

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.795 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 petitioner/Accused on bail in Crime No.145 of 2016 of Balanagar Excise Police Station, who allegedly committed the offences punishable under Sections 8(c) read with 22 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act'). He is in judicial custody since 11.12.2016.

The case of the prosecution, in brief, is that on 11.12.2016 at about 6.15 a.m. the Prohibition & Excise Inspector and staff, Balanagar, conducted route search on the road end of Erragadda to Moosapet flyover bridge, Moosapet. During search, found a Honda Activa bearing No.TS-07-TU-5169 coming towards Moosapet found one plastic bag containing 41.650 kgs of dry ganja, the police seized same and lifted the samples after following necessary procedure.

The main contention of the petitioner is that the investigating agency did not comply Section 42(2) of the NDPS Act and Section 42(2) of the NDPS Act which mandates that the officer who conducts search has to give information about the search and seizure to the superior officer within 72 hours.

The search and seizure was conducted by the Inspector of Prohibition & Excise, Balanagar, who is not an officer gazette rank. In **G. Srinivas Goud v. State of A.P.**¹ the Apex Court held that when a search was conducted by an officer of gazette rank, the court cannot insist the compliance of Section 42(2) of the NDPS Act and hence, in

¹ 2005(8) scc 183

view of the judgment of the Apex Court, non compliance of section 42(2) of the NDPS Act is not a ground to enlarge the petitioner on bail.

The other contention raised by the counsel for the petitioner before this court is that investigating agency did not comply Section 50 of the NDPS Act.

Section 50 of the NDPS Act is required to be complied only when a search of a person was conducted and seizure of contraband from possession of the person. But here a plastic bag containing 41.650 kgs., of dry ganja was found in the Honda Activa bearing No.TS 07 TU 5169 and thus for search of Honda Activa, compliance of Section 50 of the NDPS Act is not required. Therefore, non compliance of Section 50 of the NDPS Act would not vitiate the entire proceedings.

In any view of the matter, the total involvement of the ganja is 41.650 kgs., which is a commercial quantity as per the Schedule under the NDPS Act. Time and again, the Apex Court reminded all the courts that for grant of bail, the court shall satisfy that there is a reasonable ground to conclude that the petitioner did commit no offence and that the petitioner would not commit identical offences, while on bail. In compliance of Section 37 of the NDPS Act, without recording such conclusion, the court cannot grant bail in view of Section 37(1) of the NDPS Act. Here the total quantum involved in the crime is a commercial quantity and unless the court records its satisfaction regarding the above two requirements, the petitioner cannot be enlarged on bail.

In **State of Madhya Pradesh v. Kajad**² the Apex Court specifically held that the purpose for which the NDPS Act was enacted and the menace of drug trafficking which intends to curtail is evident

² AIR 2001 SC 3317

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 and exception under sub clause (ii) of clause (b) of Section 37(1) of the NDPS Act. For granting the 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. It is further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 of the NDPS Act are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for. Thus, in view of the principle laid down by the Apex Court in the Judgment referred to supra, the court is bound to record its satisfaction that the petitioner did not commit any offence, *prima facie*, to grant bail under Sections 437 and 439 of Cr.P.C. Thus, recording the satisfaction is *sine qua non* to grant bail in view of interdict under Section 37 of the NDPS Act.

According to Section 8 (c) of the NDPS Act, there is a prohibition of certain operations and no person shall cultivate, produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-state, export inter-state, import into India, export from India or transship any narcotic drug or psychotropic substance. Therefore, transporting ganja in a Honda Activa is a clear violation of Section 8(c) of the NDPS Act.

It is the specific contention of the learned counsel for the petitioner that the petitioner has no knowledge about the ganja being transported in the Honda Activa. But this contention cannot be accepted in view of Sections 35 and 54 of the NDPS Act. Section 35 of the NDPS Act give rise to a presumption of culpable mental state in any prosecution for an offence under the NDPS Act, which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state, but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Therefore, in view of rebuttable presumption under Section 35 of the NDPS Act, until it is proved that the petitioner had no mental state with respect to possession of ganja, the petitioner is deemed to have knowledge and motive regarding transportation of Ganja. Section 54 of the NDPS Act deals with presumption from possession of illicit articles. It shows that in trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of any narcotic drug or psychotropic substance or controlled substance; any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated; any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or, any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been

manufactured, for the possession of which he fails to account satisfactorily.

Thus, presumptions under Sections 35 and 54 of the NDPS Act are rebuttable presumptions, the court shall presume that he has knowledge about the transportation of ganja. At this stage, based on the presumption under Sections 35 and 54 of the NDPS Act, the court cannot readily *prima facie* conclude that the material against the petitioner for the offence punishable under Sections 8(c) read with 20(b) (ii)(c) of the NDPS Act, since it is a rebuttable presumption and therefore, lack of knowledge or motive etc., is not a ground to enlarge the petitioner on bail

Therefore, in view of the principle laid down by the Apex Court in **State of Madhya Pradesh v. Kajad** referred to supra, the petitioner cannot be enlarged on bail, as I find *prima facie* material to conclude that he committed the offence punishable under Section 8(c) read with 22(c) of the NDPS Act and consequently the criminal petition is liable to be dismissed.

In the result, the criminal petition is dismissed.

M.SATYANARAYANA MURTHY, J

07.02.2017
BV