

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.1365 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/A-2 on bail in Crime No.3/2016-17 of Excise & Prohibition, Rajahmahendravaram (North), East Godavari District, registered for the offences punishable under Sections 8(c) read with 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act'). He is in judicial custody since 05.04.2016.

The case of the prosecution, in brief, is that on receipt of credible information about transportation of ganja, the Excise officials along with the mediators proceeded towards NH-16 Kovvuru side and found one Scorpio vehicle coming from Konthamuru. On seeing the police, the driver ran away and when the police conducted search, found A.1 and A.2 in possession of 120 kgs., of ganja in 60 packets. Basing on the confession made by the petitioner and other accused, the Excise officials raided the house and found A.3 and A.5 in possession of 112 kgs., of ganja. After following the necessary procedure, the Excise officials lifted the samples and seized the contra band and registered a case, arrested the petitioner and other accused and produced them before the court for judicial remand.

Sri Rajasekhar Tulasi, learned counsel appearing for the petitioner, contended that the petitioner did not raise certain grounds in the earlier bail application in CrI.P. No.9970 of 2016, and now raised a specific contention regarding non-compliance of Section 50 of the NDPS Act.

In fact, this Court dismissed Crl.P.No.9970 of 2016 on 18.07.2016 assigning its own reasons, but now the petitioner renewed the same request, to enlarge the petitioner on bail, without any changed circumstances except raising a specific contention regarding non-compliance of Section 50 of the NDPS Act.

As seen from the material on record, the petitioner produced before the nearest gazetted officer for conducting search after affording an opportunity to the petitioner to be searched before a Magistrate and in fact nothing was seized from the possession of the petitioner except on search of the vehicle found 120 kgs., of ganja and from the search of the house of A.3 and A.5 found 112 kgs. of ganja, in all, on the basis of the confession the petitioner and others, seized 232 kgs. of ganja was seized i.e. confession leading to discovery under Section 27 of the Indian Evidence Act, 1872. Therefore, violation of Section 50 of the NDPS Act does not arise. When the search is not conducted in the presence of either nearest Magistrate or gazetted officer as opted by the petitioner, then it is an irregularity. Here the vehicle was searched and later the house of A.3 and A.5 was searched on the confession of the petitioner and others, discovered the contra band, which is relevant under section 27 of the Indian Evidence Act. Therefore non-compliance of Section 50 of the NDPS Act would not vitiate the trial of the matter.

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 will not commit identical offences, while on bail. While granting bail in compliance of Section 37 of the NDPS Act and without recording such conclusion, the court cannot grant bail in view of Section 37(1) of the Act. Here the total quantum involved in

the crime is 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**¹ 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 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.

¹ AIR 2001 SC 3317

The present criminal petition is renewal of earlier request made in Crl.P.No.9970 of 2016 which was dismissed by this Court on 18.07.2016 declining to enlarge the petitioner. There are no changed circumstances, after dismissal of the earlier bail application.

In **STATE OF TAMIL NADU V. S.A. RAJA**², at paragraphs 8 & 9 of the Judgment, the Apex Court held that when a learned Single Judge of the same Court had denied bail to the respondent for certain reasons and that order was unsuccessfully challenged before the appellate forum, without there being any major change of circumstances, another fresh application should not have been dealt with within a short span of time unless there were valid grounds giving rise to a tenable case for bail. Of course, the principles of *res judicata* are not applicable to bail applications, but the repeated filing of the bail applications without there being any change of circumstances would lead to bad precedents. Therefore, on this ground also, the petitioners are not entitled to claim bail.

The learned counsel for the petitioner contended that the petitioner is in judicial custody since a long time and hence he is entitled to bail.

In **CHENNA BOYANNA KRISHNA YADAV -VS- STATE OF MAHARASHTRA AND ANOTHER**³ the Apex Court made it clear that when gravity of the offence alleged is severe, mere period of incarceration or the fact that the trial is not likely to be concluded in the near future either by itself or conjointly may not entitle the accused to be enlarged on bail. Nevertheless, both these factors may also be taken into consideration while deciding the question of grant of bail. The same principle is reiterated in **RAJESH RANJAN YADAV**

² (2005) 8 Supreme Court Cases 380

³ (2007) 1 SCC 242

@ **PAPPU YADAV VS CBI THROUGH ITS DIRECTOR**⁴ while deciding the case it was held that it is one of the considerations in deciding whether to grant bail to an accused or not is, whether he has been in jail for a long time, the Court has also to take into consideration other facts and circumstances, and at the same time a balance has to be struck between the right to personal liberty guaranteed under Article 21 of the constitution of India and the interest of society, as no right can be absolute.

Thus, in view of the principle laid down by the Apex Court in **STATE OF MADHYA PRADESH v. KAJAD** (1supra), 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 contained under Section 37 of the NDPS Act.

Therefore, I find no ground to conclude that the petitioner did commit no offence under Section 8(c) read with 20(b)(ii)(c) of the NDPS Act, hence they cannot be enlarged on bail and the petition is liable to be dismissed.

In the result, the criminal petition is dismissed.

M. SATYANARAYANA MURTHY, J

07.03.2017
BV

⁴ (2007) 1 SCC 70