



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CrMP(M) No. 1381 of 2017
Decided on December 27, 2017

Yashpal ... Petitioner

Versus

Narcotics Control Bureau Respondent

Coram:

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? ¹ yes.

For the petitioner : Mr. N.S. Chandel, Advocate.

For the respondent : Mr. Ashwani Pathak, Senior Advocate with Mr. Sandeep K. Sharma, Advocate.

Sandeep Sharma, Judge (oral):

Bail petitioner namely Yashpal, who is in judicial lockup, has approached this Court by way of present petition under Section 439 CrPC, praying herein for grant of regular bail, in connection with Crime No. 57/2016 dated 31.12.2016, under Sections 8, 20, 25 and 29 of the Narcotic Drugs & Psychotropic Substances Act, registered by Narcotics Control Bureau, Sub Zonal Unit, Mandi, Himachal Pradesh.

2. Sequel to orders dated 3.11.2017 and 24.11.2017, Mr. Ashwani Pathak, learned Senior Advocate representing Narcotics Control Bureau, has made available complete record pertaining to search and arrest of bail petitioner. Apart from above, Narcotics Control Bureau has also filed its reply to the

¹ Whether the reporters of the local papers may be allowed to see the judgment?

bail application moved on behalf of the bail petitioner, perusal whereof suggests that on 31.12.2016, hotel namely Yash Palace owned and possessed by bail petitioner was raided/ searched by the officials of Narcotics Control Bureau. At the time of search, one Shri Ram Prakash was present in the Hotel. Narcotics Control Bureau recovered 4.272 kg Charas from one of the rooms of the aforesaid hotel. On the same day i.e. 31.12.2016, at about 9 am, Investigating Officer A.C. Malla and other NCB officials came to the residential house of the bail petitioner and asked him to accompany them to their office at Mandi. They also disclosed to the bail petitioner that Charas had been recovered from his Hotel, Yash Palace. Bail petitioner informed the Investigating Officer that he had rented out said hotel to Ram Prakash on lease with effect from 9.5.2016 and same is valid till 8.4.2017, for a total consideration of Rs.5.00 Lakh and in this regard, he has also executed a lease agreement on 9.5.2016. However, the fact remains that aforesaid explanation rendered on record by the bail petitioner was not accepted by the NCB officials and, he was arrested and a case under Sections 8, 20, 25 and 29 of the Narcotic Drugs & Psychotropic Substances Act came to be registered against the bail petitioner as well as co-accused Ram Prakash and since then they are in judicial lock-up. Bail petitioner at the first instance approached learned Additional Sessions (Special)

Judge, Kullu, District Kullu, Himachal Pradesh, by way of bail application, seeking therein bail but same was rejected by the learned Additional Sessions (Special) Judge, vide order dated 13.10.2017. In the aforesaid background, bail petitioner has approached this Court by way of instant bail petition, praying therein for grant of regular bail.

3. Mr. N.S. Chandel, learned counsel representing the bail petitioner, while referring to the record/status report filed on behalf of Narcotics Control Bureau, strenuously argued that no case is made out against the bail petitioner, who at the time of search and seizure, was not present in the hotel Yash Palace. While inviting attention of this Court to order dated 13.10.2017, passed by learned Additional Sessions (Special) Judge, Kullu, Mr. Chandel, contended that factum with regard to execution of lease deed inter se bail petitioner and other co-accused, Ram Prakash, was brought to the notice of the learned Additional Sessions (Special) Judge, but despite that bail was not granted. With a view to substantiate that bail petitioner had leased out his hotel in favour of the co-accused Ram Prakash, by way of agreement dated 9.5.2016. Mr. Chandel, also invited attention of this Court to agreement placed on record as Annexure P-1 (available at page-11 of the paper book), perusal whereof suggests that vide agreement dated 9.5.2016, present bail petitioner, who happened to owner-in-possession of the hotel

namely Yash Palace, leased out said hotel on rent to Ram Prakash, for a period of eleven months i.e. upto 8.4.2017. While placing heavy reliance upon aforesaid agreement, learned counsel representing the bail petitioner contended that since hotel, from where contraband was allegedly recovered was not with the bail petitioner at the relevant time, there was no occasion for the investigating agency to falsely implicate him in the case. Mr. Chandel, further contended that as the case of the Narcotics Control Bureau itself, bail petitioner was not present in the Hotel and he was called from his residence, whereafter, *Charas* was allegedly recovered from one of the rooms of the hotel and as such it can not be said that contraband was recovered from the conscious possession of the bail petitioner.

