

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****WRIT PETITION NO. 5826 OF 2018**

1. Sarvesh Kumar Shahi,
Age 61 years, Occ. Business,
Residing at A-30, Sunset Heights,
Nargis Dutt Road, Pali Hill Road,
Bandra (W), Mumbai 400 050.
 2. Samiresh Kumar,
Age 45 years, Occ. Business,
residing at A-303, Green View,
Plot No. 209, Vashi,
Navi Mumbai 400 703
- ... Petitioners

Versus

1. State of Maharashtra
Through Public Prosecutor,
High Court, Mumbai.
 2. Sr. Police Inspector,
Crime Branch,
Thane, Maharashtra.
 3. Police Sub Inspector,
Crime Branch, Thane,
Maharashtra.
 4. Sr. Police Inspector,
Kopri Police Station,
Thane, Maharashtra
- ... Respondents

Adv Aabad Ponda a/w Neha Ahuja & Aishwarya Kantawala
i/by Chaitanya Pendse for the Petitioners.

Smt. A.S. Pai, APP for the respondent State.

**CORAM : B.P. DHARMADHIKARI &
REVATI MOHITE DERE, JJ.
RESERVED ON : 07/02/2019
PRONOUNCED ON : 13/03/2019**

JUDGMENT (Per Dharmadhikari,J.):

In this petition, petitioners question initiation of proceedings against them pursuant to FIR No. 18 of 2018 dated 02/03/2018 at Kopri Police Station in Thane District for the offences punishable under sections 3, 7, 8 and 10 of the Essential Commodities Act, 1955 (hereinafter referred to as “Act of 1955”) and sections, 2, 3(4), 3(5) and 3(6) of the Motor Speed and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 (hereinafter referred to as “2005 Order”) read with sections 109, 114, 212, 407, 411, 420, 467, 468, 471, 120(B) of the Indian Penal Code, 1860 (hereinafter referred to as “IPC”).

2. This Court has, after hearing the learned counsel on 04/01/2019, noted the contention of the learned APP that the investigation has been carried out by the Assistant Commissioner of Police and time was given to State Government to file reply within three weeks. On 25/01/2019, the Court noted the efforts of the petitioners to

demonstrate that the investigation conducted after the raid on 14/4/2018 is distinct and has no bearing on the earlier incident dated 01/03/2018. This was disputed by the learned APP. To bring on record the interconnection between these two offences, APP sought adjournment which was given. On 01/02/2019, this Court noted that during the arguments, petitioners did not dispute the correlation of raids on 14/4/2018 with earlier incident dated 01/03/2018. Learned APP fairly stated that the raids conducted on 14/04/2018 are not by the officer of the rank of Deputy Superintendent of Police. The Court therefore, found the question arising for determination to be whether the initiation of investigation by the competent officer like Assistant Commissioner of Police on 01/03/2018 is enough to sustain the raid conducted on 14/04/2018. Learned APP sought further adjournment and it was strongly opposed by the petitioners. The respondents then claimed that the petitioners are absconding and after noticing the developments before the Hon'ble Apex Court, namely restoration of prayer in High Court for grant of anticipatory bail for fresh consideration by the Hon'ble Apex Court and the fact that the rejection of the bail application by this Court was not disturbed by the Hon'ble Apex Court, no

interim relief was given by us as request was/is pending, to the petitioners. The matter was then adjourned to 07/02/2019 when the parties were heard at length finally. Accordingly after issuing Rule and hearing the parties with consent finally, we closed the matter for judgment.

3. Petitioners point out that on 02/03/2018, FIR No. 18 of 2018 was registered at Kopri Police Station by Sub Inspector, Crime Branch, Thane on the allegations that the essential commodity namely high speed diesel meant to be delivered in bunkers at Mumbai dock, was wrongfully being taken to Indore with bogus invoices raised in the name of a bogus party. Penal provisions of Sections 3, 7, 8, 10 of the Act of 1955 and the Order 2005 as also sections 420, 467, 468 and 471 of IPC were thus invoked.

