

HIGH COURT OF ALLAHABAD**Bench: Justice Subhash Vidyarthi****Date of Decision: 5th June 2024**

CRIMINAL MISC. BAIL APPLICATION No. - 3604 of 2024

Vimal RajputApplicant**Versus****State of U.P. Through Addl. Chief Secy. HomeRespondents****Legislation:**

Sections 8, 20, 23, 29, 37 68 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act)

Subject: Bail application under the NDPS Act seeking release of the applicant on bail in a case involving the recovery of 7 kg of charas. The application was filed on grounds of alleged procedural violations in sampling and recovery, and the applicant's claim of false implication.

Headnotes:

Criminal Law – Bail Application under NDPS Act – Applicant seeking bail for charges involving commercial quantity of charas – Alleged procedural violations in recovery and sampling as per NDPS Act and Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling, and Disposal) Rules, 2022 – Court examined if provisions of Section 37 NDPS Act apply to Constitutional Courts for bail [Paras 1-3, 9-12, 39-42].

NDPS Act – Procedural Compliance – Prosecution failed to comply with mandatory provisions for sampling and recovery under Section 52-A of NDPS Act and 2022 Rules – Samples not taken in the presence of Magistrate, not drawn in duplicate, and no serial numbering of packets – Court emphasized strict adherence to procedure in cases with severe punishments [Paras 43-49].

Special Powers of High Court – Interpretation of Section 36-A(3) NDPS Act – Provision for special powers of High Court regarding bail – Court interpreted Section 36-A and 37 together, concluding restrictions in Section 37 do not apply to Constitutional Courts due to legislative intent and harmonious construction of statutory provisions [Paras 34-38].

Decision: Bail granted – Applicant released on bail on furnishing personal bond and sureties, subject to conditions of not tampering with evidence, not pressurizing witnesses, and appearing on each date fixed by the trial court – Emphasized applicant's lack of criminal history and procedural violations as grounds for bail [Paras 50-52].

Referred Cases:

- State by the Inspector of Police v. B. Ramu, 2024 INSC 114
- Union of India v. Ajay Kumar Singh, 2023 SCC OnLine SC 346
- Mohd. Muslim v. State (NCT of Delhi), 2023 SCC OnLine SC 352
- State of Punjab v. Baldev Singh, (1999) 6 SCC 172
- Makhan Singh v. State of Haryana, (2015) 12 SCC 247
- Tofan Singh v. State of T.N., (2021) 4 SCC 1
- Ramji Singh v. Enforcement Directorate, 2023 SCC OnLine All 831
- Vijay Madanlal Choudhary v. Union of India, 2022 SCC OnLine SC 929

Representing Advocates:

Sumeet Tahilramani for applicant

Ranvijay Singh, AGA for State

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Sumeet Tahilramani, learned counsel for the applicant, Sri Ranvijay Singh, learned A.G.A. for the State and perused the records.
2. The instant application has been filed seeking release of the applicant on bail in Case Crime No. 0029 of 2024, under Sections 8/20/23/29/68 of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the NDPS Act'), registered at Police Station Purakalandar, District Ayodhya.
3. The aforesaid case has been registered on the basis of an F.I.R. lodged on 28.01.2024 by the Station House Officer against five persons, including the applicant, stating that on the basis of information received from a mukhbir a team of police officers had intercepted a four wheeler vehicle in which four persons, including the applicant were travelling. Different quantities of charas were being carried by all the accused persons and 7 kgs. charas packed in 14 bags containing 500 grams each was recovered from a bag being carried by the applicant.
4. The recovery memo states that a single sample weighing 166 grams was taken out from the 14 packets of charas recovered from the possession of the applicant.

5. In the affidavit filed in support of bail application it has been stated that the applicant is innocent, he has been falsely implicated in the present case and he has no criminal history.
6. The State has filed a counter affidavit stating that samples have been sent to the Forensic Science Laboratories for being examined and as per the averment made in the counter affidavit also a single sample has been sent for examination.
7. The learned A.G.A. I has drawn attention of the Court to the provisions contained in Section 37 of the NDPS Act, which is 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 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.*

