

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.08.2017

CORAM

THE HONOURABLE MR. JUSTICE R. SURESH KUMAR

CrI.R.C.No.1132 of 2017

and

CrI.MP No.10777 of 2017

Mulla @ Sivakumar

... Petitioner

Vs.

1.State rep. by
The Inspector of Police,
J-11, Kannaki Nagar Police Station,
Chennai District.

2.The Executive Magistrate and
Deputy Commissioner of Police,
Adayar,
Chennai District.

... Respondents

Criminal Revision filed under Sections 397 and 401 of the Code of Criminal Procedure to call for the records and to set aside the order of the Executive Magistrate and Deputy Commissioner of Police made in M.P.No.3 of 2017 in Na.Ka.No.85/Se.Nadu.Ka.Thu/Adayar District/2017 on the file of the 2nd respondent and to acquit the petitioner.

For Petitioner : Mr.R.Vijayakumar

For Respondents: Mr.C.Iyyapparaj
Additional Public Prosecutor

ORDER

This revision case has been filed against the order passed by the 2nd respondent/Executive Magistrate and Deputy Commissioner of Police, on 04.04.2017.

2.By the said order, the 2nd respondent, having invoked Section 122(1)(b) of the Code of Criminal Procedure (herein after referred to as the Code), has remanded the petitioner to be in Jail for the remaining days of the bond period i.e., 179 days.

3.The case of the respondent/prosecution is that the petitioner was arrested on suspicion by the 1st respondent on 06.03.2017. On enquiry, it was revealed that the petitioner had already involved in a criminal case in Crime No.1506 of 2016 on the file of J-11 Police Station, Chennai, for the alleged offences under Sections 147, 148, 324 and 307 of IPC .

4.Further, the case of the respondent/prosecution is that in view of the said involvement of the petitioner in the said

case, the 2nd respondent, having invoked Section 110 of the Code has directed the petitioner to execute a bond for his good behaviour for the period of six months. Accordingly, he had executed a bond on 08.03.2017 under Section 110 of the Code.

5. Further, the case of the prosecution is that though the petitioner has executed a bond on 08.03.2017, on the next day i.e., on 09.03.2017, the 1st respondent, on information, had arrested the petitioner for the alleged offence that, the petitioner was found in possession of Ganja of 1Kg and 100g and registered a case in Crime No.519/17 for the alleged offences punishable under Sections 8(C) read with 20 (b) (ii) (B) of the Narcotic Drugs and Psychotropic Substances Act.

6. Further, the case of the respondent/Prosecution is that because of the involvement in the said case, even after the bond executed by the petitioner on 08.03.2017, the 1st respondent had forwarded the report to the 2nd respondent with a request to invoke Section 122(1)(b) of the Code, as the petitioner allegedly violated the bond conditions executed on

08.03.2017. According to the 2nd respondent, the petitioner had been directed to appear on 03.04.2017. As he had already been in Jail, pursuant to the arrest made on 09.03.2017, the petitioner was produced before the 2nd respondent, where, the 2nd respondent claimed that, the Prosecution witnesses i.e., the Inspector of Police and Sub Inspector of Police as well as a Police Constable and Head Constable attached with the 1st respondent police had given statements against the petitioner. For further enquiry, the petitioner had been directed to produce on the next day. Accordingly, the petitioner was produced on 04.04.2017, on that day, explanation was asked for from the petitioner, for which, the petitioner had refused his involvement in the crime. It is further recorded by the 2nd respondent that, though the petitioner had accepted that he had been in the place of occurrence, but he stated that he did not do anything, involving the said crime.

7.The 2nd respondent, therefore, in the impugned order invoking Section 122(1)(b) of the Code, ordered that the petitioner shall be kept in judicial custody for a period of 179

days, out of 180 days of the bond period from 04.04.2017. The said order has been passed on 04.04.2017 itself, as against which, the present revision has been filed.

8.I have heard the learned counsel appearing for the petitioner as well as the learned Additional Public Prosecutor appearing for the respondents.

9.It is the case of the respondents that the petitioner had involved in a crime in Crime No.1506/2016 on the file of J-11 Police Station, even according to the respondent, no other case is pending against the petitioner. Only on suspicion, he was apprehended on 06.03.2017 and on the basis of his involvement in the said case, i.e., Crime No.1506/2016, the respondent came to the conclusion that the petitioner is a habitual offender and therefore, in order to maintain law and order, peace and tranquility in the locality, he had been directed to execute a bond. Accordingly, the petitioner executed the bond on 08.03.2017.

10.The very next day i.e., on 09.03.2017, it is the case of the respondent that the petitioner was caught, while he was in possession of 1KG and 100g of Ganja for the purpose of sale.

