

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

RESERVED ON	03.08.2022
PRONOUNCED ON	11.10.2022

PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL MP(MD) No.2689 of 2020

IN

CRL A(MD) No.143 of 2020

KASI RAJAN

... PETITIONER/PETITIONER

Vs

STATE REP.BY
THE INTELLIGENCE OFFICER
NARCOTICS CONTROL BUREAU,
MADURAI SUB-ZONE,
MADURAI,
NCB F.NO.48/1/01/2014/NCB/MDU

... RESPONDENT/RESPONDENT

Petition filed praying that in the circumstances stated therein and in the petition filed therewith the High Court may be pleased to release the petitoner on bail by suspending the sentence appealed against in C.C.No.99 of 2018 on the file of Principal Special for EC & NDPS Act cases, Madurai pending disposal of the above appeal.

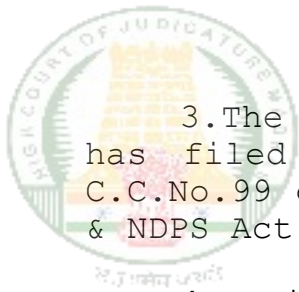
Prayer in CRL A(MD)No.143 of 2020 :

To take this file an appeal call for records relating to judgment in C.C.No.99/2018 dated on 09.01.2020 on the file of Principal Special for EC & NDPS Act Cases, Madurai and set aside the same and acquit the Appellant from all charges framed against the petitioner.

Order : This petition coming up for orders on this day, upon perusing the petition filed in support thereof and upon hearing the arguments of M/S.G.MURUGENDRAN, Advocate for the petitioner and of MR.C.ARUL VADIVEL @ SEKAR, Special Public Prosecutor for NCB Cases on behalf of the Respondent, the court made the following order:-

This Criminal Miscellaneous Petition has been filed to suspend the sentence passed in C.C.No.99 of 2018, dated 09.01.2020, on the file of the learned Additional District Judge, Principal Special Court for EC & NDPS Act Cases, Madurai, till the disposal of this Criminal Appeal.

2.The case of the prosecution is that on 22.10.2017 at about 02.30 hours, on receipt of the secret information, the respondent police party went to the spot along with the witnesses and arrested the accused and seized the contraband at Pannikundu, Usilampatti, Madurai, and on that basis, FIR came to be registered.



3.The respondent police, after completing the investigation, has filed the final report and the case was taken on file in C.C.No.99 of 2018 on the file of the Principal Special Court for EC & NDPS Act Cases, Madurai.

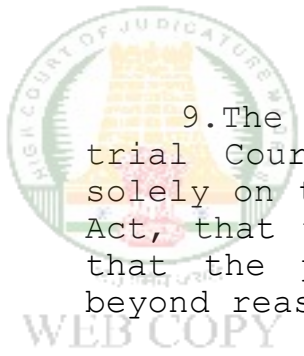
4.During the trial, the prosecution has examined 5 witnesses as P.W.1 to P.W.5, exhibited 32 documents as Ex.P.1 to Ex.P.32 and marked 11 material objects as M.O.1 to M.O.11. The defence have adduced neither oral nor documentary evidence.

5.The learned Additional District Judge, upon considering the evidence adduced and on hearing the arguments of both the sides, has passed the impugned judgment dated 09.01.2020 convicting the petitioner/accused for the offence under Section 8(c) r/w 20(b)(ii) (C) of NDPS Act and sentenced him to undergo ten years Rigorous Imprisonment and to pay a fine of Rs.1,00,000/-, in default, to undergo six months Simple Imprisonment. Aggrieved by the said judgment of conviction and sentence, the petitioner has preferred the present Criminal Appeal along with the above miscellaneous petition for suspension of sentence.

6.The learned counsel for the petitioner would submit that P.W.1 admitted that he met P.W.2 at Chellampatti and the same was corroborated by P.W.2 but the Ex.P.2 mahazar was prepared at 04.30 p.m., on the spot and it is impossible to reach the spot at 04.30 p.m., as there was a distance of 20 kms between Chellampatti and Pannikundu and that therefore the recovery itself is doubtful and false.

