

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
ANTICIPATORY BAIL APPLICATION NO.1998 OF 2021**

Karishma Prakash .. Applicant

Vs.

Union of India & Ors. .. Respondents

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Mr. Aabad Ponda, senior counsel with Mr. Ayaz Khan, Ms. Gauri Joshi i/b Mr. Suraj Iyer for the applicant.

Mr. Shreeram Shirsat with Mr. Amandeep Singh Sra for respondent No.1 – Union of India.

Ms. Rutuja Ambekar, A.P.P. for the State.

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CORAM : MRS. BHARATI DANGRE, J.

RESERVED ON : 12TH APRIL, 2022.

PRONOUNCED ON : 12TH JULY, 2022.

ORDER:-

1. The applicant is apprehending her arrest in connection with C.R. No.16 of 2020 instituted by the Narcotic Control Bureau (“NCB”), Mumbai Zone Unit, accusing her of committing offences punishable under Sections 8(c), 20(b)(ii), 27A, 28 and 29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, “the NDPS Act”).

2. Heard Mr. Ponda, learned senior counsel for the applicant and Mr. Shreeram Shirsat, learned counsel appearing for the NCB. With the assistance of the respective counsel, I have perused the material placed on record.

3. The prosecution case in brief can be stated to be as under:

On 28.08.2020, a team of NCB, Mumbai and NCB Hqrs, New Delhi apprehended two person named Abbas Ramzan Ali Lakhani S/o. Ramzan Ali Lakhani R/o. 162 Palm Villa, Convent Road, Pali Naka, Bandra (w), Mumbai-50 aged 21, along with 46 grams of mariguana/ganja at Father Peter Pereira Road, Sonapur Lane in front of Old Kurla Gaon main entrance gate. Abbas told that he has purchased the drug from one person namely Karn Arora R/o of Powai. The NCB team along with Abbas identified and apprehended Karn Arora S/o Vijay Arora R/o. Flat No.1408, Zinnia, Nahar Amrit Shakti, Chandivali, Powai, Mumbai-72 and recovered 13 gram of ganja on 28.08.2020 under Panchanama dated 28.08.2020 from his possession. Total 59 gram of ganja was recovered and both were arrested. Based on disclosure by accused namely Abbas Lakhani and Karn Arora premises of Zaid Vilatra was searched and Rs.9,55,750/-, 2081 US Dollars, 180 UK Pounds and UAE 15 Dirhans were recovered under panchanama dated 01/09/2020. His statement was recorded, wherein he has stated that the seized amount is sale proceeds of contraband and he had supplied marijuna/ganja/bud/psychotropic Substances to many persons

and he had disclosed few names with their details. He was placed under arrest.

4. On the voluntary statements of the persons arrested, several others came to be arraigned as accused reflecting their alleged involvement in dealing with illicit drugs. This covered 33 accused and the name of the applicant surfaced during investigation of NCB, MZU in C.R. No.16 of 2020, on the statement made by one Sanket Patel, who has been released on bail and another person by name Karamjeetsingh. Since the name of the applicant surfaced from the statement, suspecting her involvement with the drug peddlers, on 27/10/2020, a team of NCB officers issued notice to her under Section 67 and took search of her premises i.e. Flat No.301, "B" Wing, Poseidon Apartment CHS Limited, Versova, Andheri (West), Mumbai, in presence of an independent witnesses. A total of 1.7 grams of Charas, 2.3 gms of CBD+Oil (5% CBD) and 03 empty vials of CBD Oil were seized, under a panchanama. The recovery of the aforesaid contraband was effected in presence of independent witnesses, which included the Secretary of the building, where the premises were located and the domestic help of the applicant. The mother of the applicant was intimated about the search and she was requested to remain present, but she declined and even the request to send a known acquaintance was also not accepted. The mother of the applicant when enquired, refused to divulge any details about the applicant nor the NCB was communicated

about her contact number. After the search, notice under Section 67 was pasted on the door of the premises of the applicant directing her to report to the NCB office on 28/10/2020.

5. The involvement of the applicant was revealed on the basis of the statement of accused No.12 Sanket Patel, and when search of his house was carried out, four mobile sim cards came to be seized. His statement recorded under Section 67 of the NDPS Act on 13/09/2020 make a reference to Karamjeet Singh Anand and he has stated that he was introduced to Karamjeet Singh Anand and when he sought a job opportunity, he was asked to deliver charas, ganja/weed and cannabis from one place to other place, as per his direction. For the said purpose, he was promised payment of Rs.100/- to Rs.300/- per delivery. As per direction of Karamjeet Singh, he had delivered weed, ganja and cannabis on several occasions to different persons and he purchased charas from one lady in Andheri and received money, which he transferred to Karamjeet Singh. He refused to provide the contact numbers of the drug customers by stating that by accident his phone was crushed at Malad.

