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CRM-M-60671-2024

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-60671-2024
Decided on: 18.12.2024

Kuldeep Singh alias Keepa ...Petitioner

Versus

State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. L.S. Sidhu, Advocate
for the petitioner.

Mr. Sukhdev Singh, AAG, Punjab.

ANOOP CHITKARA, J.

CASE DETAILS:

FIR No.	Dated	Police Station	Sections
162	18.10.2024	Talwandi Sabo, District Bathinda	§ 21(a) of NDPS Act (§ 29 of NDPS Act added later on)

1. The petitioner, apprehending arrest in the FIR captioned above, came before this Court under Section 482 of Bharatiya Nagarik Suraksha Sanhita, 2023, [BNSS], seeking anticipatory bail.

2. In paragraph 9 of the bail petition, the accused declares that he has no criminal antecedents, implying that the petitioner is a first offender.

FACTS:

3. The facts and allegations are taken from the reply filed by the State. On October 18, 2024, based on a chance recovery, the Police had seized 1 gram of heroin from the possession of the co-accused, Gurdeep Singh. The Investigator claims to have complied with all the statutory requirements of BNSS, 2023, and the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter referred to as the “NDPS Act”).

4. During custodial interrogation, the co-accused, Gurdeep Singh, confessed before the Police officer that he used to purchase drugs from the petitioner Kuldeep, and even this heroin was purchased from him. Based on such confession before the police, the petitioner was arraigned as an accused. Apprehending arrest, he filed for anticipatory bail



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from the Sessions Court, which was denied. Feeling aggrieved, he has invoked the concurrent jurisdiction of this Court under § 482 BNSS, 2023.

5. The petitioner's counsel prays for bail by imposing any stringent conditions and contends that pre-trial incarceration would cause an irreversible injustice to the petitioner and his family.

6. The State's counsel refers to the reply and supports the stand taken in the reply.

BAIL ON DISCLOSURE:

7. The petitioner has been arraigned as an accused based on the confession made by the main accused to the Police officer after his arrest, in police custody.

8. In *Tofan Singh v. State of Tamil Nadu*, (2021) 4 SCC 1, the majority view of a three-member bench of Hon'ble Supreme Court holds as follows:

We answer the reference by stating:

(i) That the officers who are invested with powers under section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.

9. Subsequently, in *State of Haryana v. Samarth Kumar*, 2022(3) R.C.R.(Criminal) 991, a two-judge Bench of Hon'ble Supreme Court holds,

[8]. In cases of this nature, the respondents may be able to take advantage of the decision in *Tofan Singh v. State of Tamil Nadu* (supra), perhaps at the time of arguing the regular bail application or at the time of final hearing after conclusion of the trial.

[9]. To grant anticipatory bail in a case of this nature is not really warranted. Therefore, we are of the view that the High Court fell into an error in granting anticipatory bail to the respondents.

10. However, the contraband was recovered not from the petitioner but from the primary accused, who, while in police custody after being arrested, implicated the petitioner in a statement that would be legally inadmissible as evidence.

11. It shall be most relevant to extract the scope of a confession made before a Police officer by an accused in the custody of a Police officer, restriction of which is contained in § 23 of BSA, 2023 [Analogous to §§ 25 & 26 of Indian Evidence Act, 1872]:



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23. (1) No confession made to a police officer shall be proved as against a person accused of any offence.

(2) No confession made by any person while he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate shall be proved against him:

Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact discovered, may be proved.

BAIL IN SMALL QUANTITY:

12. Dealing in one gram of heroin is a punishable offense under the NDPS Act in the following terms:

Substance Name	Heroin/ Diacetylmorphine/Chitta/ Smack/ Brown Sugar/
Quantity detained	1 Gram
Quantity type	Small
Drug Quantity in % to upper limit of Intermediate	0.40%

Drug's Small & Commercial Qty. suggested by Committee report	
Notification No. & date	Expert Committee Report dated 24.03.1995 & 23.08.2001 (Small and Commercial)
https://www.sentencecalculator.in/acts/Parliament%20debates%20&%20Committee%20reports/Report%20dt.%2024-Mar-1995%20of%20Expert%20Committee%20on%20quantitiy%20for%20personal%20consumption%20-S.27%20NDPS%20Act.pdf	

Specified as small & Commercial in S.2(viia) & 2(xxiii) NDPS Act, 1985		
Notification No. & dated	S.O.1055(E)	10/19/2001
https://sentencecalculator.in/acts/small_Commercial/S.O.%201055(E),%2019.08.2001.pdf		
Sr. No.	56	
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Heroin	
Other non-proprietary name	*****	
Chemical Name	Diacetylmorphine	
Small Quantity	5 Gram	
Commercial Quantity	250 Gram	

0



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Declared as punishable under NDPS Act and as per schedule defined in S.2(xi) & 2(xxiii) NDPS Act, 1985		
Notification No. & dated	S.(xvi)(d) NDPS Act, 1985 (61 of 1985), S.O. 821 (E)	11/14/1985
https://sentencecalculator.in/acts/punishable/S.2%20NDPS,%20%201985.pdf		
Sr. No.	2(xvi)(d)	
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	*****	
Other non-proprietary name	*****	
Chemical Name	2(xvi)(d) diacetylmorphine, that is, the alkaloid also known as dia-morphine or heroin and its salts; Explanation.-- For the purposes of clauses (v) (vi), (xv) and (xvi) the percentages in the case of liquid preparations shall be calculated on the basis that a preparation containing one per cent. of a substance means a preparation in which one gram of substance, if solid, or one mililitre of substance, if liquid, is contained in every one hundred mililitre of the preparation and so on in proportion for any greater or less percentage: Provided that the Central Government may, having regard to the developments in the field of methods of calculating percentages in liquid preparations prescribed, by rules, any other basis which it may deem appropriate for such calculation.	

