

**M. Loganathan Vs. Directorate of Revenue Intelligence**

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**Court :** Chennai

**Decided On :** Apr-27-1994

**Reported in :** 1994(73)ELT281(Mad)

**Judge :** N. Arumugham, J.

**Appeal No. :** Writ Petition No. 2827 & 2828/94

**Appellant :** M. Loganathan

**Respondent :** Directorate of Revenue Intelligence

**Advocate for Def. :** Shri P. Rajamanickam, Central Govt. Public Prosecutor

**Advocate for Pet/Ap. :** Shri B. Kumar, Adv.

**Judgement :**

ORDER

1. Petitioner Loganathan and Shiva Narayan, who have been arrayed as A3 and A2 respectively along with 11 others, charged with offences punishable under section 8(c) read with 21, 23, 25 and 27A of the Narcotic Drugs and Psychotropic substance Act, hereinafter referred to as the 'NDPS' Act in C.C. No. 24 of 1994 on the file of the special Judge for E.C. Act cases, Salem, who were arrested and lodged to judicial custody, have come forward with these applications for bail under Section 439 of the Code of Criminal Procedure. Since the occurrence involved in the whole case relating to both the petitioners along with others is one

and the same and the points taken are common, with the consent of the Bar, I am disposing both these petitions, by passing this common order.

2. The conspectus of the facts is that at or about 11-45 A.M. on 15-5-1993 while the respondent was having a surveillance for the persons accused of the offences under the N.D.P.S. Act on intelligence spotted a light blue colour Ambassador car bearing the registration mark TNB 9346 parked near National Hotel at Salem, and in which, two persons were found getting into the same from the Hotel and that the said car proceeded towards Omalur Road, being followed by the respondent and that on covering a certain distance, at a place where a loaded public transport lorry was parked in the opposite direction in the same road, the car was stated to have stopped and one person from the car alighted and got into the lorry and on piloting by the said car, the lorry with the load of consignment followed, which was followed by the respondent's officials. At a place called Thallapallam on the same highway, both the lorry and the car were stopped and intercepted and on questioning, the respondent came to know that contrabands under the N.D.P.S. Act were concealed under the consignment of the lorry and that the inmates of the lorry as well as the car were responsible for the same and on finding the said place, being in a highway, inconvenient, for further follow up action, took the two vehicles along with responsible persons, including the petitioners herein to their office at Salem, where at about 9 P.M. on that day, the said lorry was searched and during the said sojourn, a huge quantity of heroin worth Rs. 1,32,20,000/- weighing 66,100 kgs. kept concealed under 1,750 card boards boxes containing slate pencils, which contraband was seized under the cover of mahazar at about 9 P.M. on the same day, attested by the witnesses. All the persons involved in the crime were arrested, investigation followed and several other accused were also secured. The contrabands were sent to the court according to the respondent in accordance with the procedure laid down in this regard. Consequently, a complaint was also lodged before the court at Salem and the trial of the case is yet to commence. It is thus seen that from 15-5-1993 onwards, the petitioners along with the other accused are in judicial custody for the offences aforementioned.

3. For and on behalf of the petitioners it is stated that previously bail applications were filed but however the same were dismissed as withdrawn. Now, an attempt is

being made on their behalf seeking the bail under Section 439 of the Code of Criminal Procedure on the following grounds :

(1) Mr. B. Kumar, learned counsel appearing on behalf of both the petitioners dwells his first attack by drawing my attention to the fact that an inherent improbability lies in the case of the respondent against the petitioners as seen from the first detention mahazar, prepared at about 11.45 A.M. at Thallapallam by the respondent and the statement recorded from both the petitioners. There is inconsistency between the two, according to the learned counsel for the petitioners. In the first detention mahazar, the respondent has stated that on spotting a light blue colour Ambassador car parked near the National Hotel at Salem, they found two persons coming from the hotel and they alighted the car and then proceeded to the Omalur Road, being followed by the respondent and other staff and that on reaching the place where the loaded lorry was found parked in the opposite direction, one person got down from the car and got into the lorry. This would mean that only two persons took the Ambassador car, out of whom, one got down and alighted the lorry. If that was so, while intercepting the said car by the respondent by closely following at about 11.40 P.M. at Thallapallam only one person could have been found in the car but three were found as alleged by the voluntary statements recorded from the petitioners. These two versions, according to the learned counsel poses a grave and serious doubt in the genuineness of the statements and mahazar prepared by the respondent.

