

1.06.2021
S.D.
09.

CRM 1946 of 2021

In Re: - An application for bail under Section 439 of the Code of Criminal Procedure.

And

In the matter of: **Mojibur Rahaman @ Rongbir Seikh @ Mohibur
Rahaman @ Bapi**

....Petitioner.

Mr. Arnab Chatterjee

...for the Petitioner.

Mr. Sanjoy Bardhan

Mr. Palash Chandra Majhi

... for the State.

The petitioner is arrayed as an accused in connection with N.D.P.S. Case No. 183 of 2000 corresponding to Suti Police Station Case No. 368 of 2020 dated 6.8.2020 under Section 21 (c) of N.D.P.S. Act for the recovery of commercial quantity of heroine. The complaint was lodged suo motu by Anup Kumar Deb, Sub-Inspector of Police, Suti Police Station who having received a source information on 6.8.2020 along with his force apprehended two persons on a two-wheeler at Chandernore and on search, recovered brown coloured powder seems to be heroine about 350 gm from the possession of Abdur Rajak and Barjahan Sk. On interrogation, the arrested persons disclosed the names of their associates including the name of the petitioner. So, the case was started after compliance of legal formalities. The petitioner was arrested on 15.9.2020

and is now in custody for last 250 days. Charge sheet has been submitted on completion of the investigation.

Now, the petitioner is seeking bail on parity with an accused Senarul Sk @ Senaul Sk @ Hela @ Hola who was admitted on bail in connection with CRM 7870 of 2020 on 15.10.2020 by a Coordinate Bench of this Hon'ble Court with a view that the petitioner had made out a case for taking an exception under Section 37 of the N.D.P.S. Act as the said petitioner was solely connected on the basis of the statement of co-accused from whom recovery was made.

Learned counsel for the petitioner relied on a decision of the Hon'ble Supreme Court in the case of *Surinder Kumar Khana vs Intellience Officer, Directorate of Revenue Intelligence reported in (2018) 8 SCC 271* to submit that the conviction cannot be based on the sole statement recorded under Section 67 of the N.D.P.S. Act.

In our view, having respectfully gone to the decision, at this stage we cannot come to a complete finding that the petitioner is linked with the offence alleged solely on the basis of statement of co-accused. It is true that the statement of a co-accused under Section 67 of the N.D.P.S. Act solely cannot be considered for finding involvement of the accused. The Hon'ble Apex Court observed taking note of the observation made by the Hon'ble High Court judgment which was in appeal before the Hon'ble Supreme Court challenging the judgment of conviction and sentence. It would emerge from the facts situation of the case in the cited

case that the appellant was convicted solely based on a statement recorded under Section 67 of the N.D.P.S. Act. Earlier in case of *Kanhaiyalal vs. Union of India*, wherein the Hon'ble Court had observed at page 275 which is as follows:-

"45. Considering the provisions of Section 67 of the NDPS Act and the views expressed by this Court in Raj Kumar Karwal case with which we agree, that an officer vested with the powers of an officer in charge of a police station under Section 53 of the above Act is not a "police officer" within the meaning of Section 25 of the Evidence Act, it is clear tht a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the NDPS Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act."

The Hon'ble Supreme Court observed in para 7 taking view from the decision in *Tofan Singh vs. State of Tamil Nadu reported in (2013) 16 SCC 31* as follows:

7. Later, another Bench of two Judges of this Court in Tofan Singh V. State of T.N. was of the view that the matter required reconsideration and therefore, directed that the matter be placed before a larger Bench. It was observed in Tofan Singh as under : (SC pp. 57-58, paras 40-42).

"40. In our view the aforesaid discussion necessitates a re-look into the ratio of Kanhaiyalal case. It is more so when this court was already doubted the dicta in Kanhaiyalal in Nirmal Singh pehlwan wherein their noticing both Kanhaiyalal as well as Noor Aga, this Court observed thus: (Nirmal Singh Pehlwan case, SCC p. 302, para 15)

'15. We also see that the Division Bench in Kanhaiyalal case had not examined the principles and the concepts underlying Section 25 of the Evident Act, 1872 vis-à-vis Section 108 of the Customs Act and the powers of a Customs Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in Raj Kumar case. The latest judgment in point of time is Noor Aga 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 case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with.'

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

42. 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 first 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.”

Thus, it is now settled proposition of law that statement under Section 67 of the N.D.P.S. Act is equated with a statement under Section 161 of the Cr.P.C. as it does not partake the character of a statement under Section 164 of the Cr.P.C. It was observed by the Hon’ble Apex Court that such a statement cannot be made tile foundation of conviction and can only be used in support of other evidence and conclusively held that on the touchstone of law laid down by the Apex Court such a confessional statement of co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence, it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused.

We have respectfully considered the facts situation of the cited case which, in our opinion, is not well-nigh, at this juncture, within the facts and circumstances of this case to hold that the accused petitioner has been nabbed solely on the basis of statement of co-accused inasmuch as the cited case relates to conviction solely based on the statement under Section 67 of the N.D.P.S. Act, but in this case, there is no such statement under Section 67 rather the statements recorded by the Investigating Officer is under the provision of Section 161 of the Cr.P.C.

Learned counsel for the State adverts our attention to the statement of co-villagers appearing at page 50, 51, 126 and 127 and the statement of the co-accused of the Case Diary at page 35, 48, 54 and that of the petitioner at page 77 so recorded and other materials placed in Case Diary which inspires confidence of this Court that prima facie, the petitioner is well involved and linked with the instant case.

In the context of the above, we are not inclined to release the accused on bail consequently, prayer for bail is rejected. The application being C.R.M. 1946 of 2021 is, thus, dismissed.

(Aniruddha Roy, J.)

(Shivakant Prasad, J.)