

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No. 3010 OF 2017

ORDER:

This Criminal Petition under Sections 437 and 439 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), is filed to enlarge the petitioners 1 to 3/A-1, A-2 and A-4 on bail in Crime No.25 of 2017 of Chintoor Police Station, East Godavari District for the offence under Section 8 (c) r/w 20(b)(ii)(c) of N.D.P.S. Act and they are in judicial custody since 07.03.2017.

The petitioners are coolies and driver, engaged by A-3 and A-5 who are the main transporters of ganja and these petitioners along with other accused were found transporting ganja on 07.03.2017 at about 2 p.m. and on receipt of information by Inspector of Police, Chintoor, secured the presence of Tahsildar, Chintoor, the raid party along with mediators proceeded to the scene of occurrence and found the accused transporting ganja of 300 kgs. and on verification of the vehicle bearing No.AP-16-TY-1193 found ganja which is commercial quantity and after following necessary procedure prescribed under the Act, the Inspector of Police took samples, seized the contraband, arrested the accused and produced under the cover of mediators report in the presence of mediators and on the strength of the same, the above crime was registered.

The main contention of the learned counsel for the petitioners is that the respondents did not follow the procedure under Sections 42(1) and 50 of the N.D.P.S. Act.

Section 42(1) of the Act reads as under:

42. Power of entry, search, seizure and arrest without warrant or authorisation.—

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the

concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) 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.]

Section 50 of the Act reads as under:

50. Conditions under which search of persons shall be conducted.—

(1) When any officer duly authorised under section 42 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.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female. 1[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate superior officer.

Here, the information was received by the Inspector of Police and secured presence of the mediators and proceeded to the scene of offence, conducted search, and these petitioners are authorized by G.O.Ms.No.184, Revenue (E) dt.14.02.1986 which empowered the officers of the State Excise Department, including Enforcement Wing, not below the rank of Sub Inspectors and all the officers of the Police Department not below the rank of Sub Inspector to exercise the powers provided under Section 42(1) of the NDPS Act. Therefore, the Circle

Inspector and Sub Inspector were authorized to conduct search, seizure under Sections 41(2) & 42(1) and the legality and validity of the G.Os cannot be decided, in view of the limited scope of the enquiry in the petitions filed under Section 439 Cr.P.C.

Thus, the Inspector of Police being an officer, above the rank of Sub-Inspector of Police is competent to exercise power under Section 42(1) of the Act. Therefore, on this ground of alleged violation of Section 42(1) of the Act, the petitioners cannot be enlarged on bail.

The other contention raised before this Court is that non-compliance of Section 50 which is mandatory in nature and the procedure prescribed under Section 50 is to be strictly adhered in view of heavy penalties prescribed under the Act. Even assuming for a moment, Section 50 is not complied, the said non-compliance would not vitiate for the reason that the person of the accused was not searched by the police and no contraband was seized from the possession of the person of the accused, they searched the vehicle and seized the contraband from the vehicle. Further, the accused are alleged to have stated that they want to be searched by the Gazetted officer. The Apex Court in *State of Rajasthan Vs. Paramanand and another*¹ categorically held while dealing with similar situation where the investigating officer gave an option of being searched either before the nearest Gazetted officer or nearest Magistrate

¹ 2014 (5) SCC 345

or before PW5-Superintendent of Police who was a part of raiding party, held that “the said option of being searched before PW10 therein i.e., Sub Inspector is incorrect as Section 50(1) of NDPS Act does not provide for it and accordingly, the very search frustrated the provisions of Section 50(1) of NDPS Act and the same gets vitiated”. In the instant case, a reading of the panchanama would show that an option was given to the accused as to whether they like to be searched by the police party or whether they like to be searched by a Gazetted officer. Giving an option to the accused of being searched by the police itself gets entire process vitiated in view of the judgment of the Apex Court referred to above. Apart from that, the option given to the accused does not anywhere indicate whether the accused were asked as to whether they like to be searched before the Magistrate, since Section 50 of NDPS Act contemplates that an option to be given to the accused of being searched either before the Gazetted officer or before the Magistrate only. The same also vitiates the proceeding, since Section 50 of NDPS Act was not scrupulously followed, *prima facie*, it appears to be a case where the entire search is illegal and improper. Apart from that, option given to the accused under Section 50 of the NDPS Act was by way of oral communication and it was a common communication not given individually to each of the accused, which again is violative of Section 50 of NDPS Act, as held by the Apex Court in *State of Rajasthan Vs. Paramanand and another(supra)* and thereby Section 50 is not mandatory in

