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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.07.2024

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THE HON'BLE MR.JUSTICE M.DHANDAPANI

CrI.MP.No.586 of 2024
and CrI.A No.75 of 2024

Syed Shirajuddin Badsha

... petitioner

-Vs-

The Superintendent of Customs,
RSI-AIR, New Custom House,
Meenambakkam,
Chennai-027.

... Respondent

Prayer: Criminal Miscellaneous Petition has been filed under Sections 389 (i) of the Criminal Procedure Code, to suspend the execution of the sentence dated 29.12.2023 passed in C.No.168/2021 against the appellant by the learned Special Judge, I Additional Special Court for Exclusive Trial of cases under NDPS Act, Chennai and enlarge the petitioner on bail till the disposal of the above appeal.

For petitioner : Mr.R.C.Paul Kanagaraj

For Respondent : Mr.N.P.Kumar

ORDER

The Criminal Appeal has been filed as against the Judgment passed by the learned Special Judge, I Additional Special Court for Exclusive Trial of cases under NDPS Act, Chennai dated 29.12.2023 passed in C.No.168/2021, convicted the petitioner for an offence Under Section8(c)



read with 22(b) of NDPS and sentenced the petitioner to undergo 3 years RI and also to pay a fine of Rs.30,000/- in default, to undergo RI for two months and convicted the petitioner for the offence under Section 8(c) read with 22(c) of NDPS Act and sentenced to undergo 10 years RI and to pay a fine of Rs.1,00,000/- in default, to undergo six months RI and also convicted the petitioner for the offence under Section 8(c) read with 28 of NDPS Act read with Section 53 and 58 of the NDPS Rules and sentenced to undergo 10 years RI and to pay a fine of Rs.1,00,000/- in default, to undergo six months RI. Challenging the said judgement, the petitioner has filed the above appeal and miscellaneous petition seeking suspension of sentence of imprisonment.

2. The case of the prosecution is that on various dates, many postal covers were examined by the respondent under suspicion which were alleged to contain 10 tablets of "Clonazepam 1 MG" with a commercial name "Lonazep" , 126 grams for 600 tablets of "Zolpidium Tartarate 10" with a commercial name Zolfresh, 44 grams of "Clonazepam 1 MG" with a commercial name "Lonazep", 10 tablets totally 1800 tablets of Methyl Phenidate Hydrochloride 10 MG with a commercial name Addwize, 10 tablets totally 180 tablets of Methyl Phenidate Hydrochloride, 28.08 grams of Methyl Phenidate Hydrochloride and 28.80 grams of Methyl Phenidate



Hydrochloride respectively and the same were seized after drawing necessary samples from the said seizute and they were sealed and put a cover. After completing the investigation, the respondent filed a complaint against the accused for the offence under sections 8(c) read with 22(c), 23, 28 and 29 of NDPS Act.

3. The learned counsel appearing for the petitioner submitted that there are lot of material contradictions in the evidence of the prosecution and the prosecution evidence is also highly unbelievable. He would further submit that the petitioner is confined in jail for past four years and now, they are confined in Puzhal Prison I, Chennai. Accordingly, he prays for suspension of sentence.

4. The learned Special Public Prosecutor appearing for the respondent police submitted that the contraband seized, which was sent by the petitioner through post, is a commercial quantity. Hence, he vehemently opposed to grant of suspension of sentence.

5. The learned Counsel filed counter in this case and the relevant portion is extracted hereunder:



"4. The Sec.32A of NDPS Act was challenged before Supreme Court in Dadualias Tulsidas -vs- State of Mahasathra and the same ordered on 2.10.2000 holding that Sec.32A as void in so far as it takes the right of the courts to suspend the sentence awarded to @@jjjjj convict under the Act, would neither entitle such convicts @@JJJJ to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligations to exercise the power of suspension of sentence within the parameters Prescribed under Section 37b, of the Act. Section 37 of the Act provides. In this case, the Petitioner has not satisfied the Sec.37 of NDPS Act, the lower coon already given a finding that he is involved in this offence and convicted him. The Petitioner has raised a lot of grounds in the appeal but not satisfied the Sec.37 of NDPS Act. As per the judgment reported in 2009(1) SCC Pg.482 in Ratan Kumar Vishwas - Vs- State of UP in which the Apex Court categorically stated that "A" sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions as spelt out in Section 37 of the Act" and followed by judgment reported in 2021 (0) Supreme (SC) in The State (GNCT of Delhi) Narcotics Control Bureau -Vs- Lokesh Chadha. pg.360 and Supreme Court categorically reported in 2019 (2) SCC pg. 466 in State of Punjab -Vs- Rakesh Kumar held that "when during pendency of appeal accused approaches High Court for suspension of conviction, it would not be proper for High Court for commenting on merit. 2018 (13)SCC 813,- Satpal Sing -vs- The State of Panjab ,ORDER COULD NOT BE PASSED BY



