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Crl.M.P.No.17546 of 2023
in Crl.A.No.547 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.04.2024

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Orders Reserved On 21.03.2024	Orders Pronounced On 15.04.2024
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Crl.M.P.No.17546 of 2023

in

Crl.A.No.547 of 2023

1.A.Aadhil Mon
2.Ajil Sathyan

... Petitioners

Vs.

State by
The Inspector of Police,
M-4 Redhills Police Station,
Chennai.
Cr.No.3794 of 2020.

... Respondent

PRAYER: Criminal Miscellaneous Petition has been filed under Section 389(1) of Cr.P.C., to suspend the sentence imposed on the petitioners by the learned Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai in C.C.No.33 of 2021 by judgment dated 17.04.2023.



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For Petitioners : Mr.N.Vijayaraj

For Respondent : Mr.S.Raja Kumar
Additional Public Prosecutor

ORDER

This Criminal Miscellaneous Petition has been filed to suspend the sentence imposed on the petitioners by judgment, dated 17.04.2023 in C.C.No.33 of 2021 by the learned Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai and enlarge them on bail pending disposal of the main appeal.

2.The Trial Court convicted the petitioners and sentenced to undergo ten years rigorous imprisonment each and to pay a fine of Rs.1,00,000/- each, in default to undergo six months rigorous imprisonment for the offence under Section 8(c) r/w. 20(b)(ii)(C) of NDPS Act. Challenging the same, the petitioners preferred an appeal and the Suspension of Sentence.

3.The contention of the learned counsel for the petitioners is that the petitioners are degree holders who were travelling in a car intercepted in the



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toll gate by P.W.1 during vehicle check, verifying e-pass during corona restrictions, at that time alleged seizure made. He would submit that in the search and seizure mahazar, it is recorded that on prior information P.W.1 along with his team went to the toll gate, keeping watch in the toll gate for the vehicle and intercepted the petitioners' vehicle and seized Hashish oil which is of commercial quantity. The case proceeded against the petitioners for offence under Sections 8(c) r/w. 20(b)(ii)(c), 25 and 29(1) of NDPS Act, the Trial Court acquitted the petitioners for the offence under Section 29(1) of NDPS and there is no finding with regard to Section 25 of NDPS Act. He would submit that the admitted case is that the property was seized on the confession of A1 but there is nothing to show that A2 conspired with A1. In view of the petitioners being acquitted for the offence under Section 29(1) of NDPS Act, conviction of A2 is not proper. He further submitted that P.W.1 is the person who conducted search, registered FIR, conducted investigation in this case which is not proper. Further, there is a delay of 27 days in submitting the seized contraband before the Lower Court. He further submitted that in this case, the Trial Court brushed aside the violation of Sections 42(2), 50, 52(A) and 57 of NDPS Act which is not proper. The



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Trial Court in the judgment recorded that the accused not produced any witness or documents in this case on the side of the accused. Ex.D1/deposition of P.W.6 in yet another case marked not considered. He further submitted that there is difference of weight in the samples collected, as recorded in the scene of occurrence, thereafter before the Court and when weighed the same in the forensic lab. These contradictions would cut the root of the case but the Trial Court glossed over the same stating that they are minor contradictions. He would submit that while PW1 was regular vehicle check during Corona period stopped the vehicle of the petitioners, questioned them, search and seizure conducted and thereafter, both the petitioners were taken to the Police Station and Ex.P12/Special report u/s.57 of NDPS Act submitted and FIR/Ex.P9 registered but in the samples MO1 to MO8 prepared near the Tollgate, crime number recorded which would prove that search, seizure and drawing of samples were done in the Police Station but documents prepared to suit the case of the prosecution.

4.The learned counsel further submitted that in this case, the petitioners said to have travelled in Ford Titanium car bearing registration



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No.KL-51-JB-8137 but the said Car not produced. He further submitted that