13. Given the above, the quantity recovered in the present case falls in the small category.
14. The petitioner is a first-time offender, and the evidence collected so far against him is legally inadmissible. Moreover, the quantity of the recovered drug falls within the "small quantity" category, amounting to only about one-fifth of the upper limit for this classification. Given that the maximum sentence for offenses involving small quantities is one year, and the trial falls under the jurisdiction of a Magistrate, the severity of the charges remains limited. Given this, if an accused does not get anticipatory bail even in such a case, then the enactment of § 482 BNSS, 2023 [§ 438 CrPC] itself shall become redundant, which cannot be the legislative intention.



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15. §§ 2(viia) and 2(xxiiia) of the NDPS Act classify seized contraband from an accused individual into two categories: small and commercial quantities. Colloquially, any amount that falls between the upper limit of a small quantity and the lower threshold of a commercial quantity is referred to as an intermediate quantity. The prescribed sentence depends on the specific category based on the drug's weight.

16. Per §36A (1)(a) of the NDPS Act, all offences with imprisonment of more than three years shall be triable by Special Courts. Conversely, all offences involving small quantity where the maximum sentence is one year shall be triable by Chief Judicial Magistrate or Judicial Magistrate first class.

17. Per § 2(xxiiia) of the NDPS Act, "small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the official Gazette.

18. There is uniformity in the sentencing prescribed for all offenses involving small quantities under the NDPS Act. Contraventions related to small quantities are consistently punishable by rigorous imprisonment for up to one year, a fine of up to ten thousand rupees, or both.

OBSERVATIONS IN BALDEV SINGH:

19. In *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, a Constitutional Bench of Hon'ble Supreme Court delved into the scope of the mandatory nature of provisions of S. 42 and 50 of the NDPS Act and in this regard referred to the NDPS Act, its objectives. The relevant extracts read as follows:

[2]. ... (1). In this bunch of appeals/special leave petitions the following questions of law (besides other questions of law and facts) fall for determination:

(i) Is it the mandatory requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, ("Act" for short) that when an officer, duly authorised under Section 42 of the Act, is about to search a person he must inform him of his right under sub-section (1) thereof of being taken to the nearest Gazetted Officer or nearest Magistrate for making the search ?

(ii) If any search is made without informing the person of his such right would the search be illegal even if he does not of his own exercise his right under Section 50(1) ? and



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(iii) Whether a trial held in respect of any recovery of contraband articles pursuant to such a search would be void ab initio ?

[4]. Prior to the passing of the NDPS Act, 1985 control over Narcotic drugs was being generally exercised through certain Central enactments though some of the States also had enacted certain statutes with a view to deal with illicit traffic in drugs. The Opium Act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy and manufacture of opium. Opium Act, 1878, supplemented Opium Act, 1875 and made possession, transportation, import, export, sale, etc. of opium also an offence. The Dangerous Drug Act, 1930, was enacted with a view to suppress traffic in contraband and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf etc. The Act prescribed maximum punishment of imprisonment for three years with or without fine, insofar, as first offence is concerned and for the second or the subsequent offence the punishment could go upto four years RI. These Acts, however, failed to control illicit drug traffic and drug abuse on the other hand exhibited an upward trend. New drugs of addiction known as Psychotropic Substances also appeared on the scene posing serious problems. It was noticed that there was an absence of comprehensive law to enable effective control over psychotropic substances in the manner envisaged by the International Convention of Psychotropic Substances, 1971. The need for the enactment of some comprehensive legislation on Narcotics Drug and Psychotropic Substances was, therefore, felt. The Parliament with a view to meet a social challenge of great dimensions, enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalties particularly for trafficking and various other offences. The NDPS Act, 1985 provides stringent penalties for various offences. Enhanced penalties are prescribed for second and subsequent offences. The NDPS, Act 1985 was amended in 1988 w.e.f. 29th May, 1989. Minimum punishment of 10 years imprisonment which may extend upto 20 years and a minimum fine of Rs. 1 lakh which may extend upto Rs. 2 lakh have been provided for most of the offences under the NDPS Act, 1985. For second and subsequent offences, minimum punishment of imprisonment is 15 years which may extend to 30 years while minimum fine is Rs. 1.5 lakh which may extend to Rs. 3 lakhs. Section 31(a) of the Act, which was inserted by the Amendment Act of 1988, has even provided that for certain offences, after previous convictions, death penalty shall be imposed, without leaving any discretion in the Court to award imprisonment for life in appropriate cases. Another amendment of considerable importance introduced by the Amendment Act, 1988 was that all



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the offences under the Act were made triable by a special court. Section 36 of the Act provides for constitution of special courts manned by a person who is a Sessions Judge or an Additional Sessions Judge. Appeal from the orders of the special courts lie to the High Court. Section 37 makes all the offences under the Act to be cognizable and non-bailable. However, despite the stringent provisions of the NDPS Act, 1985 as amended in 1988 drug business is booming; addicts are rapidly rising; crime with its role to narcotics is galloping and drug trafficking network is ever growing. 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.

20. The issue that crops is the effect of an obiter reference made above, wherein the Constitutional Bench, while overviewing the provisions of the NDPS Act, observed, “Section 37 makes all the offences under the Act to be cognizable and non-bailable”.

21. In *Krishena Kumar v. Union of India*, 1990 (4) SCC 207, A Constitution Bench of Hon’ble Supreme Court holds,

[19]. The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain “propositions wider than the case itself required”. This was what Lord Selborne said in *Caledonian Railway Co. v. Walker’s Trustees* and Lord Halsbury in *Quinn v. Leathem*. Sir Frederick Pollock has also said : “Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision.”

[20]. In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it.

22. In *Director of Settlements, A.P. v. M.R. Apparao*, (2002) 4 SCC 638, a three-judge bench of the Hon’ble Supreme Court holds,

A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An ‘obiter dictum’ as distinguished from a ratio



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decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case.

23. In Sanjay Singh vs. U.P. Public Service Commission, Allahabad, 2007 (3) SCC 720, a three-judge Bench of the Hon'ble Supreme Court holds,

[10]. The contention of the Commission also overlooks the fundamental difference between challenge to the final order forming part of the judgment and challenge to the ratio decidendi of the judgment. Broadly speaking, every judgment of superior courts has three segments, namely, (i) the facts and the point at issue; (ii) the reasons for the decision; and (iii) the final order containing the decision. The reasons for the decision or the ratio decidendi is not the final order containing the decision. In fact, in a judgment of this Court, though the ratio decidendi may point to a particular result, the decision (final order relating to relief) may be different and not a natural consequence of the ratio decidendi of the judgment. This may happen either on account of any subsequent event or the need to mould the relief to do complete justice in the matter. It is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent...