7.The learned counsel for the petitioner would further submit that though Ex.P.2 comes within the jurisdiction of the Judicial Magistrate, Thirumangalam, the accused and the property were not produced before the concerned Court on 22.10.2017, but the accused was produced on the next day i.e., on 23.10.2017 before the Judicial Magistrate Court No.6, Madurai, and that therefore the prosecution has failed to follow the provisions of Cr.P.C., (i.e.,) Sections 4 and 56 of Cr.P.C., and Section 51 of NDPS Act. He would further submit that P.W.2 has not supported the case of the prosecution and he has stated that he is not aware of the place of the occurrence, that the statement was recorded under the instruction of NCB officer knowing Tamil, but P.W.5 has stated that he did not know Tamil and that the above aspects were not at all considered by the trial Court.

8.The learned counsel for the petitioner would further submit that P.W.5 is not a competent under 36A of NDPS Act and as per the notification dated 27.09.1989 to file a complaint and proceed with the investigation and that therefore the very complaint itself is not maintainable.



9.The learned counsel for the petitioner would submit that the Trial Court failed to see that conviction cannot be maintained solely on the basis of the confession made under Section 67 of NDPS Act, that there is no iota of materials to convict the accused and that the prosecution has miserably failed to prove the charges beyond reasonable doubt.

10.The learned Special Public Prosecutor would submit that neither the distance between the Chellampatti and Pannikundu nor the time of arrival was questioned by the accused in the trial, that there is not even a suggestion about the distance or time in the cross-examination, that the petitioner was arrested at 03.00 p.m., on 23.10.2017 only at NCB, Sub Zone office, Madurai, and hence, he was produced before the nearest jurisdictional Magistrate at 07.30 p.m., on the same day and that therefore there is no illegality with regard to the remand and production of the accused before the learned Judicial Magistrate No.6, Madurai.

11.The learned Special Public Prosecutor would further submit that P.W.5 in his evidence has categorically deposed that one T.Sankaranarayanan, the sepoy acted as a translator while recording the statement of P.W.2 and that an endorsement to that effect was also available in Ex.P.12. He would further submit that all Intelligence officers of NCB Department are empowered officers under Section 42 of NDPS Act, that therefore P.W.5 is competent enough to file a complaint and proceed with the investigation and that the petitioner is a habitual offender and similar case was registered against him in Kerala and the same was pending on the file of the Additional District and Sessions Court No.III, Kollam, Kerala.

12.The learned Special Public Prosecutor would submit that the Hon'ble Supreme Court in **Dadu alias Tulsidas vs. State of Maharashtra** reported in (2000) 8 SCC 437 has held that the power to suspend the sentence under Section 32A is subject to Section 37 of NDPS Act and he has also relied on the decision of the Hon'ble Supreme Court in **Narcotic Control Bureau vs. Lokesh Chadha** reported in 2021 SCC Online SC 178,

"9.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*"



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."

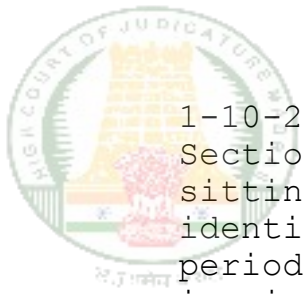
13. Recently, the Hon'ble Supreme Court in **Satender Kumar Antil vs. Central Bureau of Investigation and another** reported in **2022 LiveLaw (SC) 577** has specifically held that the word 'trial' will have to be given an expanded meaning, particularly when an appeal or admission is pending and the relevant passages are extracted hereunder:-



"46. Section 436A of the Code has been inserted in Act 25 of 2005. This provision has got a laudable object behind it, particularly from the point of view of granting bail. This provision draws the maximum period for which an undertrial prisoner can be detained. This period has to be reckoned with the custody of the accused during the investigation, inquiry and trial. We have already explained that the word 'trial' will have to be given an expanded meaning particularly when an appeal or admission is pending. Thus, in a case where an appeal is pending for a longer time, to bring it under Section 436A, the period of incarceration in all forms will have to be reckoned, and so also for the revision.

