

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.04.2016

Coram:

THE HON'BLE Mr.JUSTICE M.VENUGOPAL

Crl.R.C.No.248 of 2016

S.Vijaya

...Petitioner/Petitioner.

Vs.

1. State rep. by its
The Sub-Inspector of Police,
Peralam Police Station.
2. Suresh
3. The Assistant Superintendent of Police,
Thiruvarur
Thiruvarur District.
(R3 is impleaded as per the order of
this Court dated 30.03.16 made in
Crl.M.P.2773/2016 in Crl.RC.248/16
by Dr.PDSJ) ...Respondents/Resondent- Accused.

Prayer: Petition filed under Sections 397 and 401 of Cr.P.C.,
to call for the records and to set aside the order dated
21.01.2016 made in Crl.M.P.No.312 of 2016 passed by the Learned
District Munsif cum Judicial Magistrate, Nannilam.

For Petitioner : Mr.R.Baskar
For Respondent : Mr.V.Arul
Nos.1 & 3 : Government Advocate (Crl.Side)
For Respondent-2 : No Appearance

O R D E R

Heard both sides.

2.The Petitioner has filed the instant Criminal Revision
Petition before this Court as against the order dated
21.01.2016 in Crl.M.P.No.312 of 2016 passed by the Learned
District Munsif cum Judicial Magistrate, Nannilam.

3.The Learned District Munsif cum Judicial Magistrate,
Nannilam, while passing the impugned order in Crl.M.P.No.312 of
2016 dated 21.01.2016 in Cr.No.519 of 2016 (filed by the
Petitioner/Owner of the vehicle under Section 451(1) & 457
Cr.P.C.) had observed the following:

"On perusal of records and the documents. The Peralam Police Station has registered case in Cr.No.519 of 2016 u/s.4(1)(aa) r/w.4(1-a) TNP Act & 14(A) TNP Act & Transport. The case property involved in commission of offence has not produced before this Court and the Inspector of Police, Peralam has stated in the special report filed along with remand report, that Confiscations steps has been taken, to confiscate the vehicle. Since the offence u/s.4(1)(aa) r/w.4(1-A) TNP Act & 14(A) TNP Act is exclusively triable by Hon'ble Sessions Court, in the interest of justice, this petition is dismissed."

4.Assailing the validity, legality and correctness of the impugned order dated 21.01.2016 passed by the trial Court in CrI.M.P.No.312 of 2016, the Learned counsel for the Petitioner submits that the impugned order of the trial Court is bad in Law.

5.The Learned counsel for the Petitioner contends that the two wheeler bearing Registration No.TN-50-L-8802 (Hero Honda Splendour Plus) was not directed to be handed over to the Petitioner by virtue of the impugned order because of the latent and patent reason passed by the trial Court to the effect that since the offence under Section 4(1) (aa) r/w.4(1-A) TNP Act & 14(A) TNP Act is exclusively triable by Sessions Court, the Petition filed in this behind is came to be dismissed and the view taken by trial Court in dismissing the Petition for return of two wheeler in question is not in consonance with Law.

6.At this juncture, this Court pertinently points out that Section 4(1)(aa) of the Tamil Nadu Prohibition Act, 1937, enjoins as under:

"4.Prohibition of the manufacture of, traffic in, and consumption of liquor and intoxicating drugs- (1) whoever- (aa) imports, exports, transports or possesses liquor exceeding fifty litres but less than one hundred litres; Further, Section 14(4) of the Tamil Nadu Prohibition Act speaks as follows:

"Notwithstanding anything contained in sub-sections (1) to (3), the Collector or other Prohibition Officer in-charge of the district or any other officer authorised by the State Government in that behalf is satisfied that an offence has been committed against this Act and whether or not a prosecution is instituted for such offence, he may, without prejudice to any other punishment to which the offender is liable

under this Act, order confiscation of any animal, vessel, cart or other vehicle used in the commission of such offence:

Provided that, before passing an order of confiscation, the owner or the person from whom such animal, vessel, cart or other vehicle is seized, shall be given-

(i) a notice in writing informing him of the grounds on which it is proposed to confiscate the animal, vessel, cart or other vehicle;

(ii) an opportunity of making a representation in writing within a reasonable time, not exceeding fourteen days, as may be specified in the notice, against the grounds of confiscation; and

(iii) a reasonable opportunity of being heard in the matter:

Provided further that the owner or the person from whom such animal, vessel, cart or other vehicle is seized shall be given an option to pay, in lieu of its confiscation, an amount not exceeding the market price of such animal, vessel, cart or other vehicle."