4. It is a matter of record that in the chargesheet no. 2 submitted to Chief Judicial Magistrate, Chief Court at Thane, vide additional final report dated 20/08/2018, names of both the petitioners figure as accused persons.

5. The contention of the petitioners is as the investigation

qua them is not initiated by the authorized officer in terms of 2005 Order, the entire action must fall to ground. They rely upon the final report form (original chargesheet) submitted in the matter on 02/03/2018 by Police Sub Inspector, Crime Branch, Thane which mentions name of the complainant/informant as PSI A.H.T.C. Crime Branch, Thane City. The petitioners point out that in so far as their involvement is concerned, the respondents rely upon the material collected as per spot panchanama dated 14/4/2018, dated 26/5/2018, dated 29/6/2018 and dated 31/7/2018. Thus investigation, search or seizure is again carried out by the officer of police who is not authorized in terms of clause 7 of 2005 Order(supra). The chargesheet no.2 mentions police sub inspectors as Investigating Officers and the very same Police Sub Inspector A.H.T.C. Crime Branch, Thane is an informant.

6. Learned counsel for the petitioners has submitted that as per clause 7, the authorized officer has to be not below the rank of Deputy Superintendent of Police duly authorized by the general or special order of the Central Government or a State Government. Such officer only can stop and search any

person or vehicle or enter and search any place/premises. He alone can inspect, seize and remove objectionable material. The procedure of sampling has also to be carried out only by such authorized officer as per requirement/clause no. 8. Clause 10 is relied upon to show that the provisions of 2005 Order, clause 7 and 8 are given overriding effect and prevail over any order of State Government.

7. The contentions in consonance with grounds (a) to (m) in writ petition are advanced to demonstrate how the law on the point declares, such initiation and investigation by the incompetent officer, void.

8. Learned APP on the other hand has relied upon the reply affidavit to explain the events. She submits that all the provisions of law have been complied with and the Assistant Commissioner of Police Shri. Bhosale received information and thereafter, has conducted the exercise of raid. On 01/03/2018 after getting information he has proceeded to the spot with panchas, informant and the staff, stopped the tanker, made enquiries with its driver and then carried out search. Illegal diesel was found in that tanker of which

samples were then taken as per his instructions and under his supervision. The panchanama was also drawn by the police inspector as directed by the said Assistant Commissioner of Police. The commission of various offences under 1955 Act, IPC and was then discovered and necessary further steps were taken. A.C.P. Bhosale issued directions to his subordinate PSI to lodge the FIR on behalf of the State Government. Accordingly FIR vide CR No. I/18/2018 was filed. The offence being cognizable and non-bailable police machinery has acted within the four corners of law.

9. According to him, after the offence was registered and cognizance was taken, any police station officer as per the directions of in-charge, is competent to investigate. When this further investigation was going on, more facts emerged. Accordingly, concerned officer conducting the further investigation, being duty bound to collect the evidence, has all the powers to take search, to take samples and to seize. During this investigation, involvement of the petitioners and few other persons came to light. The organized activity of group dealing illegally with diesel in State Government and other states and on high seas using barges, road transport

etc came to light where huge money transactions by hawala transfers and forged bogus documents are seen. Our attention has also been invited to the fact that the petitioners are unnecessarily trying to complicate the matter and order denying them anticipatory bail has also been placed in to service. The need of custodial investigation is also pointed out. It is submitted that any police officer can investigate the offence and support is being taken from section 11 of 1955 Act. It is also pleaded that the offence under IPC are also of grave and serious nature and hence, emphasis on particular procedure or some sections of 1955 Act is not proper. It is urged that the petitioners have not suffered any prejudice. It is clear that the investigation is at the fag end and supplementary chargesheet may be filed soon.

