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*Crl.M.P.No.16682 of 2023
in Crl.A.No.836 of 2023*

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.10.2023

CORAM:

THE HON'BLE MR.JUSTICE **M. NIRMAL KUMAR**

Crl.M.P.No.16682 of 2023

in

Crl.A.No.836 of 2023

Deepswaroop (Brilh)

... Petitioner/Accused

Vs.

The Inspector of Police,
B-2 R.S. Puram Police Station,
Coimbatore.

... Respondent

PRAYER: Criminal Miscellaneous Petition has been filed under Section 389(1) of Cr.P.C to suspend the sentence passed in C.C.No.53 of 2020 dated 13.06.2023 on the file of Additional District Judge and Presiding Officer for Special Court under EC and NDPS Act, Coimbatore and enlarge the petitioner on bail pending disposal of the above criminal appeal.

For Petitioner : Mr.T.S.Sasi Kumar

For Respondent : Mr.A.Damodaran
Additional Public Prosecutor



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ORDER

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This Criminal Miscellaneous Petition has been filed by the petitioner, seeking suspension of sentence of imprisonment imposed by the learned Additional District Judge and Presiding Officer for Special Court under EC and NDPS Act, Coimbatore by judgment dated 13.06.2023 made in C.C.No.53 of 2020 and enlarge the petitioner on bail pending disposal of the above appeal.

2. The petitioner/accused in C.C.No.53 of 2020 was convicted by the Trial Court for the offences under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act and sentenced to undergo ten years rigorous imprisonment and to pay a fine of Rs.1,00,000/-, in default to undergo one year rigorous imprisonment. Against which, the petitioner/accused has filed Crl.A.No.836 of 2023 along with the instant miscellaneous petition seeking suspension of sentence and bail.

3.The case of the prosecution is that P.W.1/Sub Inspector of Police on 03.12.2019, while he was on patrol duty along with Special Sub Inspector of



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Police, Arumugam, Head Constable Suresh, Grade I Police Constable Sridharan and Police Constable Dinesh Kumar, at about 9.00 a.m. he received a secret information that in Samy Colony, Robertson Road near Corporation pump one person was selling Ganja. After getting permission from the superior officers, PW1 visited the scene of occurrence along with their team. The accused was enquired and given option to search him in the presence of Judicial Magistrate or a Gazetted Officer. The accused expressed his willingness to be searched by PW1 in the presence of local independent witnesses Durai, S/o.Murugesan and Boomiraj (P.W.2), S/o.Balakrishnan. In compliance with the statutory provisions the search was conducted. At that time a bag from the accused was collected in which, dried leaves were packed in a paper found. The same was taken out and a pinch of it was burnt, which emanated smell of Ganja. Thereafter two samples each weighing 50 gms were taken, sealed and the balance Ganja weighing around 2.350 kgs were packed in the same bag and sealed. The case properties were seized under a Seizure Mahazar. The accused was produced before PW4, who took up further investigation, visited the scene of occurrence, prepared mahazar, rough sketch, enquired the witnesses, sent



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the accused along with contraband for remand. The samples were sent for chemical examination and after getting opinion and on conclusion of investigation, charge sheet filed in this case.

4. Before the trial Court, P.W.1 to P.W.4 examined and marked 11 documents Ex.P1 to Ex.P11 and marked material objects M.O.1 to M.O.3. On the side of the defence, no witnesses examined and no documents marked. The Trial Court on the evidence and materials produced convicted the petitioner as stated above.

5. The learned counsel for petitioner submits that in this case there are three violations of rules, viz., (i) violation of Section 50 of NDPS Act, (ii) violation of Section 42(1) of NDPS Act and (iii) Non mentioning of the details about the seal, which is said to have been affixed in the mahazar, contraband and samples. In support of his contention with regard to violation of Section 50 of the Act, learned counsel produced Ex.P2/consent letter for search. In Ex.P2, PW1 gave options as to whether the accused is willing to be searched in the presence of Magistrate or Gazetted Officer or



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before the local independent witnesses, present along with PW1. This is clear violation of Section 50 of the Act. In support of his contention, the petitioner relied upon the decision of Hon'ble Supreme Court in the case of ***State of Rajasthan vs. Parmanand and another*** reported in (2014) 5 SCC 345, wherein it is held as follows:

“ ... P.W.10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by P.W.10 SI Qureshi is vitiated. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. ... ”

In the case of ***Sanjeev and another vs. State of Himachal Pradesh*** reported in (2022) 6 SCC 294, Hon'ble Supreme Court held as follows:

“ 9. ... It is true that the personal search did not result in recovery of any contraband material but the non-compliance of requirement of affording an option, was one of the reasons which weighed with the Trial Court in disbelieving the case of the prosecution.”



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Further relied upon the decision of this Court in Crl.A.No.192 of 2018 dated 28.10.2022 in the case of **Rajasekar vs. The Inspector of Police**, wherein it is held as follows:

“16. In the case on hand, admittedly, PW1 had given three options to the appellant that the search to be conducted by PW1 if he so wishes. The third option does not provide under Section 50(1) of the NDPS Act, therefore, such option would frustrate the provision under Section 50(1) of the NDPS Act. Therefore, failure to inform the appellant about the existence of his right would cause prejudice to him.”

