



CRL MP(MD) No.4681 of 2023

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

Tuesday, the Eleventh day of July Two Thousand and Twenty Three
PRESENT

The Hon`ble Mr.Justice K.MURALI SHANKAR
CRL MP(MD) No.4681 of 2023
IN
CRL A(MD) No.315 of 2022

1 SIVA

2 ANANTHAN

... PETITIONERS/PETITIONERS

Vs

THE INSPECTOR OF POLICE
NCB F.NO. 48/1/01/2018/NCB-MDU,
MADURAI

... 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 imposed against the petitioner in C.C.No.34/2018 dt 07.01.2022 passed by the learned Additional District and Sessions Judge / Presiding officer, Special Court for EC and NDPS Act Cases Pudukkottai and enlarge the petitioner on bail pending disposal of the above appeal.

PRAYER IN CRL.A(MD).315/2022:

Pleased to call for the records and set aside the order of the conviction sentences passed in C.C.No.34/2018 dated 07.01.2022 on the file of the Learned Additional District and Sessions Judge / Presiding Officer, Special Court For EC & NDPS Act Cases, Pudukkottai and allow this Criminal Appeal.

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.G.MURUGENDRAN, Advocate for MR.P.SENGUTTUARASAN, 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:-



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RESERVED ON	27.06.2023
PRONOUNCED ON	11.07.2023

This Criminal Miscellaneous Petition has been filed to suspend the sentence imposed on the petitioners by the learned Additional District and Sessions Judge / Presiding Officer, Special Court for E.C. and NDPS Act Cases, Pudukkottai, in C.C.No.34 of 2018, dated 07.01.2022, till the disposal of this Criminal Appeal.

2. The case of the prosecution is that the petitioners/accused 1 and 2 and other accused have entered into criminal conspiracy and in pursuance of the same, they have committed the offences of financing, procuring and trafficking 350 kgs of ganja and the second petitioner having knowingly permitted the lorry in the name of his wife for the purpose of trafficking the said ganja and that therefore the accused have committed the offences punishable under Sections 8(c) r/w 20(b)(ii)(C), 27(A), 25, 28 and 29 of NDPS Act, 1985.

3. During trial, the prosecution has examined 6 witnesses as P.W.1 to P.W.6, exhibited 49 documents as Ex.P.1 to Ex.P.49 and marked 44 material objects as M.O.1 to M.O.44, whereas, the accused have adduced neither oral nor documentary evidence.

4. The learned Sessions Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed the



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impugned judgment dated 07.01.2022 convicting the first petitioner for the offences under Sections 8(c) r/w 20(b)(ii)(C) r/w 29(1) of NDPS Act and Sections 8(c) r/w 20(b)(ii)(C) of NDPS Act and sentenced him to undergo rigorous imprisonment for 10 years each and to pay a fine of Rs.1,00,000/- each, in default, to undergo rigorous imprisonment for 3 months each and convicting the second petitioner for the offences under Sections 8(c) r/w 20(b)(ii)(C) r/w 29(1) of NDPS Act, Sections 8(c) r/w 20(b)(ii)(C) of NDPS Act and Sections 8(c) r/w 20(b)(ii)(C) r/w 25 of NDPS Act and sentenced him to undergo rigorous imprisonment for 10 years each and to pay a fine of Rs.1,00,000/- each, in default, to undergo rigorous imprisonment for 3 months each and that the above sentences were ordered to be run concurrently. Aggrieved by the said judgment of conviction and sentence, the accused 1 and 2 have preferred the present appeal.

5. No doubt, the petitioners' earlier application for similar relief for suspension of sentence was ordered to be dismissed vide order dated 14.07.2022.

6. The learned counsel appearing for the petitioners would submit that the petitioners have been in judicial custody from 09.01.2018 even from the pre-trial stage, that they were awarded with 10 years rigorous imprisonment, that both of them have already crossed the half of the imposed sentence and that therefore, the petitioners are entitled to get bail under Section 436-A Cr.P.C.



7. The learned counsel appearing for the petitioners has relied on the judgment of the Hon'ble Supreme Court in *Satender Kumar Antil Vs. Central Bureau of Investigation* and another reported in 2022 LiveLaw (SC) 577 and argued that the Hon'ble Supreme Court had taken an expanded and wider view of Section 436-A Cr.P.C. and extended the benefit not only to under-trial prisoners, but also the after-trial prisoners.

