

Crl.O.P.No.10226 of 2015**R.SUBBIAH, J.**

The petitioner, who was arrested on 21.10.2014 for the alleged offences punishable under Sections 8(c) r/w 21, 22, 23(c) & 29 of NDPS Act in Crime No.1579 of 2014, seeks the relief of bail.

2.The case of the prosecution, in brief, is as follows__

2(1)On 18.10.2014 at about 9.00 am, the Inspector of Police, T-12 Police Station, Poonamallee, Chennai received an information that narcotic substance (Heroin) was illegally kept in the house at No.74, Malliyam Narasiman Nagar, Poonamallee, Chennai. Hence, the Inspector of Police, with a special team, along with two respectable witnesses, went to the said house at 11.15 am. In the said premises, one Maillerumperumal (A1), Mohammed Rasik Jawzeek (A2) and Mohammed Sultan Rasik (A3) were present in the second floor of the said house. The said persons were informed about the information received by the Inspector of Police regarding prohibited heroin and the reasons for the search was intimated to them. In the presence of accused Nos.1 to 3 and the witnesses, the house was searched by the special team. While so, 74 fish tins and 10 fish tins were found separately and while comparing one of the 74 fish tins with

that of the 10 fish tins, it was found that there was variation in weight. So, when the accused No.1 to 3 were questioned about the variations in the weight, there was no proper reply from them. Due to suspicion, one of the fish tins was opened and it was found that yellowish powder was packed inside the tins. Using the investigation kit, the yellowish powder was tested and it was confirmed that it is prohibited heroin. When the accused 1 to 3 were questioned about the same, the 1st accused Maillerumperumal voluntarily confessed that he concealed the said drug in 74 fish tins for importing the same with the help of the accused 2 & 3. Further, when all the 74 fish tins were opened, heroin was found in all those fish tins and the same were collected in plastic containers collectively and its total weight is 16,300 kgs. Among them, 20 gms of drug was collected in two containers separately for chemical analysis and marked as S1 and S2 and they were sealed. The 74 empty fish tins and the materials used for packing the tins etc were seized under seizure mahazar and packed separately. After the completion of the seizure, the accused persons A1 to A3 were arrested at 19.00 hours on 18.10.2014 and a case was registered in Crime No.1579 of 2014 under Sections 8(c) r/w 21, 22, 23(c) & 29 of NDPS Act, 1985.

2(2)During the course of investigation, the confession

statement of A1 was recorded and the said confession statement of A1 revealed that one Barathi (petitioner herein/A4) is also involved in the offence. Hence, on 21.10.2014 the petitioner/A4 was arrested by the respondent-Police near Balaji Bhvan, Kundrathu Main Road, Mangadu and on enquiry, the petitioner/A4 confessed that he assisted the 1st accused in collecting the drug material at various instances and he also confessed that at one such instance, the drug material was sent through courier to the address of the petitioner/A4. Based on the confession statement of the petitioner/A4, the courier airway bill No.490009294 was seized from his house. On the same day ie., on 21.10.2014 the petitioner/A4 was produced before the Judicial Magistrate No.II, Poonamallee and remanded to judicial custody on the same day. The drug materials sent for chemical analysis was found to have contained Diacetyl Morphine (Heroin), Morphine and other drug substances. After the completion of investigation, on 22.12.2014 final report was filed before the Court of Principal Special Judge under EC & NDPS Act, Chennai and the same was taken on file as C.C.No.1 of 2015 on 05.01.2015. Now, the present petition has been filed by the petitioner/A4 seeking the relief of bail.

3.The learned counsel appearing for the petitioner/A4 submitted

that the accused 1 to 3 were arrested only on 18.10.2014 with the possession of contraband. So far as this petitioner/A4 is concerned, he was arrested on 21.10.2014 only based on the confession statement said to have been given by the 1st accused. Further, the accused 2 & 3 have not referred the name of the petitioner herein/A4 in their confession statement. Even in the confession statement of the 1st accused, only a passing reference was made with regard to the name of the petitioner herein to the effect that the petitioner/A4 has assisted the 1st accused in collecting the contraband material. Except the said statement, the 1st accused has not stated anything specifically about the petitioner herein/A4 to connect him with regard to the collection of the subject heroin weighing 6,300 kgs, seized from the house of the accused 1 to 3 by the respondent-Police.