10. Thus it is seen that only question to be looked into is whether here the search and seizure or investigation into the offence is in accordance with the provisions of the law or not. Carrying out of search and seizure operations at various places including on barges like Royal Gomati, Mt Sharavati and Royal Gandak is not in dispute at least for the purpose of this proceedings. On the basis of the documents on

record advocate for the petitioners have to demonstrate that the investigation has been initiated and carried out by officer who is not authorized officer in terms of clause 7 of the 2005 Order.

11. Both the sides have relied upon certain judgments and we find it convenient to refer to some in the course of this discussion. It is not in dispute that as per section 4(2) of Cr.P.C. all offences under any other law are to be investigated, enquired into, tried and otherwise dealt with according to the provisions under Cr.P.C. but it is subject to special enactment regulating the same. Petitioner has relied upon it and exposition by the Hon'ble Apex Court in the case of A.R. Antulay Vs. Ramdas Srinivas Nayak¹ to urge that here the officer authorized in terms of clause 7 of the 2005 Order alone ought to have initiated and conducted the investigation.

12. The observations of the Hon'ble Apex Court in Paragraph 140 of State of Haryana Vs. Bhajan Lal² are also pressed in to serve to show that when the investigation was

¹ (1984) 2 SCC 500

² 1992 Supp (1) SCC 335

carried out by S.H.O. not clothed with valid and legal authority for the purpose and, therefore the same has been quashed and set aside.

13. Petitioners heavily relied upon the order of Andhra Pradesh High Court in the State of Andhra Pradesh Vs. Vishwanadula Chetti Babu³ where the provisions of rule 7 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 have been looked into. As per said rule 7, offence committed under the parent Act needs to be investigated by the police officer not below the rank of Deputy Superintendent of Police. In the facts before the Andhra Pradesh High Court, power to investigate was not conferred on such Deputy Superintendent of Police and hence, investigation made by the Assistant Sub Inspector of Police was held unsustainable. The single Judge of Rajasthan High Court in the case of Roshan Singh Vs. State of Rajasthan⁴ considered the prosecution under section 3/7 of 1955 Act and provisions of IPC. There complaint about illegal transportation of diesel was looked into and charge-sheet was filed. Those petitioners had relied upon earlier view of

3 Criminal Appeal No. 131 of 2004 decided on 30/09/2010

4 S.B. Criminal Misc (Pet) No.1693 of 2016 decided on 06/09/2017

Rajasthan High Court in *Balveer Vs. State of Rajasthan* where in a similar situation, search and seizure was found conducted by an Enforcement Officer who was not authorized to act under 2005 Order and therefore, proceedings were found vitiated. This view has been followed and Rajasthan High Court again has quashed and set aside the cognizance taken by the Chief Judicial Magistrate, Bikaner and proceedings pending before him were quashed and set aside.

14. As part of the petition, petitioners have also annexed the judgment of the Hon'ble Apex Court in Allied Motors Ltd. Vs. Bharat Petroleum Corpn. Ltd.⁵ The Civil Appeal arises out of the writ petition decided by Delhi High Court and therefore, the provisions of Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order, 1999 are looked into. Clause 4 of these 1999 order speaks of power of search and seizure and as per its sub clause (A), any police officer not below the rank of the Deputy Superintendent of Police duly authorized or any officer of the concerned Oil Company not below the rank of Sales Officer can take samples and/or seize any of the stocks which the said officer has reason to believe that it is

⁵ Civil Appeal No. 11200 of 2011 decided on 16/12/2011

used or being used in contravention of 1999 order. The Hon'ble Apex Court found that the police officer who conducted the raid and collected the samples was below the rank of Deputy Superintendent of police and hence the said provision was violated. It also noticed that the reasons as required by sub clause (B) were also not recorded. The procedure for sampling prescribed under clause 5 is also found to be violated. The Hon'ble Apex Court found that as these provisions were violated, the evaluation of samples in chemical tests became irrelevant and could not have been relied upon for terminating the dealership. The Hon'ble Apex Court therefore, relied upon the judgment of Privy Council in Nazir Ahmad Vs. King Emperor and other judgments. After upholding the finding of fact that there has been total violation of legal provisions & of principles of natural justice, it found it in the interest of justice to quash and set aside the order terminating dealership.

