

**ORDER RESERVED ON :19.07.2017
ORDER DELIVERED ON:26.07.2017**

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.07.2017

CORAM :

THE HONOURABLE MR. JUSTICE R.SURESH KUMAR

**Crl.R.C.No.824 of 2017 and
Crl.M.P.No.7663 of 2017**

Bharat Kumar ... Petitioner/Petitioner

Vs.

The Sub Inspector of Police,
N3, Muthailpet Police Station,
Chennai-600 001,
(Crime No. 1111 of 2017) .. Respondent/ Respondent

Petition filed under Section 397 and 401 of Cr.P.C to set aside the order of the learned XVI Metropolitan Magistrate, George Town, Chennai-600 001 passed in Cr.M.P.No.1771 of 2017 dated 01.06.2017.

For Petitioner : Mr.N.Chandrasekaran
For Respondent : Mr.R.Sekar
Govt. Advocate (crl.side)

ORDER

This criminal revision case has been filed against the order passed by the learned XVI Metropolitan Magistrate, George Town,

Chennai in Cr.M.P.No.1771 of 2017 dated 02.05.2017.

2. By the said petition, the petitioner had approached the trial Court seeking for return of property, seized by the respondent police, from the premises of the petitioner.

3. According to the respondent, they had seized about 82 bags containing raw materials, for the preparation of a stuff called, "Mava," which is prohibited and hazardous to health, along with 11 numbers of small containers of lime.

4. According to the respondent, these are all prohibited items by the State of Tamil Nadu and whoever store and sell these items shall be punishable under the provisions of the Tamil Nadu Prohibition of Smoking and Spitting Act, 2002 (in short, the 'Act').

5. It is the case of the respondent that on 19.5.2017, on information, they visited the petitioner's premises, from where, they have seized these materials, which, according to the respondent, are prohibited items within the meaning of Section 7 of the Act and therefore, because the petitioner had stored for selling the items for

manufacture of any other snuff or stuff by name called 'Mava' which attracts punitive provisions of Section 9 of the Act and therefore, in the presence of witnesses, those items were seized from the premises of the petitioner and the petitioner and other employees of the petitioner's shop were arrested on the same day.

6. However, it is the case of the petitioner that the petitioner is a licensed seller of betel nuts and other related items and he has been doing the business for several years and they have gained reputation in the locality. It is the further case of the petitioner that he had never indulged in any illegal activities and being a trader he only purchased the said goods from the manufacturers, and stored it, to, sell them for dealers and customers with reasonable profit.

7. While so, according to the petitioner, on 19.5.2017, the respondent police suddenly came and arrested the petitioner and others and they booked a case under Sections 7 and 9(ii) of the said Act r/w Section 353 and 506(i) of IPC.

8. Since the major items, containing 82 gunny bags seized, by the respondent police, is nothing but betel nuts, which are not at all a

prohibited item and storing of the same for selling purpose cannot be termed to be a violation of any law, much less Sections 7 and 9 of the said Act, the very case booked against the petitioner and others itself is a false or frivolous case.

9. When that being so, the petitioner claimed, they moved a petition before the trial Court, seeking return of the said property, on the ground that the petitioner is the owner of the property. Moreover since it is betel nuts, it will be vulnerable of fungi formation if it is stored for a longer period and in that case, it becomes useless and would be unfit for human consumption. Therefore, on that ground also, the petitioner had moved the necessary petition before the trial Court seeking for return of the said property and the said petition had been dismissed, as against which the present revision has been filed by the petitioner.

10. Mr. N. Chandrasekaran, the learned counsel appearing for the petitioner would invite the attention of this Court to Sections 7 and 9 of the Act which reads thus:

"7. Prohibition of storage, sale and distribution of cigarettes, etc.

No person shall himself or by any person

on his behalf store, sell or distribute cigarettes, beedies, cigar, supari with tobacco, zarda, snuff, or any other smoking or chewing substance or substances containing tobacco within an area of one hundred metres around any college, school or other educational institutions."

.....

9. Penalties – Any person, who contravenes the provisions of--

(i) section 4, 5 or 8 shall be punishable with fine which may extend to one hundred rupees and in the case of second or subsequent offence, shall be punishable with a minimum fine of two hundred rupees, but which may extend to five hundred rupees;

(ii) section 6 or 7 shall be punishable with fine which may extend to five hundred rupees and in case of second or subsequent offence, shall be punishable with imprisonment which may extend to three months, or with a minimum fine of five hundred rupees, but which may extend to one thousand rupees, or with both".