7. The Learned counsel for the Petitioner seeks in aid of the judgment of the Hon'ble Division Bench of this Court dated 08.01.2010 in Contp. Petition No.1156 of 2009 between David V. Shakthivel, Inspector of Police-cum-Station House Officer [CDJ 2010 MHC 840] wherein at paragraph 28 it is observed as follows:

"28. We deem it fit to issue the following directions:-

"Whenever seizure of properties involved in the commission of offence under Prohibition Act, exercise of power is not automatic. Court should afford sufficient opportunity to the prosecution to inform the court about the steps taken by the investigating Agency. Keeping in view the spirit of section 14(4) of TNP Act, court on its own should ascertain whether any confiscation proceedings has been initiated and the stage of confiscation proceedings."

"After affording sufficient opportunity to the prosecution and only after ascertaining about the steps taken for initiation of confiscation proceedings, court could exercise its discretion u/s.451 or 457 Cr.P.C., Court could judiciously exercise its discretion with due care and caution keeping in view the spirit of Section 14 (4) of TNP Act. Exercise of discretion under Sections 451 04 457 Cr.P.C., is only after affording sufficient opportunity to the prosecution to get instructions. Subordinate Courts are directed to insist the Assistant Public Prosecutor to file written Memo as to the steps taken under Section 14(4) of TNP Act or otherwise could only on receipt of written memo, court could proceed to exercise its power u/s.451 or 457 Cr.P.C."

"In case if the court orders interim custody of vehicle, the order should be speaking order recording reasons to order interim custody of the vehicle. In case if the Court orders interim custody of the vehicle. Court should obtain necessary undertaking from the owner of the vehicle to produce the vehicle as and when directed and send copy of undertaking to the District Collector / Prohibition Officer incharge of the District or other authorised officer in that behalf by the Government along with copy of the order passed by the Court.

We direct the Registry to place this order before the Hon'ble The Chief Justice for getting approval for being circulated to all the Subordinate Courts in the State of Tamil Nadu."

8.Added further, the Learned counsel for the Petitioner refers to the judgment of this Court dated 07.04.2011 in CrI.RC.No.501 of 2011 between Sakthidevi V. State rep., by the Inspector of Police, Thittachery Police Station, Nagapattinam District [CDJ 2011 MHC 6794] whereby and whereunder at paragraph 9, it is observed as follows:

"9.It is seen that the said Judgment of this court is also circulated to the Subordinate Courts in the State of Tamil Nadu. The above guidelines stipulated by the Division Bench would make it crystal clear that the courts below shall pass any order u/s.451 or 457

Cr.P.C., by exercising its power and discretion judiciously. It is also made clear in the said guidelines that the spirit of Section 14(4) of TNP Act should also be taken into consideration while passing an order granting the relief of interim custody of vehicle. Apart from such guidelines, it is also stipulated that the owner of the vehicle shall give an undertaking to produce the vehicle as and when required by the District Collector/Prohibition Officer in-charge of the District or authorised officer in that behalf by the Government. Therefore, it is very clear that even the Division Bench has not given a finding to the effect that the pending confiscation proceedings is a bar for granting the relief of interim custody of the vehicle. It is also relevant to state that the Magistrate court is not prevented from making any order of interim custody as per the provision u/s.451 Cr.P.C., merely because the vehicle was not produced before the said court. as it is held by the Hon'ble Apex Court in the decision cited supra that the production of the vehicle is not necessary for passing the order of interim custody of the vehicle."

