

Subodh Singh Modak Vs. the State

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Court : Kolkata

Decided On : Dec-14-1972

Reported in : 1974CriLJ185

Judge : N.C. Talukdar, J.

Appellant : Subodh Singh Modak

Respondent : The State

Judgement :

ORDER

N.C. Talukdar, J.

1. This Rule is at the instance of the accused-petitioner, Subodh Singh Modak, and is directed against an order dated the 22nd July, 1972 passed by Shri Prafulla Kumar Roy, Sessions Judge, Purulia in Criminal Revision No. 10 of 1972 setting aside an order dated 29-4-1972 passed by Shri B. K. Dutta, Judicial Magistrate, 1st class Purulia in N. G. R. Case No. 130 of 1971 under Section 4 of the Bengal Criminal Law Amendment Act, 1942 quashing the criminal proceedings against him.

2. The facts leading on to the Rule can be put in a short compass. During the investigation of Manbazar P. S. Case No. 8 dated 21-3-1970 under Sections 395 and 397 of the Indian Penal Code, the police searched a house of the accused-

petitioner in the present Rule, namely, Subodh Singh Modak, and recovered one transistor radio with one license in the name of one Jagadish Misra, The radio and the license were thereafter seized by the police on the footing that the accused-petitioner failed to give a satisfactory explanation how he came by the same. In course of investigation the name of Jagadish Chandra Misra also transpired as having forged the license. The radio which was recovered was found concealed in a wooden chest. On the facts and circumstances referred to above the Investigating Officer submitted a prosecution report before the Sub-divisional Judicial Magistrate, Purulia for taking cognizance under Section 4 of the Bengal Criminal Law Amendment Act, 1942. The accused, Subodh Singh Modak was thereafter released on bail. In course of the proceedings an application was filed on behalf of the accused-petitioner praying for dropping the entire proceedings on the ground that the offence under Section 4 of the Bengal Criminal Law Amendment Act, 1942 being a non-cognizable offence the Investigating Officer could not have investigated into the same without the requisite order of a Magistrate. On hearing the parties the learned Judicial Magistrate by his order dated 29-4-1972 found in favour of the accused and quashed the proceedings against him directing that he may be discharged from the ball bond. On a motion being preferred by the State of West Bengal Shri Prafulla Kumar Roy, Sessions Judge, Purulia ultimately allowed the revisional application, set aside the order of the learned trying Magistrate and remanded back the matter to him to decide the same in accordance with law. This order has been impugned and forms the subject-matter of the present Rule.

3. Mr. Nalin Chandra Banerjee, Advocate (with Mr. Arun Kumar Mukherjee, Advocate) appearing in support of the Rule on behalf of the accused-petitioner, contended that the learned Sessions Judge erred in his interpretation of law on the point and the same has resulted in a failure of justice. Mr. Banerjee in this context submitted that there is a patent non-conformance to the mandatory provisions of Section 155 (2) of the Code of Criminal Procedure vitiating the resultant proceedings and the learned Sessions Judge on a mis-interpretation of the decisions of this Court and also of the Supreme Court ultimately held that there was no illegality or impropriety and on that footing remanded the matter back, Mr. N. R. Biswas, Advocate appearing on behalf of the State, joined issue. Mr. Biswas

contended that the investigation was really in the context of a cognizable offence under Sections 395 and 397, Indian Penal Code. Mr. Biswas next contended that the illegality was curable under Section 537, Criminal Procedure Code.

