



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 29.03.2021
DELIVERED ON : 21.05.2021

CORAM :

THE HONOURABLE **Mr. JUSTICE G.ILANGO VAN**

W.P.(MD)Nos.8739 and 8757 of 2017
and

W.M.P(MD) Nos.6658 and 6691 of 2017

Mani ...Petitioner in W.P.(MD)Nos.8739 of 2017

Jayaraj ...Petitioner in W.P.(MD)Nos.8757 of 2017

/Vs./

1.The Joint Secretary,
The government of India,
Ministry of Home Affairs,
(Centre State Division)
NDCC-II Building, Jai Singa Road,
New Delhi-110 001.

2.The Principal Secretary (Home),
Government of Tamil Nadu,
Secretariat, Chennai-600 009.

3.The Superintendent
Central Prison,
Trichy.

...Respondents
(in both petitions)

Common Prayer: Writ Petitions filed under Article 226 of the Constitution of India to issue Writ of Certiorarified Mandamus, to call for the records of the first respondent in F.No.V-20011/01.2014-PR dated 06.03.2014 and quash the same and consequently direct the respondents to release the petitioners from the prison who is confined in Central Prison, Trichy for more than 10 years and 14 years and 11 months as convict prisoner Nos.19970 and 20192 respectively.

For Petitioner : Mr.R.John Sathyan
(in both petitions)

For R-1 : Mr.C.Nandagopal
(in both petitions)
Central Govt. Standing Counsel.



For R-2 and R-3 : Mr.M.Ganesan,
(in both petitions) Government Advocate (Criminal Side)

COMMON ORDER

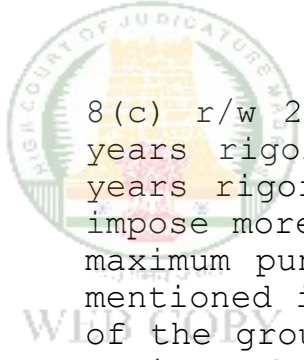
These writ petitions have been filed seeking writ of certiorarified mandamus to call for the records on the file of the first respondent in F.No.V-20011/01.2014-PR dated 06.03.2014 and to quash the same and consequently, to direct the respondent to release the petitioners from the prison who are confined in Central Prison, Trichy, for more than 10 years and 14 years and 11 months as convict prisoner Nos.19970 and 20192 respectively.

2.The brief facts in W.P(MD) No.8739 of 2017 are as follows:-

(i) During September 2005, the petitioner went to Sri Lanka for business purpose. He was apprehended by the Sri Lankan Government and a case was registered under the Poison, Opium and Narcotice Drugs Act, 1984 and he was convicted by the Vanunia High Court at Sri Lanka bearing case No.H.C.V/1994/07, on 10.03.2010 and he was sentenced to undergo life imprisonment for possession of 436.7 grams of heroin. From the date of conviction, he was confined in Welikada Prison, Sri Lanka. Thereafter, he was transferred to India from Welikada Prison, Sri Lanka, on 01.03.2013, in accordance with the agreement entered between the " Government of the Democratic Socialist Republic of Sri Lanka and the Government of India on the Transfer of Sentenced Persons" dated 06.08.2010. On that ground he was repatriated to India in 2013 under Section 13(6) of the Repatriation of Prisoners Act 2003 and in terms of Article 8 (2) of the Indo-Sri Lankan Agreement on Transfer of Sentenced Persons. Now, he is confined in Central Prison, Trichy. The first respondent passed an order dated 06.03.2014 in F.No.V-20011/01.2014-PR by convicting the petitioner under Section 21(c) of Narcotic Drugs and Psychotropic Substance Act to undergo 20 years imprisonment and the period undergone by the petitioner was also set off under Section 428 of Cr.P.C., As per the said order, he should remain in prison till 10.10.2025.

(ii)The impugned order passed by the first respondent by consulting the Narcotic Control Bureau as to the appropriate penal section and application of Indian Law on the subject. The Narcotic Control Bureau appears to have intimated that the quantity seized is commercial quantity and therefore, rigorous imprisonment upto 20 years and fine upto Rs.2 Lakhs must be imposed. On that ground, the aforesaid imprisonment was awarded. But the order passed by the first respondent is against the provision of Repatriation of Prisoners Act 2003. As per section, the Central Government should impose the sentence, which must be compatible with a similar offence provided for a similar offence with the offence committed in India.

(iii) If the offence, which has been alleged against the petitioner is committed in India, he will be punished under Section



8(c) r/w 21(c) of NDPS Act and he will be convicted to undergo 10 years rigorous imprisonment. Though the maximum punishment is 20 years rigorous imprisonment, it is the discretion of the Court to impose more than 10 years as per Section 32(B) of NDPS Act. So the maximum punishment can be imposed only if any one of the condition mentioned in Section 32(B) of the NDPS Act are satisfied. But none of the grounds mentioned in Section 32(B) of the NDPS Act attracted against the accused and the first respondent has not mentioned about the factors for imposing more than minimum sentence. So on that ground, he seeks quashment of the order passed by the first respondent and for release from the prison.

