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HIGH COURT OF CHHATTISGARH, BILASPUR**MCRC No. 3459 of 2016**

1. Dwarika Prasad Yadav S/o Sukhram Yadav Aged About 45 Years R/o Gajendrapur, Police Station Dhanapur, District Chandauli, Uttar Pradesh Ha. Mu. Country Liquor Shop, Group No. 1, Pandariya, District Kabirdham, Chhattisgarh.
2. Jaiprakash Pathak S/o Venkatesh Prasad Pathak Aged About 35 Years R/o Chakera, Police Station Amarpatan, District Satna, Madhya Pradesh Ha. Mu. Country Liquor Shop, Group No. 1, Pandariya, District Kabirdham, Chhattisgarh.

---- Petitioners

Versus

- State of Chhattisgarh through the Police Station Excise Circle District Kabirdham, Chhattisgarh.

--- Respondent

For the applicant	:	Dr. N.K. Shukla, Sr. Advocate with Mr. Ankur Agrawal, Advocate.
For the Respondent	:	Mr. Satish Gupta, Govt. Adv.
For the Objector	:	Mr. S. C. Verma, Advocate.

Hon'ble Shri Justice Goutam Bhaduri**CAV ORDER****22.07.2016**

1. This is first bail application filed under Section 439 of the Code of Criminal Procedure seeking grant of regular bail to the applicant in connection with Crime No. 01/2016 of 2016 registered at P.S. Excise Circle Pandariya, Distt. Kabirdham (C.G) for the offence punishable under Sections 34(1), 34(2) & 59(A) of the Chhattisgarh Excise Act.
2. As per the prosecution case, on an information received by the police that the applicants are selling liquor at the main road Bairag Para, Pandaria by putting up a tent, the place was raided and when the valid papers were asked for selling

liquor, they failed to show the requisite documents, as such, from the possession of the applicants 912.660 bulk litres was seized and the applicants were arrested.

3. Dr. N.K. Shukla, learned senior counsel appearing for the applicants would submit that the applicants are workers of one Manoj Kumar Samal who has been granted license at Pandaria and the said persons instead of selling the liquor at a specified area were selling it in other area not specified by the licence granted to the licensee and it is only a case of breach of some licence conditions. Referring to the license counsel would submit that the dispute is between the two liquor barons who have been granted licenses to sell liquor at Pandaria. Referring to document *Naukar Nama*, it is submitted that applicants Dwarika Prasad Yadav and Jaiprakash Pathak are workers of licensee Manoj Kumar Samal and as such it is contended that the offence would fall as a bailabale offence. It is also stated that the location other than the location of licencee is not mentioned and the applicants' owner Manoj Kumar was granted license for Pandariya. It is further submitted that the entire investigation is biased inasmuch as the Police officer parted with all the case diary documents to the objector Ashok Kumar Singh as the documents of case diary were attached with the objection, therefore, under the circumstances, it is further submitted that since the charge sheet in this case has been filed, no further investigation is necessary and the applicants may be enlarged on bail.
4. Per contra, learned State Counsel as also learned counsel for the objector vehemently oppose the prayer for grant of bail.

Learned State Counsel also referred to the license and would submit that the applicants were not granted licence to sell the liquor at the disputed place and there is no nexus in between the applicants and the licensee. He further submits that the grant of bail would lay down a wrong message in the society and there is every likelihood of tampering the evidence and further taking into huge quantity of liquor seized from the applicants, they may not be enlarged on bail.

5. Perused the documents filed along-with the bail petition as also the case diary. On earlier occasion, the coordinate Bench of this Court by order dated 09.06.2016 directed the State to obtain instruction from Excise Commissioner, Kabirdham as to why the licensee of Pandariya whose liquor is alleged to have been under the sale by the applicants has not been made an accused particularly when there was no report of theft made by the licensee in respect of alleged seizure of liquor from the possession of the applicants. In compliance of such order, the State through its investigation officer N.K. Mishra has filed an affidavit which contains a communication to the Advocate General Office on 14.06.2016 vide Annexure R-1 wherein it is stated that since Manoj Kumar Samal was not present when the raid was conducted and the liquor was seized and even after seizure no claim was made with respect to the liquor, as such, Manoj Kumar Samal the licensee has not been made an accused. Therefore the fact remains that the licensee has disowned the fact that the liquor belongs to him.
6. A perusal of the case diary would show that huge quantity of liquor was seized from the possession of the applicants ie.,

912.660 bulk litres while they were selling it in an open place by putting up a tent.