4. I have heard the learned Advocates appearing on behalf of the respective parties and gone through the materials on record. On ultimate analysis, I find that there is a considerable force behind the submissions of Mr. Banerjee. In the first place it is abundantly clear that the investigation was not in the context of cognizable offences, viz., under Sections 395 and 397, Indian Penal Code but only related to a search in the house of Subodh Singh Modak who was subsequently made an accused in the case under Section 4 of the Bengal Criminal Law Amendment Act, 1942 resulting in the seizure of a radio and a radio license. Mr. Banerjee contended that this search at the place of the present accused-petitioner is not directly related to the investigation in the cognizable offences under Sections 395 and 397, Indian Penal Code and, therefore, the interpretation given to the same by Mr. Biswas, namely, that the present investigation is not really in the context of a non-cognizable offence but is in the nature of an offshoot of the original investigation in cognizable offences. The provisions of Section 155 (2) of the Criminal Procedure Code are quite clear and mandatory. The steps of reasoning of the learned Sessions Judge, Purulia are that even if there has been such a non-conformance it is an illegality that is curable under Section 537, Criminal Procedure Code on the ground that the procedure adopted by the Investigating Officer was erroneous and irregular. He relied on the principles laid down in the case of *H. N. Rishbud v. The State of Delhi* : 1955 CriLJ526 . Mr. Biswas supported these reasons and contended that even if the investigation has been illegal that will not affect the competency of the Court to take cognizance and in any event the said non-conformance is curable. It is difficult to agree with Mr. Biswas. Firstly, because the provisions of Section 155, Criminal Procedure Code are quite mandatory and it has been held in a series of decisions, facts wherein have been sought to be distinguished from by the learned Sessions Judge, that such a non-conformance is a material one vitiating the ultimate proceeding. Secondly, the interpretation of the principles laid down in *H. N. Rishbud's* case is not a correct one. It is pertinent, therefore, to refer to the relevant findings arrived at by Mr. Justice Jagannadhadas, delivering the judgment of the Court in the said

case. It is, inter alia, as follows : - 'We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.' It is abundantly clear, therefore, that the ultimate principles laid down by the Supreme Court are based on two different steps, firstly, that the case had proceeded to a termination and secondly, that there has been a (sic)(no?) miscarriage of justice. The test of such miscarriage has been made quite clear by the Supreme Court, namely, that no objection was taken to the illegality in the first blush. In this particular case, the case has not proceeded to termination but at the earlier stage the objection was taken on behalf of the accused and given effect to by the learned Judicial Magistrate. The analogy of the said principles, therefore, would not hold good in the present case. It is a short and simple case where a non-cognizable offence was being investigated by the police without taking the previous order of the learned Magistrate concerned. The question is one of illegality and the question also is of not conforming to the procedure established by law. Article 21 of the Constitution of India has laid down in clear and unambiguous terms that no person shall be deprived of his life or personal liberty except according to the procedure established by law and this is quite distinct from the concept of due process of law in the American Constitution, Some meaning and effect must be given thereto. Even before the passing of the Constitution in our Country the well-known principle laid down by Jessel M. R. in the case of Taylor v. Taylor 1876-1 Ch D 420 was approved of by Lord Roche in the case of Nazir Ahmed v. King Emperor (1936) 63 Ind App 372 at pp. 381 and 382 : 37 Cri LJ 897 (PC) namely, that 'where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.' I respectfully agree with the said observations and I hold that a non-conformance to the mandatory provisions laid down in Section 155 (2), Criminal Procedure Code is a non-conformance to the procedure established by law and the impact thereof has been missed by the learned Sessions Judge, vitiating the ultimate order that he passed in setting aside the order for quashing the proceedings and sending back the case on remand. Justice demands that the said order should be set aside and due regard should be given to the order passed

by the learned Judicial Magistrate. The contentions of Mr. Banerjee accordingly succeed.

5. In the result, the Rule is made absolute; the order passed by Shri Prafulla Kumar Roy, Sessions Judge, Purulia on 22-7-1972 in Criminal Revision No. 10 of 1972 setting aside the order of quashing passed by Shri B. K. Dutta Judicial Magistrate, 1st Class, Purulia on 29-4-1972 in N. G. R. Case No. 130 of 1971 under Section 4 of the Bengal Criminal Law Amendment Act, 1942, is hereby set aside; and I uphold the order quashing the criminal proceedings pending against the accused-petitioner, as passed by the learned Magistrate.

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