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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

RESERVED ON : 12.04.2022

PRONOUNCED ON: 18.04.2022

PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL OP(MD) . No.5083 of 2022

M.Eswaran

... Petitioner/Accused No.2

Vs

State rep.by
The Inspector of Police,
NIB-CID, Theni,
Theni District.
(Crime No.40 of 2021)

... Respondent/Complainant

For Petitioner : Mr.K.Prabhakaran, Advocate

For Respondent : Mr.E.Antony Sahaya Prabahar,
Additional Public Prosecutor

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

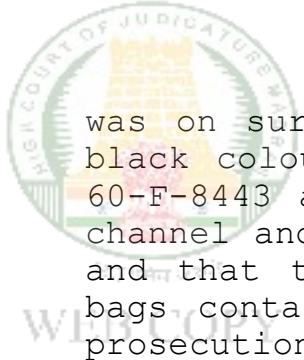
PRAYER :-

For Bail in Crime No.40 of 2021 on the file of the Respondent Police.

ORDER : The Court made the following order :-

The petitioner/A2, who was arrested and remanded to judicial custody on 26.10.2021 for the offences under Sections 8(c) r/w 20(b) (ii)(C) and 25 of NDPS Act in Crime No.40 of 2021 on the file of the respondent police, seeks bail.

2.The case of the prosecution is that on 26.10.2021, on receipt of the secret information, the respondent police party went to K.Pudupatty Road, Kannanoothu Channel, that when the police party



was on surveillance at about 07.45 a.m., a person came there in a black colour Hero Honda Splendor+ bike bearing registration No.TN-60-F-8443 and he parked the bike on the road side and went to the channel and taken out two gunny bags kept secretly under the bushes and that the police party surrounded him and recovered two gunny bags containing 24 kgs of Ganja. It is the further case of the prosecution that the petitioner has given a voluntary confession statement, wherein, he has stated that the first accused was the owner of the contraband and that the petitioner was working as an employee to help illegal activities and for the said work, the petitioner was getting wages of Rs.1,000/- from the first accused.

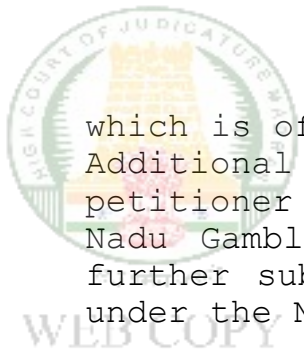
3.The petitioner's case is that he is innocent and he has not committed any offence as alleged by the prosecution and that he has been falsely implicated in the above case.

4.The learned counsel for the petitioner would submit that the Head Constable is not an empowered official incumbent under Sections 41, 42 and 43 of the NDPS Act and therefore, the search and seizure was effected by him are illegal, that the respondent police has not complied with the mandatory provisions of the said Act and that when the petitioner was in his house, he was called by the Head Constable for enquiry purpose, but later, he was arrested and remanded. The learned counsel would further submit that the petitioner is a handicapped person, he has withered and no fingers in his hand and hence, he could not able to ride the bike.

5.The learned Additional Public Prosecutor would submit that he is having one finger in his hand and he is riding the two wheeler, that the petitioner himself was given a voluntary confession statement admitting that he was working under the first accused and was involved in the transportation of Ganja.

6.Regarding the non-following of the mandatory procedures alleged by the petitioner, the compliance or non-compliance; adequate compliance or substantial compliance of the mandatory procedures contemplated under Sections 42 and 50 of the NDPS Act can only be gone into and decided only at the Trial stage and not at the Bail stage. Hence, the arguments advanced by the learned counsel for the petitioner in this regard cannot be gone into in the present application.

7.The learned Additional Public Prosecutor would submit that the petitioner in his confession statement has specifically stated that he has been working under the first accused for the past one year and he used to transport Ganja and handover the same to the person as instructed by the first accused, that on 25.10.2021, the first accused asked the second accused to come to Oothukadu outer on 26.10.2021 at about 05.00 a.m., that he went there and the first accused came there in a bike along with two gunny bags and both the accused went to Kannanuthu channel and secretly hid the two gunny bags under the bushes and that the contraband of 24kgs of Ganja,



which is of commercial quantity was recovered from him. The learned Additional Public Prosecutor would further submit that the petitioner is having three previous cases, one case under the Tamil Nadu Gambling Act and the other two cases under IPC. He would further submit that the petitioner is not having any previous case under the NDPS Act.

8. This Court, in batch of cases in ***Crl.O.P. (MD) No. 5093 of 2021 etc., in Muruganandham and another vs. the State represented by the Inspector of Police, Authoor Police Station, Thoothukudi District and others***, dated 23.12.2021, has observed as follows:-

"18. Section 37 of the NDPS Act creates bar for grant of bail whenever the recovery is of commercial in nature and also when the offence is under Section 27-A of the NDPS Act.

Perusal of the provisions of Section 37 of NDPS Act would show that although there is a bar created for grant of bail but a departure can be made in case where the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail, then the Court can always consider the grant of bail in that regard. The Hon'ble Supreme Court in the case of ***State of Kerala and another vs. Rajesh and another***, reported in **2020 SCC Online SC 81**, has observed;

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with nonobstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates."

9. It is settled law that the twin conditions contemplated under Section 37 of the NDPS Act are to be considered as conjunctive and not alternative. In the case on hand, as already pointed out, since the petitioner is not having any previous case under the NDPS Act, this Court can very well record a finding that the petitioner is not likely to commit such an offence, after coming out on bail. But at the same time, the entire contraband of 24kgs of Ganja was recovered from the petitioner, this Court cannot record a finding that the petitioner is not guilty of such offence. Hence, this Court has no other option but to dismiss the application.



10. In the result, this Criminal Original Petition is dismissed.

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Sd/-
18/04/2022

/ /2022
Sub-Assistant Registrar (C.S.II)
Madurai Bench of Madras High Court,
Madurai - 625 023.

SJI

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

TO

1. THE INSPECTOR OF POLICE,
NIB/CID, THENI, THENI DISTRICT.
2. THE SUPERINTENDENT,
CENTRAL PRISON, THENI,
THENI DISTRICT.
3. THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI.

ORDER
IN
CRL OP(MD) No.5083 of 2022
Date :18/04/2022

SP/SVR/SAR II/22/04/2022/4P/4C