

Tridip Mitra Vs. State of West Bengal

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Court : Kolkata

Decided On : Oct-07-2005

Reported in : 2006(2)CHN198

Judge : Pravendu Narayan Sinha, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 41, 42, 43, 51, 53, 55, 60 and 63; ;Arms Act - Sections 25, 27 and 35; ;Code of Criminal Procedure (CrPC) - Sections 451 and 457(1); ;Opium Act - Section 11; ;Madhya Bharat Act - Section 11; ;Forest Act

Appeal No. : C.R.R. No. 1705 of 2005

Appellant : Tridip Mitra

Respondent : State of West Bengal

Advocate for Def. : Prabir Chatterjee, Adv.

Advocate for Pet/Ap. : Joymalya Bagchi and; Rabi Shankar Banerjee, Adv.

Judgement :

Pravendu Narayan Sinha, J.

1. There visional application has been preferred by the petitioner assailing the order dated 12th April, 2005 passed by the learned Additional Sessions Judge, 6th

Court (Special Judge, NDPS), Barasat in connection with Case No. N26/05 arising out of Rajarhat P.S. Case No. 83 dated 7.3.05 under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act (in short NDPS Act) and under Section 25/27/35 of the Arms Act thereby refusing prayer of one Chinmoy Mitra for return of Tata Sumo vehicle bearing No. WB-24C/ 4382.

2. The prosecution story as depicted in the FIR lodged by S.I. of Police of Rajarhat P.S. is that, on 7th March, 2005 at 8.30 a.m. receiving source information police party of Baguiati I.C. kept watch at Badaka crossing near Indian Oil Petrol Pump on Megacity Road. At about 9.25 a.m. they noticed one cherry colour Tata Sumo and two motor cycles as per source information and when the police party challenged the vehicles, the said vehicles started fleeing away towards Hazra side. After a hot chase the police party apprehended the Tata Sumo vehicle. The other associates of the accused persons of the vehicle could be identified namely, Tridip Mitra and Manas Das and one young boy and young lady managed to escape on the said two motor cycles. On search one country made improvised firearm loaded with 303 live ammunition and one polythene pack containing 1.5 kg. Ganja and another polythene pack containing 1 kg. Ganja were recovered from the said Tata Sumo. From the R/C book of the said Tata Sumo it was ascertained that owner of the said vehicle is Tridip Mitra, son of Chinmoy Mitra. The accused Nani Gopal Sen who was arrested on the vehicle disclosed that, he is a member of the racket of Ganja peddling and leader of the racket is Tridip Mitra. The other persons of the gang, who managed to escape are Manas Das, Subhojit Basu and one lady Paramita of Baguiati. The police seized the vehicles and other articles by preparing a seizure list and started Rajarhat P.S. Case No. 83 dated 7.3.05 under Section 20(b) of the NDPS Act read with Section 25/27/35 of the Arms Act. The father of the petitioner, who was the holder of power-of-attorney, executed by Tridip Mitra filed an application before the learned Judge for return of the vehicle. The learned Judge by order dated 12.4.05 rejected the said application and hence, this revision.

3. Mr. Joymalya Bagchi, learned Advocate for the petitioner submitted that the petitioner Tridip Mitra is the registered owner of the vehicle. He executed a power-of-attorney in favour of his father, who is an acute cardiac patient and for his

illness he requires a vehicle. The vehicle is lying under the open sky as a result of which condition of the vehicle is deteriorating day by day on account of lack of maintenance and natural wear and tear. Chargesheet has already been submitted and the learned Judge could have exercised his power under Section 451 of the Code of Criminal Procedure (in short Code). If the vehicle is kept at thana compound open to sky, the vehicle would lose its value due to the heat of the sun and rain.

4. Mr. Bagchi further submitted that the law is now settled that owner of a vehicle should not suffer because of its remaining unused or by its misappropriation. When the investigation is over there is no use of keeping the vehicle at police station for an indefinite period till conclusion of trial. The confiscation proceeding, if any, may be started only after conclusion of trial and not before that. During trial consideration of the Court may be for production of the vehicle and, if vehicle is released on bond the owner must produce the vehicle in Court during trial. Even in NDPS cases Section 451 of the Code should be followed and there is no bar to return the vehicle by directing execution of bond imposing certain conditions. The learned Judge in the instant matter failed to appreciate the position of law and did not apply proper judicial mind. Accordingly, the order passed by the learned Judge should be set aside and necessary direction may be given to the learned Judge for returning the vehicle with some conditions. In support of his contention Mr. Bagchi cited the decisions in *Ashok Kumar v. State of Bihar* reported in : (2001)9SCC718 , *State of Madhya Pradesh v. Azad Bharat Finance Co.* reported in : 1967 CriLJ285 , *B.S. Rawant v. Shaikh Abdul Karim* reported in 1989 Cr.LJ 1998 and *Sunderbhai Ambalal Desai v. State of Gujarat* reported in : [2002]SUPP3SCR39 .