15. Petitioner has placed much emphasis on the judgment of the Hon'ble Apex Court in the case of State of Haryana Vs. Bhajanlal (supra). The said judgment delivered by the Hon'ble three judges of Supreme Court is on section 5A of

the Prevention of Corruption Act. That section is on subject of investigation into cases under the Prevention of Corruption Act and it opens with the words “*Notwithstanding anything contained in the Code of Criminal Procedure.....*”. This section 5 prescribes the police officers who can investigate in to the offences punishable under section 5 of the said Act and this arrangement is made overriding the provisions of Cr.P.C. The said Investigating Officer is permitted to investigate without orders of the Magistrate First Class. The discussion in this respect is contained in paragraphs 115, 116 and 118. In Paragraph 119, earlier judgments are briefly mentioned. It is in this backdrop that in paragraph 140, the Hon'ble Apex Court, though it set aside the judgment of the High Court quashing the first information report, it also quashed commencement as well as the entire investigation. Thus Hon. Apex Court found no fault with the FIR or its cognizance . The investigation commenced is found contrary to section 5A of the Prevention of Corruption Act.

16. The next judgment relied upon by the petitioners is in the case of State of Punjab Vs. Baldev Singh⁶ where the Constitution Bench looks into the provisions of section 50 of

6 (1999) 6 SCC 172

the Narcotic Drugs and Psychotropic Drugs Act, 1985. The Hon'ble Supreme Court in Paragraph 55 onwards considers the impact of sub section 50 and holds that the illicit articles seized in the search conducted in violation of safeguards provided under section 50 cannot by itself be used as admissible evidence of proof of unlawful possession. In paragraph 57 the Hon'ble Apex Court has recorded its conclusion, and in conclusion no. 4 noticed that such illegal search may undermine the respect for law and may have the effect of unconscionably compromising the administration of justice. It holds that the accused is entitled to fair trial and conviction resulting from an unfair trial is contrary to the concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 in the trial would render the trial unfair.

17. Petitioners then rely upon the judgment of the Apex Court in Roy V.D. Vs. State of Kerala⁷ which is on section 41 and 42 of the N.D.P.S. Act, 1985 and deals with the arrest and search by the officer not empowered or authorized. The petitioners submit that the Hon'ble Apex Court has found that where criminal proceedings are

⁷ (2000) 8 SCC 590

initiated on the basis of the illicit material collected on search and arrest which are per se illegal, the powers under section 482 Cr.P.C. can be exercised. Perusal of the said judgment particularly paragraph 18, 19 and 20 shows that if such illicit material and recovery vitiate the proceedings, such power under section 482 Cr.P.C. can be invoked. The Hon'ble Apex Court found that the recovery of illicit material vitiated the proceedings and therefore, quashed the sessions case on the file of the Additional Sessions Judge.

18. The Judgment of Hon'ble Apex Court in State of Punjab Vs. Balbir Singh⁸ is again on the provisions of the NDPS Act, 1985. In paragraph 6, the Hon'ble Apex Court has examined the contention that the failure to comply with the provisions of the Cr.P.C. in respect of search and seizure would vitiate the trial. It found that as held by it earlier, violation of sections 100, 102, 103 or 165 of Cr.P.C. per se does not vitiate the proceedings and the Court has to find out whether prejudice has been suffered by the accused. In paragraph 10, it found that the provisions of Cr.P.C. in section 100 and 165 are applicable to arrest and search even under the NDPS Act. It has in paragraph 12 found that

8 (1994) 3 SCC 299

only officers empowered under the Act can take steps regarding entry, search, seizure and arrest. Hence, search and arrest under section 41 and 42 of the NDPS Act under the warrant issued by any other Magistrate or by any officer not empowered or authorized is found to be per se illegal. In Paragraph 25, the Hon'ble Apex Court has recorded its conclusions and pointed out the mandatory nature of section 50 of NDPS Act with explanation that the question of complying therewith in case of chance recovery would not arise. Petitioners have relied upon this judgment to urge that in the present facts it was not chance recovery but pre-planned raid and seizure. According to them, as the respondents had enough previous notice, all legal provisions of 2005 Order could have been complied with.

