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CRL OP(MD). No.17530 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Reserved on : 23.11.2022

Delivered on : 01.12.2022

PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL OP(MD) . No.17530 of 2022

Maran

... Petitioner/
Accused No.10

Vs

The State through
The Inspector of Police,
NIB-CID Police Station,
Nagapattinam.
(Crime No.21 of 2021)

... Respondent/
Complainant

For Petitioner : Mr.G.Karuppasamy Pandiyan
for Mr.J.Senthil Kumaraiah
For Respondent : Mr.T.Senthil Kumar,
Additional Public Prosecutor.

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

PRAYER: -

For Bail in C.C.No.16 of 2022 on the file of the
learned Special Court for EC & NDPS Act Cases,
Thanjavur, in Crime No.21 of 2021 on the file of the
Respondent Police.

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ORDER : The Court made the following order :-

The petitioner/A.10, who is facing a case for the offences punishable under Sections 8(c) r/w 20(b)(ii)(c), 25 and 29(1) of Narcotic Drugs and Psychotropic Substances Act, 1985, in C.C.No.16 of 2022 on the file of the learned Special Court for EC & NDPS Act Cases, Thanjavur, in Crime No.21 of 2021 on the file of the respondent police, seeks bail.

2. Admittedly, originally FIR came to be registered in Crime No.623 of 2021 on the file of the Nagapattinam Town Police Station, thereafter the case was transferred to NIB-CID Nagapattinam and FIR came to be registered in Crime No.21 of 2021 on the file of the NIB-CID Nagapattinam and that the respondent has already laid a final report and the case was taken on file in C.C.No.16 of 2022 and is pending on the file of the Special Court for EC and NDPS Act Cases, Thanjavur.



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3. The case of the prosecution is that on 31.07.2021 at about 03.00 hours, on receipt of secret information, the respondent police went to Oosi Matha Temple located at Nagapattinam Beach Road and at 17.00 hours, the respondent police team had intercepted one Innova car bearing Registration No.PY-01-CF-2777 and eight persons were in that car, that after following the mandatory procedures, the respondent police team conducted a search in the said car and found that the accused persons were found in illegal possession of 2 gunny bags of Ganja (each contain 45 kg of Ganja) and they have arrested the accused persons, that on the basis of the confession statement given by the accused Mukesh, other accused were added and that thereafter on the basis of the confession statement of the petitioner, Arul Kumar was added as 15th accused.

4. The petitioner's case is that he is innocent and he has not committed any offence as alleged by the prosecution and that a false case has been foisted against him.



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5. The learned counsel appearing for the petitioner would submit that the petitioner was implicated only on the basis of the confession statement alleged to have taken from the co-accused, that the petitioner's name does not find place in the FIR, that there was no recovery from the petitioner and that the petitioner is not having any previous cases under NDPS Act.

6. The learned Additional Public Prosecutor appearing for the respondent would submit that the present petitioner actively involved in transportation of the Ganja knowingly and voluntarily for money and tried to smuggle it to Sri Lanka, that the contraband meant for Sri Lanka was recovered and as per the confession of the other accused, it is clear that the petitioner had an active participation in the crime and that there is not only culpable mind, but also active participation in the crime knowing fully well about the involvement of the commercial quantity of contraband.



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7. It is evident from the records that the petitioner's earlier applications in Crl.O.P.(MD)Nos. 8269 and 12994 of 2022 were ordered to be dismissed by this Court vide orders dated 17.06.2022 and 27.07.2022 respectively.

8. As rightly contended by the learned counsel appearing for the petitioner as well as the learned Additional Public Prosecutor appearing for the respondent, in the earlier applications, this Court, by holding that though there was no recovery from the petitioner, he is having two previous cases under the NDPS Act and that since the petitioner has failed to satisfy the twin grounds contemplated under Section 37 of NDPS Act, dismissed the same.