11.Only on the basis of the said case, which was registered in Crime No.519 of 2017 on the file of the 1st respondent, the invocation of Section 122 of the Code was made and the present impugned order has been passed.

12.In this regard, when this Court specifically asked the learned Additional Public Prosecutor, as to whether any previous cases are pending against the petitioner, except the one mentioned in the impugned order i.e., Crime No.1506/2016, the learned Additional Public Prosecutor, on instructions, would state that no other cases are pending. However, the learned Additional Public Prosecutor would state that the petitioner is a history sheeter and therefore, in order to prevent him from committing any crime continuously in that locality, the 2nd respondent has invoked Section 122(1)(b) of the Code and the present impugned order has been passed.

13. On perusal of the impugned order, it is found that on 04.04.2017, the petitioner had been questioned about the charges against him, as made by way of Statement by the officials, such as, the Inspector of Police, Sub Inspector of Police, etc., for which, the petitioner had denied those allegations. It is also mentioned in the impugned order that the petitioner has accepted that he was present in the said place of occurrence and he did not involve in any crime as alleged by the 1st respondent in Crime No.519 of 2017 on the file of the 1st respondent.

14. Even the invocation of Section 110 of the Code, can be permitted only to deal with the persons, who have been a habitual offender for some time. In this regard, the situations enumerated from Sub clauses (a) to (f) of Section 110 of the Code, would clearly disclose that if a person is a habitual offender and he is habitually commits or attempts to commit, or abets the commission of offences, involving breach of peace, then only he shall be treated as a habitual offender and

in order to prevent him from commissioning further offence and to ensure his good habits, he can be directed to execute a bond under Section 110 of the Code. Even after execution of the bond under Section 110 of the code, still if the petitioner committed an offence in violation of the bond conditions, then only the Executive Magistrate can further interfere with, under Section 122 of the Code.

15. Here, in the case on hand, except the case in Crime No.1506 of 2017 on the file of J-11 Police Station, even according to the respondent/Prosecution, the petitioner has not involved in any other crime or no other case is pending against him. When that being so, whether the petitioner has to be treated as habitual offender within the meaning of Section 110 of the Code itself, is a question. Further, at any rate, since the petitioner had been insisted upon to execute a bond, he had done so on 08.03.2017.

16. Immediately, on the very next day, on 09.03.2017, the prosecution case is that, he had been involving in the crime of having possession of Ganja of 1KG and 100G and

therefore, he got red-handed and this has been shown as a breach of bond conditions and accordingly, Section 122 has been invoked.

17. Except the official witnesses of the prosecution, such as, the Inspector of Police, Sub Inspector of Police and Police Constables, no other witnesses have given any statement. Moreover, even the statements given by these official witnesses had been shown to the petitioner, it is recorded by the 2nd respondent that, the petitioner had denied the same. When that being so, by merely recording a statement that the petitioner has accepted that he was present in the place of occurrence, but he did not involve in any crime, cannot be the satisfying material or necessary ingredient to invoke Section 122 (1)(b) of the Code. If at all, the statements of the official witnesses are to be accepted by the Executive Magistrate, in order to cross examine the said witnesses, the petitioner should have been given an opportunity of engaging a counsel on his own.

18.In this regard, I have dealt with a similar circumstances in the case of **Selvam @ Selvaraj vs. the Executive Magistrate -cum- Deputy Commissioner of Police, (Law and Order, Crime and Traffic), Tiruppur city and another in Crl.RC.No.505 of 2017, dated 03.07.2017 {2017 (3) MLJ (Crl) 430}**, wherein, at Paras 45 and 46, I have given the following observations.

"45. Since the order of detention to be made by the Executive Magistrate by cancelling the bond, u/s 122(1)(b) of Cr.P.C, is an order without charge, without trial and without Judgment, as has been held in the Judgment above cited, the same cannot be made without the due procedures to be followed in this regard

46.As has been rightly held by the learned Judge in the Judgment cited supra, since it is a personal liberty of an individual which is to be infringed, it can only be done under the procedure established under law within the

meaning of Article 21 of the Constitution of India. Therefore, if there is any iota of violation of such procedure, as intended or contemplated under Article 21 of the Constitution, then certainly it can only be treated as violation of Article 21 of the Constitution and on that ground itself, such order of detention made u/s 122 (1)(b) of Cr.P.C would be vitiated. Here in the case in hand, though the petitioner admittedly, was present before the first respondent, there was no mentioning about his presence and the opportunity of being heard given to him by the first respondent, in the impugned order. Since there is no whisper about the presence of the petitioner as well as the opportunity given to him in the order, the further course of action of supplying the documents and getting views or reply from the petitioner /detenu, in this case, would not have happened. Moreover, it is not the definite case of the respondent that such an opportunity was given to the petitioner and such

a procedure as contemplated, has been followed scrupulously, in this regard. In the absence of all these ingredients, as the order of detention made by the first respondent through the impugned order, will upset the personal liberty of the petitioner, as guaranteed under Article 21 of the Constitution, this Court has to construe the strict sense of non following of such procedure of being heard and the satisfaction of the Magistrate in this regard.”

