in the year 1999; and thereafter there was further amendment to Section 37 in the year 2001. Therefore, it was sought to be contended that these observations are not applicable to the amended Section 37 after 2001. This contention has no force. The Section itself has not undergone any change in its structure. Even in 1999, as the Act 40 / 70 41 1.3-BA-st-2386-2020 stood then, there was no specific sentence that "all the offences were non-bailable". This particular aspect was found to be significant by the learned Single Judge in Stefan Mueller's case (supra). It appears that Baldev Singh (supra) was not placed before the Hon'ble Courts when Stefan Mueller and Minnie Khadim's cases (supra) were decided. Hence, the observations of the Constitution Bench in Baldev Singh (supra) apply to the provisions of Section 37, as it stood then, and also to Section 37 as it stands today after the amendment in the year 2001. The categorical statement and observation of the Constitution Bench in Baldev Singh's case (supra) clearly binds everybody. Hence, there is no further scope to argue that only some offences under the NDPS Act are non-bailable and other offences where punishment is less than three years are bailable as per Part II of the Schedule of Cr.P.C.

38. It was contended on behalf of the Applicants, and in particular by Mr. Subodh Desai and Mr. Taraq Sayed, that these observations are 'fleeting reference' and do not have binding effect. This contention will have to be rejected. Even obiter dictum of the Hon'ble Supreme Court is binding on this Court. This was held in 41 / 70 42 1.3-BA-st-2386-2020 the case of Municipal Committee, Amritsar Vs. Hazara Singh⁶ In this case, a Three Judges Bench of the Hon'ble Supreme Court approved observations made by Kerala High Court in this regard. The relevant portion reads thus:

"..... Indeed, the Kerala case cited before us by Counsel viz., State of Kerala v. Vasudevan Nair, (Cr. A. No. 89 of 1973, decided by the Kerala High Court on July 18, 1974 - All India Prevention of Food Adulteration Cases Reporter, 1975 Part I, p.8.] itself shows that such distortion of the passage in the judgment did not and could not pass muster. When pressed with such misuse of this ruling, the High Court repelled it. The law of food adulteration, as also the right approach to decisions of this Court, have been set out correctly there:

Judicial propriety, dignity and decorum demand that being the highest judicial tribunal in the country even obiter dictum of the Supreme Court should be accepted as binding. Declaration of law by that Court even if it be only by the way has to be respected. But all that does not mean that every statement contained in a judgment of

that Court would be attracted by Article 141.

Statements on matters other than law have no binding force. Several decisions of the Supreme Court are on facts and that Court itself has pointed out in *Gurcharan Singh v. State of Punjab*, 1972 FAC 549 and *Prakash Chandra Pathak v. State of Uttar Pradesh*, AIR 1960 SC 195, that as on facts no two cases could be similar, its own decisions which were essentially on questions of fact could (1975) 1 Supreme Court Cases 794 42 / 70 43 1.3-BA-st-2386-2020 not be relied upon as precedents for decision of other cases."

39. In the case of *Laxmi Devi Vs. State of Bihar and others* 7, the Hon'ble Supreme Court quoted various earlier judgments with approval. It was mentioned and held that the ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based. The reasons for the decision or the ratio decidendi is not the final order containing the decision. In fact, in a judgment, though the ratio decidendi may point to a particular result, the decision may be different and not a natural consequence of the ratio decidendi of the judgment. It is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent. Ratio decidendi in Latin meant "the reason for deciding".

. These observations and reference to other judgments are found in Paragraphs-21, 22, 23 & 24 of the judgment.

40. In the case of *Baldev Singh (supra)*, the Constitution Bench had considered the objects and reasons for the Act and the amendments, various Sections, entire scheme of the Act and then 7 (2015) 10 Supreme Court Cases 241 43 / 70 44 1.3-BA-st-2386-2020 they decided the scope of Section 50 of the NDPS Act. Thus, the observations made in paragraph-4 of *Baldev Singh's case (supra)* are clearly in the nature of ratio decidendi; and they cannot be termed as fleeting reference as is sought to be argued.

41. In fact, in the case of *State of Orissa Vs. Laxman Jena* 8 Paragraph-4 of *Baldev Singh's case (supra)* is reproduced and the sentence prior to that says - "A Constitution Bench of this Court in *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, has held" Thus, even the Hon'ble Supreme Court in a later judgment has treated Paragraph-4 of *Baldev Singh's case (supra)* as important decisive observations.