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HIGH COURT U/S.438 OR 439 CR.P.0 WITHOUT REFERENCE TO S.37 AND WITHOUT ENTERING A FINDING ON THE REQUIRED LEVEL OF SATISFACTION — IMPUGNED ORDER SET ASIDE. And followed by in 2020 (0) Supreme (SC) 69 in State of Kerala -Vs- Rajesh, grant of bail-limitations under -in addition to s.439,cr.p.c-recording of satisfaction that accused is not guilty, mandatory-, 2024(0) Supreme (sc)386 Shivani Tyagi -vs- State of UP & Anr, -In case of short-term imprisonment for conviction of offence suspension of sentence is normal rule and its rejection is exception-However position should be vice-versa in case of conviction for serious offences when invocation of power under S.389 is invited, (3) Mere factum of sufferance of incarceration for a particular period, in a case where life imprisonment is imposed cannot be a reason for invocation of power under S.389 Cr.P.C. without referring to relevant factors. Hence the Respondent submits that the Petitioner is not entitled for suspension of Sentence and Bail pending Appeal."

6. Heard the learned counsel on both side.

7. Normally, offences under NDPS Act are offences against society and therefore the courts should be very circumspect while granting suspension of sentence. However, when the accused have been under incarceration for sometime and when there are points in the appeal, which



favour the accused, then the courts should not shy from granting suspension of sentence, as the liberty of the individual would be at stake if the appeal results in acquittal at a later point of time. In this regard, the decision of the Hon'ble Supreme Court of India in the case of ***Rabi Prakash Vs. The State of Odisha*** reported in ***2023 LiveLaw (SC) 533*** is of relevance and the material portion of the said judgment is quoted hereunder :-

“4. As regard to the two conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

8. Having regard to the fact that there are arguable points involved in the criminal appeal and further, the appeal is not likely to be taken up for final hearing in the near future and also considering the fact that the accused



has been under incarceration for more than four years, applying the decision of the Hon'ble Supreme Court, I am of the considered opinion that the petitioner is entitled for the relief of suspension of sentence.

9. Accordingly, the substantive sentence of imprisonment alone is suspended and the petitioner is directed to be enlarged on bail, on the following conditions:

"(a) The petitioner is directed to deposit the entire fine amount which was ordered by the Special Judge, I Additional Special Court for Exclusive Trial of cases under NDPS Act, Chennai in CC.No.168 of 2021 dated 29.12.2023 to the credit in CC.No.168 of 2021 before the trial Court within a period of two weeks from the date of receipt of copy of this order.

(b) The petitioner shall execute a bail 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 Special Judge, I Additional Special Court for Exclusive Trial of cases under NDPS Act, Chennai. This bail



bond shall be entertained only after the deposit of the money specified in clause (a).

(c) The petitioner shall appear before the respondent police on the first working day of every week at 10.30 a.m. And 11.30 a.m. During first week And also appear before the learned Special Judge, I Additional Special Court for Exclusive Trial of cases under NDPS Act, Chennai on the first working day of the every English Calendar Month at 10.30 am, until further orders; and

(d) If the petitioner fails to deposit the amount and execute the bail bond as stipulated in Clause (a) and (b), the order of interim suspension of sentence shall stand cancelled automatically without reference to this Court and the learned Judge, shall immediately issue non-bailable warrant and secure the petitioner to serve the sentence imposed against the petitioner."

10. Further, it is made clear that, if the petitioner indulges in similar



offence in the future, the suspension of substantive sentence alone granted today will automatically stand dismissed without any further reference to this Court.

11. This criminal miscellaneous petition is ordered accordingly.

10.07.2024

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Note: Issue order copy on 11.07.2024

To

1. The Superintendent of Customs,
RSI-AIR, New Custom House,
Meenambakkam,
Chennai-027.



M.DHANDAPANI.,J
rli

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2. The Special Judge,

I Additional Special Court for Exclusive Trial of cases under NDPS Act,
Chennai.

3. The Special Public Prosecutor,
High Court, Madras.

4. The Superintendent
Central Prison, Puzhal-I, Chennai.

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