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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Date on which reserved : 09/07/2019

Date on which pronounced : 15/07/2019

PRESENT

The Hon`ble Mr.Justice P.RAJAMANICKAM

CRL OP(MD) . No.9168 of 2019

P.Rajendran

... Petitioner/Accused No.3

Vs

State Rep.by
The Intelligence Officer,
Narcotic Control Bureau,
Madurai Sub Zone, Madurai.
NCB F.No.48/1/01/2018.

... Respondent/Complainant

For Petitioner : M/s. K.P.S.Palanivelrajan, Advocate.

For Respondent : Mr.C.Arul Vadivel @ Sekar,
Special Public Prosecutor

PETITION FOR BAIL Under Sec.439 of Cr.P.C.

PRAYER :-

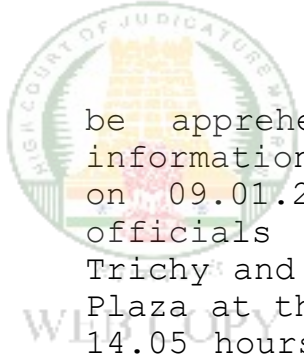
For bail in NCB F No.48/1/01/2018 on the file of Union of India, Rep by Intelligence Officer, Narcotics Control Bureau, Madurai Sub Zone.

ORDER : The Court Made the following order :-

This petition has been filed by the accused No.3, seeking bail for the alleged offences punishable under Sections 20(b)(ii)(C), 27A, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 in NCB F No.48/1/01/2018 on the file of Union of India, Rep by Intelligence Officer, Narcotics Control Bureau, Madurai Sub Zone.

2.The case of the prosecution is as follows:

i)On 08.01.2018, a specific information was received by the Intelligence Officer, NCB Madurai that 1st accused Siva procured substantial quantity of ganja at Salem and was likely to transport the same on 09.01.2018 to Kotur, Thiruvarur via Trichy in a Truck bearing No.IN28AB5177 for the petitioner and if surveillance is mounted at Trichy-Thanjavur National Highways, the said persons can

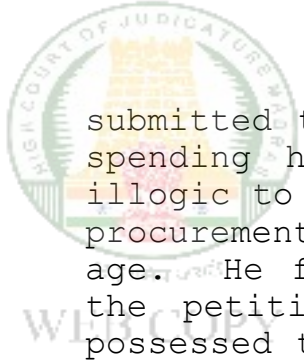


be apprehended with contraband. On the basis of the said information and direction from the Superintendent I/c, NCB, Madurai, on 09.01.2018, the Intelligence Officer along with a team of officials proceeded to Valavanthankottai Toll Plaza, Thuvakudi, Trichy and approached Vedamani & Subba who were on duty in the Toll Plaza at that time for being witnesses for possible search. At about 14.05 hours on the same day, they found the said vehicle driven by the 2nd accused, along with 1st accused near the Toll Plaza. The NCB Officials surrounded the said vehicle and disclosed their identity and enquired about the identity of the accused 1 & 2. The accused 1 & 2 have admitted that they procured 177 packets of ganja weighing 350 kgs and carried in the vehicle for the petitioner at Kottur, Thiruvavarur. The Intelligence Officer and his team also found out the same in the vehicle and recovered the articles including vehicular documents. Thereafter, the Intelligence Officer has sent a team along with 1st accused to Kottur at around 15.50 hrs on 09.01.2018 to nab the petitioner. The said team returned to the Intelligence Officer from the place of alleged occurrence at 7.30 p.m on 09.01.2018 bringing the petitioner along with 1st accused.

ii) Thereafter, the Intelligence Officer has served summons under Section 50 of the NDPS Act to accused 1 & 2 and the petitioner and mahazar was prepared for seizure of the vehicle and articles mentioned thereunder and completed the entire process at 9.50 pm on 09.01.2018. After preparation of mahazar, the accused 2 and 3 have appeared before the Intelligence Officer and his team to Madurai and on 10.01.2018, the 1st accused gave a confession statement under Section 67 of the NDPS Act, stating that he procured ganja from Tuni in Andhra Pradesh from an unknown person. The 2nd accused gave confessional statement before the Intelligence Officer on 10.01.2018 stating that when he and first accused procured ganja in Tuni in Andhra Pradesh, the vehicle was intercepted by NCB Officers at Thuvakudi Toll Plaza.