3.The petitioner in W.P(MD) No.8757 of 2017 was also punished and undergo life imprisonment for possession of 1619 grams of heroin. As per the conviction rendered by the Negambo High Court bearing Case No.30/2003, on 03.06.2010, his date of sentence is 22.02.2002 and he was detained at Welikada Prison, Sri Lanka and as per the Sri Lanka High Court order, he was transferred to India in accordance with the Agreement as stated in the aforesaid writ petition. Subsequent to the repatriation, he was also detained in Central Prison, Trichy. The first respondent passed an order dated 06.03.2014 against the petitioner to undergo 20 years of imprisonment and the period already undergone shall order to be set off. The other grounds are one and the same as mentioned in the aforesaid writ petition.

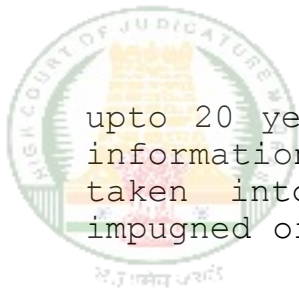
4.For the reason stated above, he prays for quashment of the order passed by the first respondent in F.No.V-20011/01/2014-PR dated 06.03.2014 and release him from the prison.

5.Heard both side.

6.The facts of the case need not be reproduced, since it has been elaborately narrated in preamble portion of this order. Let us straightaway go to the points for consideration.

7.A detailed counter affidavit has been filed by the first respondent in both the cases. The impugned order in both the cases is dated 06.03.2014. Since there is common prospect of law and facts, it is enough to refer both the orders as one. The petitioner in W.P.(MD)No.8739 of 2017 is Mani. By virtue of the powers conferred upon the competent authority viz, Section 13(6) of the Repatriation of Prisoners Act, the Ministry consulted the Narcotics Control Bureau as to the appropriate penal section and application of Indian law on the subject. Based upon this consultation, the Narcotics Control Bureau intimated the competent authority that the appropriate section of law that is made applicable to the present case is Section 21(c) of the NDPS Act. Regarding quantum of punishment, it is stated that since the contraband which was seized from the petitioner is of commercial quantity namely, 436.7 gms of

<https://hcservices.mysrils.gov.lk/hcservices/> punishment that can be imposed is rigorous imprisonment



upto 20 years and with fine upto Rs.2,00,000/- . The information furnished by the Narcotics Control Bureau has been taken into account by the competent authority and passed the impugned orders in the following terms:-

"As per the Srilankan law, for a similar offence an offender is liable to be sentenced to life imprisonment. As stated earlier, as per the corresponding Indian law, the offender is liable to be punished upto 20 years. This was taken into account and the petitioner was sentenced to 20 years rigorous imprisonment and he was directed to be imprisoned till 10.10.2025. This is in reference to Mani, who is the petitioner in W.P.(MD)No.8739 of 2017. The petitioner in W.P.(MD)No.8757 of 2017 is Jayaraj. He was found in possession of 1619 grms of Heroin and he was sentenced to 20 years rigorous imprisonment and he was directed to be imprisoned till 22.02.2022."

The reasoning given by the competent authority in both the cases is now under challenge in these writ petitions.

8.For the purpose of better understanding and discussion, first let us take the agreement between the Government of the Republic of India and the Government of the Democratic Socialist Republic of Sri Lanka on the Transfer of Sentenced Persons, dated 06.08.2010. In pursuance of which, these petitioners have repatriated to India after conviction by the Sri Lankan Court. As per the said agreement, Indian Government is the receiving State and Sri Lankan Country is the transferring State.

9.Article 8 of the Indo-Sri Lanka Agreement on Transfer of Sentenced Persons reads as under:-

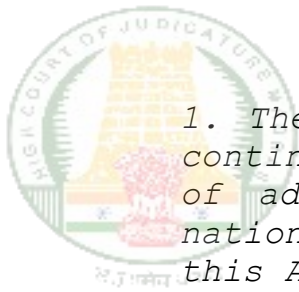
"ARTICLE-8-Continued enforcement of sentence:-

1. The receiving State shall be bound by the legal nature and duration of the sentence as determined by the transferring State.

2. If, however, the sentence is by its nature or duration or both incompatible with the law of the receiving State, or its law so requires, that State may, by Court or administrative order, adapt the sentence to a punishment or measure prescribed by its own law. As to its nature and duration the punishment or measure shall, as far as possible, correspond with that imposed by the judgment of the transferring State. It shall however not aggravate, by its nature or duration, the sentence imposed in the transferring State.

