



Crl.O.P.(MD)Nos.809, 813 and 816 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 11.01.2023

Pronounced on : 20.01.2023

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THE HONOURABLE MR.JUSTICE SUNDER MOHAN

Crl.O.P.(MD).Nos.809, 813 and 816 of 2020

and

Crl.M.P.(MD).Nos.342, 344 and 345 of 2020

Crl.O.P.(MD).No.809 of 2020

Intelligence Officer,
Narcotics Control Bureau,
Madurai Sub Zone,
Madurai.
(In F.No.48/1/04/2018/NCB-MDU)

... Petitioner/Respondent/
Complainant

Vs.

Markandan

...Respondent/Petitioner/
Accused No.3

Prayer: Criminal Original Petition is filed under Section 482 Cr.P.C., to call for the records in Cr.M.P.No.628 of 2019 in C.C.No.333 of 2018 dated 22.02.2019 on the file of the learned Additional Sessions Judge and Principal Special Judge for NDPS ACT Cases, Madurai and set aside the same.



Crl.O.P.(MD)Nos.809, 813 and 816 of 2020

Crl.O.P.(MD).No.813 of 2020

State through the Intelligence Officer,
Narcotics Control Bureau,
South Zone,
Madurai.
(In N.C.B.F.No.48/1/04/2019)

... Petitioner/Respondent/
Complainant

Vs.

Rajendran

...Respondent/Petitioner/
Accused No.4

Prayer: Criminal Original Petition is filed under Section 482 Cr.P.C., to call for the records in Cr.M.P.No.4452 of 2019 in C.C.No.408 of 2019 dated 12.11.2019 on the file of the learned Additional Sessions Judge and Principal Special Judge for NDPS ACT Cases, Madurai and set aside the same.

Crl.O.P.(MD).No.816 of 2020

Intelligence Officer,
Narcotics Control Bureau,
Madurai Sub Zone,
Madurai.
(In F.No.48/1/04/2018/NCB-MDU)

... Petitioner/Respondent/
Complainant

Vs.

Markandan

...Respondent/Petitioner/
Accused No.3

Prayer: Criminal Original Petition is filed under Section 482 Cr.P.C., to call for the records in Cr.M.P.No.634 of 2019 in C.C.No.333 of 2018 dated



Crl.O.P.(MD)Nos.809, 813 and 816 of 2020

22.02.2019 on the file of the learned Additional Sessions Judge and Principal Special Judge for NDPS Act Cases, Madurai and set aside the same.

For Petitioner : Mr.C.Arul Vadivel @ Sekar
Special Public Prosecutor for NCB

For Respondent : Mr.Jegadeesh Pandian
for Mr.S.Muniyandi

(In all the Criminal Original Petitions)

COMMON ORDER

1. a) The Criminal Original Petition in Crl.O.P.(MD).No.813 of 2020 has been filed challenging the order passed by the learned Additional Sessions Judge and Principal Special Judge for NDPS Act Cases, Madurai in Cr.M.P. No.4452 of 2019 in C.C.No.408 of 2019 dated 12.11.2019, permitting the respondent, Rajendran, to execute a bond under Section 88 CrPC on his first appearance.

b) The Criminal Original Petition in Crl.O.P.(MD).No.809 of 2020 has been filed challenging the order passed under Section 70(2) CrPC by the learned Additional Sessions Judge and Principal Special Judge for NDPS Act Cases, Madurai in Cr.M.P.No.628 of 2019, recalling the non-bailable warrant issued against the respondent in C.C.No.333 of 2018, wherein, the respondent,



Crl.O.P.(MD)Nos.809, 813 and 816 of 2020

Markandan, was shown as absconding accused in the final report filed by the petitioner.

c) The Criminal Original Petition in Crl.O.P.(MD).No.816 of 2020 has been filed challenging the order passed by the learned Additional Sessions Judge and Principal Special Judge for NDPS Act Cases, Madurai in Cr.M.P. No.634 of 2019 in C.C.No.333 of 2018 dated 22.02.2019, permitting the respondent, Markandan, to execute a bond under Section 88 CrPC.

2. The issue involved in all the three Criminal Original petitions are one and the same and hence are taken up together though the respondents are different. The facts leading to the filing of the Criminal Original Petitions are as follows:

a) The respondent in Crl.O.P.(MD).No.813 of 2020 is an accused in a case filed by the petitioner for the offences under Section 8(c) read with Section 20(b)(ii)(c), 25, 28 and 29 of the NDPS Act, 1985 before the Trial Court. The respondent was not arrested during investigation. The Trial Court issued summons for appearance of the respondent. On receipt of summons, the respondent filed a petition in Cr.M.P.No.4452 of 2019 under Section 88 CrPC and stated that he has appeared voluntarily before the Court. He expressed his willingness to execute a bond in terms of Section 88 CrPC undertaking to



Crl.O.P.(MD)Nos.809, 813 and 816 of 2020

appear for trial. The learned Public Prosecutor for NDPS cases was served with the copy on the same day. He had sought time for filing counter and objected to entertain the application. However, the learned Judge passed an order directing the respondent to execute a bond for Rs.10,000/- for his future appearance in terms of Section 88 CrPC, without giving an opportunity to the Public Prosecutor for filing counter.

b) Similarly, the respondent in Crl.O.P.(MD).Nos.809 and 816 of 2020 is an accused in C.C.No.333 of 2018 for the offences under Section 8(c) read with Section 20(b) (ii) (c), 25, 27-A, 28 and 29 of NDPS Act, 1985. In the said case, he was shown as absconding and a non-bailable warrant was issued to secure his presence. The Trial Court issued non-bailable warrant against him. The respondent filed Cr.M.P.No.628 of 2019 before the Trial Court for recall of warrant under Section 70(2) CrPC. In the said petition, the learned Public Prosecutor sought time to file counter. However, the learned Judge passed an order allowing the petition filed under Section 70(2) CrPC. Simultaneously, the respondent filed Cr.M.P.No.634 of 2019 for permitting him to execute a bond under Section 88 CrPC. The learned Public Prosecutor sought time to file counter. However, the learned Judge allowed the said petition and directed the respondent to execute a bond for Rs.10,000/- under Section 88 CrPC.



