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Court : Karnataka

Decided On : Apr-07-2017

Judge : John Michael Cunha

Appeal No. : Criminal Petition No. 1562 of 2017

Appellant : Kalegowda

Respondent : The State of Karnataka, Rep by Station House Officer, Ramapura Police Station, Rep by its State Public Prosecutor and Another

Judgement :

(Prayer: This Crl.P is filed U/S.482 Cr.P.C praying to quash the entire proceedings in Spl.C.No.68/2016 (arising out of Cr.No.96/2016) of Ramapura P.S., Kollegala Sub-Division, Chamarajanagar District for the alleged offences P/U/S 20(B)(ii)(b) of NDPS Act on the file of Prl. Dist. and S.J., Chamarajanagar.)

John Michael Cunha, J.

1. The petitioner is charge sheeted for the offences punishable under sections 20(B)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act") in Cr.No.96/2016.

2. The petitioner has sought for quashing the entire proceedings now pending on the file of the Principal District and Sessions Judge at Chamarajnagar in Special Case No.68/2016 mainly on two grounds. First, the respondent-Police have not followed the mandatory provisions prescribed in the NDPS Act. Second, the charge sheet discloses that the seized material was only flower and stems, but as per the NDPS Act, the ganja should consist of flowering tops. Since the seized flowers and stems cannot be separated from the flowering tops, the seized substance does not conform to the definition of ganja and hence, the charge-sheet filed by the respondent cannot be sustained under law and facts of the case.

3. I have heard the learned counsel for the petitioner and the learned Addl. S.P.P.

4. In support of his argument, learned counsel for the petitioner has placed reliance on the decisions rendered by this court in CrI.P.No.8089/2016, CrI.P.No.8159/2016, CrI.P.No.8659/2016, CrI.P.8193/2016, CrI.P.No.8191/2016, CrI.P.No.8192/2016, CrI.P.No.9319/2016 and CrI.P.No.628/2017 and also the decision rendered by the Hon'ble Supreme Court of India in the case of STATE OF RAJASTAN vs. JAG RAJ SINGH @ HANSA (CrI.A.No.1233/2006) disposed of on 29.06.2016.

5. Learned Addl. S.P.P. in support of his arguments has referred to the following decisions namely:-

1. (2001) 6 SCC 181 - T.T.ANOTHONY vs. STATE OF KERALA

2. Division Bench judgment in CrI.A.No.367/2013 dated 16.12.2016

3. EMPEROR vs. KWAJA NAZIR AHMED (AIR 1954 PC 18)

4. APREN JOSEPH @ CURRENT KUNJUKUNJU and Others vs. THE STATE OF KERALA - (1973) 3 SCC 114

5. Hon'ble Apex Court ruling dated 25.11.2016 in ANJANDAS GUPTA vs. STATE OF WEST BENGAL

6. (2014) 2 SCC 1 - LALITHA KUMARI vs. STATE OF UTTAR PRADESH

7. (2011) 11 SCC 559 - STATE OF RAJASTHAN vs. TARASINGH

8. (2011) 3 SCC 521 - JARNAIL SINGH vs. STATE OF PUNJAB

9. Judgment of Rajasthan High Court dated 23.1.2017

10. 2008 Criminal Law Journal 1131 - Bombay High Court.

6. On consideration of the law laid down in the above decisions and the material collected by the Investigating Agency as evidenced in the charge-sheet, in my opinion, both the contentions urged by the petitioner for quashing the proceedings are liable to be rejected.

7. In so far as the compliance of the safeguards provided in sections 42, 43 and 50 of the NDPS Act are concerned, the legal position is now well settled. Under section 41(1) of the Act, only the empowered Magistrate can issue warrant for the arrest or for the search in respect of the offences punishable under Chapter IV of the Act. Under section 41(2), the empowered officer can give the authorization to his sub-ordinate officer to carry out the arrest of a person or search as mentioned therein. As held in the case of STATE OF PUNJAB vs. BALBIR SINGH reported in (1994) 3 SCC 299, if there is a contravention in the compliance of sections 41(1) and 41(2) that would affect the prosecution case and vitiates conviction. Further under section 42(1), the empowered officer if he has a prior information given by any person that an offence punishable under the Act has been committed, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. It is held in the above decision that to this extent, these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

8. Under section 42(2), the empowered officer who takes down any information in writing or 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 prosecution case. To that extent, it is held to be mandatory. It is also held in the above decision, if there is delay whether it was undue or whether same has been explained or not, will be a question of fact in each case. Further enunciation of law laid down in the above decision which is material for the purpose of this case reads as follows:-

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr PC fails to strictly comply with the provisions of Sections 100 and 165 Cr PC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorized officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr PC namely Sections 100 and 165 Cr PC and if there is no strict compliance with the provisions of Cr PC then such search would not per se be illegal and would not vitiate the trial.

9. In the case in hand, F.I.R. was registered against accused on 4.8.2016. It is the case of the prosecution that the complainant received credible information that accused had stored ganja leaves for the purpose of sale. This information was reduced into writing and after obtaining permission from the Dy.S.P., Kollegal Sub-Division, the complainant secured the panchas and also the Gazetted officer and at about 4.30 p.m., the raiding team went near the house of the accused. The accused was apprehended and in the presence of the Gazetted officer, he was served with notice and on the western side of the house, the raiding team found two plastic bags and on opening it was found to contain ganja leaves mixed with seeds and flowering tops weighing 22 kg., 920 gms.

10. The above facts go to show that all the requirements of sections 41 and 42 of the NDPS Act were duly complied. Even with regard to the search conducted by the authorized officer, I do not find any illegality or infraction of section 50 of the

Act as contended by the petitioner. The petitioner has deliberately not enclosed the copy of the seizure mahazar along with other records produced before the court. Even otherwise, the circumstances noted in the statement of witnesses which are produced along with the petition go to show that the petitioner was not subjected to any personal search. As such, the provisions of section 50 do not get attracted to the facts of the case as held in the case of State of HP vs Pavan Kumar 2005 (4) SCC 350. Hence, the first contention raised by the petitioner is liable to be rejected.

11. The second contention urged by the petitioner is that the seized substances do not conform to the description of 'ganja' as defined under the Act. In order to examine this contention, it is necessary to refer to Section 2(iii) of the Act. It reads as under:-

(iii) "Cannabis (hemp)" means

a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;

12. In the instant case, the properties seized from the possession of the petitioner are described as "LANGUAGE". A plain reading of the above definition manifests that seeds and leaves are excluded from the definition of ganja when they are not accompanied by flowering or fruiting tops. The definition does not exclude the leaves when they are accompanied by the flowering or fruiting tops of cannabis plant. In the instant case, the seized substance is the mixture of leaves with flowering tops which squarely fall within the above definition. Therefore, even the second contention urged by the petitioner does not make out a case for quashing

the proceedings.

13. The decisions relied on by the petitioner are rendered on the premise that the seized substance did not fall within the definition of "ganja" and in that background and for non-compliance of the mandatory requirements of sections 41, 42, 43 and 50 of the NDPS Act, the proceedings therein were quashed by this court. But in the instant case the factual matrix is entirely different. Hence, the principles applied in those cases do not enure to the benefit of the petitioner. As the proceedings initiated against the petitioner are prima facie found to be in accordance with the provisions of the Act and no circumstances vitiating the trial having been pointed out, the proceedings cannot be quashed. Hence, the petition is dismissed.

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