



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 16.08.2016

Pronounced on : 23.08.2016

CORAM

THE HONOURABLE MS. JUSTICE V.M.VELUMANI

CrI.O.P.(MD)No.14252 of 2016

&

CrI.M.P.(MD)No.6652 of 2016

Superintendent of Customs,
Central Intelligence Unit,
Trichy.

(O.R.No.1 of 2016)

... Petitioner

Versus

L.Abuthahir

... Respondent

PRAYER: Criminal Original Petition is filed under Sections 439(2) and 482 of the Code of Criminal Procedure, praying to cancel the bail granted by the learned Additional District and Sessions Judge (Special Court for E.C. and NDPS Act cases), Pudukottai, in Cr.M.P.No.1882 of 2016, dated 05.08.2016.

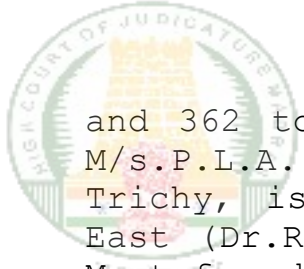
For Petitioner : Mr.C.Arul Vadivel @ Sekar
Special Public Prosecutor

For Respondent : Mr.K.Chellapandian
Senior Counsel
for Mr.M.S.Jeyakarthish

O R D E R

This Criminal Original Petition has been filed seeking to cancel the bail granted to the respondent by the learned Additional District and Sessions Judge (Special Court for E.C. and NDPS Act cases), Pudukottai, in Cr.M.P.No.1882 of 2016, dated 05.08.2016.

2. The case of the prosecution is that on 26.04.2016, the Officers of Central Intelligence Unit, Head Quarters Office, Trichy, visited M/s.Shri Renganathan Speed Parcel Service, No.8, Nirmala Building, Fort Station Road, Trichy - 2 and found one parcel said to have contained "Zolfresh" Tablets having Zolpidem substance. The parcel was transported to one Abu, booked by Mohamed Syed Mustafa/A1, who was working as Medical Representative of M/s.Court Advisory Services India Ltd., Mumbai. In the presence of Mohamed Syed Mustafa, the parcel was opened and it was found that 13 boxes of Zolfresh 10 x 10 x 10 Tablets serially numbered from 353 to 359



and 362 to 367 along with Invoice No.77573, dated 23.04.2016 of M/s.P.L.A. Kanagu Pharma, 10-C, Alexandria Road, Cantonment, Trichy, issued in the name of M/s.Athma Mind Centre, 10th Cross East (Dr.Ramakrishnan), Trichy - 620 018. The said Mohamed Syed Mustafa admitted that he produced Order Form from M/s.Athma Mind Centre, Trichy, to obtain the said Tablets and sent the same to L.Abuthahir, the respondent herein. Mohamed Syed Mustafa confessed that he has been working as Medical Representative for the past six months and previously, one Sureshkumar, who was employed with M/s.Abbott India Limited, Mumbai, in Trichy, used to supply Zolfresh Tablets to Abu of Chennai. He used to procure the Tablets by placing orders in the name of M/s.Athma Mind Centre, Trichy, and supplied the same to Abu. The said Sureshkumar gave mobile number of Mohamed Syed Mustafa to Abu, who placed order for 13000 numbers of Zolfresh Tablets. The said Mohamed Syed Mustafa procured the Tablets from M/s.P.L.A. Kanagu Pharma, Trichy and after receiving money from Abu, he dispatched the same to him. Mohamed Syed Mustafa/Al was arrested on 27.04.2016 and produced before the learned Judicial Magistrate No.I, Trichy and remanded to judicial custody.

3. L.Abuthahir, the respondent herein, who was a receiver of the parcel in Chennai was intercepted by the Officers of Customs, when he came to receive the parcel from Shri Renganathan Speed Parcel Service at Chennai. The respondent gave voluntary statement that he has procured the Tablets at the instruction of one Jamaludeen of Ramanathapuram and he is at present residing in Dubai and he gave his mobile number. He has also confessed that as per the instructions of Jamaludeen, he used to hand over Zolfresh Tablets to Ravi or Raja, who would call him over phone and take delivery of the Tablets from Abuthathir, the respondent herein. The respondent used to receive Rs.2,000/- to Rs.5,000/- for this work. He has also confessed that Sureshkumar asked him to contact Mohamed Syed Mustafa and he knew that the drugs are to be sold under the prescription of a Doctor, a registered Medical Practitioner and can be transported with proper documents only. He was informed that the Tablets were smuggled from India to Malaysia and admitted the offence. He was arrested on 29.04.2016 and remanded to judicial custody. In the investigation, it was revealed that previously Sureshkumar, the then Medical Representative of Abbott India Limited, purchased three consignments of Zolfresh Tablets (1550 strips) in the name of M/s.R.K.R.Pharma, Trichy. He had also purchased Zolfresh Tablets (2090 strips) in the name of M/s.Athma Mind Care Centre and made payments in cash and sent the same to Abuthathir.