47. Under this provision, when a person has undergone detention for a period extending to one-half of the maximum period of imprisonment specified for that offense, he shall be released by the court on his personal bond with or without sureties. The word 'shall' clearly denotes the mandatory compliance of this provision. We do feel that there is not even a need for a bail application in a case of this nature particularly when the reasons for delay are not attributable against the accused. We are also conscious of the fact that while taking a decision the public prosecutor is to be heard, and the court, if it is of the view that there is a need for continued detention longer than one-half of the said period, has to do so. However, such an exercise of power is expected to be undertaken sparingly being an exception to the general rule. Once again, we have to reiterate that 'bail is the rule and jail is an exception' coupled with the principle governing the presumption of innocence. We have no doubt in our mind that this provision is a substantive one, facilitating liberty, being the core intendment of Article 21. The only caveat as furnished under the Explanation being the delay in the proceeding caused on account of the accused to be excluded. This court in *Bhim Singh v. Union of India*, (2015) 13 SCC 605, while dealing with the aforesaid provision, has directed that:

"5. Having given our thoughtful consideration to the legislative policy engrafted in Section 436-A and large number of undertrial prisoners housed in the prisons, we are of the considered view that some order deserves to be passed by us so that the undertrial prisoners do not continue to be detained in prison beyond the maximum period provided under Section 436-A. 6. We, accordingly, direct that jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall hold one sitting in a



1-10-2014 for the purposes of effective implementation Section 436-A of the Code of Criminal Procedure. In its sittings in jail, the above judicial officers shall identify the undertrial prisoners who have completed half period of the maximum period or maximum period of imprisonment provided for the said offence under the law and after complying with the procedure prescribed under Section 436-A pass an appropriate order in jail itself for release of such undertrial prisoners who fulfil the requirement of Section 436-A for their release immediately. Such jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall submit the report of each of such sittings to the Registrar General of the High Court and at the end of two months, the Registrar General of each High Court shall submit the report to the Secretary General of this Court without any delay. To facilitate compliance with the above order, we direct the Jail Superintendent of each jail/prison to provide all necessary facilities for holding the court sitting by the above judicial officers. A copy of this order shall be sent to the Registrar General of each High Court, who in turn will communicate the copy of the order to all Sessions Judges within his State for necessary compliance."

14. In the above decision, the Hon'ble Supreme Court went to the extent of saying that the provision contained in Section 436A of the Code would apply to the Special Acts also and that the rigor as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person.

15. The learned counsel for the petitioner would submit that the petitioner is in incarceration for the past more than five years.

16. The learned counsel for the petitioner would submit that another case pending in Kerala State, referred by the learned Special Public Prosecutor has already been disposed of and that the petitioner was convicted for the offence under Section 20(b)(ii)(B) of the NDPS Act in S.C.No.470 of 2014 on the file of the III Additional Sessions Court, Kollam, Kerala State vide judgment dated 29.10.2021. He would further submit that the petitioner has preferred an appeal in Crl.A.No.78 of 2022 before the High Court of Kerala at Ernakulam and that the High Court, vide order dated 01.06.2022, suspended the sentence imposed on the petitioner. The learned counsel for the petitioner has produced the copy of the order passed by the Kerala High Court, suspending the sentence imposed on the petitioner.

17. Considering the above and also the fact that the petitioner is in incarceration for the past five years, this Court is inclined to suspend the sentence imposed on the petitioner.



18. In the result, this Criminal Miscellaneous Pet. is allowed. Accordingly, the relief of suspension of sentence and bail is granted to the petitioner on the following conditions:-

(i) The petitioner shall execute a bond for a sum of Rs.50,000/- (Rupees Fifty Thousand only) with two sureties each for a like sum to the satisfaction of the Principal Special Court for EC & NDPS Act cases, Madurai;

(ii) The sureties shall affix their photographs and Left Thumb Impression in the surety bond and the trial Court may obtain a copy of their Aadhar card or Bank Pass Book to ensure their identity; and

(iii) The petitioner shall report before the trial Court on all working days at 10.30 a.m., until further orders and if he is not able to appear before the trial Court on any day, he shall make arrangements to file an application under Section 317 of Cr.P.C. and shall appear before the trial Court on any other day in lieu of the date of his absence, as directed by the trial Court.

sd/-

11/10/2022

/ TRUE COPY /

11/10/2022

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

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 JUDGE, PRINCIPAL SPECIAL COURT FOR EC & NDPS ACT CASES, MADURAI.
- 2 THE INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU, MADURAI SUB-ZONE, MADURAI.
- 3 THE SUPERINTENDENT, CENTRAL PRISON, MADURAI.
- 4 THE SPECIAL PUBLIC PROSECUTOR, MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

ORDER IN

CRL MP(MD) No.2689 of 2020
IN CRL A(MD) No.143 of 2020
Date :11/10/2022

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<https://www.mca.gov.in> (11.10.2022) 7P-5C