

P.M. Ashraf Vs. the Senior Intelligence Officer and Another

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Court : Kerala

Decided On : Oct-04-2011

Judge : K.T. Sankaran

Appeal No. : Bail Appl.No.6077 of 2011

Appellant : P.M. Ashraf

Respondent : The Senior Intelligence Officer and Another

Judgement :

1. The petitioner is the accused in O.R.No.2 of 2010 on the file of the Directorate of Revenue Intelligence, Calicut, for the offence under 21(c) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'NDPS Act'). The petitioner seeks bail in this Bail Application filed under Section 439 of the Code of Criminal Procedure.

2. The prosecution case is the following: The Intelligence Officer, DRI, Calicut, got specific information at 16.20 hours on 24-12-2010 that a person aged about 40 years, with slight limp while walking, would be present near the main ticket counter of Calicut Railway Station at about 5 P.M. with 500 grams of heroin in his possession, for the purpose of carrying the same to Kuttippuram. The Intelligence Officer reduced the information in writing and transmitted the same to the Senior Intelligence Officer, DRI Regional Unit, Calicut. The officers of the Directorate of Revenue Intelligence proceeded to the spot. Two persons available there were

requested to be the witnesses. Within a short time, the person with the given description arrived at the spot carrying a plastic bag. The Senior Intelligence Officer intercepted the person. On formal questioning, he revealed his name and identity. After complying with the procedural formalities, the officers of the DRI examined the plastic bag in the possession of the petitioner. They found a brown coloured powder kept in the bag. The officers of DRI felt that it was not convenient to conduct further detailed examination at the Railway Station premises. Therefore, the petitioner was taken to the DRI Regional Office situated at a distance of half a kilometer. The plastic bag was kept with the petitioner and the petitioner was also taken alongwith the DRI officials. After reaching the DRI Regional Office, the plastic cover was opened in the presence of witnesses, examined the contents in the bag, tested the contents with the help of Field Testing Kit, weighed the substance and samples were taken.

3. The statement of the petitioner was taken under Section 67 of the NDPS Act. On his arrest, he was produced before Court and he was remanded to judicial custody.

4. Sri T.G. Rajendran, the learned counsel appearing for the petitioner submitted that the procedure adopted by the DRI officers was contrary to law. The contraband was seized at the Railway Station premises and the officers were satisfied that the petitioner was in possession of hereon. However, the samples were taken only at the DRI office. This procedure was illegal. The search and seizure were contrary to the provisions of Section 42 of the NDPS Act. Moreover, the officers of the DRI did not take down in writing the information allegedly received by them. This is also violative of Section 42 of the NDPS Act. Sri. Rajendran submitted that there is no chance for conviction in the case as there was violation of the mandatory conditions of Section 42 of the NDPS Act. If it is shown that the petitioner has every chance of being acquitted, that by itself is a sufficient ground to grant him bail. In such circumstances, it must be taken that the dual conditions of 37(1)(b)(ii) of the NDPS Act are satisfied.

5. Sri Udayabhanu, the learned Special Prosecutor, submitted that there was no violation of the provisions of Section 42 of the Act. The petitioner was intercepted

at the busy Railway Station premises. It was not practicable to conduct the test, prepare the mahazar and make search and seizure at that place. Summons was served on the petitioner to appear before the Senior Intelligence Officer at the DRI Regional Office, Calicut. The petitioner agreed to accompany the officers in their vehicle to the DRI office. Weighing, testing and sampling were done at the DRI office. The petitioner was carrying the bag with him till he reached the DRI office. In the voluntary statement given by the petitioner he had stated all these facts in clear terms. There was no procedural illegality in the search, seizure and arrest. It is submitted that there is no chance for the acquittal of the petitioner. The learned Special Prosecutor vehemently opposed the Bail Application and submitted that the conditions under Section 37 (1)(ii)(b) are not satisfied entitling the petitioner to be released on bail.

6. The Supreme Court in *Union of India v. Shiv Shanker Kesari*: (2007 (7) SCC 798) held thus:

“The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if its pronouncing a judgment of acquittal and recording a finding of not guilty.”

7. In *Collector of Customs, New Delhi v. Ahmadaliev Nodira*: (2004 (3) SCC 549), it was held that the conditions in Section 37(1)(ii)(b) are cumulative and not alternative. It was also held:

“The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.”

8. The learned counsel for the petitioner submitted that the question of non compliance of Section 42 of the NDPS Act is a matter to be considered even while considering the Bail Application. He relied on the decision in *Sarija Banu alias Janarthani alias Janaki and another v. State through Inspector of Police*: (2004 (12) SCC 266), where the Supreme Court held that compliance of Section 42 of the NDPS Act is mandatory and it is a relevant fact which should be considered by the Court while dealing with an application for Bail.

9. The learned counsel for the petitioner relied on the decisions of the Supreme Court in *Kuldeep Singh v. State of Punjab*: (2010 (10) SCC 219) and *Raju Premji v. Customs, NER, Shilling Unit*: (2009 (16) SCC 496) in support of the contention that the search and seizure were illegal, in these cases, the Supreme Court was dealing with appeals against conviction and sentence.

10. Paragraphs 12 and 13 in *Raju Premji v. Customs, NER, Shilling Unit*: (2009 (16) SCC 469) were referred to by the counsel for the petitioner.

“12. The Act provides for stringent punishment. Where a statute confers drastic power and provides for stringent penal provision including the matter relating to grant of bail, the conditions precedent therefore must be scrupulously complied with.