9. One cannot brush aside the very important fact that "confiscation of vehicle involved in prohibition offence is not mandatory as per decision Abdul Jabbar V. State by Inspector of Police, Manapparai [1994 MLJ (Cr) 567]. Further, before ordering confiscation of the vehicle, the concerned Authority is to provide reasonable opportunity to the owner of the vehicle. In fact, there should be some evidence under Section 144 of the TNP Act, 1937, to show that the owner had knowledge of the commission of the crime or it was likely to be committed. Even the failure on the part of the owner to satisfy the Court that he exercised due care in preventing the commission of the offence is not sufficient to order confiscation as per decision Balasubramanian V. State [1996 LW (Cr.) 76 Sum].

10. In this connection, this Court significantly points out that ordering interim custody of a vehicle involved in prohibition offence should not be automatic. Discretion of Court should be exercised judiciously with due care as per decision David V. Sakthivel [2010 (1) LW (Cr) 129 (Mad)]. It cannot be forgotten that Section 14-A of the TNP Act is not a substantive provision but only embraces within itself a rule of evidence as per decision Shanthalakshmi V. State of Tamil Nadu [1983 LW (Cr) 74].

11. In the decision of K. Nagarajan V. State by Inspector of Police, Washermanpet, [1999 (1) LW (Cr) 125] in respect of interim custody of an auto-rickshaw, a direction was issued to return the auto-rickshaw seized, while carrying illicit arrack on executing a bond.

12. It is to be pointed out that after the amendment to Tamil Nadu Prohibition Act, 1937, the onerous is shifted on the part of the owner of the vehicle to prove that he exercised due care in preventing the commission of the offence as per decision The Commissioner of Police, Madras V. R. Gothandapani reported in 1997 LW (Cr1) Pg. 93.

13. Also that, before passing an order of confiscation pertaining to a vehicle, the appropriate authority is to provide reasonable opportunity to the owner of the vehicle, as opined by this Court.

14. In this connection, this Court points out that for disposal of property in terms of Section 451 of Cr.P.C., it is just and necessary that the property should be under the control of the Learned Magistrate. In fact, not only in respect of the property in regard to an offence appears to have been committed or which appears to have been used for commission of the offence that the Court is empowered under Section 451 Cr.P.C., to pass an order for custody and disposal of property, pending trial, but even in respect of a property produced before the Court, the Court is empowered to make such an order as per the decision Om Rajnarain, Shivpuri V. R.M. Patil reported in 1978 CrLJ page 1432. (Bom-DB).

15. Indeed, the orders passed by virtue of Section 451 & 457 Cr.P.C., are during the pendency of trial or enquiry. When the complaint is filed in Court, the vehicle seized by the Police becomes a part of the complaint and it is deemed that the vehicle is also in the Court. Continuing further, just because a property is liable to be confiscated, it should not be released, during the pendency of trial, is not a reasonable ground for refusing the interim custody of the vehicle seized, in the considered opinion of this Court. If at all, a vehicle is meant for use, the user and the owner should not be deprived of such use, in the considered opinion of this Court. The vehicle is quite likely to rot and rust, if a vehicle was seized as a piece of evidence and further, the same is liable to be confiscated and at the time of passing an order on the question of interim custody, the prime consideration which should weigh with the Court of Law, is when the concerned person/Petitioner is called upon, the vehicle would be produced for the purpose of evidence and if in the event of confiscation order, the same would be available for confiscation?

16. An order under Section 457 of Code of Criminal Procedure can be made during investigation and also the Learned Magistrate need not wait until the trial or enquiry is concluded, as per the decision *Ajai Singh Vs Nathi Lal*, 1978 CrLJ. 629 (AII). Even when the matter is in the stage of Police investigation, disposal can be ordered, as per decision *Mohar Singh Vs State*, reported in 1979 CrLJ 216, at special page 218 (Himachal Pradesh).