24. In Laxmi Devi v. State of Bihar, (2015) 10 SCC 241, the Hon'ble Supreme Court observed,

[21] Since heavy reliance has been placed by the State on Satendra Prasad Jain vs. State of U.P. (1993) 4 SCC 369 and Lt. Governor of Himachal Pradesh v. Avinash Sharma (1970) 2 SCC 149, we must sedulously determine their ratios. This would therefore be the apposite time and place for a brief discussion on the contours and connotations of the term ratio decidendi, which in Latin means "the reason for deciding". According to Glanville Williams in 'Learning the Law', this maxim "is slightly ambiguous. It may mean either (1) rule that the judge who decided the case intended to lay down and apply to the facts, or (2) the rule that a later Court concedes him to have had the power to lay down." In G.W. Patons' Jurisprudence, ratio decidendi has been conceptualised in a novel manner, in that these words are "almost always used in contradistinction to obiter dictum. An obiter dictum, of course, is always something said by a Judge. It is frequently easier to show that something said in a Judgment is obiter and has no binding authority. Clearly something said by a Judge about the law in his judgment, which is not part of the course of reasoning leading to the decision of some question or issue presented to him for resolution, has no binding authority however persuasive it may be, and it will be described as an obiter dictum." 'Precedents in English Law' by Rupert Cross and JW Harris states "First, it is necessary to determine all the facts of the case as seen by the



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Judge; secondly, it is necessary to discover which of those facts were treated as material by the Judge.” Black’s Law Dictionary, in somewhat similar vein to the foregoing, bisects this concept, firstly, as the principle or rule of law on which a Court’s decision is founded and secondly, the rule of law on which a latter Court thinks that a previous Court founded its decision; a general rule without which a case must have been decided otherwise.

25. In my considered opinion, the pronouncement in *Baldev Singh*— “Section 37 makes all offenses under the Act cognizable and non-bailable and also lays down stringent conditions for the grant of bail”—does not amount to a legal proposition adjudicated upon by the Constitutional Bench. Rather, it constitutes a prefatory remark, offering a broad context of the statute without engaging in a substantive exegesis of its provisions beyond the immediate scope of discussion. Furthermore, these observations were made before the 2001 Amendment, (w.e.f. 02 Oct 2001) which introduced tripartite classification of drug quantities: Small, Commercial, and Intermediate. Given this context, it is evident that the observations in *Baldev Singh* were not intended to address the categorization of quantities—particularly Small Quantity—since such a classification did not exist at the time the judgment was rendered. Consequently, the Supreme Court’s pre-2001 pronouncements cannot be construed as engaging with or interpreting a framework of quantity-based classification that was only legislatively established at a later stage.

26. A bare reading of Section 21, NDPS makes it unequivocally clear that stated offenses involving small quantities of manufactured drugs and preparations are punishable by a maximum term of one year. Under the NDPS Act, various offences that involve violations pertaining to small quantities have been similarly penalized, reflecting a uniform legislative approach to minor fractions. However, the statute remains silent on the question of bailability for such offences.

27. A frequently advanced argument—both in judicial interpretation and legal discourse—is that Section 37 of the NDPS Act, which declares offences under the Act as cognizable and non-bailable, functions as an all-encompassing net, capturing every offence within its ambit, irrespective of the quantity of contraband involved. In essence, it is often perceived that Section 37 functions as a legal monolith, imposing a uniform classification upon all offences under the Act, regardless of their severity or the quantity of contraband involved.

28. A significant issue warranting consideration by this Court within the broader framework of statutory interpretation and judicial precedent — specifically, in the present



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context, offence under Section 21(a) and, more broadly, offences involving only small quantities of contraband substances—is whether such offences are inherently bailable by operation of the NDPS Act itself.

ANALYSIS OF SECTION 37

29. It is pertinent to refer to § 37 of the NDPS Act, including tracing its existence through several amendments.

30. A reference to the provisions regarding the scope of § 37 in the original unamended NDPS Act of 1985 is of utmost significance, and in the original unamended statute of 1985, it reads as follows:

[37]. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under this Act shall be cognizable.

31. Thus, in the original unamended NDPS Act, under Section 37, the offences were not termed as “Non-Bailable” but were defined only as “Cognizable.”

32. In 1989¹ significant amendment was made in the NDPS Act, and § 37 after the amendment of 1989 reads as follows:

[37]. Offences to be cognizable and non-bailable. —

(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.

¹ NDPS Act 1985, (Act 2 of 1989, w.e.f. 29-5-1989) [Amendment Act]



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33. In 2001, the NDPS Act was amended significantly, § 37, as amended by the 2001 amendment, reads as follows:

[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.

34. The notification S.O. 1055(E), dated 19th October 2001, issued in terms of Clauses (vii a) and (xxiii a) of § 2 of the Act stipulated what constituted a small quantity or commercial quantity of each such substance. It did not introduce a new drug or a psychotropic substance other than those mentioned in the Schedule to the Act and did not even change its definitions. The maximum sentence for a small quantity was prescribed to be imprisonment for six months and a fine of Rs. 10,000/-.

35. In 2014², the NDPS Act was again amended, and the maximum sentence for small quantity was increased to imprisonment for one year from six months provided in the 2001 amendment, and no change was made to the fine.

36. As of date, §§ 36A and 37 of NDPS Act, [Last amended by Act 48 of 2021, w.e.f. 1-5-2014) [Amended Act 29-Dec-2021], read as follows:

36A. Offences triable by Special Courts.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

² NDPS Act 1985, (Act 16 of 2014, w.e.f. 1-5-2014) [Amended Act]



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(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) x

xxx

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.

[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.