PW1 is an interested witness who after apprehension of the accused prepared all the documents, registered FIR and conducted substantial portion of investigation, he being an informant and Investigating Officer is not proper which is deprecated by the Apex Court in the case of ***Mohanlal vs. State of Punjab*** reported in ***[2018] 17 SCC 627*** and ***Mukesh Singh vs. State (NCB)*** reported in ***[2020] 10 SCC 120***, thereby prejudice caused to the petitioner. Further, the petitioners hail from the State of Kerala, they are not conversant in Tamil and they do not know to read and write Tamil but in this case, Ex.P1 & Ex.P2/Search notices, Ex.P3/Seizure Mahazar, Ex.P4 & Ex.P5/Inspection Memos, Ex.P7/Mahazar, Ex.P10 & Ex.P11/Arrest Intimation Memo all recorded in Tamil. The search notice is a mandatory notice, it is recorded in the language not known to the accused, there is nothing to show the petitioners were informed about the search in the language understandable by them and they understood the same and signatures affixed. In view of the same, the Trial Court ought not to have considered these documents to be proved. He further submitted that in this case, search and seizure taken place near the Tollgate where CCTV cameras



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mandatory, available but no CCTV recordings produced. Likewise, the case projected against the petitioners is that using their mobile phone they contacted Deepak, Naveen and Sitari Neelamasithu, through whom the contraband Hashish oil was procured by the petitioners, neither the said persons, contact details nor tower location produced in this case. He further submitted that PW5/Assistant Commissioner of Police admits that three days prior to 21.08.2020 PW5 registered a case under NDPS Act for a commercial quantity seizure and filed a charge sheet in C.C.No.32 of 2021 and his deposition in C.C.No.32 of 2021 marked as Ex.D1 which would prove the prosecution failed to come with true facts, there is suppression, adverse inference ought to have taken but the Trial Court failed to consider the contradictions in PW5 evidence, in compliance of 42 and 57 report which are mandatory. The Trial Court placing reliance on Exs.P1, P2, P4, P5 and P12 is not proper. He further submitted that the petitioners are in prison from the date of arrest for more than 3½ years, the period of conviction is 10 years and since it will take some time to take the appeal for final hearing, in view of serious violations in compliance to the statutory provisions and there are reasonable grounds for believing that the petitioners



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are not guilty of such offences and also considering their period of incarceration and on the fact that they are not having any previous cases of similar nature, sentence imposed on the petitioners may be suspended.

5.The learned Additional Public Prosecutor filed his counter and submitted that on 21.08.2020 at about 04.15 hours, when PW1/Sub-Inspector of Police was in station duty, a secret information was received about illegal sale of ganja. Based on the information, the Inspector of Police along with his team went to the place of occurrence, i.e., Near Check Post, MA Nagar, Redhills, wherein the informer identified the petitioners who were coming in a car bearing registration No.KL-51-JB-8137, they were stopped, enquired and they were found in possession of 4 kgs of liquid Hashish oil. Thereafter, the respondent police arrested the petitioner, recorded his confession statement and remanded to judicial custody. The contraband were seized under the cover of seizure mahazar in the presence of witnesses, samples were taken and sent to forensic examination. A case was registered in Crime No.3794 of 2020 for the offence under Section 8(c) r/w. 20(b)(ii)(B), 25 and 29(i) of NDPS Act, 1985. On completion of



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investigation, charge sheet filed. During the trial, on the side of the prosecution PW1 to PW6 examined, Ex.P1 to P18 and MO1 to MO15 marked. On the side of the defence, no witnesses examined, but Ex.D1 marked. On conclusion of trial, the Trial Court convicted the petitioner as stated above.

6.Learned Additional Public Prosecutor further submitted that at the time of seizure, 8 samples of 50 grams each were collected in plastic container and labelled as S1 to S8, out of which, S1, S3, S5 and S7 were produced before NDPS Court for forwarding to chemical analysis and the samples were weighed in the Court. Thereafter, the samples were sent to forensic lab where the samples weighed with polythene cover containing plastic container and it was weighed in a different weighing machine. Hence, a minor discrepancy in the weight which cannot shake the root of the prosecution case. He further submitted that if the sentence imposed on the petitioners are suspended, they will again involve in similar offences. Hence, he prayed for dismissal of the petition.



