

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.4671 OF 2018

ORDER:

This criminal petition, under Section 438 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), is filed by the petitioner/A.2 apprehending his arrest in connection with S.C.No.2 of 2018 pending on the file of I Additional Sessions Judge, Srikakulam arising out of CrimeNo.61 of 2015 of Meliaputti Police Station registered for the offence punishable under Section 8(c) read with 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'), to issue a direction to the Station House Officer to release him on bail in the event of his arrest in connection with the above crime.

The main allegation against the petitioner is that on 30.12.2015 A.1 engaged the petitioner/A.2 to transport the ganja from Jaipore to Bhuvaneshwar in his car bearing No.OR-02-AP-7349 and he left the car opposite abandoned Neelamani Durga talkies located nearby Meliaputti Police Station after noticing the vehicle checking. A.1 was arrested on 09.07.2017 while transporting 90 kgs., of ganja. Thus, it appears from the record that A.2 was engaged by A.1 for transportation of ganja and is also liable for punishment under Section 8(c) read with 20(b)(i) of the NDPS Act, and after completion of entire investigation charge sheet is filed before the Sessions court and it is pending for adjudication.

The basis for enroping the petitioner as accused is the confessional statement of A.1 recorded by the police in another crime after lapse of more than a year and therefore the petitioner is

also arraigned as A.2 in the above crime as he was the driver of the vehicle allegedly at the time of abandonment of the vehicle near police station.

The main contention of the counsel for the petitioner is that basing on the confession of A.1, A.2 the petitioner herein cannot be arrested and he has nothing to do with the offence and that too the allegations in the charge sheet would not constitute an offence much less an offence punishable under Section 8(1) read with 20(b)(i) of NDPS Act.

The objection taken by this court is as to maintainability of this petition after filing charge sheet, in view of the law declared by the Apex Court in **Satpal Singh v. State of Punjab**¹, but the counsel for the petitioner drawn the attention of this Court to a full judgment of this Court in **Smt. Sheik Khasim Bi v. The State**² anticipatory bail can be granted even after filing charge sheet.

He also contended that when there are reasonable grounds to believe that the petitioner is not guilty of the offence under the provisions of NDPS Act based on the allegations made in the charge sheet, the petitioner can be enlarged on pre-arrest bail, a bare reading of Section 37(1) of the Act will not come in the way in granting pre-arrest bail and prayed to grant pre-arrest bail.

The Public Prosecutor (A.P.) opposed the petition on the ground that the petitioner was absconding since long time and after filing charge sheet, NBW was issued and it is pending for

¹ CrI.P.No.462 of 2018

² 1986 CrI.L.J. 1303

execution. Therefore, the principle laid down in the above judgment of the Apex Court in **Satpal Singh** is directly applicable to this case as question of issuing summons after filing charge sheet would not arise and apart from that the ground urged by the counsel for the petitioner that the allegation made in the charge sheet is not sufficient to record satisfaction required under Section 37(1)(b) of the Act. He also contended that the information collected under Section 67(b) of the NDPS Act can be used as evidence against all the accused, but subject to corroboration during trial and prayed to dismiss the petition.

The first and foremost contention of the petitioner before this Court is that when charge sheet is filed and NBW is pending, the court can grant pre-arrest bail and the counsel placed reliance on the judgment of the Full Bench of this Court in **Smt. Sheik Khasim Bi** case (referred supra), wherein it was observed that filing of charge sheet by the police and issuing warrant by the Magistrate did not put an end to power to grant bail under Section 438 Cr.P.C. On the other hand, the High Court or the Court of Session has power to grant anticipatory bail under Section 438(1) to a person after the criminal court has taken cognizance of the case and has issued process viz., the warrant of arrest of that accused person.

But, the Full Bench of the Apex Court has taken a different view in recent judgment in **Satpal Singh** case referred supra, wherein at paragraph 14 in paragraph held as follows:

“14. In any case, the protection under Section 438 Cr.P.C. is available to the accused only till the court summons the

accused based on the charge sheet (report under Section 173(2) Cr.P.C.) on such appearance, the accused has to seek regular bail under section 439 Cr.P.C. and that application has to be considered by the court on its own merits. Merely because an accused was under the protection of anticipatory bail granted under Section 438 Cr.P.C. that does not mean that he is automatically entitled to regular bail under Section 439 Cr.P.C. The satisfaction of the court for granting protection under Section 438 Cr.P.C. is different from the one under Section 439 Cr.P.C. while considering regular bail.”

