

GAHC010066572024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./371/2024

RAFIQUL ISLAM DEWAN
S/O KIAMUDDIN DEWAN
R/O VILL-KHANDARKUR
P.S. BARPETA,
DIST. BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM
TO BE REP. BY THE LEARNED PP, ASSAM

Advocate for the Petitioner : MR SARFRAZ NAWAZ

Advocate for the Respondent : PP, ASSAM

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner	: Mr. S. Nawaz, Adv.
For the Respondents	: Ms. N. Begum, Addl.PP.
Date of Hearing	: 22.04.2024
Date of Judgement	: 22.04.2024

JUDGMENT & ORDER (ORAL)

1. Heard Mr. S. Nawaz, learned counsel for the petitioner. Also heard Ms. N. Begum, learned Additional Public Prosecutor for the State.
2. The present application under Section 482 of the Code of Criminal Procedure 1973 is filed praying for alteration/modification of the impugned order dated 22.01.2024 passed by the learned Sub Divisional Judicial Magistrate (M), North Salmara, Abhayapuri in Abhayapuri P.S. Case No. 14/2024 whereby and whereunder the learned Magistrate while allowing petition No. 28/24 filed by the petitioner praying for custody of the seized vehicle bearing Registration No. AS-01-PC-6032 imposed a condition to furnish bank guarantee of Rs. 5,00,000/- (Rupees Five Lakhs).
3. Ms. N. Begum, learned Additional Public Prosecutor for the State raising a maintainability of the present petition contends that an express provision of appeal is there under Section 12 of the Act, 2021 against any order passed under Section 11 of the Act, 2021 and therefore, the impugned order is an appealable order. According to Ms. N. Begum, learned Additional Public Prosecutor for the State, when an express provision of appeal is provided under the Act, the revisional power under Sections 397/401 of Cr.P.C. can not be exercised and when it comes to the exercise of power under Section 482 of Cr.P.C., the same can only be exercised in exceptional cases, where glaring illegality resulting in miscarriage of justice is shown.
4. There is no doubt that the inherent power of Section 482 of Cr.P.C., should not be exercised/resorted to, if there is specific provision in the code

for redressal of grievances of aggrieved party (In **Madhu Limaye –Vs- The State of Maharashtra** reported in **1977 4 SCC 551**).

5. There is also no quarrel to the proposition that in terms of Section 401 of Cr.P.C., when there is a provision of appeal under the code and no such appeal is filed, a proceeding by way of revision under Section 401 of Cr.P.C., shall not be entertained at the instance of the party, who could have appealed.
6. Section 397 of the Cr.P.C. allows High Court and Session Judges to call and examine the records of criminal Courts inferior to them, within their territory to examine and make sure that the decisions of such Courts are correct, legal and fair. This Court in exercise of such power can also look into whether the Courts below had followed the right procedure. In such a proceeding, the superior Court can also call for the records of the Courts below. However, such exercise of power shall not be resorted to, when there is an express provision of appeal.
7. A bare reading of Sub Section 14 of Section 7 of the Act, 2021, Sub Sections 3, 4 and 5 of Section 11 of the Act, 2021 and Section 102 of the Code of Criminal Procedure, 1973, it is crystal clear that the purpose of enactment of such provision is to facilitate investigation and to give the police officers power to gather evidence to support the allegations made, which includes search, seizure and detain etc.
8. Further, under the aforesaid provisions of law, the officer empowered to make seizure, is to report the seizure to the Magistrate within a reasonable time/forthwith. The police officer under Section 102 (3) of Cr.P.C. is even

empowered to release the custody of the seized materials to any person on execution of a bond to produce the property before the Court as and when required, when such property seized cannot be transported to the Court conveniently. At the same time under Act, 2021, a provision for keeping the custody of the cattle under gaushala etc., is also provided. The objection of such provision is for the protection of the seized property inasmuch as cattle cannot be allowed to be kept in the police station. Further such course of action, if permitted, may also amount to cruelty to these animals under the Act'1960.

9. From the provisions of law as discussed hereinabove, this court is of the considered opinion that the mandate under Sub Section 4 of Section 11 of the Act, 2021 of reporting of the seizure to the Jurisdictional Magistrate/First Class Magistrate, is to bring to the notice of the jurisdictional Magistrate such fact of seizure. It is the further considered opinion of this Court that it is a mandatory requirement under the Act, 2021 to report to the Judicial Magistrate First Class as regard the factum of search and seizure. An obligation is imposed under Sub Section 4 of Section 11 of the Act, 2021 upon the police officers designated in this regard to report such seizure to the Judicial Magistrate First Class, the same without unreasonable delay. Law is no more res integra that when there is a prescription to report the seizure "without reasonable delay", the same shall mean that the report of seizure is made with reasonable speed with expedition and any delay in the matter should be satisfactorily explained.
10. Text of section 102 of the Code and Sub Sections 3, 4 and 5 of Section 11 of the Act, 2021 is very clear and this Court is of the unhesitant view that