6. He further submitted that the trial Court failed to look into this violation but given a finding that from the evidence of PW1 it is seen that only two options have been given and there is no mention about the third option. It is also to be seen, in this case the third option is before the arrest and search. In the evidence of PW2/Boomiraj, he states that he came there when the police enquired the accused and search was to be conducted but in Ex.P2 it is recorded that PW2 is along with PW1. In Ex.P1 it is recorded that one person was selling Ganja behind the pump room in Robertson



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Road. But this is not so as could be seen from Ex.P3. Further, in Ex.P3 it is clearly mentioned that the personal search was conducted on the petitioner/accused. PW1 admits that all the documents, viz., Recording of secret information, F.I.R., request for search, seizure mahazar, rough sketch and observation mahazar have been prepared by her but PW4, the Investigation Officer evidence is that all the documents have been prepared by one person, who was part of the investigation team aiding PW4. Further submitted that PW1's specific admission is that Ex.P1 was prepared by her and she sent the same through Head Constable Suresh Kumar to PW4. Hence, contradiction in the evidence, which creates serious doubts, the time, manner and preparation of documents Exs.P1 to P8. Further in the mahazar though there is a mention about affixing of seal, but no details provided as to what is the type of seal and what is the number. Hence, there is a doubt with regard to packing and sealing of the contraband. Further, the petitioner has arguable points and fair chance of success in this appeal. Further submitted that the fine amount has not been paid since the petitioner hail from the ordinary family. Hence, he prays for granting suspension of sentence to the petitioner.



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7. Learned Additional Public Prosecutor opposes the bail petition by submitting that PW1 in her evidence deposed that she gave options to the accused, who was in possession of Ganja as to whether he wanted to be searched in the presence of Magistrate or Gazetted Officer and also obtained a consent letter for search, which was marked as Ex.P2. He further submitted that PW4 in his evidence clearly confirmed that at about 9.20 hours he received a secret information sent by PW1/Ex.P1 about the accused selling Ganja at Robertson Road, Samy Colony and after getting permission, PW1 gone to the scene of occurrence. PW4 admits that PW1 already registered a case, investigated, prepared F.I.R., seizure mahazar, special report and along with the case property the accused produced before PW4, who thereafter took up further investigation and from the confession of the accused it is seen that the accused was involved in similar type of criminal activities for want of money, to get relief from the other cases. Further PW4 gave an explanation that the observation mahazar, rough sketch were prepared in the presence of PW3. The points now raised by the petitioner already raised during trial. The trial Court on the evidence and



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materials and also on the submissions made by the petitioner had given a finding that there is no violation of Section 50 and 42 of the NDPS Act. Further as per Section 54 of the Act it is for the accused to give an explanation and the previous antecedents of the petitioner is confirmed. In view of Section 35 of the NDPS Act and cumulatively considering all these aspects the trial Court convicted the petitioner. Hence, learned Additional Public Prosecutor prays for dismissal of the petition.

8. Considering the submissions made and on perusal of the material it is seen that there is a violation in following Section 50 of the Act. From the consent letter for search/Ex.P2 it is seen that options were given viz., to be searched in the presence of Magistrate or before the Government gazetted officer or before the independent person who is present along with PW1, which is a clear violation as could be seen from the judgments in *State of Rajasthan vs. Parmanand and another*, *Sanjeev and another vs. State of Himachal Pradesh* and *Rajasekar vs. The Inspector of Police*. Further PW2, independent witness statement is that he came later when the accused was apprehended and the search was to be done. If that is the case it cannot



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be mentioned in Ex.P2 that PW2 is along with PW1. Further from secret report/Ex.P1 it is stated that the accused was present behind the pump room at Robertson Road, R.S.Puram but in the seizure mahazar/Ex.P3 there is no reference about the pump room. On the other hand, it confirms that a personal search has been conducted on the accused. In view of the same, strict compliance of Section 50 of the Act is required. Apart from it, there is also a doubt in the manner, in which Exs.P1 to P8 come into existence at the place and time as mentioned in the documents. Since PW1 states that she had written Ex.P1 and sent it through constable Suresh Kumar to PW4 but she further states that Exs.P1 to P8 have been prepared in one hand writing on the other hand PW4 states that it was prepared by a police person who was part of the investigating team headed by him. It is also to be seen that in the seizure mahazar there is no reference about the seal affixed therein. The test conducted to find out as to whether the dried leaves are Ganja or not, is also appears to be novel. On the perusal of the trial Court judgment, these factors have not been considered. The trial Court gone by the previous antecedents of the petitioner that petitioner has got five cases against him and it is also referred in the judgment that the accused has already got a



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NDPS case, which is shown as item No.2. It is to be seen that Crime No.1102/2019 is the case which has been decided by the trial Court as C.C.No.53 of 2020. In view of the above, the petitioner has made out a *prima-facie* case and further taking note of the fact that there are arguable points involved in this appeal and it would take some time for the appeal to be taken up for final hearing, this Court is inclined to suspend the sentence imposed on the petitioner.

9. Accordingly, the Substantive Sentence of Imprisonment imposed on the petitioner is suspended till the disposal of the appeal and the petitioner is ordered to be enlarged on bail, on condition that he shall execute a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the learned Additional District Judge and Presiding Officer for Special Court under EC and NDPS Act, Coimbatore.

10. Further, the petitioner shall appear before the Trial Court on the first working day of every English Calendar month at 10.30 a.m. until the



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disposal of the appeal and if he is not able to appear before the Trial Court on that day, he shall make arrangements to file an application under Section 317 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. In view of the above, the payment of fine amount is suspended for the present.

11. Accordingly, this Miscellaneous Petition is ordered.

19.10.2023

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Note: Issue order copy on 20.10.2023

To

- 1.The Inspector of Police,
B-2 R.S. Puram Police Station,
Coimbatore.
- 2.The Additional District Judge and Presiding Officer
for Special Court under EC and NDPS Act, Coimbatore
- 3.The Superintendent,
Central Prison, Coimbatore.
- 4.The Public Prosecutor,
High Court, Madras.



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M. NIRMAL KUMAR, J.

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