

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

Criminal Petition No.3706 of 2017

Between:

Yerragudi Suryanarayana Reddy. ... Petitioner/Accused No.1

And

The Senior Intelligence Officer
Directorate of Revenue Intelligence
NDPS, Hyderabad,
Rep. by its Special Public Prosecutor. ... Respondent/Complainant

DATE OF JUDGMENT PRONOUNCED: 12.06.2017

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

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1. Whether Reporters of Local Newspapers may be allowed to see the judgments? Yes / No
 2. Whether the copies of judgment may be marked to Law Reporters / Journals? Yes / No
 3. Whether Their Lordship wish to see the fair copy of the Judgment? Yes / No

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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! Counsel for Petitioner : Sri N.Sreedhar Reddy

^ Counsel for Respondent : Special Public Prosecutor for DRI

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> Head Note:

? Cases referred:

- 1) 2009 Cri.L.J. 446 (Bombay)
- 2) 2012 SCC Online Ker 18104 = (2012) 3 KLJ 698
- 3) 2015 SCC Online P&H 10259
- 4) (1996) 1 SCC 718
- 5) (1994) 5 SCC 410

HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Criminal Petition No.3706 of 2017

ORDER:

In this petition filed under Sec.437 and 439 Cr.P.C, the petitioner/ A.1 seeks regular bail in F.No.DRI/HZU/48E/ENQ-13(INT-13) of 2016 whereof he was allegedly committed offences punishable under Sec.25, 25(A), 28 and 29 of Narcotic Drugs and Psychotropic Substance Act, 1985 (for short "NDPS Act") for violation of Sec.9(A) of NDPS Act.

2) The facts in brief are to the effect that on 30.07.2016, the Directorate of Revenue Intelligence Department, Hyderabad (DRI), along with independent mediators entered the premises of M/s.Surya Fine Chemicals situated at Plot No.183, IDP, Putlampalli, Kadapa and found accused in the premises with a red colour bag and on inspection of the said bag and the premises, the authorities found in the said bag two transparent polythene bags which contained white crystalline powder and on interrogation, the accused allegedly disclosed that the content in the two bags is Ephedrine Hydrochloride, which is a controlled substance. On inspection of premises, Rs.2 lakhs was found and accused allegedly confessed that the amount represents the sale proceeds of Ephedrine Hydrochloride. He further allegedly confessed that he sold the same to Palle Bhai of Gujarat. On inspection, the officers found some manufacturing instruments at the premises. With the detection kit, they tested the sample and it proved the presence of Ephedrine Hydrochloride. Though Ephedrine Hydrochloride was a controlled substance, the

accused was not in possession of any license issued by the competent authority. The total quantity found in possession of accused was 45 kgs and it was valued at Rs.4,51,65,000/-. The contraband was seized under the panchanama and the accused was arrested and remanded to judicial custody. The case was investigated into and complaint was filed against the accused for violation of the provisions of Sec.9(A) of NDPS Act punishable under Sec.25, 25(A), 28 and 29 of NDPS Act.

3) Hence, the instant bail application.

4) Learned Special Public Prosecutor for DRI filed counter and opposed the petition.

5) It may be noted that the previous bail application of this petitioner in CrI.P.No.16821/2016 was dismissed by this Court on 23.01.2017 observing that the controlled substance is notified as per Government Notification and possessing, manufacturing, transporting and sale of controlled substance without license or authorization is contravention of Sec.8(c) of NDPS Act and it is also an offence punishable under Sec.25, 25(A), 28 and 29 of the NDPS Act. It was further observed that the controlled substance was of commercial quantity in which case Sec.37 of the NDPS Act would come in the way to grant bail to the petitioner.

6) Heard learned counsel for petitioner and learned Special Public Prosecutor for DRI.

7) Learned counsel for petitioner would submit that his earlier bail application in CrI.P.No.16821/2016 was dismissed on the main ground

that the contraband seized was in commercial quantity in terms of Sec.37 of NDPS Act and therefore, Sec.37 would come in the way of granting bail to the petitioner. He would submit that on previous occasion, petitioner's counsel failed to bring to the notice of the Court that Sec.37 has no application in the instant case and this Court also by mistake observed as if seized contraband was commercial quantity in terms of Sec.37 of the NDPS Act. He further submitted that if it is established that his case does not come under Sec.37 of NDPS Act, petitioner can seek bail. He would thus earnestly request the Court to give him permission to argue on the legal aspect involved in this case.

