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Crl.O.P.Nos.27345 & 27476 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.01.2024

Pronounced on : 31.01.2024

CORAM

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

Crl.O.P.Nos.27345 & 27476 of 2023

R. Rakesh ... Petitioner / A2 in Crl.O.P.No.27345 of 2023

S. Mohammed Fawaz Salim ... Petitioner / A1 in Crl.O.P.No.27476 of 2023

Vs.

The State Rep. by
The Union of India
Rep. by the Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit,
Chennai.

NCB No.48/01/08/2023 ... Respondent / Complainant in both Crl.O.Ps

PRAYER: Criminal Original Petitions filed under Section 439 of Cr.P.C.,
prayed to enlarge the petitioners on bail in NCB No.48/01/08/2023 pending
investigation before the respondent police.

For Petitioner : Mr. N.Manokaran,



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in Crl.O.P.No.27345 of 2023

For Petitioner : Mr. N.Ponraj,
in Crl.O.P.No.27476 of 2023

For Respondent : Mr. N.P.Kumar,
Spl. Public Prosecutor for NCB Cases

COMMON ORDER

The 1st accused has filed Crl.O.P.No.27476 of 2023 and the 2nd accused has filed Crl.O.P.No.27345 of 2023 both in NCB.No.48/01/08/2023 registered under Section 8(c) r/w Sections 20(b)(ii)(A), 21(B), 22(C), 28 and 29 of NDPS Act, 1985. They were both remanded to judicial custody on 25.06.2023.

2. It is the case of the prosecution that on the basis of specific information, the respondent had seized 10 grams of 2C-B, 3 grams of MDMA, 150 grams of THC, 156 grams of THC (viscous liquid), 168 grams of Ganja, 1 gram of Cocaine, 7 grams of LSD (double design), 20 grams of LSD (single design and no design) at K. R. Engineering Works / K.R. Kwaliti Racks at Chinnavedampatti, Coimbatore on 22/23.06.2023. They had also arrested three accused including the petitioners herein. Further seizures were made including 57 grams of Ganja, 3 grams of Cocaine at Sub-Post



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office, Rathinapuri, Coimbatore and 100 Bolts of LSD (1.08 grams) at Sub-Post Office, Thiruverkadu, Chennai and 900 grams of Ganja from parcels at Post offices which had been received by A1 from US, Canada and France and from one parcel sent by A1 to a resident in Chennai.

3. It is the further case of the prosecution that on receipt of information, after following due procedure under Section 42(2) of NDPS Act and filing report under Section 57 of NDPS Act, recovery had been made and the accused had been arrested.

4. However, it is the case of the petitioners that under Section 42(2) of NDPS Act, any information will have to be written down and forwarded to the superior officer within 72 hours and this procedure should precede search and seizure. It had been stated that the seizure was made on 22/23.06.2023, whereas the petitioners were arrested on 24.06.2023 and remanded to judicial custody on 25.06.2023. It had been stated that the contraband was in the custody of the respondent for two days. It is further contended on behalf of the petitioners that the respondent had not followed the procedure stipulated under Section 57 of NDPS Act and did not send any report to the superior



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officer about what happened during the time of search and about seizure of alleged contraband. The learned counsel for the petitioners raised these two grounds about non-compliance of Sections 42(2) and 57 of NDPS Act and therefore sought bail for the two petitioners.

5. A counter affidavit had been filed on behalf of the respondent, denying the allegation of non-compliance of the provisions. It had been stated that Section 42(2) of NDPS Act had been strictly complied with and the provision under Section 57 of NDPS Act, though not mandatory, had still been complied with. To substantiate the same, the respondent also filed the copy of the complaint presented before the Special Court for EC and NDPS Act Cases, Coimbatore and all the supporting documents including the documents relating to compliance of Sections 42(2) and 57 of NDPS Act.

6. The points to be considered in these bail petitions are whether the respondent had complied with the stipulations under Sections 42(2) and 57 of NDPS Act.

