

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 282 OF 2016

Kaluram Chaudhary	...Petitioner
vs.	
Union of India & Ors.	...Respondents

ALONG WITH

CRIMINAL WRIT PETITION NO. 117 OF 2016

Pankaj S. Kothari	...Petitioner
vs.	
Union of India & Anr.	...Respondents

Mr.A.G. Lalla I/b. Lalla & Lalla for Petitioner in WP 282/2016.
Mr.Ayaz Khan for Petitioner in WP 117/2016.
Mr.S.V. Motwal I/b. Sehra Fatima Kangi for Respondent No.2.
Mrs.Rebecca Gonsalves for Respondent No.1.
Mrs.M.M. Deshmukh, APP for State.

CORAM : RANJIT MORE & S.C. GUPTE, JJ.

RESERVED ON : 4 FEBRUARY 2016

PRONOUNCED ON : 4 APRIL 2016

JUDGMENT (PER S.C. GUPTE, J.) :

Criminal Writ Petition No.282 of 2016 is filed by the Petitioner Kaluram Chaudhary ("Petitioner") under Article 226 of the Constitution of India read with Section 482 of the Criminal Procedure Code, 1973. It seeks transfer of investigations in an NDPS Remand Application pending on the file of Special Judge appointed under NDPS Act, 1985 to the Central Bureau of Investigations ('C.B.I.') or other Central Government Agency to whom the present investigating officer, namely, Intelligence Officer, Narcotic Control Bureau is sub-ordinate. The Petitioner along with Respondent Nos.2 to 4 is a co-accused in a criminal case

pending before NDPS Special Judge under NDPS Act, 1985, for possession of contraband. Another Accused, Respondent No.3 herein has filed the companion writ petition, namely, Criminal Writ Petition No.117 of 2016, praying for similar relief in addition to quashing of the criminal prosecution.

2 The Petitioner alongwith Respondent Nos.2 to 4 and one Jayantilal Kothari were arrested on 14 August 2015 by the Intelligence Officer, Narcotics Control Bureau ('NCB') and has been in custody since then. The investigation, which was in progress when the petition was filed, has since been completed. On 2 February 2016, the complaint was filed against the Petitioner and his co-accused under Section 29 read with Sections 22(c) and 8(c) of the NPDS Act and under Sections 22 read with Section 8(c) of that act and numbered as NDPS Special Case No.28 of 2016.

3 The Prosecution case is that on 13 August 2015, based on information received by the NCB, a raid was conducted near a jewellers' shop, Kothari & Sons Jewellers, at the junction of J.P. Road and S.V. Road in Andheri (West), Mumbai. The officers of NCB intercepted four accused, i.e. Respondent Nos.2 to 4 herein along with one Jayantilal Kothari (since deceased) and recovered 2.5 kgs. of Mephedrone from them. Subsequently, in a follow-up action, one residential premises, Flat No.202, B-Wing, Vishal Residency, Near GCC Club, Mira Road (East), Thane was searched and 11.8 kgs. of Mephedrone was recovered from the possession of the Petitioner. After recording the statements of all accused, i.e. the Petitioner and Respondent Nos.2 to 4 and Jayantilal Kothari under Section 67 of the NDPS Act, wherein they narrated their role in the conspiracy in procurement, possession, concealment, sale and transportation of the contraband, Mephedrone, all were placed under arrest under the provisions of the NDPS Act, 1985.

4 The grievance of the Petitioner is that the entire prosecution case filed against him and his co-accused is completely false and untrue. Both seizure

panchanamas, namely, at the junction of J.P. Road and S.V. Road at Andheri (West) and at the residential flat at Mira Road (East), are false and fabricated. It is the Petitioner's case that on 13 August 2015, he was at the plant of H.K. Global at Mira Road, where he conducts business as a partner of H.K. Global. About 8-10 persons, who he later learnt were officials from NCB, came in a private Innova taxi to the plant of H.K. Global and after some initial talk, picked up the Petitioner in the presence of his employees and bundled him into the Innova. The Petitioner submits that the entire flow of events at H.K. Global was duly captured and recorded in a DVR recording of CCTV cameras installed there. He relies on still images and snap shots of these recordings showing actual apprehension of the Petitioner on 13 August 2015 from the plant of H.K. Global.