4. The learned Special Public Prosecutor appearing for the petitioner contended that the respondent filed Cr.M.P.No.1405 of 2016 before the Special Court for EC and NDPS Act cases, Pudukottai and the said application was dismissed on 24.05.2016. Again, he filed Cr.M.P.No.1882 of 2016. The learned Special



Public Prosecutor filed written objections and opposed the bail application on the ground that the contraband involved in the case is of commercial quantity and as per Section 37 of NDPS Act, there is a bar to grant bail. The learned Additional District and Sessions Judge (Special Court for EC and NDPS Act cases), Pudukottai, without considering the materials on record, including the voluntary statement of the respondent and gravity of the offence, enlarged the respondent on bail, by order dated 05.08.2016.

5. The learned Judge enlarged the respondent on bail on the ground that the respondent is suffering from diabetes and he needs treatment and personal care by his wife. The learned Additional District and Sessions Judge has failed to consider that as per Section 37 of NDPS Act, it is the burden on the accused to prove that he is not guilty of the offence and that he would not commit an offence, if he is enlarged on bail. The Hon'ble Apex Court in a number of judgments has held that the accused persons must prove both the ingredients and then only, the Court can enlarge the petitioners on bail.

6. The learned Special Public Prosecutor also submitted that the Court on being satisfied that the accused is not guilty based on reasonable grounds, can enlarge the accused person on bail. The reasonable ground means something more than *prima facie* grounds. The learned Additional District and Sessions Judge has enlarged the respondent on bail arbitrarily without assigning any valid reason. The respondent will abscond and live in foreign country and involve in similar offence and the respondent has committed heinous crime endangering the lives and liberty of the people and therefore, prayed for cancellation of bail.

7. The learned Special Public Prosecutor submitted that the weight of 13000 Zolfresh Tablets procured by the respondent and transported to him is 4.745 K.Gs and the quantum of Zolpidem, which is psychotropic substance, is more than commercial quantity. Therefore, Section 37 of NDPS Act is attracted and the learned Additional District and Sessions Judge failed to consider Section 37 of NDPS Act while enlarging the respondent on bail. The learned Additional District and Sessions Judge also failed to consider the well settled guidelines for grant of bail as per orders of this Court and also the Hon'ble Apex Court that the Court while considering the petition for bail must consider,

(a) *Prima facie* case against the accused person;

(b) quantum of punishment if convicted;

(c) Whether the accused person if enlarged on bail, will tamper with the evidence, influence the witness or abscond; and

(d) whether the accused person will indulge in similar

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offences or enlarge on bail or granted anticipatory bail.

8. In support of his submissions, the learned Special Public Prosecutor relied on the following judgments:

(i) AIR 2008 SC 2576 [N.R.Mon Vs. Md.Nasimuddin], wherein in paragraphs 5 to 9, it has been held as follows:

5. As rightly contended by learned counsel for the appellant, the effect of Section 37 has not been noticed by either the trial Court or the High Court. The position relating to grant of bail in the background of Section 37 of the Act has been considered by this Court in several cases.

6. In *Union of India v. Gurcharan Singh* [2003 (11) SCC 764], it was noted as follows:

"5. On a bare perusal of the impugned order of the High Court, we are satisfied that the High Court has not borne in mind the provisions of Section 37 of the Act before releasing the respondent- accused on bail. We, therefore, set aside the said order and allow this appeal. We direct that the trial be concluded expeditiously."

7. In *Public Prosecutor of Customs, New Delhi Vs. Ahmadalieva Nodira* [2004 (3) SCC 549], it was noted at page 552 as follows:

"6. As observed by this Court in *Union of India v. Thamisharasi* [1995 AIR SCW 2543], Clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that 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.

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present respondent accused is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression 'reasonable grounds' means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to



justify satisfaction that the accused is not guilty of the alleged offence. In the case at hand the High Court seems to have completely overlooked the underlying object of Section 37. It did not take note of the confessional statement recorded under Section 67 of the Act. Description of drug at Sl. No. 43 of the Schedule which reads as follows has not been kept in view:

Sl. No.	International non-proprietary names	Other non-proprietary names	Chemical name
43	* DIAZEPAM *	* *	* 7-Chloro-1, 3-dihydro-1, methyl-5-phenyl-2H-1, 4-benzondiazepin-2-one *

In addition, the report of the Central Revenue Control Laboratory was brought to the notice of the High Court. The same was lightly brushed aside without any justifiable reason."

