

ORDER BELOW EXH 177 IN NDPS CASE NO. 01/2017

The accused No.3 Kishor Dattatray Surve has filed this second bail application under section 439 of the Cr. P.C.

2] The Ld. Advocate for the accused Shri. Salve argued as per written notes of arguments at Exh.-182. According to him, first bail application of accused was rejected on 17/08/2017. Now an evidence of P.W.1 Amiteshwarand is partly recorded. This is change in circumstances. He submits that in present case, except the statement of the accused under section 67 of the NDPS Act, there is no other material against the accused no.3. Therefore, this accused is entitled for bail. By relying upon case of Tofan Singh Vs. State of Tamilnadu (Cri. Appeal No. 152/2013) , he submits that the officers who were invested with powers under section 53 of the NDPS Act are police officers and a statement made to them under section 67of the NDPS Act cannot be taken into account in order to convict the accused under the NDPS Act. Considering this judgement of Tofan Singh, the Hon'ble Bombay High Court, in case of Shashikant Prabhu Vs. Rahul Saini and others in Bail Application No. 198/2019 with Criminal Bail Application No. 1617/2019 decided on 21.12.2020, has granted bail to the applicants in NDPS case as there was no corroborative evidence except the statement under section 67 of the NDPS Act.

3] He further submitted that, the accused no.3 had no knowledge about the manufacturing process and activities of other co-accused in the premises. He cannot be held guilty for alleged offence. He relied upon case of Sujit Tiwari Vs. State of Gujrat in

Cri. Appeal No. 1897 of 2019 wherein bail was granted by observing that, “ Therefore under facts and circumstances of this case we feel that this is a fit case where the appellant is entitled to bail because there is a possibility that he was unaware of the illegal activities of his brother and other crew members and the case of appellate is different from that of all the other accused.”

4] The Ld. Advocate for the accused further submitted that as per oral evidence of PW 1 as mentioned in para nos. 3 to 5 of written notes of arguments at Exh. 182, there is non-compliance of mandatory provision of section 42(1) and 42(2) of the NDPS Act, the accused cannot be held guilty for such offence. Therefore there is reason to believe that this accused is not guilty of alleged offence and therefore rigor of section 37(1)(b) of the NDPS Act would not be applicable. He relied upon case of Sarijabanu Vs State (2004)12 SCC 266 wherein it is observed that,“ The compliance of section 42 is mandatory and that is a relevant fact which should have engaged attention of the Court while considering the bail application.” The said observation is considered by the Hon'ble Bombay High Court in cases of Suresh Somraju Ali Vs. State of Maharashtra in Cri. Application No. 143 of 2011 decided on 22/02/2011 and Rajaram Kadu Vs. State of Maharashtra in Bail Application No. 2108 of 2016 decided on 13/06/2017 and bail was granted since compliance of section 42 of the NDPS Act was not made.

5] The Ld. Advocate further submitted that the accused was arrested on 02/08/2016. He is in jail since last four years six months. Therefore he is entitled for bail as per directives in Clause (iii) laid

down by the Hon'ble Supreme Court in case of S.C. Legal Aid Committee Vs. Union of India 1994 SCC (6) 731.

6] On the other hand, Ld. Special. APP Shri. Ghate for the State strongly objected the application as per her say. He submitted that while deciding earlier bail application, this Court has already considered all above grounds except ground of delay in trial. The accused cannot raise same grounds for bail in second bail application merely because an evidence of P.W.1 is partly recorded. According to him, the successive bail applications are permissible under the changed circumstances. But without substantial change in circumstances, the Court cannot review its own order by reconsidering same grounds. There is no substantial change in circumstances since rejection of his earlier bail application. He submitted that part heard evidence of P.W.1 is not helpful to the accused at this stage as it has to be appreciated at the time of final trial. He, by relying upon case of Sunil Jagtap v The State of Maharashtra in Cr.B.A. nos. 1950 of 2020 & 2297 of 2020 decided by the Hon'ble High Court of Bombay on 12.10.2020, submits that the evidence cannot be examined or appreciated at this stage in details, else otherwise it may prejudice either the prosecution or the defence at the trial. He submits that there is strong prima facie case against the accused about his involvement in offence. There is no delay in trial. Hence he prayed to reject the application.

