



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Wednesday, the First day of August Two Thousand Eighteen

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PRESENT

The Hon`ble Mr.Justice G.R.SWAMINATHAN

CRL OP(MD) No.11909 of 2018

S.KALEESWARAN

... PETITIONER / ACCUSED NO.3

Vs

STATE REP.BY
THE INTELLIGENCE OFFICER
NARCOTICS CONTROL BUREAU,
MADURAI SUB ZONE, MADURAI.
(F.No.48/01/09/18)

... RESPONDENT / COMPLAINANT

For Petitioner : Mr.LAJAPATHI ROY, Advocate for
Mr.A.BALAJI Advocate

For Respondent : Mr.C.ARUL VADIVEL @ SEKAR,
Special Public Prosecutor for CBI Cases

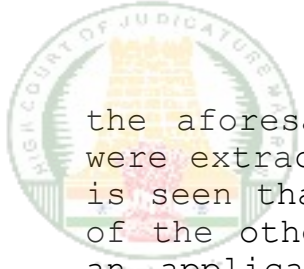
PETITION FOR ANTICIPATORY BAIL Under Sec. 438 Cr.P.C.

ORDER : The Court Made the following order :-

The petitioner herein apprehending arrest at the hands of the respondent for the offences punishable under Sections 8(c) r/w.22 (c), 27-A, 28 and 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 as amended by Act 14 (16 of 2014) in connection with crime in F.No.48/01/09/18 has moved this Court for grant of anticipatory bail.

2.When the matter was taken up for hearing, the learned Special Public Prosecutor for NCB Mr.Arul Vadivel @ Sekar appearing for the respondent, questioned the very maintainability of this petition. He placed reliance on an unreported decision of the Madurai Bench of the Madras High Court rendered in Crl OP(MD)No.1206 of 2018 dated 20.02.2018.

3.I went through the contents of the said order. The learned Judge had followed an earlier decision of the Hon'ble Himachal Pradesh High Court reported in 2003 Cri.L.J 3503 (Rakesh Kumar alais Kukka vs. State of Himachal Pradesh). Paragraph Nos. 7 and 10 of <https://hcservices.ecourts.gov.in/hcservices/>

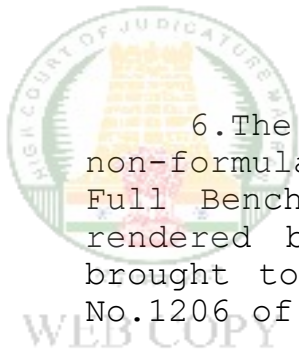


the aforesaid decision of the Hon'ble Himachal Pradesh High Court were extracted and the Criminal Original Petition was dismissed. It is seen that before the decision in Rakesh Kumar's case, the view of the other Judges of the High Court of Himachal Pradesh was that an application filed under Section 438 of Cr.PC even in cases arising under NDPS Act is very much maintainable. It was held in the decision reported in (2000 1 Cri.LJ 70) (Manbari Devi V.State) that grant of anticipatory bail under Section 438 of Cr.PC is subject to Section 37 of the NDPS Act, 1985 which provides that notwithstanding anything contained in the Code of Criminal Procedure, no person shall be released on bail unless the conditions as stipulated under sub-clause 2 of clause (b) of sub-section (1) are satisfied. The learned Judge who rendered the decision in Rakesh Kumar case had not taken note of the earlier view taken by the very same High Court with regard to the maintainability of a petition for anticipatory bail under Section 438 of the Cr.PC in NDPS cases. There was no definite formulation of the proposition that anticipatory bail cannot be granted in such cases. This is evident from Paragraph No. 11 of the said order which reads as under :

"Looking to the material on record so far, at least it cannot be said at this stage, that the case against the petitioner is groundless on a prima facie examination of it. Particularly looking to the prior information recorded and the same having been forwarded to the higher authorities under Section 42 of the NDPS Act, 1985. So even if the plea of Mr.Thakur that this application under Section 438, Cr.PC is maintainable is accepted, even then this is an additional ground to reject this application at this stage." The precedential value of Rakesh Kumar is thus clearly shaky.

4.The learned counsel appearing for the petitioner drew the attention of this Court to the Full Bench decision of the Hon'ble Calcutta High Court rendered in SRCR No.1 of 2013 (Teru Majhi & anr vs. State of West Bengal & Others). This is a very elaborate decision and discusses the issue thread bare. The question that arose before the Full Bench was whether the Special Court constituted under Section 36 of the NDPS Act is competent to entertain a pre-arrest bail petition under Section 438 of the Cr.PC. The reference was answered by stating that the Special Court constituted under Section 36 of the NDPS Act is competent to entertain pre-arrest bail petition under Section 438 of Cr.Pc, 1973.

5.In Ved Prakash Goel vs. Commissioner reported in (2001) 93 DLT 729, it was held that while considering an application under Section 438 of Cr.PC, the High Court must bear in mind the mandate set out in Section 37 (1) (b) of the NDPS Act. In other words, the Delhi High Court was of the view that an application for anticipatory bail even in NDPS cases is maintainable. But then, it would be subject to Section 37 (1)(b) of the NDPS Act.



