

Devki Nandan and ors. Vs. State of Rajasthan and anr.

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Court : Rajasthan

Decided On : Jan-15-1995

Reported in : 1996(2)WLC163; 1996(1)WLN12

Judge : R.R. Yadav, J.

Appeal No. : S.B. Cr. Bail Application No. 2261 of 1995

Appellant : Devki Nandan and ors.

Respondent : State of Rajasthan and anr.

Disposition : Application dismissed

Judgement :

R.R. Yadav, J.

1. This is an application for bail filed by the accused petitioners in the case under Sections 8/19 and 8/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as 'N.D.P.S. Act').

2. The prosecution case stated in brief as disclosed in the FIR No. 1/95 lodged on 21.10.95 at 8.00 p.m. is that in the crop year 1994-95 the accused petitioners alongwith other cultivators have been granted licences for opium poppy cultivation as per policy decision taken by the Central Government.

3. All the licenced cultivators were under obligations to deliver all opium produce of their plots cultivated with opium poppy as stipulated in their licences. It is further alleged that the accused persons named in the said FIR hatched a conspiracy by committing forgery in the Preliminary Vehement Register (hereinafter referred as 'P.W.R.') commonly known as 'Kachcha Taul Register' and in the process they changed the pages of P.W.R. so that their villages may be declared damaged opium crop are and they can show less opium produced by them.

4. It is also alleged that the accused persons named in the FIR have collected Rs. 2,000/- from each cultivator of villages Jawanpura, Hanseda, Amargarh, Bhaggu Nagar and Meghpura etc, and gave it to one 'Aarakshi' of the department. The total collection at the aforesaid rate after investigation was found to be Rs. 2,51,000/- at the time of lodging the FIR.

5. It is further alleged in the FIR that Devki Nandan after giving bribe to some of the officials of the District Opium Office, Bhilwara obtained P.W.R. forms and changed the original P.W.R. forms by replacing new forms obtained from the officials of the department.

6. According to the FIR the aforesaid conduct of the cultivators of opium poppy amounts embezzlement of opium produced by them and also amounts hatching a conspiracy and as such they are liable to be punished under Sections 8/19 and 8/29 of the N.D.P.S. Act.

7. From the persual of the case diary it is to be remembered that the Present Pandora's Box of large scale embezzlement and disposal of opium by about 158 cultivators of aforesaid five villages situated within the territorial limits of District Opium Office, Bhilwara by greasing the palm of some of the officials posted at District Head quarter Bhilwara has not been detected by those officials who have been charged by the Central Government to keep surveillance to prevent embezzlement of opium and its disposal by cultivators within their territorial jurisdiction under N.D.P.S. Act and Rules framed thereunder.

8. The aforesaid brutal episode involving upto this stage of investigation 158 cultivators of aforesaid five villages has been brought to took on complaint of some

unknown persons to the Narcotic Commissioner of India at Gwalior (M.P.) Copies whereof appears to have been forwarded to Dy. Narcotic Commissioner, Kota and District Opium Officer, Bhilwara.

9. The case diary produced by the Investigating Officer in the present case reveals complicity of some of the officials functioning at District Opium Office, Bhilwara and even after knowing their complicity in the offence no attempt appears to have been made by the Investigating Officer to obtain previous sanction of the Central Government to prosecute them.

10. There is no material available on record to suggest that any initiative has been taken by the Investigating Officer to obtain such previous sanction of the Central Government as contemplated under Section 59 of the N.D.P.S. Act. It would be profitable to quote Sub-sections (2) and (3) of Section 59 of the N.D.P.S. Act which reads thus -

59. Failure of officer in duty or his connivance at the contravention of the provisions of this Act. -(1) XXX XXX XXX

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XXX XXX(2) Any officer on whom any duty has been imposed by or under this Act or any person who has been given the custody of - (a) Any addict; or (b) any other person who has been charged with an offence under this Act, and who wilfully aids in, or connives at, the contravention of any provision of this Act or any rule or order made thereunder, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

Explanation.-For the purpose of this Sub-section the expression 'officer' includes any person employed in a hospital or institution maintained or recognised by the Government or a local authority under Section 64A for providing de-addiction treatment.

3. No Court shall take cognizance of any offence under Sub-section (1) of Sub-section (2) except on a complaint in writing made with the previous sanction of the Central Government or as the case may be, the State Government.