(iii) The petitioner, who was arrayed as 3rd accused also gave a confessional statement stating that the accused 1 & 2 had brought the said ganja in December 2017 and concealed it somewhere in Sangagiri, due to strict police checking, during New year celebrations. He further stated that the said contraband was purchased by the 1st accused in December 2017 and it was concealed in somewhere else in Sangagiri. He further stated that on 09.01.2018, when he was standing in Thiruthuraipoondi-Mannargudi Road at Kottur bus stop, he was approached by NCB Officers showing their identity card and he was identified by 1st accused and hence the respondent has filed a complaint before the Special Court for NDPS Act Cases at Pudukkottai to punish the accused Nos.1 to 3 under Section 20(b) (ii) (C), 25, 27-A, 28 and 29 of the NDPS Act, 1985.

3. The learned counsel for the petitioner has submitted that the petitioner is a document writer, aged about 62 years and the accused NOS.1 & 2 are strangers to him. He further submitted that the petitioner did not know or met the accused Nos.1 & 2. He further



submitted that since the petitioner is a document writer and he is spending his life in the profession of document writing, it is illogic to say that he has indulged in dealings with the accused for procurement, sale and illegal transportation of ganja at this old age. He further submitted that even as per the prosecution case, the petitioner was not travelling in the contraband vehicle or possessed the alleged contraband and no recovery has been made from him. He further submitted that the petitioner herein has been arrayed as accused only based on the confession statements said to have been given by accused Nos.1 & 2. He further submitted that since the powers of an Officer in-charge of Police Station for the investigation of the offences under the NDPS Act have been conferred to the respondent, as per Section 53 of the NDPS Act, he also comes under the category of Police Officer and in such a case, the confession statements, which were said to have been recorded by the respondent are not admissible, in view of the provisions of Section 25 of the Indian Evidence Act. He further submitted that no such confession statement can be recorded under Section 67 of the NDPS Act. This provision empowers to call for information and not to record such confession statements. Thus, the statement recorded under this provision akin to the statement under Section 161 Cr.P.C. In any case, since the said statements have been retracted, no reliance can be placed upon the said confession statements. He further submitted that the Honourable Supreme Court in **Tofan Singh Vs. State of Tamil Nadu, (2013) CrI.L.J.4990**, has expressed a view that the ratio of **Kanhaiyalal Vs. Union of India: 2008 (4) SCC 668: AIR 2008 SC 1044** necessitates a relook and hence the matter was referred to a larger Bench for re-consideration of the issue as to whether the Officer investigating the matter under the NDPS Act would qualify as Police Officer or not and so far, the said matter has not been disposed of and under the said circumstances, no reliance can be placed upon those statements said to have been recorded under Section 67 of the NDPS Act.

4.The learned counsel for the petitioner, relying upon a decision of the Honourable Supreme Court in **Surinder Kumar Khanna Vs Intelligence Officer, Directorate of Revenue Intelligence (2018) 8 Supreme Court Cases 271** has further submitted that even if it is assumed that the statement recorded under Section 67 of NDPS Act may amount to confession, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. He further submitted that in this case, except the confession statement of the co-accused, no other material is available suggesting involvement of the petitioner in the aforesaid crime. He further submitted that after the dismissal of previous bail application in CrI.O.P.No.15872/2018, the health of the petitioner has become deteriorated and the petitioner is a diabetic patient and hence, he has to take better treatment. He further submitted that the petitioner is in custody for more than 18 months and the trial court is not likely to conclude the trial in the near future and therefore, he prayed to grant bail to the petitioner.