8. The learned A.G.A.-I has relied upon the judgments in the cases of **State by the Inspector of Police versus B. Ramu**, 2024 INSC 114, S.L.P. CrI. No. 8137 of 2022, decided on 12.02.2024, **Union of India v. Ajay Kumar Singh**, 2023 SCC OnLine SC 346 and **Mohd. Muslim v. State (NCT of Delhi)**, 2023 SCC OnLine SC 352.
9. In **B. Ramu and Ajay Kumar Singh** (Supra), the Hon'ble Supreme Court has reiterated that for entertaining a prayer for bail in a case involving recovery of commercial quantity of narcotic drug or psychotropic substance, the Court would mandatorily record the satisfaction in terms of the rider contained in Section 37 of the NDPS Act.
10. In **Mohd. Muslim** (Supra), the Hon'ble Supreme Court held that: -

“20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would

not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

21. *The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik¹⁹). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”*

- 11.** However, none of the cases referred to above takes note of the provision contained in Section 36-A of the NDPS Act, which is as follows: -

“36-A. Offences triable by Special Courts.—(1) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973—*

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2-A) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considers—

- (i) when such person is forwarded to him as aforesaid; or*
(ii) upon or at any time before the expiry of the period of detention authorised by him; that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;
(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having

jurisdiction to try a case may exercise under Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to “Magistrate” in that section included also a reference to a “Special Court” constituted under Section 36.

(4) In respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27-A or for offences involving commercial quantity the references in sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to “ninety days”, where they occur, shall be construed as reference to “one hundred and eighty days”:

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.”

12. Surprisingly, Section 37 of the NDPS Act, which contains certain restrictions on the Courts' power to grant bail, does not contain any provision saving the special powers to grant bail conferred upon the High Courts by Section 439 Cr. P.C., whereas Section 36-A of the NDPS Act, which confers jurisdiction for trial of offences under the Act upon Special Courts and which does not contain any provision which may affect the powers of any Court regarding grant of bail, provides that nothing contained in Section 36-A shall affect the High Court's special powers regarding bail under Section 439 Cr. P.C. It appears that the provision contained in Section 36-A (3) of NDPS Act saving special powers of the High Courts regarding grant of bail was meant to be

incorporated in Section 37 of the Act, but it has erroneously been placed in the Section preceding Section 37. This conclusion is supported by a study of similar provisions contained in other Statutes which are being referred to in the following paragraphs.

13. Section 12(1) and 12(2) of the **Anti-Hijacking Act, 2016** contain a provision similar to Section 45(1) and 45(2) of PMLA, but a provision similar to Section 44(2) of PMLA is also contained Section 12(3) of the **Anti-Hijacking Act**. The aforesaid section reads thus:—

“12. Provision as to bail.—(1) *Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974), no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless,—*

(a) *the Public Prosecutor has been given an opportunity to oppose the application for such release; and*

(b) *where Public Prosecutor opposes the application, the Designated 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 as specified in sub-section (1) are in addition to the limitation under the Criminal Procedure Code, 1973 (2 of 1974), or any other law for the time being in force, on granting bail.*
- (3) **Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974).”**

(Emphasis added)

14. The High Courts' special powers for grant of bail under Section 439 Cr. P.C. have been saved even when the punishment for the offence of hijacking provided in Section 4 is upto death.

15. Similarly, the offences under the **Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982** carry a punishment of imprisonment for life and Section 6A of the Act provides that:—

“6-A. Provision as to bail.—(1) *Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974), no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless—*

(a) *the Public Prosecutor has been given an opportunity to oppose the application for such release; and*

(b) *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 sub-section(1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.*
- (3) ***Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974).***

(Emphasis added)

24. Section 3 of the **Maritime Anti-Piracy Act, 2022** provides that the offence of piracy will carry a maximum punishment of imprisonment upto life and in case the person committing piracy cause death of any person or attempts to cause death, he may be punished with death.

Section 12 of the aforesaid Act provides that:—

“12. Provisions as to bail.—(1) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless—

(a) the Public Prosecutor has been given a reasonable opportunity to oppose the application for such release; and

(b) 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) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding grant of bail under section 439 of the Code.”

(Emphasis added)

25. Offences under **Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf**

Act, 2002 carry punishment upto death and Section 8 of the aforesaid

Act provides that:—

“8. Provision as to bail.—(1) Notwithstanding anything in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless

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

(b) 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 sub-section(1) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code.”

