

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.08.2018

PRONOUNCED ON : 13 .08.2018

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH
Criminal Original Petition No.18945 of 2018

Jamal Mohamad

... Petitioner

Vs.

1.Mohammad Sadiq Batcha @ Sadiq Batcha

2.Union of India
rep. by NCB through Intelligence Officer
Chennai Zonal Unit
Chennai 600 077.

... Respondents

Prayer:- Petition filed under Section 482 Cr.P.C., to direct the Principal Special Judge for EC/NDPS Cases at Chennai to grant the certified copies of 1. Mahazar dated 22.03.2018; 2. Section 67 statement of Balamurugan, Abdul Kareem and Mohamad Sadiq Batcha at the earliest on payment of cost to enable the first respondent to face the legal battle.

For Petitioner : Mr.R.Vijayakumar

O R D E R

This petition has been filed to direct the Principal Special Judge for EC/NDPS Act Cases at Chennai to grant the certified copies of (a) the mahazar dated 22.03.2018 and (b) Section 67 statements of Balamurugan, Abdul Kareem and Mohamad Sadiq Batcha at the earliest, on payment of costs to enable the first respondent to face the legal battle.

2. The petitioner, who is a third party, filed a copy application in C.A.No.516 of 2018 in R.R.No.5 of 2018 before the Principal Special Judge for NDPS Act Cases, Chennai, for the issuance of a certified copy of the aforesaid documents in NCB F.No.48/1/5/218-NCB/MDS, which has been rejected in part, by an order dated 26.06.2018, aggrieved by which, the petitioner is before this Court.

3. Heard Mr.Vijayakumar, learned counsel for the petitioner.

4. This Court called for the original records from the trial Court and perused the same.

5. To appreciate the contentions of Mr.Vijayakumar, it may be necessary to briefly state the facts obtaining in this case.

6. On receipt of information, the Officers of the Narcotics Control Bureau (for short "the NCB") seized 14.650 kgs. of white powder believed to be ketamine from the possession of one Balamurugan and Abdul Kareem near Rohini Theatre, Koyambedu, Chennai on 22.03.2018. The contraband was seized under the cover of mahazar and thereafter, the statements of the said Balamurugan and Abdul Kareem were recorded under Section 67 of the Narcotic Drugs and Psychotropic Substances Act (for short "the NDPS Act"). Thereafter, they were placed under arrest and were produced before the Judicial Magistrate, Ambattur and were remanded to judicial custody. After the initial period of remand, the accused were produced before the

Principal Special Judge for NDPS Act Cases, Chennai, where the NCB submitted the case properties together with requisition to send the samples for chemical analysis.

[a] That being so, during the course of investigation, the involvement of one Mohammed Sadiq Batcha, the first respondent herein, came to light and therefore, the NCB issued a look out circular, pursuant to which, Mohammed Sadiq Batcha was intercepted at Anna International Airport, Chennai when he was attempting to go to Malaysia. On intimation from the Airport authorities, he was questioned by the NCB and his statement under Section 67 of the NDPS Act was recorded. He was also placed under arrest and was produced before the Judicial Magistrate, Ambattur, who remanded him to custody on 27.04.2018. After the initial remand, now, he is being produced before the Principal Special Judge for NDPS Act Cases, for subsequent remand.

[b] Under such circumstances, his father-in-law, Jamal Mohammad, the petitioner herein, filed a copy application before the Principal Special Court for NDPS Act Cases seeking certified copies of mahazar, Section 67 statements of Balamurugan, Abdul Kareem and Mohammad Sadiq Batcha and retracted statements of the accused.

[c] Learned Special Judge, after hearing both sides, by the impugned order dated 26.06.2018, has directed issuance of certified copy of the retracted statement of the accused alone. The request for the other documents was dismissed. Challenging the said order, Jamal Mohammad is before this Court.