10.In the back drop of Article 8, Article 7 of the Indo-Sri Lanka Agreement on Transfer of Sentenced Persons reads as under:-

"ARTICLE-7-Effect of transfer for the receiving State:-



1. The competent authorities of the receiving State shall continue the enforcement of the sentence through a Court of administrative order, as may be required under its national law, under the conditions set out in Article 8 of this Agreement.

2. Subject to the provisions of Article 10 of this Agreement, the enforcement of the sentence shall be governed by the law of the receiving State and that State along shall be competent to take all appropriate decision.''

11.The combined reading of Articles 7 and 8 would go to show that Government of India being the receiving State is exercising the powers under the Act and as per Agreement and has imposed 20 years imprisonment upon the petitioners in both the cases.

12.Now the grievances of the petitioners is that the minimum punishment, which has been prescribed under Section 8(c) r/w 21(c) of NDPS Act in both the cases, the maximum sentence of 20 years is prescribed and subject to the factors that has to be taken into account for imposing higher punishment than the minimum prescribed under Indian Law. For this purpose, the learned counsel for the petitioners would rely upon Section 32(B) of NDPS Act, which reads as under:-

"32B. Factors to be taken into account for imposing higher than the minimum punishment. Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely:

(a) the use or threat of use of violence or arms by the offender;

(b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;

(c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence;

(d) the fact that the offence is committed in an educational institution or social service facility or in the immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities.;

(e) the fact that the offender belongs to organized



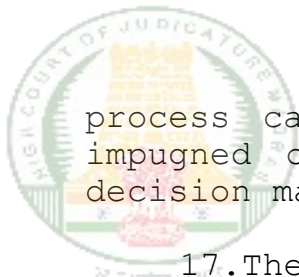
*in the commission of the offences; and
(f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence."*

13.The point on which, the learned counsel for the petitioners would urge is that the competent authority while imposing punishment of 20 years by the impugned orders did not take into account Section 32(B) of NDPS Act. It ought to have imposed minimum punishment, which is prescribed under the Act for such offence and the impugned orders did not speak about the factors set out in Section 32(B) of NDPS Act to impose maximum sentence. Hence, it is not valid under Law.

14.The learned Central Government Standing Counsel appearing for the first respondent would state that the provision clearly mandates that in addition to such factors, it may deem it fit, the Court may take into account the factors that are prescribed under the Section. According to the learned standing counsel, the additional factors that have taken into account by the competent authority in law as well as the punishment, which has been imposed upon the petitioners by the Sri Lankan Court. According to him, for similarly placed persons, they are punished upto life imprisonment. That factor has been taken into account by the competent authority while imposing maximum punishment of 20 years.

15.But reading of the impugned orders, it does not disclose anything about the additional factors that has been taken into account by the competent authority. It has simply stated that the opinion from Narcotics Control Bureau has been obtained and as per the opinion given by the Bureau, the maximum punishment that has been prescribed under the Act is 20 years imprisonment. Therefore, the offenders are liable to be punished for 20 years imprisonment. I am unable to accept the argument advanced by the learned standing counsel for the first respondent that the additional factors have been taken into account by the competent authority before passing the impugned orders.

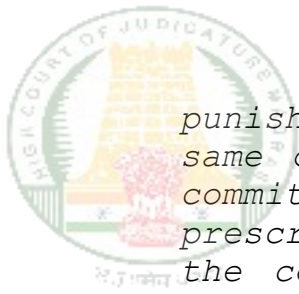
16.An onerous duty is cast upon the competent authority before passing the orders under Section 13(6) of the Repatriation of Prisoners Act. Even though they are holding and exercising administrative duty, they ought to have given an opportunity of being heard to the petitioners either in person or through legal advisor before passing the impugned orders. But it appears that no such opportunity has been given to the petitioners. It is also settled law that Court cannot sit in appeal over the orders passed by the administrative authorities. But if something happened during the decision making process, which is illegal or against the natural justice, the Courts can interfere but the Courts cannot interfere with the decision as such itself and only the decision making



process can be scrutinized. When we adopt this procedure to the impugned orders, we can easily come to the conclusion that the decision making process is flawed.