5 Similar contentions have been advanced by the petitioner (Respondent No.3 herein) in the companion petition, Criminal Writ Petition No. 117 of 2016, based on CCTV footage recorded from a camera installed at one Bikaner Sweets Shop at Andheri, at the location of the junction of J.P. Road and S.V. Road, where the first raid was carried out. Based on this CCTV footage, it is submitted that on 13 August 2015 at about 10.00 p.m. Jayantilal Kothari alone was apprehended from the spot and none of the other accused was present at the spot. So also, it is claimed that the CCTV footage does not show that there were any drugs seized from Jayantilal Kothari. The accused petitioner has also produced a call record of Whatsapp communications between himself and his wife, which shows that at the relevant time (right upto 7.49 p.m.) he was in communication of his wife on whatsapp, whereas the panchanama drawn by NCB shows that he was subjected to search and seizure and his phone, bearing the same number on which his wife was chatting with him as above, was shown as recovered from him. So also a printout of call records of Jayantilal Kothari shows that he was in communication with the petitioner at the relevant time. It is submitted that all this record, which is an authentic electronic record, belies the panchanama made by NCB.

6 Based on this material, the accused are seeking transfer of investigations. (One of them is also seeking quashing of the criminal case.) Their case is that the prosecution had all these records at the remand stage and yet it chose not to investigate; it has not collected/ filed the CDR records of the mobile phones in question; it has neither chosen to record the statement of the accused's wife nor inspected the mobile phone offered to it for investigation. It is submitted that whenever the investigation is not in a proper direction or if high officials are involved in a crime, in order to do complete justice it is always open to the court to hand over the investigation to an independent agency like CBI; the court in the process ensures that there is fair investigation and no accused is falsely implicated. It is submitted that this may be done even after submission of the charge sheet. Learned Counsel for the two Petitioners rely upon several judgments of the Supreme Court such as **State of Punjab Vs Baldev Singh¹**, **Sarju @ Ramu Vs. State of Uttar Pradesh²**, **Tomaso Bruno Vs. State of Uttar Pradesh³** and **Rubabbuddin Sheikh vs. State of Gujarat⁴** in support. Learned Counsel also rely on judgments of **Sarija Banu Vs. State⁵**, **State of Orissa vs. Debendra Nath Padhi⁶** and **Rukmini Narvekar vs. Vijaya Satardekar⁷** to support their plea that this Court can well consider material produced by the accused for considering an application under Section 482. Counsel submit that the material such as CCTV footage, mobile phone messages, record of calls, etc. ought to be considered by this Court for the present applications.

7 In effect, the accused are seeking transfer of investigation /quashing of the case at this preliminary stage on the basis of their defence

1 (1999) 6 SCC 172 : 1999 SCC (Cri) 1080

2 (2010) 2 SCC (Cri) 1510

3 (2015) 3 SCC (Cri) 54 : (2015) 7 SCC 178

4 (2010) 2 SCC (Cri) 1006

5 2004 (12) SCC 266

6 (2005) 1 SCC 568

7 2011 AIR (SC) (Cri) 1825

of alibi. What the accused say is that they were not at the places alleged in the police panchanama at the relevant time, but elsewhere. The proof of such a plea is a matter of trial. The accused will have to prove their defence at an appropriate stage in accordance with law. The CCTV footage, the cell records and everything else they are today relying on will have to be strictly proved in accordance with law. There is no question of all this material being looked into at this stage. It will have to be considered when the accused are called upon to enter their defence under Section 233 of the Code of Criminal Procedure, after the prosecution has led its evidence, and not now. After all we are today at the stage of framing of charges. As the Supreme Court has held in **Hem Chand vs. State of Jharkhand**⁸, the Court at the stage of framing of charge exercises a limited jurisdiction; It only sees if a *prima facie* case has been made out. The concern of the Court is whether a case of probable conviction for commission of an offence has been made out on the basis of the materials found during the investigation. The Court does not delve deep into the matter for the purpose of appreciating evidence and would not ordinarily consider as to whether the accused would be able to establish his defence, if any.

8 Learned Counsel for the Petitioners submit that though at the stage of framing of charge, the trial court can only look at the material produced by the investigating agency and not the defence of the accused, the material produced by the accused can be considered by this Court at the stage of an application under Section 482 of the Criminal Procedure Code. In the case of **Debendra Nath Padhi** (supra) the Supreme Court did affirm the unlimited width of the power of the High Court under Section 482 of the Code and Article 226 of the Constitution to relieve the accused of a trial

8 (2008) 5 SCC 113

in the face of material of unimpeachable character of sterling quality produced by the accused, so as to prevent abuse of the process of court or otherwise secure the ends of justice.

