

IN THE HIGH COURT OF KERALA AT ERNAKULAM  
PRESENT  
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V  
TUESDAY, THE 13<sup>TH</sup> DAY OF JUNE 2023 / 23RD JYAISHTA, 1945

CRL.MC NO. 755 OF 2023  
AGAINST THE ORDER/JUDGMENT CMP NO.4059/2022 OF DISTRICT &  
SESSIONS COURT, ALAPPUZHA

**PETITIONER/RESPONDENT/COMPLAINANT:**

STATE OF KERALA  
REPRESENTED BY THE PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA,  
ERNAKULAM, PIN - 682031

BY ADVS.  
PUBLIC PROSECUTOR  
ADDL.DIRECTOR GENERAL OF PROSECUTION(AG-11)  
ADDL. STATE PUBLIC PROSECUTOR(AG-28)

**RESPONDENT/PETITIONER/2ND ACCUSED:**

SREEBABU  
AGED 43 YEARS  
S/O SUNDARAN,  
MADATHUMMURI HOUSE,  
MAVELIKKARA P.O, MAVELIKKARA VILLAGE,  
ALAPPUZHA DISTRICT, PIN - 690101

BY ADVS.  
B.PRAMOD  
BIJU VIGNESWAR(KAR/171/1998)  
AYYAPPADAS V(K/001500/2018)

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON  
13.06.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**"CR"****ORDER**

This petition is filed by the State challenging the order dated 13.10.2022 in Crl. M.P. No. 4059/2022 passed by the learned Sessions Judge, Alappuzha, granting regular bail to the respondent herein.

2. Short facts are as under:

The prosecution allegation is that on 11.02.2022 at about 2.55 PM, the 1st accused was found travelling in a private bus bearing Registration No.KL-38-2825 from Cherthala Bhagom to Arukkutty possessing 138.750 gms of MDMA. Based on source information, he was arrested, and the contraband articles were seized. The 1st accused is alleged to have disclosed that the respondent herein is his close friend and associate. A crime was registered as FIR No.110/2022 at Poochakkal Police Station u/s.22(c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act, 1985" for brevity) against accused Nos. 1 and 2. The investigation which was conducted disclosed the involvement of the accused Nos. 3 and 4.

3. An application for regular bail was preferred by the 2nd accused.

The learned Sessions Judge took note of the rival contentions and observed as follows:

"6. From a perusal of the report, it can be seen that huge quantity of MDMA is allegedly recovered in this case from the possession of the first accused. It emerges that, this case was detected on the basis of a tip-off received by the S.1. of Police, Poochackal Police station. The quantity of contraband seized in this case is commercial quantity. It is alleged that it was the petitioner, who aided the first accused to purchase the contraband seized in this case. There is specific allegation that the petitioner helped the 1st accused to purchase the contraband seized in this case and also received monetary benefits for the help which he had given to the 1st accused for purchasing the contraband. From the case diary, it emerges that already sufficient materials are collected by the police regarding the complicity of the petitioner in the commission of the offence and in the conspiracy hatched between the accused persons in this case. There is specific allegation that all the accused frequently contacted each other over phone and there were monetary transactions between them. Therefore, the petitioner cannot escape from the liability solely for the reason that no contraband is seized from him.

7. However, the contraband is actually seized from the exclusive possession of the first accused. When compared with first accused, the role played by the petitioner in the alleged commission of the offence stands on a lower pedestal. Undisputedly, no contraband is seized from the possession of the petitioner. The petitioner is seen arrested in this case on 12.02.2022 and since then he has been in custody. The investigation with respect to the involvement of the petitioner in the

commission of the offence appears to have progressed substantially. I do admit that, already an order has been passed by this court, in view of S.36 A (4) of the NDPS Act, and a further time till 14.11.2022 is granted for completing the investigation in this case in respect of A2 and hence the period of detention authorised by the statute as per sub section (2) of S.167 of Cr.P.C. r/w 36 A (4) of the NDPS Act stands extended till 14.11.2022. However, the said order will no way restrict the power of this court to grant bail u/s.439 Cr.P.C. As already mentioned, from the available inputs it is discernible that, the investigation with respect to the complicity of the petitioner in the commission of the offence has crossed its major and crucial part. Further detention of the petitioner in judicial custody appears to be unwarranted for the progress of the remaining part of the investigation in this case. Considering the same, I am of the view that, the petitioner can be released on bail, on stringent conditions.”