7. Mr.Vijayakumar, learned counsel submitted that unlike police investigation where an FIR is registered under Section 154 Cr.P.C., in an investigation conducted by agencies like NCB, there is no procedure for registration of an FIR. Therefore, he submitted that only if those documents sought for by the petitioner are furnished, could the accused effectively defend his case and if necessary, file an application for quashing the prosecution. He also submitted that without the said documents, the accused will be seriously handicapped while prosecuting the bail application also.

8. As to the judgment of a Full Bench of this Court in Selvanathan @ Raghavan and others Vs State by Inspector of Police, G-5 Police Station, Madras and others [1988 LW (CrL.) 503], he submitted that the said case relates only to investigation by the police, under Chapter XII Cr.P.C. and that the ratio of the decision will not cover cases investigated by agencies like the NCB, DRI, Customs, etc.

9. In Selvanathan (supra), the Full Bench of this Court has gone into the entitlement of an accused to copies of documents before filing of the final report. The Full Bench has held that an accused will be entitled to the certified copy of the FIR and that, he will not be entitled to certified copies of the inquest report, Statements recorded under Section 161(3) of the Code, Post-mortem certificate, requisition given by the Police to a Medical Officer for conducting post-mortem and for medical treatment of the injured, Rough sketch of the scene and Observation mahazar, before the final report is filed.

10. The contention of Mr.Vijayakumar that Selvanathan (supra) would apply only to the investigation conducted by the police and would not apply to the investigation conducted by other agencies like the NCB, cannot be countenanced, in view of the authoritative judgment of the Supreme Court in Directorate of Enforcement vs. Deepak Mahajan and another [(1994) 3 SCC 440], wherein, it is held as follows:

119. The word 'investigation' though is not shown in any one of the sections of the Customs Act, certain powers enjoyed by the police officer during the investigation are vested on the specified officer of customs as indicated in the table given above. However, in the FERA the word 'investigation' is used in various provisions, namely Sections 34, 36, 37, 38 and 40 reading, "... any investigation or proceeding under this Act. ..." though limited in its scope.

120. From the above discussion it cannot be said that either the Officer of Enforcement or

the Customs Officer is not empowered with the power of investigation though not with the power of filing a final report as in the case of a police officer.

131. The submission that as there is no investigation within the terms of the Code in the field of FERA or Customs Act, Section 4(2) of the Code can have no part to play, has to be rejected for the reasons given by us while disposing of the contention "What investigation means and is" in the preceding part of this judgment.

132. For the aforementioned reasons, we hold that the operation of Section 4(2) of the Code is straightaway attracted to the area of investigation, inquiry and trial of the offences under the special laws including the FERA and Customs Act and consequently Section 167 of the Code can be made applicable during the investigation or inquiry of an offence under the special Acts also inasmuch as there is no specific provision contrary to that excluding the operation of Section 167. "

11. The NDPS Act is a special Act within the meaning of Section 4(2) Cr.P.C. and the said Act empowers the police and other agencies like the NCB to conduct search, seizure, record statements, arrest and prosecution of offenders. This is a unique Act which also empowers the Central and State revenue authorities and para-military authorities to conduct search and effect seizures. On account of the alarming increase in drug trafficking which has a direct nexus to terrorism, the Parliament, in its wisdom, has empowered a wide range of officials to prosecute offenders under the Act. This objective should be borne in mind while interpreting the provisions of the NDPS Act. Though the police conduct the investigation in terms of Chapter XII of the Code, yet, they are also required to follow the mandates of the provisions of the NDPS Act while investigating a case under the said Act. Officials other than the police are not governed by Chapter XII of the Code and therefore, they cannot register an FIR under Section 154 Cr.P.C. and file a final report under Section 173(2) Cr.P.C. However, the NDPS Act itself has provided certain safeguards, inasmuch as Section 42 states that if an Officer below the rank of a Gazetted Officer were to conduct a search of an enclosed place or vehicle on prior information, he is required to take down the information in writing and forward it to his immediate officer superior in rank within 72 hours. Section 68 of the Act