19. In Hussein Ghadially Vs. Sate of Gujarat⁹ is a judgment on the effect of illegal approval under section 20A of the Terrorist and Disruptive Activities (Prevention) Act, 1987. There in paragraph 20 section 20A has been reproduced and the sub section 1 thereof shows that no information about the commission of offence under TADA can be recorded by the police without prior approval of the District

⁹ (2014) 8 SCC 425

Superintendent of police. The discussion in paragraph 21(2) shows that such power given to District Superintendent of police cannot be exercised either by the Government or by the Additional Police Commissioner. In such a situation before the Hon'ble Apex Court, powers were seen exercised by the Additional Police Commissioner, Surat. The Hon'ble Apex Court has answered the question in the negative and ultimately found that the approval was invalid.

20. The Larger Bench of Hon'ble Apex Court in State of Madhya Pradesh Vs. Mubarak Ali¹⁰ found that the objection of the present nature must be raised at the earliest. In the facts before the Hon'ble Apex Court, the objection about the validity of investigation in the absence of order of Magistrate was taken at the earliest. No attempt was made by the prosecution to adduce any evidence to show that the Magistrate gave permission to Sub Inspector after satisfying himself on advisability of doing so. The Hon'ble Apex Court upheld the view of High Court and found that the Magistrate did not realize the significance of his order giving permission but issued it mechanically. It therefore, accepted the contention that section 5A of the Prevention of Corruption

¹⁰ AIR 1959 SC 707

Act, 1947 were not complied with. In the facts the Hon'ble Apex Court also found that investigation was started by Sub Inspector 10 days prior to his obtaining permission by the Magistrate. Hence, Hon'ble Apex Court dismissed the appeal of the State Government.

21. Learned APP has relied upon the judgment of the Hon'ble Apex Court in R.A.H.Suguran Vs. Shankar Gowda¹¹ where provisions of Immoral Traffic (Prevention) Act, 1956 are looked into. The respondents in the Apex Court had approached the High Court under section 482 contending that the Investigating Officer was not competent to investigate. High Court held that investigation was not steered by the Special Officer appointed under section 13 and hence, investigation was illegal and vitiated. The Hon'ble Apex Court in paragraph 10 relied upon the its judgment in the case of H.N. Risbood Vs. State of Delhi¹² and noted that the cognizance is preceded by investigation and invalid investigation does not necessarily nullify the cognizance. The defect or illegality in investigation however serious, has no direct bearing on the competence or the procedure relating to

¹¹ (2017) 16 SCC 126

¹² AIR 1955 SC 196

cognizance or trial. When the cognizance is of police report vitiated by breach of mandatory provisions relating to investigation, the trial would be set aside only if illegality is shown to have brought about miscarriage of justice. However, it is also observed that when the attention of the court is invited to such illegality at very early stage, it would not be fair to accused not to obviate the prejudice that may have been caused thereby by appropriate orders at that stage. The Judgment of the Hon'ble Apex Court in the State of MP Vs. Mubarak Ali is also considered in paragraph 11 in this judgment.

22. In the case of State of M.P. Vs. Ramesh C. Sharma¹³ on section 5A of Prevention of Corruption Act, the Hon'ble Apex Court there has held that the investigation by incompetent police officer cannot result in vitiating the charge. Said defect has no direct bearing on the competence or procedure relating to cognizance or trial.