37. In 1985, the provisions governing bail for NDPS offenses were regulated by the Code of Criminal Procedure, 1973. However, the 1989 amendment (effective May 29, 1989) fundamentally altered this framework by introducing a non obstante clause, which expressly excluded the applicability of the CrPC in matters of bail. This legislative change ensured that, in the event of any conflict between the NDPS Act and the CrPC, the provisions of the NDPS Act would take precedence.

38. § 5 of BNSS states that “Nothing contained in this Sanhita shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in



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force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

39. In *Sri Bapan Roy v. State of Tripura*, B.A. 65-2018, decided on 20 Aug 2018, Tripura High Court observed,

[21]. From a bare reading of Section 37 as it was prior to amendment and after amendment, it is quite obvious that the legislature taking note of the changing societal scenario as well as the ground realities have brought into force reformatory changes and have defined “small quantity” and “commercial quantity” under Section 2(xxiii a) and Section 2(vii a), provisions being made accordingly, for proportionate sentencing for possession of small, intermediate and commercial quantity of offending material and necessary substitution of Section 21 and 22 also have been made preferably to provide a lenient treatment to the addicts on the pretext that they possess small quantity.

EFFECT OF NON-OBSTANTE CLAUSE IN § 37:

40. The title of § 37 of the NDPS Act explicitly designates offenses under the Act as cognizable and non-bailable, its provisions taking precedence over those of the CrPC, 1973, and the BNSS, 2023, whenever a distinct procedural framework is prescribed. However, within the substantive text of § 37, the legislature introduced sub-section (1), which expressly states that all offenses under the NDPS Act are cognizable. If an explicit declaration of cognizability was absent, certain offenses under the NDPS Act—those punishable by imprisonment of less than three years or by a fine—would have been classified as non-cognizable under Part II of the First Schedule of the CrPC. However, these offenses are deemed cognizable not merely by virtue of the section’s title but also due to the specific mandate of § 37(1)(a), which reinforces their cognizable nature through an express statutory provision.

41. Had the legislature intended to render all offenses under the NDPS Act non-bailable, it would have expressly included the term "Non-Bailable" in § 37(1)(a), just as it did for cognizable offenses. If the meaning of "Non-Bailable" were simply to be inferred from the CrPC, 1973, there would have been no need to explicitly mention it in the heading of § 37. Moreover, § 37(2) clearly stipulates that the restrictions on granting bail under § 37(1) are in addition to those prescribed under the CrPC. This leaves no doubt that the reference to "Non-Bailable" in the title of § 37 does not extend to all offenses under the NDPS Act but is specifically confined to grave offenses, including those under §§ 19, 24, and 27A, as well as offenses involving commercial quantities.



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42. In *The Dominion of India v. Shrinbai A. Irani*, AIR 1954 SC 596, the Hon'ble Supreme Court holds,

"...Although ordinarily there should be a close approximation between the non-obstante clause and the operative part of the section, the non- obstante clause need not necessarily and always be co- extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof a non-obstante clause cannot cut down that construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment."

43. In *Madhav Rao Jivaji Rao Scindia v. Union of India* (1971) 1 SCC 85, the Hon'ble Supreme Court holds,

[16]... When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself.

44. In *Minnie Khadim Ali Kuhn v. State NCT of Delhi*, [WP (CRL) 338/2012], 2012:DHC:3146-DB, Delhi High Court observed,

[13]. A non-obstante clause is a well-known legislative device, used to emphasize the overriding nature of the subject matter, or the particular provision. It is fairly commonplace for legislatures to use it, in order to ensure that known, or even unidentified provisions, in the same or other enactment, which can potentially conflict with the enacted part, are overridden.

45. Thus, the heading of § 37, which states "Offenses to be Cognizable and Non-Bailable," lacks comprehensive applicability, as the non-bailable nature of all offenses under the Act is not explicitly affirmed across all clauses of the Section 37.

HEADINGS AS AN AID TO INTERPRETATION OF THE SECTION:

46. A section's title or heading illustrates its contents but should be read with the body, especially if the language of the body is clear.

47. Lord Goddard C.J., in *R v. Surrey (North Eastern Area) Assessment Committee* (1948) 1 KB 29 at pp. 32-33, articulated the following principle. This has also been reiterated in *Maxwell on the Interpretation of Statutes* (11th Edn. p. 49):

While the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to



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give a different effect to clear words in the section, where there cannot be any doubt as to their ordinary meaning.

48. In *Bhinka v. Charan Singh*, 1959 SCC OnLine SC 118 [AIR 1959 SC 960], a three-judge bench of the Hon'ble Supreme Court holds,

[15]. ...Maxwell on Interpretation of Statutes, 10th Edn., gives the scope of the user of such a heading in the interpretation of a section thus, at p. 50: "The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words." If there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that doubt.

49. In *H.M. Kamaluddin Ansari & Co v. Union of India*, (1983) 4 SCC 417, the Hon'ble Supreme Court holds,

[27]... The headings prefixed to a section or a group of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statutes but they may explain ambiguous words. The view is now well settled that the headings or titles prefixed to a section or a group of sections can be referred to in determining the meaning of doubtful expressions. It is true that the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words. The law is clear that those headings cannot be used to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning of the words. The golden rule is that when the words of a statute are clear, plain and unambiguous, that is, they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences. The duty of a Judge is to expound and not to legislate, is a fundamental rule.

50. In *M/s Frick India Ltd. v. Union of India*, (1990) 1 SCC 400, Hon'ble Supreme Court holds,

[8]... It is well-settled that the headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision.

51. In *Raichurmatham Prabhakar and Anr v. Rawatmal Dugar*, (2004) 4 SCC 766, Hon'ble Supreme Court holds,

[14]. The view is now settled that the headings or titles prefixed to sections or group of sections can be referred to in construing an Act of the legislature. But conflicting opinions have been



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expressed on the question as to what weight should be attached to the headings or titles. According to one view, the headings might be treated as preambles to the provisions following them so as to be regarded as giving the key to opening the mind of the draftsman of the clauses arranged thereunder. According to the other view, resort to heading can only be taken when the enacting words are ambiguous. They cannot control the meaning of plain words but they may explain ambiguities... In our opinion, it is permissible to assign the heading or title of a section a limited role to play in the construction of statutes. They may be taken as very broad and general indicators of the nature of the subject-matter dealt with by the enactment underneath, though the name would always be brief having its own limitations. In case of conflict between the plain language of the provision and the meaning of the heading or title, the heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder.