11. It is a mystery in the present case until date who was the proper officer entrusted under statutory Sub-rule (4) of Rule 13 of the N.D.P.S. Rules to conduct check of vehement of opium collected by the cultivators of aforesaid five villages with reference to the entries in the Lumberdars record i.e. five forged P.W. Rs. in question and to indicate his finding therein which was further required to be attested by him and Lumberdar under their signatures. Who was the officer who accepted delivery of the opium from such large number of cultivators of these five villages on basis of entries made in five forged P.W. Rs. in question.

12. It is further a mystery in the present case who was the proper officer under Sub-rule (5) of Rule 13 of the N.D.P.S. Rules of these five villages who was required to check variations between the quantity of opium actually produced by the cultivators of these five villages and some other villages if any and the incorrect quantity shown in the Lumberdars' record i.e. P.W.R. Uptil this stage of investigation it is unknown who was the proper officer to ascertain the liability of the cultivators of these five villages for punishment under Section 19 of the N.D.P.S. Act. How under Rule 20 of the N.D.P.S. Rule, 1985 the District Opium Officer, Bhilwara having regard to the weight and consistence of opium delivered by individual cultivators, worked out the weight of such opium at the standard consistence and determined provisionally the total price payable to these cultivators of five villages. How said officer paid these cultivators ninety percent of the price so determined on the basis of entries made in these five forged registers as envisaged under Sub-rule (2) of Rule 20 of the said Rules. Under what circumstances forgery done in five registers in question could not be detected upto final payment of price to these cultivators is to be ascertained by investigating officer. These questions required detailed and through minute investigation in order to avoid such brutal episode in future and to inculcate discipline among the officials working at District Opium Office, Bhilwara.

13. With anguish I am making the aforesaid observations to sensitise Central Bureau of Narcotics Department to have a reliable eye and ears in future to control embezzlement of opium and its disposal by licenced cultivators at District Opium Office, Bhilwara and also to sensitise investigating agency conducting investigation in the present case.

14. Judicial restrain does not permit me to say more than this that today it is found at Bhilwara District Opium Office where large number of licenced cultivators have committed embezzlement and disposed-off their opium in clandestine manner in connivance of some of the officials and tomorrow it could be at some other place unless the present case is dealt with firmly.

15. The investigation in the present case is required to be conducted objectively with absolute impartiality testing the conduct of the officials also involved in the case otherwise the present investigation would lead to grotesque result.

16. Now days narcotic mafia have developed nexus with terrorist having international ramifications. Spreading poison of opium is being used by some of the smugglers having terrorist nexus as a weapon to destroy our society. It should not be forgotten that in murder case the accused commits the murder of one or two persons while those persons who are dealing in opium as an intoxicant drug are causing death of number of persons in our society and ruining their life. Such criminals are hazard to the society hence they are required to be identified properly by investigating agency in the present case and they are liable to be punished.

17. With the aforesaid introspection now I propose to dispose-off the present bail application of the accused petitioners.

18. It is contended by the learned counsel for the accused petitioners before me that statements recorded under Section 67 of the N.D.P.S. Act by Central Bureau of Narcotics have been recorded by giving them severe beating. The statements so recorded are neither voluntarily nor truthful.

19. It is also contended by the learned counsel for the accused petitioners that apart from the aforesaid facts the accused petitioners have retracted from their statements at the first available opportunity hence such statements cannot be the sole basis for implicating them in the present case.

20. I am not impressed with the aforesaid arguments inasmuch as it is a case of conspiracy where there could be no direct evidence. It is a well known fact that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can only be proved largely from the inferences drawn from acts or illegal omissions committed by the conspirators in pursuance of their common design. The investigation is at progress yet even at this stage the statements recorded under Section 67 of the N.D.P.C. Act found corroboration from five forged registers of village Jawanpura, Amargarh, Hanseda, Bhaggu Nagar and Maghupura, therefore, it is not correct to argue that there is no corroboration to the statements recorded under Section 67 of the N.D.P.S. Act.

21. Apart from five forged registers it is pertinent to mention that there are statements of some of cultivators of the aforesaid five villages available on the case diary who have given their statements under Section 67 of the N.D.P.S. Act to the effect that they have refused to pay Rs. 2,000/- demanded by some of the accused petitioners to make an entry in new P.W.R. showing less weight of opium produced by them. They have also stated that they have signed on earlier P.W.R. but present P.W.R. do not contain their signatures.

22. No injury report or any material has been brought to my notice that these statements have been obtained by giving severe beating to the accused petitioners.

23. It is true that the accused petitioners have filed six photostat copies of telegrams in support of their argument that some of the accused petitioners were detained illegally by the department and allegations of beatings are also made. In my considered opinion firstly these telegrams sent by some of the accused petitioners have no evidenciary value and secondly even if assuming for argument sake that these telegrams have some testimonial valued its testimonial value has to be evaluated at the time of trial not at the stage of granting bail.