11. The learned counsel would also invite the attention of this Court to Rule 6 of the Rules made under the said Act which reads as

follows:

"6. Power of entry, inspection and search.-

(1) Any authorised officer may enter and inspect at any time if he has reason to believe that any person is in possession of cigarettes, beedies, cigars, supari with tobacco, zarda, snuff or any other smoking or chewing substance or substances for sale or distribution in any premises which is within an area of 100 metres around any college, school or any other educational institutions and may search and seize the articles or other substances under a seizure list as specified in Form-A".

12. By citing the said provisions of the Act as well as the Rule made thereunder, the learned counsel would make his submissions that, even according to the respondent, as recorded in the FIR, the alleged offences under Sections 7 and 9 of the Act, has not been, even *prima facie*, made out.

13. According to the learned counsel, both under Section 7 of the Act as well as Rule 6, certain items have been prohibited and if those prohibited items is stored and sold in a place within the radius of 100

metres of any college, school or any educational institution, the police would be empowered to search and seize those articles under a seizure list as specified under Form-A of the Rule.

14. In this regard, the learned counsel would submit that here, there is no educational institution within 100 metres area which is one of the necessary ingredient to invoke Sections 7 and 9 of the Act. Moreover, the very stuff seized from the petitioner's premises is nothing but betel nuts which has not been prohibited either under Sections 7 and 9 of the Act as well as any other provision. He would also submit that since the petitioner is a licensed seller of betel nuts and for the said purpose, when he stored, of course, after purchasing it in bulk from the manufactures for selling to dealers and consumers, the same has been seized and the petitioner and others were arrested. These action on the part of the respondent, according to the learned counsel, would disclose that *prima facie*, it is a frivolous case where the petitioner and others have been implicated.

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15. The learned counsel would also submit that even under Rule 6, those articles seized under the sub rule (1) of Rule 6 shall be produced before the Magistrate for disposal of the articles or

substances as per law.

16. Here in the case in hand, even though the goods were seized on 19.5.2017, the same were produced before the Magistrate concerned only on 29.5.2017 i.e., after ten days. There is no plausible reason given by the respondent for such belated production of such seized goods before the Magistrate, as mandated under the provisions of the Rule.

17. The learned counsel also would make a submission that in the FIR, it has been stated that the seized goods were stored at the petitioner's premises for the purpose of preparation of a prohibited tobacco item called 'Mava'. In this regard, the learned counsel would submit that the word or term, 'Mava' has not been described either under the Act nor under the Rule made thereunder. It is not known to the petitioner as to the details and explanation of the word, 'Mava'. The learned counsel would also submit that even the respondent police did not say anything about or described about the word, 'Mava', except quoting the said word in the FIR. He would further submit that certain items are specifically mentioned at Section 7 of the Act, as has been extracted above, and only those items are prohibited, that too within

or around 100 metres of the college, school or educational institutions and if both the ingredients for invoking Section 7 of the Act are absent in this case, the very invocation of Sections 7 and 9 of the Act against the petitioner itself, is unlawful and therefore, on that ground also the petitioner would be entitled to get back the goods which were stored by the petitioner for selling it to the dealers and consumers, ofcourse, from his premises / shops which is a licensed one.

18. The learned counsel would also submit that, since except the petitioner, no one has made any claim over the property, for which, application was filed to return the same to the petitioner, the learned trial Court Judge should have allowed the said petition.

19. Per contra, Mr. Sekar, learned Government Advocate (criminal side) appearing for the respondent would submit that the word, 'Mava' mentioned in the FIR is only a local name for a stuff which is being produced or manufactured for which tobacco, betel nuts and other ingredients are used. Only on specific information received from the respondent police, they made a sudden search at the premises / shop of the petitioner, where there were 82 gunny bags of these raw materials and other items and since those items were

procured and kept there for the purpose of production and manufacturing of the stuff called, 'Mava', the respondent police, immediately, seized it under seizure mahazar, in the presence of independent witnesses and the petitioner and others were arrested, immediately.

20. The learned Government Advocate would further submit that on arrest and seizure of the properties, they were produced before the concerned Magistrate court, where the petitioner and others were remanded to judicial custody. Insofar as the seized goods are concerned, though the same was produced before the Magistrate on the very same date, the learned Magistrate wanted to produce the same during the working hours. Only on the said instructions, the goods were subsequently been produced and based on which an order was passed by the learned Magistrate that for want of space, those goods can be kept at the safe custody of the respondent police until further orders.

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21. Only in that circumstances, the petition for return of property was filed before the Court below, where, after considering the claim of the petitioner as well as the objection made by the respondent, the

learned Judge rejected the said application and therefore, the learned Government Advocate would submit that, absolutely, there is no infirmity in the said order.