7. Taking into consideration the way in which the offence committed and considering the huge quantity of liquor which was seized from the possession of applicants, I am not inclined to allow this bail application. Accordingly, it is rejected.
8. Now turning to the objection made by objector Ashok Kumar Singh, son of Sardar Singh, it goes to show that the objection contains photocopies of the police case diary, important documents of seizure and other documents of case diary which are part of objection. This Court by order dated 16.6.2016 directed the State and Objector to file an explanation how the copies of the case diary came within their possession. In response to it, instead of filing an affidavit by objector Ashok Kumar Singh, an affidavit has been filed by one Yogendra Gupta son of Bali Gupta on behalf of objector. It is stated that certain disputes are going on between the licensee Manoj Kumar Samal and other licensee and W.P(C).No.1156/2016 is pending. It is further contended that the concerned papers were delivered in the liquor shop of Yogendra Gupta by some unknown person(s), which in turn was sent to the office of his Advocate. Ashok Kumar Singh, who has filed the objection along-with photocopy of Bunch of case diary papers, has not filed any affidavit.
9. N.K. Mishra, the Excise S.I., Kabirdham firstly contended that Manoj Kumar Samal was not present at the spot and therefore, at that time, he has not been made an accused.

While explaining about parting with copies of case diary papers, he stated that all the photocopies of charge sheet were misplaced and since the number of litigations are pending before the trial Court and the High Court, as such, while he went to the Court with the papers, all the papers were got mixed up during the course of hearing and they came in possession of the objector. Para 8 of the affidavit of M.K. Mishra, the investigating officer, is reproduced hereinbelow:

“That, part of the case diary which is filed along-with objection can only be in the hands of the objector due to misplacing of the photocopies which were made ready for the purpose of filing of the charge sheet on 23.04.2016, the entries were already made in the case diary by me on 23.04.2016 which is evident from the diary itself.”

10. The necessary relevant statute i.e., section 172 of Cr.P.C., deals with diary of proceedings and investigation. So far as it relates to the present case, sub-section (3) of section 172 is relevant and reproduced hereinbelow.

“172. Diary of proceedings in investigation .-

- (1) xxx
- (2) xxx
- (3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the Police Officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872) shall apply.”

11. A perusal of the aforesaid section would show that under the law, it is the State which is the prosecutor in all criminal cases, and any private party or litigant can at best act under the guidance and in accordance with the instructions of the public prosecutor. Therefore, a private party cannot act over and above the Government prosecutor and cannot have access to the case diary. Thus section 172(3) puts a bar for a private litigant to have the copy of case diary as it would be illegal and against the provisions of Section 172(3) of Cr.P.C. Therefore, certainly a perusal of the documents placed by the objector would lead to show that the investigating officer has acted otherwise from the procedure established by law.
12. It is settled proposition that the investigation into criminal offence must be free from any objectionable features or infirmities which may give rise to an apprehension in the mind of the complainant or the accused, that investigation was not fair and may have been carried out with some ulterior motive. The investigating officer must not indulge in any kind of mischief, or cause harassment either to the complainant or to the accused. His conduct must be entirely impartial and must dispel any suspicion regarding the genuineness of the investigation. The investigating officer, "is not merely present to strengthen the case of the prosecution with evidence that will enable the court to record a conviction, but to bring out the real unvarnished version of the truth". Ethical conduct on the part of investigating agency is absolutely essential, and there must be no scope for any allegation of mala fides or bias and the investigation cannot be interfered with or influenced even by the courts.

Therefore, the investigating agency must avoid entirely any kind of extraneous influence.

13. The objector namely Ashok Kumar Singh instead of filing his affidavit, filed affidavit through one Yogendra Gupta and it is stated that certain documents were left at his liquor shop by some unknown person whereas the investigation officer who was in hold of the case diary has stated that the papers got mixed up in bulk of papers during the course of hearing and by mistake reached to the objector. Therefore, if all the events are placed together the explanation will show that the case diary papers got mixed up and ultimately travelled to a particular destination in the hand of a person who was in need of such papers. In the opinion of this Court such explanation jointly offered by Ashok Kumar Singh, Yogendra Gupta and M.K. Mishra are beyond all reasonable explanation of bona-fide as could be accepted by prudent individuals as the personal skill cannot hold the sway against the statute. An inference can be drawn from series of such events that the objector and the investigation officer cannot make the statute porous and the Courts have to respond to the cause.
14. Therefore, the copies of case diary and the documents in the hands of the objector would show that the investigating agency has faulted. At the same time the objector in the instant case has intermingled with the documents of criminal case. Hence, the role played by the Investigating Officer as also the Objector who have filed objection and affidavit has raised reasonable doubt about the conduct and make the entire investigation as homogeneous, which is not permissible under the provisions of criminal procedure code.

15. In view of the above, I deem it necessary to direct the concerned Superintendent of Police of the District to make an enquiry and may take necessary steps against the erring parties for amalgamation of police case diary.

Sd/-

**GOUTAM BHADURI
JUDGE**

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