7. Even before proceeding further it would only be appropriate to



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extract Sections 42(2) and 57 of NDPS Act. They are as follows:

“42. Power of entry, search, seizure and arrest without warrant or authorisation.—

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

57. Report of arrest and seizure.—*Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.”*

8. In ***(2009) 3 SCC 203, Hamidbhai Azambhai Malik Vs. State of Gujarat***, the Hon'ble Supreme Court had examined an appeal against conviction of the appellant for the offences punishable under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and held as follows when there was a complaint about non-compliance of the requirement under Section 42(2) of the Act.

11. Before dealing with the factual aspect certain observations



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made by this Court in ***State of Punjab v. Baldev Singh [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080]*** need to be noted:

“9. Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search, without a warrant between sunrise and sunset, and he may do so without recording his reasons of belief.

10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. ***Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in***



*a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas **Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure**, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article, etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful. (SCC p. 189, paras 9-10)*

17. The trial court in those cases had acquitted the accused on the ground that the arrest, search and seizure were conducted in violation of some of the 'relevant and mandatory' provisions of the NDPS Act. The High Court declined to grant appeal against the order of acquittal. The State of Punjab thereupon filed appeals by special leave in this Court. In some other cases, where the accused had been convicted, they also filed appeals by special leave questioning their conviction and sentence on the ground that their trials were illegal because of non-compliance with the safeguards provided under Section 50 of the NDPS Act. A two-Judge Bench speaking through K. Jayachandra



Reddy, J. considered several provisions of the NDPS Act governing arrest, search and seizure and, in particular, the provisions of Sections 41, 42, 43, 44, 49, 50, 51, 52 and 57 of the NDPS Act as well as the provisions of the Code of Criminal Procedure relating to search and seizure effected during investigation of a criminal case.....

“25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1)

(2-A)

(2-B)

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.



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To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

*(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) **should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance with this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.***

(4-A)

(4-B)

(5)

*(6) **The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay, etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding***



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arrest or seizure as well as on merits of the case.”
(SCC pp. 192-94, para 17)

(Emphasis Supplied)

23. In **Mohinder Kumar v. State [(1998) 8 SCC 655 : 1999 SCC (Cri) 79]** , a three-Judge Bench (to which one of us, Sujata V. Manohar, J., was a party) once again **considered the requirements of Sections 42 and 50 of the Act**. In that case the police officer ‘accidentally’ reached the house while on patrol duty and had it not been for the conduct of the accused persons in trying to run into the house on seeing the police party, he would perhaps not have had any occasion to enter the house and effect search. But when the conduct of the accused persons raised a suspicion, he went into the house and effected the search, seized the illicit material and caused the arrest. The Court opined that in the facts and circumstances of the case, when the investigating officer accidentally stumbled upon the offending articles and himself not being the empowered officer, then on coming to know that the accused persons were in possession of illicit articles, then from that stage onwards he was under an obligation to proceed further in the matter only in accordance with the provisions of the Act. On facts it was found that the investigating officer did not record the grounds of his belief at any stage of the



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*investigation, subsequent to his realising that the accused persons were in possession of charas and since he had made no record, he did not forward a copy of the grounds to his superior officer nor did he comply with the provisions of Section 50 of the Act, inasmuch as he did not inform the person to be searched that if he required, his search could be conducted before a gazetted officer or a Magistrate. **The Bench held that for failure to comply with the provisions of Sections 42 and 50, the accused was entitled to an order of acquittal and consequently the appeal was allowed and the order of conviction and sentence against the accused was set aside. (SCC pp. 196-97, para 23)***

(Emphasis Supplied)

9. Coming to the facts of this case, the documents furnished to the accused very clearly show that information received on 22.06.2023 had been reduced in writing on the same day by the Intelligence Officer, Narcotics Control Bureau, Chennai at 10.30 hours and had been submitted to the Superintendent, Narcotics Control Bureau, Chennai. The Intelligence Officer was directed to act as per NDPS Act by a noting on the same day. Similarly, every information received had been reduced in writing and documents to that effect had been filed before the Court. It is thus seen that there has been



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strict compliance of Section 42(2) of NDPS Act.