the power to release the seized material under sub Section 5 of Section 11 of the Act, 2021 and under Section 102 of Cr.P.C., are relatable only to the stage of seizure under Sub Section 3 of Section 11 of the Act, 2021 and under Chapter VIII of the Cr.P.C. as the case may be. The reason is obvious that such seizure can be carried out only in a situation as envisaged under sub section 3 and 4 of section 11 of the Act'2021 and the same is without approval of the jurisdictional magistrate. Therefore, such prescription cannot be made relatable to a provision of disposal of property during enquiry and trial. Thus, such power and mandate of law also cannot be treated to be a power and / or prescription for entire period of enquiry and trial.

11. Though a power has been granted to the Magistrate under Sub Section 10 of Section 11 of the Act, 2021 to allow sale of seized material on an application filed by the police officer having authority to make seizure, however, the Act is silent under what circumstances such permission can be granted. The provisions of forfeiture and sale including the handing over of the cattle to gaushalas are enumerated under the provision of Section 11 of the Act, 2021, which deals with power to enter, inspect, search and detain.
12. That being the position and in absence of any specific prescription in the Act'2021 as regards disposal of property during enquiry and trial or post trial or at the conclusion of trial, the provision of Chapter XXXIV of the Code, 1973 shall be applicable, so far the same relates to disposal of property seized under the provision of Section 11 of the Act, 2021. Further, the Act,2021, more particularly, Sub Section 1 of Section 11 of the Act, 2021 makes it clear that Section 11 is enacted to deal with the power of

search and seizure, which has been granted for the purpose of enforcing the provision of the Act, 2021.

13. Power of search and seizure are important tools for the investigating authorities to properly investigate the case. The purpose of seizure in a criminal case is to secure and preserve evidence or items that are relevant for investigation or for prosecution of a criminal case. Thus, in the aforesaid context and the determination made hereinabove, this Court is of the unhesitant view that the provision of Chapter XXXIV of Cr.P.C., more particularly, Section 451 and 457 of Cr.P.C. shall be applicable in a case under the Act, 2021 inasmuch as it is clear that barring the provision of Sub Section 9 of Section 11 of the Act, 2021, there is no procedure prescribed for disposal of property.
14. Now, coming to the case in hand and as reflected in the FIR that on 04.01.2024, 2232 Kgs. of beef was seized from the Tata Yodha bearing registration No. AS-01-PC-6032. The petitioner claims to be the owner of the said vehicle.
15. The petitioner had preferred an application seeking zimma of the vehicle seized. Such zimma was granted by the learned Magistrate under its order dated 22.01.2024 in exercise of its power under Section 11(5) of the Act, 2021 with a condition of furnishing a bank guarantee of Rs. 5,00,000/- (Rupees Five Lakhs). The petitioner is aggrieved by such condition.
16. From the impugned order, it is clear that the order was passed in exercise of power under Section 11(5) of the Act, 2021. That being the position, an appeal shall lie under Section 12 of the Act, 2021 as determined

hereinabove. Therefore, the present petition shall not be maintainable.

17. The petitioner has also not annexed the application seeking zimma before the learned Magistrate to ascertain at what stage and under what provision of law, such application was filed. That being the position, this Court cannot also presume the zimma petition to be a petition under Section 451 or under Section 457 of the Code. On this count also, the impugned order cannot be interfered.
18. However, it is undisputed that the investigation has in the meantime completed and charge sheet has been laid in the case in hand, which is annexed as Annexure-4 to the petition. Therefore, the petitioner shall be at liberty to seek zimma of the vehicle afresh in terms of Chapter-XXXIV of the Code of Criminal Procedure, 1973. It is further clarified that as in the meantime, investigation is completed and charge sheet has been filed, the order impugned shall not be a bar to entertain a fresh application under Chapter-XXXIV of the Code of Criminal Procedure, 1973.
19. Accordingly, in view of the determination made hereinabove, and the given facts of the present case as recorded hereinabove, the present petition stands dismissed with a liberty to the petitioner to file a fresh application in terms of Chapter-XXXIV of the Code of Criminal Procedure, 1973 seeking zimma of the vehicle and in the event such application is filed, same be decided as expeditiously as possible and within a period of one month of filing of such application and in terms of the determination made hereinabove and also taking note of the ratio laid down by the Hon'ble Apex Court in the case of **Sunderbhai Ambala Desai –Vs- State of Gujrat** reported in **(2002) 10 SCC 283**.

20. It is further made clear that the condition of bank guarantee may not be imposed for the reason that such condition is relatable and applicable when an application is considered and order is passed under Section 11(5) of the Act, 2021.
21. This criminal petition stands disposed of.

JUDGE

Comparing Assistant