THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.1390 OF 2017

ORDER:

This criminal petition is filed under Sections 437 & 439 of Cr.P.C to enlarge the petitioner on bail in Crime No.F.No,.DRI/HZU/48D/ENQ-8 (INT-NIL)/2016 on the file of Senior Intelligence Officer, Directorate of Revenue Intelligence, Zonal Unit, Hyderabad, for the offences punishable under Sections 21, 23, 28 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and the petitioner is in judicial custody since 17.05.2016.

Upon receiving credible information of transporting cocaine, a narcotic drug as defined under Section 2(xv) of the Act, into India from Dubai and arriving by Emirates Flight EK-526 on 17.05.2016, the officers of Directorate of Revenue Intelligence, Zonal Unit, Hyderabad intercepted the petitioner at Customs Arrival hall and taken to the Air Intelligence Unit Room located at the Customs Arrival hall for further examination of her baggage. The examination of the three bags carried by the passenger was conducted by the Revenue Intelligence Authorities. On examination of the black coloured backpack, it was found to contain five books wrapped and sealed with polythene cover. When the Intelligence Authorities slit open the books, they have found some powder in the books, off-white in colour and slightly damp in nature. The Intelligence Authorities have conducted the test of the chemical powder recovered from the petitioner and conducted tests and all the tests resulted positive for the presence of cocaine. The total weight of the narcotic substance tested positive for the presence of cocaine was found to be 1990 grams and the authorities have seized the total quantity of cocaine which is valued at Rs.9,95,00,000/- (@Rs.5 crore per kilogram) in the international market, on a reasonable belief that the same is liable for confiscation under the provisions of NDPS Act. The officers of DRI have also seized currency of Rs.22,000/- on a reasonable belief that the same is liable for confiscation under the NDPS Act, reasonably believing that the same is used to finance the smuggling of cocaine, a narcotic substance under the NDPS Act. The manner of sealing the items seized is detailed in the panchanama dated 17.05.2016. Further, a personal search of the petitioner was conducted in the presence of a gazetted officer and in the presence of lady officer. The officers have also recovered documents that are useful to the investigation and detailed in the panchanama dated 17.05.2016 and the entire proceedings were reduced to writing in panchanama dated 17.05.2016. On the strength of the panchanama, the Senior Intelligence Officer, Directorate of Revenue Intelligence, Zonal Unit, Hyderabad registered Crime No.F.No,.DRI/HZU/48D/ENQ-8 (INT-NIL)/2016 for the offences punishable under Sections 21, 23, 28 and 29 of NDPS Act.

The main contention of the petitioner before this Court is that the petitioner did commit no offence, muchless, offences punishable under Sections 21, 23, 28 and 29 of NDPS Act and that she was falsely implicated in the crime. It is further contended that she is young lady aged about 24 years and working in a private company, earning good salary without any criminal background; her parents and brother are highly respected persons in the society and she was in the trap of Nigerian friend who dragged her into the present crime and she was unaware of the contents in the bag which she carried till she was intercepted by the DRI Authorities. Therefore, it is contended that the petitioner is unaware of the contents of the bag, muchless the books and prayed to enlarge the petitioner on bail who is in jail for more than 1 ½ years.

Learned Special Public Prosecutor for DRI, Hyderabad filed counter affidavit denying material allegations while reiterating the contentions raised in the charge sheet and mainly drawn attention of this Court that one Nigerian Mr. Sama arranged tourist Visa and arranged fare for smuggling Narcotic drugs from different countries to India and thus she was found carrying cocaine in huge quantity in contravention of the provisions of NDPS Act. The petitioner went to Colombia and later to Dubai and then traveled Hyderabad and she was caught red-handedly smuggling 1990 grams of cocaine in five books in Rajiv Gandhi International Airport at Hyderabad. Therefore, the learned Special Public Prosecutor contended that the petitioner cannot be enlarged on bail, in view of the bar contained under Section 37 of the Act, in view of the increasing drug menace in the country. Further, it is contended that if the petitioner is released on bail, there is every possibility of committing similar offence and placed reliance on several judgments in support of his contention which will be referred at appropriate stage.