view of the Apex Court Judgment, as no search of person of accused was conducted.

But, in the other judgment, in *THE STATE OF PUNJAB v. BALDEV SINGH*², the Apex Court held that if any violation of Section 50 took place, even then it would not vitiate the entire proceedings but based on such illegal search, such accused cannot be found guilty.

But, at this stage, it is difficult to conclude that the Inspector Police violated Section 50 of the Act even assuming for a moment that the person of the accused was searched.

Section 37 of NDPS Act created an interdict to grant bail for an offence punishable under various provisions of the Act, where a commercial quantity of contraband is involved. According to Section 37(1)(b) of NDPS Act, unless the Court records its satisfaction that the petitioner did commit no offence and that he would not commit no offence again while on bail under Section 439 Cr.P.C in serious offences like the offence punishable under Sections 41(2) & 42(2).

In *State of Madhya Pradesh v. Kajad*³ the Supreme Court held that the purpose for which the NDPS Act was enacted and the menace of drug trafficking which intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the Court that a person accused of an offence, punishable for a term of imprisonment of five

² JT 1999 (4) SC 595

³ AIR 2001 SC 3317

years or more, shall generally be not released on bail. Negation of bail is the rule and its grant is an exception under sub clause (ii) of clause (b) of Section 37(1). For granting bail, the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail.

In *Maktool Singh v. State of Punjab*⁴ Supreme Court held that for all the offences punishable more than five years, the Courts power to release the accused on bail during the period before conviction has been thus drastically curtailed by providing that if the Public Prosecutor opposes the bail application, no accused shall be released on bail, unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty for such offences.

In *Customs, New Delhi v. Ahmadalieva Nodira*⁵ held that the Court has to keep in mind two conditions i.e, 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 and the expression reasonable grounds means something more than prima facie grounds and it contemplates substantial probable causes for believing that the

⁴ (1999) 3 SCC 321

⁵ 2004 (1) JCC 662

accused is not guilty of the alleged offences.

In view of the law declared by the Apex Court in the judgments referred supra, Section 37 of NDPS Act, unless the Court concludes that the accused is not guilty based on reasonable ground and that there is no possibility of committing similar offences while on bail, where the offences are punishable for more than five years, he shall not be enlarged on bail.

Even according to Section 37 of NDPS Act, the general provisions regarding grant of bail under Section 437, 438 & 439 are applicable. Besides the application of general provisions of Cr.P.C, certain safeguards are provided in the Act to grant bail, while placing reversal burden in view of Section 35 & 54 of NDPS Act. Therefore, the general principles governing bails under Section 437, 438 & 439 are equally applicable to the bail applications filed for the offences punishable under Sections 8(C) read with Section 20(b)(ii)(C) of NDPS Act for enlarging the accused in the above crimes under NDPS Act, where commercial quantity is involved.

In the present case, the offences allegedly committed by the petitioners are serious in nature and it is difficult for me to conclude that these petitioners did not commit any offence and they will not commit such offence while on bail. Therefore, I find no ground to grant bail to the petitioners in view of the law declared by the Apex Court in the judgment referred supra. Hence, the petition is liable to be dismissed.

In the result, the criminal petition is dismissed.

Consequently, miscellaneous applications pending if any,
shall also stand dismissed.

JUSTICE M. SATYANARAYANA MURTHY

Date:24.04.2017
Ccm



THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY



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