24. In support of his aforesaid contention the learned counsel for the accused petitioners placed reliance on a decision rendered by a learned Single Judge of Bombay High Court in the case of Arvind Mehram Patel and Anr. v. The Intelligence Officer, Narcotics Control Bureau, Bombay reported in 1991 Cr.L.J. 382 where testimonial value of the statements recorded under Section 67 of the N.D.P.S. Act was evaluated by the learned Single Judge at the stage of granting bail.

25. The facts of the case of Arvind Mehram Patel (supra) are distinguishable to the facts and circumstances of the present case as in the aforesaid case learned Single Judge has recorded a positive finding about several injuries received by the accused petitioners but in the present case no injury report has been brought to my notice by the learned counsel for the accused petitioners to suggest that the aforesaid statements have been recorded by the Narcotics Department after giving them severe beating or under coercion.

26. Another distinction which is pertinent to note in the present facts and circumstances of the case is that here there are corroborations of the statements recorded under Section 67 of the N.D.P.S. Act while in the case of Arvind Mehram Patel (supra) there was no such corroboration.

27. It is next contended by the learned counsel for the accused petitioners that the powers of High Court to grant bail under Section 439 Cr.P.C. are not subject to the limitations contained in the amended Section 37 of the N.D.P.S. Act. In support of his aforesaid contention the learned counsel for the accused petitioners again placed reliance on the case of Arvind Mehram Patel (supra).

28. I am not able to persuade myself to subscribe the view taken by learned Single Judge in the case of Arvind Mehram Patel (supra) to the effect that the powers of High Court to grant bail under Section 439 Cr.P.C. are not subject to the limitations contained in the amended Section 37 of the N.D.P.S. Act. In my considered opinion the decision rendered in the case of Arvind Mehram Patel (supra) relied upon by the learned counsel for the accused petitioners does not hold water in view of the decision rendered by the apex court in the case of Narcotic Control Bureau v. Kishan Lal and Ors. reported in : 1991 CriLJ654 where

their lordships specifically ruled that the powers of the High Court to grant bail under Section 439 Cr.P.C. are subject to the limitations contained in the amended Section 37 of the N.D.P.S. Act.

29. It is next contended by the learned counsel for the accused petitioners that the accused petitioners are bonafide opium growers under valid licences and they are being falsely implicated in spite of the fact that due to heavy rains and hail storm the opium crop cultivated by them were badly damaged throughout the circle.

30. The aforesaid fact has been denied by the Investigating Officer by filling an affidavit. Investigating Officer has clearly stated in his affidavit that in the crop year 1994-95 no such damage partial or extensive whatsoever was reported in the villages in question. However, these facts relates to the defence of the accused petitioners which can be raised by them at the time of trial not at the stage of granting bail.

31. The last contention of the learned counsel for the accused petitioners before this Court is that since this Court on 15.11.95 directed an order in open court enlarging the accused petitioners on bail, therefore, now it is not open to review or alter the aforesaid order. In support of his aforesaid contention the learned counsel for the accused petitioners placed reliance on a decision rendered by learned Single Judge of this Court in the case of Dhanna and Ors. v. State of Rqjasthan reported in 1963 (1) Cr.L.J. 615 according to which a judgment delivered orally in open court is not open to review or alter because it has not been signed.

32. It is true that on 15.11.95 this Court dictated an order enlarging the accused petitioners on bail in open court due to non-production of case diary but before signing the order it was detected that in the bail application the accused petitioners have not impleaded the Union of India as a party. As a matter of fact in place of Union of India as a party State of Rajasthan was impleaded as a party.

33. In view of the aforesaid facts and circumstances the court declined to sign the order dictated in open court and immediately called Shri Manish Sisodia, learned counsel for the accused petitioners and pointed out how the accused petitioners can be enlarged on bail due to non-production of case diary by prosecuting

agency when Union of India is not impleaded as a party. It was also asked from Shri Manish Sisodia as to how Shri Purohit or Shri Lal can be allowed to represent Union of India without impleading it as a party.

34. After giving subsequent hearing and after looking into the mandatory provisions of Section 37 of the N.D.P.S. Act following order-sheet was drawn which reads thus -

15.11.95

Heard.

Put up this case for further hearing on 27.11.95. Meanwhile the learned counsel for the applicants should amend the bail application impleading Union of India as a party. He is directed to file amended cause title within three days from today.

Office is directed to list this case showing the name of learned counsel for Union of India Shri P. P. Choudhary in the cause list.

