Madhavan and ors. Vs. Excise Inspector and ors.

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Court : Kerala

Decided On : Nov-23-1999

Reported in : 2000CriLJ1636

Judge : Arijit Pasayat, C.J. and K.S. Radhakrishnan, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 96, 96(1), 99, 100, 100(1), 100(4), 100(5), 100(6), 100(8) 102, 102(1), 102(2), 102(3), 102(4), 103, 103(1), 103(2), 103(3) 103(4)(7), 103(5) and 165; Code of Criminal Procedure (CrPC) , 1973; Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 50 and 50(1); Kerala Abkari Act, 1902 - Sections 36; Prevention of Food Adulteration Act, 1954 - Sections 10(7); Evidence Act - Sections 68; Constitution of India - Articles 19(1) and 20(3);

Appeal No. : C.R.R.P. No. 962 of 1993

Appellant : Madhavan and ors.

Respondent : Excise Inspector and ors.

Advocate for Def. : Sri Gracious Kuriakose, P.P.

Advocate for Pet/Ap. : T.N. Hareendran, Adv.

Judgement :

Arijit Pasayat, C.J.

1. Scope and ambit of the proviso to Section 36 of the Kerala Abkari Act (1 Karkadagom 1077, corresponding to English calendar 1902) (in short, the Act), which was extended to the whole of Kerala with effect from 11th day of May, 1957 by Act (10 of 1967) is under consideration. This has become necessary as there was clearvage in view expressed by two learned single Judges. In Ramchandran Nair v. State, 1990 (1) KLT 44, it was held that prosecution had failed to give explanation for non-compliance with the conditions stipulated in proviso to Section 36 and, therefore, accused was entitled to acquittal. Contrary view appears to have been taken in Job v. State of Kerala, 1999 (1) KLT 491 : 1991 Cri LJ 2180. In view of this divergence, learned single Judge, before whom present petition was placed for hearing, has made a reference to this Court.

2. In order to appreciate the rival contentions, it is necessary to quote Section 36 :

36. Searches how to be made :- All searches under the provisions of this Act shall be made in accordance with the provisions of the Code of Criminal Procedure, 1898.

Provided that the persons called upon to attend and witness such searches shall include at least two persons neither of whom is an Abkari, Police or Village Officer.

3. Main part of Section 36 mandates that all searches under the provisions of Act are to be in accordance with provisions of Code of Criminal Procedure, 1973 (in short, the Code). Originally the expression read Code of Criminal Procedure, 1898' (in short, the old Code) which has been subsequently amended. In the Code, modalities of search are indicated in Chapter VII under the heading 'processes to compel the production of things. Under the sub-heading (c), 'general provisions relating to searches' are dealt with. Section 99 of the Code corresponds to old Section 99. Section 100 of the Code has eight sub-sections. Sub-sections (1), (5), (6) and (8) relate to Sub-section (1) of old Section 102 and Sub-sections (2), (3) and (5) of Section 103 of old Act respectively, word for word. Sub-section (2) reproduces Section 102(2) and Sub-section (7) reproduces Section 103(4) with only change in respect of Sections referred to therein. Sub-sections (3) and (4) correspond to Sub-section (3) of Section 102 and Sub-section (4) corresponds to Sub-section (1) of old Section 103. In Sub-section (4), certain words viz. 'or of any

other locality if no such inhabitant of said locality is available or is willing to be a witness to the search, to attend' have been added and appear to have been made to ensure that witnesses for search are disinterested persons and to provide that witnesses may be of any other locality if respectable and independent witnesses of the locality are not available or are not willing to be witness of search. Section 101 of the Code corresponds to old Section 99. Proviso to Section 36 provides that persons called upon to attend and witness such searches shall include at least two persons neither of whom is an Abkari, Police or Village Officer.

4. Question is whether the provision is mandatory or directory. According to learned counsel for State, provision is directory as it relates to a procedure. On the other hand, according to learned counsel for accused, provision is mandatory, more so when it is incorporated by way of a proviso. Use of the word 'shall' is said to be determinative of the question. Study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage, Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of legislature by carefully attending to whole scope of the statute to be considered' (see Liverpool Borough Bank v. Turner (1861) 30 LJ Ch 379. As stated by Supreme Court, 'the question as to whether a statute is mandatory or directory depends upon intent of the legislature and not upon the language in which the intent is clothed. Meaning and intention of legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the only way or the other' (see State of U.P. v. M.L. Shrivastava, AIR 1957 SC 912. As stated in State of U.P. v. Baburam Upadhyama, AIR 1961 SC 751, for ascertaining the real intention of the legislature, Court may consider, inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the

circumstances, namely, that the statute provides for a contingency of the noncompliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty, serious or trivial consequences, that flow therefrom; and above all, whether the object of legislation will be defeated or furthered. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory. If a provision is mandatory, an act done in breach thereof will be invalid, but if it is directory, the act will be valid although the non-compliance may give rise to some other penalty if provided by the statute.