6. In the voluntary statement recorded on 10/11/2020, Sanket Patel has named the applicant by stating that he received a phone call on his mobile from Karamjeet Singh and he was directed to go and deliver ganja to Karishma Prakash and her mobile number was shared with him. Sanket Patel specifically states that whenever Karamjeet Singh used to tell him to go and deliver

ganja/weed, he used to meet Karamjeet Singh near Lokhandwala and collect the same. Karishma Prakash used to call him and introduce as Karishma and ask for ganja. Sanket Patel used to call Karishma from his mobile phone for delivery of ganja and by travelling in rickshaw to different places, he used to deliver ganja as asked by Karishma Prakash and the delivery was taken by different persons (men or women) and whoever used to collect the ganja, they never disclosed their identity.

7. Sanket Patel was confronted with the transactions in the statement of HDFC Bank account of Karishma Prakash, from where amount of Rs.3,100/- has been transferred to him on 25/07/2020.

He specifically states that Karishma Prakash has transferred the amount for delivery of 50 gms of ganja on the given date and he also received Rs.100/- for travelling expenses, over and above the said amount. He also states that Karishma Prakash has also transferred sum of Rs.3,100/- to Jagtapsingh Anand, who is the brother of Karamjeet Singh, from whom Sanket Patel used to take ganja and deliver it to others. His specific statement is to the following effect: - *“I want to state that I was delivering 50 gms of ganja (weed) several times on the order of Karishma Prakash between June, 2020 and July, 2020 after taking delivery of ganja (weed), they used to pay at the rate of Rs.3,100/- sometimes in cash and sometimes transfer via UPI to my account and sometimes through Karamjeet*

Singh's brother (Jagtapsingh Anand)."

8. The voluntary statement of Karamjeet Singh recorded on 10/11/2020 also inculcate the applicant, when he states that Karishma Prakash used to call Karamjeet Singh and ask for ganja. On such a call being received, he used to call Sanket Patel and hand over to him the ganja and the mobile number of Karishma Prakash. He states that after delivery of ganja, Sanket Patel received payment sometimes in cash and sometimes online. On being confronted with the UPI transaction in the name of Sanket Patel, Karamjeet Singh states that the mobile number linked to UPI is that of Sanket Patel and Karishma Prakash had transferred the amount of Rs.3,100/- for delivery of 50 gms. of ganja to her and the ganja was taken by Sanket Patel from him and delivered to Karishma Prakash. He also states that Karishma Prakash had transferred an amount of Rs.3,100/- to Jagtapsingh Anand on 02/08/2020 and Jagtapsingh Anand is his brother and the said transaction done by Karishma Prakash was known to him as he was using the said account. He specifically states that Karishma Prakash used to pay at the rate of Rs.3,100/- sometimes in cash and sometimes used to transfer amount by UPI to Sanket Patel's account and once she transferred the amount in the account of his brother.

9. The statement of Jagtapsingh Anant recorded under Section 67 of the NDPS Act on 10/12/2020 is also on the similar lines where, he states that he has received the amount

of Rs.3,100/- on 02/08/2020, but he was unaware of the said transaction and he was not knowing Karishma Prakash. He states that the said account was used by his brother.

10. The statement of the applicant herself was recorded under Section 67 of the NDPS Act, and on being asked about the recovery of hashish (charas) from her house, she has stated that, she was unaware about the substance and though it is recovered from her house, it is not from her bedroom. She offered an explanation that pre-covid time, she had a lot of social gatherings in her house and friends as well as friends of friends came to her house for drinks and dinner or to party and the substance was recovered from a room in her house with a balcony and this room was used by the guests. She also states that she did not have access to the said room, as it was not her bedroom.

The statement of the applicant about the recovery of contraband is, she had no idea how the substance came in her room. She states that it might have been left by some guests by mistake and someone could have brought the substance without her knowledge. In her statement, she also offered an explanation about the recovery of CBD oil and states that since she was called for the purpose of investigation, she was under stress and along with her mental state the stress impacted her skin and she bumped across some girl and she noticed rashes on her forehead and the girl pulled out two small bottles, which were almost empty and one medium bottle which was half and asked her to

apply it on her skin and hair. She states that the girl known as Rosa told her that she was leaving for Spain and, anyway, she was going to throw it.

The applicant also offered an explanation that she has seen a therapist based in Hyderabad about her anxiety. She states that she has not consumed the CBD oil but used it as serum on her face and hair.

11. On being confronted with the mobile number 8657119985, the mobile number of accused Sanket Patel, she responded by stating that she does not remember the number and does not know to whom the number belong. On being asked about the conversation with the user of the mobile, she states that she might have reached out to the user to purchase loose tobacco as during the Covid period, tobacco and cigarettes were not easily available and, in some places they were sold for double the actual price. The applicant denied that she knows the person known as Karamjeet Singh Anand and the above conversation with Sanket Patel over phone or the WhatsApp/text, she states that she might have talked to him few times during Covid period for loose tobacco and cigarettes only.

12. On confronted with her bank account in HDFC Bank and transaction dated 02/08/2020 with Jagtapsingh Anand for Rs.3,100/- and the transaction dated 25/07/2020 with Sanket Patel, she reiterates that it was for purchase of loose tobacco as cigarettes were not available and that she was not aware that

Sanket Patel was dealing in ganja, as he used to sell her only tobacco and that she had never purchased or further forwarded any drugs, weed, hashish, etc.