13. An information was received by the police authorities. The police officers were empowered officers within the meaning of the provisions of the NDPS Act. They were required to reduce the same into writing so as to apprise the higher officers thereabout. No search warrant or authorization was obtained. Some plainclothes policemen were posted. In the own words of the prosecution witnesses and particularly those of PWs 9 and 10, M. Kharkrang, Additional Superintendent of Police, SI N. Thapa, respectively, the appellants were nabbed. Raid was conducted inter alia by SI. N. Thapa, P.W.10. They were taken in custody and brought to the office of PW9. Even they were not asked to make any statement. They were not even summoned. Their persons were searched without complying with the provisions of Section 50 of the Act. They were evidently interrogated. Only on interrogation they disclosed about the address of Accused 1.”

The Supreme Court in the above case considered whether the statement made by the accused while in custody, which was subsequently retraced, could be relied on. The Supreme Court also took note of the fact that the accused were not found to be in possession of any contraband.

11. In *Kuldeep Singh v. State of Punjab*: (2010 (10) SCC 219), the Supreme Court held thus:

“Having considered the submissions made on behalf of the parties, while we were willing to accept the propositions advanced on behalf of the State of Punjab as far as substantial compliance with Section 42 of the NDPS Act, 1985 is concerned, we are unable to accept the latter part of the submissions relating to collection of samples at the police station from the seized goods which had been sealed by PW3 Malkiat Singh. Non-collection of samples at the initial stage of seizure was a defect, which could not have been cured in the manner in which it was done by opening the bags which had been sealed by Malkiat Singh and mixing the contents thereof.”

The aforesaid finding was arrived at by the Supreme Court in the factual background as is evident from paragraphs 2 and 3 of the judgment, which read as follows:

“According to the case of the prosecution, PW3, Mr. Malkiat Singh, Sub Inspector of Police Station Bhawanigarh, was said to have been on patrol duty when a secret information was received by him that the appellant was dealing with poppy husk from his residence. On receipt of the said information the said Malkiat Singh, along with Head Constable Gurmail Singh, Constable Gamdoor Singh, Head Constable, Jagga Ram, PHG Rajinder Singh and SPO Hari Singh, went to the house of the appellant and upon questioning him they came to learn that he had concealed certain amount of contraband. Based on the said part of the information which was admissible under Section 27 of the Evidence Act, a recovery was made of four bags of poppy husk.

3. At the time of seizure of the said contraband, no samples were taken by PW3. The same was seized by Mr. Kalkiat Singh, who also sealed the same with his

seal, and thereafter, the four bags were taken to the police station where the Station House Officer, Gurmail Singh, broke open the seals and mixed the contents of the four bags together, and took the samples therefrom and resealed the bags with his seal. At that point of time, the poppy husk was weighed and found to be 150 Kg of poppy husk in all.”

12. The decisions of the Supreme Court in *Kuldeep Singh v. State of Punjab*: (2010 (10) SCC 219) and *Raju Premji v. Customs, NER, Shilling Unit*: (2009 (16) SCC 496) are not applicable to the facts of the present case. In the present case, notice under Section 50 of the Act was given to the petitioner. Witnesses were present. Seizure was made only at the DRI office, after inspecting the article with the help of Field Testing kit. Mahazar was prepared and samples were taken at the DRI office. Summons was issued to the petitioner under Section 67 of the Act to appear before the Senior Intelligence Officer of the DRI. The statement of the petitioner was duly recorded. It is stated by the petitioner in his statement that the plastic bag was kept by him while traveling from the Railway Station to the office of the DRI. The mahazar also indicates the same.

13. The contention put forward by the learned counsel for the petitioner that the preparation of the mahazar, seizure of the contraband, testing the same, taking samples etc. should have been done at the Railway Station premises itself where the petitioner was intercepted, *prima facie*, cannot be accepted. The premises of Railway Station is a crowded place. It cannot be said that the DRI officers should have done all the aforesaid procedural formalities at the Railway Station premises itself. The provisions of Section 42 and 43 of the NDPS Act cannot be construed in such a hyper technical manner, which would have the effect of expecting something to be performed which is practically impossible of performance. It is true that the provisions of Sections 42 and 43 should be complied with in letter and spirit. That does not mean that while complying with the requirements, the necessary things should be done at the spot itself where the person concerned is intercepted. A person who is suspected to be carrying contraband may sometimes be found in a busy market place, bus stand, railway station, way side tea shop, place of worship or where a festival is going on. There may be heavy rain while a person carrying the contraband is intercepted. There may be varied circumstances

and situations where it is practically impossible to seize, weigh and take samples of the contraband at the particular place where the person concerned is found. If the inspection, weighing, taking samples and preparation of mahazar were to be done in such places and in such circumstances, it may even affect the accuracy, efficacy and propriety of the said acts.

14. It is seen that the Intelligence Officer had recorded the information received by him and had intimated the same to the Senior Intelligence Officer. The submission made by the learned counsel for the petitioner in this regard is, prima facie, unsustainable.

15. In the aforesaid facts and circumstances, I am not inclined, prima facie, to accept the contentions put forward by the learned counsel for the petitioner. It is made clear that the aforesaid findings were arrived at only for the purpose of considering the Bail Application and those findings should not be treated as binding at the time of trial.

16. I am not satisfied that there are reasonable grounds for believing that the petitioner is not guilty of the offence and that he is not likely to commit any offence while on bail. The conditions under Section 37(1)(b)(ii) of the NDPS Act are not satisfied in the case.

For the aforesaid reasons, the Bail Application is dismissed.

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