9. It is not in dispute that the petitioner is having two previous cases, one in Crime No.503 of 2015 on the file of Usilampatti Town Police Station under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act and another case in Crime No.72 of 2021 on the file of TR



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Pattinam Police Station, Karaikkal District,
Puducherry under Sections 8(c) r/w 20(b)(ii)(B) of
NDPS Act.

10. The learned counsel appearing for the petitioner would contend that though two cases are pending against the petitioner, there was no recovery of contraband from the petitioner in the above two cases also and that he was implicated only on the basis of the confession statement alleged to have given from the co-accused. He would further submit that this Court in similar circumstances in ***Crl.O.P. (MD) Nos.2094 and 2680 of 2022 dated 28.02.2022 (Nelson Vs. The State represented by The Inspector of Police, Subramaniyapuram Police Station)*** has granted bail to the accused therein as there was no recovery of contraband in both the cases pending against the accused. It is necessary to refer the following passages in the said order hereunder:-

11. This Court in batch of cases in ***Crl.O.P. (MD) No.5093 of 2021 etc., batch cases***



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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 held as follows:

"8. Section 25 of the Indian Evidence Act contemplates that no confession made to a Police Officer shall be proved as against a person accused of any offence. The very object of Section 25 is to ensure that the person accused of offence would not be induced by threat, coercion or force to make a confessional statement and the Police Officer is to make every effort to collect or gather the evidence with regard to the commission of offence, but not the confession while the accused is under custody.

9. It is settled law that statements made by an accused before Police Officer, which amount to confessional statement is clearly barred under Section 25 of the Indian Evidence Act and the only exception is under Section 27 of the Indian



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Evidence Act, which provides that any portion of the information in the confession statement, which leads to discovery of any new fact or thing can be proved.

10. Applying the legal dictum laid down by the Hon'ble Supreme Court in **Tofan Singh's** case any statement recorded under Section 67 of NDPS Act cannot be treated as a confession statement in the trial for the offence under the provisions of NDPS Act. Since the statement under Section 67 of the NDPS Act cannot be treated and relied as a confession statement in the trial itself, then the very question of considering and deciding the validity of the said confession statement at the trial does not arise at all. Moreover, in the absence of any recovery from the accused, now seeking bail, the confession of co-accused implicating the present accused cannot be relied or looked into, so far as the present accused is concerned.



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11. 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



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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."

12. Bearing the above legal position in mind, let us consider the bail applications, now under consideration.

13. The learned Counsel for the petitioner has relied on a recent decision of the Hon'ble Supreme Court in **State by (NCB) Bengaluru Vs. Pallulabid Ahmad Arimutta and another** reported in **2022 Live Law SC 63**. The Hon'ble Apex Court, by relying the judgment



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in **Tofan Singh Vs. State of Tamil Nadu** has upheld the bail orders granted by the Karnatak High Court with respect to some accused and confirmed the order with respect to one accused from whom the recovery was made and the relevant passages are extracted hereunder:

"9. Having gone through the records alongwith the tabulated statement of the respondents submitted on behalf of the petitioner-NCB and on carefully perusing the impugned orders passed in each case, it emerges that except for the voluntary statements of A-1 and A-2 in the first case and that of the respondents themselves recorded under Section 67 of the NDPS Act, it appears, prima facie, that no substantial material was available with the prosecution at the time of arrest to connect the respondents with the allegations levelled against them of indulging in drug trafficking. It has not been denied by the prosecution that except for the respondent in SLP (Crl.) No.



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1569/2021, none of the other respondents were found to be in possession of commercial quantities of psychotropic substances, as contemplated under the NDPS Act.

10. It has been held in clear terms in **Tofan Singh Vs. State of Tamil Nadu**, that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial. For the aforesaid reason, this Court is not inclined to interfere in



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the orders dated 16th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020 passed in SLP (Cr1.) No@ Diary No. 22702/2020, SLP (Cr1.) No. 1454/2021, SLP (Cr1.) No. 1465/2021, SLP (Cr1.) No. 1773-74/2021 and SLP (Cr1.) No. 2080/2021 respectively. The impugned orders are, accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless.

