

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.3123 OF 2017

ORDER:

This criminal petition is filed under Section 437 & 439 of Cr.P.C to enlarge the petitioner/A-2 on bail, in NCB F.No.48/1/1/2017/NCB/HYD/SUB-ZONE dated 07.03.2017 for the offences punishable under Sections 22(c), 28 & 29 of NDPS Act, and that the petitioner/accused is in judicial custody since 07.03.2017.

The case of the prosecution is that, credible information was received by the Intelligence Officer, Narcotics Control Bureau, Sub-Zone, Hyderabad, that one N. Venkateswara Rao/A-1 is in the process of synthesizing and selling around 20 kgs Alprazolam. The Intelligence Officer noticed that A-1 was in talks with A-2 and A-3 towards selling Alprazolam for Rs.24,000/- per kg and this was supposed to happen on the road that lead to Rajendranagar to Hyderabad from the end of Attappar, near the Poultry Experimental Station at around 13:30 hrs on 07.03.2017. In the above said place, the Intelligence Officer noticed that the three persons i.e. A-1 to A-3 were conversing with each other and observed A-1 handing over a white gunny bag to A-2 & A-3. Upon enquiry, the three persons revealed their identities to the Narcotics Control Bureau Team. On such disclosure, the Narcotics Team had conducted search under the cover of Panchanama. During enquiry, A-1 replied that he was involved in manufacture of Alprazolam and in fact, he had already made, stored and transported by bus a large cache of the said chemical upwards of 20 kgs and that he

had handed over to A-2 & A-3, who readily agreed with the statement made by A-1 that the gunny bag in their hands contained Alprazolam. A-1 opened the white gunny bag to reveal within it the presence of whitish-yellow colour powder. Further, A-1 stated that he was the sole owner of the chemical in question, but was not in possession of any grant of permission of licence from any Government Agency towards manufacturing and possessing such a chemical. Thereafter, the team of officials of respondent seized the contraband Alprazolam from the possession of A-1 to A-3 jointly and drawn samples from the contraband, and seized the remaining contraband, arrested A-1 to A-3 under the cover of Panchanama in the presence of mediators after following necessary procedures. On weighing, it was found that the weight of the contraband was 22.248 kgs.

On the strength of Panchanama, crime was registered against the petitioner herein/A-2 and the other two petitioners A-1 & A-3 for the offences punishable under Section 8(c) read with Sections 22(3), 28, 29 & 31 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act').

The main contention of the petitioner is that, the officials did not follow the mandatory requirement prescribed under Section 41 and so also Section 50 of NDPS Act and that the question of possessing Alprazolam by the petitioner is not a ground to enrope him with the offence, since nothing was seized from the possession of the petitioner/A-2 and thereby, there is reasonable ground to release the petitioner on bail and prayed to enlarge the petitioner on bail.

During hearing, learned counsel for the petitioner mainly drawn the attention of this Court to the procedure to be followed by the officials in search and seizure of the contraband from the possession of the accused, highlighting non-compliance of Sections 50 & 41 of NDPS Act and drawn the attention of this Court to the judgments of the Supreme Court in **Gurjant Singh @ Janta v. State of Punjab**¹, **State of Rajasthan v. Parmanand and another**² and judgment of Orissa High Court in **Bidyadhar Dolai v. The State**³. On the strength of the principles laid down in the above three judgments, learned counsel for the petitioner contained that non-compliance of Section 50 of NDPS Act vitiates the entire proceedings and thereby, the petitioner is entitled for grant of bail, as there is a reasonable ground to believe that the petitioner did commit no offence and prayed to enlarge the petitioner on bail.

The respondent/learned Public Prosecutor filed counter affidavit, denying material allegations, while contending that they followed procedure prescribed under Sections 41 & 50 of NDPS Act and the confession made by A-1 is relevant by following the procedure prescribed under Section 67 of NDPS Act is sufficient to conclude that this petitioner is also one of the persons who is involved in manufacture and sale of Narcotic Drugs and Psychotropic Substances which would attract Section 8(c) read with Sections 22(3), 28, 29 & 31 of NDPS Act. Thereby, the petitioner is not entitled to be enlarged on bail, as the offences committed by the petitioner are grave and serious offences against

¹ 2014 (1) ALD (Crl.) 363 (SC)

² 2014 (1) ALD (Crl.) 909 (SC)

³ 1993 CRI.L.J. 260

the society at large, in view of the bar under Section 37 of NDPS Act and also laid down by the Apex Court in various judgments. The learned Public Prosecutor also drawn attention of this Court to the judgment of the Supreme Court in **Union of India (UOI) v. Rattan Mallik @ Habul⁴, Kanhaiyalal v. Union of India⁵, State of Himachal Pradesh v. Pawan Kumar⁶**, based on the law declared by the Apex Court, learned Public Prosecutor sought for dismissal of the bail.