9 Now the question is whether the evidence brought before the Court by the accused here is really of “unimpeachable character of sterling quality” so that the prosecution's case really does not call for a trial or it would be an abuse of the process to make the accused stand the trial. We think not. Firstly, the material is not such as needs no explanation. It is not something which is self-evident. Besides, the call records as well as the CCTV footage and electronic record of whatsapp chats are all matters of evidence, which will have to be strictly proved in accordance with law. Thirdly, it may even be possible to explain away some of the material. At this *prima facie* stage we cannot view it as conveying unimpeachability of a sterling character.

10 There is clearly no case for considering the plea quashing on the basis of this material. Indeed, learned Counsel for the Petitioner, even in Criminal Writ Petition No.117 of 2016, laid stress more on his application for transfer of investigations rather than the prayer for quashing.

11 As far as the prayer for transfer of investigations is concerned, there is no case whatsoever on any known principle of law. The only allegation is that the investigating agency refuses to investigate the material produced by the accused. The accused have already made an application to the trial court for taking the CCTV footage on record for safe custody. By his order dated 7 September 2015, the learned Special Judge has allowed the material to be produced leaving the question of its admissibility either

in evidence or for any other purpose open. It is difficult to see how the accused are in any way prejudiced in the trial either by the prosecution's reluctance to investigate the material or respond to it. (Learned Counsel for the Petitioner pressed for directing the prosecution's response to the material adduced by the accused to be placed on record. That is not something that this Court would do at this stage. Even before the prosecution leads its evidence, it cannot be asked to deal with the defence.)

12 This is not a case where the case of the accused is that the contraband was planted on them by the investigating agency or that there is culpability on its part or on the part of particular officers of it. This is a case of a simple alibi, which the accused will have to prove at the trial. The cases of **Sarju alias Ramu** (supra) and **Rubabbuddin Sheikh** (supra) are on an entirely different footing. In **Sarju alias Ramu**, the allegation of the accused was that the SHO and other constables had an evil eye on his wife and that he was framed when she resisted their advances. The Court also found that the prosecution case was shrouded in mystery and even the procedural safeguards were not followed scrupulously. The Court, in the premises, referred to the following observations in **Ritesh Chakarvarti vs. State of M.P.**⁹ :

“16. In a case under the NDPS Act, particularly where such serious allegations are made against the police officials, recovery of contraband in presence of the independent witness assumes significance. (See **Ritech Chakarvarti vs. State of M.P.**, SCC p. 327, para 24.)

The Court also quoted the following observations in **Baldev Singh's** case :

⁹ (2006) 12 SCC 3221 : (2007) 1 SCC (Cri) 744

“The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the need result is important but the means to achieve it must remain aboveboard. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconsciously compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.”

In **Rubabbuddin Sheikh** (supra) the case of the accused was of police inaction and atrocities. It was a case of an alleged fake encounter. The allegation was that high officials of State Police (Gujarat) were themselves involved and as a result, investigations had not been properly conducted by them. In that context, the Supreme Court held that it was an admitted position that the accusations were directed against the local police personnel in which high police officials of the State of Gujarat had been made the accused. The Court held that therefore “it would be proper for the writ petitioner or even the public to come forward to say that if the investigation carried out by the police personnel of the State of Gujarat is done, the writ petitioner and their family members would be highly prejudiced and the investigation would also not come to an end with proper finding and if investigation is allowed to be carried out by the local police authorities, we feel that all concerned included the relatives of the deceased may feel that investigation was not proper and in that circumstance, it

would be fit and proper that the writ petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility however faithfully the local police may carry out the investigation, particularly when the gross allegations have been made against the high police officials of the State of Gujarat and for which some high police officials have already been taken into custody.”

These facts are completely distinguishable from the facts of our case. The transfer of investigations is sought here not on the ground that there are improper motives on the part of the investigating agency or its officers or that procedural safeguards are not followed, but simply because the evidence of the accused has not been further investigated. That is no ground for seeking a transfer of investigations.

13 There is, thus, no merit in the petitions. Both petitions are dismissed.

14 It is expressly made clear that the observations made herein are for the limited purpose of disposal of these writ petitions and the trial court shall decide the bail applications as well as case on their own merits and in accordance with law.

(S.C. GUPTE, J.)

(RANJIT MORE, J.)