8. The learned Special Public Prosecutor for NCB Cases appearing for the respondent would submit that there is a difference between grant of bail under Section 439 Cr.P.C. in pre-trial stage and suspension of sentence under Section 389 Cr.P.C. for grant of bail, post conviction, that grant of suspension of sentence, after conviction, is a discretionary relief and the same has to be decided based on the nature and gravity of the offence and other facts and circumstances of the case and that though appeal is considered to be continuation of the trial, the presumption of innocence is not applicable after conviction, particularly in the cases under NDPS Act.

9. The learned Special Public Prosecutor for NCB Cases appearing for the respondent would further submit that grant of bail under Section 436-A Cr.P.C. is not an absolute one, that the first proviso clause clearly indicates that after hearing the Public Prosecutor, the Court may order the continued detention of person for a



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period longer than one half of the said period by recording its reason in writing and that the twin conditions contemplated under Section 37 of NDPS Act has not been satisfied by the petitioners.

10. The learned Special Public Prosecutor for NCB Cases appearing for the respondent would further submit that the Hon'ble Supreme Court in Dadu alias Tulsidas Vs. State of Maharashtra reported in (2000) 8 SCC 437 has specifically 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 Pradesh³ 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 Rajesh⁴. 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



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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.”

11. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in Satender Kumar Antil's case, mainly relied on by the learned counsel appearing for the petitioners, wherein, the Hon'ble Apex Court has 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 by 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



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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 week in each jail/prison for two months commencing from 1-10-2014 for the purposes of effective implementation of 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."



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12. The learned Special Public Prosecutor for NCB Cases appearing for the respondent has relied on the decision of the Full Bench of Bombay High Court in *Maksud Sheikh Gaffur Sheikh Vs. State of Maharashtra* reported in 2020 SCC Online Bom 878 and argued that the Full Bench has interpreted Section 436-A Cr.P.C. and concluded that the intention of the legislature to confer the benefit under Section 436-A is for the under-trial prisoners and not for the convicts.

13. No doubt, the Full Bench has answered the reference that a convict, who has challenged his conviction under Section 374 of the Code, is not entitled to the benefit of Section 436-A of the Code.

14. As rightly pointed out by the learned counsel appearing for the petitioners, in the said Full Bench judgment, the then Chief Justice of Bombay High Court has expressed his view separately and in that it has been stated that the spirit of Section 436-A Cr.P.C. could be considered by an appellate Court while it is seized of an application under Section 389 Cr.P.C. and, drawing inspiration from the principle ingrained in the former, to suspend execution of the sentence bearing in mind all relevant factors including the time likely to be taken for disposal of the appeal and that the judicial mind in the wise exercise of discretion and by suitable moderation may suspend execution of the sentence and grant bail under Section 389 Cr.P.C., the absence of a provision like Section 436-A Cr.P.C. in the chapter on appeals

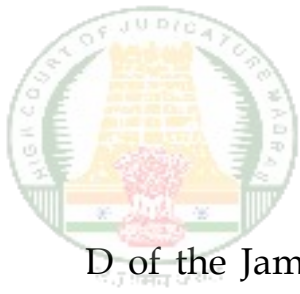


notwithstanding.

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15. The learned Special Public Prosecutor for NCB Cases appearing for the respondent has also relied on the judgment of the Kerala High Court in Midlaj Vs. Union of India represented by National Investigation Agency reported in 2023 SCC Online Ker 998, wherein, the Kerala High Court has referred the judgment of the Hon'ble Supreme Court in Satender Kumar Antil's case. As rightly pointed out by the learned Special Public Prosecutor, the Kerala High Court has stated that in Satender Kumar Antil's case, the Hon'ble Apex Court made it clear that all the discussions along with the directions in that case, were meant to act as guidelines, as each case pertaining to a bail application is obviously to be decided on its own merits. In that case, the appellants/accused therein had acted as against the interest of the nation as they wanted to wage war against Syria, an Asiatic power at peace with the Government of India and hence, the High Court came to the decision that though appellants have undergone major portion of the sentence imposed on them, it is not safe to release them on bail, as we do not know whether they still entertain the idea of performing Hijra to Syria for indulging in violent jihad.