5. Per contra, the learned Special Public Prosecutor has submitted that based on the confession statements given by the accused Nos.1 & 2, the petitioner herein has been arrayed as accused. He further submitted that apart from the confession statements of co-accused, the petitioner himself gave a confession statement and the same has been recorded under Section 67 of the NDPS Act and since the respondent will not come under the definition of 'Police', the said confession statement is not hit by the provision of Section 25 of the Indian Evidence Act and as such, the same can be used against him. He further submitted that the call detail records of the petitioner's mobile phone would show that the accused Nos.1 & 2 and the petitioner herein were in constantly in contact with each other. He further submitted that in **Tofan Singh V. State of Tamil Nadu (cited supra)**, the Honourable Supreme Court has referred the matter to a larger Bench, but, so far no decision came from the larger Bench and under the said circumstances, in view of the decision of the Honourable Supreme Court in **Kanhaiyalal Vs Union of India (cited supra)**, that the Officer under Section 53 of the NDPS is not the Police Officer and therefore, the statement recorded by the respondent under Section 67 of the NDPS Act is admissible in evidence. He further submitted that since in this case, large quantity of the ganja i.e 350 kilograms is involved, the said quantity comes under the category of Commercial Quantity and in the case of commercial quantity, the petitioner has to satisfy the conditions envisaged under Section 37 of the NDPS Act, but, in this case, the petitioner has not satisfied the said conditions and hence, he is not entitled to get bail. He further submitted that all these contentions were raised by the petitioner in the previous bail application itself i.e in CrI.O.P.(MD).No.15872/2018 and this Court, after considering the said contentions, has dismissed the said application by the order dated 06.12.2018 and after dismissal of the said application, there is no change of circumstance and therefore, on that ground also, this petition has to be dismissed.

6. In **Tofan Singh V. State of Tamil Nadu (cited supra)**, the Honourable Supreme Court, in paragraph No.38 to 40, has held as follows:

"38. In our view the aforesaid discussion necessitates a re-look into the ratio of Kanhiyalal Case. It is more so when this Court has already doubted the dicta in Kanhaiyalal (supra) in the case of **Nirmal Singh Pehalwan (2011) 12 SCC 298** wherein after noticing both **Kanhiyalal as well as Noor Aga**, this Court observed thus:

"15. We also see that the Division Bench in Kanhaiyalal case; 2008 (4) SCC 668; (2008) 2 SCC (CrI.) 474, had not examined the principles and the concepts underlying Section 25 of the Evidence Act vis.-a-vis. Section 108 of the Customs Act the powers of Custom Officer who could investigate and bring for



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trial an accused in a narcotic matter. The said case relied exclusively on the judgment in Raj Kumar's case (Supra). The latest judgment in point of time is Noor Aga's case which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in Noor Aga's case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with."

39. For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for re-consideration of the issue as to whether the officer investigating the matter under NDPS Act would qualify as police officer or not.

40. In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement under Section 161 of the Code or it partakes the character of statement under Section 164 of the Code."

7. Admittedly, so far no decision came from the larger Bench with regard to the issue as to whether the statement recorded by the Investigating Officer under Section 67 of the NDPS Act can be treated as a confessional statement or not. Under the said circumstances, this Court is of the view that there is no bar to rely upon the decision in **Kanhaiyalal Vs. Union of India** (cited supra). In the said case, the Honourable Supreme Court has held that the Officer under Section 53 of the NDPS Act is not a Police Officer and as such, the statement recorded under Section 67 of the NDPS Act is not hit by the provisions of Section 25 of the Evidence Act.

8. In **Surinder Kumar Khanna Vs Intelligence Officer, Directorate of Revenue Intelligence** (cited supra), the Honourable Supreme Court, after referring to the decision of the Honourable Supreme Court in **Tofan Singh V. State of Tamil Nadu** (cited supra), has observed in paragraph Nos. 8 and 9 as follows:

"8. Thus the issue whether statement recorded under Section 67 of the NDPS Act can be construed as a confessional statement even if the officer who recorded such statement was not to be treated as a police officer, has now been referred to a larger Bench.



9. Even if we are to proceed on the premise that such statement under Section 67 of the NDPS Act may amount to confession, in our view, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. It is noteworthy that unlike Section 15 of Terrorist and Disruptive Activities Act, 1987 which specifically makes confession of a co-accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co-accused. Similarly: Section 18 of Maharashtra Control of Organised Crime Act, 1999 accused. The matter therefore has to be seen in the light of the law laid down by this Court as regards general application of a confession of a co-accused as against other accused."

9. In this case, the prosecution not only relied upon confession statement of co-accused, but also the confession statement given by the petitioner himself. Further it also relied upon the call detail records pertaining to the petitioner's mobile phone and the said call details would show that the petitioner and other accused persons were constantly in contact with each other. So, the defence set up by the petitioner that he did not know or met the accused Nos.1 & 2 appears to be false. Under the said circumstances, this Court is of the view that the aforesaid decision will not help the petitioner.