4.It is the next fold of submission of the learned counsel for the petitioner/A4 that it is the case of the prosecution that the petitioner/A4 was arrested on 21.10.2014 near Balaji Bhavan, Kundrathu Main Road, Mangadu, without the possession of the contraband, based on the confession statement of the 1st accused which was recorded on 18.10.2014. But, in the news items reported in various dailies on 19.10.2014, the name of the petitioner was already

reflected as if the petitioner/A4 is also one of the arrested accused. Further, though the petitioner/A4 is said to have given confession statement on 21.10.2014, his statement was retracted by the letter sent by the wife of the petitioner herein/A4 on the same day. Therefore, according to the learned counsel for the petitioner, the case of the prosecution that the petitioner/A4 was arrested on 21.10.2014, is false.

5.The learned counsel for the petitioner would further submit that as per Section 25 of the Indian Evidence Act, no confession made to a police officer shall be proved as against the person accused of any offence. According to the learned counsel for the petitioner, in the instant case, the confession statement by the petitioner/A4 before the Police cannot be used against him as per Section 25 of the Indian Evidence Act; hence, if the said confession statement of the 1st accused is eschewed, absolutely no other tangible material is available with the respondent-Police as against the petitioner herein/A4.

6.It is the next fold of submission of the learned counsel appearing for the petitioner/A4 that though it is the case of the prosecution that this petitioner used to receive the drugs through

courier in his house address, the courier cover/receipt seized from the petitioner's house would show that it contains only house hold goods item and the said cover was not sent for chemical analysis to find out as to whether that cover had contained heroin or not; in fact, the 1st accused has also stated in his confession statement that he used the petitioner's address to receive the courier without his knowledge; further, the cover seized from the 1st accused also contained the signature of the 1st accused alone and the cover reflected the phone number of the 1st accused only. The statement of the staff from the courier office namely Balasubramanian would show that the parcel/cover was not delivered at the petitioner's address. Absolutely, there is no material to show that the cover seized from the petitioner's house has contained the contraband. In this regard, the learned counsel appearing for the petitioner/A4 has also invited the attention of this Court to the statement given by the staff from the courier office namely Balasubramanaian and submitted that in his statement, he had stated that when he contacted the number written on the parcel/cover, a person came to Kumanan Junction and collected the parcel/cover and and he is not sure as to whether the person who had collected the cover from him, is the petitioner herein/A4 or some other person. Thus, the learned counsel for the petitioner/A4 submitted that

absolutely no material on record is available to show that the petitioner/A4 was the person who went and collected the courier parcel/cover. The petitioner/A4 has been arrested only on the ground of conspiracy. But, absolutely no material was produced by the prosecution to show that there was conspiracy between the 1st accused and the petitioner herein/A4 in respect of the narcotic substance weighing about 6,300 kgs seized from the house of the accused 1 to 3.

7.Further, the learned counsel for the petitioner, by inviting the attention of this Court to Sections 41(2) & 50 of NDPS Act, submitted that as per Section 50 of NDPS Act, the Inspector of Police has no power to seize the contraband. As per Section 50 of the Act, when an officer duly authorized under Section 42 of the Act is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. But, in the instant case, the respondent-Police was not duly authorised under Section 42 of the Act; hence, the search said to have been conducted in the house of the accused 1 to 3 and the seizure of the cover from the house of the petitioner/A4 are against the law.

8.Further, the learned counsel appearing for the petitioner/A4, by inviting the attention of this Court to Section 42(2) of NDPS Act, submitted that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy two hours send a copy thereof to his immediate official superior. But, in the instant case, the respondent-Police has not sent any copy to this superior officer. Similarly, under Section 52(1) of NDPS Act, any officer arresting a person under Section 41, Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds for such arrest. But, in the instant case, such fact has not been stated either in the mahazar or in the remand report. Similarly, under Section 57 of NDPS Act, whenever any person makes any arrest or seizure under this Act, he shall, within forty eight hours after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. But, in the instant case, the respondent-Police has not sent any report to his superior officer.

9.In this regard, the learned counsel for the petitioner relied upon the judgment reported in **1908(8) SCC 655 [Mohinder Kumar Vs. State, Panaji, Goa]** and submitted that since the procedures as

contemplated under Sections 42, 52 & 57 of NDPS Act are not complied with by the respondent-Police, the petitioner/A4 is entitled for the relief of bail.