23. Learned APP has invited our attention to the Full Bench Judgment of Patna High Court in the case of Rajan Kumar

¹³ (2005) 12 SCC 628

and Ors. Vs. State of Bihar¹⁴ where Full Bench has delivered the judgment by majority. The minority view quashes the prosecution. The majority discussion from paragraph 42 onwards records the conclusion in paragraph 92 thereof. In the first conclusion, it has been observed by the Full Bench that the registration of FIR disclosing commission of cognizable offence on the basis of illegal investigation/search/seizure, does not render the entire investigation, enquiry or trial illegal from its very inception. Full Bench of Patna High Court takes note of the judgment of Hon'ble Apex Court in K.L. Subhayya Vs. State of Karnataka and finds that there the issue was in relation to non cognizable offence. It also holds that the illegal search by unauthorized officer does not ipso facto mean that the seizure of article would be vitiated and it would vitiate the trial.

24. The arguments in this matter before us are on the basis of four panchanamas Panchanama dated 18/4/2018 is drawn in presence of witnesses by police sub inspector Vijay Upale and it pertains to vessel Royal Gandak. The second panchanama dated 25/6/2018 is in relation to vessel Royal Gomati and it is drawn by Sr. P.I. Ravindra Daundkar. PSI

¹⁴ Criminal Misc. No. 11852 of 1984 decided on 27/10/2016

Upale is also shown as present at that time. This panchanama shows grievance of one K. K. Sharma, General Manager that Royal Gomati and Sharawati had supplied 56 KL diesel less between 13/2/2018 to 7/3/18. This vessel belongs to Shahi Shipping Company and the petitioners before this Court are directors thereof. Third Panchanama dated 29/6/2018 is in relation to vessel M. T. Sharawati and it refers to Sarvesh Shahi as the owner of company. It is drawn by Sr. P.I. Doundkar. Fourth panchanama dated 31/7/2018 is in relation to vessel Royal Gomati and it is drawn by Shri Doundkar.

25. At this stage we are not concerned with correctness or otherwise of the contents of these panchanamas. Only question to be looked into is whether on the basis of these panchanamas action could have been initiated against the petitioners.

26. Charge-sheet filed against the petitioners is supplementary charge-sheet No.2 in C. C. No.969/2018. There PSI Upale and PSI Ravindra Daundkar are shown as Investigating Officers while Sunil Baburao Chauhanke, PSI is

shows as complainant/informant. In charge-sheet shown as original charge-sheet name of Vijay Upale only is shown as Investigating Officer while name of complainant/informant is same. In supplementary charge-sheet panchanamas mentioned supra are shown and in details of documents/properties seized during investigation, are relied upon. In this charge-sheet, in Form No.5-C under clause(xii) name of Sarvesh Shahi, petitioner no. 1 is shown as accused and on next page name of petitioner No.2 is also shown as accused.

27. Relevant section of 1955 Act read as under--

“S.11. Cognizance of offences.—No Court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Section 21 of the Indian Penal Code (45 of 1860) [or any person aggrieved or any recognised consumer association, whether such person is a member of that association or not].

[Explanation.—For the purposes of this section and Section 12-AA, “recognised consumer association” means a voluntary consumer association registered under the Companies Act,

1956 (1 of 1956) or under any other law for the time being in force.]

S.10-A. Offences to be cognizable and bailable.—
Notwithstanding anything contained in [the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be cognizable [* * *].]

Section 10-A of the Essential Commodities Act, 1955 was introduced by Amending Act 36 of 1967 and was made applicable from 30th December 1967 whereby the offences under the Act were made cognizable. Section 10A above is in compliance with section 4 of Cr.P.C. and implies that procedure relevant for investigating the cognizable offence therein is applicable. Otherwise there is no need to add such a overriding provision in the 1955 Act. Section 10A on the other hand emphasizes the purpose behind enacting such a provision & if interpretation put on by the Petitioners is accepted, clause 7 of 2005 Order overreaches parent enactment & defeats S. 10A there in. Effort made by them is not sustainable at all. Section 7 of the 1955 Act deals with Penalties & except S. 10A there is no other section in the main Act which regulates the procedural province of

investigation. Petitioners' contentions ignores S. 11 also which enables the court to take cognizance if complaint is by the officers specified therein. Reading the clauses in 2005 Order as restricting the power of a police officer under S. 154 Cr.P.C. is unwarranted & a subordinate regulation can not be construed to derogate from the scope of S.10A or S.11 of 1955 Act.