13. The statement given by the present applicant has been recorded under Section 67 of the NDPS Act and though the applicant has denied that she used to buy ganja from Sanket Patel, she admits that she had brought loose tobacco from him. She also denied any acquaintance with Karamjeet Singh Anand.

14. Mr. Ponda, the learned senior counsel has strenuously argued that it was only on account of refusal of a deal by one of the officers of NCB, Section 27A has been invoked against the applicant and he would submit that the applicant was given an assurance that if a particular advocate is engaged by her, Section 27A shall not be invoked. He would submit that the conversation recorded to that effect are on record. He argues that, it was in a *mala fide* manner, Section 27A was invoked, but there is no material establishing any connect of the applicant for financing the drug deal.

Further, learned senior counsel would submit that in the wake of the decision of the Hon'ble Apex Court in ***Tofan Singh v. State of Tamil Nadu***, reported in ***2020 SCC Online SC 882***, the statement recorded under Section 67 of the NDPS Act is not admissible and, therefore, when the prosecution is relying upon the statement of the co-accused, it has to justify the case by bringing corroborating evidence or material to establish the

alleged involvement and, particularly, when she is accused of a serious offence under Section 27A of the NDPS Act.

15. Per contra, learned counsel Mr. Shirsat would submit that though a statement recorded under Section 67 of the NDPS Act has been held to be inadmissible at the stage of trial, it can always be relied upon during investigation as a *prima facie* circumstance on record and would form the relevant material against the accused person. Apart from this, he would submit that the statement of co-accused as well as the call recording of CDRs and Tower locations are the material, which establish that the present applicant was connected with drug peddlers.

16. On perusal of the material compiled in the complaint and though a serious argument has been advanced in support of the application to submit that Section 27A of the NDPS Act was invoked against the applicant only to harass her, since she did not accede to the request of the concerned officer for change of lawyer, I do not think that the aforesaid contention deserve any consideration and as the applicant is accused of financing illicit traffic on the basis of the voluntary statement of the co-accused being supported by entries found in her own account establishing her connect with the co-accused, who are alleged to have supplied the contraband. The explanation offered that she intended to buy loose tobacco and the fact that she admits the deals and payment of amount to the co-accused, which is exhibited through her bank statements, *prima facie* establish her

connection to the co-accused, who are charged for being drug peddlers in the subject complaint. The recovery of the contraband *charas* from her house, which was in a locked condition, though small quantity, *prima facie*, establish her connection to the payments that have been made by her to the drug peddlers. *Prima facie* her explanation that somebody must have placed the narcotic drug in her house deserves a thorough investigation. As far as the CBD oil is concerned, her explanation once again does not appear to be truthful, in the wake of the explanation offered, that she met some lady, who handed over the same to her and this version also requires her custodial interrogation.

17. Learned senior counsel for the applicant would submit that Sanket Patel as well as Karamjeet Singh Anand have filed applications before the Special Judge for retracting their statements and the statement, which is sought to be replaced, is that, Sanket Patel used to arrange for grocery, alcohol and loose tobacco, which were on high demand during Covid time. The effect of the retracted confession is a matter of trial.

However, at present, there is sufficient material on record to indicate the involvement of the applicant, in the wake of the statement of the co-accused Sanket Patel, though recorded under Section 67 of the NDPS Act. He has given the details of the payment made by the applicant into his account against delivery of ganja and the said entries being reflected in the account of the

applicant, the explanation offered that it was for purchase of tobacco, which comes by way of a statement which seeks retraction of the earlier statement, do not inspire confidence.

18. As far as Section 27A is concerned, it punishes any person, indulging in financing, directly or indirectly, any of the activities specified in sub-clauses (i) to (v) of clause (viii) of section 2 of the NDPS Act. The said act is considered to be a serious offence, which contemplates a punishment of imprisonment not less than 10 years, but which may extend to twenty years. The term illicit traffic in relation to narcotic drugs and psychotropic substances, means and covers engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transshipment of narcotic drugs or psychotropic substances. It also includes dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in sub-clauses (i) to (iii); or even handling or letting out any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv). The term 'illicit traffic' also includes financing, directly or indirectly, any of the aforementioned activities.

19. In the wake of the material available against the present applicant, which is established from the bank account statement and the CDRs, the role of the applicant in the dealing of drug peddling definitely warrants a custodial interrogation. The digital

evidence and call data records and details of the mobile phones and tower locations, prima facie make out a case for custodial interrogation. She is also accused of Section 25 of the NDPS Act, which prescribes punishment for allowing premises, etc., to be used for commission of an offence. As per Section 25, whoever, being the owner or occupier or having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under any provision of this Act, shall be punishable with the punishment provided for that offence.

20. When the applicant states that parties used to be held in her house, but she is not aware who has placed the contraband in her house, definitely deserve a custodial interrogation. It is necessary to establish her link in dealing/peddling of the contraband and her nexus in the distribution, sale and purchase of the contraband. Considering her serious involvement, the Special Judge has rightly refused her protection from arrest.

I find no legal infirmity in the said order. Upholding the said order, the present application is rejected.

21. It is pertinent to note that while rejecting the application, learned Judge has conferred a protection upon the applicant for a limited period of time and which was continued by this court from time to time. However, now since the application is turned

down on merits, the protection shall no longer be available to the applicant.