52. In *Union of India and Another v. National Federation of the Blind*, (2013) 10 SCC 772, a Division Bench observed,

[45] ...It is clear that when the provision is plainly worded and unambiguous, it has to be interpreted in such a way that the Court must avoid the danger of a prior determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. While interpreting the provisions, the Court only interprets the law and cannot legislate it. It is the function of the Legislature to amend, modify or repeal it, if deemed necessary.

[46] ... The heading of a Section or marginal note may be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent. However, when the Section is clear and unambiguous, there is no need to traverse beyond those words, hence, the headings or marginal notes cannot control the meaning of the body of the section...

53. In *Sarah Mathew v. Institute of Cardio Vascular Diseases*, (2014) 1 SCC 721, the Constitution Bench of the Hon'ble Supreme Court holds,

[47]... So far as the 'heading' of the chapter is concerned, it is well settled that 'heading' or 'title' prefixed to sections or group of sections have a limited role to play in the construction of statutes. They may be taken as very broad and general indicators of the nature of the subject matter dealt with thereunder but they do not control the meaning of the sections if the meaning is otherwise ascertainable by reading the section in proper perspective along with other provisions....

54. The legislative intent of a section duly drafted is inferred from the terminology and the relationship between the head and the body of the section. James Landis, an



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American legal adviser and government official³ distinguished between two senses of “intent”- “intent” as “intended meaning” and “intent” as “purpose”.⁴

55. Furthermore, it is an indubitably established principle of statutory interpretation that where the wording of a statute is clear, precise, and unambiguous, the heading of a provision cannot be invoked to expand its substantive scope. The statute must be construed in accordance with its natural and ordinary meaning without resorting to aids. Only in instances where the plain language of the provision gives rise to ambiguity or absurdity can the heading—akin to a preamble—be relied upon to discern the legislative intent and scope of the provision. The heading of a statutory provision is merely a contextual aid, relevant only when the language of the provision is ambiguous. Where the text is clear and unambiguous, interpretation must be confined to its plain and natural meaning without unwarranted reliance on the heading. While a heading may signal intent, it cannot override, expand, or redefine the substantive provision. To do so would be akin to judging a book by its title rather than its content, an error no prudent interpreter should commit.

56. The heading of § 37 of the NDPS Act designates offences under the Act as cognizable and non-bailable. However, a careful textual examination reveals that if the legislature had intended to classify all offences as non-bailable, it could have explicitly done so by employing a simple ‘all’ -encompassing prefix. The section aims to make all offences cognizable but only certain offences non-bailable.

57. § 37(1)(b) imposes specific restrictions on bail, but only in relation to offences involving commercial quantities or those punishable under §§ 19, 24, and 27A of the Act. It categorically mandates that individuals accused of such offences shall not be released on bail or their own bond unless the Public Prosecutor has been afforded an opportunity to oppose the bail application. Further reinforcing these stringent conditions, § 37(2) adds multiple layers of restrictions by stipulating that the limitations prescribed under § 37(1)(b) shall operate in addition to the general restrictions on bail imposed by the CrPC or BNSS, or any other applicable law in force.

58. If one were to argue that the omission of the term "all" does not conclusively indicate a deliberate legislative intent, the absence of any explicit provision within the substantive body of § 37 categorically declaring all offenses as non-bailable remains a critical omission that cannot be disregarded. By contrast, the legislative

³ Gerald C. Mac Callum Jr., "Legislative Intent," Yale Law Journal 75, no. 5 (April 1966): 754-787.

⁴ Landis, A Note on "Statutory Interpretation," 43 HARV. L. REV. 886 (1930).



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certainty regarding the cognizable nature of offences under the NDPS Act is unequivocally established in § 37(1)(a), which expressly stipulates that every offence under the Act shall be cognizable. However, when it comes to the question of bailability, the statute does not adopt an equally sweeping approach.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS:

59. The application of the maxim *expressio unius exclusio alterius* to § 37(1)(b) of the NDPS Act reinforces the conclusion that the express classification of only certain offenses—namely those under Sections 19, 24, 27A, and those involving commercial quantities—as non-bailable also necessarily excludes all other offenses under the Act from the same categorization. Had the legislature intended to render all offenses under the NDPS Act non-bailable, it would have expressly provided so, rather than specifying only a limited set of grave offenses.

60. In *Maxwell on the Interpretation of Statutes* (12th Ed. P. 293), the maxim is explained as follows:

By the rule usually known in the form of this Latin maxim, mention of one or more things of a particular class may be regarded as silently excluding all other members of the class: expressum facit cessare tacitum.

61. In *A.B.C. Laminart (P) Ltd. v. A.P. Agencies*, (1989) 2 SCC 163, the Hon’ble Supreme Court holds,

“21. As regards construction of the ouster clause when words like "alone", "only", "exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim "*expressio unius est exclusio alterius*" - expression of one is the exclusion of another - may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another....”

62. According to the language of § 37, only the offences explicitly listed in this section are considered non-bailable. Offences outside its scope are excluded. Including these offences under the heading of § 37(1)(a), which pertains to cognizable offences, would fetter, and undermine the principle of fairness and not align with the act's primary objective.

DEFINITIONS OF BAILABLE AND NON-BAILABLE OFFENCES:

63. It shall be relevant to extract the definitions of ‘Bailable Offence’ and ‘Non-Bailable Offence’ from the BNSS, 2023, which read as follows:

2(c) "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any



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other law for the time being in force; and "non-bailable offence" means any other offence; [Corresponds to CrPC S. 2(a)]

64. Thus, per § 2(c) of BNSS, 2023, only those offences would fall in the category of ‘bailable offences’ which are mentioned in the First Schedule of BNSS, 2023 or have been specially declared as ‘bailable offences’ under any Special Statute; and all the remaining offences are deemed to be ‘non-bailable’. This was also the position in the old CrPC, 1973. The legislative intention under the new code, i.e., BNSS, 2023, which is the new avatar of CrPC, 1973, remains the same, and all the offences shall be ‘non-bailable’ unless shown and specified as ‘bailable.’