8. In *Union of India v. Abdulla* [2004 (13) SCC 504], it was noted as follows: (SCC p. 505, para 5)

"5. The respondent herein was charged of the offences punishable under Sections 8/21/29/60 of the Narcotic Drugs and Psychotropic Substances Act, 1985 before the Court of Special Judge, Lucknow. His application for grant of bail was rejected by the Special Judge by assigning reasons therefor. Further application being made to the High Court of Judicature at Allahabad, the High Court without considering the mandatory requirement of Section 37 of the Act and without coming to the prima facie conclusion that there was no material against the respondent to convict him for the charges alleged against him mechanically proceeded to grant the bail. This Court in *Narcotics Control Bureau v. R. Paulsamy* [2000 AIR SCW 4131] has held that in matters arising out of the Narcotic Drugs and Psychotropic Substances Act grant of bail is controlled by Section 37 of the Act and it is mandatory for the Court to hear the Public Prosecutor and come to the prima facie conclusion that there is no material to come to the conclusion that the accused could be held guilty of the charges levelled against him. Since such a conclusion is not recorded by the High Court and is not supported by



reasons we think the impugned order cannot be sustained."

9. In *Narcotics Control Bureau v. Karma Phuntsok and others* [2005 (12) SCC 480], it was noted as follows: (SCC p. 481, para 4)

"4. The respondents were convicted under Section 29 read with Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (the NDPS Act) and sentenced to rigorous imprisonment for 10 years and a fine of Rs 1000. On appeals being filed, the learned Judge suspended the sentence and the respondents were enlarged on bail on executing a personal bond for a sum of Rs 50,000 with one surety for the like amount, to the satisfaction of the trial court. We have perused the order passed by the learned Judge and we find that there is not even a whisper about the condition contained in Section 37 of the NDPS Act with regard to enlarging of the accused on bail. Mr Jaspal Singh, learned Senior Counsel appearing for the respondents contended that the learned Public Prosecutor did not oppose the bail as contained in Section 37(1)(b)(ii) of the NDPS Act. According to him, unless the Public Prosecutor opposes the bail application, Section 37 will not apply. Mr. Singh seriously contended that inasmuch as the appellant have not put on record that the Public Prosecutor had opposed the granting of bail it must be presumed that this is an order covered under Section 37(3) read with Section 439 Cr.P.C. To say the least, the argument appears to be baseless. We cannot accept the contention that in a matter involving seizure of commercial quantity of a substance prohibited by the NDPS Act when the Public Prosecutor appears on notice of the bail application he would be standing there as a mute spectator not opposing the bail application unless he was at the beck of the accused. We find no substance in this argument. In our view, the very fact that the Public Prosecutor appeared would suggest that he appeared to oppose the bail application. In any event, the order of the High Court does not suggest that the Public Prosecutor had agreed for bail being granted. In the aforesaid circumstances, we find no substance whatsoever in the contention raised by Mr Singh."

(ii) AIR 2004 SC 3022 : 2004 (3) SCC 549 [Collector of Customs, New Delhi Vs. Ahmadalieva Nodira], wherein in paragraph 8, it has been held as follows:

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8. In the aforesaid background, this does not appear to be a case where it could be reasonably believed that the



accused was not guilty of the alleged offence. Therefore, the grant of bail to the accused was not called for. The impugned order granting bail is set aside and the bail granted is cancelled. The respondent-accused is directed to surrender to custody forthwith. Additionally, it shall be open to the trial court to issue notice to the surety and in case the accused does not surrender to custody, as directed, to pass appropriate orders so far as the surety and the amount of security are concerned. It is made clear that no final opinion on the merit of the case has been expressed in this judgment, and whatever has been stated is in the background of Section 37 of the Act for the purpose of bail."

(iii) 2008 (4) SCC 668 [Kanhaiyalal Vs. Union of India], wherein in paragraphs 40 and 41, it has been held as follows:

"40. From the facts of the case and the submissions made on behalf of the respective parties the point which emerges for determination is up to what extent can a statement under Section 67 of the NDPS Act be relied upon for convicting a person accused of having committed an offence under the provisions of the said Act. In order to arrive at a decision in regard to the above, it will also have to be considered whether such a statement would attract the bar both of Sections 24 to 27 of the Evidence Act as also Article 20(3) of the Constitution of India. For the aforesaid purpose, the provisions of Section 67 of the NDPS Act are reproduced hereinbelow:

"67. *Power to call for information, etc.*—Any officer referred to in Section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act—

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case."