19. When that being the position, the present reason given in the impugned order for invocation of Section 122(1)(b) of the Code is not satisfying the parameters of Section 110 read with 122(1)(b) of the Code as well as the observation made by this Court in the Judgment cited above. Moreover, the prosecution also is not in a position to state that except the said Crime No.1506/2017 on the file of J-11 Police station, any other previous case has been filed against him or pending against the petitioner.

20. Therefore, the 2nd respondent cannot invoke Section 122(1)(b) of the Code in a casual manner, without strong materials and evidence to establish that the petitioner or detenu has involved in so many crimes continuously, with a result, he has become a habitual offender and his free movement would be the hindrance and challenge to the Society and his further commissioning of offence would affect public peace and tranquility, and the law and order would get deteriorated in the locality, where such person/detenu is residing.

21. Therefore, considering all these aspects, this Court is of the considered view that the impugned order is liable to be interfered with, as it does not meet the requirements and the parameters within the meaning of Section 110 as well as Section 122(1)(b) of the Code.

In the result, the Criminal Revision Case is allowed. The impugned detention order in M.P.No.3 of 2017 dated 04.04.2017 passed by the Executive Magistrate and Deputy Commissioner of Police, Adayar, Chennai District, is set aside.

The petitioner/accused is directed to be released forthwith, unless he is required in connection with any other case. The bail bond, if any executed by the accused, shall stand cancelled. Consequently, connected Miscellaneous Petition is closed.

31.08.2017

Index :yes/no

Internet :yes/no

mps

To

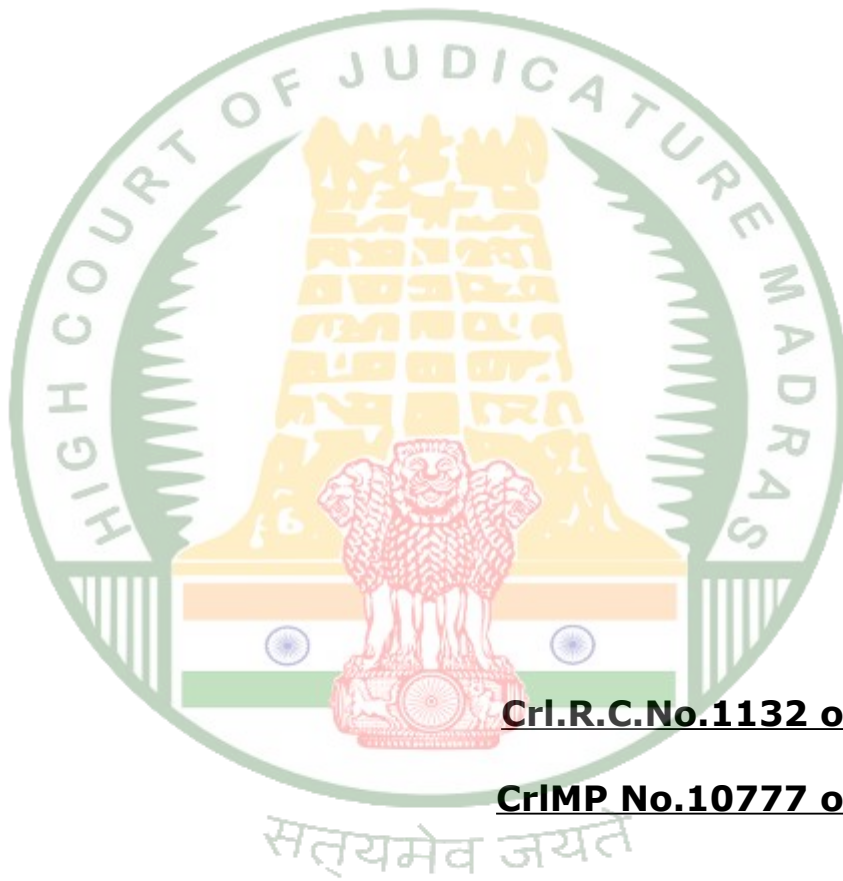
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R. SURESH KUMAR, J,

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