protects the identity of the informant. The reason for giving such a protection is obvious, because no person would come forward to give an information about drug traffickers, unless he is assured of legal protection. The NDPS Act contemplates close supervision by the superior officer of Gazetted rank and that is why the proviso to Section 42 mandates the furnishing of the information within 72 hours. Such an information can, by no stretch of imagination be equated to the First Information Report that is registered under Section 154 Cr.P.C. by the police on the complaint given by a person of the commission of a cognizable offence. Thus, in the light of Deepak Mahajan (supra) and the object of the NDPS Act, the protection given by Selvanathan (supra) would apply in all fours to the investigation conducted by non-police officials like the NCB under the NDPS Act.

12. The argument that unless the documents are supplied, the accused would be denuded of an opportunity to file a quash application is clearly misconceived. The Code does not inhibit the supply of documents to the accused, but only seeks to make them accessible to the accused after the conclusion of investigation. The accused will have an opportunity to challenge the complaint, if he so desires, at the opportune stage and not earlier. In this way, the right of the agencies to statutorily investigate an offence is balanced with the right of an accused to move the Courts to quash the prosecution against him.

13. An application for quash is a statutory right, be it of an FIR or a charge sheet and it flows from the inherent powers vested with the Constitutional Court under Section 482 Cr.P.C. Just because an accused has been arrested under the NDPS Act, it would not mean that he will be prosecuted as a matter of course. The power to arrest under the NDPS Act is founded on "reason to believe". The agency can drop his name subsequently in the complaint filed under Section 36-A(1)(d) before the Special Court, if it finds that there are no materials to prosecute the accused.

14. This issue can be looked at from another angle. In the statement of the accused recorded under Section 67 of the NDPS Act, he would have disclosed about the involvement of other notorious drug traffickers. If the statement of this accused is furnished even before the complaint/charge sheet is filed, the life of the one who gives the statement could be in peril. Common sense dictates that the agencies will have to necessarily maintain secrecy for effecting arrest of notorious drug traffickers. Such secrecy can be maintained only if the documents are kept confidential. The harm that would befall the system of free and fair investigation would outweigh any

presupposed inconvenience that may result in the non-supply of documents before the conclusion of investigation.

15. Public interest should undoubtedly give way to private interest. The rationale for adopting such a course was spelt out by a Full Bench of this Court in *State of Madras vs. G.Krishnan* [AIR 1961 Mad 92] wherein, it was held as under:

"From their very nature such confessions or statements will necessarily have to be kept secret; they being taken in the course of investigation, a disclosure before the authorities decide to launch a prosecution might impede the even course of the investigation or even lead to undesirable results. It is undeniable that one of the prime duties of the State is to investigate into offences and bring the offenders to trial. In our country, the obligation is a statutory one, provided for in the Code of Criminal Procedure. Reason and convenience would dictate that nothing should impair the efficiency of the investigation into offences."

16. In *Naresh Kumar Yadav vs. Ravindra Kumar and others* [(2008) 1 SCC 632], the Supreme Court examined the question of supply of documents before filing of the charge sheet and concluded that non-supply of documents is not necessarily prejudicial to the accused. While deprecating the practice of the accused accessing the case diary at the stage of bail, the Court held that papers that must be supplied to the accused have been statutorily prescribed.

"13. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilised against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in *Noor Khan v. State of Rajasthan* [AIR 1964 SC 286] and *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble* [(2003) 7 SCC 749 : 2003 SCC (Cri) 1918]. It was held that non-supply is not necessarily prejudicial to the accused. The court has to give a definite finding about the prejudice or otherwise. Even the supervision notes cannot be utilised by the prosecution as a piece of material or evidence against the accused. If any reference is made

before any court to the supervision notes, as has been noted above they are not to be taken note of by the court concerned. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorised access to the official records.