As seen from the seizure panchanama, A-1 was found discussing something with A-2 & A-3 and while he was handing over the white gunny bag, the officials of the Narcotics Team along with mediators on suspicion, apprehended them and on interrogation, they disclosed their identity. Further, A-1 opened the white gunny bag to reveal within it the presence of Alprazolam which is whitish-yellow colour powder. Thus, opening of bag by A-1 would go to show that the bag contained Alprazome, a Narcotic & Psychotropic Substance, it is contended that nothing was seized or recovered from the possession of A-2 herein, thereby, the petitioner is not liable for the offences. No doubt, as seen from the material on record, the accused A-1 to A-3 were discussing something and when A-1 was handing over the white gunny bag containing Alprazone, whitish-yellow colour powder, the police apprehended them on suspicion, while the petitioner/A-2 along with A-3 was settling the transaction with A-1 and after settling the transaction, A-1 handed over the bag containing Alprazome. Thus, A-1, A-2 & A-3 were found trading in sale and purchase of Narcotic Drugs or

⁴ 2009 (1) ALD (Cri) 684

⁵ AIR 2008 SC 1044

⁶ AIR 2005 SC 2265

Psychotropic Substances without any license or authorization from the authorities concerned, competent to issue license, thereby, such trade of sale and purchase of Narcotic Drugs and Psychotropic Substances is clear violation of Section 8(c) of NDPS Act and thereby, it would attract the offences punishable under Section 8(c) read with Sections 22(3), 28, 29 & 31 of NDPS Act.

The other contention raised before this Court is that Section 41 of NDPS Act was not complied, since, no warrant was obtained and information was not noted. But, the learned Public Prosecutor for the respondent refuted the contention and contended that the language used in Sections 41(2) & 42(1) is that there must be a special or general authorization by the State or Central Government to conduct search, seizure and arrest etc. The State Government issued G.O.Ms.No.183, Revenue (E) 14.02.1986 empowering 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 41(2) of the NDPS Act. Similarly, the State Government issued G.O.Ms.No.184, Revenue (E) 14.02.1986 empowering 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.

In view of the above two G.Os, the State Government authorized the officials of Intelligence Department and thereby, they are competent to conduct search and seizure without obtaining warrant and authorization from any Magistrate having

jurisdiction in the area. Therefore, there is absolutely no *prima facie* violation of Sections 41 & 42 of NDPS Act.

Section 41 of NDPS Act deals with Power to issue warrant and authorization. Section 41(2) permits any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the paramilitary forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer 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 personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence 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 place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such person or search a building, conveyance or place. Thus, a Gazetted Officer of the rank referred above who is superior in rank of peon, sepoy or constable is authorized by the

