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Court : Karnataka

Decided On : May-04-2017

Judge : P.S. Dinesh Kumar

Appeal No. : Criminal Petition No. 9097 of 2016

Appellant : V. Arun

Respondent : State by Inspector of Customs, CIU, Rep. by Public Prosecutor

Judgement :

(Prayer: This Crl.P is filed U/S.439 Cr.P.C praying to enlarge the Petr. on Bail in O.R.No.4/2016-2017 pending on the file of XXXIII Addl. City Civil and S.J., and Spl. Judge (NDPS), Bangalore for the offences P/U/S 43 of NDPS Act R/W Sec.108 of Customs Act. the XXXIII Addl. City Civil and S.J., and Spl. Judge (NDPS), Bangalore has rejected the Bail Petition on 19.11.2016 in Crl.Misc.No.8040/2016.)

1. This petition is filed under Section 439 Cr.P.C, to enlarge the petitioner on bail in O.R.No.4/2016-17, pending on the file of XXXIII Addl. City Civil and Sessions Judge and Special Court for NDPS Cases, Bengaluru (CIS-693/2016) (Special C.C.No.148/2017)

2. Heard Shri.R.Sridhar, learned counsel for the petitioner and Shri.Jeevan J Neeralgi, learned Central Government Standing Counsel.

3. Briefly stated the facts of the case are petitioner filed shipping bills to export cargo of 'Non - Woven Shopping Bags' to Malaysia. The customs authorities based on intelligence information examined the cargo and found some white powder in hollow plastic handles of bags. Preliminary test conducted using narcotics Field Test Kit indicated possible presence of Methaqualone. The same was seized. Petitioner was summoned and his statement recorded. Samples of seized material was sent to Custom House Laboratory, Chennai for chemical analysis. After investigation, the respondent has filed the complaint before the Special Court for NDPS cases under Sections 36 A (1) (d) of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short). The said complaint has been registered in Special C.C.No.148/2017. The statement of the petitioner was recorded on October 13 and 14, 2016 and he was formerly arrested on October 14, 2016. Since then, he is in custody.

4. Shri.R.Sridhar, learned counsel appearing for the petitioner arguing in support of this petition made following submissions:

(a) that, along with the complaint filed by the respondent under Section 36 A (1) (d) of the NDPS Act, the examination report dated March 7, 2017 issued by the Central Forensic Science Laboratory, Hyderabad ('CFSL' for short) is annexed; the said report shows that 'Methaqualone' was not detected, but Ketamine was detected in the samples. He contended that a mere statement by the examiner that Ketamine was detected is not in consonance with the law as held by the Hon'ble Rajasthan High Court in the case of Paramjit Singh and another v. Union of India, reported in 2000 CrI.L.J. 100. He placed reliance on paragraph No.30 thereof and argued that the said judgment is based on a Division Bench judgment of Hon'ble High Court of Gujarat. In substance, he contended that the report must be categorical and contain details of tests conducted and the percentage of drug/concentration found;

(b) that, neither qualitative nor quantitative analysis of the sample was done and in the absence of these tests, respondent could not have filed the complaint at all. In support of this contention, he placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of E.Micheal Raj v. Intelligence Officer,

Narcotic Control Bureau reported in (2008) 5 SCC 161;

(c) that, the samples, which were sent to the CFSL were earlier opened by the Custom House Laboratory, Chennai. Thus, the sample sent to CFSL were tampered samples. He adverted to the report of CFSL and pointed out that the seals were illegible; and

(d) that, the petitioner was not in physical possession of the contraband. The presumption under Section 35 of the Act is rebuttable. There must be culpable mental state of a person to commit the crime. The petitioner was only a name lender to export the goods in question. Therefore, the petitioner cannot be considered as an actual owner and exporter of goods.

With these submissions, he prayed that this petition be allowed.

5. Opposing the bail petition, Shri.Jeevan J.Neeralgi, learned Central Government Standing Counsel submitted that the CFSL report clearly shows that 'Ketamine' was found in the samples. 'Ketamine' is a narcotic substance described at Sl.No.110A in the schedule to the NDPS Act. The petitioner, in his statement, recorded under Section 67 of the NDPS Act has accepted moral responsibility with regard to attempted export of contraband. Admittedly, petitioner has filed shipping bills. Offence is serious in nature and on conviction, the petitioner is liable to be convicted for not less than ten years under Section 22(c) of the NDPS Act. Hence, he prayed for dismissal of this petition.