4. Mr. Ashwani Pathak, learned Senior Advocate duly assisted by Mr. Sandeep K. Sharma, Advocate representing Narcotics Control Bureau, while refuting aforesaid claim, contended that the lease agreement was never produced by the bail petitioner at the time of search in the hotel, rather, same has been placed before the this Court for the first time. Learned Senior Advocate further contended that neither during investigation nor at the time of presentation of accused and case property before the concerned Magistrate, bail petitioner produced lease agreement, now sought to be relied by him in the instant proceedings, as such, same can not be taken into

consideration at this stage. Mr. Pathak, learned Senior Advocate, further contended that keeping in view the gravity of offence allegedly committed by bail petitioner and other co-accused, who is already in custody, present bail petitioner deserves no leniency, rather he needs to be dealt with severely. Mr. Pathak, learned Senior Advocate further contended that since commercial quantity of contraband has been recovered from the hotel room, owned and possessed by the bail petitioner, rigours of Section 37 of the Act *ibid* are applicable and petitioner is not entitled to be released on bail.

5. I have heard the learned counsel for the parties and gone through the record carefully.

6. At this stage, it may be noticed that bail application on behalf of the present bail petitioner came to be filed before Additional Sessions (Special) Judge on 4.8.2017, wherein admittedly bail petitioner submitted before the Court below, rather, he produced a Photostat copy of agreement, allegedly executed inter se him and co-accused Ram Prakash on 9.5.2016, suggestive of the fact that Hotel Yash Palace owned by bail petitioner was leased out to the co-accused Ram Prakash but the same was not taken into consideration by the learned Court below. Order dated 13.10.2017 passed by learned Additional Sessions (Special) Judge, suggests that aforesaid aspect of the matter was not considered at all by it and learned

Court below merely taking note of the commercial quantity of contraband allegedly recovered from the premises owned by the bail petitioner, proceeded to dismiss the application. During aforesaid arguments having been made by the learned counsel representing the parties, Mr. Ashwani Pathak, learned Senior Advocate had also raised issue with respect to genuineness and correctness of the agreement dated 9.5.2016 and as such, this Court, solely with a view to ascertain the correctness and genuineness of the document, which could be crucial for determination of rights of the parties, qua hotel in question, at the relevant time, requested the learned Additional Advocate General to get the same verified from the authorities concerned. Pursuant to order dated 8.12.2017, passed by this Court, learned Additional Advocate General, requested Deputy Superintendent of Police, Kullu, District Kullu, to get the lease agreement dated 9.5.2016, verified. Aforesaid Deputy Superintendent of Police vide communication dated 14.12.2017, addressed to the learned Additional Advocate General, submitted his report, which is taken on record. Perusal of report suggest that non-judicial stamp paper was purchased on 9.5.2016, by the bail petitioner from one Harpreet Singh, Stamp Vendor of District Courts Kullu. Said Shri Harpreet Singh, in his statement given to the police, acknowledged the factum with regard to purchase of non-judicial stamp paper on 9.5.2016. He

also produced his register. As per certified copy of Notary Register, agreement between Yashpal and Ram Prakash was also executed on the same day i.e. 9.5.2016. As per statement of Shri Tehal Singh son of Shri Thakur Singh, resident of Village Kasol, Tehsil Bhunter, District Kullu, Himachal Pradesh, Hotel Yash Palace is being run on lease by accused Ram Prakash since May 2016. Report of Deputy Superintendent of Police further suggests that agreement in question was executed for the purpose for which non-judicial stamp paper was purchased on 9.5.2016.

7. After having carefully perused report submitted by Deputy Superintendent of Police as also relevant extract of Register maintained by Stamp Vendor and Notary, there appears to be considerable force in the argument of Mr. N.S. Chandel, learned counsel representing the bail petitioner that on 9.5.2016, agreement was executed inter se his client and Ram Prakash, whereby he had leased out Hotel Yash Palace to Ram Prakash for 11 months, for a total consideration of Rs.5.00 Lakh.

8. This Court also perused record of investigating agency, perusal whereof suggests that Ram Prakash during investigation disclosed that he had to pay an amount of Rs.5.00 Lakh to the bail petitioner on account of hotel business. Though statement made by Ram Prakash, if is read in its entirety, suggests that bail petitioner and Ram Prakash were

running hotel business together but, it has specifically come in the statement of Ram Prakash that out of total proceeds of hotel business and illegal trade of narcotics/psychotropic substances, he had to pay Rs.5.00 Lakh to the bail petitioner.

