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Court : Patna

Decided On : Jun-02-1994

Judge : S.K. Chattopadhyaya, J.

Appeal No. : Criminal Misc. No. 1787 of 1994 (R)

Appellant : Bilas Singh

Respondent : State of Bihar

Advocate for Pet/Ap. : Mr. Pandey

Disposition : Application Dismissed

Judgement :

S.K. Chattopadhyaya, J.

1. In this application under Sections 439 and 440 of the Code of Criminal Procedure, an interesting question of law has been raised by Mr. Radhey Shyam Pandey, learned Counsel, for the Petitioner.

2. In order to appreciate his argument, some facts which are necessary, as follows:

First information report was lodged against the petitioner on the allegation that on 20-1-1994 at 2.30 p.m. the Officer-in-Charge raided the house of the petitioner and

recovered one kilogram of ganja from the roof of the house. First information report was lodged for the said offence under Section 47(A) of the Excise Act and Section 16 of the Narcotic Drugs Act.

3. Mr. Pandey learned Counsel for the petitioner submits that the item 'ganja' has defined in Section 2(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as, the Act') which goes to show that 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. It is submitted that the first information report as well as the seizure list does not show that ganja which was alleged to have been recovered was excluding the seeds and leaves and not accompanied by tops. On these circumstances, it is submitted that the case of *Tribhuwan Kharwar v. The State of Bihar* 1994 (1) PLJR 501, (1994) 2 BLJR 600 (DB) has no application and the petitioner is entitled to be released on bail by this Court it is further submitted that the petitioner for the offence alleged may be convicted under the Excise Act and definitely not under the Act.

4. learned Counsel appearing on behalf of the State, however, has submitted that the first information report and seizure list disclose recovery of ganja which comes under the definition of Section 2(b) of the Act and whether seized ganja was with seeds or leaves is a matter of evidence and as such the High Court has no jurisdiction to grant bail in view of the reported decision of this Court as well as the Supreme Court.

5. In order to appreciate the contentions of the counsel of the parties, the meaning of different narcotic substances may be looked into.

6. The dictionary meaning of 'cannabis' is the hemp genus (without cap), a Narcotic Drug variously known as hashish, bhang marijuana etc. Similarly, the meaning of 'hemp' according to Chambers of Twentieth Century Dictionary means a plant (*cannabis sativa*) classified by some as belonging to the Mulberry family. Section 2(xiv) of the Act defines 'Narcotic Drug' as coca leaf, cannabis (hemp), opium, poppy straw and includes at manufactured drugs.

7. Section 8 of the Act is prohibitory in nature and lays down that no person shall

(a) ...

(b)...

(c) 'produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any Narcotic Drug or Psychotropic substance.

Section 52A of the Act contemplates disposal of seized Narcotic Drugs and Psychotropic Substances.

8. In exercise of the powers by Section 52A(1) of the Act, the Central Government has specified some of the Narcotic Drugs and Psychotropic Substances and ganja is one of them.

9. Taking into consideration the scope of definition of ganja, in my opinion, it is futile to argue that failure to mention in the first information report or the seizure list specifically about recovery of ganja from the house of the petitioner with seeds and tops will entitle the petitioner to be released on bail.

10. In this connection, it will be useful to look to the definition of 'Hemp Plant' as defined in Section 2(11) of the Bihar Excise Act, 1915. Definition of 'Hemp Plant' as given in Section 2(11) means the 'Plant Cannabis Sativa'. Reading these two provisions together, in my opinion, ganja as defined in the Act definitely comes within the purview of the Act.

11. Mr. Pandey, however, has submitted that in similar circumstances a Division Bench of this Court in Cr. Misc. Nos. 4304 and 5050 of 1993 (R): 1994 (2) PUR 600, by order dated 25th April, 1994 has directed the petitioners of that case to be released on bail. It is submitted that the aforesaid bail applications were referred to the Division Bench to decide the question as to whether in spite of the limitation imposed under Section 37(1)(b) of the Act with regard to grant of bail to an accused who is booked under Section 20 of the Act is entitled on bail, the Division Bench while distinguishing the case of Narcotics Control Bureau v. Kishan Lall :

1991 CriLJ654 , has observed that the Supreme Court had no occasion to consider the question whether the breach of various safeguards provided in the Act in the matter of arrest etc., will render the arrest non-est entitling the detenu to bail. The Division Bench, however, relied on some of the decision of the different High Courts and has come to a conclusion that as the offence alleged against the petitioner was under Section 20 of the Act and the sentence can be less than five years, the bar imposed under Section 37(1)(b) will not operate.