10.The learned counsel for the petitioner has also relied upon the judgment reported in **(2002) 4 SCC 229 [Beckodan Abdul Rahiman Vs. State of Kerala]** wherein it has been held that under Section 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior and if there is a total non-compliance with the provisions the same affects the prosecution case. For the same proposition, the learned counsel for the petitioner/A4 has also relied upon the judgment reported in **2004(3) CTC 215 [Sarija Banu (A) Janarthani @ Janani Vs. State].**

11.The learned counsel appearing for the petitioner has also invited the attention of this Court to Section 37(1)(b)(ii) of NDPS Act and submitted that if 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, bail could be granted

by the Court. In the instant case, except the confession statement of the co-accused, absolutely no other material is available to show that the petitioner/A4 is involved in the alleged offence. Therefore, the present case would fall under Section 37(1)(b)(ii) of NDPS Act. Thus, the learned counsel for the petitioner sought for the grant of bail to the petitioner.

12.But, the learned Public Prosecutor submitted that the total quantum of the contraband seized is 6,300 kgs and it is worth about Rs.50 crores. Section 42 of NDPS Act will come into force only if the Investigating Officer enters into a place for search, seizure and arrest. But, in the instant case, the petitioner herein/A4 was arrested in a public place viz., near Balaji Bhavan, Kundrathu Main Road, Mangadu. Further, in his confession statement the petitioner had stated that if he is taken to his house, he would produce the courier receipt. Subsequently, when he was taken to his house, the petitioner produced the courier receipt. Therefore, the procedures contemplated under Section 42 of NDPS Act will not be applicable to the present case.

13.Similarly, the learned Public Prosecutor would further submit

that only if the body of the person is searched, the ingredients of Section 50 of NDPS Act would be applicable. But, in the instant case, body of the person has not been searched. Even as per the confession statement of the petitioner, the petitioner had accepted that he was assisting the accused 1 to 3 in collecting the contraband. After the petitioner was remanded, his wife had sent a letter dated 21.10.2014, retracting the confession statement given by her husband/petitioner herein. Therefore, there is enough material available to connect the petitioner herein with the contraband seized in this case.

14.With regard to the submission made by the learned counsel appearing for the petitioner in respect of news items published in the news papers on 19.10.2014, the learned public prosecutor replied that the news items published in the newspapers cannot be taken into consideration for granting bail. The said news items published in the newspapers have to be proved before the Court during the trial in the manner known to law. Therefore, at this stage, the news items published in the newspapers cannot be taken into consideration.

15.The learned Public Prosecutor has further submitted that

unless there are reasonable grounds to believe that the petitioner/A4 is not guilty of the alleged offence and that he is not likely to commit any offence while on bail, the petitioner is not entitled to the relief of bail. In this regard, the learned Public Prosecutor has relied upon the judgment reported in **(2001) 2 SCC 566 [Babua @ Tazmul Hossain Vs. State of Orissa]** wherein it has been held as follows:-

“3. In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the

charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced within the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view."

Thus, by relying upon the above said judgment, the learned Public Prosecutor has submitted that the petitioner/A4 has not made out a case to grant relief; he sought for dismissal of the bail petition.

16. Keeping the submissions made on either side, I have carefully perused the materials available on record.

17.It is the submission of the learned counsel appearing for the petitioner, by inviting the attention of this Court to Sections 41, 42, 43 & 50 of the NDPS Act, that the prosecution has not complied with the mandatory provisions; that except the confession statement of the 1st accused, wherein a passing reference was made about the petitioner herein/A4, no other tangible material is available to connect the petitioner herein/A4 with the alleged offence; that the confession statement given by the petitioner/A4 was retracted by his wife. But, in my considered opinion, all the submissions made by the learned counsel appearing for the petitioner/A4 cannot serve as a ground to grant bail. So far as the bail petition is concerned, only if there are reasonable grounds to believe that the petitioner/accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail, bail could be granted. But, in the instant case, I find that *prima facie* materials are available on record to establish the ground of conspiracy as against the petitioner herein/A4. In the confession statement of the petitioner/A4, he had admitted that contraband was sent to him through courier. The staff from the courier office, who had delivered the cover, had also stated that from the address stated in the parcel, a person came and collected the material from him. Further,

the petitioner/A4 has given his sister's address to receive the courier. The courier receipt was also seized only from the house of the petitioner/A4. Therefore, the cumulative effect of all these facts would show that though no contraband was seized from the possession of the petitioner, there is a case of conspiracy as against the petitioner. Therefore, in my considered opinion, the petitioner has miserably failed to satisfy this Court with regard to the conditions enumerated under Section 37(1)(b)(ii) of NDPAS Act for granting bail. Hence, he is not entitled to the relief of bail.

In fine, the criminal original petition fails and the same is dismissed accordingly.

25.06.2015

SSV

R.SUBBIAH, J.

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Pre-delivery order
in
Crl.O.P.No.10226 of 2015

25.06.2015