(Emphasis added)

26. Offences under the Drugs and Cosmetics Act, 1940 carry a punishment of imprisonment upto life and Section 36-AC of the **Drugs and Cosmetics Act, 1940** provides that:—

“36-AC. Offences to be cognizable and non-bailable in certain cases.—(1) *Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974),—*

(a) every offence, relating to adulterated or spurious drug and punishable under clauses (a) and (c) of sub-section (1) of Section 13, clause (a) of sub-section (2) of Section 13, sub-section (3) of Section 22, clauses (a) and (c) of Section 27, Section 28, Section 28-A, Section 28-B and sub-sections (1) and (2) of Section 30 and other offences relating to adulterated drugs or spurious drugs, shall be cognizable.

(b) no person accused, of an offence punishable under clauses (a) and (c) of sub-section (1) of Section 13, clause (a) of subsection (2) of Section 13, sub-section (3) of Section 22, clauses (a) and (c) of Section 27, Section 28, Section 28-A, Section 28-B and sub-sections (1) and (2) of Section 30 and other offences relating to adulterated drugs or spurious drugs, 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:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.

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

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to “Magistrate” in that section includes also a reference to a “Special Court” designated under Section 36AB.”

(Emphasis added)

27. The aforesaid Acts deal with heinous offences like hijacking of aero planes, unlawful acts against safety of civil aviation, maritime piracy, unlawful acts against safety of maritime navigation and fixed platforms on continental

shelf, and offences relating to manufacture and sale of adulterated or spurious drugs, which would affect a very large number of population, and the offences carry punishment upto death. All the Acts contain restrictions of Courts' power to grant bail to an accused person, which are similar to the restriction provided in Section 37 of NDPS Act.

28. Section 45 of Prevention of Money Laundering Act (PMLA) also contains restrictions for grant of bail, which are similar to Section 37 of NDPS Act and it reads as follows:—

“45. Offences to be cognizable and non-bailable.—

(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974), no person accused of an offence 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:***

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

Provided further that ...

** * **

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

** * *”*

(Emphasis supplied)

29. It is relevant to note that Section 44 of the PMLA contains the following provision:—

“44. Offences triable by Special Courts.—*(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974),—*

(a) an offence punishable under Section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed:

Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or

(b) a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under Section 3, without the accused being committed to it for trial.

Provided that after conclusion of investigation, if no offence of money-laundering is made out requiring filing of such complaint, the said authority shall submit a closure report before the Special Court; or

(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Criminal Procedure Code, 1973 (2 of 1974), as it applies to a trial before a Court of Session.

Explanation.—For the removal of doubts, it is clarified that,—

(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;

(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.]

(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to “Magistrate” in that section includes also a reference to a “Special Court” designated under Section 43.”

(Emphasis supplied)

30. In **Ramji Singh v. Enforcement Directorate**, 2023 SCC OnLine All 831, this Court took into consideration the aforesaid provisions of various Statutes and held that: -

“45. From the aforesaid study of pari materia provisions contained in several Statutes dealing with heinous offences carrying punishment upto death, the only irresistible conclusion that can be drawn is that the provision contained in Section 44 (2) of PMLA saving special powers of the High Courts regarding grant of bail was meant to be incorporated in Section 45 of the Act, but it has erroneously been placed just above

Section 45. In present times of use of computers, such errors are commonly referred to as the “copy-paste errors”.

31. In paragraph 274 of the judgment in the case of **Vijay Madanlal Choudhary versus Union of India**: 2022 SCC OnLine SC 929, the Hon'ble Supreme Court referred to a King's Bench judgment in the case of *Seaford Court Estates Id.*, which is as follows:—

“274. We may profitably advert to the judgment in Seaford Court Estates Id. [1949] 2 K.B. 481, which states:

“...A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give “force and life” to the intention of the legislature. That was clearly laid down by the resolution of the judges in Heydon's case, (1584) 3 Co. Rep. 7a, and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden in his second volume Eyston v. Studd (1574) 2 Plowden 465. Put into homely metaphor it is this : A judge should ask himself the question : If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.”