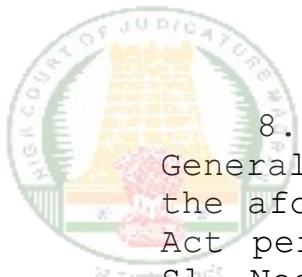
41. A parallel may be drawn between the provisions of Section 67 of the NDPS Act and Sections 107 and 108 of the Customs Act and to a large extent Section 32 of the Prevention of Terrorism Act, 2002 and Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. These are all special Acts meant to deal with special situations and circumstances. While the provisions of the Prevention of Terrorism Act, 2002 and the TADA Act, 1987 are much more stringent and exclude from their purview the provisions of Sections 24 to 27 of the Evidence Act with



regard to confession made before a police officer, the provisions relating to statements made during inquiry under the Customs Act and under the NDPS Act are less stringent and continue to attract the provisions of the Evidence Act. In the case of both the latter enactments, initially an inquiry is contemplated during which a person may be called upon to provide any information relevant to the inquiry as to whether there has been any contravention of the provisions of the Act or any rule or order made thereunder. At that stage the person concerned is not an accused although he may be said to be in custody. But on the basis of the statements made by him he could be made an accused subsequently. What is important is whether the statement made by the person concerned is made during inquiry prior to his arrest or after he had been formally charged with the offence and made an accused in respect thereof. As long as such statement was made by the accused at a time when he was not under arrest, the bar under Sections 24 to 27 of the Evidence Act would not operate nor would the provisions of Article 20(3) of the Constitution be attracted. It is only after a person is placed in the position of an accused that the bar imposed under the aforesaid provision will come into play."

(iv) 2008 (1) SCC (Cri) 346 [Sanjay Kumar Kedia Vs. Narcotics Control Bureau and another], wherein in paragraphs 7, 8 and 11 to 13, it has been held as follows:

"7. Mr. Tulsi has first and foremost argued that the allegations against the appellant were that he had used the network facilities provided by his companies for arranging the supply of banned psychotropic substances online but there was no evidence to suggest that the appellant had been involved in dealing with psychotropic substances or engaged in or controlled any trade whereby such a substance obtained outside India had been supplied to persons outside India and as such no case under Section 24 of the Act had been made out against the appellant. Elaborating this argument, he has submitted that the two drugs which the appellant had allegedly arranged for supply were Phentermine and Butalbital and as these drugs were not included in Schedule I of the Narcotic Drugs and Psychotropic Substances Rules, 1985 in terms of the Notification dated 21-2-2003 and were also recognised by the Control Substances Act, a law applicable in the United States, as having low potential for misuse and it was possible to obtain these drugs either on written or oral prescription of a doctor, the supply of these drugs did not fall within the mischief of Section 24. He has further argued that in the circumstance, the companies were mere service providers and they were protected under Section 79 of the Information Technology Act from any prosecution.



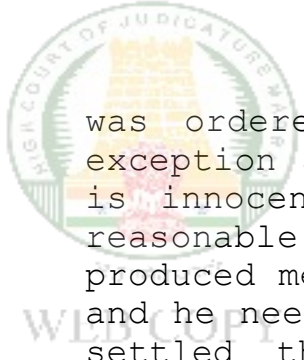
8. Mr. Vikas Singh, the learned Additional Solicitor General for the respondents has however pointed out that the aforesaid drugs figured in the Schedule appended to the Act pertaining to the list of psychotropic substances (at Sl. Nos. 70 and 93) and as such it was clear that the two drugs were psychotropic substances and therefore subject to the Act. It has also been pointed out that the appellant had been charged for offences under Sections 24 and 29 of the Act which visualised that a person could be guilty without personally handling a psychotropic substance and the evidence so far collected showed that the appellant was in fact a facilitator between buyers and certain pharmacies either owned or controlled by him or associated with the two companies and that Section 79 of the Information Technology Act could not by any stretch of imagination guarantee immunity from prosecution under the provisions of the Act.

11. We thus find that the appellant and his associates were not innocent intermediaries or network service providers as defined under Section 79 of the Information Technology Act but the said business was only a facade and camouflage for more sinister activity. In this situation, Section 79 will not grant immunity to an accused who has violated the provisions of the Act as this provision gives immunity from prosecution for an offence only under Information Technology Act itself.

