

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.2288 OF 2017

ORDER:

This Criminal Petition, under Section 438 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), is filed by the petitioners, who are A-7 & A-8 in Crime No.1167 of 2016 of Banjara Hills Police Station, Hyderabad, for the offences punishable under Sections 21(b), 27(a) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act") read with Section 109 of the Indian Penal Code, 1860 (for short, "IPC") seeking a direction against the Station House Officer, Banjara Hills Police Station, Hyderabad, to release the petitioners on bail in the event of their arrest in connection with the above crime, apprehending their arrest.

2. The case of the prosecution, in brief, is that on 25.12.2016, at about 19.45 hours, while the Detective Inspector of Police, Banjara Hills Police Station, was in Police Station, he received credible information about sale of Heroine by four persons namely Zaid Ahmed, Banwar Lal Gupta R/o. Mumbai, Sharukh and Salman, R/o. Hyderabad, in the age group of 25 years. The Detective Inspector of Police went to the Water Coffee Shop/Hookah Centre, situated in the premises bearing No.8-2-584/4/B, Road No.08, Banjara Hills, Hyderabad, and found all the said four persons sitting by the side of the reception counter of the Water Coffee Shop/Hookah Centre and selling narcotic drug substances to the needy customers at the Water Coffee Shop and on conducting search of the said

premises along with two mediators, they found A-1 to A-4 in possession of heroine and the same was seized in the presence of mediators under the cover of panchanama and arrested them. Basing on the strength of the above panchanama, a case was registered by the police against the accused. The petitioners are the Manager and owner of the Water Coffee Shop/Hookah Centre respectively and that the petitioners allegedly harboured and abetted A-1 to A-4 in sale of heroine to the needy customers. Therefore, these petitioners were also roped in the above crime by the police.

3. The contention of the petitioners before this Court is that the petitioners are the Manager and owner of the Water Coffee Shop/Hookah Centre respectively and that they were not found in the hotel premises by the time of the incident. However, the petitioners were also roped in the above crime by taking aid of Section 109 IPC and the allegations in the mediators report does not disclose that these petitioners harboured A-1 to A-4 and that they were just sitting by the side of the reception counter of the Water Coffee Shop/Hookah Centre. Therefore, the petitioners cannot be made responsible even for the offences punishable under Sections 21(b) & 27(a) of the NDPS Act and till today, no memo was filed altering Section of Law from Section 109 IPC to Section 29 of the NDPS Act and in the absence of any such alteration memo, the petitioners cannot be made responsible criminally for any of the offences and they are apprehending their arrest being the Manager and owner of the Water Coffee Shop/Hookah Centre respectively and

in case of their arrest, they will be subjected to incalculable damage to their reputation and hence, prayed to enlarge them on pre-arrest bail.

4. Learned counsel for the petitioners, Sri S.M. Rafee, would contend that none of the Sections i.e., Section 109 IPC and Section 27(a) of the NDPS Act would apply to the present facts of the case and that nothing was seized from the possession of the petitioners and that they were not even present in the Water Coffee Shop/Hookah Centre at the time of raid. Therefore, he prayed to enlarge the petitioners on pre-arrest bail.

5. Learned Public Prosecutor for the State of Telangana would contend that the petitioners were found harbouring the accused and that they are also equally guilty for the offences punishable under Sections 21(b), 27A & 29 of the NDPS Act along with A-1 to A-4 and though no memo is filed for alteration of Section of Law, still the Court, if finds, while deciding an application for bail, that the petitioners committed any offence punishable under the provisions of the NDPS Act, they cannot be enlarged on pre-arrest bail and hence, prayed for dismissal of the same.

6. As seen from the Mediators Report, A-1 to A-4 were found sitting by the side of the reception counter of the Water Coffee Shop/Hookah Centre and selling narcotic drug to the needy customers, situated in the premises of the Water Coffee Shop/Hookah Centre bearing No.8-2-584/4/B, Road No.08,

Banjara Hills, Hyderabad, but the panchanama does not disclose about the actual presence of the petitioners, Shaik Mateen & Shaik Moinuddin, who are the Manager and owner of the Water Coffee Shop/Hookah Centre respectively, but based on the confessional statement cum seizure panchanama, the petitioners were roped in the above crime. No customer was also present at the time of raid and the raid party did not find any transaction of sale of any narcotic or psychotropic substances to attract the offences punishable under Sections 21(b), 27A & 29 of the NDPS Act. No doubt, Section 27A of the NDPS Act made the person, who harboured the accused of an offence punishable under the provisions of the NDPS Act, is liable for punishment with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years including a person who is financing illicit trade either directly or indirectly, but in the present case, the petitioners did not concealed or harboured A-1 to A-4, *prima facie*. Therefore, the offences allegedly committed by the petitioners would not attract Section 27A of the NDPS Act, but the petitioners allowed A-1 to A-4 to sell the narcotic drugs in the Water Coffee Shop/Hookah Centre premises and they are liable for punishment for the offences punishable under Section 29 of the NDPS Act.

