

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.12.2017

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THE HONOURABLE DR.JUSTICE.S.VIMALA

CrI.R.C.No.1580 of 2017
and CrI.M.P.No.16073 of 2017

Velankanni

... Revision Petitioner

Vs

1. Executive Magistrate cum
Deputy Commissioner of Police,
Adayar District, Chennai.

2. State:
Inspector of Police,
J11 Kannagi Nagar Police Station,
Chennai.

... Respondents

Criminal Revision Case filed under Section 397 and 399 of Cr.P.C. Praying to call for the entire records on the file of the 1st respondent, Executive Magistrate, Deputy Commissioner of Police, Adayar District, Chennai, in M.P.No.13 of 2017 in Na.Ka.No.413/Nir. Executive Magistrate cum Deputy Commissioner of Police, Adayar District, in Cr.No.1165 of 2017 and set aside the order 09.10.2017.

For Petitioner : Mr.M.Rajavelu
For Respondent : Mr.V.Arul
Additional Public Prosecutor

ORDER

The petitioner herein is the accused in Cr.No.1376 of 2017 for the offences under Sections 8(C) r/w. 20(b)(ii)(B) of NDPS Act and now he is in custody from

07.10.2017. Challenging the same, the Criminal Revision Case has been filed by the accused.

2. Brief facts:

Originally, a case has been registered against the petitioner in Cr.No.1165 of 2017 and she appeared before the first respondent on 09.09.2017 in obedience to the summons and notice u/s.110 Cr.P.C. and she executed a bond for a sum of Rs.2,000/- to maintain good behaviour in her locality for a period of six months from the date of execution of the bond. Thereafter, it is alleged that the petitioner, on 21.09.2017, indulged in the offence u/s 8 (C) r/w 20(b)(ii)(B) NDPS Act, which led to the registration of case in Cr.No.1376 of 2017. Since the petitioner had indulged in the other offences immediately to the execution of bond, the first respondent has passed the order, ordering the petitioner to be imprisoned till the completion of the period of the bond executed in connection with the case in Cr.No.1165 of 2017. Challenging the same, the accused has filed this Criminal Revision Case.

3. The main contention of the learned counsel for the revision petitioner/accused is that before cancellation of the bond executed in connection with the case in Cr.No.1165 of 2017, the revision petitioner/accused was not given an opportunity of hearing as to why the bond executed by her should not be cancelled in view of the subsequent crime committed by her. Furthermore, no legal assistance was provided to the accused. Hence, the order passed by the first respondent is legally unsustainable.

4. The learned Additional Public Prosecutor appearing for the respondents submitted that originally, on 21.09.2017, as the accused was found to be in possession of kanja and was selling the kanja, she was arrested by the second respondent; as the accused has been in prison, she was produced before the first respondent on 07.10.2017, on P.T.warrant and she was given the copy of the documents on that day, the order was passed by the first respondent on 09.10.2017. Alleging that opportunity given was not sufficient, this revision is filed.

5. A perusal of the order passed by the first respondent would go to show that the first respondent, namely, the Executive Magistrate cum Deputy Commissioner of Police, Adayar District, Chennai had given an opportunity of hearing, when the accused/revision petitioner had committed offence in Cr.No.1165 of 2017 and directed the accused to execute the bond to maintain good behaviour for a period of six months. The petitioner allegedly had indulged in other offences on 21.09.2017 and a case has been registered in Cr.No.1376 of 2017 for the offence u/s 8 (C) r/w 20(b)(ii)(B) NDPS Act. It is further seen that the first respondent had given the copy of the documents to the accused on 07.10.2017 and thereafter, on 09.10.2017, the prosecution witnesses were examined before the accused and the accused was also heard by the first respondent and the accused also refuted the allegations made by the prosecution witnesses. Thereafter, without furnishing opportunity to the petitioner, order has been passed on the same day of hearing, as rightly contended by the learned counsel for the revision petitioner/accused.

6. In the case of Murali @ Ponnuchamay Vs. The Sub Divisional Executive

Magistrate and another [Crl.R.C.(MD) No.161 of 2016 dated 09.06.2016] as regards the nature of the power under [Section 122](#) Cr.P.C. and the procedure to be followed, this Court has held as under:

"8. Under the Code of Criminal Procedure, there are Judicial Magistrates and Executive Magistrates. In order to keep peace, tranquility and also to prevent persons from indulging in any criminal activities, disturbing the peace of others, powers to take certain preventive measures have been given to the Executive Magistrates.

9. Under Section 117 Cr.P.C., upon satisfaction, the Executive Magistrate may direct such persons to execute a bond, but upto 3 years and when they breach the conditions, he can pass orders to detain them under Section 122 (1)(b) Cr.P.C.

10. It is pertinent to note that such a detention is different from a detention authorised by a Court. Jailing a person by a Judicial Order is based on charges, evidence, trial and a detailed Judgment. However, in jailing a person, under Section 122 (1)(b) Cr.P.C., by the Executive Magistrate, there will be no charge, no evidence and no trial. Without any trial, the liberty of a person can be taken away by the Executive Magistrates. So, it is draconian in nature. An affront to civil and personal liberty.

11. Under Article 21, Constitution of India, no one shall be deprived of his life and liberty, except by procedure established by law. Thus Article 21 of the Constitution does not prevent the authorities to take away the liberty or life of a person. But, in doing so, they should follow prescribed procedures.