22. It is made clear that the above observations are *prima facie* in nature and made only for the purpose of deciding the anticipatory bail application of the applicant and the trial court shall not be influenced by the same during trial.

23. In the backdrop of the facts arising out of the present case and in the wake of the arguments advanced by the learned senior counsel, Mr. Ponda for the applicant and Mr. Shirsat for the Union of India, a controvertible question that arises for determination is -

“Whether all offences under the NDPS Act, 1985 are non-bailable, irrespective of the punishment prescribed and irrespective of the fact that many offences do not even mandate imprisonment as a punishment”?

24. The learned senior counsel has asserted that in the wake of the conflicting view of the single judges of this court in three different cases, it would be most appropriate to refer the above question to a larger Bench. He has invited my attention to the following decisions of this court:

- (a) **Stefan Mueller v. State of Maharashtra** reported in **2010 SCC Online Bom. 1974.**
- (b) **Rhea Chakraborty v. The Union of India & Ors.** reported in **2020 SCC Online Bom. 990.**

- (c) *Santosh Pundalik Kale v. State of Maharashtra* (Order dated 04/08/2021 in Bail Application No.1583 of 2020).

25. In the case of Stefan Mueller, learned single judge of this court (Justice J.H. Bhatia,) was dealing with an accused, who was charged for the offences punishable under Section 20(b)(ii) (a) and Section 27 of the NDPS Act. The accused was granted bail by the learned special Judge and was directed to deposit his passport in the court, with a condition being imposed that he shall not leave the country without permission of the court. The accused made an application, seeking permission to go abroad and for return of his passport so as to undertake his journey to Germany to meet his ailing mother. This application came to be rejected by the special judge, on the ground that he is a foreigner and if released on bail, he may not come back to India and by invoking the limitation, for grant of bail imposed under Section 37(2) of the NDPS Act along with the limitation under the Code of Criminal Procedure (for short, “**Cr.P.C.**”).

This order was assailed before the single judge.

Recording that each of the offences with which the petitioner was charged is punishable with imprisonment which may extend to six months, or with fine, or with both, it was sought to be argued that in view of the amendment in the NDPS Act in the year 2001, the stringent conditions of grant of bail as prescribed under Section 37(1)(b) are applicable only to the offences punishable under Sections 19, 24 and 27A and also to the offences involving commercial quantity, but the conditions

are not applicable to any other offences. An argument was advanced that Section 37 does not declare that all offences under the NDPS Act are non-bailable. The contra argument being that all the offences under the NDPS Act are non-bailable and the conditions can be imposed while granting bail under Section 437 or under Section 439 of the Cr.P.C.

26. Dealing with the rival contentions and recording that the petitioner was charged with offences punishable with imprisonment, which may extend to six months or with fine or with both, since he was found in possession of small quantity of Ganja and Charas, by referring to Section 37 of the NDPS Act, the learned single Judge has recorded as under:

5. *The heading or the marginal note of Section 37 reads "Offences to be cognizable and non-bailable". On the first reading of this marginal note, one may get an impression that all the offences under the NDPS Act are cognizable and also non-bailable. However, on reading the language of Section 37, it becomes clear that in Clause (a) to Sub-section (1), the legislature has unequivocally declared that notwithstanding anything contained in the Code of Criminal Procedure, every offence punishable under this Act shall be cognizable. If this provision would not have been there, certain offences under the NDPS Act punishable with imprisonment for less than three years or with fine, would be non-cognizable in view of Part II of Schedule to Cr.P.C., but they are made cognizable because of the specific provision in Clause (a) of Section 37(1). If the marginal note or the heading of Section 37 is kept aside for a moment, nowhere Section 37 specifically declares that every offence punishable under the NDPS Act shall be non-bailable. Clause (b) specifically provides that a person accused of offence punishable under Sections 19, 24, 27A and the offences involving commercial quantity shall not be granted bail unless the Public Prosecutor is given an opportunity of hearing and if the Public Prosecutor opposes the application, unless 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. Sub-section (2) declares that the limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Cr.P.C. or any other law for the time being in force on granting bail. The conditions imposed by Clause (b) are not applicable to the offences punishable under Sections 20(b)(ii)(a) and Section 27.”

27. This decision is followed in case of ***Santosh Kale (supra)*** (Bharati Dangre, J.), when the contraband recovered from the applicant was found to be small quantity. Holding that the rigours of Section 37 of the NDPS Act will not come into force in offences punishable other than those under Sections 19, 24, 27A, the applicant was released on bail.

28. Another single judge of this court (Justice Sarang Kotwal) in the case of ***Rhea Chakraborty (supra)***, dealt with the issue once again, while determining the question, whether the offences alleged against the applicant are bailable and if the offences are not bailable, whether rigours mentioned in Section 37(1)(b) are applicable.

