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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 08th May, 2023

Date of decision: 16th May, 2023

+ BAIL APPLN. 24/2023

DHIRENDRA PRAKASH SAXENA Petitioner

Through: Mr. Vikas Gautam, Advocate.

versus

DIRECTORATE OF REVENUE INTELLIGENCE Respondent

Through: Mr. Satish Aggarwala, Senior Standing
Counsel with Mr. Gagan Waswami,
Ms. Ayushi Mangain, Advocates.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. This is the second application filed on behalf of Dhirendra Prakash Saxena, the applicant, under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeking grant of regular bail in Sessions Case no. 7520/2016 under Sections 25, 25A, 29 and 22 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') titled 'Directorate of Revenue Intelligence v. Dhirendra Prakash Saxena and Ors', pending trial before the Court of the Learned Special Judge (NDPS), South District, Saket.

2. The first application seeking regular bail filed on behalf of the present applicant was dismissed as withdrawn *vide* order dated 27.05.2022 passed by a coordinate bench of this Court in BAIL APPLN. 2004/2016, titled 'Dhirendra Prakash Saxena v. DRI'. It was observed as under:

"2.0 Learned counsel for the applicant submits that this application was filed in 2016. The law in the interregnum has undergone change. Therefore applicant be allowed to withdraw this application. In view of the above, the applicant's request is allowed.

3.0 The application is dismissed as withdrawn."

3. The facts of the present case, as stated in the complaint filed on behalf of the Directorate of Revenue Intelligence ('DRI'), i.e., the respondent herein are as under:

- i. On 19.08.2015, specific information was received indicating that Dharendra Prakash Saxena, i.e., the present applicant and the proprietor of M/s Weishorn Biotech located at 102, Malhotra Complex, A-212, Street no. 1, Shakarpur, Delhi-92 and Manoj Kumar Nayak, the proprietor of M/s Lakshya Traders located at SCO-31, A-215, Chawla Complex, Street no. 1, Shakarpur, Delhi-92 are engaged in illicit possession, transportation, warehousing, sale and purchase of psychotropic and controlled substances which were being clandestinely manufactured and removed from the factory premises of M/s G.T. Biopharma Private Limited located at village Moginand, Chandhigarh-Dehradun road, Kala-Amb (Nahan), District Sirmor, Himanchal Pradesh. The intelligence indicated that about 250 to 300 kg of controlled substance was being removed from the said factory under the cover of any invoice showing clearance of legally manufactured drugs and being delivered to the premises of either M/s Weishorn Biotech or M/s Lakshya Traders on 19.08.2015 at about 1200 hours.
- ii. Acting on the said information, two teams of DRI Officers reached the premises of M/s Weishorn Biotech and M/s Lakshya Traders. The premises of M/s Lakshya Traders was found locked. M/s Weishorn

Biotech was found open and one of the persons present there introduced himself as D.P. Saxena, the proprietor thereof and the present applicant. Manoj Kumar Nayak, Rakesh Kumar Bhola, Vishal Chaudhary and other employees of M/s Weishorn Biotech were also present. Rs. 3.2 lakhs in cash and sum documents were recovered from M/s Weishorn Biotech. An original GR No. ARL 9360, dated 17.08.2015 of M/s Andhra Roadlines was also recovered. The said slip pertained to a consignment sent from M/s G.T. Biopharama to M/s Lakshya Traders and bore and acknowledgement of receipt by Manoj Kumar Nayak, dated 19.08.2015 at 12:30 PM.

- iii. Manoj Kumar Nayak disclosed that he was the proprietor of M/s Lakshya Traders and the key of the above said premises is with the applicant. Thereafter, the applicant handed over the key of the said premises which was initially found locked by officers of the DRI.
- iv. Upon search of the premises M/s Lakshya Traders, it was found stocked with white plastic bags, cardboard boxes as well as some carry-bags containing a white granular powdery substance. Manoj Kumar Nayak identified 45 cartons which were received under the aforesaid invoice and GR No. ARL 9630. He further informed that he had opened 11 cartons and transferred the white granular substance from those 11 cartons to 11 carry bags out of which one had already been delivered to some person. The white granular powdery substance found in 10 carry bags weighing 25 kg each was tested with a field detection kit and same tested positive for 'Pseudoephedrine'. Thus in total, 250 kg of Pseudoephedrine was recovered from the premises of M/s Lakshya Traders.