28. Hon. Apex Court in Satya Narain Vs. State of Bihar¹⁵ considered Section 11 of the 1955 Act to find out when the court can take cognizance of offences under the said Act. Hon. Court considered the scope of section 10-A in para 5 of its Judgment as follows:

"5. Section 10-A of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under the Act shall be cognizable which would imply that an officer in charge of police station on receipt of the information of such cognizable offence may without the order of Magistrate investigate into the offence

15_AIR 1980 SC 506

according to the procedure prescribed in Chapter XII of the Code. On completion of the investigation the police officer shall submit a report to the Magistrate empowered to take cognizance of the offence on a police report”.

29. Paragraph 7 in this judgment of the Hon. Apex Court shows--

“ 7. Section 11 of the Act precludes a Court from taking cognizance of the offence punishable under the Act except upon a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Section 21 of the Indian Penal Code. The question is, if such police officer investigating into an offence which the Act has declared as cognizable submits a report in writing under Section 173(2) disclosing an offence under the Act and requesting for proceeding further into the matter, would it satisfy the requirements of Section 11 for taking cognizance of the offence so disclosed. Undoubtedly the police officer submitting the report would be a public servant within the meaning of Section 21 IPC and his report has to be

in writing as required by Section 173(2). It must disclose an offence of which cognizance can be taken by the Magistrate. Apparently Section 11 would stand fully complied with. This question was raised before this Court in a slightly different context in Pravin Chandra Mody v. State of Andhra Pradesh². The question was whether a report submitted by the police officer after investigating into an offence under Section 420 IPC and Section 7 of the Act as it then stood would enable the Magistrate to take cognizance under Section 190(1)(a) or Section 190(1)(b) of the Code so as to require the Magistrate to proceed to try the offence under Section 252 or Section 251-A of the Code, as the case may be. If such police report would provide sufficient compliance with Section 11 even though at the relevant time the offences punishable under the Act were not declared cognizable it was contended that it may nonetheless be at best a complaint under Section 190(1)(a) and in that event the Magistrate taking cognizance of the offence under Section 190(1)(a) of the Code will have to proceed to try the offence according to procedure prescribed under Section 252. On the other

hand it was contended that where the police officer was investigating into allegations of facts constituting some cognizable and some non-cognizable offences the report submitted by such officer would be under Section 190(1)(b) and the Magistrate taking cognizance of the offence on such report would be so doing under Section 190(1)(b) and the case would have to be tried according to the procedure prescribed in Section 251-A. This Court held that “the police officer is a public servant” and this was not denied. The requirements of Section 11 are, therefore, satisfied though Section 11 does not make the report, if filed by a police officer, a charge-sheet. It was also contended that the report under Section 11 could not be treated as a report under Section 173 but only as a complaint under Section 190(1)(a). The police officer was investigating under Section 156(1) of the Code of Criminal Procedure a cognizable offence under Section 420 IPC which was based on the same facts as the offence under Section 7 of the Essential Commodities Act. He investigated the latter offence along with the former and joined it with the former in the charge-sheet which he presented. Negating the

contention it was held that where the law requires a report in writing by a public servant to the Magistrate for taking cognizance of an offence, the requirements of law are satisfied when a report is forwarded by a public servant who is also a police officer. By a subsequent amendment and insertion of Section 10-A in the Act, the offences under the Act are declared as cognizable and, therefore, the police officer would be entitled to investigate into such offences without the order of a Magistrate and if the police officer proceeds to investigate into the offence it is obligatory upon him to submit a report under Section 173(2). Such a report would be a police report for purposes of Section 190(1)(b) and if the Magistrate takes cognizance of an offence under the Act upon such a police report, Section 11 would be complied with in its entirety.”