12. We are therefore of the opinion that in the face of overwhelming inculpatory evidence it is not possible to give the finding envisaged under Section 37 of the Act for the grant of bail, that there were reasonable grounds for believing that the appellant was not guilty of the offence alleged, or that he would not resume his activities should bail be granted.

13. For the reasons recorded above, we find no merit in this appeal, which is accordingly dismissed. We however qualify that the observations made above are in the context of the arguments raised by the learned counsel on the bail matter which obligated us to deal with them, and will not influence the proceedings or decision in the trial in any manner."

9. The learned Senior Counsel appearing for the respondent submitted that there is no evidence to link the respondent with the contraband in question. The contraband was seized at Shri Renganathan Speed Parcel Service and it was addressed to one Abu. The petitioner issued summons to the respondent to appear on 28.04.2016 and the respondent appeared before the petitioner. The statement alleged to have given by the respondent is not voluntary. He has not admitted that the contraband in question

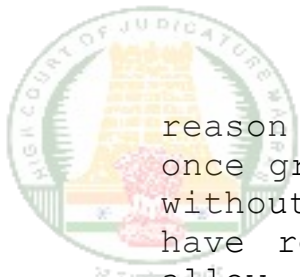


was ordered by him and sent to him. The denial of bail is exception and a person, who alleged to have committed an offence, is innocent till his allegations against him are proved beyond reasonable doubt. The respondent is a diabetic patient and produced medical report to show that he is suffering from diabetes and he needs treatment and personal care by his wife. It is well settled that bail already granted cannot be cancelled in a mechanical manner. The Court must consider the supervening circumstances and only for valid reasons, the bail can be cancelled. The grounds for granting bail and the grounds for cancelling bail are not similar. The total weight of the contraband is not a criteria to decide whether the contraband in question is commercial quantity or not when the contraband is a mixture with other substances. The quantum of Narcotic mentioned in schedule alone taken into consideration as to whether the contraband in question is small, intermediate or commercial quantity. Only by a Purity Test, it can be decided. The alleged psychotropic substance in the Tablets in question is less than commercial quantity and further, it is not psychotropic substance and therefore, NDPS Act is not applicable and only Drugs and Cosmetics Act is applicable. Further, once bail is granted even without considering Section 37 of NDPS Act, Court considering a petition for cancellation of bail, cannot consider the ingredients of Section 37 for cancellation of bail. The learned Additional District and Sessions Judge has considered all the facts and circumstances and enlarged the respondent on bail. As held by the Hon'ble Apex Court in a number of judgments, the bail already granted cannot be cancelled in a mechanical manner, unless the order of the lower Court granting bail is perverse and granted without considering the facts and circumstances of the case. Therefore, the order of the learned Additional District and Sessions Judge cannot be set aside.

10. In support of his submissions, the learned Senior Counsel appearing for respondent relied on the following judgments:

(i) 1995 (1) SCC 349 [Dolat Ram and others Vs. State of Haryana], wherein in paragraph 4, it has been held as follows:

"4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another



reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non-bailable case in the first instance and the cancellation of bail already granted."

(ii) 1992 (4) SCC 272 [Aslam Babalal Desai Vs. State of Maharashtra], wherein in paragraph 11, it has been held as follows:

"11. On a conjoint reading of Sections 57 and 167 of the Code it is clear that the legislative object was to ensure speedy investigation after a person has been taken in custody. It expects that the investigation should be completed within 24 hours and if this is not possible within 15 days and failing that within the time stipulated in clause (a) of the proviso to Section 167(2) of the Code. The law expects that the investigation must be completed with dispatch and the role of the Magistrate is to oversee the course of investigation and to prevent abuse of the law by the investigating agency. As stated earlier, the legislative history shows that before the introduction of the proviso to Section 167(2) the maximum time allowed to the investigating agency was 15 days under sub-section (2) of Section 167 failing which the accused could be enlarged on bail. From experience this was found to be insufficient particularly in complex cases and hence the proviso was added to enable the Magistrate to detain the accused in custody for a period exceeding 15 days but not exceeding the outer limit fixed under the proviso (a) to that sub-section. We may here mention that the period prescribed by the proviso has been enlarged by State amendments and wherever there is such enlargement, the proviso will have to be read accordingly. The purpose and object of providing for the release of the accused under sub-section (2) of Section 167 on the failure of the investigating agency completing the investigation within the extended time allowed by the proviso was to instil a sense of urgency in the investigating agency to complete the investigation promptly and within the statutory time-frame. The deeming fiction of correlating the release on bail under sub-section (2) of Section 167 with Chapter XXXIII, i.e. Sections 437 and 439 of the Code, was to treat the order as one passed under the latter provisions. Once the order of



release is by fiction of law an order passed under Section 437(1) or (2) or Section 439(1) it follows as a natural consequence that the said order can be cancelled under sub-section (5) of Section 437 or sub-section (2) of Section 439 on considerations relevant for cancellation of an order thereunder. As stated in Raghbir Singh case [1986 (4) SCC 481 : 1986 SCC (Cri) 511 : 1986 (3) SCR 802] the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to."