(Emphasis added)

32. In **Rajendra Prasad Yadav v. State of M.P.**: (1997) 6 SCC 678, the Hon'ble Supreme Court reiterated the well established principle of interpretation of Statutes that *“all the provisions should be harmoniously interpreted to give effect to all the provisions and no part thereof rendered surplusage or otiose.”*

33. After referring to the aforesaid cases, this Court held in **Ramji Singh** (Supra) that: -*“48. In case we look at the bare language of Sections 44 and 45 of PMLA, the defect of misplacement of the provision contained in Section 44(2) becomes manifest. Section 44 does not contain any restriction on the powers of any Court regarding grant of bail, yet Section 44(2) provides that nothing contained in this section shall affect the Special powers of the High Courts under Section 439 Cr.P.C. reading Section 44(2) with Section 44(1) only would render Section 44(2) of PMLA redundant and otiose, but this Court cannot chose an interpretation which will render the provision contained in Section 44 (2) of the PMLA redundant or otiose.*

49. Apparently, Section 44(2) was inserted by the Parliament with the intention to save the special power of the High Courts under Section 439 Cr. P.C., which intention cannot be fulfilled due to an erroneous placement of the provision as pointed above. This Court has to interpret the provisions contained in Sections 44 and 45 of PMLA collectively so as to give “force and life” to the intention of the legislature behind inserting Section 44(2) in the Act. Undoubtedly, if the makers of the Act had themselves come across this jumbling of the provisions in Sections 44 and 45 due to a copy-paste error, they have surely have straightened it out by reading Section 44(2) and Section 45 in conjunction with each other. Therefore, in order to correct the defect without altering the provisions of the Statute, the provisions of Sections 44 and 45 have to be read together and interpreted harmoniously so that Section 44(2) does not become redundant or otiose.

50. The only irresistible conclusion that can be drawn from the foregoing discussion, is that the intention of the Legislature was clear and unambiguous while making the provisions contained in Sections 44 and 45 of PMLA and it was that the Special Courts will have jurisdiction to try the offences under the Act and no Court shall grant bail to an accused person 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:**

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

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

Nothing contained in sections 44 or 45 shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to “Magistrate” in that section includes also a reference to a “Special Court” designated under Section 43.

51. In view of the aforesaid discussion, I am of the considered view that the restrictions contained in Section 45 of the PMLA were meant to be applicable to Courts other than the Constitutional Courts and in view of the provision contained in

Section 44 (2) of PMLA, those restrictions do not apply to the Constitutional Courts.”

(Emphasis added)

34. As Sections 36-A (3) and 37 of NDPS Act contain provisions which are *pari materia* to the provisions contained in Sections 44 and 45 of the PMLA, the

aforsaid principles of interpretation applied by this Court while interpreting Sections 44 and 45 of the PMLA would apply to interpretation of the provisions of Section 36-A(3) and 37 of the NDPS Act also.

35. In case we look at the bare language of Sections 36-A and 37 of NDPS Act, the defect of misplacement of the provision contained in Section 36-A(3) becomes manifest. Section 36-A does not contain any restriction on the powers of any Court regarding grant of bail, yet Section 36-A(3) provides that nothing contained in this Section shall affect the Special powers of the High Courts under Section 439 Cr.P.C. reading Section 36-A(3) with the other parts of Section 36-A only would render Section 36-A(3) of NDPS Act redundant and otiose, but this Court cannot choose an interpretation which will render the provision contained in Section 36-A (3) of the NDPS Act redundant or otiose.
36. Apparently, Section 36-A(3) was inserted by the Parliament with the intention to save the special power of the High Courts under Section 439 Cr. P.C., which intention cannot be fulfilled due to an erroneous placement of the provision as pointed above. This Court has to interpret the provisions contained in Sections 36-A and 37 of NDPS Act collectively so as to give “force and life” to the intention of the legislature behind inserting Section 36-A(3) in the Act. Undoubtedly, if the makers of the Act had themselves come across this jumbling of the provisions in Sections 36-A and 37 due to a copy-paste error, they have surely have straightened it out by reading Section 36-A(3) and Section 37 in conjunction with each other. Therefore, in order to correct the defect without altering the provisions of the Statute, the provisions of Sections 36-A and 37 have to be read together and interpreted harmoniously so that Section 36-A(3) does not become redundant or otiose.
37. The only irresistible conclusion that can be drawn from the foregoing discussion, is that the intention of the Legislature was clear and unambiguous while making the provisions contained in Sections 36-A and 37 of NDPS Act and it was that the Special Courts will have jurisdiction to try the offences under the Act and:—
- (1) 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 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.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to “Magistrate” in that section included also a reference to a “Special Court” constituted under Section 36.”