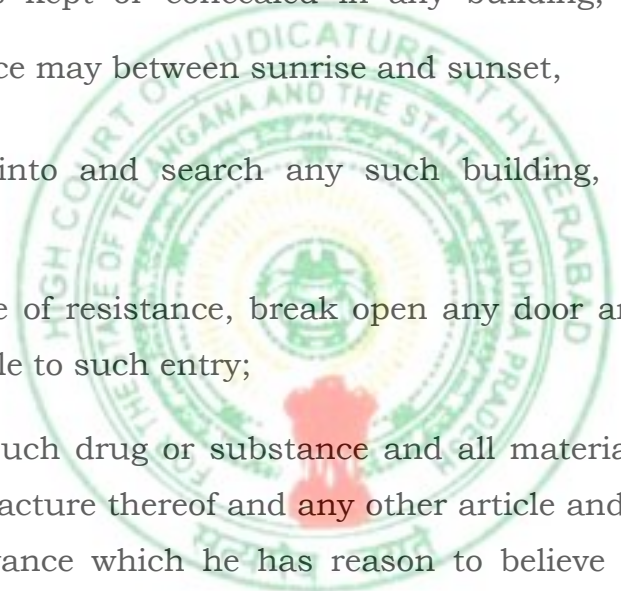
State or Central Government may search, seize and arrest on receipt of any information regarding commission of offence under the Act. Thus, clause 19 seeks to substitute sections 41 to 43 of the principal Act to extend powers of the Central Government and State Governments to authorize subordinate officers for search, seizure, etc., and to simplify the procedure for seizure, detention and search of persons. On strict construction of Subsection (2) of Section 41, any Gazetted Officer of the department referred therein, who is authorized by the State Government is empowered in this behalf by general or special order by the Central Government, upon his personal knowledge or on information given by any person and taken in writing, conduct search, seizure etc. Here, the contention of the learned counsel for the petitioners in all the criminal petitions is that the petitioners did not take the information they received in writing. But, question of taking the information in writing would arise only when the Gazetted Officer is in the station or in the office concerned, from any third party either by telephone or personally and make necessary entry in the General Diary. Thus, safeguard is provided only to avoid unnecessary implication of various persons as accused for the serious offences punishable under the provisions of NDPS Act. It is only a check on the power of the police to ensure free and fair search, seizure and arrest under the provisions of the Act, in view of the heavy penalties prescribed for the offences punishable under this Act.

No doubt, there is some space between two lines in the specific endorsements, but still, that is not a ground at this stage

whether the prosecution complied with Sections 41(2) & 42(2) at this stage and whether such compliance was real or not is to be decided only based on evidence. Therefore, the compliance of Sections 41(2) & 42(2), I find *prima facie* material to establish a substantial compliance of Sections 41(2) & 42(2), in view of the Constitution Bench judgment in **Karnail Singh v. State of Haryana**⁹ case. Moreover, in all these cases, search, seizure and arrest was effected by the Gazetted Officer i.e. Circle Inspector of Police. Therefore, in all these matters, the question of non compliance of Sections 41(2) & 42(2) does not arise, in view of the ratio laid down in **G. Srinivas Goud v. State of A.P.**⁷ case.

Similarly, Section 42(2) deals with power of entry, search, seizure and arrest without warrant or authorization. Section 42(2) is in the nature of exception to Section 41 and Section 42(2) mandates 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. Section 42 permits any officer who is 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 paramilitary 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 V-A of NDPS 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:

But, proviso to Subsection (1) of Section 42 thereon spelt out that if such officer has reason to believe that a search warrant or authorization 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. Thus, provisio to Section 41 enables the officer referred in Section 41(1) to conduct search, seizure and arrest on his belief. The requirement of compliance under Section 42 is also in the nature of a safeguard to avoid concealment in evidence or facilitating for escape of the offender, who committed an offence under the provisions of the Act and at the same time, it is a check against the power of police officials to conduct such search only to avoid false implications of any person in the serious crimes.

In the judgment of the Constitutional Bench of the Supreme Court in **Karnail Singh**⁹, some relaxation can be given in view of the provisio of Section 41(1) and such relaxation is only in cases where there is a possibility of concealment of evidence or escaping from the place who allegedly committed an offence and punishable under the provisions of NDPS Act, the Constitutional Bench is of the view that the balance must be struck between need of law and enforcement of such law on one hand and protection of citizens from oppression and injustice on other. Court while constructing such provisions strictly should not interpret them literally so as to render their compliance impossible. The Apex Court further observed that, in view of changed circumstances in technology, if statutory provisions under Sections 42(1) & 42(2) of writing down information is interpreted as a mandatory provision, it will disable haste of an emergency situation and may turn out to be in vain

with regard to criminal wrongdoers/offenders as a major ground for acquittal. These provisions should be taken as discretionary measure which should check the misuse of Act rather than providing an escape to hardened drug-peddlers. Here, the petitioners are involved in different crimes and even if such law declared by the Constitutional Bench is applied to the present facts of the case, it is only a discretionary measure to have a check on the misuse of the powers of the officials under the Act, which provides a way to escape to hardened drug-peddlers or drug-traders.