8) Since it is a trite law that repeated bail applications can be filed showing the change in circumstances and substantial questions of law in favour of a detainee who seek for bail, this Court was inclined to hear learned counsel on the question of law in respect of Sec.37 of NDPS Act which this Court earlier observed as an interdict for considering his bail plea.

9) Learned counsel would, for arguments sake, admit the seizure of 45 kgs of Ephedrine Hydrochloride and also admit that it is a controlled substance as per the notification of the Government i.e, S.O.1296(E) F.No.V/105/98-NC,II, dated 28.12.1999. In spite of the same, he would argue, Sec.37 of NDPS Act, *ipse dixit* will have no application. In expatiation, he would argue Sec.37(1)(b) of the NDPS Act comes into play only when a person is accused for the offence punishable under Sec.19 or 24 or 24(A) of NDPS Act and also for offences involving

commercial quantity in which case, he shall not be released on bail unless the conditions mentioned in Clauses (i) and (ii) are satisfied. He would submit, in this case admittedly he was charge sheeted for the offences punishable under Sec.25, 25(A), 28 and 29 of NDPS Act but not for the offences under Sec.19, 24 or 27(A) of NDPS Act. Involvement of commercial quantity is concerned, though the Ephedrine Hydrochloride was a notified controlled substance, still in the notification issued by the Government specifying small quantity and commercial quantity of Narcotic Drugs and Psychotropic Substances, the said commodity i.e, Ephedrine Hydrochloride was not specified either as a small quantity or commercial quantity. Therefore, the concept of commercial quantity is not applicable to the substance involved in this case. Consequently, Sec.37 of NDPS Act also has no application. Taking the Court through the following judgments, he would submit that in those cases, considering that controlled substance involved was not specifically mentioned in the list of small quantity or commercial quantity, several High Courts have held that Sec.37 had no application in respect of those substances:

- i) ***Rafael Palafox Garcia vs. Union of India & Another***¹
- ii) ***Karuthan Ponnaiya and another vs. Senior Intelligence Officer, State of Kerala DRI, Sub Unit Thiruvananthapuram***²
- iii) ***Satish Bansal vs. NCB Chandigarh***³

¹ 2009 Cri.L.J. 446 (Bombay)

² 2012 SCC Online Ker 18104 = (2012) 3 KLJ 698

³ 2015 SCC Online P&H 10259

10) Nextly he would argue, when Sec.37 of the NDPS Act has no application, his case will fall under Sec.36(A)(4) of the Act. Narrating the same, he would submit, the main offence imputed against him is under Sec.25(A) of the Act for contravention of the orders under Sec.9(A) of the Act and the said offence is punishable for a term extendable up to 10 years. The punishment for the other offences under Sec.25, 28 and 29 of the Act also fall in the line of Sec.25(A) of the Act. Hence, in terms of Sec.36(A)(4) of NDPS Act read with Sec.167(2)(a)(i) & (ii) of Cr.P.C, the police shall file the complaint within 60 days from the date of first remand of the petitioner/accused. He would submit, the petitioner was arrested on 30.07.2016 and produced before learned II Additional Judicial Magistrate, Kadapa on 31.07.2016 and was remanded to judicial custody. However, the complaint was filed by DRI only on 07.11.2016 i.e, beyond the period of 60 days and hence, the petitioner deserves bail. He would submit that these legal facts could not be brought to the notice of the Court during the hearing of the previous application and thus prayed for bail.

11) Per contra, learned Special Public Prosecutor for DRI (Spl.P.P) while opposing the bail would submit that the contraband Ephedrine Hydrochloride is a notified controlled substance and though the same was not specifically mentioned as a commercial quantity in the notification, still in view of the fact that huge quantity of 45 kgs was seized from the premises of the accused whose value is more than Rs.4 Crores, the petitioner does not deserve bail due to the gravity of the

offence. He would submit that Palle Bhai of Gujarat is still at large and the case against the petitioner/A.1 is coming up for framing charges and once trial begins, it will be completed and if bail is granted, the petitioner may not attend the Court. On these submissions, he prayed to dismiss the bail.