38. In view of the aforesaid discussion, I am of the considered view that the restrictions contained in Section 37 of the NDPS Act were meant to be applicable to Courts other than the Constitutional Courts and in view of the provision contained in Section 36-A (3) of NDPS Act, those restrictions do not apply to the Constitutional Courts

39. Now I proceed to examine the provision for collection of samples etc. has been laid down in Section 52 A of the NDPS Act, which provides as follows: -

“52-A. Disposal of seized narcotic drugs and psychotropic substances.--

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

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

- (a) certifying the correctness of the inventory so prepared; or*
- (b) taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or*
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.*

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

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

40. In exercise of powers conferred by Section 76 read with Section 52-A of NDPS Act, the Central Government has framed Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal), Rules, 2022 (which shall hereinafter be referred to as ‘the 2022 Rules’).

41. Chapter II of the 2022 Rules deals with seizure and storage of seized material. Rule 3 falling in Chapter II of the aforesaid Rules provide as follows:

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“3. Classification of seized material. –

(1) The narcotic drugs, psychotropic substances and controlled substances seized under the Act shall be classified based on physical properties and results of the drug detection kit, if any, and shall be weighed separately.

(2) If the narcotic drugs, psychotropic substances and controlled substances are found in packages or containers, such packages and containers shall be weighed separately and serially numbered for the purpose of identification.

(3) All narcotic drugs, psychotropic substances and controlled substances found in loose form shall be packed in tamper proof bag or in container, which shall be serially numbered and weighed and the particular of drugs and the date of seizure shall also be mentioned on such bag or container: Provided that bulk quantities of ganja, poppy straw may be packed in gunny bags and sealed in such way that it cannot be tampered with: Provided further that seized concealing material such as trolley bags, backpack and other seized articles shall be sealed separately.

(4) The classification, weighing, packaging and numbering referred to in this sub-rule shall be done in the presence of search witnesses (Panchas) and the person from whose possession the drugs and

substances was recovered and a mention to this effect shall invariably be made in the panchnama drawn on the spot of seizure.

(5) The detailed inventory of the packages, containers, conveyances and other seized articles shall be prepared and attached to the panchnama.”

42. Chapter III of the aforesaid Rule deals with sampling and Rules 9, 10, and 11 falling within the aforesaid Chapter provide as follows: -

“9. Samples to be drawn in the presence of Magistrate. – *After application to the Magistrate under sub-section (2) of section 52A of the Act is made, the Investigating Officer shall ensure that samples of the seized material are drawn in the presence of the Magistrate and the same is certified by the magistrate in accordance with the provisions of the said-sub-section.*

10. Drawing the samples. – *(1) One sample, in duplicate, shall be drawn from each package and container seized.*

(2) When the packages and containers seized together are of identical size and weight bearing identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than ten packages or containers, and for each such lot of packages and containers, one sample, in duplicate, shall be drawn:

Provided that in the case of ganja, poppy straw and hashish (charas) it may be bunched in lots of not more than forty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that representative sample in equal quantity is taken from each package or container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

11. Quantity to be drawn for sampling. – *(1) Except in cases of opium, ganja and charas (hashish), where a quantity of not less than twenty-four grams shall be drawn for each sample, in all other cases not less than five grams shall be drawn for each sample and the same quantity shall be taken for the duplicate sample.*

(2) The seized substances in the packages or containers shall be well mixed to make it homogeneous and representative before the sample, in duplicate, is drawn.

(3) In case where seized quantities is less than that required for sampling, the whole of the seized quantity may be sent.”

43. The Recovery Memo/F.I.R. states that upon being apprehended, the accused persons confessed that they were having charas in bags in the vehicle and they brought the same from Nepal and sell it in Kanpur. The persons were told that as per Rules, they would be searched in presence of some Gazetted

Officer, but all of them stated that they should be searched by the informant. Thereafter the Circle Officer was given telephonic information about the matter and he reached on the spot. The accused persons were searched in his presence. All the four persons were carrying back-packs containing different number of packets of Charas – each weighing 500 gms. The applicant is said to be carrying 7 Kg. charas packed in 14 packets - each weighing 500 gms. 03 currency notes of Rs.500/- each were recovered from the applicant.