The learned single judge was dealing with an application for bail preferred by an applicant in connection with C.R. No.16 of 2020 registered with Narcotic Control Bureau, Mumbai for the offences punishable under Sections 8(c) read with Section 20(b)(ii), 22, 27A, 28, 29 and 30 of the NDPS Act. In the facts of the case, the following questions arose for consideration:

- (a) *Whether the offences alleged against the applicant are bailable?*

- (b) *If the offences are non-bailable, then, as to whether rigours mentioned in Section 37(1)(b) of the NDPS Act are applicable? And*
- (c) *If such rigours are not applicable and if the offences are non-bailable, then, whether the Court should exercise its discretion to grant or refuse bail?*

29. The earlier decision in the case of **Stefan Mueller (supra)**, was noted and after referring to the original Section 37 in the Act, as it was, while enacting the statute, by referring to its revolution, after the amendment of 1988 and its further amendment in the year 2001, in the backdrop of the Statement of Objects and Reasons of the amendment, it was recorded as under:

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

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

43. In the 1985 Act except Sections 26, 27 and 32, all other offences were non-bailable as per the schedule of Cr.P.C. and yet necessity was felt to make offences non-bailable as mentioned in

the Statement of Objects and Reasons. The concept of small quantity was already there in the then existing Section 27. Therefore, the amendment to Section 37 in the year 1989 and then in the year 2001 will not be affected by concept of "small quantity" introduced in sentencing structure of other penal sections."

30. In deducing the above, Justice Sarang Kotwal has found support from the observations of the Constitution Bench decision of the Supreme Court in the case of ***Baldev Singh (supra)***, and extensively reproduced paras 3 and 4 of the Constitution Bench and particularly centered the observations, in paragraph 4 to the following effect:-

"Section 37 makes an offence under the Act to be cognizable and non-bailable and also laid down stringent conditions for grant of bail."

31. Based on the aforesaid, the conclusion came to be recorded as under:

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

46. The Hon'ble Supreme Court has further observed that despite the stringent provisions of the NDPS Act, 1985, as amended in 1988, the drug business was booming, addicts were rapidly rising, crime with its role in narcotics was galloping and drug trafficking network was ever-growing. While interpreting various provisions of the statute, the object of the legislature is required to be kept in view, but, at the same time the interpretation has to be reasonable and fair.

47. The situation has not changed since 1999 when these

observations were made by the Hon'ble Supreme Court. In fact, the situation has become worse. Therefore, these observations apply to today's scenario with more force."

32. The observations made by learned single Judge in case of **Stefan Mueller (supra)** was held to be devoid of any binding effect since the observations of the Constitution Bench in **Baldev Singh (supra)** was not placed, when **Stefan Mueller (supra)** was decided. Justice Kotwal, therefore, concluded by holding that the observations of the Constitution Bench in **Baldev Singh (supra)** apply to the provisions of Section 37, as it stood then, and also to Section 37 as it stands now, after the amendment in 2001. It is held that the statements and observations of the Constitution Bench in **Baldev Singh (supra)** binds everybody and there is no scope for an argument that only some offences are non-bailable and other offences where punishment is less than three years, are bailable as per Part II of the Schedule of the Cr.P.C.

33. In the wake of the two divergent views of this court, Mr. Ponda asseverated the need of a reference to the Larger Bench.

From the cleavage of opinions expressed as above, one thing is apparent that two conflicting views are holding the field and though the learned single Judge in **Rhea Chakraborty (supra)** has refused to follow **Stefan Mueller (supra)** on the ground that it did not take into consideration the observations of the Constitution Bench of the Hon'ble Apex Court in the case of **Baldev Singh (supra)** and since **Baldev Singh (supra)** was not

noticed while deciding *Stefan Mueller (supra)*, the said decision is per incuriam.

With greatest respect to the learned single Judge, who dealt with *Rhea Chakraborty (supra)*, I am unable to subscribe to his view.

When the decision of the Constitution Bench in case of Baldev Singh is read in its entirety, it can be seen that while delivering the said judgment, the Constitution Bench was confronted with an issue about the imperative nature of Section 50 of the NDPS Act and whether compliance with the said section is mandatory and if it is so, what is the effect of its breach.

The Two Judge Bench, which made a reference to the Larger Bench, clearly formulated the said issue in the following words:

“From the above resume, it would thus appear that though a two-Judge Bench of this Court considered the earlier judgments of this Court, it held in the case of Pirthi Chand, and affirmed in the case of Labh Sing (supra), that breach of Section 50 does not affect the trial while in the case of Ali Mustaffa (supra), another Bench categorically laid down that bench of Section 50 makes the conviction illegal. In view of the divergent opinions so expressed, we deem it fit to refer these matters to a larger Bench.

Let the records be placed before the Chief Justice for necessary orders.”

34. On due deliberation of the statutory provisions and the different views, the question came to be determined in paragraph No.57 of the Report and the judgment in Ali Mustaffa was held to be correct interpretation on Section 50 of the NDPS Act, with

a conclusion being drawn that it is the obligation of the empowered officer, before conducting the search of a suspect, on the basis of prior information, to inform the suspect that he has a right of his search being conducted in the presence of a gazetted officer or a Magistrate. Failure to so inform the suspect of his right, was held to render the search illegal. It was also held that failure to do so, would cause prejudice to the accused and also render the search illegal and the conviction and sentence of the accused based only on the recovery made during the search, bad.