12. The Division Bench decision referred to above can be distinguished solely on the ground that whereas the Division Bench was considering a case in which the accused persons were prosecuted under Section 20 of the Act but, in the instant case, the first information report has been lodged under Section 16 of the Act and under Section 47(a) of the Excise Act against the petitioner in the case of Tribhuwan Kharwar (supra), I had occasion to deal with the power of High Court in granting bail in a case registered under the Act. Relying upon the pronouncement of the Supreme Court in Narcotics Control Bureau (supra). I look into consideration the limitation imposed under Sub-section (1)(b)(ii) of Section 37 of the Act and held that the Court while hearing the application for bail cannot be satisfied with the fact that there are reasonable grounds for believing that the petitioner is not likely to commit any offence while on bail. In the aforesaid decision, I had occasion to refer the decision of other High Courts including the Full Bench decision of the Madhya Pradesh High Court in the case of Ram Dayal v. Central Narcotic Bureau, 1993 Cr. LJ 442. It is true that under Section 20 of the Act, punishment prescribed is rigorous imprisonment for a term which may extend for. five years and also liable to pay a fine which may extend to Rs. 50,000 but in my view even granting of bail to such offender is subject to limitations imposed under Section 37 of the Act. In dealing with the question of granting bail to an accused, in my opinion, it is not necessary to consider as to whether the accused will be sentenced to imprisonment for five years or more. In a recent decision, Orissa High Court in the case of State of Orissa v. Ganapati Mohanty 1993 (1) EFR 491, under similar circumstances has set aside the order of bail granted in favour of the accused by the Sessions Judge. His Lordships in this connection observed as follows:

It is apparent that the question of applying Section 27 of the Act would arise only during trial, and really after the accused has otherwise been found guilty. This is so because, for the case to come within the fold of Section 27, the accused has to prove that article in question had been intended for his personal consumption and not for sale etc. The accused shall be able to prove this only during the course of trial, and not at any time preceding it. So, even if a case were ultimately to attract the opinion of Section 27 of the Act, at the stage of considering the question of release of the accused on bail, this section is irrelevant, and the case has to be decided on the basis of the section which makes the offence punishable, which, in the present case, was Section 20(b), as already noted, which attracts the rigour of Section 37(1)(b).

13. Regarding non-compliance of the mandatory provisions of search and seizure under Sections 42 to 50 of the Act, in a recent decision, the Apex Court in the State of Punjab v. Balbir Singh 1994 (1) EFR 516 (SC)(1995) 1 BLJR (SC) in Paragraph 11 has observed as follows:

It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4, Cr. P.C. regarding arrest and search under Sections 41, 42 and 43 the provision of Cr. P.C. namely Sections 100 and 165 would be applicable to such arrest and search. Consequently, the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.

Their Lordships had further held that:

It thus emerges that when the police, while acting under the provisions of Cr. P.C. as empowered therein and while exercising surveillance or investigating into other offences, had to carry out the arrests or searches they would be acting under the provisions of Cr. P.C. At this stage if there is any non-compliance of the provisions of Sections 100 or 165, Cr. P.C. that by itself cannot be a ground to reject the prosecution case outright. The effect of such non-compliance will have a bearing on the appreciation of evidence of the official witness and other material

depending upon the facts and circumstances of each case. In carrying out such searches if they come across any substance covered by NDPS Act the question of complying with the provisions of the said Act including Section 50 at that stage would not arise. When the contraband seized during such arrests or searches attracts the provisions of NDPS Act then from that stage the remaining relevant provisions of NDPS Act would be attracted and further steps have to be taken in accordance with the provisions of the said Act.

From the aforesaid decision, it appears that their Lordships have taken a view that on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the Officer empowered have to proceed and act under the provisions of Sections 41 and 42. In the instant case, as we have notice that the police had gone for investigation in connection with a case relating to offence under the Indian Penal Code and during such investigation when they reached the house of the petitioner they found that 1 Kg. Ganja was kept in his house. In such view of the matter, in my opinion, it cannot be said that the police had prior information before the investigation that ganja was kept in the house of the petitioner. On these facts the search and seizure cannot be held to be illegal in view of the decisions of the Supreme Court in *State of Punjab* (supra).

14. I am aware of the precedent that the decision of Division Bench is binding on a Single Judge but it is also an established principle of law that if such decision is not in consonance with the law laid down by Supreme Court, the decision cannot have any binding precedence. Moreover, I have already noticed earlier that the facts of the case before Division Bench is different from that of the present case. In such view of the matter, I respectfully differ from the decision of the Division Bench.

15. In the result, this application is dismissed as in my opinion, the petitioner is not entitled to be released on bail and as such his prayer for bail is refused. The trial court is directed to expedite the trial.