35. It is well to remember that a counsel or Public Prosecutor gets an authority to represent his client only if it is impleaded in a particular case. If the client to whom he intends to represent is not impleaded as a party his representation cannot said to be on behalf of that party to whom, he intends to represent. On the aforesaid consideration in my considered opinion Public Prosecutor who appeared on behalf of Union of India which was not impleaded as a party could not amount sufficient compliance of Section 37 of the N.D.P.S. Act. Thus the oral dictation in open court on 15.11.95 without impleading Union of India as a Party was against the principle of natural justice and as such it was nullity. No question of opposing bail by Public Prosecutor and production of case diary could arise unless the Union of India is made as a party in the present case.

36. The learned counsel for the accused petitioners himself realised the inherent mistake going to the root of the case and moved an application for impleading Union of India as a party and he also filed amended cause title within three days from the date of order. Immediately after impleadment of Union of India the case diary was produced which revealed involvement of accused petitioners in a

heinous crime and Shri P.P. Choudhary representing Union of India vehemently opposed the present bail application.

37. It is true that Section 362 Cr.P.C. is applicable to the trial court not to the appellate or revisional court yet it has to be read alongwith Section 387 Cr.P.C which provides that the rules contained in chapter XXVII as to the judgment of a criminal court of original jurisdiction shall apply so far as may be practicable to the judgment in appeal of a court of Session or Chief Judicial Magistrate. A conjoined reading of both the sections clearly indicate that these sections are general in its application. The expression 'no court' would include all courts including High Court in respect of all judgments including appeals, revisions and bail orders provided the court has signed it.

38. My aforesaid view is buttressed by a decision rendered by the apex court in the case of State of Orissa v. Ram Chander Agerwal reported in : 1979 CriLJ33 where their lordships which interpreting Sections 369 and 424 Cr.P.C. ruled in para 14 which reads thus-

14. XXX XXX XXX XXX XXX XXX XXX XXX XXX XXXXXXXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXXXXXXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXXXXXXX XXX XXX XXX XXX XXX XXX XXX XXX XXX XXXXXXXX XXX XXX XXX XXX XXX XXX XXX XXX While Section 369 prohibits altering or reviewing the judgment after a court has signed its judgment, Section 424 requires that the judgment of the appellate court shall, as far as applicable (sic) (possible ?) be in accordance with Sections 366, 367 and 368 of the Criminal Procedure Code, which deals with the trial court. Sections 369 and 424 do not restrict the prohibition Under Section 369 to the trial court alone. The purpose of Section 424 is to prescribe mode of delivering of judgment, the language and the contents of the judgment while Section 369 is general in its application and prohibits all courts from altering or reviewing its judgment when it once has signed it.

39. It is to be noticed that Section 362 Cr.P.C. corresponding to old Section 369 Cr.P.C. clearly provides that no court when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error leads to the conclusion that the court has authority to alter or

review its dictation in open court specially when a basic fact which was unknown at the time of such dictation comes to its knowledge going to the root of the case making the order so dictated per se illegal and nullity provided it is not signed. Once it is signed the High Court is not empowered to review, revise or alter its judgment or final order within its criminal jurisdiction except to correct clerical or arithmetical errors.

40. For the reasons stated hereinabove the decision relied upon by the learned counsel for the accused petitioners in the case of Dhanna and Ors. (supra) rendered by learned Single Judge of this Court cannot be said to be a good law in view of the decision rendered by the apex court in the case of State of Orissa v. Ram Chander Agrawal (supra).

41. In the present case after impleadment of Union of India and after hearing learned Public Prosecutor Shri P.P. Choudhary at length who vehemently opposed the bail application of the accused petitioners and also after careful perusal of the case diary. I am not satisfied that there are reasonable grounds for believing by the prosecution agency.

42. On the facts and circumstances of the case and for the foregoing reasons the Court is clearly of the opinion that the instant bail application lacks merit. It is, therefore, dismissed.

43. The two sets of case diary and the five registers produced by the prosecution agency are hereby returned to learned Public Prosecutor Shri P.P. Choudhary. It is made clear that any observations made in the present order will not come in the way of the accused petitioners as well as prosecution at the stage of trial.

44. Registry of the Court is directed to send a copy of this order to the Home Secretary, Government of India, Finance Secretary-in-charge of Department of Revenue, Government of India as well as Narcotics Commissioner of India at Gwalior (M.P.) forthwith for such action as they deem fit and proper to ensure that real perpetrators of crime in the present case may not escape punishment and innocent may not suffer.