5. Mr. Prabir Chatterjee learned Advocate for the State submitted that Tridip Mitra, the present petitioner, is the leader of the gang who are engaged in peddling Ganja and the petitioner fled away from the said vehicle. The police report reveals that for the last six months the vehicle is used for carrying NDPS materials like Ganja and was used in committing offence. The statement of the driver made it clear that for the last six months the vehicle is used in carrying Ganja which is an offence under the NDPS Act. The learned Judge made no mistake by dismissing the application for return of the Tata Sumo vehicle.

6. After hearing the submissions of the learned Advocates for the parties I find that before the learned Judge, Special Court (NDPS Act) at Barasat Chinmoy Mitra, father of the present petitioner prayed for return of the vehicle. Chinmoy Mitra was not the registered owner of the vehicle. Chinmoy Mitra did not prefer revisional application before this Court. Before this Court present petitioner is Tridip Mitra, the registered owner of the Tata Sumo vehicle bearing registration No. WB-24C/4382. It is clear from the materials on record that Tridip Mitra is the accused in the case bearing No. N26/05 before the Special Judge, NDPS Act and according to police report, the present petitioner is the leader of the racket who are engaged in carrying or peddling Ganja illegally. The alleged power-of-attorney is dated 6.3.05 and it was not registered and it was before Notary Public. At the first page of the said document towards top there are overwriting relating to date. The significant date is 7.3.05 when the vehicle was apprehended by Baguiati I.C under Rajarhat P.S. Without entering into further details I make it clear that no reliance can be placed on this general power-of-attorney which is unregistered and, where there are over writings at the top of first page relating to date. Possibility of its creation with antedate after the incident dated 7.3.05 cannot be ruled out. This document is suspicious and it fails to gain confidence of the Court for any action and no order can be passed for return of vehicle relying on such document. The order dated 12.4.05 passed by the learned Judge rejecting prayer for return of the vehicle made by Chinmoy Mitra cannot be regarded as improper or bad in law and the said order does not require any interference by this Court.

7. The crux for consideration is whether the petitioner, who is an accused in the case and is the registered owner of the vehicle, is entitled to receive the vehicle in his possession during pendency of the trial. The order dated 12.4.05 passed by the learned Judge reveals that the learned Judge rejected the prayer of Chinmoy Mitra for return of seized Tata Sumo observing that the case was at the early stage of investigation. From paragraph 14 of the revisional application it appears that the petitioner has mentioned therein that chargesheet has already been submitted. Under Section 60 of the NDPS Act the vehicle used in carrying any narcotic drug or psychotropic substance or any article liable to confiscation, unless the owner proves that it was so used without the knowledge or connivance of the owner himself, his agent, and the person in charge of the vehicle and that each of

them had taken all reasonable precautions against such use. In this case, the petitioner is himself the accused and naturally question of taking reasonable precaution or plea of use of the vehicle without his knowledge is not available to the petitioner at this stage, unless in evidence it is established that Tridip Mitra, the present petitioner was not in the vehicle at the time of alleged offence. Be that as it may, the confiscation proceeding, if any, may start after conclusion of trial. At this stage, during trial the main question before the Court would be the production of the vehicle on the dates of trial. The Tata Sumo vehicle allegedly was used in carrying narcotic and psychotropic substance and, according to the police only 2.5 kgs. Ganja in two polythene packs were found in the vehicle. The seizure list reveals that the said 2.5 kgs. Ganja were not seized from the possession of this petitioner and the same was seized from the Tata Sumo vehicle. When the learned Judge rejected the prayer of Chinmoy Mitra it was early stage of investigation but, if the contention of the revisional application is accepted chargesheet has been submitted. It is expected that since 7.3.05 up to this date during the last seven months definitely investigation has been completed. The consideration would be whether at such a stage the vehicle can be returned to the petitioner or kept at thana compound open to sky and under the heat of sun and rain and allow it to lose its value day to day due to lack of maintenance and natural wear and tear.

8. One of the considerations would be whether the said vehicle will be produced in the Court on the dates of trial or, before any other authority if so directed by Court and, whether it would be used again for committing such NDPS offence. Before the learned Judge the present petitioner did not file any application praying for return of the vehicle. If the petitioner agrees to give written undertaking and affidavit and conditions are imposed that the vehicle would not be used or involved in future in activities of committing any offence under NDPS Act and also the condition that he will produce the vehicle in the Court during trial or any other authority as may be directed by Court, whether the learned Judge can consider such prayer.