(iii) Haidani Dei Vs. State of Orissa and others [1994 Cri. L.J. 660], wherein in paragraph 11, it has been held as follows:

"11. If the aforesaid be the position in law when a person is released even with the aid of proviso (a) to Section 167(2) of the Code, we are of the opinion that the same view is required to be taken when during investigation a person is released on bail, which order of bail has to be treated as one Under Section 437 (1) or (2) or Section 439 (1), because of which cancellation could be made under the corresponding provisions of Section 437 or Section 439 and on the grounds germane to such cancellation. May it be stated here that power of release on bail under the Act either by the Magistrate or a Special Court is same as that visualised by Section 167, Cr.P.C., as would appear from Clauses (b) and (c) of Sub-section (1) of Section 36-A of the Act. No doubt, Section 37 of the Act starts with a non obstante clause : ("Notwithstanding anything contained in the Code of Criminal Procedure, 1973"); what has been stated in Clause (b)(ii) of Section 37 of the Act would be applicable, according to us, when the question of release on bail is being considered. But, once an accused has been released even without satisfying the requirements in the normal criminal law would spring into action and bail would be open to be cancelled only on the grounds on which bail can be otherwise cancelled, the important



grounds relating to which have been mentioned in paragraph 11 of Aslam Babalal's case, the same beings: (i) where the accused misuses his liberty by indulging in similar criminal activity; (ii) interferes with the course of investigation; (iii) attempts to tamper with evidence or witnesses; (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation; (v) there is likelihood of his fleeing to another country; (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency; (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are of course illustrative and not exhaustive. Remand to custody merely because of non-fulfilment of the requirements of Sub-clause (ii) would really amount to review of the earlier order, which is not permissible, in view of what has been stated in Section 362 of the Code, which provision applies to proceedings before the Special Court (or till constitution of such Courts before the Court of Session). This is what has been held by the Single Judge of this Court in Ramesh Chandra's case also."

11. The learned Special Public Prosecutor appearing for the petitioner and the learned Senior Counsel appearing for the respondent relied on the judgment reported in 2012 (1) LW (Cr1.) 70 [M.Veludurain Vs. The State, Rep. by the Superintendent of Customs, Special Narcotic Cell, Nagercoil], wherein in paragraphs 11, 14 and 16, it has been held as follows:

"11. While deciding the relevant clause of Section 21, under which the accused should be punished, in terms of the above definitions, and in the light of the above notification issued by the Central Government, in E.Micheal Raj's case, the Hon'ble Supreme Court held that it is absolutely necessary for the prosecution to prove as to what exactly was the quantity of heroin contained in the contraband [powder] seized from the possession of the accused. As we have already stated, in E.Micheal Raj's case, a test, known as "Purity Test" was conducted, by which the percentage of the heroin found in the samples was found out, from which the total quantity of heroin in the contraband was calculated, based on which it was easily concluded that the accused was found in possession of heroin, which was an "intermediate quantity". The Hon'ble Supreme Court, ultimately, in Paragraph No.4, held as follows:-

4. The accused-appellant was charged with the offence committed under Section 8(c) read with Sections 21 and 29 of the NDPS Act by the Intelligence Narcotic Control Bureau. The Special Judge for Trial of Cases under the NDPS Act found that the substance found in possession of the accused was an

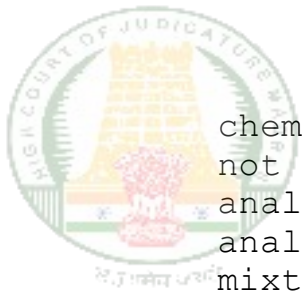


opium derivative which has been defined under Section 2(xvi), and under Section 2(xvi)(e) a preparation, containing more than 0.2% of morphine or diacetylmorphine, is an opium derivative; and that since this contraband article contained 1.4% and 1.6% heroin it is an opium derivative, and punishable under Section 21 of the NDPS Act. Since the manufactured drug being carried weighed 4.07 kg., it would come under Section 21(c) being a commercial quantity, but since the accused is only a carrier and is not the beneficiary of the transaction, he would not be awarded the maximum sentence and would be awarded the minimum sentence of 10 years rigorous imprisonment and a fine of rupees one lakh, in default of payment of fine rigorous imprisonment for one more year.