10. Even with respect to Section 57 of NDPS Act, a perusal of the records show that the respondent had filed reports under Section 57 of NDPS Act detailing the search and seizure and also stating about the directions given on the information submitted to the Superintendent, NCB, Chennai and the direction to take appropriate action issued by the Superintendent, NCB Chennai. The reports are extensive and had been submitted to the Superintendent, NCB, Chennai.

11. Therefore, on perusal of the entire records, I do find compliance of all the procedures enunciated by the aforementioned two provisions.

12. It is also seen that the contraband seized in the instant case are commercial in nature.

13. In view of the stipulations under Section 37 of the NDPS Act, before granting bail for an offence under NDPS Act, twin conditions as



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provided under Section 37(1)(b) (i) and (ii) have to be satisfied. Section 37 of the N.D.P.S. Act is quoted herein below:

"37. Offences to be cognizable and non-bailable. - (1)

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in



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clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

14. The Hon'ble Supreme Court had examined the expression '*reasonable grounds*' as found in Section 37(1)(b)(ii) of NDPS, Act.

15. In ***Union of India Vs. Rattan Mallick @ Habul, 2009 (1) SCC (CrI) 831***, the Hon'ble Supreme Court has settled the expression "reasonable grounds". The relevant paragraphs Nos.12, 13 and 14 are extracted below:

"12. It is plain from a bare reading of the nonobstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub- section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable



grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

*13. The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide **Union of India Vs. Shiv Shanker Kesari, 2007(7) SCC 798**] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.*

*14. We may, however, hasten to add that **while considering an application for bail** with reference to Section 37 of the NDPS Act, **the Court is not called upon to record a finding of 'not guilty'**. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a*



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*positive finding as to whether or not the accused has committed offence under the NDPS Act. **What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.***"

(Emphasis Supplied)

16. The Hon'ble Supreme Court while dealing with the question of possession and application of Section 50 in the case of ***Megh Singh Vs. State of Punjab, 2003 CRI. L.J. 4329***, held that word '*possession*' includes *conscious possession*. Relevant paragraph nos. 9 to 13 are extracted below:

*"9. 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 **Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (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.

10. The word '**conscious**' means awareness about a particular fact. ***It is a state of mind which is deliberate or intended.***

11. As noted in ***Gunwantlal v. The State of M.P. (AIR 1972 SC 1756)*** possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

12. The word '**possession**' means the legal right to possession (See ***Health v. Drown (1972) (2) All ER 561 (HL)***). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See ***Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD)***).

13. 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 presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to



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be drawn from possession of illicit articles. This position was highlighted in Madan Lal and Anr. v. State of Himachal Pradesh (2003 (6) SCALE 483). ”

17. The Hon'ble Supreme Court in the case of **Dehal Singh vs. State of Himanchal Pradesh, 2011 (72) ACC 661**, has again considered the concept of "*conscious possession*". In the said case, two accused persons were travelling in a car and they knew each other. From the windows/door of the said car, recovery of 27 Kgs. 800 gms. of charas was made, which were found concealed between the shields and doors of the car. The Hon'ble Supreme Court in the said case, taking into consideration the provisions of Sections 35 and 54 of the N.D.P.S. Act, had held that the accused was not only in possession, but conscious possession of the recovered contraband also.

18. It is thus seen that the Hon'ble Supreme Court had expanded the term possession to also include not just physical possession and constructive possession but also conscious possession.

19. In the instant case, both the petitioners herein were found to be in possession of substantial assorted quantities of drugs ranging from Ganja



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to LSD of commercial in nature. The respondent had also seized contraband from different post offices where the drugs had been received from foreign countries like US, Canada and France and also from the parcel sent by the 1st accused to an individual in Chennai.

20. In view of the reasons given, the grounds raised by the learned counsel for the petitioners are rejected. These Criminal Original Petitions stand dismissed.

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Index: Yes / No

Neutral Citation: Yes / No

Speaking order : Yes / No

C.V.KARTHIKEYAN, J.

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To

1. The Intelligence Officer,
Narcotic Control Bureau,



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Chennai Zonal Unit,
Chennai.

2.The Public Prosecutor,
High Court of Madras.

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