- v. Thereafter, on 19.09.2015, a team of DRI searched the factory premises of M/s G.T. Biopharma owned by Sanjay Bhartia, from where 3 drums of 'Ketamine Hydrochloride IP' weighing 75.370 kg were recovered in addition to 40 packets of 'alprazolam' weighing 500 grams each. Further, an HDPE bag containing 6000 thousands of 'Bioaset' was also recovered.
- vi. Intelligence further indicated that M/s Dhari Chemicals owned by Yogesh Shah, located at G/2, Laxmi Apartment, Kadam Nagar road, Nizampura, Baroda owned by Yogesh Shah was also involved in diversion of controlled substances in association with M/s Daffohils Laboratories Private Limited located at F-109-110, UPSIDC, Industrial Area, Selaqui, Dehradun. Upon a search of the premises of M/s Dhari Chemicals, 40 drums of 25 Kg each of Pseudoephedrine and 7 drums of 25 kg each of Ephedrine were recovered.
- vii. On 19.08.2015, the premises of M/s Daffohils Laboratories Private Limited was also searched and 25 kg of Pseudoephedrine was recovered.
- viii. On 20.08.2015, a consignment suspected to be that of Pseudoephedrine sent from M/s Daffohils Laboratories Pvt. Ltd. to M/s Weishorn Biotech was intercepted by a team of DRI at New Delhi. Total 100 kg of Pseudoephedrine was recovered from the said consignment.
- ix. During the course of investigation, Yogesh Shah, i.e., the proprietor of M/s Dhari Chemicals gave his statement under Section 67 of the NDPS Act and disclosed that he used to supply raw materials such as Pseudoephedrine and Ephedrine to various buyers like M/s G.T. Biopharma Pvt. Ltd., M/s Daffohils Laboratories Pvt. Ltd. and Redic

Labs through the present applicant. In their statement under Section 67 of the NDPS Act, other co-accused persons also admitted to their and the applicant's involvement in the offences alleged.

- x. Based on the investigation conducted and the evidence gathered, the present complaint was registered. Charges *qua* the present applicant were framed under Section 22, 25A and 29 of the NDPS Act *vide* order dated 07.08.2018 passed by the learned Special Judge, NDPS, South District, Saket.
4. At the outset, learned counsel appearing on behalf of the applicant submitted that rigors of Section 37 of the NDPS Act will not apply to the present case since the recovery is that of a controlled substance. It was submitted that in **Niranjan Jayantilal Shah v. Directorate of Revenue Intelligence (BAIL APPLN. 1202/2013)**, a coordinate bench of this Court granted bail to an accused in a case where 100kg of Pseudoephedrine was recovered.
5. Learned counsel appearing on behalf of the applicant submitted that the only piece of evidence connecting the present applicant to the recoveries effected in the present case is the statements of the latter and other co-accused persons recorded under Section 67 of the NDPS Act which in any case, are not admissible as per the verdict of the Hon'ble Supreme Court in **Tofan Singh v. State of Tamil Nadu, (2013) 16 SCC 31**. It was submitted that no incriminating substance was recovered from the applicant or from his business premises, i.e., M/s Weishorn Biotech.
6. It was submitted that out of the 53 witnesses cited by the prosecution, only 13 have been examined so far and the trial is likely to take a long time.

7. Learned counsel appearing on behalf of the applicant further submitted that co-accused Rakesh Kumar Bhola and Manoj Kumar Nayak have already been granted bail *vide* orders dated 19.10.2022 (BAIL APPLN. 216/2020) and 11.11.2022 (BAIL APPLN. 3011/2022) passed by coordinate benches of this Court. It was further submitted that co-accused Inder Pal Singh Chawla was granted bail by the learned Special Judge, NDPS, South District, Saket *vide* order dated 19.05.2016, passed in Sessions Case No. 06A/2015. It was further submitted that the present applicant was granted interim bail *vide* order dated 04.09.2018, passed by coordinate bench of this Court in BAIL APPLN. 2004/2016 and the same was extended from time to time. During interim bail, the applicant did not misuse his liberty.

8. It was submitted that the applicant has been in judicial custody since 21.08.2015. The trial is likely to take a long time. It was submitted that the applicant has been released on interim bail by this Court as well as the learned Trial Court on a few occasions and he surrendered in time upon expiry of the said interim bail. It was submitted that the applicant is suffering from a heart disease, haemorrhoids and glaucoma for which he was treated at Fortis Hospital and Yatharth Hospital during his interim bail.