13. Very recently, in Harjit Singh vs. State of Punjab reported in 2011 (4) SCC 441, the Hon'ble Supreme Court had an occasion to consider the Judgment in E.Micheal Raj's, case. That was a case, where the accused was allegedly found in possession of 7.10 kilograms of opium. Two samples of 10 grams [each] of opium were taken. According to the Purity Test conducted, it was found that it contained 0.8% of morphine. Based on the said estimation, it was contended before the Hon'ble Supreme Court that out of the total quantity of the contraband weighing 7.5 kilograms, the morphine content was only 56.96 gms, which, according to the accused, was an intermediate quantity. Therefore, it was contended before the Hon'ble Supreme Court that as per E.Micheal Raj's, case, the accused should be convicted only under Section 21(b) of the NDPS Act for having found in possession of the intermediate quantity of opium. But, the Hon'ble Supreme Court did not agree with the said contention of the accused. The Hon'ble Supreme Court, after referring to the definition of opium, as found in Section 2 (xv) of the NDPS Act and the notification issued by the Central Government, in Paragraph Nos.15, 16, 17, 21, 22 and 23 of the said Judgment, held as follows:-

"15. Opium is essentially derived from the opium poppy plant. The opium poppy gives out a juice which is opium. The secreted juice contains several alkaloid substances like morphine, codeine, thebaine, etc. Morphine is the primary alkaloid in opium.

16. Opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. Thus, it can be identified without subjecting it to any chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a



chemical analysis may be necessary. In case opium is not mixed up with any other material, its chemical analysis is not required at all. "Of course, an analysis will always be necessary if there is a mixture and the quantity of morphine contained in mixture has to be established for the purpose of definition (of opium under the Opium Act)." (Vide: Baidyanath Mishra v. State of Orissa, 1968 (34) CLT 1 (SC); and State of Andhra Pradesh v. Madiga Boosenna, AIR 1967 SC 1550). [Emphasis supplied].

17. However, the aforesaid cases have been decided under the Opium Act and cannot be the authority so far as deciding the cases under the NDPS Act. Thus, chemical analysis of the contraband material is essential to prove a case against the accused under the NDPS Act.

21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus, the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry No.92 becomes totally redundant.

22. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry No.93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry No.92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity.

23. The judgment in E. Micheal Raj (Supra) has dealt with heroin i.e., Diacetylmorphine which is an Opium Derivative within the meaning of the term as defined in Section 2(xvi) of the NDPS Act, and hence not a 'manufactured drug' within the meaning of Section 2(xi)(a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the



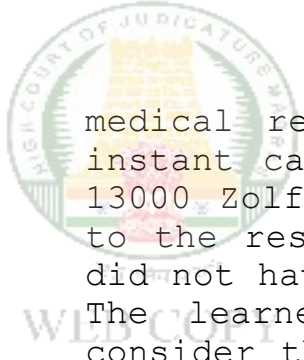
adjudication of the present case. Ultimately, referring to the above facts, the definitions in respect of the opium and the other relevant provisions, the Hon'ble Supreme Court distinguished the ratio in E.Micheal Raj's, case and in Paragraph No.24 of the said Judgment held as follows:-

24. In Amarsingh Ramjibhai Barot v. State of Gujarat, (2005) 7 SCC 550, this Court dealt with a case where the black-coloured liquid substance was taken as an opium derivative. The FSL report had been to the effect that it contained 2.8% anhydride morphine, apart from pieces of poppy (Posedoda) flowers. This was considered only for the purpose of bringing the substance within the sweep of Section 2(xvi)(e) as 'opium derivative' which requires a minimum 0.2% morphine."

14. Thus, a close reading of the above Judgment of the Hon'ble Supreme Court in Harijit Singh's case would make it abundantly clear that if the contraband is opium falling within the definition of Section 2(xv)(a) of the NDPS Act, then, the total quantity of morphine contained in the contraband need not be estimated, per contra, it would suffice, if it is proved that it is opium. In case it is a mixture or preparation with or without any neutral material of the juice and poppy falling within the definition of the opium as made in Section 2(xi)(b) of the NDPS Act [i.e., a manufactured drug], then, it is absolutely necessary for the prosecution, by conducting Purity Test, to find out that the morphine content was more than 0.2%. Therefore, in deciding the case involving opium, there may not be any difficulty henceforth, in view of the Judgment of the Hon'ble Supreme Court in Harijit Singh's case. Thus, it is crystal clear that the law laid down in E.Micheal Raj's, case is not applicable to the opium cases in the event, the contraband falls within the definition of Section 2(xva) of the NDPS Act."