During hearing, Sri P. Vishnuvardhana Reddy, learned counsel for the petitioner reiterated the contentions raised in the affidavit and mainly contended that the petitioner is innocent of any offence and in the absence of proof of collection of the drug, proposed place of handing over the narcotic drug, the petitioner cannot be made criminally responsible. Further, it is contended that entire investigation is completed and copy of the charge-sheet is also filed before the concerned Court, therefore, there is nothing to be investigated by the Investigating Agency and consequently keeping the petitioner behind the bars as a pre-trail detenue would infringe the right of liberty of the petitioner guaranteed under Article 21 of the Constitution of India and prayed to enlarge the petitioner on bail.

Learned Special Public Prosecutor for DRI, Hyderabad while reiterating the contentions raised in the counter affidavit, mainly drawn the attention of this Court that earlier when the petitioner filed similar bail petitions, Crl.P.No.12168 of 2016 and Crl.P.No.16947 of 2016, the same were dismissed by this Court i.e. after filing charge sheet and in the absence of any major changed circumstances in the case, the petitioner cannot be enlarged on bail and prayed for dismissal of the criminal petition.

In view of the rival contentions, the following are the points that arise for consideration:

1. ***Whether the petitioner is liable to be enlarged on bail when earlier two bail petitions Crl.P.No.12168 of 2016 and Crl.P.No.16947 of 2016 were dismissed by this Court, without there being any major changed circumstances, after dismissal of the above two***

criminal petitions.

2. ***Whether the petitioner is entitled to be enlarged on bail, in view of the bar under Section 37 of NDPS Act.***

POINT NO.1

The first and foremost contention raised by the learned Special Public Prosecutor is that when earlier criminal petitions Crl.P.No.12168 of 2016 and Crl.P.No.16947 of 2016 were filed and were dismissed, in the absence of any major changed circumstances, the present criminal petition is not maintainable, since it is settled principle of law that filing of successive bail applications without any changed circumstances would not serve any purpose and the Court cannot grant bail, unless, there are major changed circumstances after dismissal of the earlier bail applications. It is an admitted fact that the petitioner filed two earlier bail petitions in Crl.P.No.12168 of 2016 and Crl.P.No.16947 of 2016 which were dismissed by this Court on 31.08.2016 and 20.12.2016 respectively. When this Court dismissed the two bail applications for grant of bail, this Court once again cannot grant bail and enlarge the petitioner without there being any major changed circumstance.

The main endeavour of the learned counsel for the petitioner is that the major changed circumstance is filing of charge sheet. It is an undisputed fact that charge sheet was filed before the Special Judge for Trial of Cases under NDPS Act-cum-Metropolitan Sessions Judge, Cyberabad in the month of November, 2016. But second criminal petition Crl.P.No.16947 of 2017 was dismissed on 20.12.2016 i.e. after filing charge sheet before the Competent

Court. Thereafter, there were no major changed circumstances to enlarge the petitioner on bail, except her incarceration in jail, subsequent to filing charge sheet. That will never be any changed circumstance to enlarge the petitioner on bail.

Learned Special Public Prosecutor for DRI has drawn attention of this Court to the judgment of the Apex Court in "***Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav***[1]" the Apex Court held that the principles of *res judicata* and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a co-ordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the Courts must give due weight to the grounds which weighed with the former or higher Court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same it would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

When a bail application is rejected there is no bar to entertain another application afresh since principle of *res judicata* has no application, however there must be some new ground to be made out to apply for bail again after rejection of earlier bail

[1] AIR 2005 SC 921

application (vide: "***Gama v. State of U.P.***[2]")

Whereas Delhi Court in "***Rajender Singh v. State***[3]" held that after rejecting bail application 12th time, allowed bail when the application was filed for 13th time on the ground that there are new developments in the investigation.

In ***"State of Tamil Nadu v. S.A.Raja"*** (referred supra) the Apex Court held in paragraphs 8 & 9 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.

Similarly in "***Parvinder Singh v. State of Punjab***[4]" the Apex Court held that dismissal of earlier bail application would not render fresh bail application legally not maintainable and Court can always consider fresh circumstances and subsequent events.