9. At the cost of repetition, it may be observed that though there is no categorical statement on behalf of co-accused Ram Prakash that there was a lease agreement executed inter se him and the bail petitioner, but certainly, in his statement, he has admitted that he was under obligation to pay Rs. 5.00 Lakh to the bail petitioner on account of hotel business and trade of narcotics, meaning thereby that at the relevant time, hotel was being run and managed by co-accused Ram Prakash. Otherwise also, as per story put forth by the Narcotics Control Bureau, when hotel was raided/ searched only co-accused Ram Prakash was present in the Hotel and bail petitioner was subsequently called from his house. Inquiry got conducted by this Court with a view to ascertain correctness and genuineness of lease deed, allegedly executed inter se bail petitioner and co-accused Ram Prakash also suggests that on 9.5.2016, Hotel Yash Palace was leased out to co-accused Ram Prakash, who in lieu of the same had to pay an amount of Rs.5.00 Lakh to the bail petitioner.

10. Though aforesaid aspect of the matter is to be considered and decided by the learned trial Court on the basis of evidence adduced on record by investigating agency, but this Court, after

having perused lease agreement dated 9.5.2016, which has been further verified by Deputy Superintendent of Police, Kullu, sees substantial force in the arguments of learned counsel representing the bail petitioner that at present there is no evidence to directly implicate the bail petitioner in the offence allegedly committed by co-accused Ram Prakash in the Hotel owned and possessed by the bail petitioner. ◇

11. True it is that quantity of contraband allegedly recovered from the hotel owned by bail petitioner is commercial in nature, but that cannot be sole ground to keep the bail petitioner in custody that too, for indefinite period, especially when lease agreement placed on record suggests that at the time of search/recovery of contraband, Hotel Yash Palace was in occupation and possession of co-accused Ram Prakash and as such, this Court sees no reason to let bail petitioner incarcerate in jail during pendency of the trial.

12. This Court also cannot lose sight of the fact that alleged contraband has not been recovered from the conscious possession of the bail petitioner, rather, he was subsequently called by the officials of NCB, on the basis of statement made by co-accused Ram Prakash that bail petitioner is the owner of the Hotel. But, as has been taken note above, lease deed dated 9.5.2016 executed inter se bail petitioner and co-accused suggests that for eleven months, Hotel Yash Palace was leased

out to the co-accused by the bail petitioner. Otherwise, co-accused namely Ram Prakash, who was actually present in the Hotel at the time of search, has categorically stated in his statement given to the NCB that apart from hotel activities, he was earning money from illegal trade of narcotics. Above named co-accused is in custody.

13. Otherwise also, guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the investigating agency by leading cogent and convincing evidence. There is no material placed on record by investigating agency suggestive of the fact that bail petitioner had been previously indulging in such illegal trade of narcotic substances and in the event of his being enlarged on bail, he may flee from justice. Petitioner, who is a local resident of area, shall always remain available for investigation/ trail. Otherwise, the apprehension expressed by the investigating agency with regard to the bail petitioner fleeing from justice, can be met by putting bail petitioner to stringent conditions.

14. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The

object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

“The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson.”

15. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of**

Maharashtra and others, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia vs. State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

“111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

- (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
- (iii) The possibility of the applicant to flee from justice;
- (iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

16. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought

before a Court”, the present provision postulates the accused being “brought before a Court other than the High Court or a Court of Session” in respect of the commission of any non-bailable offence. As observed in *Gurcharan Singh vs State (Delhi Admn)* (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with *Gurcharan Singh*, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in *State of Haryana vs Bhajan Lal*, 1992 (Supp) 1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We

have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazoned by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically

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dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

17. In Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC

218, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

18. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime. Petitioner is local resident of Himachal Pradesh and shall remain available to face the trial and to undergo imprisonment, if any, which may be imposed on conclusion of the trial.

19. The Apex Court in **Prasanta Kumar Sarkar versus Ashis Chatterjee and another** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the accused absconding or fleeing, if released on bail;
- (v) character, behaviour, means, position and standing of the accused;
- (vi) likelihood of the offence being repeated;
- (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail.

20. In view of above, present petition is allowed and the petitioner is ordered to be enlarged on bail in the aforementioned FIR, subject to his furnishing personal bonds in the sum of Rs.5,00,000/-(Rupees Five Lakh) with two local sureties in the like

amount to the satisfaction of concerned Chief Judicial Magistrate,
with following conditions:

- (a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;
- (b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;
- (c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and
- (d) He shall not leave the territory of India without the prior permission of the Court.

21. It is clarified that if the petitioner misuses the liberty or violate any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

22. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

Copy dasti.

(Sandeep Sharma)
Judge

December 27, 2017
(vikrant)