30. This judgment in Satya Narain Vs. State of Bihar (supra) is directly on the point. Hon'ble Apex Court in the case of A.R. Antulay Vs. Ramdas Srinivas Nayak¹⁶ & State of Haryana Vs. Bhajan Lal¹⁷ consider S. 5A of P.C. Act In later

¹⁶ (1984) 2 SCC 500

¹⁷ 1992 Supp (1) SCC 335

case in paragraph 117, Hon. Court notices that a police officer not below the rank of an Inspector of Police authorised by the State Government in terms of the first proviso can take up the investigation of an offence referred to in clause (e) of Section 5(1) only on a separate and independent order of a police officer not below the rank of a Superintendent of Police. Hon. Apex Court proceeds to explain that a strict compliance of the second proviso is an additional legal requirement to that of the first proviso for conferring a valid authority on a police officer not below the rank of an Inspector of Police to investigate an offence falling under clause (e) of Section 5(1) of the Act. State of M.P. Vs. Ramesh C. Sharma¹⁸ (supra) also considers same law. The very schemes in these sections of P.C. Act & Ss. 10A & 11 of 1955 Act vary. These judgments under P.C. Act do not constitute valid precedents in present facts.

31. As per language of rule 7 looked into by Andhra Pradesh High Court in State of Andhra Pradesh Vs. Vishwanadula Chetti Babu¹⁹, offence committed under the parent Act needs to be investigated by the police officer not

¹⁸ (2005) 12 SCC 628

¹⁹ Criminal Appeal No. 131 of 2004 decided on 30/09/2010

below the rank of Deputy Superintendent of Police. View of the Rajasthan High Court in the case of Roshan Singh Vs. State of Rajasthan²⁰ or in Balveer Vs. State of Rajasthan apparently runs counter to the law laid down by the Apex Court in Satya Narain Vs. State of Bihar (supra). Hon'ble Apex Court in Allied Motors Ltd. Vs. Bharat Petroleum Corpn. Ltd. (supra) looks into civil action and impact of S. 11 or 10A of 1955 Act or its earlier view in Satya Narain Vs. State of Bihar did not fall for consideration there. Similarly other judgments mentioned supra which turn on the scheme peculiar to either Narcotic Drugs and Psychotropic Substances Act, 1985 or Terrorist and Disruptive Activities (Prevention) Act, 1987 do not form a valid precedent in this matter. Questions whether objection of present nature, if it strikes at the root of registration of offence by the police should be taken at the earliest & its impact on further steps i.e. investigation by the authorities or contention that search & seizure was not a chance recovery, therefore do not arise in present matter & it is not necessary to dwell upon various cases cited for that purpose by both sides.

32. In present matter, police effected first arrest on 2nd

20 S.B. Criminal Misc (Pet) No.1693 of 2016 decided on 06/09/2017

March, 2018 when accused Shakirali Tahidulla @ Jahidulla @ Vahidulla was sent to Court. Second accused Nabiraja Khan was sent to Court after his arrest on next day ie 3/3/2018. Document of final report at Annexure A shows that the FIR is registered on 2.3.2018 & there were other persons named in it as accused. All panchanamas mentioned supra by us or assailed before us as “unauthorized” are in furtherance of this FIR & cognizance. This action by the Police is in accordance with S. 10A & 11 of the 1955 Act. Seizure or act of drawing samples recorded therein is not even urged to be in breach of any provision contained in Cr.P.C. There is no independent challenge to FIR as registered on 2.3.2018 or to scheme apparent from S. 10A or 11 of 1955 Act at all. Only effort is to demonstrate that initiation of action against the Petitioners in pursuance thereof is illegal because of subordinate piece of legislation viz. 2005 Order. Cl.10 of this Order while giving it an overriding effect expressly clarifies that it supersedes only the similar Order, if any made by the States.

33. In view of this discussion, it follows that the scheme of 1955 Act has to prevail and any clause in 2005 Order cannot

be construed and used to defeat it. We therefore, find no substance in the contentions raised by the petitioners. Petition is accordingly dismissed. Rule is discharged. There shall be no order as to costs.

(REVATI MOHITE DERE,J.)

(B.P. DHARMADHIMARI,J.)