



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.03.2022

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

CrI.O.P.No.20727 of 2021

Hrishikesh

... Petitioner

Vs.

The Superintendent of Customs,
Prosecution Unit - Air New Custom House,
Meenambakkam,
Chennai - 600 027.
(O.S.No.5/2020 PAD-INT-AIR)

... Respondent

PRAYER: Criminal Original Petition has been filed under Section 439 of Cr.P.C praying to enlarge the petitioner on bail in connection with C.C.No.104 of 2020 in R.R.No.14 of 2020 r/w O.S.No.5/2020/PID-INT-AIR pending on the file of the I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai,

For Petitioner : Mr.S.Sathiaseelan

For Respondent : Mr.N.P.Kumar,
Special Public Prosecutor (Customs)

ORDER

The petitioner who was arrested and remanded to judicial custody on 12.03.2020 for the offences under Sections 8(c) read with 22(c), 23, 28 and 29 of the NDPS Act, 1985, C.C.No.104 of 2020 in R.R.No.14 of 2020 r/w O.S.No.5/2020/PID-INT-AIR pending on the file of the I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai,

2. The case of the prosecution is that the petitioner had attempted to smuggle 384 grams of blue colour tablets believed to be MDMA which was stated to be seized at Foreign Post Office, Meenambakkam, Chennai 600 027, on 10.03.2020, on the above said allegations, the petitioner herein was allegedly arrested by the respondent/complainant at 18.30 hrs on 12.03.2020 at Room No,.310, New Customs House, Meenambakkam, Chennai under the provisions of NDPS Act, 1985 as per the Arrest Memo (without DIN) dated 12.03.2020 only based on the alleged voluntary statements (Without DIN) given by the petitioner/accused on 12.03.2020 as if, he had accepted the alleged smuggling of MDMA and arrayed him as sole accused.



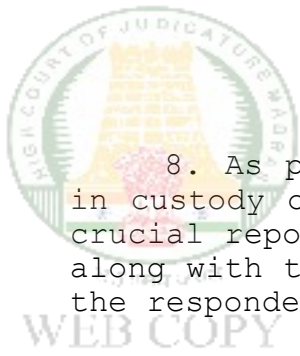
3. The learned counsel for the petitioner submitted that the petitioner is an innocent person and he has been falsely implicated in this case. He further submitted that the petitioner is a B.E. Graduate and the contraband was sent from Netherland and there is no parcel belonged to the petitioner. The fact and events which were mentioned in the paragraph 5 of the typed set. He further submitted that the contraband was seized on 10.03.2021. It is pointed out that the offence under Section 8(C) only and Section 22(C) as contemplated inter alia.

4. The petitioner has not involved any such criminal activity previously. Further, the respondent police has also not recovered any contraband article, even at the time of search. Under Article 21A, 22(ii) of Constitution of India, more than 24 hours he was unlawfully kept by the respondent police. He was set custody from Mysore on 11.03.2020 and produced before the Alandur Magistrate on 12.03.2020 at 10.00 p.m.

5. Through the petitioner's cell phone only, the Air ticket was booked from Chennai to Mysore, even before the alleged contraband seized on 10.03.2020. As per the submission at Pg.16 and 17 of the typed set which deals about the summons issued to addressee of the parcel as well as the accused as per the summon dated 12.03.2020. The accused asked to appear before the Chennai Air Port Customs Office at 5.30. But summons was issued at the time of 5.17 p.m. The learned counsel has pointed out that the accused stayed at Mysore, then, how could he come to Chennai Air Port office within half an hour.

6. As per Pg.18, voluntary statement given by the addressee Shreyash Kukshal when he appeared before the authority on 12.03.2020, it does not contain the DIN number, which is mandatory one under Section 151(A) of Customs Act, 1962. Circular No.37 of 2019 is also annexed in Pg.133 of the typed set of papers. Based upon that, he contended that any document issued without electronic DIN shall be treated as similar, and deemed to never been issued under Section 72 of NDPS, based upon that the circular was issued under Customs Act or apply to the provision of NDPS Act.

7. As per the seized Mazahar at Pg.11, on 10.03.2020 at 14 hours in the presence of the witnesses, they seized the contraband articles as per the Mazahar. Seized Mazahar was completed on 10.03.2020 at around 15.00 hours (3.00p.m.). But at Pg.11, without booking the ticket (from 10.03.2020 but give a ticket to 2.48 hours.) The learned counsel pointed out that as per the seized mazahar on 10.03.2020 around 3.00 p.m., they seized the contraband from the accused then, how can they book the ticket. On 09.03.2020 itself they seized the contraband, but the fact was suppressed by the Investigating Agency.