Moreover, in **G. Srinivas Goud**⁷ case, while dealing with Section 42(2) of NDPS Act, the Apex Court while dealing with Section 42(2) made it clear that when a Gazetted officer conducted search and seizure, Section 42 is not required to be complied with, as the said requirement is confined to cases where the action is taken by an officer not below the rank of Gazetted Officer. In the facts of **G. Srinivas Goud**⁷ case, violation of Section 42(2) was questioned though search and seizure was conducted by the Gazetted Officer, i.e Circle Inspector. In paragraphs 9 & 10 of the judgment, the Apex Court made it clear that the officers of gazetted rank conducted search, seizure and arrest. Section 42(2) is not required to comply with the said requirements, as the said requirement is confined to cases where the action is taken by officers below the rank of gazetted officers without authorization under Section 41(2). Therefore, there is a need for reporting. For this reason, Section 41 does not contain any requirement. The need for reporting under Section 42(2) arises where an officer takes

down any information in writing in terms of Sections 41(1) or 42(2), requiring him to record grounds for his belief under the proviso thereto, to inform the immediate official superior under Section 42(2) as the information has to be confined in the cases where the action has to be taken by the Gazetted Officer.

The judgment in **G. Srinivas Goud**⁷ case is of the year 2005 i.e. subsequent to **Sarija Band alias Janarthani Alias Janani v. State Through Inspector of Police**⁵ case. If the principle laid down in **G. Srinivas Goud**⁷ case is applied to the present facts of the case, when search was conducted by an officer of Gazetted rank, compliance of Section 42(2) cannot be insisted. Search, seizure and arrest was conducted by the Gazetted Officer i.e. Circle Inspector of Police and therefore, non-compliance of procedure prescribed under Section 42(2) is not a ground to grant bail to the petitioners.

So far as compliance of Section 41(2) is concerned, I have mentioned in the table, details of compliance. However, the said compliance is questioned before this Court during argument by the learned counsel for the petitioners making certain allegations that the compliance is an interpolation in the registers maintained i.e. General Diary in the concerned office. But, such enquiry cannot be undertaken by this Court while deciding the application under Section 439 of Cr.P.C and at best, this Court is required to record its satisfaction that there is no prima facie material to conclude that the petitioners did commit offence and that there is no possibility of their interference with further investigation and

threat to witnesses in the event of releasing them on bail and meticulous examinations of the evidence giving an impression that the Court has pre-judged cannot be taken up. Basing on the material produced before this Court, as shown in Table-II, the prosecution complied with the procedure contemplated under Sections 41(1) & 42(2) of NDPS Act, though with margin of few hours, in view of the urgency by exercising power as per proviso to Section 42(1) of the Act. In any view of the matter, the safeguards are provided in the Act itself by way of proviso to Section 42(1) and the intention of the Legislature is to provide such exception by way of proviso to prevent drug menace, which is increasing day by day in the present days, despite heavy penalties prescribed in the Act. On account of the alleged procedural lapses, most of the accused are being allowed to scout free on account of technical flaws or failure of the Investigating Agency to take necessary measures to comply with the procedural requirements under the Act. Despite ending several matters in acquittal, the concerned departments are not taking appropriate steps to enlighten the officials about requirements to conduct search, seizure and arrest. If they are enlightened, attached responsibility to individual officials for failure of prosecution on account of violation of such procedure for their failure, such lapses would not recur or repeat.

In **Sarija Band alias Janarthani Alias Janani v. State Through Inspector of Police**⁷, where the Apex Court discussed about the requirement of compliance of Section 42 of NDPS Act and its relevancy at the time of considering of application at the time of granting bail. The Apex Court held in paragraphs 7 & 8 of

⁷ 2004 12 SCC 266

the judgment as follows:

“7. It is pertinent to note that in the bail application the appellants, it was alleged, that there was serious violation of Section 42 of the NDPS Act. In the impugned order nothing is stated about the alleged violation of Section 42, and it is observed that it was not necessary to consider such violation at this stage. The compliance of Section 42 is mandatory and that is a relevant fact which should have engaged attention of the Court while considering the bail application. In the aforesaid circumstances having regard to the special facts of the case, we direct that the appellants 1 and 2 be released on bail on executing a bail bond for Rs. 50,000 each with two solvent sureties for the like amount to the satisfaction of the Special Judge, EC/NDPS, Madurai on the following conditions:

- (1) The counsel for the appellants requested that the appellants may be allowed to stay outside the State of Tamil Nadu. We are not inclined to grant such a prayer as the respondents police authorities would not be able to ensure the timely presence of the appellants in Court;
- (2) The appellants shall not leave jurisdiction of the District Court, Madurai and shall report before the Circle Inspector, Karuppayurani Police Station once in two weeks for 3 months, thereafter, once in a month.
- (3) The appellants shall surrender their pass-port before the Court, if not already seized by the police.”