42. In another case of *Beckodan Abdul Rehiman Vs. State of Kerala* 9, Paragraph-4 of *Baldev Singh (supra)* is reproduced and before that it was mentioned that "In that case the Court observed". Thus, in the subsequent judgments, i.e., subsequent to the amendment of 2001 to Section 37, the Hon'ble Supreme Court continued to refer to and rely on Paragraph-4 of *Baldev Singh's case (supra)*.

8 (2009) 16 SCC 332

9 (2002) 4 SCC 229

43. In the case of Director of Settlements, A.P. and others Vs. M.R. Apparao and another¹⁰, it is observed that even obiter of Supreme Court is of considerable weight. It was further observed that a decision in the judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court. When the Supreme Court decides a principle, it would be the duty of the High Court or a sub-ordinate Court to follow the decision of the Supreme Court. These observations can be found in Paragraph- 7 of the said judgment. Thus, it leaves no manner of doubt in my mind that the observations in Paragraph-4 in Baldev Singh's case (supra) are binding and it is my duty to follow this decision.

44. In another case of the Hon'ble Supreme Court, in the case of Maktool Singh Vs. State of Punjab¹¹, the Hon'ble Supreme Court in Paragraph-17 observed that the only offences exempted from the purview of the said rigours on the bail provisions are those under Sections 26 and 27 of the Act. The former was punishable upto a maximum imprisonment for three years; and the ¹⁰ (2002) 4 SCC 638 ¹¹ (1999) 3 SCC 321 45 / 70 46 1.3-BA-st-2386-2020 latter upto a maximum imprisonment for one year. For all other offences, the Court's power to release an accused on bail during the period before conviction had been drastically curtailed. Thus, these observations also mean that only in some of the offences where lesser punishment is provided, the rigours of bail provisions under Section 37 will not apply, but, that does not make those offencesailable. As mentioned earlier, the concept of application of rigours and the concept as to whether a particular offence isailable or non-ailable are two different issues.

45. The non obstante clause in Section 37 plays a very important part in construction of that Section. Originally in the year 1985 this non obstante clause operated to exclude the provisions of Cr.P.C. only to make all offences cognizable. At that point of time, Section 37 declared that all the offences were cognizable notwithstanding anything contained in the Cr.P.C.. In the year 1985, the applicability of the Schedule to Cr.P.C. was not excluded. For the first time in the year 1989, when the amended provision of Section 37 was brought into force, the bail provisions of Cr.P.C. were brought under the non obstante clause of Section 37 46 / 70 47 1.3-BA-st-2386-2020 of NDPS Act. Therefore, since 1989, the provisions for bail including the Schedule to Cr.P.C., and in particular Part II of Schedule of Cr.P.C., ceased to apply for offences punishable under the NDPS Act. The provisions of NDPS Act in respect of bail provisions were given complete over-riding effect and from that point onwards the classification of offences were strictly governed by Section 37 of the NDPS Act to the exclusion of all the provisions of Cr.P.C. in respect of classification of such offences. The only concession given by Section 37 of NDPS Act to the provisions of Cr.P.C. are mentioned in sub-section (2) of Section 37. The Scheme of Section 37 clearly shows that its provisions are independent of Cr.P.C. and only additional limitations mentioned in Cr.P.C. in granting bail were relevant. Therefore, clearly the classification of offence was restricted to Section 37 of the NDPS Act and the Schedule, in particular Part II of the Schedule of Cr.P.C. has no application. The same situation continued even after amendment of year 2001 made to Section 37 of the NDPS Act. Wherever there was no inconsistency between the provisions of Section 37 and the provisions for bail under Cr.P.C. then only it was permissible to look at the Cr.P.C. for bail provisions. Therefore, other procedural 47 / 70 48 1.3-BA-st-2386-2020 aspects concerning bail provisions, for example, execution of bail bonds etc. will be governed by the provisions of Cr.P.C.. If the accused claims bail as of right in case of possession of small quantity then no investigation can be carried out to find the

source and trade of the contraband. This defeats the object of the Act. Considering all this discussion, I am of the firm view that the observations made by the Hon'ble Supreme Court in Baldev Singh (supra) are binding and all offences under the NDPS Act are non- bailable.