5. It has often been said that a mandatory enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. The latter half of this proposition is, however, not quite accurate as even a complete non-compliance of a directory provision has been held in many cases as not affecting the validity of the act done in breach thereof. It has been suggested that directory requirements fall under two heads; (1) Those which should be substantially complied with to make the act valid; (2) those which even if not at all complied with have no effect on the act. The correct position appears to be that substantial compliance of an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the non-compliance of directory requirements. Point may be explained by taking an example of a set of service rules which provide that adverse remarks shall be communicated to the civil servant concerned ordinarily within seven months. Object of communicating the adverse remarks is to give an opportunity to the civil servant to improve his performance to make up the deficiency noticed in his work and to give him an opportunity to represent against the remarks, in case he disputes them, to the reviewing authority. In the light of this object and having regard to the part adverse remarks play in service career, rules on a proper construction will require; (i) communication of the remarks to civil servant concerned; (ii) communication within a reasonable time; and (iii) communication ordinarily within seven months. First

two requirements will be construed as mandatory and noncompliance of either of them will make the remarks as also any adverse action on their basis invalid. Third requirement will be treated as directory and its non-compliance alone will not make the remarks invalid if the first two requirements are satisfied. This example illustrates the lumping of mandatory and directory requirements at one place and substantial compliance with them if mandatory part is complied with even if the directory party is not complied with. Coming to the plea that stipulation being part of a proviso, it is mandatory, the true import of a proviso has to be noted. Normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As stated by Lush, J. 'when one finds a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso' see Mullins v. Treasurer of Survey, (1880) 5 QBD 170. In the words of Lord Macmillan: 'The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case see Madras and Southern Maharatta Railway Co. Ltd. v. Bezwada Municipality, AIR 1944 PC 71. Proviso may, as Lord Macnaghten laid down, be a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. As stated in Dibya Singh Malana v. State of Orissa, AIR 1989 SC 1737, proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, main enactment, a portion which, but for the proviso would fall within the enactment. Ordinarily, it is foreign to the proper function of proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. Further, a proviso is not normally construed as nullifying the enactment or as taking away completely a right conferred by the enactment. As a consequence of aforesaid function of a true proviso certain rules follow.

6. Except as to cases dealt with by it, a proviso has no repercussion on the interpretation of the enacting portion of the section so as to exclude something by implication which is embraced by clear words in the enactment. Further, as stated

by Lord Watson in an oft-quoted passage :

If the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso.

So, when on a fair construction the principle provision is clear, a proviso cannot expand or limit it. See Dwarka Prasad v. Dwarka Das Saraf, AIR 1975 SC 1758, where the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms see Madras and Southern Maharatta Rly. Co. Ltd. v. Bezwada Municipality, AIR 1944 PC 71.

7. Apex Court had occasion to consider an almost similar provision, i.e. Section 10(7) of Prevention of Food Adulteration Act, 1954 (in short, the PFA Act), in Babu Lal Hargovindas v. State of Gujarat, AIR 1971 SC 1277 : 1971 Cri LJ 1075, wherein Court observed thus at page 1078; of Cri LJ :

5...In the first place we do not think that having regard to findings based on an appreciation of evidence of the Panch witness and the Food Inspector that the milk was bottled and sealed, signed and attested by the Panch witness in the presence of the accused as spoken to by the Food Inspector can be challenged before us as those are findings of facts. In the second place, there is nothing to indicate that the provisions of Sub-section (7) of Section 10 have been complied with. Even otherwise in our view no question of the trial being vitiated for noncompliance of these provisions can arise. It is not a rule of law that the evidence of the Food Inspector cannot be accepted without corroboration. He is not an accomplice nor is it similar to the one as in the case of wills where the law makes it imperative to examine an attesting witness under Section 68 of the Evidence Act to prove the execution of the will. The evidence of the Food Inspector alone if believed can be relied on for proving that the samples were taken as required by law. At the most Courts of fact may find it difficult in any particular case to rely on the testimony of the Food Inspector alone though we do not say that this result generally follows. The circumstances of each case will determine the extent of the weight to be given