9. In support of his contentions, learned counsel appearing on behalf of the applicant placed reliance on the following judgments:

- i. Jainam Rathod v. State of Haryana, Order dated 18.04.2022 passed in Criminal Appeal No. 640 of 2022.
- ii. Niranjana Jayantilal Shah v. Directorate of Revenue Intelligence, 2013 LawSuit(Del) 4627.
- iii. Manoj Kumar v. Director of Revenue Intelligence through Vikram Singh, Judgment dated 03.03.2015 in BAIL APPLN. 257/2015.

- iv. Hakkim v. Narcotic Control Bureau, Order dated 08.11.2019 in BAIL APPLN. 2257/2019.
- v. Hari Charan Kurmi and Jogia Hajam v. State of Bihar, 1964 SCR (6) 623.
- vi. Javed Siddiqui v. The State (Govt. of NCT of Delhi), Order dated 24.11.2020 in BAIL APPLN. 2397/2020.

10. *Per contra*, learned Senior Standing Counsel ('Sr. SC') appearing on behalf of the DRI opposed grant of bail to the present applicant on the ground that he is at the centre of the entire criminal conspiracy of illegal trade of controlled substances carried out from premises of business where searches were conducted.

11. It was further submitted that the ground of parity with co-accused persons who have been granted bail is also not available to the present applicant inasmuch as in the orders granting bail to the said co-accused persons, it has been categorically recorded that the present applicant is the 'main accused' in the present case. Learned Sr.SC drew the attention of this Court to the order dated 11.11.2002, passed by a coordinate bench of this Court granting bail to co-accused Manoj Kumar Nayak, wherein it has been observed that "*It is thus seen that D.P. Saxena is the main accused and the present applicant was co-conspirator.*"

12. It was submitted that the applicant had given a premium of Rs. 35 lakhs in cash to co-accused Yogesh Shah via an *aangadiya* firm . The said cash was also recovered and seized form the residence of Yogesh Shah. It was submitted that the applicant was coordinating the supply of controlled substances between M/s Dhari Chemicals and M/s Daffohils Laboratories Pvt. and between M/s G.T. Biopharma and Redic Labs Ltd. and received a

commission for the same. Learned Sr.SC further submitted that the consignment of Pseudoephedrine which was seized from M/s Lakshya Traders was paid for in cash.

13. It was further submitted that as per the bank statements of M/s Lakshya Traders, co-accused Manoj Kumar Nayak and Rakesh Kumar Bhola made multiple cash deposits and payments were also made to M/s G.T. Biopharma. It was submitted that even though M/s Lakshya Traders was owned by Manoj Kumar Nayak, the actual control of the business was with the applicant. Learned Sr.SC submitted that a scrutiny of the bank statements of M/s Weishorn Biotech revealed multiple cash/RTGS deposits, most of which was transferred to the account of M/s Daffohils Laboratories Pvt. Ltd.

14. It was submitted that the fact that the applicant handed over the keys to the premises of M/s Lakshya Traders is not the only piece of evidence that links him with the said business concern. It was submitted that the documents related to the business of M/s Lakshya Traders including the GR and invoice issued by M/s G.T. Biopharma Pvt. Ltd. were recovered from the business premises of M/s Weishorn Biotech owned by the applicant. Co-accused Manoj Kumar Nayak, the proprietor of M/s Lakshya Traders was also apprehended from the premises of M/s Weishorn Biotech.

15. It was submitted that the applicant was consciously involved with fraudulent diversion of 3648 Kg of Pseudoephedrine hydrochloride out of which 350 kg was recovered. Out of the said 350 kg of Pseudoephedrine, 250 kg was recovered from the premises of M/s Lakshya Traders received under the invoice dated 17.08.2015 pertaining to a consignment sent from M/s G.T. Biopharma to M/s Lakshya Traders and the remaining 100 kg was recovered from the consignment sent from M/s Daffohils Pvt. Ltd. to M/s Weishorn

Biotech, which was intercepted by the officers of DRI. He was also responsible for the diversion 74.995 kg of Ketamine Hydrochloride from the premises of M/s G.T. Biopharma through M/s Lakshya Traders.

