

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.16821 OF 2016

ORDER:

This petition is filed by the petitioner under Sections 437 and 439 of Cr.P.C. to enlarge the petitioner on bail in F.No.DRI/HZU/48E/ENQ-13 (INT-13) of 2016 of Directorate of Revenue Intelligence, Zonal Unit, Hyderabad for the alleged offences punishable under Sections 25, 25A, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. (For short 'the NDPS Act').

Petitioner herein is A.1.

The case of the prosecution, in brief, is as follows:

On 30-7-2016 at 12.15 P.M., the Directorate of Revenue Intelligence, Zonal Unit, Hyderabad (DRI) along with panchayatdars entered the premises of M/s. Surya Fine Chemicals, Plot No.183, Industrial Development Park, Putlampalle, Kadapa City and found the accused in the premises with a red colour bag. Later the DRI Officers inspected the premises and also found red colour bag and in the said bag, there were two transparent polythene bags with white crystalline powder and when he was interrogated, the accused is said to have disclosed that the contents of the two bags is ephedrine hydrochloride. The entire premises was searched, Rs.2,00,000/- was found and the accused is said to have confessed that the amount represents sale proceeds of ephedrine hydrochloride. The accused further stated that they sold the same to Pallebhai of Gujarat. The officers found some manufacturing instruments at that place. With their detection kit, they tested the sample and the sample was found

positive for the presence of the ephedrine hydrochloride. The accused was found to be not in possession of any license issued by any competent authority. The DRI official with a reasonable belief that the chemical ephedrine seized from the possession of the accused is a controlled substance under the Act and found 45 kgs in possession of the accused and the respondent valued it at Rs.4,51,65,000/-, the bags containing contraband the amount were seized under panchanama and the accused was arrested and later, he was remanded to the judicial custody.

On the strength of the panchanama, registered a case in F.No.DRI/HZU/48E/ENQ-13 (INT-13) of 2016 of Directorate of Revenue Intelligence, Zonal Unit, Hyderabad for the alleged offences punishable under Sections 25, 25A, 28 and 29 of the Act against the accused. Since the date of remand, he is in judicial custody.

Heard the learned counsel for the petitioner and the learned Special Standing Counsel for Revenue Intelligence.

The main case of the petitioner is that he was arrested long back i.e., on 31-7-2016, since then he is in judicial custody and therefore, he sought his enlargement on bail. It is his further case that to face fair trial and to defend the cases, he has to be enlarged on bail and therefore, prayed to allow this petition by enlarging him on bail.

The Special Standing Counsel for Revenue Intelligence appearing for the respondent placed reliance on the Judgment of the

Apex Court in *STATE OF MADHYA PRADESH v. KAJAD*¹ to contend 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 in view of bar under Section 37 of the NDPS Act and prayed to dismiss the criminal petition.

As seen from the material on record, more particularly, panchanama dated 30-7-2016, it is clear that the contraband seized from the factory, is controlled substance as per notification issued by the Government under notification No.S.O.1296 (E), F.No.V/105/98-NC, II, dated 28-12-1999 and therefore, possessing such controlled substance prima-facie is an offence punishable under Section 8 (c) read with Sections 25, 25A, 28 and 29 of the Act.

Learned counsel for the petitioner would contend that the seized controlled substance is in huge quantity and value of it is shown at inflated rate. But this cannot be a ground at all to release or not to release the petitioner on bail.

The other contention of the petitioner is that he is languishing in jail since 31-7-2016. Such a long, pre-trial detention cannot be said to be a ground to release the petitioner on bail as per the judgment of Apex court reported in *CHENNA BOYANNA KRISHNA YADAV V. STATE OF MAHARASHTRA AND ANOTHER*⁽²⁾.

The other contention is that petitioner must have a fair opportunity to face the trial for setting up a defence in the case.

