



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Reserved on : 24.03.2022

Pronounced on : 30.03.2022

PRESENT

The Hon`ble Mr.Justice G.K.ILANTHIRAIYAN

CRL MP(MD) No.491 of 2021

IN

CRL A(MD) No.35 of 2021

MANJULA ARASUPILLAI

... PETITIONER / APPELLANT

Vs

THE INVESTIGATING OFFICER / INSPECTOR,
CENTRAL BUREAU OF NARCOTICS,
PREVENTIVE AND INTELLIGENCE CELL, CHENNAI.
F.NO.XV(11) 9 /CHN/ZOLPIDEM/2016 -
(CBN CRIME NO.02/2016)

... RESPONDENT / RESPONDENT

Petition filed praying that in the circumstances stated therein and in the petition filed therewith the High Court may be pleased to suspend the sentence of Imprisonment imposed in C.C.No.44/2017 on the file of the Learned Additional District and Sessions Judge / Presiding Officer, Special Court for EC and NDPS Cases, Pudukkottai, dated 28.12.2020, and enlarge the petitioner/ Appellant on bail, pending disposal of the above Criminal Appeal.

Prayer in CRL A(MD) No.35 of 2021:

To call for the records of the court below and set aside the judgment and conviction in C.C.No.44 of 2017 on the file of the learned Additional District and Sessions Judge/ Presiding Officer, Special Court for EC and NDPS Act Cases, Pudukkottai, dated 28.12.2020 and enlarge the petitioner / Appellant on bail.

Order : This petition coming up for orders on this day, upon perusing the petition filed in support thereof and upon hearing the arguments of MR.V.KATHIR VELU, Senior Counsel for Mr.K.GUHAN, Advocate for the petitioner and of MR.ARUL VADIVEL @ SEKAR, Advocate on behalf of the Respondent, the court made the following order:-

This Criminal Miscellaneous Petition has been filed to suspend the sentence of imprisonment imposed in C.C.No.44 of 2017 on the file of the learned Additional District and Sessions Judge / Presiding Officer, Special Court for EC and NDPS Cases, Pudukkottai, dated 28.12.2020 and enlarge the petitioner on bail, pending disposal of the above Criminal Appeal.

<https://hcs.cse.court.gov.in/hcs/serve>



2. The case of the prosecution is that the petitioner was convicted by the learned Additional District and Sessions Judge / Presiding Officer, Special Court for EC and NDPS Cases, Pudukkottai, in C.C.No.44 of 2017 dated 28.12.2020, for the offences under Sections 8(c) r/w 22 (c), 8(c) r/w 21(c) and 8(c) r/w 23(c) r/w 28 of NDPS Act, 1985 and sentenced her to undergo Rigorous Imprisonment for 10 years each and to pay a sum of Rs.1,00,000/- each, in default to undergo Rigorous Imprisonment for one year each. The above substantive sentences imposed on the petitioner is ordered to be run concurrently. The detention period already undergone by her is ordered to be set off under Section 428 of Cr.P.C.

3. The prosecution further alleged that the petitioner was found in possession of 3450 Zolfresh (Zolpidem Tartrate tablets 10 mg) with brand name Zolfresh, 640 Zolpidem Tartrate tablets 10 mg with brand name Restonite, 8400 Alprazolam 0.5 mg tablets with brand name Becalm and 20 bottles of Codeine Phosphate 100 ml with brand name Eskuf, when she was attempting to smuggle out the same to Malaysia through Trichy Airport on Malindo Airlines Flight departure at 23.25 hours on 04.12.2016 bound for Kula Lumpur, Malaysia in pursuance of the conspiracy entered into between the petitioner and one Jameel and thereby, she committed the offences under Sections 8 (c) r/w 22 (c), 8(c) r/w 21(c) and 8(c) r/w 23(c) r/w 28 of NDPS Act, 1985 registered in Crime No.02 of 2016 on the file of the respondent.

4. The learned Senior Counsel appearing for the petitioner would submit that the respondent has failed to examine any independent mahazar witnesses and it is fatal to the case of the prosecution. The official witnesses P.W.2 to P.W.4 could not be accepted, since without any corroboration by independent witnesses. The seizing officer failed to comply the mandatory provision under Section 41 (1) and (2) of NDPS Act, since the petitioner was not in conscious possession of the alleged contraband. The name of the petitioner was not found place in Ex.P.1-information and it is mentioned in Ex.P.1 that suspected passenger is leaving India by Srilankan Airlines from Trichy International Airport. Therefore, Ex.A.1 itself is a doubtful document. Even according to Ex.P.1, the petitioner was attempting to export contraband by travelling on Srilankan Airlines. Whereas the petitioner was found in possession of the alleged contraband when she was attempting to smuggle out the contraband to Malaysia through Trichy Airport on Malindo Airlines Flight. P.W.2 and P.W.3 have deposed that P.W.1, who recorded Ex.P.1, disclosed the name of the petitioner only reaching Trichirappalli. Therefore, P.W.1 cannot be compelled to disclose of the secret information received by him much earlier before the seizure proceeding. Further, deposed that they checked the passenger list of all the Airlines gone to Kulambur and found the name of the petitioner in the passenger manifesto of Malindo Airlines.