(2) Basing reliance upon the language and phraseology adopted in the detention mahazar prepared at about 11.45 A.M. on 15-5-1993, learned counsel contends that the respondent officials had a definite information about the trafficking and transport of the narcotic drugs, namely, the heroin and that therefore, they ought to have recorded the same in writing as provided under Section 42 of the N.D.P.S. Act and sent a copy of the special report to the immediate superior officer and which they had not done, clearly amounts to the non-compliance of the mandatory directions of the said sections of law.

(3) Thirdly that after taking the car and the lorry in question to the office of the respondent at about 9 P.M. on the day of occurrence, that is after sun set the

search made is also totally against the mandate in built in the above section of law, which vitiates the case of the prosecution.

(4) Fourthly, the learned counsel would contend that Section 50 of the N.D.P.S. Act, namely, the requirement to inform the accused that their person would be searched in the presence of a Gazetted Officer or the nearest Magistrate has not been complied with.

(5) The failure to file any petition before the appropriate court or learned Magistrate to take photographs and to follow necessary procedures as provided under Section 52-A of the N.D.P.S. Act amounts to the clear violation of the Act itself. For the aforesaid reasons, bail was sought for both the petitioners.

4. Mr. P. Rajamanickam, learned standing counsel for the respondent would vehemently controvert the said contentions by stating that the respondent officers had no definite information about the commission of the offences under the N.D.P.S. Act by the petitioners and other accused herein on the morning of 15-5-1993 and what all they had was only a source of information and that therefore, the respondent shall not have necessarily taken down the information in writing as provided under Section 42 of the Act and for the said reason Section 50 cannot be deemed to be applicable in this case and that therefore, no mandatory violations have been committed in this case. With regard to the inconsistencies between the detention mahazar and the statements, learned counsel would contend that it is not the definite case of the prosecution that such number of the persons alone were found occupying the car while it was parked near the National Hotel, and that what was claimed was that only two persons came from the hotel and got into the car and that therefore assuming it does not affect the prosecution case in any manner and for the said reasons, Sections 42(1) or 41(2) of the Act cannot come to the rescue of the petitioners herein. While stating the above contentions, learned counsel would point out the details of the voluntary statements given by both the petitioners herein, which is clearly an information and material gathered under Section 67 of the N.D.P.S. Act and that therefore, in all he would contend that the petitioners are not entitled to be enlarged on bail.

5. Before proceeding to discuss the case on hand on facts, I would like to advert the relevant sections of the N.D.P.S. Act in this regard. Section 41 of the N.D.P.S. Act reads as follows :-

'41 Power to issue warrant and authorisation - (1) A Metropolitan Magistrate or a magistrate of the first class or any magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the Commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other departments of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search, or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under Sec. 42.

This section empowers (in addition to the first class Magistrate and specially empowered second class Magistrate) the Gazetted Officers of the Central Excise, Narcotics, Drugs Control, Customs, Revenue Intelligence, Border Security Force, Revenue, Excise, Police or other departments of the Central and State Governments to issue warrants and authorisation for arrests, search and seizure.'

Section 42 of the N.D.P.S. Act reads as follows :-

'Power of entry, search, seizure and arrest without warrant or authorisation -

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other departments of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place may, between sunrise and sunset :-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) Seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the Commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance :

Provided that if such officer has reason to believe that a search-warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior'.

