



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Criminal Jurisdiction)

Monday, the Thirteenth day of September Two Thousand Twenty One

PRESENT

The Hon`ble Mr Justice RMT. TEEKAA RAMAN

CRIMINAL MISCELLANEOUS PETITION No.5269 of 2021

IN CRL.A.630 of 2018

K.JAGMAL

[PETITIONER/APPELLANT/ACCUSED]

Vs

STATE BY

[RESPONDENT/COMPLAINANT]

INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU,
CHENNAI ZONE, CHENNAI.

REPRESENTED BY ITS SPECIAL PROSECUTOR,
N.C.B.F.NO.48/1/3/2013-NCB/MDS)

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to

(i) Suspend sentence imposed upon the petitioner in C.C.No.2/2014 dated 27.03.2018 of the learned Principle Special Judge, Principle Special Court under NDPS Act Cases, Chennai-600 104 and enlarge him on bail, pending disposal of the above Crl.A.630/2018.

Order : This petition coming on for orders upon perusing the petition and the filed in support thereof and upon hearing the arguments of M/S.SRUTHY BHAT Advocate for M/S.K.GOWTHAMKUMAR, Advocate for the Petitioner and of MR.N.P.KUMAR SPECIAL PUBLIC PROSECUTOR FOR NDPS ACT CASES on behalf of the Respondent the court made the following order:-

The above criminal miscellaneous petition is filed by the petitioner/A.1, seeking to suspend the sentence imposed on him by the learned Principal Special Judge, Special Court under NDPS Act cases, Chennai, in C.C.No.2 of 2014, dated 27.03.2018, and enlarge him on bail, pending disposal of the above criminal appeal.

2 (a). Learned counsel for the petitioner would submit that he was instructed to argue the matter only for suspension of sentence and not for the appeal.



2 (b). Learned counsel for the petitioner relied upon a decision of the Hon'ble Apex Court reported in 2002 (7) SCC 419 [Avtar Singh and Others Vs. State of Punjab], regarding conscious possession of contraband to be specifically put forth to the accused at the time of questioning under Section 313 of Cr.P.C, as an incriminating substance. Further, Ex.P5-Seizure mahazar, is not proved in the manner known to law. The attestor of Ex.P5-Seizure Mahazar was not examined by the prosecution to prove the seizure. The trial Court has given a finding at para No.21 stating that the statement recorded from A1 has no evidentiary value as it is not voluntary and hence, A2 was acquitted by the trial Court. Even in respect of transportation charge, A1 was also acquitted and he was convicted only under Section 8(c) r/w. 18(b) of the NDPS Act.

3. Learned counsel for the petitioner also drew my attention to the evidence of P.W.10, who was not an NCB Official and during the alleged search, there was no resistance or any reservation on the part of the accused which shows his bona fide. According to the statement of A1, someone has handed over the items with a request to deliver to the address of A2. The statement of the co-accused is not sufficient to convict A2 and hence, A2 was acquitted by the trial Court. The learned counsel also pleaded that the petitioner was already undergone nearly eight years of rigorous imprisonment and hence, he prayed for some leniency to the petitioner/A.1, as he is a total stranger to the entire NDPS scheme.

4. Per contra, Mr.N.P.Kumar, learned Special Public Prosecutor appearing for the respondent would contend that out of two attestors, one attestor viz., Mr.Jegan was examined regarding Ex.P.5-seizure mahazar.

5. In the decision reported in 2019 (2) SCC 466 [State of Punjab Vs. Rakesh Kumar], the Hon'ble Apex Court has observed as under:-

"Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 8, 21 and 22 should not be read in exclusion to Drugs and Cosmetics Act, 1940. Additionally, it is the prerogative of the State to prosecute the offender in accordance with law. Since the action of the accused-respondents amounting to prima facie violation of Section 8 of the NDPS Act, they were charged under Section 22 of the NDPS Act.

For administration of justice, the accused approached the High Court for suspension of sentence and while granting relief, High Court commenting on merit of the case which is not proper and more so when appeal against conviction was pending."

6. In the decision reported in 2015 (4) MLJ (Cri) (SC) 486 [Baldev Singh Vs. State of Haryana], the Hon'ble Apex Court has held as under:-



"The evidence on record amply establishes physical possession of the contraband by the appellant. The appellant being the driver of the vehicle by all probabilities must have been aware of the contents of the bags transported in the trolley attached to the tractor. Once the physical possession of the contraband by the accused has been proved, Section 35 of the NDPS Act comes into play and the burden shifts on the appellant-accused to prove that he was not in conscious possession of the contraband and since the burden is not discharged, there is no infirmity in convicting the appellant-accused."

7. In the above Baldev Singh case, the Hon'ble Apex Court has also observed as follows:-

"In his statement under Section 313 Cr.P.C., no plea has been taken that the appellant was not in conscious possession of the contraband. The appellant has only pleaded that he being falsely implicated and that a false case has been foisted against him in the police station. In his statement under Section 313 Cr.P.C., the appellant had not stated anything as to why would the police foist the false case against the appellant. It is to be noted that huge quantity of poppy straw was recovered from the possession of the appellant. Admittedly, the police officials had no previous enmity with the appellant. It is not possible to accept the contention of the appellant that he is being falsely implicated as it is highly improbable that such a huge quantity has been arranged by the police officials in order to falsely implicate the appellant."