65. As established above, since the NDPS Act does not explicitly classify offences involving small quantities as non-bailable, recourse is taken to § 5 of BNSS, 2023 which mandates that in the absence of a specific provision in a special enactment, the general principles of classification under BNSS shall apply. In this context, Part II of the First Schedule of BNSS, 2023 (corresponding to Part II of the First Schedule of the CrPC, 1973) provides the framework for determining whether an offence is bailable or non-bailable based on the prescribed punishment.

Part II.—CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

Offence	Cognizable or non-cognizable.	Bailable or non-bailable.	By what court triable.
1	2	3	4
If punishable with death, imprisonment for life, or imprisonment for more than 7 years.	Cognizable.	Non-bailable.	Court of Session.
If punishable with imprisonment for 3 years and upwards but not more than 7 years.	Cognizable.	Non-bailable.	Magistrate of the first class.
If punishable with imprisonment for less than 3 years or with fine only.	Non-cognizable.	Bailable.	Any Magistrate.

66. Since the maximum prescribed punishment for small quantity offences is limited to one year, they fall within the lowest tier of classification, thereby rendering them bailable by operation of law.



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**CRM-M-60671-2024****JUDICIAL PRECEDENTS ON SMALL QUANTITY IS A BAILABLE OFFENCE:**

67. In Abdul Aziz v. State of U.P., 2002 SCC OnLine All 1223, Allahabad High Court observed,

[2]. The facts of this case are that a case under Section 8/21 N.D.P.S. Act has been registered against the petitioner at case crime No. 257 of 2001, police station Maduadeeh, district Varanasi. According to prosecution the petitioner was found in possession of 2.5 gm. of heroine....

[8]. From the analysis of provisions of section 37 of the N.D.P.S. Act and sections 4 and 5 of the Cr. P.C. it is clear that except or offences under sections 19, 24 and 27-A of the Act, the provisions for bail as given in the Cr. P.C. will apply. The offences no doubt are also cognizable and to this extent also the provisions of the Act will prevail over the provisions of the Cr. P.C. Therefore, in the matter of bail the provisions of Cr. P.C. will apply in the present case.

[9]. Bailable offences have been defined under clause (a) of section 2. Cr. P.C. which means offences which is shown as bailable in the first Schedule, or which is made bailable by any other law for the bail being in force and “non-bailable offence” means any other offence. The first Schedule of Cr. P.C. consists of two parts, the first part is regarding the offences under the I.P.C. and second part is regarding offences against other law. The second part provide that if the offence is punishable with imprisonment for less than three years or fine only it shall be bailable and can be tried by any Magistrate.

[10]. In view of the above the provisions, the offence alleged to have been committed is a bailable offence.

68. In Shaji v. Kerala State, decided on 18 Nov 2003, Law Finder Doc Id # 78494, a Division Bench of the Kerala High Court observed,

[1]. ...When the applications came up for consideration before a learned Single Judge, the matter has been referred for consideration of the following points by a Bench:

(1) Whether the offences which are punishable with imprisonment for a term of not more than three years are bailable or non-bailable?

(2) xx

[15]. ...If it is a case of possession of a psychotropic substance more than the small quantity, necessarily, it will not be a bailable offence going by the provisions of Section 4(2) Criminal Procedure Code, 1973 as, to the extent of bailability, the provisions of Section 37 of the Act will prevail over the provisions contained in the Code of Criminal Procedure, 1973.

[22]. Based on our finding that the quantity involved in these cases is larger than small quantity, we will now answer the reference and we do so as follows:



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(1) Going by Section 36A of the Act, all offences under the Act, punishable with imprisonment for a period of more than three years shall be triable only by the Special Court. An offence under the Act, involving small quantity, is punishable as per Section 20(c) with rigorous imprisonment for a term which may extent upto six months only. The last entry in Part II of the First Schedule to the Code of Criminal Procedure, 1973, provides that offences under laws other than Indian Penal Code, punishable with imprisonment for less than three years or with fine shall be 'Non cognizable' and 'Bailable' to be tried by 'Any Magistrate'. The offence under the Act is made triable by a Special Court, in terms of Section 36A(1)(a) of the Act, if it is "punishable with imprisonment for a term of more than three years". Of course, all offence under the Act are cognizable going by Section 37(1)(a) of the Act. Except to that extent, for trial of the offences, the provisions in the Code of Criminal Procedure, 1973, shall be applied going by Section 4(2) of that Code. So, the offences under the Act, which are punishable with imprisonment for a term not exceeding three years, are bailable offences.

69. In Mathew alias Raju v. State of Kerala, Bail Appl No. 836 of 2008, Decided on 15 Feb 2008, Kerala High Court observed,

[13]. It is not necessary to search for the principles of law applicable. It is axiomatic in the interpretation of statutes that when the enacted provisions of the statute in the body of the statutory provisions show a particular conclusion, the head note or the objects and reasons cannot nullify or modify the effect of the enacted provisions in the body of the statute. Where there is confusion or ambiguity arising from the words used in the statutory provisions, certainly external aids can be made use of like head note and objects and reasons. When the statutory provisions is clear, cogent and unambiguous, it is impermissible to resort to external aids like the head note, marginal note or the objects and reasons to come to a conclusion contrary to the conclusion which a plain reading of the statutory provisions yields. Maxwell on the Interpretation of Statute accepts this principle. It will be apposite in this context to extract from page 11 of the 12th edition of Maxwell wherein it is stated as follows:

"They (headings) cannot control the plain words of the statute, [(1923) 1 Ch.143], but they may explain ambiguous words, (1884) 9 App. Cas.365. But "while the court is entitled to look at the headings in an act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to give a different effect to clear words in the section, where there cannot be any doubt as to their ordinary meaning, R. v. Surrey (North-Eastern Area) Assessment Committee (1948) 1 K.B. 29, per Lord Goddard C.J. at pp .32, 33."