17. It is an axiomatic Principle in Law that a Court of Law is to exercise its judicial discretion, after taking into account due consideration, interest of justice, including the future necessity of production of the seized vehicle/article at the time of trial. However, if the release of property in question/issue will in any manner affect or prejudice the course of justice, at the time of trial, it will be a sound exercise of judicial discretion to reject the claim for return, as opined by this Court. Under Section 457 Cr.P.C., the title to the property is not determined or adjudicated. Indisputably, the order to be passed for return/release of vehicle is summary in character. Section 457 Cr.P.C., enjoins a Court of Law to release the property seized by the Police from accused during investigation, but not yet produced before it, as per decision *Amarjith Singh Vs State of Punjab* reported in 1982 CrLJ at page 523 (Punjab & Haryana). Further, the powers of the Magistrate to order release of the vehicle in issue comes into operative play, when some investigation in respect of an offence is registered and the seizure is made of the property concerned.

18. As per Section 457 Cr.P.C., it is to be pointed out that a Court of Law has power to order release of property seized from any person in connection with an offence, even though the property was not produced and the trial of the main case has not commenced, as per decision of the Honourable Supreme Court in *Ram Prakash Sharma Vs State of Haryana* reported in AIR 1978 Supreme Court page 1282. Also that, in the decision of *Rajendra Prasad Vs State of Bihar* reported in 2001 10 SCC page 88, the Honourable Supreme Court had held that subject to certain conditions, the custody of vehicle can be entrusted during the pendency of trial temporarily to its registered owner".

19. Furthermore, Section 102 Cr.P.C., defines the power of Police Officer to 'seize certain property' especially where the allegation of commission of an offence is alleged. As a matter of fact, Section 102 Cr.P.C., speaks of any offences and is wide enough to cover offences either under the Indian Penal Code or under any special statute, as opined by this Court. Moreover, for an application of Section 102 Cr.P.C., the essential requirements are that the properties said to be seized or frozen must be either stolen property or they should have been found to have some nexus with the alleged offence, which is under investigation of the concerned Police Officer, as per decision

Rajamani Vs Inspector of Salem reported in 2003 CrLJ page 2902 at special page 2903.

20. In the present case on hand, the Revision Petitioner/Petitioner before the trial Court in CrI.M.P.No.312 of 2016, had clearly mentioned that she is the owner of Hero Honda Splendor Plus bearing Registration No.TN-50-L-8802.

21. Admittedly, the police had seized the said vehicle and she had utilised the said vehicle for her own use viz., for agricultural activities and for taking children to school and proceeding to hospital.

22. The plea of the Petitioner is that if the motor-cycle is kept in open space at the Police Station, during sunshine and rain, the battery and engine would get rusted and the tyres would get worn out.

23. In the light of the foregoing discussions and the aforesaid judicial pronouncements and also, this Court taking note of the fact that the reason assigned by the trial Court in the impugned order to the effect that "... confiscations steps has been taken, to confiscate the vehicle. Since the offence u/s.4(1)(aa) r/w.4(1-A) TNP Act & 14(A) TNP Act is exclusively triable by the Hon'ble Sessions Court" is not a correct one. As such, this Court, in the interest of justice, perforced to interfere with the said order of dismissal dated 21.01.2016 passed in Cr.M.P.No.312 of 2016 by the trial Court and sets aside the same to prevent an aberration of justice and to promote substantial cause of justice. Consequently, the Criminal Revision Petition succeeds.

24. In the result, the Criminal Revision Petition is allowed and the order passed by the Learned District Munsif cum Judicial Magistrate, Nannilam in Cr.M.P.No.312 of 2016 dated 21.01.2016 is set aside by this Court for the reasons ascribed in this Criminal Revision Petition.

25. Added further, this Court in the interest of justice, directs the Respondent/Complainant/Police to produce the Hero Honda Splendour Plus motor-cycle bearing Registration No.TN-50-L-8802 before the Learned Magistrate, within a week from the date of receipt of a copy of this order. Thereafter, the vehicle may be handed over to the Revision Petitioner/Petitioner on filing of Miscellaneous Petition by her before the trial Court. Inasmuch as the trial Court is empowered to pass orders under Section 451 Cr.P.C., only after a symbolical or physical production of the two wheeler in question, of course after hearing the respective parties concerned. However, the return of the vehicle in question is subject to the fulfillment of following conditions, by the Petitioner.