4. The learned Sessions Judge has stated in the order that the prosecution has gathered compelling evidence regarding the involvement of the respondent. However, it was noted that a substantial portion of the investigation had been completed and the accused had already served a considerable period of incarceration. This observation was made despite the aforementioned circumstances. Furthermore, the order considered the fact that the learned public prosecutor had requested an extension of the detention period under Section 36(4) of the Act, which was allowed and that the said period had not yet expired. The learned Sessions Judge concluded

that Section 439 of the Cr.P.C does not impose any restrictions on granting bail to the accused, even if an extension has been granted under Section 36A(4) of the Act.

5. Sri. C.K.Suresh, the learned Public Prosecutor, submitted that the order granting bail is perverse and against the principles laid down by the Apex Court. According to the learned public prosecutor, the learned Sessions Judge failed to take note of the mandate and the limitations under Section 37(1)(b)(ii) of the Act, 1985 with regard to the grant of bail involving commercial quantities of narcotic drugs and substances. It is submitted that the court granting bail is bound to consider whether there are reasonable grounds to believe that the accused has not committed an offense and whether he is likely to commit any offense while on bail. The legislature has placed such an embargo taking note of the seriousness of the offenses punishable under the NDPS Act and with a view to curb the menace of drug trafficking in the country. It is further submitted that the learned Sessions Judge had allowed the application filed by the learned Public Prosecutor under Section 36A (4) of the Act and had extended the period of detention till 14.11.2022 for completing the investigation after due application of mind. In

spite of the above, by the impugned order dated 13.10.2022, regular bail was granted, ignoring the mandate under Section 37 of the Act, 1985.

6. In response, it is submitted by the learned counsel appearing for the respondent that the prime accused from whom contraband was seized was granted statutory bail owing to the failure of the prosecuting agency to file the final report within the statutory period. It is further submitted that the 3rd accused has also been granted bail by the Court of Sessions, and the same has not been challenged. It is submitted that the petitioner had undergone incarceration of over 229 days, and the learned Sessions Judge was satisfied that his continued incarceration was unwarranted in the facts and circumstances. It is submitted that bail, once granted, may not be cancelled merely for the reason that the learned Sessions Judge has not reproduced verbatim the wordings of section 37 of the Act, 1985. The learned counsel points out that the right to liberty is a fundamental right under Article 21 of the Constitution of India and in the facts and circumstances, the technical contentions projected in the petition filed by the State is no reason to cancel the bail. Finally, it is submitted that the application challenging the grant of bail was preferred after much delay, which is yet another reason why

no interference is warranted.

7. I have carefully considered the submissions and have gone through the records.

8. Before advertng to the contentions, it would be relevant to note that the seizure involved in the instant case is 138.750 gms of MDMA. Admittedly, the above quantity falls in the category of commercial quantity. The reason given by the learned Sessions Judge for the grant of bail is the long period of incarceration undergone by the accused and the stage of the investigation. However, the learned Sessions Judge, while issuing the order, has not taken note of Section 37 of the NDPS Act, and he has not entered into a finding with regard to the level of satisfaction that was required in case the court was otherwise inclined to grant bail to the accused.

9. It would be apposite to refer to Section 37 of the NDPS Act at this juncture.

“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.”

10. A reading of Section 37 of the Act would make it clear that the jurisdiction to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. Bail can be granted in case the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offense and that he is not likely to commit any offenses while on bail. It is the mandate of the legislature and the same is required to be followed. (See



**State of Kerala v. Rajesh<sup>1</sup>.**

11. In **Union of India v. Ram Samujh** [**Union of India v. Ram Samujh**<sup>2</sup>], the Apex Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in the offenses under the NDPS Act.

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. State (UT of Goa)* [*Durand Didier v. State (UT of Goa)*, (1990) 1 SCC 95] as under:

'24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into

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<sup>1</sup> [2020 (12) SCC 122]

<sup>2</sup> [(1999) 9 SCC 429]

this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.'

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

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

12. In **Rajesh**, (supra), the State of Kerala had challenged the order granting bail passed by this Court to an accused without complying with the mandate under Section 37 of the Act. It was held as follows in paragraph Nos. 19 to 21 of the judgment.

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

20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High

Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

21. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a *sine qua non* for granting bail to the accused under the NDPS Act.