46. A competent officer can effect arrest if he thinks it proper to arrest such person. This is provided under Section 42(d). The officer arresting any such person has to keep in his mind the benevolent provisions of this Act as well. This Act is not only a strict, stringent and harsh Act for drug traffickers, it also shows compassion and leniency in laying down reformatory approach under Sections 64A and 71. This reformatory approach should never be lost sight of.

47. Having said this, one cannot overlook the prevailing situation in today's society. The offenders involving smaller 48 / 70 49 1.3-BA-st-2386-2020 quantity or lesser punishment expose themselves to immediate arrest. They cannot claim bail as of right. The Act needs to have this deterrent effect to curb the spread of drug abuse.

INTERPLAY BETWEEN SECTIONS 27A & 37

48. Another issue which was raised before me, particularly by Mr. Sayed, is that Section 37 indicates that rigours in granting bail are applicable for the offences involving commercial quantity and this concept will apply even to Sections 19, 24 and 27A of the NDPS Act. The scheme of the NDPS Act, after amendment in the year 2001 shows that the concept of small, intermediate and commercial quantity was introduced in some penal sections. The sentencing structure was changed. For smaller quantity, the sentence is much lesser. For intermediate quantity, minimum sentence was not provided. But for the offences involving commercial quantity, the minimum sentence provided is ten years. According to Mr. Sayed, the rigours of Section 37 will apply to the offences under Sections 19, 24 and 27A of the NDPS Act if only the offences involve commercial quantity. His reasoning is that Sections 19, 24 and 27A are separated by word "or".

After Section 27A, they have used the word "and also" followed by the words "for offences involving commercial quantity". He, therefore, contended that the concept of offences involving commercial quantity is applicable to Sections 19, 24 and 27 as well. Even this contention will have to be rejected. If the Legislature wanted to restrict application of rigours only to the offence involving commercial quantity including Sections 19, 24 & 27 there was no necessity to mention these sections specifically in Section

37. A simple sentence that rigours will apply to all offences involving commercial quantity would have served the purpose. The specific mention of these three sections has its significance. The punishment and sentencing under these Sections are independent of the quantity of a contraband.

When the Act was amended in the year 2001, the other relevant penal Sections, viz., Sections 20, 21 & 22 were amended to include the concept of commercial quantity and lesser quantity. However, these three Sections were deliberately left untouched. Therefore, the concept of commercial quantity or lesser quantity is not applicable to these Sections even for consideration of bail applications. In the case of Union of 50 / 70 51 1.3-BA-st-2386-2020 India Vs. Niyazuddin Sk. and another 12, in Paragraph-6, the Hon'ble Supreme Court has enumerated the offences where special rigours apply. This Paragraph-6 reads thus:

"6. Section 37 of the NDPS Act contains special provisions with regard to grant of bail in respect of certain offences enumerated under the said section. They are:

(1) In the case of a person accused of an offence punishable under Section 19, (2) Under Section 24, (3) Under Section 27-A and (4) Of offences involving commercial quantity."

. Thus, there are four categories as observed by the Hon'ble Supreme Court and the offences involving commercial quantity is a separate category that has no direct connection with the earlier three categories i.e. Sections 19, 24 & 27A. The use of the word "and also" does indicate that the fourth category of offences involving commercial quantity is separate. Therefore, if the prosecuting agency has material to show that either of these three offences are committed i.e. under Sections 19, 24 and 27, then irrespective of the quantity of the contraband, the rigours of Section 37 will apply.

12 (2018) 13 SCC 738

52

51 / 70
1.3-BA-st-2386-2020

SCOPE OF SECTION 27A OF THE NDPS ACT

49. Another important question of law which is required to be addressed in this case is the scope and interpretation of Section 27A of the NDPS Act. Section 27A reads thus:

"27A. Punishment for financing illicit traffic and harbouring offenders:-- Whoever indulges in financing, directly or indirectly, any of the activities specified in sub-clauses (i) to (v) of clause (viii) of section 2 or harbours any person engaged in any of the aforementioned activities, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

. This Section refers to Section 2(viii) of the NDPS Act. That Section defines "illicit traffic" thus :

"2. Definitions.-- In this Act, unless the context otherwise requires, (viii) "illicit traffic", in relation to narcotic drugs and psychotropic substances, means--

52 / 70 53 1.3-BA-st-2386-2020

(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;"