to the evidence of the Food Inspector and what in the opinion of the Court is the value of his testimony. The provisions of Section 10(7) are akin to those under Section 103 of the Criminal Procedure Code when the premises of a citizen are searched by the police. These provisions are enacted to safeguard against any possible allegations of excesses or resort to unfair means either by the Police Officers or by the Food Inspector under the Act. This being the object it is in the interests of the prosecuting authorities concerned to comply with the provisions of the Act, the noncompliance of which may in some cases result in their testimony being rejected. While this is so we are not to be understood as in any way minimissing the need to comply with the aforesaid salutory provisions. In this case, however, there is no justification in the allegation that the provisions have not been complied with because the Panch witness had been called and his signatures taken which he admits. In these circumstances, the Courts were justified on the evidence of the Food Inspector that he had complied with the requirements and that the samples were seized in the presence of the Panch witness whose signatures were taken in the presence of the accused.

While observing, in Ram Labhaya v. Municipal Corporation of Delhi, AIR 1974 SC 789 : 1974 Cri LJ 672, that one or more independent witness to be present at the time of search, it was clarified that regardless of all circumstances, absence of such witnesses would not vitiate the trial. Reference was made to the decision in Babulal's case (supra) that non-compliance would not vitiate the trial and since Food Inspector was not in the position of accomplice, his evidence alone, if believed, can sustain conviction.

8. Section 100(4) of the Code deals with the requirement to call upon two or more independent and respectable inhabitants of the locality to attend and witness the search. If no such inhabitant of the locality is available or is willing to be a witness to the search, to attend and witness the search, he can call witness from any other locality. The officer or other person about to make the search may issue an order in that regard to them or any of them so to do. In State of Punjab v. Wassan Singh, AIR 1981 SC 697 : 1981 Cri LJ 410, it was observed that omission on the part of investigating officer to join with him some independent persons or respectables of the locality to witness the recovery devalues that evidence, but that does not

render it inadmissible. It was for the Court of fact to consider the weight of evidence.

9. Search and seizure are essential steps in the armoury of an investigator in the investigation of a criminal case. Code of Criminal Procedure itself recognises the necessity and usefulness of search and seizure during investigation as is evident from provisions of Sections 96 - 103 and Section 165 of the Code. In M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 : 1954 Cri LJ 865, challenge to the power of issuing a search warrant under Section 96(1) as violative of fundamental rights was repelled by the Constitution Bench of the Apex Court on the ground that power of search and seizure in any system of jurisprudence is an overriding power of State for protection of social security. It was also held that a search by itself is not a restriction on the right to hold and enjoy property, though a seizure may be a restriction on right of possession and enjoyment of seized property, but it is only temporary and for the limited purpose of an investigation. Court opined at Page 872; of Cri LJ :

A power of search and seizure is in any system of jurisprudence an overriding power of the State for protection of social security and that power is necessarily regulated by law. When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches.

Court also opined :

A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is a necessary and reasonable restriction and cannot per se be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. We are unable to see how any question of violation of Article 19(1)(f) is involved in this case in respect of the warrants in question which purport to be

under the first alternative of Section 96(1) of the Criminal Procedure Code.

The position was reiterated in State of Punjab v. Baldev Singh, AIR 1999 SC 2378 : 1999 Cri LJ 3672.

10. Requirement under the proviso is clearly linked with the procedure to be followed while conducting search and that is in terms of the Code. Category of persons to be called upon to attend and witness the search is indicated in the proviso and they have really nothing to do with mandatory or directory nature of the provision.

11. It is also necessary to consider the effect of non-compliance with the requirements under proviso to Section 36 of the Act. Decision of Apex Court in Baldev Singh's case (supra), which dealt with the scope and ambit of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985, throws considerable light on the controversy. In para 55 of the judgment, conclusions have been recorded. Conclusions (5) to (7) read as follows :

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or aquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot

be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

xx xx xx xx xx xx.

Thus, in the facts and circumstances of each case, effect of non-compliance is to be examined.

12. In view of the above position, it is clear that Section 36 only provides safeguard to accused during search and even if there is any infraction, that will not vitiate the trial if materials brought on record justify the conviction. It is for the Court to decide what weightage can be attached to the evidence in that regard. Learned counsel for State submitted that the provisions of Section 36 have no application to the facts of case as search related to a person and was not relatable to a place of search. We do not think it necessary to answer the question as that is not the point of reference. In any event, this aspect can be highlighted before learned single Judge when the matter is taken up on merits.

The reference is accordingly answered.