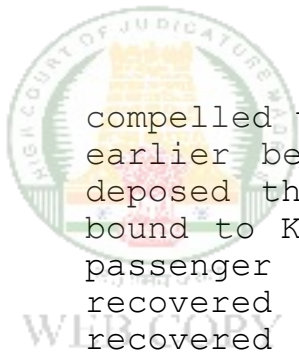


5. The learned Senior Counsel appearing for the petitioner also produced the Statement recorded under Section 67 of the NDPS Act, 1985 and pointed out that the petitioner used to travel frequently to Malaysia and Singapore carrying courier items like garments, imitation jewellers, sweets etc., to Malaysia and Singapore and on return journey, she used to carry electronic goods and other courier items. By the said service, she used to earn a sum of Rs.9,000/- to Rs.12,000/- per month. While being so, two weeks before the date of occurrence, one person Jaleel called her and enquired whether the petitioner can take the medicines to Malaysia. At last, she agreed for a sum of Rs.2,000/- commission and she contacted him through phone. He sent the medicines in a carton box from Chennai to Tanjore through private travels and asked the petitioner to collect those medicines. The petitioner did not know anything about the said medicines and she is only just a carrier. She was not aware that the medicines contained Narcotics and Pschychotropic substances. Therefore, she was not conscious possession of the alleged contraband.

6. The learned Senior Counsel appearing for the petitioner submitted that the alleged contraband is not coming under the purview of the NDPS Act, since it is a drug. If at all anything found in the drug it would attract only the offence under the Drugs and Cosmetics Act. Without considering the same, the trial Court found the petitioner guilty and sentenced her to undergo 10 years Rigorous Imprisonment each for three offences.

7. Heard the learned counsel appearing for the petitioner and the learned Special Public Prosecutor appearing for the respondent and perused the materials available on record.

8. On a perusal of the materials available on record revealed that the prosecution had examined P.W.2, who is the officer conducted the search and seizure, P.W.5, who is the Superintendent, Central Excise and Customs, P.W.3, who is the Superintendent, CBN, Chennai to prove the search and seizure proceedings. P.W.2 deposed about the seizure proceedings conducted by him and recovery of contraband from the hands baggage of the petitioner. P.W.5, who is the independent witness, has also corroborated the evidence of P.W.2 with regard to search and seizure proceedings and also about the personal search of the petitioner in the presence of her colleague. Thereby, the prosecution has established the possession and recovery of contraband from the petitioner. Therefore, the provision under Section 42 of the NDPS Act is not applicable to the case on hand as the seizure proceeding was conducted at Trichy International Airport, which is a public place. In Ex.P.1, it is mentioned that the suspected accused was attempting to export the contraband by travelling on Srilankan Airlines. P.W.2 and P.W.3, who were in the raiding team, deposed that Ex.P.1 disclosed the name of the

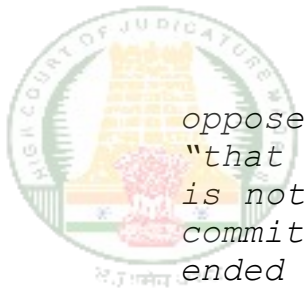


compelled to disclose of the secret information received by him much earlier before the seizure proceedings. In fact, P.W.2 and P.W.3 deposed that they checked the passenger list of all the Airlines bound to Kuala Lumpur and found the name of the petitioner in the passenger manifesto of Malindo Airlines. The contraband was recovered from the hand luggage of the petitioner and it was not recovered on the personal search of the petitioner. Therefore, Section 50 of the NDPS Act is applicable only if the contraband has been recovered from the body of the person. Now, the petitioner was found guilty and hence, the condition contemplated under Section 37 of the Act is a bar to grant suspension of sentence. Further, the contraband is also commercial quantity of Narcotic Drugs. The Hon'ble Supreme Court of India in **Narayanaswamy Ravishankar Vs. Assistant Director, Directorate of Revenue Intelligence** reported in **2002 (8) SCC 7**, held that the search and seizure took place at the Airport which is a public place. That being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as per Section 42 of the Act, the seizure having been effected in a public place, the question of non-compliance is wholly irrelevant.

9. In **State of Punjab Vs. Rakesh Kumar** reported in **2019 (2) SCC 466**, the Hon'ble Supreme Court of India held that Section 80 of the NDPS Act clearly lays down the application of the Drugs and Cosmetics Act is not barred and provisions of the NDPS Act can be applicable in addition to that of the provisions of the Drugs and Cosmetics Act. The statute further clarifies that the provisions of NDPS Act are not in derogation of the Drugs and Cosmetics Act, 1940.

