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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Reserved on : 25.11.2022

Delivered on : 01.12.2022

PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL OP(MD) . No.19402 of 2022

S.Nivash

... Petitioner/ Accused No.2

Vs

State represented by
The Inspector of Police,
NIB-CID,
Nagapattinam,
Nagapattinam District.
(Crime No.21 of 2021)

... Respondent/ Complainant

For Petitioner : Mr.M.Jegadeesh Pandian, Advocate
for Mr.NA.Manimaran, Advocate.
For Respondent : Mr.T.Senthil Kumar,
Additional Public Prosecutor.

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

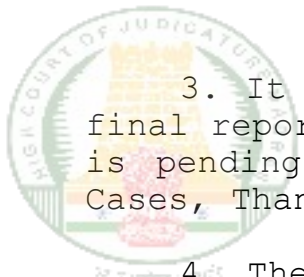
PRAYER :-

For Bail in C.C.No.16 of 2022 on the file of the learned Special Principal & District Judge for E.C. & NDPS Act, Thanjavur, in Crime No.21 of 2021 on the file of the respondent Police.

ORDER : The Court made the following order :-

The petitioner/A.2, 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, in C.C.No.16 of 2022, on the file of the learned Special Principal & District Judge for E.C. & NDPS Act, 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 and that 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.



3. It is not in dispute that the respondent has already filed 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.

4. 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 and 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.

5. It is further case of the prosecution 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 co-accused, the petitioner was added as accused.

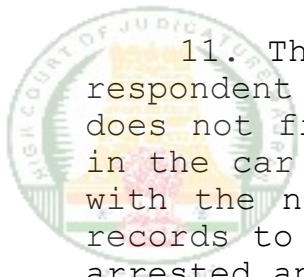
6. The case of the petitioner is that he is innocent and he has not committed any offence as alleged by the prosecution and that the respondent police have foisted the false case as against the petitioner.

7. It is not in dispute that the trial has already been commenced and is in progress.

8. The learned counsel appearing for the petitioner would submit that P.W.1 and P.W.2 have not deposed anything about the present petitioner and that the said two witnesses have not even identified the petitioner/accused, while deposing before the trial Court.

9. The learned counsel appearing for the petitioner would further submit that though 8 persons were alleged to have been arrested, Seizure Mahazar does not contain the names of those accused including the petitioner, that the contraband was not at all recovered from the petitioner and that the petitioner has been falsely implicated in the above case as if he was also travelling in the car.

10. The learned Additional Public Prosecutor would contend that the learned counsel appearing for the petitioner has produced and quoted the deposition of P.W.1 and P.W.2, that the trial Court has already examined some more witnesses and that therefore, even assuming for arguments sake that P.W.1 and P.W.2 have not deposed anything about the petitioner, it cannot be said that the petitioner is entitled to get bail.



11. The learned Additional Public Prosecutor appearing for the respondent would submit that though the names of the other accused does not find place in the Seizure Mahazar, the 8 persons travelling in the car were arrested at the same place and time, after complying with the necessary formalities and that they have produced all the records to show that all the 8 persons including the petitioner were arrested and remanded to judicial custody.

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12. The learned Additional Public Prosecutor appearing for the respondent would further submit that the contraband of 90 kgs of Ganja was recovered from the car, in which, 8 accused were travelling including the petitioner and that the petitioner is not having any previous case under the NDPS Act.

13. No doubt, the petitioner's earlier applications in CrI.O.P. (MD) Nos. 6506 of 2022 and 13016 of 2022 seeking bail were ordered to be dismissed by this Court vide order dated 26.04.2022 and 27.07.2022 respectively.

14. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in **Union of India through Narcotics Control Bureau vs. Nawaz Khan in CrI.A.No.1043 of 2021** dated 22.09.2021. In the said decision case, a car, in which, the respondent therein was travelling with the other two accused was intercepted and they have recovered two polythene packets hidden under the place where the wiper is connected to the front bonnet of the car and that since the respondent therein has claimed that there was no recovery from him, the High Court has granted bail holding that the twin conditions under Section 37 of NDPS Act get satisfied. When the same was challenged before the Hon'ble Supreme Court, the Hon'ble Supreme Court has observed as follows:-

"21. In the present case, the High Court while granting bail to the respondent adverted to two circumstances, namely (i) absence of recovery of the contraband from the possession of the respondent and (ii) the wrong name in the endorsement of translation of the statement under Section 67 of the NDPS Act.

22. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In **Madan Lal and Another v. State of Himachal Pradesh**¹⁶ this Court held that

"19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not

been explained or shown as to how they travelled



together from the same destination in a vehicle which was not a public vehicle.



20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

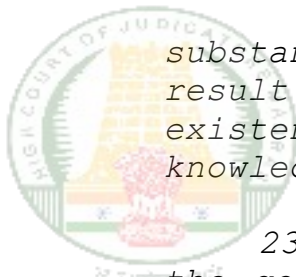
21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja* [(1979) 4 SCC 274 : 1979 SCC (Cri) 1038 : AIR 1980 SC 52] to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.
[...]

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."

What amounts to "conscious possession" was also considered in **Dharmpal Singh v. State of Punjab**¹⁷, where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In **Mohan Lal v. State of Rajasthan**¹⁸, this Court also observed that the term "possession" could mean physical possession with animus; custody over the prohibited



substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

23. We have referred to the above precedents to reiterate the governing principles. At this stage of the proceedings, it needs only to be clarified that the trial is to take place in this Court where evidence will be adduced.

24. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in **Union of India v. Rattan Malik**¹⁹, a two-judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the 'possession' of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37 (1)(b) and there was non-application of mind by the High Court."

15. As rightly contended by the learned Additional Public Prosecutor, the pleas and the points now raised by the petitioner have already been dealt with and considered by this Court, while dismissing the earlier applications and the relevant paras of the earlier order are extracted hereunder,

"11. It is necessary to refer the following passages in the earlier order,

"11. 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;

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"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."

12. It is settled law that the twin conditions contemplated under Section 37 of NDPS Act are to be considered as conjunctive and not alternative. In the case on hand, the learned Additional Public Prosecutor would fairly submit that since the petitioners are not having any previous case under the NDPS Act, this Court can very well record a finding that the petitioners are not likely to commit any such offence, after coming out on bail. But at the same time, the entire contraband of commercial quantity was recovered from the Car, in which petitioners and the other accused were travelling and that the petitioners were also arrested along with other accused at the occurrence place, this Court cannot record a finding that the petitioners are not guilty of such offence as contemplated under Section 37 of NDPS Act."

12. Considering the above and also the facts that the petitioners have failed to satisfy the twin conditions contemplated under Section 37 of NDPS Act conjunctively and that there is no change in circumstances, since the dismissal of the earlier petition, this Court is not inclined to grant bail to the petitioners."

16. Considering the above, this Court has no other option but



to dismiss the bail plea of the petitioner. Hence, this Court is inclined to grant bail to the petitioner. Accordingly, this Original Petition is dismissed.



sd/-
01/12/2022

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/12/2022
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

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 SPECIAL PRINCIPAL & DISTRICT JUDGE
FOR E.C. & NDPS ACT,
THANJAVUR,
- 2 THE INSPECTOR OF POLICE
NIB CID, NAGAPATTINAM, NAGAPATTINAM DISTRICT.
- 3 THE OFFICER INCHARGE,
DISTRICT PRISON, NAGAPATTINAM.
- 4 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

ORDER
IN
CRL OP(MD) No.19402 of 2022
Date :01/12/2022

CSM
MK/SSS/SAR II/07.12.2022/7P/5C