16. With regard to the applicability of Section 37 of the NDPS Act, it was submitted that the same would be applicable in view of the recovery of Ketamine Hydrochloride, i.e., a psychotropic substance from M/s G.T. Biopharma Pvt. Ltd. The supply of Ketazee 500 injections containing the said substance was shown to be made to M/s Lakshya Traders. Learned Sr.SC submitted that as per the invoices recovered, Ketazee-500 injections were sold to M/s. Nath Medicos, M/s. Triveni Medicos, M/s. Dinesh Medicos and M/s. Pioneer Medicos. However, in their statements under Section 67 of the NDPS Act, the proprietors of the aforesaid established denied having purchased the injections from M/s Lakshya Traders. It was further submitted that the fact that chargesheet has been filed and the trial has commenced or the length of incarceration of the applicant are not the only considerations for grant of bail under Section 37 of the NDPS Act. In support of the said contention reliance was placed on the verdict of the Hon'ble Supreme Court dated 19.07.2022 in **CRLA Nos. 1001-1002/2022** titled '**Narcotic Control Bureau v. Mohit Aggarwal**'.
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17. It was further submitted that upon expiry of the interim bail granted to him, the applicant did not surrender on time and has not given any satisfactory explanation as to based on which order/notification/direction he continued to be on interim bail until he was made to surrender by this Court.

18. Learned Sr. SC placed reliance on the following judgments:

- i. Union of India (NCB) v. Khalil Uddin, Judgment dated 21.10.2022 in Criminal Appeal Nos. 1841-1842 of 2022.

- ii. State of Kerala Etc. v. Rajesh, Judgment dated 24.01.2020 in Criminal Appeal Nos. 154-157 of 2020.
- iii. Narcotics Control Bureau v. Mohit Aggarwal, 2022 CrLJ 3422.
- iv. Union of India v. Md Jamal, Order dated 06.05.2022 in Criminal Appeal No. 752 of 2022.
- v. Union of India v. Rattan Malik alias Habul, (2009) 2 SCC 624.
- vi. Satpal Singh v. The State of Punjab, Judgment dated 27.03.2018 in Criminal Appeal No. 463 of 2018.
- vii. N.R. Mon v. Md. Nasimuddin, 2008 [3] JCC [Narcotics] 170.
- viii. Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798.
- ix. Union of India v. Gurcharan Singh, (2003) 11 SCC 764.
- x. Union of India v. Abdulla (2004) 13 SCC 504.
- xi. Collector of Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549.
- xii. Ramesh Bhavan Rathod v. Vishanbhai Hirabhai Makwana (Koli) & Anr., (2021) 6 SCC 230.
- xiii. State by (NCB) Bengaluru v. Pallulabid Ahmad Arimutta & Anr., Judgment dated 10.01.2022 in Special Leave to Appeal (Crl.) 242 of 2022.

19. Heard learned counsel for the parties and perused the record.

20. The recoveries in the present case, as highlighted in the reply dated 27.01.2023 filed on behalf of the DRI are as under:

"6. Acting on further specific information, simultaneous search operations were conducted at various places and the following contraband substances were seized under the provisions of the NDPS Act, 1985 on 19.08.2015 and 20.08.2015.

(i) Delhi - (a) 250 Kgs of Pseudoephedrine Hydrochloride. a **controlled substance** under the NDPS Act, 1985 clandestinely and

fraudulently removed from the factory of M/s. G T Biopharma Pvt. Lid., Kala- Amb, accused no. 6 of which the petitioner, accused no. 8, was Manager cum Chemist, on 17.08.2015 under a parallel invoice, **consigned to M/s. Lakshaya Traders**. Delhi, was seized at Delhi on 19.08.2015.

(b) 100 Kgs of Pseudoephedrine Hydrochloride, a **controlled substance** under the NDPS Act, 1985 clandestinely and fraudulently removed from the factory of M/s. Daffohils Laboratories Pvt. Lid., Selaqui, Dehradun, accused no. 10, on 18.08.2015 **consigned to M/s. Weishorn Biotech, Delhi of which Shri D.P.Saxena, coaccused is proprietor**, was seized at Delhi on 20.08.2015.

(ii) M/s. G T Biopharma Pvt. Ltd., Kala Amb (HP), accused no. 6-

(a) 75.370 kg. of Ketamine Hydrochloride, a **Psychotropic substance** under the NDPS Act, 1985 found unaccounted in the statutory records. (b) 20 Kg. of Alprazolam Hydrochloride, a **Psychotropic Substance** under the NDPS Act, 1985 found unaccounted in the statutory records.

(c) 6000 tablets containing Pseudoephedrine, a **controlled substance** under the NDPS Act, 1985 found unaccounted in the statutory records.