10. In **Narcotics Control Bureau Vs. Lokesh Chadha** reported in **2021 SCC Online SC 178**, the Hon'ble Supreme Court of India held as follows:-

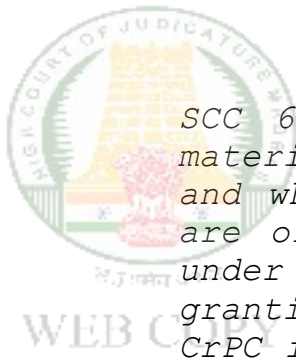
"9. While considering the rival submissions, we must at the outset advert to the manner in which the learned Single Judge of the High Court has dealt with the application for suspension of sentence under [Section 389 \(1\)](#) of CrPC. The offence of which the respondent has been convicted by the Special Judge arises out of the provisions of [Sections 23\(c\)](#) and [25A](#) of the NDPS Act. The findings of the learned Special Judge which have been arrived at after a trial on the basis of evidence which has been adduced indicate that the respondent who was a proprietor of a courier agency was complicit with a foreign national in the booking of two parcels which were found to contain 325 grams of heroin and 390 grams of pseudoephedrine. [Section 37](#) of the NDPS Act stipulates that no person accused of an offence punishable for offences under [Section 19](#) or [Section 24](#) or [Section 27A](#) and also for offences involving a commercial quantity should be released on bail, where the public prosecutor



opposes the application, unless the Court is satisfied "that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail". Where the trial has ended in an order of conviction, the High Court, when a suspension of sentence is sought under [Section 389\(1\)](#) of CrPC, must be duly cognizant of the fact that a finding of guilt has been arrived at by the Trial Judge at the conclusion of the trial. This is not to say that the High Court is deprived of its power to suspend the sentence under [Section 389\(1\)](#) of CrPC. The High Court may do so for sufficient reasons which must have a bearing on the public policy underlying the incorporation of [Section 37](#) of the NDPS Act. At this stage, we will refer to the decision of a two-Judge Bench of this Court in *Preet Pal Singh v State of Uttar Pradesh*³ where Justice Indira Banerjee, speaking for the Court, observed as follows:

"35. There is a difference between grant of bail under [Section 439](#) of the CrPC in case of pre-trial arrest and suspension of sentence under [Section 389](#) of the CrPC and grant of bail, post-conviction. In the earlier case there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in *Dataram Singh v. State of U.P. and Anr.* (supra). However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in [Section 389\(1\)](#) of the Cr.P.C."

10. The principles which must guide the grant of bail in a case under the [NDPS Act](#) have been reiterated in several decisions of this Court and we may refer to the decision in *State of Kerala v Rajesh*⁴. The High Court unfortunately, in the present case, has not applied its mind to the governing provisions of the NDPS ³ (2020) 8



SCC 645 4 (2020) 12 SCC 122 Act. On the basis of the material which emerged before the learned Special Judge and which forms the basis of the order of conviction, we are of the view that no case for suspension of sentence under Section 389(1) of CrPC was established. The order granting suspension of sentence under Section 389(1) of CrPC is unsustainable and would accordingly have to be set aside."

The Hon'ble Supreme Court of India thereby set aside the order of suspension in a case involved in commercial quantity of Narcotic Drugs.

11. In the case on hand, admittedly the petitioner was found guilty for the offences under Sections 8(c) r/w 22 (c), 8(c) r/w 21 (c) and 8(c) r/w 23(c) r/w 28 of NDPS Act, 1985. There is a finding of guilt and the question of presumption of innocence does not arise as held by the Hon'ble Supreme Court of India. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction. This Court finds no case for granting suspension of sentence and this Court is not inclined to suspend the sentence. Accordingly, this Miscellaneous Petition is dismissed.

sd/-
30/03/2022

/ TRUE COPY /

/ /2022

Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1 THE ADDITIONAL DISTRICT AND SESSIONS JUDGE /
PRESIDING OFFICER,
SPECIAL COURT FOR EC AND NDPS CASES, PUDUKKOTTAI

2 THE INVESTIGATING OFFICER / INSPECTOR,
CENTRAL BUREAU OF NARCOTICS,
PREVENTIVE AND INTELLIGENCE CELL, CHENNAI.
F.NO.XV(11) 9 /CHN/ZOLPIDEM/2016.

3 THE SUPERINTENDENT,
CENTRAL PRISON FOR WOMEN, TRICHY.

4 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

+1 CC to Mr.C.ARUL VADIVEL @SEKAR, Advocate (SR-2672[I] dated 30/03/2022)

+1. C.C. to Mr.K.GUHAN, Advocate SR.No.2840.

ORDER IN
CRL MP(MD) No.491 of 2021
IN
CRL A(MD) No.35 of 2021
Date :30/03/2022

MK/VR/SAR.IV/30.03.2022/6P/7C

<https://hcservices.ecourts.gov.in/hcservices/>