6. I have carefully considered the submissions made by the learned Counsel for the parties and perused material papers.

7. The respondent, Customs Department, after investigation has already filed a complaint under Section 36 A (1) (d) of NDPS Act and the same is registered as Spl.C.C.No.148/2017. The principal material document upon which the respondent is placing reliance is the report of the CFSL dated March 7, 2017, which reads as follows:-

"12. Results of Examination The exhibits were analyzed by Physico - Chemical examination, colour test (Mandelin reagent test) and Gas Chromatography - Mass

Spectrometry (GC-MS) methods. Based on the above methods, the results obtained are given below:

1. Methaqualone was not detected in the exhibits marked as Exhibits 962 to 968. However, Ketamine was detected in all the exhibits marked as Exhibits - 962 to 968."

8. The report is silent about the quantitative and qualitative analysis, if any conducted. Even the weight of the sample is not forthcoming in the report. A careful perusal of the report shows that the samples were sent with illegible seals.

9. The Division Bench of Gujarat High Court in the case of Mahad Hanif Shaik Ibrahim v. State of Gujarat, [(1995)1 Crimes 274] extracted in the judgment of Paramjith Singh, supra held as follows:-

"In such serious cases under the Narcotic Act, where rightly the Legislature has prescribed stringent punishment of R.I. for not less than 10 years which may as well extend to 20 years and also liable to find which shall not be less than one lac rupees, and the same may also as well extend to two lac rupees, if on the one hand bald assertions of the Complainant - Police Officer and thereafter the F.S.L. report which indicates jumping to the conclusion rather than any analysis is to be mechanically accepted, without testing the same, it would be simply hazardous and risky to convict and sentence the accused on such laconic evidence. We are quite conscious of the fact that the Narcotic offences like most contagious deadly disease, is fact spreading in our society. It is not less deadly than the dreaded disease like Cancer and AIDS, and therefore, once a person is found to have committed the said offence, there indeed cannot be any question of showing any mercy to him, but at the same time, if the prosecution stops at mere allegations against the person of having committed Narcotic offence without there being any dependable verifying evidence in support of the same, by way of report of the Public Analyst, it would indeed be totally imprudent and unjust to act upon the same. In fact, in such type of cases under the Narcotic Act, every Public Analyst must be alert, honest conscientious and copy-book exact in discharge of his important duties, viz., preparing the final report."

(emphasis supplied)

10. Since the offences alleged are under Sections 22(c), 23(c), 28 and 29 of the NDPS Act, 1985 read with Section 135A of the Customs Act, 1962, the provisions of Section 37 of NDPS Act will not apply. Hence, this petition is considered within the parameters of Section 439 Cr.P.C.

11. The Chemical Examination Report of CFSL is prima facie bereft of any details with regard to any qualitative and quantitative tests.

12. Perusal of the statements of the petitioner recorded under Section 67 of NDPS Act, indicates that the goods were received from some other person and the petitioner had prepared the shipping bills as per mutual understanding between the owner of the goods and the petitioner.

13. It is argued by the learned counsel for the petitioner that the petitioner holds an Import Export code and he is a law abiding citizen. The petitioner has been in custody since October 14, 2016. Investigation is complete and respondent has already been filed the complaint before the Special Court.

14. In the circumstances, in my considered view, petitioner deserves to be enlarged on bail, but with stringent conditions. Hence, it is directed that:

(i) Petitioner shall be released on bail in O.R.No.4/2016-17 registered in Inspector of Customs, CIU, Airport and AIR Cargo Complex, Bengaluru, upon his executing a self bond for a sum of Rs. 5,00,000/- (Rupees five lakhs only) with two sureties for the like sum to the satisfaction of the jurisdictional Court;

(ii) Petitioner shall surrender his passport before the jurisdictional Court namely., XXXIII Addl. City Civil and Sessions Judge and Spl. Judge (NDPS), Bengaluru;

(iii) Petitioner shall attend the hearings before the trial Court regularly subject to it's directions;

(iv) Petitioner shall not directly or indirectly make any inducement, threat or promise to prosecution witness or any person acquainted with the facts of the case, so as to dissuade him from disclosing such facts to the Court or investigating

officer;

(v) Petitioner shall not involve himself in any criminal activities; and

(vi) If the petitioner violates any one of the conditions, the prosecution shall be at liberty to seek cancellation of bail.

15. It is made clear that, any observations made in this petition is only for the limited purpose of consideration of this bail petition and shall not in any way affect any proceedings before the Trial Court.

Petition allowed.

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