50. As per the NCB's case, the Applicant financed procurement of drugs for Sushant Singh Rajput and she harboured him knowing that he was consuming drugs and, therefore, she has committed the offence punishable under Section 27A. As discussed earlier, rigours of Section 37 of the NDPS Act specifically apply to Section 27A; and Section 27A is independent of the quantity 53 / 70 54 1.3-BA-st-2386-2020 involved. There is no mention of activities involving small, intermediate or commercial quantity in Section 27A. Therefore, what is required to be considered is what is meant by "financing" and "harbouring". Section 2(viii) defining "illicit traffic" gives a list of various activities. Clauses (i) to (v) in Section 2(viii) are referred to in Section 27A. Clauses (i), (ii) & (iii) are reproduced ad verbatim in sub-clauses (a), (b) and (c) of the prohibitory Section 8 of the NDPS Act. In the present case, the Applicant is not concerned with sub-clauses (i) & (ii) of Section 2(viii) or sub - clauses (a) & (b) of Section 8 of the NDPS Act. Sub-clause (iii) of Section 2(viii) and

sub-clause (c) of Section 8 require close scrutiny. Section 8(c) prohibits certain activities and it lays down that no person shall produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-state, export inter-state, import into India, export from India or tranship any narcotic drug or psychotropic substance. These all activities are included in sub-clause (iii) of Section 2(viii) except 'concealment', which is missing from Section 8(c). However, that would be perhaps covered under the residuary provision of sub-clause (iv) of Section 2(viii). Contravention of Section 8 is made punishable 54 / 70 55 1.3-BA-st-2386-2020 under various provisions of NDPS Act, viz., Sections 20, 21, 22 and

23. Importantly all these penal Sections take into account the quantity of the contraband to prescribe a particular sentence. The penal Section like Sections 19, 24 and 27A are not quantity specific. They make no reference to the quantity of the substance involved.

51. The Legislature was clear in its intention to give concession in the sentencing structure for smaller or intermediate quantities of the contraband. If Section 27A is applied to the activities mentioned in Sections 8, 18, 20(b), 21, 22 and 23, then classification of offences for sentencing purposes depending on the quantity will lose all its significance. Section 27A is a different provision, though, the activities mentioned in these Sections are common.

52. Section 27A is much wider if sub-clause (iv) of Section 2(viii) is taken into account. This sub-clause (iv) of Section 2(viii) takes in its sweep all the remaining activities which are not mentioned in sub-clauses (i),(ii) & (iii). This covers just about every activity which can be described as dealing in narcotic drugs 55 / 70 56 1.3-BA-st-2386-2020 or psychotropic substances. The interpretation of Section 27A should not be stretched to the extent of rendering classification of sentences depending on the quantities in penal Sections 20, 21, 22 and 23 otiose.

53. Sub-clause (viii) of Section 2 of the NDPS Act is an inclusive definition. The inclusive part mentions financing, abetting or conspiring and harbouring. The financing and harbouring parts are specifically made punishable under Section 27A.

54. The activities mentioned in Section 2(viii)(iii) and Section 8(c) refer to sale, purchase, export, import etc.. All these activities involve monetary transactions. For every sale or purchase, there can be use of money. But, that will not mean that either of the parties has "financed" the transaction. Such sale and purchase are separately prohibited and made punishable under Section 8(c) read with Section 20 and other similar Sections. Therefore, "financing" is something more than just paying for purchase and other activities involving contraband as defined under Section 8(c). Contravention of that Section and indulging in 56 / 70 57 1.3-BA-st-2386-2020 activities mentioned in Sections 20, 21, 22 and 23 incur punishment depending on the quantity of the contraband.

55. For interpreting Section 27A harmoniously with the Scheme of the Act and other Sections, it is necessary to go to the Statement of Objects and Reasons for incorporating this Section in the Act w.e.f 29.5.1989. The Statement of Objects and Reasons of the 1989 Amendment, which is reproduced hereinbefore, mentions that India was facing a problem of transit traffic in illicit drugs. The spill-over from such traffic was causing problems of abuse and addiction. Therefore, need was

felt to amend the Law to further strengthen it.

56. Thus, the aim was to control the traffic in illicit drugs as the spill over from such traffic was causing problems of abuse and addiction. The Legislature wanted to attack the basic cause of illicit traffic of drugs. The prohibitory Section 8 was already existing at that time. Therefore, a separate Section 27A was introduced to check these activities which were the root cause of illicit traffic. "Financing" and "harbouring" such activities were, therefore, specifically mentioned under Section 27A.