8. As per pg.74, on 11.03.2020 at 6.24 p.m., the petitioner was in custody of the Investigating Agency. Tickets annexed. At pg.84 is crucial report. As per the seating arrangement the accused is sitting along with the Investigation Officer. All the facts are suppressed by the respondent police.

9. At Pg.86, the contact information reveals that through the petitioner's cell phone number at Mysore the flight ticket was booked. Pg.87, fair details ticket from payment. Relying the arrest memo., The learned counsel submitted that DIN number is not generated which is mandatory as per the circular.

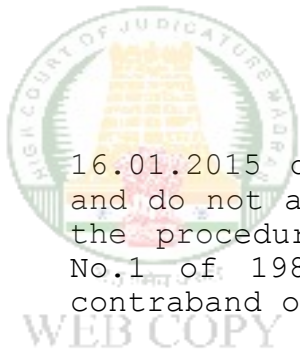
10. As per the arrest memo, he was arrested on 12.03.2020, but, he was under judicial custody from 11.03.2020 at 2.00 p.m., As per Pg.44, it was informed that PAD INT (AIR) have been seized one consignment in O.S. 05/2020-PAD-INT.AIR of "blue But as per the RDI information it was not levied so.

11. At Pg.37, it is informed that RSI-AR have seized 1 parcel which itself contra to the owner statement. Further he pointed out that as per the voluntary statement, entire complaint was provided by the respondent police. Accordingly Sri. Haishikesh and Sh.Shreyash Kukshal were requested to come to Chennai and then summoned in connection with seizure of postal parcel covered with tracking No.227304482NL. Accordingly, both of them have presented themselves for investigation narrating the complaint files and contradictorily they were knowing investigation proceedings.

12. By violating the section 52(A) of NDPS Act Investigating Agency has not adduced seized Narcotic drugs after taking Narcotic sample. Based as per that they make an application to the learned Magistrate and they should take photographs and take sample before the Magistrate. But, as per the complaint they have not taken the samples in the presence of the Magistrate, thereby violate the mandatory requirements of the Act. If they obtained certificate from the learned Magistrate and not taken the sample in the presence of the Magistrate, there is no primary evidence as per Law.

13. Summing up all those facts, the learned counsel for the petitioner relied on the following authorities, in 2016 3 SCC Pg.379, to supporting his contentions, Paragraph 12 at Pg.61. Which as follows:

" 12.Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No.1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing Orders one dated 10.05.2007 and the other dated



16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No.1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads:

'2.2.All the packages /containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witness (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."

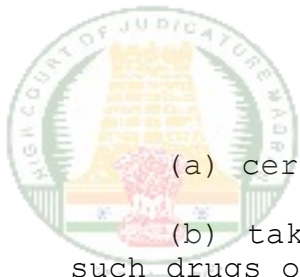
14. The 52-A(1) amendment prescribes that the procedure would be followed for seizure. Standing order No.1 1889 states that, samples must be taken from the seizure contraband on the spot at the time of recovery itself and it is superstitated by new amendment. Para 14 at Pg.62 extract as follows:

"14. Section 52-A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

"52-A.Disposal of Seized narcotic drugs and Psychotropic Substances.

(1) The Central Government may, having regard to the hazardous nature theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure herein after specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in Sub-Section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of--



(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, Photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made under Sub-Section (2), the Magistrate shall, as soon as may be, allow the application.

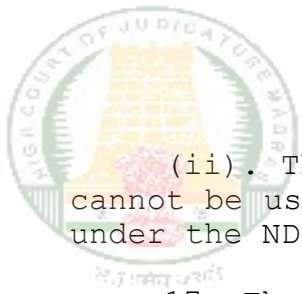
(4) Notwithstanding anything contained in the Indian Evidence act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section 92) and certified by the Magistrate, as primary evidence in respect of such offence."

15. But as per the new amendment 52-A(2)(c), list of samples so drawn certified by the Magistrate and taken samples in the presence under the supervision of the Magistrate. Even the samples taken at the time of seizure statutory provision alone stand in foot. With regard to the search of the contraband, as per Section 55 of the Act, it should be kept in safe custody and seized the articles pending orders of the Magistrate. It should be "Safes and vaults" providing with double locking system. There is no primary evidence on the side of the Investigating Agency, they should follow all the guidelines relying the article in CrI.A.No.319 of 2012 at Para.78, Pg.114.