22. The learned Government Advocate would also submit that these goods, which were seized from the premises of the petitioner, certainly would come under the purview of prohibited items within the meaning of Section 7 of the Act and if those items are stored for selling, definitely, the punitive provisions of Section 9(ii) of the Act would be attracted. Moreover, when the police team tried to seize the property, the petitioner and others had prevented the police and also threatened the police force and that is the reason why the case has been booked against the petitioner not only under Sections 7 and 9 of the Act and also under Sections 353 and 506(i) of IPC. Since the investigation is yet to be completed, if these goods are returned to the petitioner, the same would be utilised for manufacturing or production of banned goods like "Mava", and that would be hazardous to the health of the general public and only in the interest of the general public, these goods need not be returned to the petitioner atleast for the time being and therefore, the learned Government Advocate is opposing this revision petition.

23. I have heard the learned counsel appearing for both sides.

24. As has been rightly pointed out by the learned counsel appearing for the petitioner, Section 7 of the Act prohibits certain items, wherein neither the goods called "Betel nut", nor the word, 'Mava' finds place. Therefore, *prima facie* these two items are not banned within the meaning of Section 7 of the Act. Moreover, it is an important ingredient that, even the prohibited item under Section 7 of the Act must have been stored and being sold from the shop of the premises around 100 metres from a school or college or educational institution. Here in the case in hand, nothing had been stated about the same in the FIR filed by the respondent police. The 100 metres radius from the educational institutions is a necessary ingredient, without which Section 7 of the Act cannot be invoked, however, the respondent police failed to mention anything about the same in the FIR itself. This aspect *prima facie* weakens the case of the respondent police. Be that as it may, it is a matter for trial of course, after filing charge sheet in this regard.

25. As has been pointed out by the learned counsel for the

petitioner, in order to ascertain whether the seized goods have been produced before the Magistrate immediately, as required under law, it was necessitated to call for the records, pursuant to which, the learned Government Advocate has produced the records before the Court. On a perusal of the same, it discloses that on 19.5.2017 when the respondent attempted to produce the seized goods to the Magistrate Court, it was specifically endorsed that 'produce during working hours'. Therefore, the respondent police ought to have produced the same on the next day during working hours. However, as per the record, it shows that, only on 29.05.2017, the same was produced, where the learned Magistrate has made an endorsement that, 'for want of sufficient space which is not available in the property room, the seized property was handed over to one SivaKumar Head Constable No.16666 L & O for safe custody.

26. In this regard, the submission of the learned counsel for the petitioner that the seized goods were not immediately produced before the Magistrate for safe custody and by thus, has not been followed the provision strictly, by the respondent police, would have some force.

27. Also, since it is a definite case of the petitioner that the

major seized goods, namely, 82 gunny bags are nothing but betel nuts which are vulnerable for decay and it is perishable in nature, it is not advisable to keep those goods for a longer period, that too without any proper protection and treatment. Moreover, since the petitioner is a licensed seller of betel nuts and in this regard, his license etc, and the bills for having purchased the goods, which were seized, have been since produced before the Court below and the learned Judge has also recorded the said factors in the said impugned order itself, it cannot be said that those goods do not belong to the petitioner nor those items were stored without the authority of law atleast *prima facie*.

28. Considering all these aspects, this Court feels that, since the petitioner being the owner of the seized goods of 82 gunny bags of betel nuts, the same can be handed over to him ofcourse, on conditions.

29. In the result, the impugned order is set aside.

(i) The court below shall hand over the seized goods, namely, 82 gunny bags of betel nuts seized from the petitioner's premises on 19.5.2017 and kept in safe custody of respondent police, to the petitioner, on condition that, the petitioner executing a bond for a sum

of Rs. 2,00,000/- (Rupees Two Lakhs only) and also with a condition that some sample from each gunny bag, not more than 50 gms each, shall be taken and kept it for safe custody by the Court below.

(ii) The other infirmities as pointed out by the learned counsel for the petitioner, need not be gone into at this juncture and therefore, in respect of those alleged infirmities, the observations made by this Court, if any, shall be construed only for the purpose of disposing this Criminal Revision Case and those observations, shall not stand in the way of completion of investigation by the respondent police and conducting of trial by the Court below in accordance with law.

30. With these directions, this criminal revision is allowed. Consequently, connected miscellaneous petition is closed.

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To
1.The Sub Inspector of Police,
N3, Muthailpet Police Station,
Chennai-600 001,

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2. XVI Metropolitan Magistrate,
George Town, Chennai-600 001

R.SURESH KUMAR, J.

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**Pre-Delivery Order in
Crl.R.C.No.824 of 2017**

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