Shri Sultan Ansari, Shri Sanjay Kumar Bhartia, Managing Director and Jai Ballabh, authorised signatory of M/s G.T. Biopharma Pvt. Ltd. Kala Amb are accused no. 8, 7 and 9 respectively.

(iii) M/s. Daffohils Laboratories Pvt. Ltd. Selaqui, Dehradun, accused no. 10, - 25 Kg. of white granular powdery substance declared to be Pseudoephedrine hydrochloride, a **controlled Substance** under the NDPS Act, 1985 by Shri Preet Pal singh Chawla, accused no. 12, on chemical analysis revealed to be chalk powder which establishes manipulation and fabrication and falsification of statutory records.

Shri Inder Pal Singh Chawla, Managing Director and Shri Preet Pal Singh, Director of M/s Daffohils Laboratories Pvt. Ltd., F-109-110, UPSIDC Industrial Area, Scalqui, Dehradun are accused no. 11 and 12 respectively.

(iv) Vadodara

a) Recovery and detention of 1000 kg Pseudoephedrine Hydrochloride and 175 kg, Ephedrine **both controlled substances**

under the NDPS Act, 1985 at the godown premises of M/s. Dhari Chemicals, G/2, Laxmi Apartment, Kadam Nagar, Nizampura, Vadodara of which Shri Yogesh Shah, accused no. 5, is the proprietor, which were intended for dispatch to M/s G.T. Biopharma Pvt. Ltd., Kala Amb and M/s Daffohils Laboratories Pvt. Ltd., Dehradun under panchnama dated 19.08.2015. The detained 1000 kg Pseudoephedrine Hydrochloride and 175 kg. Ephedrine have been released to M/s Dhari Chemicals, Vadodara vide DRI's letter dated 29.10.2015.

b) Rs. 35 lakh being sale proceeds of illegal trade in controlled substances from the residential premises of Yogesh Shah, accused no. 5 proprietor of M/s Dhari Chemicals, Vadodara."

(emphasis supplied)

21. It has been further alleged in the complaint that M/s Lakshya Traders had procured Ketazee-500 injections containing Ketamine Hydrochloride from M/s G.T. Biopharma Pvt. Ltd. and that these injections were further sold to certain chemists, who in their statements denied receiving any such injections. Thus, the present case involves recovery of Pseudoephedrine Hydrochloride, which is a controlled substance under the NDPS Act, and Ketamine Hydrochloride, which is psychotropic substance under the NDPS Act, as already detailed in the preceding paragraph.

22. It is an admitted position that Pseudoephedrine is a controlled substance and therefore, inasmuch as the recovery of the said substance is concerned, rigors of Section 37 of the NDPS Act are not applicable. The aforesaid legal position has been clarified by way of various decisions rendered by coordinate benches of this Court, including the following:

- i. Niranjan Jayantilal Shah v. Directorate of Revenue Intelligence, 2013 SCC OnLine Del 4608.
- ii. Manoj Kumar v. Director of Revenue Intelligence, 2015 SCC OnLine Del 7830.

iii. N.C. Chellathambi v. N.C.B., Order dated 20.04.2005 in BAIL APPLN. 216/2005.

Learned counsel appearing on behalf of respondent/NCB also does not dispute the aforesaid legal proposition.

23. So far as the recovery of Ketamine Hydrochloride is concerned, the same is a psychotropic substance under the NDPS Act and thus, Section 37 of the NDPS Act would be attracted. In the present case, the recovery of Ketamine Hydrochloride was from the premises of M/s G.T. Biopharma Pvt. Ltd. It is pertinent to note that the said recovery cannot be attributed to the present applicant, since it is not the case of the prosecution that the present applicant was in any way responsible for running M/s G.T. Biopharma Pvt. Ltd. It is the case of the prosecution, as per the invoices recovered, that Ketazee-500 injections containing Ketamine Hydrochloride were supplied by M/s G.T. Biopharma Pvt. Ltd. to M/s Lakshya Traders. It is the case of the prosecution that the said injections were further shown to be sold by M/s Lakshya Traders to M/s Nath medicos, M/s Triveni Medicos, M/s Dinesh Medicos and M/s Pinaire Medicos. It is alleged that in their statements recorded under Section 67 of the NDPS Act, the proprietors of the aforesaid firms denied having purchased the said injections from M/s Lakshya Traders. Since, it is the case of the prosecution that the present applicant was the *de-facto* owner of M/s Lakshya Traders, therefore the receipt of the said injections and their clandestine supply to unknown persons would attract the rigors of Section 37 under the NDPS Act with respect to the present applicant.