Thus, the law consistently laid down by the Apex Court and other Courts is that if there are major changed circumstances subsequent to dismissal of earlier bail application, the Court can entertain application for bail, consider the same and decide afresh. Merely, on the ground that the earlier application was dismissed,

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[2] 1987 Crl.L.J. 242 (All)
[3] 1988 Cr.L.J 749 (Del.)
[4] (2003) 14 SCC 615

the Court cannot straightaway dismiss the fresh bail application and if major changed circumstances are shown to the satisfaction of the Court, the Court can grant bail.

But in the present case, no major changed circumstances are brought to the notice of this Court except filing some applications and dismissal. Hence, those circumstances are not suffice to conclude that same are major subsequent developments in investigation etc. to enable the Court to grant bail.

In view of the law declared by the Apex Courts in various judgments, it is difficult to accept the contention of the learned counsel for the petitioner that there are major changed circumstances which entitled the petitioner to claim bail under Sections 437 & 439 of Cr.P.C. Therefore, filing of successive bail applications without any major changed circumstances would not serve any purpose and even incarceration in jail for long period as pre-trial detention is also not a ground to enlarge the petitioner on bail, in view of **Pappu Yadav**[1] case.

Therefore, I find no substantial or major changed circumstance after dismissal of earlier two bail petitions. On this ground alone, the petitioner is disentitled to claim bail in a serious crime for the offences under Sections 21, 23, 28 and 29 of NDPS Act. Accordingly the point is held against the petitioner.

POINT NO.2

The second contention of the petitioner is that in the absence of any details regarding the place from where the contraband was procured by the petitioner and to whom the contraband is likely to be supplied, the prosecution cannot be maintained and she is liable to be enlarged on bail. Here, the contention of the learned Special Public Prosecutor is that one Mr. Sama, a Nigerian arranged tourist Visa and free air tickets for transportation of narcotic substances to India and the petitioner also confessed before the officers that earlier on two occasions, the petitioner brought chocolates from Dubai and handed over to Mr. Sama, Nigerian. Therefore, the charge sheet is clear that the petitioner procured the narcotic substance from Dubai and transported it to India to hand it over to Mr. Sama. These details would suffice and the prosecution reserved its right to take necessary action against Mr. Sama who is responsible for encouraging the petitioner to commit such offence i.e. transportation of narcotic substance. Therefore, the contention of the petitioner that no details were furnished is without any substance. However, the quantity involved in the crime is 1990 grams worth Rs.9,95,00,000/-. When the petitioner is indulged in such serious crime, she is disentitled to be enlarged on bail in view of the interdict contained under Section 37 of NDPS Act.

It is relevant to note Section 37of NDPS Act which reads as follows:

> **37. Offences to be cognizable and non-bailable .-**
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> (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 2[offences under section 19 or section 24 or section 27 A 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.
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> (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.

Learned counsel for the petitioner relied on the judgment of the Apex Court in **Union of India v. Mohanlal & another**[5] to contend that the respondent has to follow the procedure prescribed under Section 52-A and directions contained therein while investigating the offence, but, failed to follow the guidelines laid down in **Mohanlal**[5] case. As seen from the grounds urged in the bail petition, I find no such ground in the petition. Even during hearing also, non-compliance of Section 52-A was not pointed out. In those circumstances, the judgment of the Apex Court in **Mohanlal**[5] case is of no assistance to the petitioner. Therefore, on the ground of non-compliance of Section 52-A also, this Court cannot grant bail to the petitioner who committed serious offence.

Learned Special Public Prosecutor for DRI placed reliance on the judgment of the Supreme Court in **State of Madhya Pradesh v. Kajad**[6] wherein, the Supreme Court 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 is an exception under sub clause (ii) of clause (b) of Section 37(1). For granting

[5] (2016) 3 Supreme Court Cases 379
[6] AIR 2001 SC 3317

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.

