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**C.R.M. 7948 of 2015**

In Re:- An application for anticipatory bail under Section 439 of the Code of Criminal Procedure filed on 26.08.2015 in connection with Bongoan P.S. Case No.406 of 2015 dated 13.04.2015 under Section 20(b) (II) of the N. D. P. S. Act, 1985.

In the matter of : Saiful Mandal @ Rajesh. ... Petitioner.

Mr. D. C. Kabir,  
Mr. Indranil Roy Chowdhury,  
Mr. Ashok Kuyumar Nath. ...For the Petitioner.

Ms. Faria Hossain. ....For the State.

Heard the learned Advocates appearing for the petitioner and the State.

It is submitted on behalf of the petitioner that the petitioner is in custody for 153 days and charge sheet has been submitted. It is also submitted on behalf of the petitioner that no seizure had been effected from his possession. It is further submitted that the petitioner was not a member of the party who were carrying narcotic substance and were pursued by the B.S.F. personnel.

Learned Advocate appearing for the State opposes the prayer for bail.

Having considered the materials in the case diary, we do not find that the narcotic substance was seized from the possession of

the petitioner. It also transpires from the materials on record that four persons were carrying such narcotic substance and were pursued by the B.S.F. personnel. Thereafter, those persons dropped the narcotic substance and ran away. There is confusion as to the presence of the petitioner at the place of occurrence.

In the instant case, we find that the seizure list unequivocally shows that the seizure of the narcotic substance is not from the possession of the petitioner. It is trite law that the crux of the offence under Section 20 (b) (ii) of the N. D. P. S. Act is one of conscious possession of narcotics. Petitioner has not been charged with abetment or financing or trading in narcotic substance. There is also no material to connect the petitioner with the seized narcotic apart from vague surmises or conjectures that he may have been one of the miscreants carrying the narcotic substance.

Dealing with Section 21(4) of MCOCA, 1999, the Apex Court held the Court in ***Ranjitsing Brahmajetsing Sharma Vs. State of Maharashtra and Another, (2005) 5 Supreme Court Cases 294*** need not record a positive finding of 'not guilty'. It held as follows:-

**“44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of**

**conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.”**

.....

**“46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in Sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.”**

The said provision in MCOCA, 1999 is pari materia with Section 37 of N.D.P.S. Act.

The expression “reasonable grounds for believing that the accused is not guilty of the alleged offence” in Section 37 of N.D.P.S. Act does not, however, mean prima facie ground. It

means something more, that is, substantial probable cause for believing that accused is not guilty of the alleged offence. In other words, it means the existence of such facts and circumstances that by itself would justify satisfaction that the accused is not guilty of the offence [**See: *Union of India Vs. Rattan Mallik @ Habul, (2009) 2 SCC 624, Para 13***].

Judged from this perspective, the absence of any legally admissible and cogent material establishing conscious possession or any nexus vis-à-vis the petitioner and the seized narcotic and other attending facts and circumstances of the case give rise to substantial and probable cause to arrive at the requisite belief as required under Section 37 of N.D.P.S. Act for grant of bail.

In view of the aforesaid findings, we are inclined to grant bail to the petitioner.

Accordingly, the petitioner, namely, Saiful Mandal @ Rajesh be enlarged on bail upon furnishing a bond of Rs.10,000/- with two sureties of like amount to the satisfaction of the learned Special Judge under the N.D.P.S. Act, North 24-Paraganas, Barasat and on condition that the petitioner shall appear before the Trial Court on every date of hearing. In the event, the petitioner fails to appear before the Trial Court, the said Court shall be at liberty to cancel his bail in accordance with law without further reference to this Court.

The application for bail, thus, stands allowed.

We clarify observations made in this order are for the purpose of disposal of this application and shall not have any bearing on the trial of the case which shall be conducted independently and in accordance with law without any reference to the observations made in this order.

**(Tapash Mookherjee, J.)**

**(Joymalya Bagchi, J.)**