12. I have carefully considered the rival submissions advanced by the learned counsel appearing for the parties.

13. The allegation against the respondent is that he has purchased the schedule drug and paid the amount for the same by depositing in the account of A1 in ICICI Bank. From the Lorry Receipt [LR], it is clear that the Consignor is A1 and the Consignee is the respondent. The mobile numbers of both parties were mentioned in the Lorry Receipt. The respondent in his statement under Section 67 of the Act before the Officials as per the instructions of one Jamaludeen of Ramanathapuram, who is now in Dubai, had procured on earlier occasion, the same schedule drug from Sureshkumar, the then



medical representative of Abbott India Ltd. Similarly, in the instant case also, there is a *prima facie* case that A1 procured 13000 Zolfresh Tablets, which is a schedule drug and transported to the respondent as per his instructions. The respondent or A1 did not have any licence to possess or transport the said Tablets. The learned Additional District and Sessions Judge failed to consider that the total contraband in question is 9781.2 grams or 9.7812 kgs, which is more than commercial quantity, i.e., 250 grams. As per Section 22(c) of NDPS Act, a person possessing commercial quantity without valid licence, is punishable with minimum sentence of 10 years imprisonment, which may extend to 20 years and a fine of Rs.1,00,000/-, which may extend to Rs.2,00,000/-. As per Section 37 of NDPS Act, the burden is on the accused person to prove that he is not guilty of offence and he would not commit an offence, if he is enlarged on bail. Further, only when the Court is satisfied on reasonable ground that the accused person is not guilty, can enlarge the accused person on bail, otherwise, there is a bar to enlarge the accused on bail, if he was in possession of contraband, more than commercial quantity.

14. It is relevant to extract Section 37 of NDPS Act.

"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;

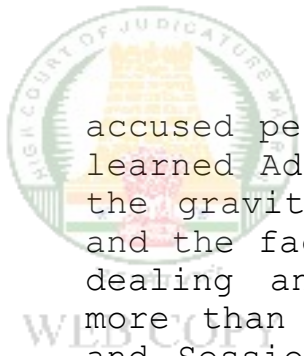
(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless-

(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 (2 of 1974), or any other law for the law being in force on granting of bail."

15. From the materials available on record, it is seen that the respondent has committed a heinous crime against the society. As per Section 37 of NDPS Act, there is a bar for grant of bail to



accused person, who is in possession of commercial quantity. The learned Additional District and Sessions Judge has not considered the gravity of offence and provisions of Section 37 of NDPS Act and the fact that the allegation against the respondent is, he was dealing and making arrangement for transporting contraband for more than commercial quantity. The learned Additional District and Sessions Judge has not considered these aspects and enlarged the respondent on bail on the sole ground that he is suffering from diabetes and he needs treatment and personal care by his wife. The Hon'ble Apex Court in a number of judgments, especially in the judgments reported in 2012 (12) SCC 180 [Kanwar Singh Meena Vs. State of Rajasthan and another] and 2015 Cri. L.J. 4862 [Neeru Yadav Vs. State of Uttar Pradesh and another] has held that the order enlarging the accused person on bail or granting anticipatory bail without considering the serious allegation made against the accused person and without considering as to whether any *prima facie* case has been made out and quantum of punishment that may be imposed, then the said order is illegal.

16. The ratio in the above judgments and the judgments relied on by the learned Special Public Prosecutor appearing for the petitioner is squarely applicable to the facts of the present case. Hence, the order of the learned Additional District and Sessions Judge enlarging the respondent on bail, is illegal and non-est in law. Therefore, this criminal original petition is liable to be allowed. Accordingly, the criminal original petition is allowed and the bail granted to the respondent by the learned Additional District and Sessions Judge (Special Court for E.C. and NDPS Act cases), Pudukottai, in Cr.M.P.No.1882 of 2016, vide order dated 05.08.2016, is cancelled. Consequently, Crl.M.P.(MD)No.6652 of 2016 is closed.

Sd/-

Assistant Registrar(CSII)

/True Copy/

Sub-Assistant Registrar

To

The Additional District and Sessions Judge

(Special Court for E.C. and NDPS Act cases), Pudukottai,

+One cc to Mr.C.Arul Vadivel @ Sekar, Advocate, SR.No.46585

+One cc to Mr.M.S.Jeyakarthick, Advocate, SR.No.47066

smn2

RL/4C/18P/SK/SKN/26/8/2016

Cr1.O.P.(MD)No.14252 of 2016

23.08.2016