[17]. I am bound by the decision of the Division Bench. The learned Public Prosecutor contends that the said decision did not



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take into consideration the head note of Section 37 as also the stipulation in the objects and reasons of the 1989 amendment. Even if those aids for construction were also looked into, the conclusion cannot be different.

70. In *Stefan Mueller v. State of Maharashtra*, 2010 SCC OnLine Bom 1974 [2010:BHC-AS:11734], the Bombay High Court observed,

[10]. ...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 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.

[11]. First schedule to the Cr.P.C. 1973 is about classification of offences. Against each offence, it is specifically mentioned whether offence is cognizable or non-cognizable, whether it is bailable or non-bailable and by what court it is triable. Part I of the Schedule deals with offences under the Indian Penal Code, while Part II deals with offences against other laws. Therefore, Part II will be relevant to find out whether offences under the NDPS Act are bailable or not. In part II, the first entry provides that if the offence is punishable with death, imprisonment for life or imprisonment for more than 7 years, it is non bailable. As per second entry, if the offence is punishable with imprisonment for 3 years and upwards but not more than 7 years, it is also non-bailable. The third entry which is the last entry in this Part, declares that if the offence is punishable with imprisonment for less than 3 years or with fine only, it is bailable and non cognizable. There are several offences under the NDPS act which are punishable with imprisonment which may extend to 10 years and for period which may extend to 20 years. There are certain offences which are punishable with imprisonment for less than 3 years or with fine. The offences under Section 20(b) (ii)(A) and Sec. 27 are such offences as they are punishable with imprisonment which may extend to six months or with fine. In view of the punishment prescribed for these offences, they fall in third entry in part II of the Schedule and, therefore, these offences will be bailable. As noted earlier, S.37(10(a) declares that all the offences under the NDPS Act are cognizable notwithstanding the provisions of Cr.P.C. If that provision would not be there, by virtue of classification in Part II, these offences would have been non-cognizable, but they are made cognizable by specific provision of Section 37(1)(a).

71. In *Minnie Khadim Ali Kuhn v. State NCT of Delhi*, [WP (CRL) 338/2012], 2012:DHC:3146-DB, the Delhi High Court observed,

[12]. It is evident that Parliamentary intent underwent a significant change, in respect of the sentencing policy, (in that a graded



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response was thought of, by introducing a quantitative approach, i.e. “small” and “commercial” quantities – and by implication the “in-between” or “intermediate” quantity). This policy and legislative change was also automatically reflected in the bail regime. Instead of the previous classification of offences which were punishable with less than five years, (which alone apparently qualified for a liberal view), Parliament now restricted the category of offences where bail could be granted after applying additional norms to “offences under section 19 or section 24 or section 27 A and also for offences involving commercial quantity”. Section 37 begins with a non obstante clause; the provision dealing with bail begins with a negative mandate (“no person accused of an offence), by way of emphasizing or underlining the importance which the law sought to attach on the conditions to be imposed.

[15]. So far as the non-obstante clause under Section 37 (1) goes, it is clear, from the decisions in ICCI Bank, Central Bank of India, and The Dominion of India that the true meaning of the non-obstante clause is to be discerned from what it seeks to override, and the legislative policy which underlies the enactment. In this case, what must not be forgotten is that all offences, regardless of their nature or gravity, are made cognizable, - a clear purpose for which the non obstante clause was put in place. The specific reference in Section 37 (1) (b) to only three provisions, i.e. Sections 19, 24 “or” 27, and the offences dealing with commercial quantities, clearly points to those offences and no other, being the subject matter of additional bail conditions. Section 37 (2) is also instructive, in that it says that the conditions in respect of offences covered by Section 37 (1) (b) are in addition to other provisions of the Code of Criminal Procedure.

[19]. This court, in view of the above analysis, is therefore, of the opinion that except in respect of offences specifically enumerated under Section 37, i.e. offences punishable under Sections 19, 24 and 27, and those cases involving commercial quantities, the normal law, i.e. the Criminal Procedure Code is applicable whenever the question of bail arises. Thus, if the offences are punishable – like in the case of possession of small quantities of the concerned substance or drug, under Section 21 and 22- the suspect or accused is entitled to bail, and if she or he is prepared to give, has to be granted bail, in terms of Section 436 of the Criminal Procedure Code, without the necessity of his (or her) seeking it in the Court. This Court hereby directs the Police Commissioner to issue necessary guidelines and instructions to all police officials bringing to their notice the effect of this judgment, so that they are suitably instructed in future cases, wherever offences are bailable, to release the suspects wherever bail is offered in terms of Section 436, Cr. PC, read with Item 3 of Part II to the First Schedule of the Act, and any other class of offences deemed bailable by the Code.

72. In *Hussain v. State of Rajasthan*, S.B. Criminal Miscellaneous Bail No. 11268 of 2017, decided on 01-09-2017, the Rajasthan High Court observed,



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[7]. Part 2 of Schedule 1 of Cr.P.C. provides that where the punishment is of less than three years for offences against other law the offence would be a bailable.

[8]. Taking note of the fact that this is an offence against other law and the maximum sentence provided has one year. The offence becomes a bailable offence, hence, application under Section 438 of Cr.P.C. is not maintainable.

73. In *Raj Kumar v. State of Rajasthan* 2019 SCC OnLine Raj 5732, Para 8, Rajasthan High Court observed, “By virtue of Section 37(1) of the NDPS Act, the offence has become cognizable, however, as per Item No. 3 in the list (In Part II of the First Schedule) offence is clearly bailable.”

74. In *Muhammed Navas Mahamood v. Station House Officer*, 2020 SCC OnLine Ker 564, decided on February 6, 2020, the Kerala High Court observed,

[14]. The offence under Section 22(a) of the Act is punishable with rigorous imprisonment for a term which may extend to one year or with fine which may extend to ten thousand rupees, or with both. The punishment prescribed for the offence under Section 20(b)(ii) A of the Act is also the same. It follows that as per the last entry in Part II of the First Schedule of the Code, the aforesaid offences are bailable.