The procedure must be fair, reasonable, not unjust, not arbitrary and not whimsical.

12. Now, in the case before us, the detention order has been passed by the first respondent under Section 122 (1)(b) Cr.P.C. As per the said provision, the Executive Magistrate, before ordering a person to be jailed, he shall be satisfied that the person has breached the

bond conditions, the Executive Magistrate must also record the grounds for such proof. That means he must apply his mind and pass orders. He cannot pass orders mechanically. But, he need not write an elaborate Judgment like us. His Orders must show atleast briefly the grounds upon which, he has satisfied that the person has breached the bond executed by him. Under Section 122 (1)(b) Cr.P.C., if the said satisfaction is not recorded, it will be presumed that the detention authority sending a person to jail is arbitrary, mechanical, not fair, unjust. At that time, the respondent has not given any opportunity of hearing to the accused as to why the bond executed by him should not be cancelled in view of the offence committed by him. Once the opportunity of hearing is not given to the parties, then, it is pure violation of natural justice.”

7. As per this decision, opportunity granted should be a meaningful opportunity and the Executive Magistrate has to apply his mind in arriving at a decision. Perusal of the order passed by the Executive Magistrate would go to show that the operative portion of the order, directing the cancellation of bond is very vague and he did not give reasons for arriving at such a conclusion. Hence, order passed is liable to be set aside. सत्यमेव जयते

8. Insofar as the legal assistance being given to the accused, the Supreme Court, in the case of Khatri vs. State of Bihar (1981 (1) SCC 627), has noted that the Judicial Magistrate did not provide any legal representation to the accused persons, because, they did not ask for it and this found to be unacceptable. The Hon'ble Supreme Court went further and held that it was the obligation of the Judicial Magistrate before whom the accused were produced to inform them of their entitlement to legal representation at State Costs.

9. Even though the decision is with reference to proceedings before Judicial Magistrate, the dictum laid down would be applicable in case of proceedings before Executive Magistrate also, where, the decision would take away the liberty of the concerned person.

10. In the light of the above decisions cited supra, as no legal representation was provided to accused to assist her case, the order passed by the first respondent is liable to be set aside.

11. Accordingly, the Criminal Revision Case is allowed. The order dated 09.10.2017 passed by the 1st respondent, in M.P.No.13 of 2017 in Na.Ka.No.413/Nir. Executive Magistrate cum Deputy Commissioner of Police, Adayar District, in Cr.No.1165 of 2017 is hereby set aside. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते

21.12.2017

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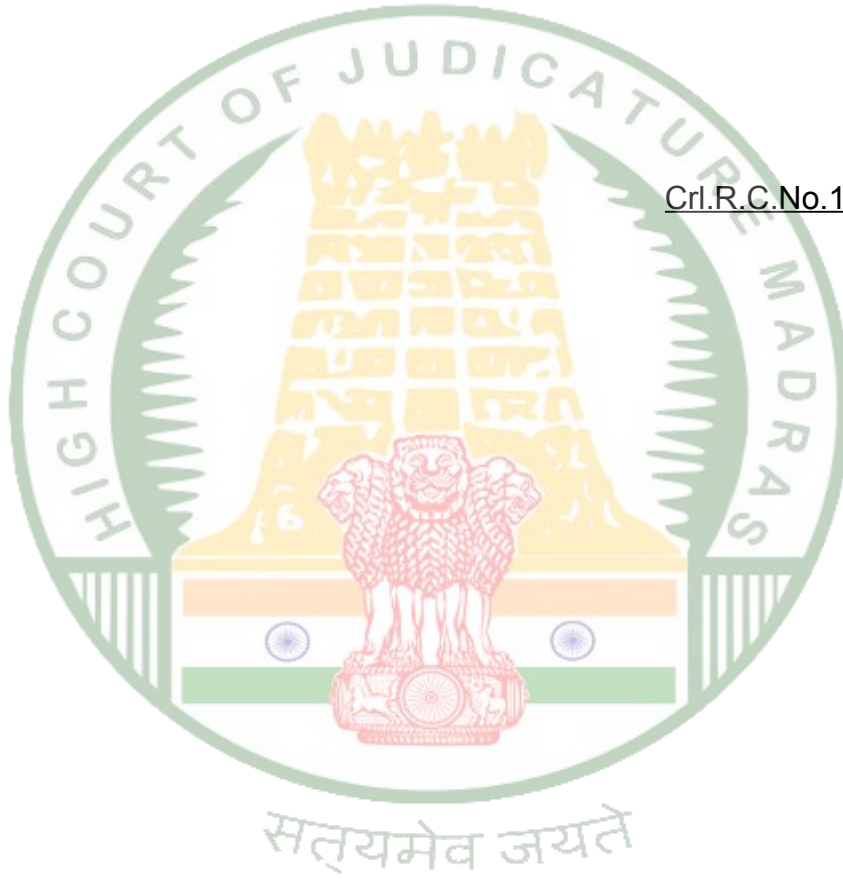
Note : Issue order copy on or before 28.12.2017

To

1. Executive Magistrate cum
Deputy Commissioner of Police,
Adayar District, Chennai.
2. The Inspector of Police,
J11 Kannagi Nagar Police Station,
Chennai.

Dr. S.VIMALA, J.,

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