24. On the other hand, learned counsel appearing on behalf of the applicant submitted that in absence of any recovery with respect of the aforesaid injections, the prosecution does not have a leg to stand on with respect to the

aforesaid allegation.

25. It is pertinent to note that even if it is assumed for the sake of argument that the present applicant was the *de-facto* owner of M/s Lakshya Traders, even then, the seizure of certain documents showing receipt and further supply of aforesaid injections containing Ketamine Hydrochloride, *sans* any recovery, cannot be a foundation for launching prosecution against the present applicant with respect to the aforesaid psychotropic substance. The burden of proving that certain substances fall under the category of 'narcotics drug' or 'psychotropic substance' is upon the prosecution, which is discharged by chemical analysis of the representative samples taken from the alleged recovery.

26. In the absence of such chemical analysis, one cannot presume, on the basis of certain invoices, that the substance mentioned therein is an alleged contraband manufactured, possessed, sold, purchased, transported, imported inter-state, exported inter-state or used in violation of Section 22 of the NDPS Act. The primary requirement for prosecution under the NDPS Act is the existence of a substance which is covered under the said Act. In view of the aforesaid, without such evidence, the present applicant cannot be stated to have committed an offence with respect to Ketamine Hydrochloride, which is a psychotropic substance, covered under the NDPS Act. Therefore, the rigors of Section 37 of the NDPS Act would not be applicable to the applicant's case.

27. So far as the allegation with respect to other recoveries of Pseudoephedrine is concerned, the case of the prosecution is that the present applicant is the main accused. It was submitted that the role assigned to the other co-accused persons, who have been granted bail, is on a different

footing and that the present applicant cannot claim parity with respect to the benefit of bail granted to the other co-accused persons. Learned counsel for the applicant had submitted that the latter was issued a drug license by the competent authority in the year 2012, with a validity of five years. The firm of the applicant has authorization for selling Pseudoephedrine, Citrizine or Triprolidine for the purpose of the activities mentioned in Schedule A to the Narcotics Drugs and Psychotropic Substances (Regulation of Controlled Substances) Orders, 2013. It was further submitted that the only piece of evidence based on which the connection between the applicant and the recovery of Pseudoephedrine from M/s Lakshay Traders and M/s Aash Logistic Pvt. Ltd. is his alleged statement under Section 67 of the NDPS Act, which was retracted by the applicant at the first opportunity before the learned Trial Court.

28. The present applicant was arrested on 21.08.2015 and the complaint was filed citing 53 witnesses, although only 13 of them have been examined so far. It is further pertinent to note that all other co-accused persons, except for the present applicant and Sultan Ansari, have been granted bail. Two of the co-accused persons are stated to have been declared proclaimed offenders. Charges *qua* the present applicant have been framed under Sections 22, 25A & 29 of the NDPS Act and the said order on charge has been challenged by way of a revision petition pending adjudication before this Court. The trial is likely to take a long time.

29. Section 25A of the NDPS Act provides as under:

"25. Punishment for allowing premises, etc., to be used for commission of an offence.-- If any person contravenes an order made under section 9A, he shall be punishable with rigorous imprisonment for a term which may extend to ten years and shall

also be liable to fine which may extend to one lakh rupees:

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

The aforesaid section provides for punishment for violation of Section 9A of the NDPS Act, which relates to the 'power to control and regulate controlled substance'. It is pertinent to note that maximum punishment, without any minimum, provided for in Section 25A of the NDPS Act is imprisonment for a term which may extend to 10 years with fine which may extend to Rs. 1,00,000/-.

30. As per the nominal roll dated 04.02.2023 received from Superintendent of Prison, Central Jail No. 8/9, Tihar, New Delhi, the applicant has been in custody for 03 years, 06 months and 02 days.

31. It is pertinent to note that the present applicant, aged about 65 years, was granted interim bail on medical grounds as he is suffering from Hemorrhoids & Glaucoma. The said interim bail granted to him was extended from time to time *vide* orders passed by coordinate benches of this Court. The applicant had duly surrendered after the expiry of interim bail granted to him. It was contended by the learned Sr. SC that the applicant had not surrendered on time and has not given any satisfactory explanation as to how he continued to be on interim bail. It is pertinent to note that *vide* order dated 08.02.2023, passed by a coordinate Bench of this Court in BAIL APPLN. 2004/2016, it is noted that the present applicant would surrender on or before 02.03.2022. However, an application bearing number CRL.MA. 3923/2022 was moved on behalf of the applicant seeking modification of the said order and praying for exemption from surrendering on 02.03.2022. The said application was disposed of *vide* order dated 28.02.2022 passed in BAIL APPLN. 2004/2016,

with the directions that the applicant will surrender on 03.03.2022. The nominal roll reflects that the applicant had surrendered on 03.03.2022. There is no previous involvement of the present applicant in any case under the NDPS Act.