35. While determining the said question, Their Lordships of the Apex Court in paragraph No.4 exhaustively traced the history of the NDPS Act and highlighted the need for an enactment providing stringent penalties for various offences. Reference was made to the amendment in the Act in the year 1988, which prescribed minimum punishment of 10 years imprisonment extending upto 20 years for most of the offences under the NDPS Act. Noticing the intent and purpose of the amendment, when it provided harsher punishment for second and subsequent offences, while referring to the scheme of the enactment, reference was made to Section 36, which provided for constitution of special courts for trying the offences. While discussing the scheme of the statute, reference is made to Section 37, which makes all offences under the Act to be cognizable and non-bailable, which laid down stringent conditions for grant of bail.

36. Expressing anguish, that despite the stringent provisions of the NDPS Act as amended in 1988, the drug business is booming addicts are rapidly rising, crime rate with its role to narcotic is galloping and drug trafficking network is ever growing, Their Lordships observed that while interpreting various provisions of the statute, the object of the legislation has to be kept in view, but at the same time the interpretation has to be reasonable and fair.

37. With this background, while introducing the scheme of the NDPS Act along with its provisions, the Constitution Bench proceeded to determine the question before it, revolving around Section 50 of the NDPS Act and its mandatory nature, coupled with consequences flowing, in case of its breach.

38. The observation of the Constitution Bench in paragraph No.4, to the effect that “*Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail*” has been accepted as a binding precedent in case of ***Rhea Chakraborty (supra)***.

I am unable to agree with the said proposition since, the observations made by the Hon’ble Apex Court in paragraph No.4 in the case of ***Baldev Singh (supra)***, in my considered opinion, is not the ratio of the decision, since the *ratio decidendi* of any judgment are the observations made by a court, which are necessary for determining the issues before it and as it can be seen that the question that was referred to the Constitution Bench

formulated as above, the Hon'ble Apex Court was not focused upon the aspect of the bailability or so of the offences, but while narrating the scheme of the enactment, reproduced Section 37 as it read.

39. The decision of a court is a binding precedent if it lays down some principle of law supported by reasons and mere casual observations or directions without laying down any principle of law, would not amount to a precedent. A decision is an authority for what it decides and not that every thing said therein constitutes a precedent. A decision is only an authority for what it actually decides and the essence in a decision is a ratio and not every observations found therein nor what logically follows from the observations made in it.

It is not profitable task to extract a sentence here and there in a judgment and to build upon it. True, it is, that obiter dicta of the Highest Court of this country should command highest respect flowing from Article 141 of the Constitution and even the *obiter dicta* of the Apex Court is entitled for considerable weight, but it is surely to be distinguished from the *ratio decidendi*, as an observation of the court on legal questions suggested in a case before it, but not arising in such a manner, as to require a decision and in such a case, such an *obiter dicta* may not amount to binding precedent though it may carry considerable weight.

40. With this principle being in my mind, when paragraph

No.4 of the decision of the Constitution Bench in **Baldev Singh (supra)** is read, I do not think that *dehors* the accompanying principles governing Section 37 of the NDPS Act and the argument advanced before the learned single Judge in **Rhea Chakraborty (supra)**, the whole emphasis could not have been upon the binding effect of the observations in paragraph No.4 of the judgment.

41. Section 37 of the NDPS Act needs a reproduction to ascertain its nature and object, as it stands in the statute, intended to curb the widespread menace of drug and its abuse.

"37. Offences to be cognizable and non-bailable - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

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

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-

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

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

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

41. At first blush, one may get an impression that all the offences are to be treated as cognizable and non-bailable, if the heading of the section is given precedence and weightage over the contents of the section. But, when the section is carefully read, without impacted by the heading and the intention of the legislature is sought to be ascertained, what surfaces is, the said section has to be given effect to, notwithstanding anything contained in the Code of Criminal Procedure.

On account of non-obstante clause, every offence punishable under the NDPS Act is made cognizable. While giving sub-clause (b) of Section 37(1) its true meaning, it will have to be read with the non-obstante clause.

Sub-clause (b) of Section 37(1) prescribes conditions for an accused being released on bail for offence punishable under Sections 19, 24 and 27A of the NDPS Act and for the offences involving commercial quantity. It stipulated that he shall be released on bail or on his on bond subject to two contingencies – *(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 be commit any offence while on bail.*

Sub-section (2) of Section 37 further offers a clarification by incorporating that the limitations on granting of bail specified

in clause (b) of Sub-section (1) are in addition to the limitations under the Cr.P.C. or any other law for the time being in force, while granting bail.

42. The journey through which Section 37 attained its present status deserve a mention at this stage. The NDPS Act, 1985 at the time of its enactment included Section 37, which reads thus:

“37. Offences to be cognizable and non-bailable-

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

43. Section 37 did not deal with the aspect whether the offences under the Act would be bailable or non-bailable. The Act underwent a change in the year 1988 and it read as under:

"37. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,-

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

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

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

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

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code

of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail".