Learned Special Public Prosecutor for DRI also placed reliance on the judgments of the Supreme Court in **Union of India v. Ram Samujh and another**[7], **Durand Didier v. Chief Secretary, Union Territory of Goa**[8], wherein, the Apex Court discussed scope of Section 37 of NDPS Act. In **State of Uttaranchal v. Rajesh Kumar Gupta**[9] and **Union of India v. Rattan Mallik alias Habul**[10], the Supreme Court extensively discussed about scope and consequences failing to adhere Section 37 of NDPS Act and concluded that Section 37 of NDPS Act created an interdict to grant bail for an offence punishable under various provisions of the Act, where a commercial quantity of contraband is involved. According to Section 37(1)(b) of NDPS Act, unless the Court records its satisfaction that the petitioner did commit no offence and that he would not commit similar offence again while on bail under Section 439 Cr.P.C in serious offences like the offence punishable under the Act.

In **Maktool Singh v. State of Punjab**[11] Supreme Court held that for all the offences punishable more than five years, the Courts power to release the accused on bail during the period before conviction has been, thus, drastically curtailed by providing

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[7] 1999 Supp (2) SCR 76
[8] 1989 AIR 1966
[9] (2007) 1 Supreme Court Cases 355
[10] (2009) 2 Supreme Court Cases 624
[11] (1999) 3 SCC 321

that if the Public Prosecutor opposes the bail application, no accused shall be released on bail, unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty for such offences.

In **Customs, New Delhi v. Ahmadalieva Nodira**[12] the Apex Court held that the Court has to keep in mind two conditions i.e, 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 and the expression reasonable grounds means something more than prima facie grounds and it contemplates substantial probable causes for believing that the accused is not guilty of the alleged offences.

In view of the law declared by the Apex Court in the judgments referred supra, Section 37 of NDPS Act, unless the Court concludes that the accused is not guilty based on reasonable ground and that there is no possibility of committing similar offences while on bail, where the offences are punishable for more than five years, he shall be enlarged on bail.

Even according to Section 37 of NDPS Act, the general provisions regarding grant of bail under Section 437, 438 & 439 are applicable. Besides the application of general provisions of Cr.P.C, certain safeguards are provided in the Act to grant bail, while placing reversal burden in view of Section 35 & 54 of NDPS

[12] 2004 (1) JCC 662

Act. Therefore, the general principles governing bails under Section 437, 438 & 439 are equally applicable to the bail applications filed by accused of the offences punishable under Sections 8(C) read with Section 20(b)(ii)(C) of NDPS Act for enlarging the accused in the above crimes under NDPS Act, where commercial quantity is involved.

In view of the law declared by the Apex Court in the judgments referred supra, Section 37 of NDPS Act, unless the Court concludes that the accused is not guilty based on reasonable ground and that there is no possibility of committing similar offences while on bail, where the offences are punishable for more than five years, he/she shall be enlarged on bail.

But, in the present case, the petitioner committed a serious offence of smuggling cocaine which is a narcotic drug. Hence, I do not find any ground to enlarge the petitioner on bail, though the petitioner is undergoing long period of incarceration as a pre-trail detention, the same is also not a ground to enlarge the petitioner on bail.

It is the contention of the learned counsel for the petitioner that the petitioner was not aware about the contents in the books and she was innocent of any offence. But, this contention is contrary to Sections 35 & 54 of NDPS Act.

In view of the presumptions contained under Sections 35 & 54 of NDPS Act, the initial onus of proof is on the accused to prove that she is unaware of the contents of the bag. Till the petitioner rebuts such presumptions, she is presumed to have mental element and *mens rea* to commit such an offence. Therefore, plea of such innocence and lack of knowledge is not a ground to enlarge the petitioner on bail. Hence, I find no ground to enlarge the petitioner on bail who allegedly committed a serious offence which becomes a menace to the society at large and that apart, it is difficult for me to conclude at this stage that she did commit no offence on any reasonable ground and it is the main requirement to enlarge the petitioner on bail, in view of the interdict contained under Section 37 of NDPS Act.

The criminal petition is devoid of merits and it is liable to be dismissed.

In the result, the criminal petition is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed.

JUSTICE M. SATYANARAYANA MURTHY

Dated: 14.03.2017

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