7. According to Section 29(1) of the NDPS Act, whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and

notwithstanding anything contained in Section 116 of IPC be punishable with the punishment provided for the offence. According to Section 29(2) of the NDPS Act, a person, who abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India, abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which would constitute an offence if committed within India; or under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constituted it such an offence the same as or analogous to the legal conditions required to constituted it an offence punishable under this Chapter, if committed within India.

8. Thus, a person, who abets or is a party to the criminal conspiracy to commit an offence, is equally liable for the offence punishable under Section 29 of the NDPS Act, but the Investigating Agency quoted Section 109 IPC instead of Section 29 of the NDPS Act. Section 109 IPC has no application *prima facie* and till today, no memo was filed altering Section of Law, but that by itself is not a ground to grant pre-arrest bail to the petitioners, since the relief of pre-arrest bail is purely discretionary in nature and that too in the present facts and circumstances of the case, the quantity of contra band seized from the possession of A-1 to A-4, who were found sitting by the side of the reception counter and offering for sale to the needy people though not commercial quantity as notified under the provisions of the NDPS Act.

9. The law regarding grant of anticipatory bail is elaborately discussed by the Constitution Bench of the Apex Court in “**Gurbaksh Singh Sibbia v. State of Punjab**¹”, as the power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him/her, or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his/her liberty while on bail" that such power is to be exercised. No hard and fast rule can be laid down in discretionary matters like grant or refusal of bail whether anticipatory or regular bail. The Apex Court further held that, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the state" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. Therefore, while dealing with the application for grant of pre-

¹ AIR 1980 SC 1632

arrest bail or anticipatory bail, the Court must take into consideration the guidelines issued in “**Gurbaksh Singh Sibbia v. State of Punjab**” (referred supra).

10. For granting pre-arrest bail under Section 438 of Cr.P.C. the Apex Court laid down 10 guidelines in “**Siddharam Satlingappa Mhetre v State Of Maharashtra**²” which are as follows:

- i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
- iii. The possibility of the applicant to flee from justice;
- iv. The possibility of the accused's likelihood to repeat similar or the other offences.
- v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
- vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.
- vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the court should consider with even

² AIR 2011 SC 312

greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

11. The Apex Court, in the above referred cases, while dealing with the identical circumstances held that the seriousness of the offence, impact on the society shall be considered. Hence, the petitioner abated A-1 to A-4 to trade Heroine and A-1 to A-4 were found in possession of 150 grams. If heroine is consumed by public, it will not only spoil individual but society at large. Thus, when a petitioner is accused of an offence punishable under the provisions of the NDPS Act where substantial quantity is involved and liable for sentence for a period of five years, rejection of bail is a rule and grant of bail is an exception. Here, in the present case, the situation is totally different. The petitioners are apprehending their arrest and filed the present criminal petition for grant of pre-arrest bail. Grant of pre-arrest bail is not a matter of course, but it is a matter of

exception and unless the petitioners show exceptional circumstances, the petitioners cannot be enlarged on pre-arrest bail.

12. In view of the law declared by the Apex Court in the judgments, the alleged offences committed by the petitioners is punishable with imprisonment for a period of more than five years, thereby I am unable to exercise my discretion to grant pre-arrest bail to the petitioners as the offences allegedly committed by the petitioners are serious in nature and since it is difficult for me to strike the balance between the individual right of liberty guaranteed under Article 21 of the Constitution of India and the societal interest at large.

13. At this stage, learned counsel for the petitioners, Sri S.M. Rafee, requested the Court to permit the petitioners to surrender before the Special Court trying the offences punishable under the provisions of the NDPS Act, and if any application is filed under Section 439 of Cr.P.C. to grant bail, the Presiding Officer may be directed to consider their application on the same day.

14. Acceding to the request of learned counsel for the petitioners, I deem it appropriate to permit the petitioners to surrender before the Special Court trying the offences punishable under the provisions of the NDPS Act, and on such surrender, in the event of filing of an application for grant of bail under Section 439 of Cr.P.C., after due service of notice to the Public Prosecutor and after affording reasonable opportunity to the learned Public Prosecutor to defend the case, the Presiding

Officer of the Special Court trying the offences under the provisions of the NDPS Act is directed to decide such application on the same day in accordance with law.

15. With the above direction, the Criminal Petition is disposed of. Miscellaneous Petitions, if any, pending in this criminal petition shall stand closed.

JUSTICE M.SATYANARAYANA MURTHY

Date: 27th March, 2017

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