12) In the light of above rival arguments, the points for determination are:

- i) *Having regard to the facts, whether Sec.37(1)(b) of NDPS Act, has application here?*
- ii) *If point No.1 is held in negative, whether petitioner/A.1 deserves bail?*

13) **POINT No.1:** Admittedly the petitioner/A.1 was charge sheeted for the offences under Sec.25, 25(A), 28 and 29 of NDPS Act for the contravention of provisions of Sec.9(A) of NDPS Act. Sec.37 of NDPS Act needs to be extracted here, which reads thus:

“37. Offences to be cognizable and non-bailable.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

Thus Sec.37(1)(b) of the Act has no application since the petitioner was not charge sheeted for the offences under Sec.19, 24 or 27(A) of NDPS Act. Commercial quantity is concerned, neither in the notification in S.O.527/E dated 16.07.1996 of Ministry of Finance Department for Revenue or in its subsequent notification No.S.O.1055(E) dated 19.10.2001, the Ephedrine Hydrochloride was enlisted demarcating its small/commercial quantity to consider in terms of Sec.37 of the Act. It is true that as per notification No.S.O.1296(E) dated 28.12.1999, the Central Government have declared Ephedrine and its salts as controlled substances in view of the possibility of the use of the said substance for production and manufacturing of various narcotic drugs and psychotropic substances. It may be true, as contended by learned Special Public Prosecutor, the Ephedrine Hydrochloride is used for besides manufacture of anti-allergic medicines, also for manufacture of illegal drug namely Meta-amphetamine. It may be also true that DRI authorities might have seized 45 kgs of Ephedrine Hydrochloride from the possession of A.1. However, all these facts *per se* will not make the quantity seized as commercial quantity unless by the notification the Government has

specified a particular quantity as a commercial quantity. Needless to emphasize that the rule of strict interpretation has to be followed with regard to the penal statutes and Court is not permitted to add something into the statute.

a) In **Rafael Palafox Garcia**'s case (1 supra), the authorities seized 290 kgs of Pseudo Ephedrine, which was a controlled substance, from the possession of the petitioner therein. Seeking bail, the petitioner therein *inter alia* contended that in respect of certain controlled substances including the Pseudo Ephedrine, the smaller or commercial quantity was not notified and thereby the rigor of Sec.37 of the Act, *ipso facto* had no application. Agreeing with his argument and granting Bail, the Bombay High Court observed thus:

“Para 28: xx xx xx

... The concept of commercial quantity does not apply to controlled substance in view of the provisions relating to commercial quantity specially Section 2(viia) and Section 2(viid) of the Act and the notification issued by the Government specifying the small quantities and commercial quantities also shows that this concept is peculiar to Narcotic Drugs and Psychotropic Substances.”

b) In **Karuthan Ponnaiya**'s case(2 supra), about 12 kgs of Ephedrine was recovered from the petitioners. In the bail application filed by them, the Kerala High Court in tune with Bombay High Court has held thus:

“Para 7: Section 37(1)(b) only deals with offences under sections 19, 24 or 27A and also offences involving 'commercial quantity'. As said earlier, so far it relates to controlled substance, the categorization as small quantity or commercial quantity has no

*application. Section 25A is not included in section 37(1)(b). Therefore, the rigour of section 37(1)(b) cannot be projected as a ground to deny bail, the petitioner contends. In support of that submission the learned counsel for the petitioner has relied upon the decision of the Bombay High Court in **Rafael Palafox Garcia vs. Union of India and Another 2009 KHC 5335**. In that case 290 Kg of Pseudo Ephedrine, which is a controlled substance was seized. It was held that the concept of 'commercial quantity' does not apply to 'controlled substances' as per section 37(1)(b) of the Act. As has been said earlier, section 37(1)(b) itself is clear that it applies only to offences under Sections 19, 24, 27A and offences involving 'commercial quantity'. The concept of commercial quantity is alien to 'controlled substances' Therefore, there can be no doubt that section 37(1)(b) is not applicable to the facts of this case."*

However, bail was refused on other grounds.

c) In **Satish Bansal's** case (3 supra), the Punjab and Haryana High Court has, in respect of seizure of Pseudo Ephedrine a notified controlled substance, observed that Ephedrine and Pseudo Ephedrine are controlled substances and the concept of commercial quantity was not applicable to such a recovery under Sec.37(1)(b) of the Act.

In the light of above discussion and precedential jurisprudence, it is held that in the instant case Sec.37(1)(b) of NDPS Act has no application. Accordingly this point is answered.