8. Per contra, learned counsel for the petitioner relied upon a decision of the Hon'ble Apex Court reported in (2002) 7 Supreme Court Cases 419 [Avtar Singh and Others Vs. State of Punjab], wherein, the Hon'ble Apex Court has held as follows:-

"A case of drawing presumption under Section 114 of the Evidence Act could perhaps be made out then to prove the possession of the accused, but the fact remains that in the course of examination under Section 313 Cr.P.C., not even a question was asked that they were the persons in possession of poppy husk placed in the vehicle."

9. Keeping the law settled by the Hon'ble Apex Court in mind, the petitioner/A.1 was convicted by the learned Principal Special Judge, Special Court under NDPS Act cases, Chennai, under Section 8(c) r/w. 18(b) of the NDPS Act and A.2 was acquitted under Section 235(1) of Cr.P.C. from the offences under Sections 8(c) r/w. 29, 8(c) r/w. 18(b) and 8(c) r/w. 28 of NDPS Act. As against the conviction passed against the petitioner herein/A.1, he has preferred the above criminal appeal.



10. The case of the prosecution is that on 03.07.2013, on specific information received, the officers along with the independent witnesses mounted surveillance at Egmore Railway Station; identified the petitioner herein/A.1, intercepted him and on enquiry, the officers found dark brown colour semi solid substances concealed inside the transparent plastic covers, found out to be opium on test. The total weight of the substance is 5.5 kilograms, samples taken, remand samples were also packed, sealed and marked and based on the materials seized and as per the statements, both accused were remanded to judicial custody. After completion of investigation, a complaint was filed under Sections 8(c) r/w. 18(b), 28 and 29 of NDPS Act.

11. According to the learned counsel for the petitioner, the petitioner is in judicial custody from 04.07.2013. The main contention of the learned counsel for the petitioner is that there is a violation of mandatory provision under Section 50 of the NDPS Act. Though the alleged seizure was not made from the persons, they were found to follow the procedure under Section 50 of the NDPS Act and no question was put to the accused during the questioning under Section 313 of Cr.P.C. and hence, seeks for suspension of sentence.

12. As observed earlier, the learned counsel for the petitioner has argued only for suspension of sentence/bail pending appeal.

13. In the decision reported in (2000) 8 SCC 437 [Dadu alias Tulsidas Vs. State of Maharashtra, the Hon'ble Apex Court has categorically held that in respect of cases under NDPS Act, the relief of suspension of sentence and bail can be granted by the Appellate Court only if the twin test laid down as per Section 37 of the NDPS Act are satisfied.

14. In the instant case, the quantity of opium seized is 5.5 kilograms. With regard to observance of the provision of Section 50 of the NDPS Act, learned counsel for the petitioner argued that since the petitioner/A.1 was searched and document was seized from him, it is settled by the Hon'ble Apex Court that procedure contemplated under Section 50 of the NDPS Act might have been required to be complied with in respect of the search of the accused. In the instant case, the search of the person viz., the accused is made and thus, it is obligatory on the part of the intelligence officer to comply with the above procedure. However, after going through the evidence of the prosecution witnesses, I find that the contraband was recovered from the brown colour trolley back and not from the accused in respect of the documents 1 to 7 marked and mentioned in the mahazar. The recital to the mahazar is very clear to the effect that A.1 has taken the item No.1 and handed over the same to the intelligence officer and therefore, it is evident from the finding rendered by the trial Court that A.1 was not subjected to personal search and hence, in so long as the search is only with respect to the bag and hence, I find that in



the absence of personal search of the accused, the provision of Section 50 of the NDPS Act will not apply to the facts and circumstances of the case.

15. On perusal of the questioning under Section 313 of Cr.P.C., I find that question No.3, the incriminating circumstances regarding possession and conscious possession of the contraband was specially put to the accused and hence, on the factual position, the contention of the learned counsel for the petitioner stands negatived.

16. On the point of seizure of opium which is weighing 5.5 kilograms seized from the trolley bag carried by A.1, the contraband was in the custody of A.1 and it was in connection with the seizure, the seizure officer/P.W.3 and intelligence officer/P.W.10 were let in evidence cogently. After going through the evidence, I find that the presumption as contemplated under Sections 34 and 50 of the NDPS Act would come into play and therefore, once the presumption is established, the burden is shifted on the accused that he was in conscious possession. Admittedly, the accused is not made any attempt to discharge the burden. All the contentions raised by the learned counsel for the petitioner for grant of bail not being satisfied. Hence, I am not inclined to grant suspension of sentence to the petitioner/A.1. Accordingly, this petition, seeking suspension of sentence, is dismissed.

-sd/-
13/09/2021

This order, on being produced, be punctually observed and carried into execution by all concerned

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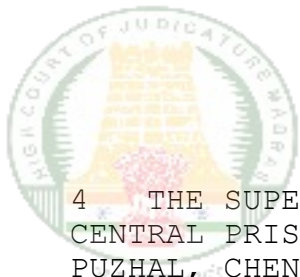
Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE PRINCIPAL SPECIAL JUDGE,
PRINCIPAL SPECIAL COURT UNDER NDPS ACT,
CHENNAI.

2 THE SPECIAL PUBLIC PROSECUTOR
FOR NDPS ACT, HIGH COURT, MADRAS.

3 THE INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU,
CHENNAI ZONE, CHENNAI.



4 THE SUPERINTENDENT,
CENTRAL PRISON,
PUZHAL, CHENNAI.

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+1 C.C. to M/S.K.GOWTHAMKUMAR Advocate on payment of necessary
charges SR.NO.46708

Order

in
CRL MP.5269/2021
in
CRL.A.630/2018

Date :13/09/2021

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RW 16/09/2021