11. However, the evidence brought before us against Mohammed Afzal [A-2], respondent in SLP (Cr1.) No. 1569/2021, subject matter of the second case i.e., NCB Case FN No. 48/01/07/2019/BZU, who was granted bail vide order dated 08th January, 2020, will have to be treated on an entirely different footing. There are specific allegations levelled against the said respondent regarding recovery of substantial commercial



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quantities of drugs from a rented accommodation occupied by him pursuant to which he was arrested on 16th June, 2019. This aspect has been completely overlooked while passing the order dated 08th January, 2020 wherein, the only reason that appears to have weighed with the High Court for releasing him on bail is that his case stands on the same footing as A-1, A-3 and A4 who had been enlarged on bail vide orders dated 11th October, 2019, 16th September, 2019 and 09th September, 2019, in connection with the second case registered by the Department. We are of the firm view that A-2 cannot seek parity with the aforesaid co-accused and no such benefit could have been extended to him in view of Section 37 of the Act when he was found to be in conscious possession of commercial quantity of psychotropic substances, as contemplated under the NDPS Act. That being the position, the petitioner-NCB succeeds in SLP (Crl.) No. 1569/2021. The bail granted to the respondent-Mohammed Afzal [A-2] is



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cancelled forthwith at this stage and he is directed to surrender before the Sessions Court/Special Judge (NDPS) within a period of two weeks, for being taken into custody."

14. In the case on hand, admittedly, there was no recovery of contraband from the petitioner in both the cases. Moreover, the petitioner was implicated only on the basis of the confession statement alleged to have taken from the co-accused in the respective cases. Except the alleged confession taken from the co-accused, the prosecution has not produced any material or evidence to connect the petitioner with the alleged recovery or the crime in question.

15. The prosecution has been alleging in both the cases that one previous case for similar offence is pending, by showing the other case and vice versa. Admittedly in both the cases, there was no recovery from the petitioner and he was implicated only on the basis of the confession statement alleged to have taken from the co-accused. Hence, the same cannot be considered as previous case under the NDPS Act, so as to



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prevent the petitioner from showing that the second is satisfied. If the petitioner is having another case under the NDPS Act in which the recovery of contraband was made from the petitioner, then this Court cannot record a finding that the petitioner is not likely to commit any such offence while on bail. In Cr.No.1453 of 2020, after investigation, a charge sheet has been laid and the case is taken on file in C.C.No.244 of 2021 and the same is pending on the file of the Special Court."

11. The learned Additional Public Prosecutor appearing for the respondent has relied on the following decisions of the Hon'ble Supreme Court,

(i) Union of India (NCB) and others Vs. Khalil Uddin and others reported in 2022 LiveLaw (SC) 878,

"The answer to said question could be the statement recorded of Md. Nizam Uddin. The statement of Md. Jakir Hussain recorded under Section 67 of the Act has also named his owner accused Abdul Hai. We are conscious of the fact that the



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validity and scope of such statements under Section 67 has been pronounced upon by this Court in *Tofan Singh vs. State of Tamil Nadu*¹. In *State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta & Anr.*², the rigour of law lay down by this Court in *Tofan Singh* was held to be applicable even at the stage of grant of bail.

However, going by the circumstances on record, at this stage, on the strength of the statement of Md. Nizam Uddin, though allegedly retracted later, the matter stands on a different footing. In our considered view, in the face of the mandate of Section 37 of the Act, the High Court could not and ought not to have released the accused on bail. We, therefore, allow these appeals, set aside the view taken by the High Court and direct that both the appellants be taken in custody forthwith."

(ii) Narcotics Control Bureau Vs. Mohit Aggarwal (Criminal Appeal Nos.1001-1002 of 2022 dated 19.07.2022)

"17. Even dehors the confessional



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statement of the respondent and the other co-accused recorded under Section 67 of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant-NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to justify that he was not guilty of such an offence under the NDPS Act. We are not persuaded by the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he has been charged. Such an assumption would be premature at this stage."