Two documents are available at this stage for the purpose of disposing these petitions. Which are, the detention mahazar dated 15-5-1993 prepared at about 11.45 A.M. at the earliest point of time and another mahazar which came into existence at about 9 P.M. on the same day. With regard to the two mahazars, there is no controversy or dispute made among the parties herein. To find out whether any mandatory direction has been violated in this case or not so as to entitle the petitioners to be enlarged on bail, as held by this court in very many number of cases, it has become necessary to probe the case. The first detention mahazar prepared at about 11.45 A.M. on 15-5-1993 runs with the following opening words :-

'On information gathered by the Officials of Central Revenue Intelligence Department, and the Officials of Trichy Zonal Office and Madras Revenue Intelligence Officers were vigilant about the vehicles smuggling the Narcotic Drug on 15-5-1993 and at that time a light blue Ambassador Car No. TNB 9346 was found to be parked near National Hotel, Salem Situated on Omalur Road, and 2 persons alighted from the above said Hotel, and entered into the aforesaid Car and the said Car proceeded to Omalur and the authorities followed the said Car and it passed Salem Town and it was stopped near the Place and a person alighted from the said car and got into a lorry which was already parked in the opposite direction on the otherside and the said lorry started and proceeded

towards Salem and immediately the aforesaid Ambassador car also turned and over taken the said lorry and was showing the way and both these vehicles were followed by the Officials.'

6. In support of this and to make it show that the word 'information' pertains to the 'definite information about the commission of Offences under the N.D.P.S. Act, learned counsel appearing for the petitioners, produced before this court GIST of INTELLIGENCE', the xerox copy of a document furnished to the petitioners through the Superintendent, Central Prison, Salem on 22-6-1993, which according to the learned counsel, was supplied for the purpose of writ proceedings. The same has necessarily to be adverted, which is as hereunder :-

'One Prabhulal of Anna Nagar, Trichy, his brother Shivanarain of Trichy, Mohammed Shabir of Madhya Pradesh and Loganathan of Dindigul are engaged in dealing in narcotic drugs. Intelligence gathered indicates that Shivanarain and Loganathan are likely to proceed to Salem and stay in National Hotel, Salem and are likely to receive huge quantity of Heroin from Mohammed Shabir of Madhya Pradesh on 15-5-1993 who is accompanying the said consignment in a lorry from North India. Shivanarain and Loganathan are likely to travel in a car bearing Registration No. TNB 9346 to meet the lorry carrying the contraband Heroin at the outskirts of Salem. If this car is followed from National Hotel, then we may be able to seize the contraband.'

The contents of this document though has not been controverted, clearly fortifies the conclusion that on information the respondent authorities had a total surveillance on the Car in question with definite information about the transporting of the narcotic drugs under the N.D.P.S. Act, with the concerned vehicle number and the relevant persons by specified names previously. If this is the position, then, I am totally unable to persuade myself to agree with the contentions forwarded by the learned standing counsel that the word information refers only to a source of information and not definite information. The very words which the learned standing counsel read out from the detention mahazar made in Tamil and original is further fortified by the above piece of document. All these factors would clinchingly go to show that the respondent authorities had proceeded on 15-5-

1993 at about 11.45 A.M. near the hotel on definite information about the definite commission of the offences under the N.D.P.S. Act with reference to the Car number, persons, lorry expected to arrive at that place. If that is so, Section 42 of the Act, is squarely applicable to and one cannot dispute the said fact.

7. The Apex Court while dealing with the ambit, scope and object of the seizure and search as provided under Sections 100 and 165 CrI. P.C. the general law, and Sections 41, 42 and 43 of the N.D.P.S. Act has clearly laid down the law after having an elaborate discussion in State of Punjab v. Balbir Singh 1994 1 Crimes 753 in paragraph 23 and sub-paragraph 3, the law laid down reads as follows :-

'(3) Under Section 42(2) such empowered officer who takes down any information in writing to records the grounds under proviso to section 42(1) should forthwith send a copy thereof to his immediate Official Superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case'.