44. Continuing the non-obstante clause, a restriction was imposed on releasing a person accused of an offence punishable under the Act for a term of imprisonment of three years or more. The Act further underwent an amendment in the year 2001 and from the Statement of Objects and Reasons of the amendment, it becomes apparent, that the legislature deemed it fit to rationalize the sentence structure so as to ensure that high quantities of drugs are punished with deterrent sentences, whereas the addicts and those who commit less serious offences are sentenced to less severe punishment. The amendment in the Act was, therefore, based on rationalization of the sentence structure and it proposed to restrict the application of strict bail provisions to those offenders who indulges in serious offences.

After the 2001 amendment, the serious rigours imposed for releasing the accused on bail were only restricted to Sections 19, 24 and 27A and in relation to commercial quantity.

45. While Section 37 underwent changes as above, its heading remained the same, throughout – “**Offences to be cognizable and non-bailable**’.

The Amendment Act (9 of 2001) introduced distinct punishment for the offences under the Act i.e. punishment of imprisonment for three years or fine, other than the offences punishable under Sections 19, 24 or 27A and those cases

involving commercial quantity. The limitations for releasing an accused on bail as contemplated under clause (b) of sub-Section (1) of Section 37 is now restricted to offences punishable under Sections 19, 24 or 27A. The Parliament effected the change by introducing a quantitative approach i.e. small and commercial quantities and by implication intermediate quantities and this policy and legislative change automatically found itself to be reflected in cases of grant of bail for the offences punishable under the NDPS Act.

46. Reading the existing provision, it is apparent that the restriction imposed on releasing an accused on bail on being charged for Sections 29, 24 and 27A and those cases involving commercial quantity, the dual conditions prescribed under Section (b) will have to be adhered to, in addition to the normal conditions provided under the Cr.P.C. while releasing an accused on bail under Section 437 or 439 of the Code. Necessarily, barring the sections prescribed in sub-clause (b) of Section (2) of Section 37, the normal parameters for releasing a person on bail, shall be adopted keeping in consonance Part II of Schedule of the Cr.P.C.

The non-obstante clause contained in sub-section (1) of Section 37 clearly gives an overriding effect to the provisions of the section, over the Code of Criminal Procedure in respect of clause (a) and (b) and notwithstanding anything in the Code, every offence under the NDPS Act is made cognizable. Had the

legislature intended to make every offence, non-bailable, it could have explicitly made it so, like when it intended to make every offence cognizable, it worded itself specifically. But, it refrained itself from saying so and, therefore, imposed certain conditions, while releasing a person on bail, being accused of certain offences under the NDPS Act by imposing stringent conditions, in addition to the normal parameters, to be mindful of, while releasing a person on bail.

47. The heading of Section 37 of the statute, in my considered view, has created a problem for itself. How much weightage has to be given to the heading and marginal notes is, therefore, to be determined.

It is settled position of statutory interpretation that the Headings, Preface to the section or entries cannot control the plain words of a section and they can be referred to for the limited purpose of construing the provision, but in any case, they cannot be used for cutting down the plain meaning of the words of the provision. The Heading has limited role to play and it cannot be accorded much importance, so as to control the meaning of clear and unambiguous words, discerning from the provision itself.

By reading the Heading of Section 37, one may get an impression, that all offences under the NDPS Act are cognizable and also non-bailable, however, when the provision itself is perused, the illusion, which the Heading gives, immediately fade

away. On reading of Section 37, it is clear that in sub-clause (a) of Section 37(1), the legislature as unequivocally declared that notwithstanding anything contained in the Code, every offence punishable under the NDPS Act shall be cognizable.

In absence of this specific provision, certain offences under the NDPS Act, which are punishable with imprisonment for less than three years or with fine would have been non-cognizable in view of Part II of the Schedule to the Cr.P.C. But, the legislature intended that all the offences under the Act to be cognizable and, hence, it reiterated so, in clause (a). However, clause (b) does not give any indication to the effect that all the offences under the NDPS Act are non-bailable, even though the Heading, at first blush, create such an impression. The Heading of Section 37 act like a *nom de guerre* and if one read Section 37 in its entirety, the impression disintegrate and it becomes apparent that the legislature never intended that every offence under the NDPS Act shall be non-bailable. What is described by the Heading, therefore, shall not be necessarily be the law, but the substantive provision has to be applied and interpreted by the courts, unmindful its presence along with the said section, since the legislature has expressed its intention very clearly by refraining itself from declaring that all offences under the Act are non-bailable.

48. In *Stefan Mueller (supra)*, learned single Judge of this court had focused itself upon the said aspect of the matter by

referring to the decisions of the Privy Council in *Thakurain Balraj Kunwar & Anr. v. Rae Jagatpal Singh* reported in *L.R. 31 132* as well as in the case of *Frick India Ltd. v. Union of India & Ors.* reported in *(1990) 1 SCC 400*, expounding the limited purpose of the heading prefixed to a provision, while construing the statute.

49. In paragraph No.10, the legal position of the Heading of Section 37 has been culled out as under:

“9. In view of these observations, now it is settled position that a limited role to play in the construction of statute may be assigned to the heading or title of a section. The title or heading of Section 37 of NDPS Act shows that offences shall be cognizable and non-bailable. However, as noted above, in the body of the section, the legislature has only declared that all the offences under the Act shall be non-cognizable, but the legislature has not declared that all the offences under the Act shall be non-bailable. In Clause (b) only it speaks about the limitations on granting of bail in addition to the limitations under the Cr.P.C. while granting bail. Therefore, the provisions of Cr.P.C. will have to be looked into to find out whether offences under the NDPS Act are bailable or not.”