16. Direction was given by the Court to be followed with regard to seizure and production of the contraband. Further he pointed out that, as per the sample produced, they mentioned 0.44 grams but as far as in the complaint mentioned as 5.9 grams which is contrary, with regard to taking of this samples. As per Section 37 of the NDPS Act, no document was produced on the side of the investigating agency and no contraband was produced before the Magistrate as per the Act. He opposed the complaint, relevant paragraph in 2020 SCC online SC 882 Pr.158 @ Pg.193 as follows:

"158. We answer the reference by stating:

(i). That the officers who are invested with powers under Section 53 of the NDPS Act are "Police Officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.



(ii). That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

17. The learned counsel relied to ratio laid down in above case, argued that the officers under Section 53 of the NDPA Act, are the 'police officers', as per the Act 23, any confession statement recorded by them are not admissible in evidence under Section 25 of the Evidence Act. Pointing out that except the alleged confession statement of the accused, no other documents were produced on the side of the investigating agency for alleged investigation of the accused.

18. He relied on another judgement in SLP No(s).5458 of 2021 Pg.265, dated 20.09.2021 Pg.266, Pr.4, Pg.267. Extract the order passed by the Hon'ble Supreme Court, while allowing the bail application. Pg.268, another Supreme Court Judgment except voluntary statement, no other material was placed.

19. At the time of Covid-19 pandemic, as per the issue of the common order of the Magistrate, all the accused including the petitioner, he went to his native at Bihar and after consulting this advocate subsequently, he himself surrendered before the trial Court and then he was remanded to judicial custody during the month of February 2021. Hence, he prayed to consider his conduct, which ensure that he will co-operate the trial proceedings.

20. As per objection raised by the respondent/prosecution is that on receiving information from Foreign Post Office, Meenambakkam, Chennai on 10.03.2020, the team of officers went that place and took parcel with tracking No.RN227304482NI in the presence of independent witnesses under Mahazar dated 10.03.2020. The said parcel was found to be addressed to Shreyash Kukshal. House No.1084, Garudachar Layout, Vijaynagar 3rd Stage, Mysore, Karnataka, Pin:570030, India Mob:7019148320 and the place of residence of the sender as available on the parcel was Ballistraat 104, Netharlands 1335 JN. The declaration made on the parcel was 'Wedding Doc' as per CN22 form pasted on the parcel. The parcel marked as P1 was weighed in presence of independent witnesses and was found to weigh 509 gms in total and upon opening of the parcel, it contains that blue colour tablets were weighed in presence of independent witnesses and found weigh 384 gms in total and it was tested with the field drug detection kit and it answered positive 'MDMA; a drug covered under NDPS Act. The officers collection of the samples from P1 and the samples were sealed and parcel containing blue color tables suspected to be 'MDMA' a narcotic substance was seized as per the provisions of the NDPS Act. The Mahazar was drawn on the spot. Further, the original package with marking P1 along with other the sample with marking P1S1 and P2S2 were deposited with seals intact to Detention Officer, Chennai International Airport for safe custody on same date i.e., 10.03.2020.



21. Furthermore, on enquiry by the officers from Mysuru, CGST and Chennai-1 customs from the area postman it was found that earlier also similar parcels have come in the name of Shreyash Kukshal and they were received by this petitioner/herein at the same address and this petitioner used to be available on Phone No.7019148320 which was mentioned on the parcels when called by the postman. Accordingly, the petitioner and Shreyash Kukshal were requested to come to Chennai and then summoned in connection with seizure of Postal parcel covered with tracking No.RN227304482NI and investigation, it came to know that the petitioner used to collect from the postman at Shreyash Kukshal Place, House No.1084, Garudachar Layout, Vijayanagar and the said fact was categorically stated by Shreyash Kukshal and his friend Hrishikesh /petitioner herein asked his ID, later he come to know that he need the ID to collect the parcel from post office.

22. As per the voluntary statement given by the said Hrishikesh/petitioner herein, he categorically admitted that he met a person named one Nazim from Bangalore and they become friends and requested him to receive the parcel on his behalf and further asked him to deliver the parcel to Nazim and gave his cell No and Hrishikesh gave Shreyash Kukshal address to deliver the parcel and Nazim will call only in Wickr and his ID on wicker is naizyananzim. Nazim informed the specific date to receive the parcel and Hrishikesh will available or he will go directly to the post office to collect the parcel either from the postman will call him nor in his cell number available mentioned in the on that parcel. Further, he also admits that the parcel contained contraband and Nazim has used to spent lot of money for him, hence he want to help him to collect the contraband parcel. Further, the petitioner also admits that he and Shreyash Kukshal jointed college in the year of 2014. So, on inquiry as well as the investigating agency found that the petitioner used collect the parcel from the post office from the postman.