[19]. The right to claim bail under Section 436(1) of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences, there is no question of discretion in granting bail. There is no manner of doubt that bail in a bailable offence can be claimed by accused as of right. So long as the accused is prepared to give bail, the Court is bound to grant bail to a person accused of a bailable offence (See *Rasiklal v. Kishore* : (2009) 4 SCC 446 : AIR 2009 SC 1341 and *Talab Haji Hussain v. Madhukar Purshottam Mandkar* : AIR 1958 SC 376). Bail can be refused to a person accused of a bailable offence only under the circumstances mentioned in Section 436 (2) of the Code (See *Wilson v. State of Kerala*: 2011 (2) KHC 129 : 2011 (2) KLT 596).

75. In *Rhea Chakraborty v. Union of India, Through Intelligence Officer, NCB*, 2020 SCC OnLine Bom 990,

[58]. A competent officer can effect arrest if he thinks it proper to arrest such person. This is provided under Section 42(d). The officer arresting any such person has to keep in his mind the benevolent provisions of this Act as well. This Act is not only a strict, stringent and harsh Act for drug traffickers, it also shows compassion and leniency in laying down reformatory approach under Sections 64A and 71. This reformatory approach should never be lost sight of.



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[59]. Having said this, one cannot overlook the prevailing situation in today's society. The offenders involving smaller quantity or lesser punishment expose themselves to immediate arrest. They cannot claim bail as of right. The Act needs to have this deterrent effect to curb the spread of drug abuse.

76. An analysis of the above judicial pronouncements affirms that the small quantity offences are bailable.

CONCLUSION:

77. The stringent bail provisions enshrined within the NDPS Act are meticulously crafted to ensure the incarceration of drug mafia, traffickers and organized criminal syndicates, thereby acting as a formidable deterrent against the proliferation of illicit narcotics. However, this exacting legal framework does not extend to offences involving mere possession of small quantities, which often signify personal consumption rather than commercial intent, and involves those who are usually enticed to the drugs eventually becoming dependent to the drugs. A nuanced examination of § 39, read in conjunction with §§ 64A and 71, reveals a legislative paradigm that differentiates between hardened traffickers on one hand and the incidental offenders and drug dependents on the other. Notably, individuals prosecuted under § 27 or found in possession of minor quantities are conceptualized not as criminals, but as individuals necessitating rehabilitation. Thus, the Act aspires to strike a delicate equilibrium between shielding society from the pernicious ramifications of drug abuse and fostering the reintegration of minor offenders through rehabilitative jurisprudence.

78. Substance Use Disorders (SUDs) necessitate an empathetic and rehabilitative approach rather than the exclusion of affected individuals from society's vision. A growing global trend towards the decriminalization of minute quantities of certain drugs reflects the evolving recognition that addiction should be addressed as a public health issue rather than a criminal offence. The Expert Committee on Small Quantities, constituted in 1995, recommended decriminalizing the possession of small amounts of narcotic substances, emphasizing that punitive measures are counterproductive. The Committee further observed that the reverse burden of proof imposed under Section 27 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) places an undue burden on the accused and is prone to misuse by law enforcement authorities. Instead of criminal sanctions, the Committee advocated for a legal framework mandating compulsory treatment through judicial orders, alongside the establishment of adequate rehabilitation facilities. In this context, entangling individuals in possession of negligible drug



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quantities in the legal maze of the criminal justice system appears not only disproportionate but also fundamentally misguided.

79. In essence, when the law itself does not impose shackles, interpretations should not forge them. It is now apt to refer to S. 478(1) BNSS, 2023, which reads as follows:

478. (1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail bond from such person, discharge him on his executing a bond for his appearance as hereinafter provided.

Explanation.—Where a person is unable to give bail bond within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso:

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 135 or section 492.

(2) Notwithstanding anything in sub-section (1), where a person has failed to comply with the conditions of the bond or bail bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond or bail bond to pay the penalty thereof under section 491.

80. In the absence of explicit legislative clarification, the only viable recourse available to the judiciary is an interpretative reliance on Schedule II of the BNSS 2023, which delineates the classification of offences based on the prescribed sentence. As per the final column of this Schedule, offences carrying a sentence of less than three years are categorically designated as non-cognizable and bailable. However, within the framework of the NDPS Act, offences are explicitly classified as cognizable in the corresponding column of the Second Schedule. Consequently, the designation of ‘non-cognizable’ cannot be extrapolated to NDPS offences, given that the Act operates as a Special Legislation with an overriding effect.

81. Nevertheless, while the NDPS Act unequivocally declares such offences as cognizable, it remains silent on their bailability. In light of this legislative omission, the intent of the legislature must be discerned through Schedule II of the BNSS 2023, which



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unambiguously stipulates that all offenses carrying a sentence of less than three years shall be treated as bailable. Since the maximum sentence that may be imposed for an offense involving a small quantity under the NDPS Act is one year, it logically follows that such an offense must be construed as bailable under the prevailing legal framework.

82. Thus, in light of the judicial precedents cited above and the foregoing analysis, the general rule of incarceration should be viewed as an exception in the context of offences involving small quantities under the NDPS Act. Where the statutory framework does not expressly mandate stringent bail restrictions, judicial interpretation must align with the principles of proportionality and legislative intent, ensuring that minor infractions are not met with unduly harsh consequences.

83. Consequently, when the contravention under the NDPS Act involves 'Small Quantity', the offences are 'Bailable'. When the drug quantity falls in small category, the offence is bailable by operation of BNSS, 2023. Thus, any person accused of such an offence is entitled to bail without filing any bail application, subject to furnishing the requisite bail bonds.

84. Resultantly, the order dated 29.10.2024 passed by the Special Court, Bathinda, is set aside. In the event of arrest, the concerned officer to release the petitioner on bail in terms of S. 478 BNSS, 2023.

85. Petition allowed in terms mentioned above. All pending applications, if any, stand disposed of.

(ANOOP CHITKARA)
JUDGE

18.12.2024

anju rani

Whether speaking/reasoned: Yes

Whether reportable: **YES.**