The second ground raised before this Court is that, the respondent violated Section 50 of NDPS Act. Section 50(5) mandates that when an officer duly authorised under section 42 as 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 Cr.P.C. and failure to follow the said procedure would vitiate the entire

proceedings. The search under Section 50 of NDPS Act applies only to personal search of the accused but not to search of a bag or vehicles etc. Therefore, when the bag was searched and found containing whitish-yellow colour chemical, it does not amount to personal search of the accused. In such a case, the failure to give option under Section 50 would not vitiate the proceedings.

The learned Special Public Prosecutor has drawn attention of this Court to **Parmanand²** case where the Supreme Court highlighted the requirement of giving option under Section 50(1) and held as follows:

“In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in *Paramjit Singh* and the Bombay High Court in *Dharamveer Lekhrum Sharma* meets with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.”

The same view was also expressed by the Apex Court in **Gurjant Singh @ Janta v. State of Punjab¹**.

In view of the law declared by the Apex court in the above two judgments, compliance of Section 50(1) of NDPS Act applies only to the person who has to be searched. Thus, it means, it applies only for the personal search of the accused, not for the search of the bag. But here, though it is contended that an option was given for conducting search, since no search of a person was conducted, the alleged search of conduct would not vitiate the proceedings. As seen from the panchanama, the respondent also seized and searched other items.

The respondent/Narcotics Team has also recovered the following items from A-1 to A-3 during panchanama.

(A) GAVVALA VIJAY KUMAR:

- 1) Copy of Aadhaar Card in the name of Gavvala Vijay Kumar with number – 4127 5872 0097.
- 2) Indian currency amounting to INR 50 (50×1, 10×1).
- 3) Indian Union Driving License in the name of G. Vijay Kumar with number – DLF AP 123110122006.
- 4) Andhra Bank Visa Electron International Debit Card with number – 4688 1719 9100 7238.
- 5) Andhra Bank Platinum Visa Card in the name of Vijay Kumar with number – 4373 7820 3585 3005.
- 6) SBI Debit Card in the name of Gavvala Narayana with number – 5044 3520 1000 0287 991.
- 7) SBI Maestro Debit Card in the name of Gavvala Vijay with number – 5044352010000195632.
- 8) Andhra Bank Rupay Debit Card in the name of Gavvala Laxmi with number – 6079101991001966.
- 9) SBI Debit Rupay Debit Card in the name of APGVB Customer with number – 6071989001903082.
- 10) One Gionee M3 Dual SIM mobile phone with IMEI numbers – M_IMEI:866924020124602 & S_IMEI:866924020624601 along with two IDEA SIMS with numbers – 89910765901425725973 & 89910735101419223724.

(B) MOHAMMED DASTHAGEER:

- (1) Andhra Bank Visa Electron Debit Card with number – 4688171431049642.
- (2) Axis Bank Visa Prime Card with number – 4505020007820749.
- (3) One Samsung 4G Duos mobile phone with IMEI numbers – 352840/07/857399/8 352841/07/857399/6 along with two Airtel SIMs with numbers – 89914903040495817009 89914903040475169926.

md. Goni
03.03.2017

Appd. 05.03.2017

Siraj K. Tanyab
05.03.2017



On personal search, the petitioners produced themselves produced the above items before the authorities. The personal search of the three accused was conducted. But, the above items does not relate to any commission of offence. However, in view of the judgment of the Apex Court in **Baldev Singh v. State of Punjab**, the issue of conviction based on items recovered from the personal search of the accused is illegal and conviction cannot be maintained. But, in the present case, the case of the prosecution is based on the panchanama with regard to seizure of Alprazolam from the possession of A-1 to A-3 while they were involved in sale and purchase of the Narcotic Substance. If the prosecution totally placed reliance on those documents, the Court cannot rely on those documents and if the Court found that there is other material to conclude that the petitioner herein along with others

committed offence, the Court can record its conviction for the said offences.