23. As per the voluntary statement of this petitioner, he committed offences under Sections 8(c) r/w Sec 22(c), 23, 28 & 29 of the NDPS Act since as much as he attempted to smuggle 384 gms of blue colour tablets 'MDMA'. Prosecution also submits that as seized contraband is a commercial quantity, the petitioner as to satisfy the Section 37 of the NDPS Act and reason stated several grounds raised by the petitioner also not satisfy the requirements as mentioned in the Section 37 NDPS Act, and also submits not mentioned in the DIN Number is not a violation of NDPS Act. He also submits that the prosecution not only relying upon on the petitioner but also other materials available to prove that the petitioner is the person to whom the parcel was booked also proved that the parcel is only to the petitioner and he is to receive the parcel, the petitioner fully knows the parcel was conceded with contraband..



24. The learned Special Public Prosecutor denied the other allegations made in the petition that the custom officer booked the ticket from Mysore to Chennai to the petitioner, but the ticket was purchased on payment of cash by the petitioner himself. For customs officer they booked flight ticket through the agency on credit, hence, the allegation made by the petitioner is not true and reply received from RTI nothing to do this petition. In the parcel petitioner's cell number was mentioned for communication which is admitted by the petitioner and in his statement, the rest of the RTI reply has to be proved in accordance with law and it is not ground for bail. Furthermore, there was no complaint from the side of this petitioner at the time of remand against the officers of customs. Hence, he prays to dismiss the petition.

25. Considering the facts and circumstances of the case and also the fact that on on 10.03.2020, the team of officers went to that place and took parcel with tracking No.RN227304482NI in the presence of independent witnesses under Mahazar dated 10.03.2020. The said parcel was found to be addressed to Shreyash Kukshal. House No.1084, Garudachar Layout, Vijaynagar 3rd Stage, Mysore, Karnataka, Pin:570030, India Mob:7019148320 and the place of residence of the sender as available on the parcel was Ballistraat 104, Netharlands 1335 JN. The declaration made on the parcel was 'Wedding Doc' as oer CN22 form pasted on the parcel. The parcel marked as P1 was weighed in presence of independent witnesses and was found to weigh 509 gms in total and upon opening of the parcel, it contains that blue colour tablets were weighed in presence of independent witnesses and found weigh 384 gms in total and it was tested with the field drug detection kit and it answered positive 'MDMA; a drug covered under NDPS Act. The officers collection of the samples from P1 and the samples were sealed and parcel containing blue color tables suspected to be 'MDMA' a narcotic substance was seized as per the provisions of the NDPS Act. The Mahazar was drawn on the spot. Further, the original package with marking P1 along with other the sample with marking P1S1 and P2S2 were deposited with seals intact to Detention Officer, Chennai International Airport for safe custody on same date i.e., 10.03.2020.

26. On perusal of records, as per the investigation it reveals that the petitioner received the parcel in earlier occasions as per request made by his friend. Furthermore, as per the investigation that the petitioner use to collect the parcel from the postman. Admittedly, the parcel contends 384 gms blue colour tablets, which is commercial quantity, there was prima facie materials presumed that the accused committed offence punishable under sections 20(b)(ii)(c) and 29 of the NDPS Act Section. Therefore, the Section 37 (i) (ii) NDPS Act which is not apply to this case.



27. On perusal of FIR, it is seen that the petitioner attempted to smuggle 384 grams of blue colour tablets believed to be MDMA which is commercial in quantity. Therefore, Section 37 of NDPS Act is attracted as against the petitioner and the petitioner is also failed to show any single ground to satisfy the condition as contemplated under Section 37 of NDPS Act. Further, the petitioner is involved in very serious offence, this Court is not inclined to grant bail to the petitioner.

28. Accordingly, this Criminal Original Petition is dismissed. However, since the petitioner is in Judicial custody, the trial Court is directed to complete the trial in C.C.No.104 of 2020 within a period of three months from the date of receipt of a copy of this order.

-sd/-

25/03/2022

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

TRUE COPY

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

TO

1 I ADDITIONAL SPECIAL COURT FOR
EXCLUSIVE TRIAL OF CASES UNDER NDPS ACT,
CHENNAI

2 THE SUPERINTENDENT, CENTRAL PRISON II,
PUZHAI, CHENNAI

3 THE SUPERINTENDENT OF CUSTOMS,
PROSECUTION UNIT-AIR NEW CUSTOM HOUSE,
MEENAMBAKKAM, CHENNAI - 600 027.

4 THE SPECIAL PUBLIC PROSECUTOR
(CUSTOMS) HIGH COURT, MADRAS.

CC to M/S. S.SATHIASEELAN Advocate on payment of necessary
charges Sr.4543

CRL OP.20727/2021

Date :25/03/2022

RVR 30/03/2022