

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CRIMINAL PETITION No.7046 of 2017

ORDER:

1 This petition, seeking bail, is filed under Sections 437 and 439 Cr.P.C., by Petitioners / accused Nos.3 and 5 in Crime No.1 of 2017 on the file of the Station House Officer, Mothugudem Police Station, registered for the offences punishable under Section 8 (C) r/w 20 (b) (ii) (C) of NDPS Act.

2 The learned counsel for the petitioner strenuously submitted that the investigating agency conducted the investigation in gross violation of Sections 41, 42 and 53 of the NDPS Act, therefore, remanding the petitioners to judicial custody is not sustainable either on facts or in law. He further submitted that the person who received the reliable information is not legally entitled to conduct investigation and file charge sheet.

3 *Per contra*, the learned Additional Public Prosecutor submitted that the petitioners have taken the same plea in their previous bail application and the same was negated by this Court. He further submitted that the petitioners ought to have taken the plea of non-compliance of the procedure as contemplated under Section 53 of the Act in his earlier bail application in CrI.P.No.1311 of 2017. He further submitted that the petitioners have not taken a plea, in the present bail application, that the investigating agency has not followed the procedure contemplated under Section 53 of the NDPS Act.

4 The facts leading to the filing of the present petition are as follows:

5 On 10.01.2017 at about 2.00 PM, the Circle Inspector of Police, Chinturu, on receiving reliable information about the illegal transportation of ganja, along with his staff and mediators, proceeded to Y. Junction road, Lakkavaram in order to check the vehicles. In that process, the Inspector of Police observed two vehicles i.e. TATA Indica car bearing No.AP 09 BC 2169 and lorry bearing No.AP 12 V 2851 proceeding towards Chinturu from Maredumilli side. When the Inspector stopped the vehicles, three persons who were travelling in those vehicles tried to flee. The police apprehended those three persons, who in turn disclosed their identity as Mohammad Hakeem (A.3), Mohammad Khalidh (A.5) and Bibipet Subhash Babu @ Sailu (A.6). The police seized 12 bags of ganja from the TATA Indica Car and 17 bags of ganja from the lorry. Basing on the complaint lodged by the Sub-Inspector of Police and after following the due procedure, the crime was registered for the offences stated above.

6 The first and foremost contention of the learned counsel for the petitioner is that the investigation conducted by the investigating agency is in gross violation of Sections 41 and 42 of the NDPS Act, therefore, remanding the petitioners to judicial custody is not sustainable either on facts or in law. The petitioners herein filed CrI.P.No.1311 of 2017 seeking anticipatory bail wherein the petitioners have raised the same ground of non-compliance of the procedure contemplated under Sections 41 and 42 of the NDPS Act. This Court in CrI.P.No.1311 of 2017 at Para Nos.3 to 6 of the order considered all these aspects and negated

the contention of the petitioners and rightly dismissed the petition on 22.02.2017.

7 The learned counsel for the petitioners further submitted that an officer, who received reliable information about commission of offence under the NDPS Act, is not entitled to conduct investigation. To substantiate the argument, the learned counsel for the petitioners has drawn the attention of this Court to the ratio laid down in ***Tofan Singh v. State of Tamil Nadu***¹ wherein the Hon'ble apex Court at Para Nos.28 to 30 held as follows:

28. The learned Counsel for the respondent had pointed out that in the case of *Kanhaiyalal vs. Union of India*; 2008(4) SCC 668, it has been categorically held that the officer under Section 63 is not a police officer. In arriving at that conclusion the two judge Bench judgment had followed earlier judgment in the case of *Raj Kumar Karwal Vs. Union of India*; 1990(2) SCC 409.

29. Had the matter rested at that, the aforesaid dicta laid down by two judge Bench would have been followed by us. However, on the reading of the aforesaid judgment, we find that the only reason to conclude that an officer under Section 53 of the NDPS Act was not a police officer was based on the following observations: (*Raj Kumar Karwal case* {(1990) 2 SCC 409}).

“20.....These provisions found in Chapter V of the Act show that there is nothing in the Act to indicate that all the powers under Chapter XII of the Code, including the power to file a report under Section 173 of the Code have been expressly conferred on officers who are invested with the powers of an officer-in-charge of a police station under Section 53, for the purpose of investigation of offences under the Act.”

30. We find, prima facie, in the arguments of Mr. Jain to be meritorious when he points out that the aforesaid observations are without any detailed discussion or the reasons to support the conclusion arrived at. Mr. Jain's fervent plea to depart from the view taken in the said judgment deserved consideration as there is no provision under the NDPS Act which takes away the power of filing a report under Section 173 of the Code which is available with an officer-in-charge of a police station. He further argued that the provision of Section 173 are contained in Chapter XII of the Code and since all powers of an officer in-charge of a police station has been conferred, there is no legal basis to suggest that the said power is not available

¹ (2013) 16 SCC 31

with the officer under Section 53 of the Act. Above all, we find that the judgment in *Raj Kumar Karwal* (supra) was considered by this court in few cases but without giving imprimatur, as can be seen below:

8 There is no specific provision under the NDPS Act prohibiting an officer, who received credible information, to investigate into the matter and file charge sheet. Whether such an act of the investigating officer caused prejudice to the accused in any manner whatsoever is a question of fact to be determined at the time of full fledged trial. The decision cited supra was referred to a larger bench. The learned counsel for the petitioners in all fairness submitted that he has no information with regard to the reference. On the other hand, the principle enunciated in the case cited supra, is no way helpful to the petitioners to substantiate their case.

9 In order to appreciate the contentions of learned counsel for the petitioners, this court is placing reliance on the following decisions:

(i) In **State of M.P. v. Kajad**², the Hon'ble apex Court held at paragraph No.5 as follows:

5. ... The purpose for which the Act was enacted and the menace of drug trafficking which it 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 an exception under sub-clause (ii) of clause (b) of Section 37(1). 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 has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section

² (2001) 7 SCC 673

37 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.

(ii) In **Collector of Customs v. Ahmadalieva Nodira**³, the Hon'ble apex Court at paragraph No.7 as follows:

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 accused-respondent 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.

(iii) The Hon'ble apex Court reiterated the same principle in **Union of India v Sanjeev V. Deshpande**⁴.

10 As per the principle enunciated in the cases cited supra, the court can grant bail to the persons involved in the cases under the NDPS Act, if it satisfies that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and even if the accused is released on bail, he will not involve in similar type of offences.

11 In the instant case, the Police officials caught hold the petitioners while they were transporting 420 Kgs of Ganja, which is a commercial quantity. The material placed before the court is

³ (2004) 3 SCC 549

⁴ (2014) 13 SCC 1

prima facie sufficient to arrive at a conclusion that the petitioners have committed the offence punishable under Sections 8(c) read with 20(b)(ii)(c) of the NDPS Act. If the petitioners are released on bail, the possibility of involving in similar type of cases cannot be ruled out completely.

12 Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that it is not a fit case to grant bail to the petitioners.

13 Hence, the criminal petition is dismissed.

Date: August 29th, 2017
Kvsn

T.SUNIL CHOWDARY, J

