

J.E. Gubbay Vs. Emperor

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Court : Kolkata

Decided On : Dec-11-1935

Reported in : AIR1936Cal65

Appellant : J.E. Gubbay

Respondent : Emperor

Judgement :

ORDER

1. The facts and circumstances of the case giving rise to the applications on which these Rules were issued may be briefly stated: An investigation in which the complicity of the petitioners in the matter of offences contemplated by Section 46, Bengal Excise Act, has been started by the Excise authorities, and the petitioners were during the course of such investigation arrested. On furnishing bail to the satisfaction of the Magistrate before whom the petitioners were placed after their arrest, they were released from custody. At a time when they were on bail an Inspector of Excise applied to the Magistrate for permission to take measurements and photographs of the petitioners, and it was mentioned in the application that measurements and photographs were required for the purpose of the investigation. The application for taking measurements and photographs was made under Section 5, Identification of Prisoners Act, and the Magistrate in his order recorded on 1st November 1935 stated that he was satisfied that for purposes of investigation of the case photographs and measurements were necessary; and direction was given to the petitioners to allow them to be taken. As

against the aforesaid order of the Magistrate, the petitioners moved the learned Sessions Judge of the 24 Perganas, with the result that the Judge held that the Magistrate was competent to pass the order. The Sessions Judge in the order passed by him on 9th November 1935 stated also that the petitioner had secured reduction of their bail by undertaking to assist the authorities. The Judge directed the petitioners to show cause why their bail should not be enhanced. The Rules granted by this Court are directed against the orders passed by the Sessions Judge.

2. The main points raised in support of the Rule were that the investigation of the Excise Authorities not being one under the Code of Criminal Procedure, Section 5, Identification of Prisoners Act, could not possibly apply; the Excise authorities had no power to apply for taking measurements and photographs, and the Magistrate had no authority to grant such application, as was done by him on 1st November 1935. The questions must, in our opinion, be answered against the petitioners in view of the clear provisions contained in Section 74 and Section 81, Bengal Excise Act, which make the provisions of the Code of Criminal Procedure applicable to investigations by Excise Officers. The Bengal Excise Act does not lay down a complete procedure for investigation of offences under the Act; and the provisions of Chapter 9 of the Act relating to the procedure in the matter of detection, investigation and other matters including trial of offences, in which Sub-section 74 and 81 referred to above find place, leave no doubt that it was mainly the procedure laid down in the Code of Criminal Procedure that has to be followed in investigation into offences under the Bengal Excise Act. In the above view of the case, there can be no question as to the applicability of Section 5, Identification of Prisoners Act, under which a Magistrate is empowered to order a person to be measured and photographed for the purpose of any investigation or proceeding under the Code of Criminal Procedure. The definition of 'Police Officer' contained in Section 2, Identification of Prisoners Act, must be read now in the light of the decision of the Full Bench of this Court in *Ameen Sherif v. Emperor* 1934 Cal 580, in which it has been laid down that an excise officer, who in the conduct of an investigation of an offence against the excise, exercises the powers conferred by the Code of Criminal Procedure is a police officer. The decision of the Full Bench cannot be whittled down by saying that it is to be confined to the question whether

an excise officer in charge of an investigation was a police officer within the meaning and for the purposes of Section 25, Evidence Act, only, and for no other purpose.

3. The further contention urged in support of the Rule issued by this Court related to this: that the Magistrate's order did not indicate that he was satisfied on any materials placed before him, that measurements and photographs, as contemplated by Section 5, Identification of Prisoners Act, were necessary for the purposes of investigation by Excise authorities, and the direction in that behalf containing the order was erroneous and unsustainable. In our judgment there is no substance involved in this contention, as the order clearly states that the Magistrate was satisfied that for the investigation of the case photographs and measurements of the accused were necessary; the circumstance that no reasons were specifically stated by the Magistrate in his order does not make the order illegal. On the conclusions we have arrived at, as indicated above, the order passed by the learned Sessions Judge on 9th November 1935, affirming the Magistrate's order of 1st November 1935, must be upheld. The direction of the Sessions Judge that the petitioners are to show cause why their bail should not be enhanced, does not commend itself to us, as it proceeds solely on the basis that the petitioners had challenged the order of the Magistrate passed on 1st November 1935. In our judgment, the question whether there is any valid reason for enhancing the bail granted to the petitioners should be left to the Magistrate, who might very well deal with the matter of enhancement of bail, on materials placed before him, by the Excise Authorities, if they are so advised. In the result, the Rules are disposed of in the manner indicated above. The order of the Sessions Judge affirming those of the Magistrate are upheld. The Judge's orders directing the petitioners to show cause why their bail should not be enhanced is modified in the manner mentioned above.