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3. Mr.C.Arul Vadivel @ Sekar, learned Special Public Prosecutor for NCB representing the petitioner submitted that the orders passed by the learned Additional Sessions Judge and Principal Special Judge for NDPS Act Cases, Madurai are not in accordance with law and are in violation of Section 37 of NDPS Act. The learned Special Public Prosecutor further submitted that Section 88 CrPC is subject to Section 37 of NDPS Act. The learned Judge had not given opportunity to the Public Prosecutor representing the petitioner to file counter and make his submissions, which is mandated under Section 37 of NDPS Act. The impugned orders in all the Criminal Original Petitions suffer from violation of principles of natural justice besides specific legislative mandate under Section 37 of NDPS Act. The learned Special Public Prosecutor also submitted that this Court under similar circumstances in Crl.R.C.(MD). No.735 of 2022 dated 12.12.2022, had set aside the order allowing the application under Section 88 CrPC without reference to Section 37 of NDPS Act and directed the Court concerned to pass orders after complying with Section 37 of NDPS Act.

4. Mr.Jegadeeshpandian, learned counsel for the respondents in all the Criminal Original Petitions fairly conceded the relevant legal position and



Crl.O.P.(MD)Nos.809, 813 and 816 of 2020

submitted that execution of bond under Section 88 CrPC is subject to provisions of Section 37 of NDPS Act.

5. In the instant case, we find that so far as accused in C.C.No.333 of 2018 and the respondent in Crl.O.P.(MD).Nos.809 and 816 of 2020 is concerned, he has been shown as absconding accused. Therefore, the respondent had filed two applications, one under Section 70(2) CrPC to recall the non-bailable warrant and another under Section 88 CrPC to permit to execute bond. In both the applications, the learned Public Prosecutor before the Trial Court had objected to the petition and sought time to file counter. Unfortunately, the learned Judge has allowed both the applications without giving sufficient opportunity to the learned Public Prosecutor to put forth his case. Likewise, as regards the respondent in Crl.O.P.(MD).No.813 of 2020, who is an accused in C.C.No.408 of 2019, summons were issued by the Court and on his appearance, he was allowed to execute a bond under Section 88 CrPC, though it was objected to by the learned Public Prosecutor.

6. This Court had held in similar circumstances in Crl.R.C.(MD).No.735 of 2022 dated 12.12.2022, that in a case under NDPS Act even for exercising jurisdiction under Section 88 CrPC, the provisions of Section 37 of NDPS Act



has to be complied with, which reads as follows:

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“6. I am not inclined to agree with the point argued by the respondent's Counsel. Even in the case of exercising jurisdiction under Section 88 of Cr.P.C, provision under Section 37 of NDPS Act must be complied. If not there will be no purpose for section 37 of NDPS Act, as rightly pointed out by the State. If such a power is fruly exercised by the trial court in respect of the special offences under the provision of NDPS Act, then accused who are absconding, who are not available for interrogation during the investigation period, may appear before the Special Court and seek exercise of power under Section 88 of Cr.P.C., will have serious consequences, which in effect will dilute the rigour and the object of Section 37 of NDPS Act. So, when we approach this issue from this angle, then consequential answer will be that the exercise made by the trial Court is absolutely without jurisdiction.

In the result, this Revision Case is liable to be allowed and accordingly allowed.

The trial Court is directed to secure the accused and remand him immediately pending trial. But this will not affect the right of accused to approach the concerned Court seeking regular bail. If it is filed before the trial Court, the trial Court may pass the orders on its own merits by strictly complying Section 37 of NDPS Act. Consequently, connected Miscellaneous Petition is closed.”



7. a) Section 37 of NDPS Act reads as follows:

“37. Offences to be cognizable and non-bailable. □

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) □

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless □

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, 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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

b) As per Section 37 (1)(b), the accused shall not be permitted to execute any bond unless the twin conditions provided under Section 37 are complied with. The conditions are that the Public Prosecutor has to be given an



Crl.O.P.(MD)Nos.809, 813 and 816 of 2020

opportunity to oppose such application for release and where the Public Prosecutor opposes the application, the Court has to be satisfied with reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. The learned Judge, by allowing the applications filed under Section 88 CrPC without giving opportunity to the Public Prosecutor and satisfying himself about the other conditions provided, has passed the impugned orders.

8. Therefore, the impugned orders are set aside and the above Criminal Original Petitions are allowed. It is open to the respondents to appear before the Trial Court and seek bail in terms of Section 37 of NDPS Act. The order passed by this Court shall not affect the right of the respondents to seek regular bail and any observation made by this Court shall not influence the learned Judge in any manner while considering the bail application of the respondents in terms of Section 37 of NDPS Act. Consequently, connected miscellaneous petitions are closed.

20.01.2023

NCC : Yes / No
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Crl.O.P.(MD)Nos.809, 813 and 816 of 2020

SUNDER MOHAN, J.

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**Pre-delivery Order made in
Crl.O.P(MD).Nos.809, 813 and 816 of 2020
and
Crl.M.P.(MD).Nos.342, 344 and 345 of 2020**

20.01.2023