13. In **Union of India v. Shiv Shanker Kesari**<sup>3</sup>, the Apex Court had occasion to observe that under Section 37 of the Act though the court is called upon the same if there are reasonable grounds for believing that the accused is not guilty and record its satisfaction about the existence of such grounds, the court is not required to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

14. The principles laid above would reveal that the scheme of Section 37 is that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the Code but also subject to the limitation placed by Section 37, which commences with a non-obstante

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<sup>3</sup>

(2007) 7 SCC 798]

clause. The first condition is that the prosecution must be given an opportunity to oppose the application, the second is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such an offense, and the third is that the court should be satisfied that the accused is not likely to commit any offense while on bail. Unless all these conditions are satisfied, the prohibition in the grant of bail shall operate. The court, while considering the application for bail with reference to Section 37 of the Act, is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court is not required to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

15. I have already extracted the order passed by the learned Sessions Judge. The learned Sessions Judge noted that sufficient materials had been collected by the investigating agency with regard to the complicity of the petitioner and also in the conspiracy hatched among the accused

persons. The Sessions Judge also held that the respondent cannot escape from liability solely for the reason that no contraband was seized from his possession. However, in tune with the mandate under Section 37, the learned Sessions Judge has failed to record a finding, which is a sine qua non for granting bail to the accused in a case involving commercial quantity.

16. The fact that no contraband was seized from the possession of the accused could have been considered by the learned Sessions Judge. However, that alone could not have been a reason for grant of bail. The question whether the absence of recovery of contraband from the possession of the accused could be taken as a reason for the grant of bail was considered by the Apex Court in **Md. Nawaz Khan** (supra). Answering this question, the Apex Court had occasion to observe as under:

28. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in Union of India v. Rattan Mallik [Union of India v. Rattan Mallik, (2009) 2 SCC 624] , a two-Judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from

a specially made cavity above the cabin of a truck, no contraband was found in the "possession" of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37(1)(b) and there was non-application of mind by the High Court.

29. In line with the decision of this Court in Rattan Mallik [Union of India v. Rattan Mallik, (2009) 2 SCC 624], we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act.

As held by the Apex Court, the absence of possession of the contraband on the person of the respondent does not absolve it of the level of scrutiny required under Section 37 (1)(b)(ii) of the NDPS Act.

17. The order passed by the learned Sessions Judge reveals that based on the report filed by the learned Public Prosecutor under Section 36A(4), the detention of the petitioner was extended till 14.11.2022 for completing the investigation. The learned Sessions Judge has, however, proceeded to grant regular bail even before the expiry of the extended period. While granting bail, the learned Sessions Judge took the view that the

extension order will not restrict the power of the court to grant bail under Section 439 of the Cr.P.C. However, the learned Sessions Judge failed to note that the conditions for the grant of bail specified in Section 37(1)(b)(ii) are in addition to the limitations provided under Cr.P.C. or any other law for the time being in force regulating the grant of bail. The Apex Court in **Satpal Singh v. State of Punjab**<sup>4</sup>, had held that the court considering the grant of bail in a case involving commercial quantity, could not have and should not have passed the order under 439 CrPC without reference to Section 37 of the NDPS Act and without entering a finding on the required level of satisfaction in case the Court was otherwise inclined to grant the bail. Moreover, in a case of this nature, where the learned Sessions Judge has meticulously considered an application filed under Section 36A(4) and extended the period of detention, the order granting bail within the extended period ought to have disclosed the requisite level of satisfaction regarding the compelling grounds that prompted the learned Sessions Judge to grant bail.

18. As the learned Sessions Judge has overlooked the crucial mandate under Section 37 of the Act, this Court cannot sustain the impugned order. In that view of the matter, this petition will stand allowed. The order

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<sup>4</sup> (2018) 13 SCC 813]



granting bail to the respondent is set aside. The respondent shall surrender forthwith.

19. Before parting, I make it clear that this order is being passed for failing to comply with the mandate under Section 37 of the Act. It would be open to the respondent to file a fresh application for regular bail before the learned Sessions Judge. The learned Sessions Judge shall consider all attendant facts, including the fact that accused Nos. 1 and 3 are on bail, and shall pass a fresh order in tune with the directions above.

This petition is disposed of.

Sd/-

**RAJA VIJAYARAGHAVAN V**  
**JUDGE**

PS/avs

APPENDIX OF CRL.MC 755/2023

**PETITIONER ANNEXURES**

ANNEXURE 1	TRUE COPY OF THE FIR IN CR.NO.110/2022 DATED 11.02.2022
ANNEXURE 2	THE REPORT DATED 15.03.2022 FILED BY THE INVESTIGATING OFFICER BEFORE THE LEARNED SESSIONS COURT
ANNEXURE 3	TRUE COPY OF THE FINAL REPORT IN CR.NO.110/2022 OF POOCHACKAL POLICE STATION
ANNEXURE 4	THE CERTIFIED COPY OF THE ORDER DATED 13.10.2022 IN CRL.MP NO. 4059/2022