7] Ld. Spl. APP further submitted that there is bar of section 37 of the NDPS Act to grant bail. It is not necessary to record a finding of not guilty of the accused, but the Court has to see where

there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty. In this light he relied upon cases of Union of India Vs. Shivshankar in Appeal (Cri.) 1223 of 2007 decided by the Hon'ble Supreme Court on 14/09/2007, Union of India Vs. Ram Samuzh in Appeal (Cri) 866 of 2019 decided by the Hon'ble Supreme Court on 30/08/1999, State of Kerala Vs. Rajesh in Criminal Appeal 154-57 of 2020 decided by the Hon'ble Supreme Court on 24/01/2020 and An application for bail under... Vs. In Re: Babar SK. @ Mursalim decided by Calcutta High Court on 24/08/2017.

8] Firstly it is to be noted that, my predecessor has decided earlier bail application of the accused on 17/08/2017 i.e. after charge-sheet and discussed in details all grounds raised by the learned advocate of this accused and case laws in written notes of arguments except directives in Clause (iii) laid down by the Hon'ble Supreme Court in case of S.C. Legal Aid Committee Vs. Union of India 1994 SCC (6) 731 and case laws referred in this order.

9] In earlier bail order, it is observed that even if the statements of the accused nos. 1 to 4 are excluded, still there is prima facie evidence to show involvement of the accused nos. 1 to 5 in manufacturing contraband psychotropic substances, as accused nos. 1 to 4 were present in the factory where the contraband was manufactured which came to seized, statements of the witnesses show that the accused 3 and 4 were looking after day to day

business, and accused No. 1 to 5 were present in the meeting where they decided to manufacture the contraband. Thus, it is observed that the accused No. 3 was involved in alleged offence.

**10]** In earlier bail order, the accused had put forth the ground for bail that the accused no.3 had no knowledge about the manufacturing process and activities of other co-accused in the company premises. That ground was also considered in para no. 38 by observing that, “Moreover, the material on record shows that accused nos. 2,3,& 4 have expertise in chemical as they have worked in several factories; therefore their contention that they were not aware that contraband produced in the factory, cannot be accepted.”

**11]** In earlier bail order, all material on record with charge-sheet was considered and it was observed in para 22 that the submissions on behalf of the accused for want of non-compliance of section 42(1) and (2) of the Act, the accused are entitled for bail, cannot be accepted.

**12]** Thus in earlier bail order, the above grounds in para nos. 9 to 11 were considered and the bail was rejected. Therefore the same grounds cannot be reagitated for bail in this second bail application and bail order cannot be reviewed. No doubt, the accused can file subsequent or successive bail application, if there is a substantial change in circumstances. However, the evidence of P.W.1 is partly recorded, cannot be substantial change in circumstance. The accused has not brought substantial change in circumstances since rejection of earlier bail application so as to grant bail.

13] The accused is in jail since 02/08/2016. However, he is not entitled for benefit of directives Clause (iii) in case of S.C. Legal Aid committee (supra). From material available on record, there appears prima facie involvement of this accused in the alleged offence which is serious in nature. There are no reasonable grounds for believing that he is not guilty of said offence. There is bar of section 37(1)(b) of NDPS Act to grant bail. If the accused released on bail, there is possibility of tampering prosecution evidence. There is also possibility of absconding of the accused. Thus, the accused No. 3 has no case for bail. Hence the following order is passed.

**ORDER**

1] Application below Exh.177 is rejected.

Date – 15/02/2021

**(Rajendra V. Lokhande)**  
Addl. Sessions Judge, Baramati.

**CERTIFICATE**

I affirm that the contents of the PDF file order are same word to word as per the original order.

Name of steno                      : Bharati D. Gaikwad (Grade -I)

Court                                      : District Judge -4 &  
Addl. Sessions Judge, Baramati,

Date                                        :      15/02/2021

Order signed by  
Presiding Officer on                :      15/02/2021

Order uploaded on                 :      15/02/2021