14) **POINT No.2:** It should be noted that merely because Sec.37(1)(b) of the NDPS Act is not applicable to the facts of the case, that would not lead to automatic conclusion that the petitioner is entitled to bail. Sec.37(2) of the Act lays that the limitations on granting of bail specified

in Clause (b) of sub-Section (1) are in addition to the limitations under Cr.P.C or any other law for the time being in force for granting bail. In that view, it is evident that even if rigor under Sec.37(1)(b) of the Act is not applicable, still the Court has to see whether petitioner is otherwise entitled to bail in terms of Sec.437 and 439 Cr.P.C. It is a case where the DRI Authorities on inspection of the premises of accused found in his possession 45 kgs of Ephedrine Hydrochloride, a controlled substance. Besides anti-allergic drugs, it can also be used for manufacture of illegal drug namely Meta-amphetamine and its worth is Rs.4,51,65,000/-. The statement of petitioner/A.1 was also recorded under Sec.67 of the NDPS Act, which *prima facie* throw a strong suspicion against the accused involving in the offence. It is seen that the case is now in the stage of framing of charges and since there are only 13 witnesses shown by the prosecution, the trial can be completed in quick succession. The apprehension of learned Spl.P.P that if bail is granted the accused may not turn out for the trial is well founded in view of the gravity of the offence. In these circumstances, it is not a fit case to grant bail to the petitioner.

15) Before parting, it should be mentioned that the petitioner claimed bail as an indefeasible right under Sec.167(2) Cr.P.C. His submission is that in respect of the offences under Sec.25, 25(A), 28 and 29 of the NDPS Act, the prosecution agency had to file complaint on completion of investigation within 60 days but they failed to do so and hence in terms of Sec.36(A)(4) of the NDPS Act and Sec.167(2) of Cr.P.C, he

deserves bail. I am afraid, this argument is not correct. It is true that since the offence under Sec.25(A) of the Act is punishable with imprisonment which may extend up to 10 years and other offences toe the line of Sec.25(A) of the Act, the prosecution needs to file complaint on completion of investigation within 60 days from the date of remand of the accused in terms of Sec.167(2) Cr.P.C. It is also true that the petitioner was remanded to judicial custody on 31.07.2016 but the complaint was filed by DRI on 07.11.2016 i.e, beyond the period of 60 days and thereby the indefeasible right to claim bail was accrued to petitioner/accused immediately after the expiry of the 60 days. However, the crucial question is whether the petitioner availed such right before the complaint was filed on 07.11.2016. The trite law expounded by Hon'ble Apex Court is that when once the accused failed to avail the indefeasible right accrued to him under Sec.167(2) Cr.P.C on failure of the prosecution agency to file charge sheet on the appointed day and subsequently when the charge sheet was filed though belatedly, the accused cannot claim such indefeasible right. The Apex Court in the case of *Dr.Bipin Shantilal Panchal vs. State of Gujarat*⁴, answered the question whether the accused who was entitled to be released on bail under proviso to sub-Section(2) of Sec.167 of the Code, not having made an application when such right had accrued, can exercise that right at a later stage of the proceeding. Referring its earlier judgment in *Sanjay Dutt vs. State through CBI*⁵, it held that if an accused person fails to

⁴ (1996) 1 SCC 718

⁵ (1994) 5 SCC 410

exercise his right to be released on bail for the failure of the prosecution to file the charge sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise at any time notwithstanding the fact that in the meantime charge sheet is filed.

a) In the instant case, the petitioner has not produced any record showing that immediately after expiry of the period prescribed, he applied for bail under Sec.167(2) Cr.P.C and the same was dismissed and hence pursuing the same now. It is true that in Crl.M.P.No.882 of 2016 filed by him for bail before the I Additional Sessions Judge, Kadapa, he claimed such a right. However, the learned Judge in her order dated 23.11.2016 observed that the petitioner filed the bail application only under Sec.439 Cr.P.C but not under Sec.167(2)Cr.P.C claiming as a matter of right and ultimately dismissed the petition. Even the earlier bail petition in Crl.P.No.16821 of 2016 was also not filed before this Court in terms of Sec.167(2) Cr.P.C but only filed under Sec.437 and 439 Cr.P.C. As such, he cannot claim such alleged indefeasible right at this stage.

16) Accordingly, this criminal petition is dismissed. However, the trial Court is directed to frame charges and proceed with the trial and pronounce the Judgment on merits expeditiously but not later than four(4) months from the date of receipt of copy of this order.

As a sequel, miscellaneous petitions pending if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 12.06.2017
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