58

57 / 70
1.3-BA-st-2386-2020

57. "Financing" is not defined under the Act. The Concise Oxford Dictionary defines the word "finance" as "(1) the management of (esp. public) money, (2) monetary support for an enterprise, (3) (in pl.) the money resources of a state, company, or person, to provide capital for (a person or enterprise)".

58. Black's Law Dictionary gives meaning of the word "finance" as "to raise or provide funds".

59. Thus, "financing" as generally understood, is offering monetary support or provide funds.

60. Therefore, simply providing money for a particular transaction or other transactions will not be financing of that activity. Financing will have to be interpreted to mean to provide funds for either making that particular activity operational or for sustaining it. It is the financial support which directly or indirectly is cause of existence of such illicit traffic. The word "financing" would necessarily refer to some activities involving illegal trade or business.

61. The allegations against the Applicant of spending money in procuring drugs for Sushant Singh Rajput will not, 58 / 70 59 1.3-BA-st-2386-2020 therefore, mean that she had financed illicit traffic.

62. The next key word in Section 27A is "Harbours". Again "harbouring" is not defined under the NDPS Act. The expression "harbour" is used in other Acts as well. One such Act is Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short, "TADA"). Sub-section (4) of Section 3 of said Act reads thus:

"3. Punishment for terrorist acts.--

xxxx xxxx xxxx (4) Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

63. The word "harbours" was not even defined in TADA. The Hon'ble Supreme Court had an occasion to address this issue which is reflected in the case of Kalpanath Rai Vs. State (through CBI)¹³. In that case, it was contended before the Hon'ble Supreme Court that the word "harbour" which was not defined in TADA must be understood in the same manner as it was understood in Indian Penal Code. The Hon'ble Supreme Court did not completely agree ¹³ (1997) 8 SCC 732 59 / 70 60 1.3-BA-st-2386-2020 with such contention, but, went on to make certain important observations in Paragraphs-49, 50, 51, 52 and 53. Said Paragraphs- 49, 50, 51, 52 and 53 read thus :

"49. There are two hurdles in the way to adopt the IPC definition of the word "harbour" for TADA. First is that TADA permits reliance to be made only on the definitions included in the Procedure Code and not on the definitions in the IPC. Second is, the word "harbour" as such has not been used in the Procedure Code and hence the question of side-stepping to Penal Code definitions does not arise.

50. Be that as it may, we would refer to the expression "harbour" as understood in IPC, for, TADA is essentially a penal statute and hence the meaning attached to the words in the IPC can have a bearing on the words used in TADA, unless they are differently defined in the Code.

51. Section 52-A of the Indian Penal Code defines the word "harbour" as including "supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension".

52. Sections 136 and 312 of IPC are the provisions incorporating two of the offences involving "harbour" in which the common words used are "whoever knowing or having reason to believe". Another offence in the Penal Code involving 60 / 70 61 1.3-BA-st-2386-2020 "harbour" is Section 157 wherein also the words "whoever harbours knowing that such person etc." are available. It was contended that mens rea is explicitly indicated in the said provisions in the Penal Code whereas no such indication is made in Section 3(4) of TADA and therefore, the element of mens rea must be deemed to have been excluded from the scope of Section 3(4) of TADA.

53. The word "harbours" used in TADA must be understood in its ordinary meaning as for penal provisions. In Black's Law Dictionary its meaning is shown as "to afford lodging to, to shelter, or to give a refuge to". Quoting from *Susnjar v. U.S.*, CCA Ohio, 27 F 2d 223 (F 2d at p. 224) the celebrated lexicographer has given the meaning of the word harbour as "receiving clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same". In the other dictionaries the meaning of the said word is delineated almost in the same manner as above. It is, therefore, reasonable to attribute a mental element (such as knowledge that the harboured person was involved in a terrorist act) as indispensable to make it a penal act. That apart, there is nothing in the Act, either expressly or even by implication, to indicate

that mens rea has been excluded from the offence under Section 3(4) of TADA."

