

SMT JUSTICE T. RAJANI

CRIMINAL PETITION No.341 of 2018

ORDER:

This petition is filed, under Sections 437 and 439 of the Code of Criminal Procedure, 1973, seeking for release of the petitioner, who is A2, on bail in Crime No.38 of 2017 on the file of G.Madugula Police Station.

2. Heard the counsel for the petitioner and the Public Prosecutor appearing for the respondent.

3. The case of the prosecution is that on 20.08.2017 at 14:00 hours, on receiving information, the Assistant Sub-Inspector of police, along with the staff, went near the house of Kondapalli Rajbabu and found two persons present there. On seeing the police, they started running and the police caught them. When questioned, the first person revealed his name as Kondapalli Rajbabu and confessed that Mandadary Ganesh, ie., the petitioner purchases ganja in the interial villages now and then and brings it behind his house and hide it at Gangha konda hillock under his watching and in that connection he used to give Rs.10,000/- for each trip. In the same way, about two weeks back, Mandodary Ganesh brought 10 ganja bags to the back side of his house and asked him to hide, by giving Rs.10,000/- to him. While so, on the date of offence, Mandodari Ganesh came to the house of Rajbabu and asked him to bring the said bags which were hidden by him. When the police questioned the second person, he revealed his name as Mandadary Ganesh,

who is none other than the petitioner herein, and he also confessed, corroborating the facts stated by Kondapalli Rajbabu.

4. The counsel for the petitioner, in order to bring the petitioner outside the purview of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, “the Act”), contends that non-compliance of the mandatory provisions of the Act would entitle the petitioner for acquittal and in this case there is such non compliance and hence, the conditions laid down under Section 37 of the Act stand satisfied.

5. The said contention of the learned counsel for the petitioner would be true if the compliance of Section 42 of the Act and other provisions is considered as mandatory. In that regard, the counsel for the petitioner relies on a ruling of the Supreme Court in a case between *Sarija Banu v. State*¹, wherein it was held that compliance of Section 42 is mandatory and the same can be taken into account while considering the bail application.

6. As against the said ruling, the Public Prosecutor relies on the ruling, which was rendered by the apex court, in a case between *G.Srinivas Goud vs. State of A.P.*² wherein at paragraph 9 observed as follows:

“It will be seen from [Section 41\(2\)](#) that it refers to only officers of gazetted rank and it is such officers who can authorise their subordinates, not below the rank of peon, sepoy or constable, to carry out arrest, search or seizure. The function of arrest, search and seizure carried out under [Section](#)

¹ (2004) 12 SCC 266

² (2005) 8 SCC 183

[42\(1\)](#) is by officers who do not have warrants or authorization in their hands before proceeding to take action. This is as per the heading of the Section which reads: "Power of entry, search, seizure and arrest without warrant or authorization". Under [Section 41](#) it is the specified Magistrates who issue warrants of arrest and it is officers of gazetted rank who give authorisation in favour of their juniors. Provisions of sub-section (2) of [Section 42](#) are meant to cover cases falling under [Section 42\(1\)](#). Therefore, in our view, the requirement under [Section 42\(2\)](#) need not to be extended to cases of arrest, search and seizure by officers of gazetted rank. The officer of gazetted rank while authorising junior officers under [Section 41\(2\)](#) knows what he is requiring them to do and, therefore, there is no need for reporting. For this reason [Section 41](#) does not contain any such requirement. The need for reporting under [Section 42\(2\)](#) arises because the officer proceeds without authorisation in terms of [Section 41\(1\)](#) or 41(2). The requirement of informing the immediate official superior under [Section 42\(2\)](#), in our view, has to be confined to cases where the action is without authorisation by officers below the rank of gazetted officers."

7. The counsel for the petitioner also further relies on the ruling of the Apex Court in a case between *Kuldeep Singh vs. State of Punjab*³, wherein it was observed that no samples were taken at the place of occurrence and that would lead to violation of Section 42 of the Act. But the facts of the case, on hand, are not as such.

8. From the ruling relied upon by the Public Prosecutor in *G.Srinivas Goud's* case (supra), it can be understood that not only Section 42(2), but also Section 42(1) is not mandatory and the non-compliance of the same would not vitiate the trial. When Section 42(2) permits an officer without authorisation to

³ (2010)10 SCC 219

conduct search after complying with the conditions laid therein, it goes without saying that Section 42(1) is not a mandatory provision. Hence, the above ruling would answer and negate the contention of the petitioners' counsel that since investigation in this case was done by the Assistant Sub-Inspector, who is not an authorised officer, the petitioner would be entitled for acquittal.

9. The reliance placed by the petitioner's counsel on the ruling of the apex court in a case between *Sukhdev Singh vs. State of Haryana*⁴, does not help him to secure bail to the petitioner, as the said ruling is rendered in a criminal appeal and that cannot be made applicable while dealing a bail application. The observations of the apex court at paragraph 15 therein would make it clear that compliance or non-compliance of Section 42 involves a question of fact.

10. In view of the above, this court opines that this is not a fit case for granting bail to the petitioner.

Accordingly, the Criminal Petition is dismissed. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

T. RAJANI, J

February 9, 2018
LMV