6. The earlier stand of the Himachal Pradesh High Court, the non-formulation of the ratio in definite terms in Rakesh Kumar, the Full Bench Judgment of the Calcutta High Court and the decision rendered by the Delhi High Court in Ved Prakash Goel were not brought to the notice of the learned Judge who decided CrI OP(MD) No.1206 of 2018.

7. Therefore, I am of the humble and respectful view that the said order is to be confined to the facts and circumstances of that case. There is yet another aspect. In the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, there is a specific provision, namely, Section 18 which excludes the applicability of Section 438 of Cr.PC. Section 18 of the SC & ST Act reads as under :

"Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act".

Likewise, Section 20(7) of the Terrorist and Disruptive Acts (Prevention and Punishment) Act, excluded the benefit of Section 438 of Cr.PC. Section 20(7) of the said Act reads as under :

"Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this act or any rule made thereunder."

The constitutional validity of the said provision was questioned but upheld in Kartar Singh vs. State of Punjab (1994) 3 SCC 569. In NDPS Act, there is no such exclusion of Section 438 of Cr.PC. There are quite a few provisions in NDPS Act, 1985 which do override the provisions of Cr.PC. Section 32 A, Section 33 and Section 37(1) do contain the expression "notwithstanding anything contained in the Code of Criminal Procedure". But then, nowhere in the statutory scheme there is any express or implied exclusion of Section 438 of Cr.PC. Section 438 of Cr.PC was incorporated in the statute book to protect one's liberty. Of course, this is only a statutory right. It is open to the Parliament to take it away in particular situations. But then, only if there is a specific legislative exclusion, the courts should hold that a petition for anticipatory bail is not maintainable.

8. I am therefore of the view that a petition for grant of anticipatory bail is maintainable even in respect of cases arising under NDPS Act, 1985. But then, as held by the other High Courts, the prohibition set out in Section 37(1) (b) will have to be borne in mind. In other words, the court must be satisfied that there are reasonable grounds for believing that the applicant is not guilty of such offence and that, he is not likely to commit any offence while on bail. The limitations that have been provided for grant of bail under Section 37(1) (b) will have to be read into Section 438 of Cr.PC also if the offences under the Act involves commercial quantity.



9. In the present case, the petitioner who is shown as Accused No.3 is a whole sale dealer. He has chosen to deal with the product in question, namely, Alprazolam. He has been a whole sale dealer for the last 20 years. This product falls under Schedule H of the Drugs and Cosmetics Act, 1940. It is also referred to at Serial No.30 of the Schedule 1 of the NDPS Act, 1985. There is only one restriction. The retailer can sell the same only under prescription and bill. The whole sale dealer is authorised to sell to the retailers through proper documents.

10. In the present case, the petitioner admittedly has sold the products in question to the first accused under proper documents. The F.I.R itself came to be registered based on an information that an attempt was made to sell the product without proper bill. The second accused is none other than the petitioner's brother. He has given a confession. Even in the confession made by the second accused, the petitioner is nowhere implicated. As a date, there is absolutely no material whatsoever to implicate the petitioner. Taking into account the fact that all the sale transactions are duly documented, this Court is of the view that there are reasonable grounds for believing that the petitioner is not guilty of offences in question and that he is not likely to commit any offence while on bail.

11. When the matter was taken up earlier, a specific allegation was made against the officials of the respondent that they damaged the CCTV camera of the petitioner's shop. This court had directed the Assistant Commissioner, Thilagar Thidal (L&O) Police Station to secure the CCTC footage in this regard. This Court is satisfied that there was a movement of the respondent in the locality during the relevant time as alleged by the petitioner. Be that as it may, the learned counsel appearing for the petitioner on instructions submitted that the petitioner is not interested in pursuing the complaint which the petitioner has given with regard to the damage of the CCTV camera. Therefore, the Inspector of Police, Thilagar Thidal Police Station is directed to close the complaint.

12. This Criminal Original Petition is allowed. Accordingly, the petitioner is ordered to be released on bail in the event of arrest or on his appearance before the learned Principal Sessions Judge under NDPS Act Cases, Madurai and on his executing a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the learned Principal Sessions Judge under NDPS Act Cases, Madurai and on further condition that the petitioner shall appear before the respondent police as and when required for interrogation. The petitioner shall comply with the conditions stipulated under Section 438 Cr.P.C. Scrupulously. The petitioner shall appear before the Principal Sessions Judge under NDPS Act Cases, Madurai within a period of 15 days from the date on which the order copy is made



ready, failing which, the petition for anticipatory bail shall stand dismissed.

sd/-
01/08/2018

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1. THE PRINCIPAL SESSIONS JUDGE
NDPS ACT CASES, MADURAI.

2. THE INTELLIGENCE OFFICER
NARCOTICS CONTROL BUREAU,
MADURAI SUB ZONE, MADURAI.

3. THE ASSISTANT COMMISSIONER,
THILAGAR THIDAL POLICE STATION.

4. THE SPECIAL PUBLIC PROSECUTOR FOR CBI CASES,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

+1. CC to Mr.A.BALAJI Advocate SR.No.14725

+1. CC to Mr.C.ARUL VADIVEL@SEKAR Advocate SR.No.14730

ORDER
IN
CRL OP(MD) No.11909 of 2018
Date :01/08/2018

TK/VR/SAR.2/05.09.2018/5P-7C