64. Section 2(xxix) of NDPS Act also permits use of Cr.P.C. to assign meaning to words and expressions. The Hon'ble Supreme Court mainly discussed whether mens rea was applicable. Even in 61 / 70 62 1.3-BA-st-2386-2020 Section 27A of NDPS Act, the concept of mens rea is applicable. Section 52-A of IPC can be used for a limited purpose as mentioned by the Hon'ble Supreme Court. The key words in that Section are "to evade apprehension". This only means that first of all there has to be another offender who has committed the offence. The person who is charged with harbouring that main offender should have supplied him with shelter, food etc.; and then the next requirement is that that second person should have done this to prevent the main offender's apprehension. In the present case, no criminal case or FIR was pending against Sushant Singh Rajput. He was residing in his own house and was spending for his own food and other necessities. At that point of time, he had no apprehension of any arrest. Therefore, the act on the part of the Applicant cannot be stretched to attract the allegation of harbouring Sushant Singh Rajput.

65. Another important word in Section 27A is "engaged". The offence of harbouring is attracted when a person harbours the persons "engaged" in the activities mentioned in Section 2(viii)(i) to (v). The Black's Law Dictionary gives the meaning of the word 62 / 70 63 1.3-BA-st-2386-2020 "Engaged" as 'to employ' or 'involve oneself'; 'to take part in'; 'to embark'. Thus, if Section 27A is read in its entirety, it indicates that financing is in respect of illicit traffic through which the financier expects monetary or other returns. In the same context, Section 27A makes harbouring a punishable offence. Harbouring is in respect of a person who is engaged in such activities. It requires that he is either employed in or has involved himself with or has taken part in or has embarked on such activities.

66. In this context, Mr. Maneshinde and Mr. Sayed relied on the judgment of a Single Judge of High Court of Kerala in the case of K.K. Ashraf s/o Muhammed K.K14. In Paragraph-17 of that order, the expression "financing" was discussed. After referring to the facts of the case, the learned Judge observed that sale of a narcotic drug on credit is different from financing the activity of sale of narcotic drug. The expression "financing" was not related to the payment of the value of the narcotic drug. On the other hand, it involved an activity other than sale or purchase of the narcotic drug, in which a person invests or provides funds or 14 Decided on 13.10.2009 in Bail Application No.5251/2009 [Kerala High Court].

resources for facilitating the activities mentioned in sub-clauses (i) to (v) of Clause (viii) of Section 2 of the NDPS Act. I agree with these observations. Though, the learned ASG tried to submit that the observations in fact helped his cause, I am unable to agree with the learned ASG in this regard.

67. There is another important angle to interpretation of Section 27A. Mr. Sayed submitted that the interpretation of "harbouring" and "financing", as sought to be made by Respondent No.1 gives rise

to anomalous situation. He pointed out that the punishment for consumption of any narcotic drug or psychotropic substance, as mentioned under Section 27, is maximum one year or imposition of fine which may extend to Rs.20,000/-. By applying the interpretation of Section 27A by NCB, if some other person like a friend or a relative pays money for such consumption, then the person who actually consumes the drug can be punished only upto one year or can get immunity under Section 64-A of NDPS Act; but the person who gives money for purchasing that drug faces the prospect of spending twenty years in jail. This is highly disproportionate and would be extremely unreasonable.

65

64 / 70

1.3-BA-st-2386-2020

I agree with Mr. Sayed on this point. Section 27A

cannot be interpreted in this manner. Therefore, Section 27A will have to be interpreted harmoniously with other Sections as well as Objects and Reasons of the Act so that it attacks the illicit drug trafficking, but, does not extend to sentencing another accused more severely than the main offender.

. I am unable to agree with the submission that giving money to another for consuming drug would mean encouraging such habit and would mean "financing" or "harbouring" as envisaged under Section 27A of the NDPS Act.

68. In the light of what is discussed above in respect of questions of law, the facts in the case against the Applicant can be considered.

69. The allegations and material against the present Applicant are that on some occasions she had used her own money in procuring drugs. She facilitated procuring of drugs through her brother. For that purpose employees of Sushant Singh Rajput were also used. As discussed earlier, her acts would not fall under Section 27A of the NDPS Act.