32. Judgments relied upon by the learned Sr. SC appearing on behalf of the DRI concern grant of bail in relation to the satisfaction of the twin conditions contained in Section 37 of the NDPS Act. As aforesaid, the position that rigors of Section 37 will not be applicable in a case where the recovery is that of a controlled substance has been clarified by way of various judgments. In *Niranjan Jayantilal Shah (supra)*, while granting bail to the applicant in a case where 100 kg Pseudoephedrine was recovered, a coordinate bench of this Court took note of various other decisions involving controlled substances and observed as under:

"6. During the course of arguments, it was fairly conceded by learned counsel for the respondent that bar of Section 37 of the NDPS Act is not attracted in the present case since as per the prosecution 100 kgs. of Pseudoephedrine was recovered which is a controlled substance within the meaning of Section 2(vii)(b) of the Act. Pseudoephedrine is not a narcotic drug as envisaged under Section 2(vii)(a) of the Act. In *N.C. Chellathambi (supra)* one tonne of ephedrine was recovered, in *Ajay Aggarwal (supra)* recovery was of 1600 liters of Acetic Anhydride, in *Rajiv Kumar @ Sukha (supra)* recovery was of 25 kgs powder ephedrine hydrochloride, in *Faiyaz Ahmed Rasool Shaikh (supra)* and another recovery was of 290 kgs of pseudoephedrine, in *Chakrapani Dutt (supra)* recovery was of 100 liters of Acetic Anhydride, and in all these cases since the accused had remained in custody for certain period, they were released on bail...."

In *N.C. Chellathambi v. N.C.B.*, a coordinate bench of this Court, *vide* order dated 20.04.2005, granted bail to the applicant in a case of recovery of Ephedrine - a controlled substance. It was observed as under:

"1.The learned counsel for the petitioner submitted that no recovery was made from the present petitioner. In any event, the substance that is involved in the present case is ephedrine, which is neither a drug nor a psychotropic substance. Undoubtedly, though, it is a controlled substance within the meaning of Section 9A of the NDPS Act and the offence that is alleged against the petitioner is under Section 25A of the NDPS Act. The case for the prosecution is that 1 ton of ephedrine was exported to Manila by the concern known as 'M/s Gray Fox Inc.' That concern was allegedly being run by Mr Gurnam Singh, Devender Singh and Gurnam Singh's sister. Devender Singh is not an accused because he is absconding and Gurnam Singh's sister is not being prosecuted inasmuch as she is reported to have made a statement that the entire affairs of the said concern known as 'Gray Fox Inc.', were being run by Devender Singh. Gurnam Singh has already been granted bail by the learned Additional Sessions Judge. The petitioner has been in custody since 20.03.2004 He further submits that the rigours of Section 37 of the NDPS Act are also not attracted.

2.The learned counsel for the State opposed the grant of bail inasmuch as he said that the said ephedrine was exported to Manila at the instance of the present petitioner and it is also alleged that the present petitioner received a consideration of Rs.2 lakhs for the said purpose. However, apart from the statements under Section 67, there is no other evidence to implicate the present petitioner.

3. The learned counsel for the petitioner reiterated that the witnesses being PW-3 and PW-4 have also not identified the present petitioner.

4.In view of the foregoing submissions, facts and circumstances and in particular the fact that Section 37 of the NDPS Act would not be attracted in this case as also the fact that the petitioner has already been in custody for over a year, he is directed to be released on bail on furnishing a personal bond in the sum of Rs.25,000/- with one surety of the like amount to the satisfaction of the concerned court with the further condition that he shall not leave the territorial limits of India without prior permission of the court concerned."

Further, in Manoj Kumar Nayak (*supra*), where the recovery was that of Pseudoephedrine, while relying on the decision in Niranjana Jayantilal Shah (*supra*), a coordinate bench of this Court granted bail to the applicant therein and observed as under:

"10. As noticed above, the petitioner has been in custody for nearly 22 months. The decision rendered by this Court in *Niranjan Jayantilal Shah* (supra) shows that in cases where quantity of the controlled substance recovered was even much larger, the Court had granted bail to the accused considering the period for which they had remained in custody during the trial. Accordingly, the present application is allowed.