9. In this connection, it would be fruitful to refer the decisions placed by the learned Advocate for the appellant. The decision in Ashok Kumar v. State of Bihar

(supra) is a decision based on general principle relating to return of vehicle during pendency of trial. The Supreme Court held that, 'We do not think it necessary to keep the vehicle in the compound of the Court indefinitely for a very long time till the final disposal of the case. It is more advisable to entrust it to the registered owner on behalf of the Court under certain conditions.' The Supreme Court accordingly directed release of the vehicle on execution of a bond to the satisfaction of the Chief Judicial Magistrate, Muzaffarpur imposing certain conditions which are as follows :-

- i) He must satisfy the Court that he is the registered owner of the vehicle,
- ii) He shall not allow his son Deepak Singh to use the vehicle until disposal of the prosecution case against him. He shall file an undertaking in Court to that effect.
- iii) He shall produce the vehicle either before the Court or before such other authorities as the Court may direct.
- iv) He will not transfer the vehicle to anybody else not possession of the same be parted with until disposal of the Case.

10. In *State of Madhya Pradesh v. Azad Bharat Finance Co.* (supra), the case was relating to Section 11 of the Opium Act and the said Act provided confiscation proceeding. The Supreme Court observed that, 'In our opinion, the High Court was correct in reading Section 11 of the Madhya Bharat Act as permissive and not obligatory. It is well-settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory; it depends upon the context in which the word 'shall' occurs and the other circumstances.... Bearing all these considerations in mind, we consider that Section 11 of the Madhya Bharat Act is not obligatory and it is for the Court to consider in such case whether the vehicle in which the contraband opium is found or is being transported should be confiscated or not, having regard to all the circumstances of the case.

11. In *Sunderbhai Ambalal Desai v. State of Gujarat* (supra), the Supreme Court laid down guidelines for disposal of property including vehicles pending criminal trial. The Supreme Court laid down the law in the following manner:

In our view, whatever be the situation, it is of no use to keep seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.

In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If insurance company fails to take possession of the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared.' The Supreme Court also laid down the principles observing that, 'Similarly for the narcotic drugs also, for its identification procedure under Section 451, Cr. P.C. should be followed for recording evidence and disposal.

12. In *B.S. Rawant v. Shaikh Abdul Karim* (supra), the Bombay High Court passed order relating to interim custody of property seized in NDPS Act and observed that operation of Sections 451 and/or 457(1) of the Code not excluded by any provision of the NDPS Act. The Bombay High Court held that, the provisions of Section 41/42/43/51/53/55/60/63 of the NDPS Act do not exclude the operation of Section 451 or Section 457(1) of the Code. The High Court observed that, 'Under Sections 60 and 63 such an article or vehicle used for the purpose of commission of an offence under this Act, is liable for confiscation. In other words, the article or the vehicle must be available at the time of trial or at the end of the trial for the purpose of confiscation. It does not mean that the vehicle shall always remain at the concerned police station pending the trial.... Under Section 457(1) Criminal P C the learned Magistrate has a discretion to pass an order granting interim custody or to decline. But, in either case, the discretion has to be exercised judicially, and not in a cavalier fashion.

13. The Forest Act also prescribes confiscation of all kinds of vehicles used in transporting the forest produce illegally. A learned Single Judge of this Court in *Asis Base v. State of West Bengal* reported in 2005(2) C LJ 269 relying on an earlier decision of this Court in *Sri Jiban Aich v. State of West Bengal* reported in 2003 C Cr. LR (Cal) 929, passed order returning a vehicle involved in a case under the Forest Act putting condition and obtaining affidavit from the owner of the vehicle to the effect that, he shall not be involved with any further offence of carrying unauthorised forest produce in future. In *Jiban Aich (supra)* it was held by this Court that, 'Whereas the vehicle in question used for removing the forest produce cannot be presumed in all circumstances will be used only for committing such forest offence if released on condition. But such release should be on such strict terms and conditions that will have a deterrent effect on the owner of the same to indulge further in such activities in committing forest offence in future. Because in any event under the provisions of the aforesaid Act, upon such confiscation the vehicle in question would be required to be sold in option. In such case either the appellant-owner-petitioner or some other person would be entitled to purchase the same in such public auction. Thus, the purpose of the Act being to derive some fiscal benefit out of such confiscation, I am of the view that release of such vehicle upon payment of an amount which will have some deterrent effect upon the appellant-petitioner-owner will suffice the purpose.