50. It is indeed true that whenever there is inconsistency between the NDPS Act and the Cr.P.C., the provisions of the NDPS Act will prevail. That being said, the non-obstante clause in Section 37 does not contain an absolute exclusion of Cr.P.C., for the grant of bail. The exclusion of the provisions of the Cr.P.C. is only to the extent of the offences mentioned in Section 37(b). In other matters, the provisions of the Cr.P.C. will apply with full force.

51. Thus, it can be seen that the ‘Notwithstanding clause’ only overrides the Code qua Sections 19, 24 and 27A and the offences involving commercial quantity. For instance, Sections 15(a), 17(a), 18(a), 20(b)(ii)(A), 21(a), 22(a), 23(a) deal with the small quantity and the punishment prescribed therein is less than three years. But, since now, Section 37 does not mention any of these sections, it cannot be stated that the ‘Notwithstanding Clause’ will apply to these sections as well.

52. In the wake of the aforesaid, I must determine whether a reference to a larger Bench is necessary.

In case of **Sundarjas Kanyalal Bhatija v. Collector, Thane**, reported in **(1989) 3 SCC 396**, the doctrine of binding precedent came to be elaborated in the following words :

“21. Chief Justice Pathak, in a recent decision stressed the need for a clear and consistent enunciation of legal principle in the decision of a Court. Speaking for the Constitution Bench (Union of India v. Raghubir Singh ([1989] 2 SCC 754)] learned Chief Justice said: (SCC p.766, para 9):

“The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court.”

22. *Cardozo propounded a similar thought with more emphasis : [The Nature of the Judicial Process, Benjamin N. Cardozo p. 33]:*

“I am not to mark the symmetry of the legal structure

by the introduction inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly by some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another.

In our system of judicial review which is a part of our Constitutional scheme, we hold it to be the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behavior . It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute.””

53. Judicial decorum no less than legal propriety forms the basis of judicial procedure. The thing, which is necessary in law, is its quality of certainty. In **Mahadeolal Kanodia v. Administrator General of West Bengal** reported in **AIR 1960 SC 936**, their Lordships of the Apex Court specifically expressed, that this very quality of certainty in law would totally disappear if judges of the co-ordinate jurisdiction in a High Court start overruling one another's decisions.

54. The authoritative judicial pronouncements have crystallized the position of law and the observation in the case of

State of Bihar v. Kalika Kuer reported in **(2003) 5 SCC 448** is relevant and, hence, gainfully reproduced:

“An earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the Court or more aspects should have been gone into by the Court deciding the matter earlier but it would not be reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the latter bench of coordinate jurisdiction.

10 Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways - either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits.”

55. In **Lala Shri Bhagwan v. Shri Ram Chand** reported in **(1965) 3 SCR 218**, the proper course to be adopted, in case where a Single Judge of the court is not in agreement with a the decision of the Division Bench or of a Single Judge, was recorded in the following words:

“It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of Judicial decorum and propriety.”

56. It is a settled principle of law, that the decision rendered by a co-ordinate bench is binding upon the co-ordinate bench of equal or lesser strength. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the latter authority is substituted for the earlier, but it results in a situation where the two stand taken, side by side in conflict with each other. It is necessary to clear the legal antinomy by an act of a bench of higher strength, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good law.

The earlier judgment may seem to be not correct, but yet it will have binding effect on the latter Bench of the co-ordinate jurisdiction. As held in *Kalika Kuer (supra)*, easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways; either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits.

57. It is not desirable nor permissible to take a divergent view from an earlier co-ordinate bench and while deciding *Rhea Chakraborty (supra)*, though the learned Single Judge held the decision in case of *Stefan Mueller (supra)* not to be binding precedent, since it did not consider the Constitution Bench

judgment in *Baldev Singh (supra)*. With due respect to the learned Judge, it was not open for him to take a contrary view and he ought to have referred the matter to a larger bench, if he disagreed with the view in *Stefan Mueller (supra)*.

58. In any case, I have exhaustively referred to the decision of the Constitution Bench in *Baldev Singh (supra)* and about the context in which the offences under NDPS Act are held to be non-bailable. The judgment by the Constitution Bench is delivered prior to the 2001 amendment to the NDPS Act, which marked a significant difference and from the Statement of Objects and Reasons of 2001 amendment, it is apparent that the amendment was proposed to restrict the application of strict bail provisions, only to those who indulge in serious offences. One has to keep in mind the observations made by the 155th Law Commission Report highlighting reformatory approach to be adopted towards the accused, found in possession of small quantity of drugs and the question is, despite its lesser gravity and punishment prescribed, are all the offences under NDPS Act to be treated as non-bailable.

59. In the wake of the above, I deem it appropriate to place this matter before Hon'ble the Chief Justice for making reference to a larger bench for determining the following question:

“Whether all offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 are non-bailable,

irrespective of the punishment prescribed and
irrespective of the fact that many offences do not even
mandate imprisonment as a punishment?

[SMT. BHARATI DANGRE, J.]