a) Soon after the production of the vehicle viz., Hero Honda Splendor Plus bearing Registration No.TN-50-L-8802, before the trial Court, the Petitioner is directed to produce all the necessary documents relating to the ownership of the vehicle.

b) The Petitioner shall execute a bond for a sum of Rs.20,000/- along with two sureties likesum to the satisfaction of the Learned District Munsif cum Judicial Magistrate, Nannilam;

c) The Petitioner shall surrender the R.C.Book and the Learned District Munsif cum Judicial Magistrate, Nannilam is at liberty to return the R.C.Book, in case of renewal, if any for the purpose of registration or for insuring the vehicle.

d) The Petitioner shall furnish an affidavit of undertaking to the effect that she will cause production of the vehicle in question before the appropriate/competent authority/Court as and when called for and further, she will not alienate the vehicle in question till the appropriate proceedings to be initiated or completed.

e) The Petitioner shall not alter the character and nature of the vehicle except by carrying out necessary repairs to make the vehicle road worthy.

f) The Petitioner should give an undertaking to produce the vehicle as and when required by the requisite authority/Prohibition Officer duly authorised in that behalf by the Government."

DP

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

To

1. The District Munsif cum Judicial Magistrate, Nannilam.
2. The Assistant Superintendent of Police, Thiruvavarur, Thiruvavarur District.

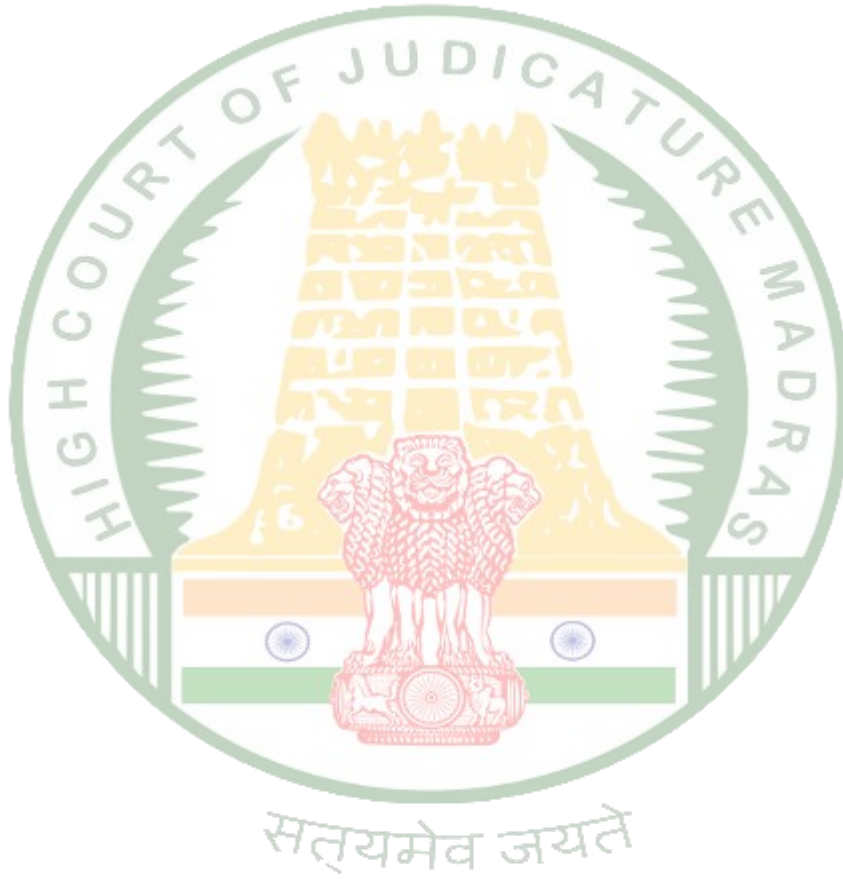
3. The Sub Inspector of Police,
Peralam Police Station.

4. The Public Prosecutor,
High Court, Madras.

+ 1 cc to Mr.R.Baskaran, Advocate SR 27255

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