14. The Supreme Court in *Section Forester and Anr. v. Mansur All Khan* reported in 2004 SCC (Cri) 333, interfered into an order of Karnataka High Court relating to release of confiscated vehicle involved in a forest offence during pendency of the proceeding. The Supreme Court observed that, though power of the High Court to direct interim release is undisputed but it is to be exercised for good reasons and in exceptional cases only. The Supreme Court further held that while doing so minimum condition of furnishing bank guarantee is to be strictly complied with.

15. The Supreme Court relied upon its own decision in *State of Karnataka v. K. Krishnan*, reported in 2000 SCC (Cri) 1289. In the said decision the Supreme Court laid down the law observing that, 'The Courts cannot shut their eyes and ignore their obligations indicated in the Act enacted for the purpose of protecting and safeguarding both the forests and their produce. The forests are not only the

natural wealth of the country but also protector of human life by providing a clean and unpolluted atmosphere. We are of the considered view that when any vehicle is seized on the allegation that it was used for committing a forest offence, the same shall not normally be returned to a party till the culmination of all the proceedings in respect of such offence, including confiscatory proceedings, if any. Nonetheless, if for any exceptional reasons a Court is inclined to release the vehicle. Release of such vehicle during the pendency, furnishing a bank guarantee should be the minimum condition.' Accordingly, in Section Foresters v. Mansur Ali Khan (supra) the Supreme Court held that, 'From the above dictum of this Court, we find that when a vehicle is involved in a forest offence the same is not to be released to the offender or the claimant as a matter of routine till the culmination of the proceedings which may include confiscation such vehicle. Release of such vehicle during the pendency of the proceedings though permissible, the same should be done for good reasons and that also upon a minimum condition of furnishing a bank guarantee as contemplated under the Act itself.

16. The decision of the Supreme Court in Sunderbhai Ambalal Desai and decision of the Bombay High Court mentioned above clearly reveals that, provisions of Sections 41, 42, 43, 51, 53, 55, 60 and 63 of the NDPS Act do not exclude operation of Sections 451 and 457(1) of the Code. The decision of this Court in Asis Bose v. State of West Bengal (supra) and Sri Jiban Aich v. State of West Bengal (supra) concerning Forest Act reveals that vehicle used in transporting forest produce should not be released normally but can be released imposing certain conditions which will have deterrent effect on the owner and putting different conditions including condition that the said vehicle henceforth shall not be used in indulging similar type of offence in future. Besides that, the general provision laid down by the Supreme Court in Sunderbhai Ambalal Desai (supra) cannot be ignored as it was observed that the vehicles should not be kept in Court compound or thana compound for indefinite period till the conclusion of trial to allow the vehicles lose its value open to sky, sun and rain. The Supreme Court and this Court clearly laid down the consideration of the Court is production of the vehicle at the time of trial and also during confiscation proceeding if any confiscation proceeding is started at all and for securing that the said vehicle is not used in similar type of offence in future. If Government fiscal policy of fetching

money by auction of vehicles after confiscation proceeding is considered then also it is desirable that the vehicles should be in good condition. A vehicle if kept at thana or Court compound open to sky for indefinite period would become scrap material within a year or two for want of maintenance. A scrap material cannot fetch such money which a good conditioned vehicle would fetch.

17. After considering the entire facts and circumstances and the provisions of law, I am of opinion that, the case cannot now be considered as under the early stage of investigation. If chargesheet has been submitted the investigation is over and trial will follow. During pendency of the trial or pendency of the criminal proceeding the learned Special Judge has jurisdiction under Sections 451 and 457 of the Code to pass necessary order in accordance with law concerning prayer for release of the vehicle. The learned Judge after assigning adequate reasons and in view of the guidelines indicated above may allow the prayer or may reject the prayer but, should exercise his jurisdiction judicially. It is evident that the present petitioner did not file any application before the learned Judge praying for return of the seized Tata Sumo bearing registration No. WB-24C/4382. The petitioner is given liberty to file proper application before the learned Judge (Special Court, NDPS Act), Barasat for release of the vehicle, and if any, application is filed by the present petitioner the learned Additional Sessions Judge, 6th Court (Special Judge, NDPS Act), Barasat shall dispose of the same in accordance with law after hearing the petitioner, the State and the NDPS Authority if the said authority is proceeding with the said criminal proceeding. The learned Judge shall dispose of the application as early as possible, if any such application is filed by the present petitioner before him.

18. The revisional application is accordingly disposed of in the light of the observations made above.

19. The Criminal Section is directed to send a copy of this order to the learned Additional Sessions Judge, 6th Court (Special Judge, NDPS Act), Barasat for information and necessary action.