In view of the Full Bench judgment of the Apex Court, when anticipatory bail was obtained, and summons were issued after filing charge sheet, and on such appearance, the person who obtained anticipatory bail shall file an application for grant of regular bail, though it appears to be contrary to the law, but still it is binding precedent on the court under the Constitution of India, though the counsel for the petitioner drawn the attention of this Court to the observation in paragraph 17 of the judgment that the Court made it clear that none of the observations made in this judgment shall have any bearing on the trial or consideration of any application for bail at any stage since order is only for the purpose of the appeals in the matter of grant of bail. Thus, it means observations are limited for deciding the appeal before the Supreme Court, but it will have no bearing on the trial or in interlocutory applications being filed in the said case, it does not meant it is binding presidential value. Therefore, this principle cannot be treated as binding precedent as unsustainable.

Here in this case, NBW was issued against the petitioner after filing charge sheet and found absconding, question of issuing summons for securing his presence in the sessions case would not arise when the charge sheet is filed and NBW was issued, if the principle laid down in **Satpal Singh** case referred supra is applied, the remedy is to apply to the Sessions Court and to seek regular bail, but this view appears to be contrary to the principle laid down in the Full Bench of this Court in **Kasim Bee** case referred supra.

The Full Bench judgment of the Apex Court will prevail over the Full Bench judgment of this Court. Hence, I am unable to consider the request of the petitioner to grant pre-arrest bail to the petitioner.

The other contention raised by the counsel for the petitioner is that based on information collected during interrogation of A.1, the petitioner is arraigned as A.2, the information collected under Section 67(b) of the NDPS Act can be used against the accused, but that cannot be sole basis for recording conviction and even corroborated by any other evidence. The question of corroboration will arise only during trial, but not at this stage.

The other contention raised by the counsel for the petitioner is that there is a reasonable material to conclude that the petitioner is not guilty and that he will not commit any offence while on bail as to satisfy the requirement under Section 37(1)(b) of the NDPS Act.

When commercial quantity is involved in the crime, it is the duty of the court to record its satisfaction under Section 37(1)(b) of

the Act, when commercial quantity is involved in the crime, it is the duty of the court to record its satisfaction under Section 37(1)(b) of the NDPS Act, that the petitioner will commit no offence while on bail. Unless the court satisfied the existence of twin requirements, the court cannot grant bail as a matter of course. In view of interdict contained under Section 37(1)(b) of the NDPS Act.

Here the petitioner relied on the allegation made in the charge sheet and no other material is produced before the court, charge sheet is only gist of evidence collected during investigation enabling the court to frame a charge against the accused. The allegations in the charge sheet are not evidence and what is produced before the court either by way of document or oral evidence is the evidence on record, but no other material is produced to record satisfaction as required under Section 37(1)(b) of the NDPS Act to grant pre-arrest bail to the petitioner.

Basing on the allegation made in the charge sheet, it is difficult to record its satisfaction as required under Section 37(1)(b) of the NDPS Act, it is obligation on the Court to record such satisfaction. In **State of Madhya Pradesh v. Kajad**³ 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

³ AIR 2001 SC 3317

the rule and its grant and exception under sub clause (ii) of clause (b) of Section 37(1) of the NDPS Act. 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 **Maktool Singh v. State of Punjab**⁴ the Apex 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 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.

⁴ (1999) 3 SCC 321

In **Customs, New Delhi v. Ahmadalieva Nodira**⁵ 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 my foregoing discussion, the petitioner is not entitled to claim pre-arrest bail, for the reason that NBW is pending for execution, and by applying the principle laid down in **Satpal Singh** case anticipatory cannot be granted even otherwise there is no material is placed on record to conclude that there is a reasonable ground to believe that the petitioner is not guilty of the offence and that he will not commit any offence while on bail, which is mandatory for granting bail. Consequently, the criminal petition is liable to be dismissed.

In the result, the criminal petition is dismissed.

M.SATYANARAYANA MURTHY, J

27.04.2018
BV

⁵ 2004 (1) JCC 662