17. The learned counsel appearing for the petitioners would rely on the judgment of the Hon'ble Bombay High Court in ***Shaikh Istiyaq Ahmed Vs. The Union of India through the Secretary, Ministry of Home Affairs, (Centre-State Division) and Others*** reported in ***CDJ 2019 BHC 615***. In that case, the petitioner was convicted and sentenced to undergo 26 years of imprisonment by the Mauritius Court. He was repatriated to India as per the terms of the Agreement between the Government of India and the Government of Republic of Mauritius. As per Section 13(6) of Repatriation of Prisoners Act, for the offence committed by the offender in India, he would have been convicted and sentenced to undergo 10 years rigorous imprisonment under Section 21(b) of the NDPS Act. The reasons given by the competent authority is that the contraband seized from the petitioner was an intermediate quantity, as has been standardized by the Amendment Act, 2001, in NDPS Act. Hence, the petitioner sought in that case 10 years imprisonment after the repatriation. The competent authority found that if such a course is adopted then it will amount to reduction of sentence by 16 years. According to the competent authority, this does not satisfy the spirit of the Act as well as the provision under Section 13(6) of Repatriation of Prisoners Act. Therefore, it has rejected the representation made by the petitioner in that case and he was sentenced to 20 years rigorous imprisonment. This decision was challenged before the Hon'ble Division Bench of Bombay High Court. After an elaborate discussion, the Hon'ble Bombay High Court has held as follows:-

"In such circumstances, it was open for the Central Government by taking into consideration the spirit of the Repatriation of Prisoners Act, 2003 and Article 8 of the Transfer of Sentenced Prisoners Agreement to adapt the sentence which would correspond with the sentence imposed by the contracting State by taking into consideration its nature and duration. What would be required to be compared is the Act which constitute an offence in the contracting State and duration of penalty which would be imposed if a person is found guilty of committing an offence resulting from such an act. The reason cited in the impugned order of adaptability of the sentences and to be precise, sentence of 26 years awarded by Mauritius Court to 10 year under Section 21(b) of the NDPS Act, 1985 has been held to be not in consonance of the Section 13(6) of the Repatriation of Prisoners Act, 2003, we do not think that Section 13(6) or the agreement intend to measure the duration of the penalty and it is not a sole basis of it being compatible. Compatibility necessarily would involve the nature of offence and also the corresponding

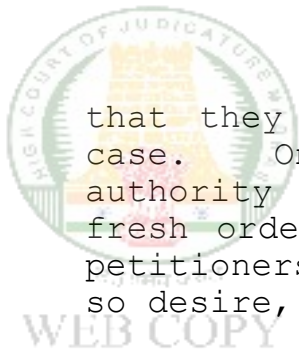


punishment. Taking into consideration the fact that if the same offence committed by the petitioner in Mauritius was committed in India, he would have been imposed a penalty prescribed under Section 21(b) and in such circumstances, the compatibility of the sentence would not only require compatibility of duration but also the nature of the offence. The mere reason that if the prayer of the petitioner is granted it would amount to reduction of sentence by 16 years cannot be a valid justification for rejection of the prayer of the petitioner. In such circumstances, we are satisfied that the order impugned passed by the respondent No.1 cannot be sustained and it rather violates Section 13(6) of the Repatriation of Prisoners Act, 2003 and its object and spirit. In the result the impugned order is liable to be struck down. The petitioner is entitled for the benefit of adoption of sentence in terms of Section 13(6) of the Repatriation of Prisoners Act, 2003."

18.It was challenged by the Central Government before the Hon'ble Supreme Court by way of filing S.L.P.No.7723 of 2019 and it is pending before the Hon'ble Supreme Court and the verdict is awaited.

19.The learned counsel appearing for the petitioners further relied on the decision of the Hon'ble Bombay High Court in **Prem Kishore Raj Vs. The Department of Home, through its Principal Secretary (Appeals), Government of Maharashtra and Others** reported in **CDJ 2013 BHC 1734**. In that case also, the quantity involved as per Indian Law was intermediate quantity, so the minimum sentence was 10 years imprisonment. When the petitioner was heard, he had already served the sentence more than which is prescribed under Section 21(b) of NDPS Act. He was ordered to be released forthwith. But in the cases on hand, commercial quantity is involved. The minimum punishment is 10 years and the maximum punishment is 20 years. Hence, the aforesaid judgments will not be applicable to the cases on hand at this stage.

20.The point discussed above is that the ultimate decision making process is flawed and the impugned orders are liable to be set aside and accordingly, they are set aside. But at the same time, the request made by the petitioners to impose the minimum sentence of 10 years by this Court cannot be accepted. It lies within the executive power of the competent authority, which is required to pass fresh orders. So the petitioners must make a fresh representation to the competent authority within a period of one month from the date of receipt of a copy of this order setting out the facts and circumstances and the facts, which they want to rely for the purpose of imposing the minimum sentence and other facts



that they deem it necessary and fit in the circumstances of the case. On receipt of the such representation, the competent authority namely, the first respondent herein is directed to pass fresh orders on merits by giving an opportunity of hearing to the petitioners either in person or through their legal advisor, if they so desire, within a period of two months thereafter.

21.With these directions, these writ petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)

ias/cp

Note In view of the present lock down owing to COVID-19 pandemic,
: a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The Joint Secretary,
The government of India,
Ministry of Home Affairs,
(Centre State Division)
NDCC-II Building, Jai Singa Road,
New Delhi-110 001.
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