66

65 / 70

1.3-BA-st-2386-2020

70. The main Section which could be attracted in her case is violation of Section 8(c) of the NDPS Act, which is made punishable under Section 20 or Section 22. In that case, it is necessary for the investigating agency to show that her activities or contravention involved commercial quantity of a Narcotic drug or psychotropic substance. The investigation did not reveal any recovery either from the Applicant or from the house of Sushant Singh Rajput. It is their own case that the drugs were already consumed and hence there was no recovery. In that case, there is nothing at this stage to

show that the Applicant had committed any offence involving commercial quantity of contraband. The material at the highest shows that she has committed an offence involving contraband, but, the crucial element of incurring rigours of Section 37 in respect of commercial quantity is missing. Therefore, I am satisfied that there are reasonable grounds for believing that the Applicant is not guilty of any offence punishable under Sections 19, 24 or 27A or any other offence involving commercial quantity. There are no other criminal antecedents against her. She is not part of the chain of drug dealers. She has not forwarded the drugs allegedly procured by her to somebody else to earn monetary or 66 / 70 67 1.3-BA-st-2386-2020 other benefits. Since she has no criminal antecedents, there are reasonable grounds for believing that she is not likely to commit any offence while on bail.

71. The learned ASG had argued that the celebrities and role models should be treated harshly so that it sets an example for the young generation and they do not get encouraged to commit such offences. I do not agree. Everybody is equal before law. No celebrity or role model enjoys any special privilege before the Court of law. Similarly, such person also does not incur any special liability when he faces law in the Courts. Each case will have to be decided on its own merits irrespective of the status of the accused.

72. The learned Special Judge has observed that the Applicant may alert others and evidence can be destroyed by them. There is no basis for such observation. It is also important to note that when the Applicant was produced before the Court for her first remand, the investigating agency did not seek her custody. That means, they are satisfied with her interrogation and she had cooperated in that investigation.

73. Based on all this discussion, the Application is allowed.

However, considering the background of the case, stringent conditions are imposed. Hence, I pass the following order :

ORDER i. In connection with C.R. No.16/2020 registered with the Narcotics Control Bureau, Mumbai, the Applicant is directed to be released on bail on her furnishing PR bond in the sum of Rs.1,00,000/- (Rupees One Lakh Only) with one or two sureties in the like amount.

ii. The Applicant shall deposit her passport with the investigating agency.

iii. The Applicant shall not leave the country without prior permission from the Special Judge for NDPS at Greater Mumbai.

iv. If the Applicant has to go out of Greater Mumbai, she shall inform the Investigating Officer; and shall give her itinerary to the Investigating Officer in advance.

v. The Applicant shall attend the office of investigating agency on first Monday of every month between 10:00 a.m. to 11:00 a.m. to mark her presence, for a period of six months.

68 / 70

69

1.3-BA-st-2386-2020

vi. The Applicant shall attend all the dates in the Court unless prevented by any reasonable cause.

vii. The Applicant shall not tamper with the evidence or investigation of the case.

viii. Criminal Bail Application stands disposed of accordingly.

(SARANG V. KOTWAL, J.)

74. At this stage, Shri Maneshinde requested to permit the Applicant to furnish cash bail for a period of one month so that the sureties can be arranged within that period. He submitted that considering the prevailing pandemic situation, it will not be possible to complete the formalities to arrange for sureties. Learned ASG left this aspect to the discretion of the Court. Therefore, initially the applicant is permitted to furnish cash bail for the sum of Rs.1,00,000/- (Rupees One Lakh only) for a period of one month from today. Within that period, the Applicant will have to furnish the sureties, as directed.

75. Learned ASG sought stay of this order for a period of at least one week from today to enable him to approach the Hon'ble Supreme Court.

69 / 70

70

76. I have imposed sufficiently stringent conditions on the Applicant. Some further condition can be imposed for a limited period to take care of the request made by learned ASG though I am not inclined to grant stay to the order. If finally the order is set aside and the bail is cancelled, the Applicant will be available for being arrested again. Hence to ensure that even further, one more condition is imposed:

(vii-a) After her release on bail, the Applicant shall mark her presence at the nearest Police Station from her residence anytime between 11:00 a.m. to 5:00 p.m. to show her Digitally signed by

Pradeepkumar availability, for a period of ten days from her release. Pradeepkumar P. Deshmane P. Deshmane Date:

2020.10.07 12:12:08 +0530

77. This order shall be digitally signed by the Private Secretary of this Court. All concerned shall act on production by fax or email of a digitally signed copy of this order.

(SARANG V. KOTWAL, J.) Deshmane (PS) 70 / 70