16. The learned counsel appearing for the petitioners has relied on the judgment of the Jammu and Kashmir High Court in Mudassir Hussain and another Vs. State and another reported in 2020 SCC Online J&K 381, wherein, taking note Section 497-



D of the Jammu and Kashmir Code of Criminal Procedure (1933 A.D) as obtaining prior to coming into force of Code of Criminal Procedure, 1973, states that where a person has during the period of investigation, inquiry or trial under the Code or an offence under any law undergone detention for a period extended up to one half of the maximum period of imprisonment specified for that offence under that law he shall be released by the court on his personal bond with or without sureties, but that the rider of the person got detained longer than one half of the said period if the court records reasons for the same in writing, that Section 436-A of the Code of Criminal Procedure, 1973 is para-materia to Section 497-D of the Code and that since the appeal is continuation of trial and that since the appellants were admittedly undergone more than half of the sentence awarded to them, they are entitled to get the relief of suspension of sentence.

17. Recently, the Hon'ble Supreme Court in Mohd. Muslim alias Hussain Vs. State (NCT of Delhi) reported in 2023 SCC Online SC 352, by referring the decision of the Hon'ble Supreme Court in Satender Kumar Antil's case, has observed,

“16. In the most recent decision, Satender Kumar Antil v. Central Bureau of Investigation¹⁶ prolonged incarceration and inordinate delay engaged the attention of the court, which considered the correct approach towards bail, with respect to several enactments, including Section 37 NDPS Act. The court expressed the opinion that



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Section 436A17 (which requires inter alia the accused to be enlarged on bail if the trial is not concluded within specified periods) of the Criminal Procedure Code, 1973 would apply:

“We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour 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. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code.”

....

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be



guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik¹⁹). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”

18. In Satender Kumar Antil's case, as already pointed out, the Hon'ble Apex Court went to the extent of saying that the provision contained in Section 436-A of the Code would also apply to the Special Acts 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.

19. It is pertinent to note that the Full Bench of Bombay High Court has delivered its judgment on 28.08.2020, but the Hon'ble Supreme Court in Satender Kumar Antil's case has decided on 11.07.2022.

20. In the case on hand, as already pointed out, the petitioners were in prison from 09.01.2018 and as such, they had already undergone more than half of the sentence imposed on them.

21. It is not the case of the prosecution that the petitioners are having previous



or pending cases under NDPS Act.

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22. Considering the above facts and circumstances and taking note of the guidelines issued by the Hon'ble Supreme Court in Satender Kumar Antil's case and also the fact that the petitioners had already undergone more than half of the sentence imposed on them, this Court is inclined to suspend the sentence imposed on the petitioners.

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

(i) The petitioners shall execute a bond for a sum of Rs.1,00,000/- (Rupees One Lakh only) each with two sureties each for a like sum to the satisfaction of the Additional District and Sessions Judge / Presiding Officer, Special Court for E.C. and NDPS Act Cases, Pudukottai;

(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 petitioners shall appear before the trial Court on all working days at 10.30 a.m., until further orders and if they are not able to appear before the trial Court on any day, they shall make arrangements to



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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 their absence, as directed by the trial Court.

sd/-
11/07/2023

(*)Corrected as per order of this Hon'ble Court in
CRL MP(MD).4681/2023 in CRL A(MD).
315/2022 dated 20.07.2023

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/07/2023
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

CSM

TO

TO BE SUBSTITUTED WITH THE ORDER ALREADY DESPATCHED ON
13.07.2023

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

2 THE SUPERINTENDENT,
CENTRAL PRISON AT TRICHY.

3 THE INSPECTOR OF POLICE
NCB F.NO. 48/1/01/2018/NCB-MDU,
MADURAI.



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

ORDER
IN
CRL MP(MD) No.4681 of 2023
IN
CRL A(MD) No.315 of 2022
Date :11/07/2023

SA/VR/SAR. /13.07.2023/17P/5C
RS/MMS/SAR-(27.07.2023) 17P 5C

Madurai Bench of Madras High Court is issuing
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