44. Similarly, 6 packets charas and 2 currency notes of Rs.500/- were recovered from co-accused Asheesh Yadav, 5 packets charas and 2 currency notes of Rs.500/- were recovered from co-accused Yogendra Singh and 8 packets charas and two currency notes of Rs.500/- were recovered from co-accused Jitendra Singh. The persons arrested stated that they transport charas under instructions from the other accused person Manoj Tiwari. The recovery memo further states that a single sample weighing 100 gms. was taken out from 3 kg. charas recovered from Ashish Yadav, a single sample weighing 166 gms. was taken out from 7 k.g. charas recovered from the applicant, a single sample weighing 100 gms. was taken out from 2.5 k.g. charas recovered from Yogendra Singh Yadav and a single sample weighing 100 gms. was taken out from 4 k.g. charas recovered from Jitendra Singh. A request was made to the passersby to witness the recovery but nobody acceded to the request.
45. The recovery memo has been signed by members of the search team and the accused persons and the Circle Officer has written 'Seen' on the margin of the memo and he has signed it. The recovery memo further states that a copy of the memo was given to the applicant only with the consent of all the accused persons.
46. From a perusal of the averments made in the recovery memo, it appears that the packets recovered were not numbered serially for the purpose of identification, as provided in Rule 3 (2) of the 2022 Rules.
47. The samples were not drawn in presence of a Magistrate, as provided in Section 52-A of the NDPS Act and Rule 9 of the 2022 Rules. Although 14 packages are claimed to have been seized from the applicant, samples have not been drawn from all the packets and a single sample has been drawn, that too not in duplicate and thus the authorities have violated Rule 10 of the 2022 Rules.

48. In **State of Punjab v. Baldev Singh**: (1999) 6 SCC 172, the Hon'ble Supreme Court held that:—

“Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused.”

24. In *Makhan Singh v. State of Haryana*, (2015) 12 SCC 247 while dealing with a case under the Narcotic Drugs and Psychotropic Substances Act, the Supreme Court reiterated that *“...It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence.”*

25. In *Tofan Singh v. State of T.N.*, (2021) 4 SCC 1, the Hon'ble Supreme Court reiterated that:—

“55. Given the stringent provisions of the NDPS Act, together with the safeguards mentioned in the provisions discussed above, it is important to note that statutes like the NDPS Act have to be construed bearing in mind the fact that the severer the punishment, the greater the care taken to see that the safeguards provided in the statute are scrupulously followed.”

26. The principle that where the law prescribes a manner for doing a thing, the thing has to be done in that manner or not at all, was propounded in *Taylor v. Taylor*, [L.R.] 1 Ch. 426 and it was followed by the Privy Council in *Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 and it has consistently been followed since then. What prima facie appears at this stage is that the procedure prescribed by Section 52 A of the Act and by the Standing Order No. 1 of 1989 issued by the Central Government and the guidelines issued by the Hon'ble Supreme Court in *Mohanlal (Supra)* have not been followed in the present case, which vitiates the prosecution.

27. It has further been held in *Tofan Singh (Supra)* that:—

“158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

49. In the present case, it is evident that the authorities themselves have violated the mandatory provisions contained in Rules of 2022 in the manner detailed

in preceding paragraphs and prima facie it appears that the aforesaid violations of the Rules of 2022 will be a strong factor against the accused persons being held guilty.

- 50.** Keeping in view the aforesaid facts, coupled with the fact that the applicant has no previous criminal history and he is languishing in jail since 28.01.2024 and no material has been placed with the counter affidavit to establish that there is a reason to apprehend that in case the applicant is released on bail, he would again indulge in commission of similar offence again and without making any observation, which may affect the merits of the case, I am of the view that the aforesaid facts are sufficient for making out a case for enlargement of the applicant on bail in the aforesaid crime.
- 51.** Accordingly, this bail application stands **allowed**.
- 52.** Let the **applicant- Vimal Rajput** be released on bail in the aforesaid case on furnishing a personal bond and two sureties each in the like amount to the satisfaction of magistrate/court concerned, subject to following conditions:-
- (i) the applicant shall not tamper with the prosecution evidence;
 - (ii) the applicant shall not pressurize the prosecution witnesses;
 - (iii) the applicant shall appear on each and every date fixed by the trialcourt, unless his appearance is exempted by the learned trial court.

**Disclaimer: Always compare with the original copy of judgment from the official website.*