10. In view of Section 37(1)(b)(ii) of the NDPS Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence, while on bail alone will entitle him to a bail. In this case, as already pointed out that the defence set up by the petitioner that he did not know or met the accused Nos.1 & 2 proved as false. So, an adverse inference has to be drawn against the petitioner. The petitioner has not satisfied the conditions envisaged under Section 37(b)(ii) of the NDPS Act.

11. In **Union of India Vs Shiv Shanker Kesari (2007) 7 Supreme Court Cases 798**, the Honourable Supreme Court has observed in paragraph No.7 as follows:

"7. The expression used in Section 37 (1)(b) (ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged."



12. In State of **Madhya Pradesh Vs Kajad A.I.R 2001 Supreme Court 3317**, the Honourable Supreme Court in paragraph No.5, has observed as follows:

"5. The purpose for which the 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 subclause (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 has further to be noticed that the conditions for granting the bail, specified in clause (b) of subsection (1) of Section 37 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."

13. In this case, after dismissal of the earlier bail application in Crl.O.P.(MD).No.15872/2018, the petitioner has not pointed out any change of circumstance. Taking into consideration of all the aforesaid facts, this Court is of the view that the petitioner has not satisfied the conditions as envisaged under Section 37(1)(b)(ii) of the NDPS Act. Therefore, this petition is liable to be dismissed.

14. Accordingly, this petition is dismissed.

Sd/
(P R M J)
15.07.2019

vs

After passing of the final order, the learned counsel for the petitioner has made an oral application to issue a certificate for appeal to the Honourable Supreme Court.

2. The learned counsel for the petitioner has submitted that already the Honourable Supreme Court in **Tofan Singh Vs. State of Tamil Nadu, (2013) Crl.L.J.4990**, has referred the matter to a larger Bench to decide the issue as to whether the statement recorded by the Investigating Officer under Section 67 of the NDPS Act can be



treated as confession statement or not and hence, this case is a fit case for filing appeal before the Honourable Supreme Court and therefore, he requests to issue certificate for appeal to the Honourable Supreme Court.

3.The learned Special Public Prosecutor has submitted that in this case, the prosecution has not only relied upon the confession statement of the co-accused but also the confession statement of the petitioner. He further submitted that the prosecution also relied upon the call details pertaining to the petitioner's mobile phone and the said call details would show that the petitioner and other persons were constantly in contact with each other. He further submitted that this Court, after taking into consideration of the aforesaid facts and also the fact that after dismissal of the earlier application in CrI.O.P.(MD).No.15872/2018, there is no change of circumstance, this Court has dismissed this petition and hence, it is not a fit case for issuing certificate for appeal to the Honourable Supreme Court.

4.The previous bail application in CrI.O.P.(MD).No.15872/2018 was dismissed by this Court, after taking into consideration of all the submissions made by the learned counsel for the petitioner. After dismissal of the said application, no change of circumstances have been pointed out. Further, the prosecution not only relied upon the confession statement of the co-accused and confession statement of the petitioner petitioner but also relied upon the call details pertaining to the mobile phone of the petitioner, which would show that the petitioner and other accused persons were constantly in contact with each other. Taking into consideration of all the aforesaid facts, this Court has dismissed the present bail application. Therefore, this Court is of the view that it is not a fit case for issuing certificate for appeal to the Honourable Supreme Court. Accordingly, the oral application made by the learned counsel for the petitioner is rejected.

sd/-

15/07/2019

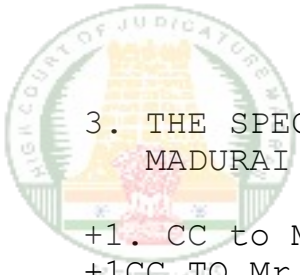
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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1. THE INTELLIGENCE OFFICER,
NARCOTIC CONTROL BUREAU,
MADURAI SUB ZONE, MADURAI.

2. THE SUPERINTENDENT, CENTRAL PRISON,



3. THE SPECIAL PUBLIC PROSECUTOR FOR NCB CASES,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

+1. CC to M/S. K.P.S.PALANIVELRAJAN Advocate SR.No.11707
+1CC TO Mr.C.ARUL VADIVEL @ SEKAR, Advocate, Sr No.11737

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ORDER

IN

CRL OP(MD) No.9168 of 2019

Date :15/07/2019

MS/VR/SAR-3/16.07.2019/9P.6C