12. In the first decision case, the Hon'ble Supreme Court, taking note of the circumstances of that case into consideration and by observing that since the matter stands on a different footing on the strength of the statement of Md. Nizam Uddin, has held that as per the mandate of Section 37 of the



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Act, the High Court could not and ought not to have released the accused on bail. In the second decision case, the Hon'ble Supreme Court, by taking note the other circumstantial evidence brought on record by the NCB, has held that the narrow parameters of bail available under Section 37 of the Act, have not been satisfied. As rightly contended by the learned counsel appearing for the petitioner, in those two cases apart from the confession statement, there were other materials to connect the accused therein with the crime.

13. In the case on hand, it is not in dispute that two other cases pending against the petitioner relate to the recovery of 2 kgs of Ganja from the co-accused. Admittedly, in the case on hand, as well as in the other two cases pending against the petitioner, there was no recovery of contraband from him.

14. As already pointed out, the petitioner has been implicated in all the three cases only on the



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basis of the confession statement alleged to have taken from the co-accused of the said cases.

15. No doubt, the learned Additional Public Prosecutor appearing for the respondent would submit that the respondent police has recorded a confession statement alleged to have given by the petitioner voluntarily. But it is not the case of the prosecution that they have recovered contraband or any other material or property connected with the above cases, in pursuance of the confession alleged to have given by the petitioner. It is also not their case that the alleged confession given by the petitioner lead to recovery of any contraband nor discovery of any new facts, connected with the crime in question.

16. As rightly observed by this Court in **Nelson's** case above referred, since there was no recovery from the petitioner in any of two previous cases pending against him and he was implicated only on the basis of the confession statement alleged to



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have taken from the co-accused, the same cannot be considered as previous case under the NDPS Act, so as to prevent the petitioner from showing that the second condition gets satisfied and if the petitioner is having another case under the NDPS Act, in which, the recovery of contraband was made from the petitioner, then this Court cannot record a finding that there are reasonable grounds for believing that the petitioner is not guilty of such offence.

17. Considering the above, since there was no recovery of contraband from the petitioner and that though he is having two previous cases, there was no recovery in those two cases also, this Court is satisfied that there are reasonable grounds for believing that the petitioner is not guilty of such offence and that he is not likely to commit any such offence, after coming out on bail, as contemplated under Section 37 of NDPS Act. Hence, this Court concludes that the petitioner is entitled to get the bail and the petition is allowed accordingly subject to the following conditions:

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18. Accordingly, the petitioner is ordered to be released on bail on his executing a bond for a sum of **Rs.50,000/- (Rupees Fifty Thousand only)** with two sureties each for a like sum to the satisfaction of the learned Additional District and Sessions Judge, Special Court under EC Act Cases, Thanjavur District.

(i)the sureties shall affix their photographs and left thumb impression in the surety bond and the Sessions Judge/Special court may obtain a copy of their Aadhar card or Bank Pass Book to ensure their identity;

(ii)the petitioner shall report before the trial Court at 10.30 a.m., on all working days until further orders;

(iii)the petitioner shall not tamper with evidence or witness;

(iv)the petitioner shall not abscond during trial;

(v)On breach of any of the aforesaid conditions, the learned Sessions Judge/Special Court is entitled to take appropriate action against the petitioner in

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accordance with law as if the conditions have been imposed and the petitioner released on bail by the learned Sessions Judge/Special Court himself as laid down by the Hon'ble Supreme Court in ***P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560]***.

(vi) If the petitioner thereafter abscond, a fresh FIR can be registered under Section 229A IPC.

(K M S J)
01.12.2022

CSM

TO

- 1.The Additional District and Sessions Judge,
Special Court under EC Act Cases,
Thanjavur District.
- 2.The Superintendent,
District Prison,
Nagapattinam.
- 3.The Inspector of Police,
NIB-CID Police Station,
Nagapattinam.
- 4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR, J

CSM

Pre-delivery order made in
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Date : 01/12/2022