11. The petitioner is directed to be released on bail upon his furnishing personal bond in the sum of Rs. 50,000/- with one surety of the like amount to the satisfaction of the trial court. The petitioner shall not leave the country without prior permission of the trial court. He shall surrender his passport, if any, before the trial court. During the pendency of the appeal, the petitioner shall not contact or try to influence any of the witness, and shall not indulge in any similar activity. He shall not cause any delay in the progress of the trial."

Similarly, in *Tinimo Efere Wowo v. State Govt. of NCT of Delhi*, 2022 SCC OnLine Del 46, a coordinate bench of this Court, in a case involving recovery of Pseudoephedrine granted bail to the applicant and observed as under:

"9. The offences alleged against the petitioner are U/s 9A/25 A of the NDPS Act. First and foremost question is whether rigors U/s 37 of the NDPS Act applies to the case of the petitioner or not.

10. The present petitioner is facing prosecution for charges U/s 9A and 25 A of the NDPS Act and hence obviously his case would not be covered U/s 37 of the NDPS Act. Moreover, as far as Section 9A which deals with controlled substance is concerned, there is no categorization of small quantity or commercial quantity. Therefore, concept of commercial quantity is applicable only to narcotic drugs and psychotropic substances and not to controlled substance.

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12. The substance alleged to have been recovered from the petitioner/accused is 3.5 Kg. of pseudoephedrine which is a controlled substance. It has been rightly submitted by the Ld. counsel for the petitioner/accused that it is neither a narcotic drug nor a psychotropic substance under the NDPS Act. The alleged offences are not punishable with death or imprisonment for life. The offence falling U/s 9A r/w section 25A of the NDPS Act is punishable with imprisonment which may extend to 10 years and

also fine which may also extend to Rs. 1 Lakh and the bar of Section 37 is not attracted in the present case as the substance recovered is a controlled substance within the meaning of Section 2 (viid) of the Act.

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17. It has also been argued by the Ld. counsel for the petitioner that in cases, where the controlled substance recovered was even much larger than that recovered from the petitioner/accused even in those cases the bail have been granted and he has placed reliance upon "*Niranjana Jayantilal Shah v. Directorate of Revenue Intelligence*" decided on 19.11.2013 (Bail Application No. 1202/2013), this Court granted bail to the accused where the recovery of the same controlled substances was of 100 Kg. This decision referred to had relied upon several other decisions of the Court, where the recovery of much larger quantities of controlled substances have been made. Reliance can also be placed upon the judgment of this Court "*Manoj Kumar v. Directorate of Revenue Intelligence*" 2015 SCC OnLine Del 7830."

Therefore, as mentioned hereinabove, in view of the recovery of Pseudoephedrine, which is a controlled substance and the aforementioned precedents, this Court is of the opinion that Section 37 of the NDPS Act will not be attracted in the present case as the allegations with respect to the present applicant are covered under Section 25A of the NDPS Act.

33. In view of the facts and circumstances of the present case, the applicant is admitted to bail upon his furnishing a personal bond in the sum of Rs. 1,00,000/- alongwith two sureties of the like amount, to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions:

- i. The memo of parties shows that the applicant resides at B-101, Hindon Apartment, Vasundhara Enclave, Delhi. In case of any change of address, the applicant is directed to inform the same to the Investigating Officer and the concerned learned Trial Court.

- ii. The applicant shall report at the office of the DRI twice in a week, i.e., on every Tuesday and Friday at 10:30 AM and the concerned officer is directed to release him by 11:00 AM after recording his presence and completion of all the necessary formalities.
 - iii. The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
 - iv. He shall drop a pin on the Google map to ensure that his location is available to the Investigating Officer.
 - v. The applicant shall not leave India without prior permission of the Trial Court.
 - vi. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witness in any manner.
 - vii. In case it is established that the applicant has indulged in similar kind of offences or tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.
- 34.** Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case pending before the learned Trial Court.
- 35.** The application stands disposed of along with all the pending application(s), if any.
- 36.** Let a copy of this judgment be communicated to the concerned Jail Superintendent.
- 37.** Order be uploaded on the website of this Court *forthwith*.

AMIT SHARMA
JUDGE

MAY 16, 2023/bsr