¹ AIR 2001 SC 3317

² (2007) 1 SCC 242

No doubt, a fair opportunity shall be afforded to the petitioner to defend his case during trial, but that cannot also be a ground for his release. In such case, an opportunity shall be provided to the accused to contact his counsel in the jail providing necessary arrangements. Hence, the jail authorities are directed to provide necessary arrangements to the petitioner to consult his counsel to defend in the trial of case. So, it is not a ground to enlarge the petitioner on bail.

The other contention of the petitioner is that when the material on record does not disclose prima facie material to conclude that the petitioner committed alleged offences punishable under the sections referred above, the petitioner is entitled to seek bail and placed reliance on the judgment reported in *ASHAK HUSSAIN ALLAH DETHA ALIAS SIDDIQUE AND ANOTHER* v. *ASSISTANT COLLECTOR OF CUSTOMS (P), BOMBAY AND ANOTHER* ⁽³⁾. The above decision is not binding precedent, all the more the material on record prima facie establish committing of offences referred above.

In the present case, the controlled substance is notified as per Government's notification which is referred above and possessing, manufacturing, transporting and sale of controlled substance without licence or authorisation is contravention of Section 8 (c) of the NDPS Act and it is an offence punishable under the section referred above. Therefore, Section 37 of the Act has direct application in the present case, since the controlled substance is commercial quantity.

³ 1990 CRL.L.J.2201 (1)

According to Section 37 of the Act, unless a notice was issued to the Special Standing Counsel and a reasonable opportunity is afforded to the Standing Counsel to defend his case where commercial quantity of controlled substance is involved, then only after recording a reason, after satisfying that petitioner did commit no offence and there is no possibility of committing similar offence while on bail, the court may grant bail.

Even in *STATE OF MADHYA PRADESH v. KAJAD* (1supra), 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). 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.

In *STATE OF UTTARANCHAL VS. RAJESH KUMAR GUPTA*⁴, and UNION OF INDIA v. RATTAN MALLIK @ HABUL⁵ the Apex Court specifically held that recording of satisfaction that accused is not guilty of offence and that he is not likely to commit any offence while on bail is *sine qua non* for granting bail.

Therefore, in the present case the very presence of the petitioner is not doubtful in view of signing on the panchanama dated 06.10.2016 acknowledging conduct of search and seizure in his presence and seizure of more than 45 kgs., of ephedrine hydrochloride which is worth Rs.4,51,65,000/- psychotropic substance. In such a case, onus of proof is on the petitioner to prove that he is not concerned with the manufacture of Alprazolam in view of Sections 35 and 54 of the NDPS Act, which imposes reverse burden on the petitioner. Sections 35 and 54 give rise to culpable mental state on the part of the accused as also placed burden of proof in this behalf on the accused vide judgment of the Apex Court in NOOR AGA v. STATE OF PUNJAB⁶.

Though petitioner is in jail since long time and moreover, the material on record specifically pointed out the involvement of

⁴ 2007 (1) Crimes 6 (SC)

⁵ (2009) 2 SCC 624

⁶ (2008) 16 SCC 417

petitioner in commission of offences of such crime, in such a case, by applying the principle laid down in *STATE OF UTTARANCHAL Vs. RAJESH KUMAR GUPTA* (⁷) AND *UNION OF INDIA v. RATTAN MALLIK @ HABUL* (⁸), it is difficult to release the petitioner on bail.

The seizure panchanama clearly shows that the petitioner is found possessing and manufacturing of controlled substance in contravention of provisions of NDPS Act. Therefore, it is difficult to prima facie conclude that the petitioner did commit no offence. Total controlled substance seized is commercial quantity as per schedule, in such case Section 37 of the Act will come in way to grant bail to the petitioner.

In view of my foregoing discussion, I find that it is not a fit case to release the petitioner on bail and as such, this Criminal Petition is liable to be dismissed.

In the result, this Criminal Petition is dismissed.

As a sequel to the disposal of this petition, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

JUSTICE M.SATYANARAYANA MURTHY

Dated 23-1-2017.

Dvs.

⁷ 2007 (1) Crimes 6 (SC)

⁸ (2009) 2 SCC 624

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Dvs