Following this ratio, if the conspectus of the case on hand is looked into, it is significant to note that the very case of the respondent is that they had denied any definite information about the Commission of the Offence, which clearly runs counter to the document supplied by them in the writ proceedings. However, if I may say so, Section 42(2) a mandatory provision has not been complied with. Then in sub-paragraph (5) of paragraph 23 the law laid down by the Supreme Court, reads as follows :-

'(5) On prior information, the empowered officer or authorised Officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted Officer or a magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted Officer or the magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether

such person opted for such a course or not would be a question of fact'.

8. However, with regard to the above ratio, in the context that search and seizure was made not on the person but over the vehicles in question, one can argue that Section 50 of the N.D.P.S. Act cannot be made applicable. I can find some force in the contentions on behalf of the respondent in that regard. The mandatory directions required to be compulsorily complied with, namely, recording the details of information about the commission of Offence in writing by the respondent before proceeding further and sending the special report after the preparation of detention mahazar and seizure mahazar to the superior officer, as provided under Section 42 admittedly, have not been done in this case. The proviso to Section 42(2) which has since been declared as mandatory by the Apex Court, has not been complied with either in spirit or in reality by the respondents, which would clearly amount to the non-compliance of the mandatory provision and it is presumed that the petitioners are put to serious prejudice.

9. In *Narcotic Control Bureau v. Kishanlal and Others* 1991 LW Cri53, Supreme Court has held that Section 37 of the N.D.P.S. Act, limits the power of this court to grant the bail under Section 439 of the Code but while stating so, the Apex Court, has not stated that the power of the High Court in grant bail has been totally taken away the special Enactment, namely, the N.D.P.S. Act.

In this regard, I may mention that it was the consensus-ad-idem of all the High Courts in our country that in the context of stringent punishments provided under the N.D.P.S. Act for the various offences, the mandatory provisions were built in for the purpose of providing a total check over the unfettered powers vested with the officers from implicating false persons ruthlessly. It is rather unfortunate that the respondent's Officers while they were able to spread the drag net to one of the major crimes in this country had simply ignored the provisions of law to be complied with, which are mandatory in nature and failed to book the real culprits in this case. For the violations of the provisions of the Act, it is the settled view that bail can be granted however with certain conditions. After having given my anxious consideration over the entire gamut of the case, for the reason of the non-compliance of the mandatory provisions of Section 42(2) of the N.D.P.S. Act, I am

constrained to hold that the petitioners can be enlarged on bail.

10. With regard to the other contentions made on behalf of the Bar for the petitioners, I am unable to countenance of the same, if at all for the any reasons, the Bar decides, it is always open for it to take those pleas during trial but certainly not at this stage of bail.

11. After having thus anxiously and carefully examined this case, in the context of the legal pronouncement made by the Apex Court in the above case law cited, I am fully satisfied to hold that the petitioners are entitled to be enlarged on bail and that they are not likely to commit any offence during the tenure of bail. The very non-compliance of Section 42(2) of the N.D.P.S. Act is definitely a presumption available as a total prejudice to the accused who are facing grave charges in the context of the offences alleged. However, with the following conditions, I grant bail to the petitioners herein.

12. Both the petitioners shall be released on bail on each of them executing a bond for a sum of Rs. 1,00,000/- (Rupees one lakh only) with two sureties for a like sum each to the satisfaction of the Designated Judge, at Salem on whose file the case is now pending.

(2) Except on the hearing dates, both petitioners shall reside within Trichirapalli Municipal town limits and report before the respondent daily at 10 A.M. and 6 P.M. until further orders.

(3) They shall not move out of the said town on any account without the permission of this court.

(4) They shall not indulge in meddling with the prosecution witnesses or in causing impediment to the trial and should not indulge in any of the offences either under the special Act or under the regular law.

13. Both petitions are ordered accordingly.