Learned counsel for the petitioner also placed reliance on **Bidyadhar Dolai**³ where the Orissa High Court granted bail for non-compliance of Sections 50, 52 and 57. But, this judgment is not binding on this Court, except for consideration of its persuasive value. Therefore, on the strength of the principle laid down in the above judgment, it is difficult for me to grant bail to the petitioner herein/A-2. The judgment of the Apex Court in **Pawan Kumar**⁶ clarified that search of a person under Section 50 of NDPS Act, as against a search of any bag, briefcase or any article or container etc., which is being carried by him, 'person' as under Section 50 *ibid*, having regard to the scheme of the Act and the context in which it has been used in the Section, it naturally means a human being or a living individual unit and not an artificial person. Further, a bag, briefcase or any such article or container, etc., can, under no circumstances, be treated as body of a human being and they are given a separate name and are identifiable as such. Therefore, non-compliance of Section 50 of NDPS Act would not vitiate any search. If this principle is laid down, coupled with **Parmanand**² case, when no search of a person is conducted, the proceedings would not vitiate entire case. Hence, on the ground of non-compliance of Section 50, the petitioner cannot be enlarged on bail.

The last contention raised by before this Court is that, except the contention of A-1 that there is no direct material to show that the petitioner is connected to this offence, thereby, confession made before a Police Officer is inadmissible in evidence

and it is not a substantive piece of evidence, in view of Section 24 of Indian Evidence Act. Therefore, the petitioner is entitled to be enlarged on bail.

The learned Standing Counsel for the respondent contended that, in view of Section 67 of NDPS Act, when a confession is recorded, the Court can record confession based on such contention and based reliance on **Kanhaiyalal**⁵, where the Apex Court by following the judgment in **Raj Kumar Karwal v. Union of India and ors.**⁸ this Court held that officers of the Department of Revenue Intelligence who have been vested with powers of an Officer-in-Charge of a police station under Section 53 of the NDPS Act, 1985, are not 'police officers' within the meaning of Section 25 of the Evidence Act, thereby, it is clear that a statement made under Section 67 of NDPS Act is not the same as a statement made under Section 161 of the Code unless made under threat or coercion. Thus, statement made under Section 67 of the NDPS Act can be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act. Therefore, when there is nothing on record to suggest that the appellant was compelled under threat to make the statement after he had been placed under arrest which renders such statement inadmissible and not capable of being relied upon in order to convict him. I find that when there is evidence, the Court can rely on such contention recorded under Section 67 of NDPS Act recorded by an officer of Narcotics Cell, who is not a police officer, unless it is shown that it was obtained under threat or duress,

⁸ 1991 CriLJ 97

since Sections 24 & 27 of the Evidence Act have no application to the cases under NDPS Act.

Section 37 I.P.C deals with cooperation by doing one of several acts constituting an offence and it is defined as when an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

In **State of Madhya Pradesh v. Kajad**⁹ 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 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**¹⁰ 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

⁹ AIR 2001 SC 3317

¹⁰ (1999) 3 SCC 321

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**¹¹ 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 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 be enlarged on bail.

The normal principle is that, unless the Court comes to a conclusion that there are no reasonable grounds that the petitioner/accused did commit no offence and that there is no apprehension of interference in case the petitioner is enlarged on bail, the Court can enlarge the accused on bail.

¹¹ 2004 (1) JCC 662

While dealing with an application for bail, there is a need to indicate in the order, reasons for *prima facie* concluding why bail was being granted, particularly where an accused was charged of having committed a serious offence. It is necessary for the Courts dealing with application for bail to consider among other circumstances, the following factors also while granting bail, they are:

- 1) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
- 2) Reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;
- 3) *Prima facie* satisfaction of the Court in support of the charge.

Section 67 of NDPS Act deals with power to call for information, etc. and it is defined as 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 provisions 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.

In view of the law declared by the Apex Court, the confessional statement recorded under Section 67 of NDPS Act is admissible and it can be based to record conviction, if, the accused failed to establish that it was obtained on coercion or duress or under threat, and that the quantity involved in this matter is commercial quantity and in view of the bar, as there is no material to show that the petitioner did commit no offence, this Court cannot enlarge the petitioner on bail.

In the result, the criminal petition is dismissed.

Consequently, miscellaneous petitions, if any, pending in this petition, shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:28.04.2017

SP