14. Further, it is baffling to note that the accused and the informant referred to particular portions of the case diary. At the stage the bail applications were heard by the High Court, legally they could not have been in a position to have access to the same. The papers which are to be supplied to the accused have been statutorily prescribed. The courts should take serious note when the accused or the informant refers to the case diary to buttress a stand."

17. Similarly, in a case under the Sea Customs Act, 1878, a Constitution Bench of the Supreme Court in Assistant Collector of Customs, Bombay and another vs. L.R.Melwani and another [AIR 1970 SC 962] held that the High Court could not direct the prosecution to supply copies of the documents collected during investigation even before the commencement of an enquiry in a case instituted on a private complaint (or otherwise than on a police report).

18. The accused will be entitled to a certified copy of the arrest memo, the judicial order of remand passed by the Magistrate/Special Court and the retraction if any, recorded by the Magistrate/Special Court at the time of remand and nothing more.

In the light of the foregoing discussion, this petition is dismissed as being devoid of merits.

सत्यमेव जयते Sd/-

Assistant Registrar (CS VII)

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Sub Assistant Registrar

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To
1.The Intelligence Officer, NCB
Chennai Zonal Unit
Chennai 600 077.

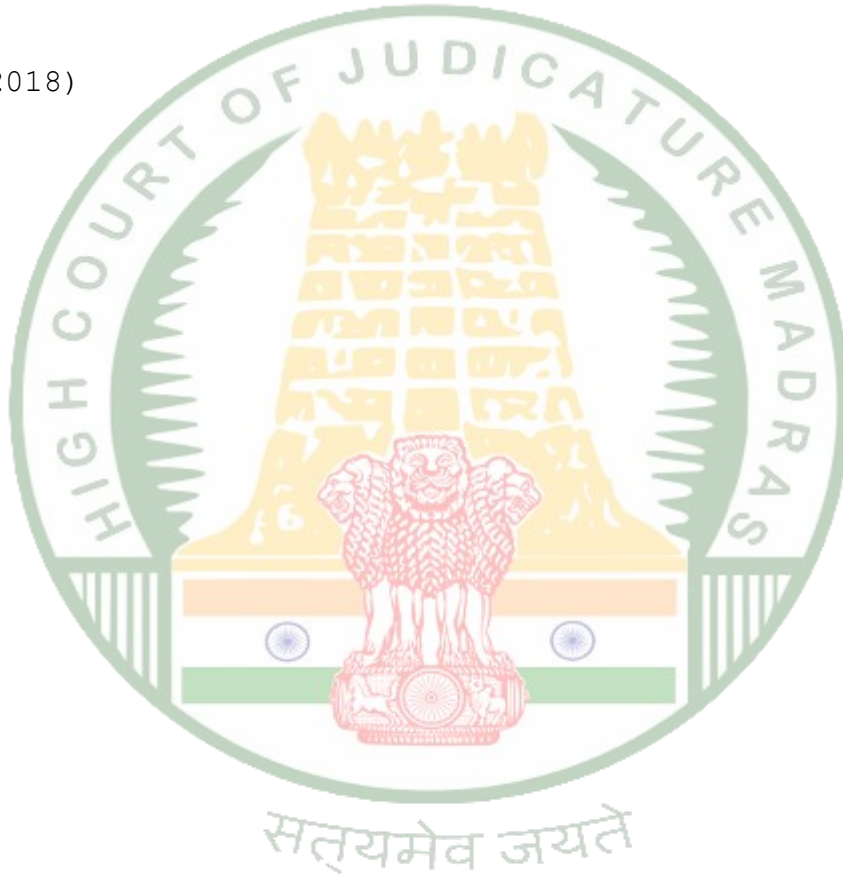
2.The Principal Special Judge for EC/NDPS Cases
Chennai.

3.The Public Prosecutor
High Court, Madras.

+lcc to Mr.R.Vijay kumar, Advocate SR.No.55794

CrI.O.P.No.18945 of 2018

CP(CO)
GN(27/08/2018)



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