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7.Considering the submissions made and on perusal of the materials, it is seen that in this case, PW1 and PW3 were conducting vehicle check on 21.08.2020 at about 4.00 a.m., a car bearing registration No.KL-51-JB-8137 was stopped since it was Corona period and there was restriction in movement of vehicles, to verify whether proper permission obtained for plying during the restricted period, car stopped and inmates enquired. The other State vehicles was thoroughly checked. When the petitioners were questioned, they gave contradictory statements and when the vehicle was checked, four packets of 1kg each of Hashish oil was found in the car. Prior to it, Ex.P1 and Ex.P2/search notice was given to them, intimation was sent to PW2/Village Administrative Officer and the Village Assistant to be present near the vehicle Check point. PW3/Head Constable was sent to the Police Station to bring the weighing scale and Narcotic test kit. Since there was no public forthcoming to be witness, in the presence of PW2/Village Administrative Officer and Village Assistant, search, seizure, recovery, arrest and confession recorded. Samples were taken from the contraband, weighed, sealed and all the proceedings recorded. Thereafter, the accused, contraband and the vehicle produced before the Investigating Officer and



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information was sent to superior police officer PW5. In this case, it is not in dispute that both the accused hail from the State of Kerala and they are not conversant to read and write Tamil. Ex.P1 and Ex.P2/search notice is in Tamil and nowhere it is recorded that the contents were explained to the petitioners and they understood the same. Further, in Ex.P1 and Ex.P2, the option of taking them before the Gazette Officer alone recorded and there is no recording with regard to producing them before the Judicial Magistrate. Though PW1 and PW3 in their evidence gave an explanation that orally such option was given the same denied by the petitioners which causes doubt. The confession is also written in Tamil. PW2, who is a witness for arrest and recovery is silent about accused understanding the option of conducting search before a Gazetted officer or before Judicial Magistrate in the language known to them. Whether waiving of such option given, nothing is recorded in Ex.P1 and Ex.P2. It is seen that there are contradictions with regard to the weight of samples recorded in the seizure mahazar at the scene of occurrence, before the Court and in the forensic lap, there are significant variance, no explanation available.



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8.In this case PW1 admits he has conducted major portion of the investigation and he is also an informant, in view of the same prejudice caused to the accused cannot be ignored. Before search, Section 50 of NDPS Act has to be complied, which is mandatory, in this case admittedly the petitioners are Keralites, Ex.P1 and Ex.P2 both recorded in Tamil, there is nothing to show they were explained and understood its significance. The contention of the learned counsel for the petitioners are that serious flaws and violations in following the statutory provisions, in the investigation cannot be ignored. Further, in this case CCTV footages not produced though it was available in the scene of occurrence. Investigation with regard to other persons, namely, Deepak, Naveen, Sitari Neelamasithu, their contact details, tower location not conducted.

9.One kilogram and above of Hashish oil falls under commercial quantity and in this case 4 kgs of Hashish oil seized which cannot be lost sight of. It is also to be seen that it is a chance recovery during Corona period, the vehicle of the petitioners was stopped to find out whether they had e-pass to ply in the road during the restricted period, thereafter the entire



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case unfolded, seizure was made in the presence of Village Administrative Officer and Village Assistant. The petitioners were charged for various offences under NDPS Act including the offence under Section 29 of NDPS Act for the charge of abetment and conspiracy and the Trial Court acquitted the petitioners for charge under Section 39 of the Act. Hence, the Trial Court convicted the petitioners/A1 and A2 for possession of Hashish oil. Admittedly, in this case, the contrabands MO9 to MO12 seized under seizure mahazar/Ex.P3, cash of Rs.1,500/-, white ford car bearing registration No.KL-51-JB-8137 and iPhone 11 Pro from the first petitioner/A1. From A2, Honor Play mobile phone alone was seized under seizure mahazar/Ex.P7. Since the petitioners acquitted for the offence under Section 29 of NDPS Act and from A2 mobile phone alone seized, this Court is inclined to grant suspension of sentence to the second petitioner/A2 alone. The suspension of sentence as against the first petitioner/A1 is dismissed for the present.

10. Accordingly, the Substantive Sentence of Imprisonment imposed on the second petitioner/A2 is suspended till the disposal of the appeal and



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the second petitioner/A2 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 trial Court.

11.Further, the second petitioner shall appear before the Trial Court on the first working day of once in three months at 10.30 a.m. until the 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. Accordingly, this Miscellaneous Petition is partly allowed.

15.04.2024

Index:Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation: Yes/No
cse



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To

- 1.The Special Judge,
I Additional Special Court for
Exclusive Trial of Cases under NDPS Act, Chennai.
- 2.The Inspector of Police,
M-4 Redhills Police Station, Chennai.
- 3.The Superintendent,
Central Prison, Puzhal, Chennai.
- 4.The Public Prosecutor,
High Court, Madras.



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M. NIRMAL KUMAR., J.

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Pre-delivery order made in

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