GAHC010019502014

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P. 506/2014

1:RATI BANIK
S/O LT. MOHAN BANIK R/O RUPAHI TOWN, MISTRI PATTY P.S. RUPAHIHAT
DIST. NAGAON, ASSAM.

VERSUS

1:THE STATE OF ASSAM AND ANR

2:MD GOLAP HUSSAIN
S/O MD SIRAJUDDIN AHMED R/O VILL- RUPAHI TINIALI P.O. RUPAHI
P.S. RUPAHI HUT
NAGAON
ASSAM

Advocate for the Petitioner : MR.P P DUTTA
Advocate for the Respondent :

BEFORE
HONOURABLE MRS. JUSTICE RUMI KUMARI PHUKAN

ORDER

Date : 05-05-2020

Heard the learned counsel for the petitioner. None appears for the respondent No.2 despite service of notice. The learned counsel for the State, Mr. SH Bora is present.

As the matter pertains to 2014 so it is taken up for hearing and disposal.

The petitioner herein has been charged in connection with Sessions (t-2) Case No.317(N)/2014 under Section 379/411 IPC read with Section 4 of Explosive Substance Act by order dated 22.09.2014 passed by the Additional Sessions Judge, Nagaon.

The aforesaid order has now being challenged by the petitioner on the ground that in the

backdrop of the case where there is simple recovery of petrol and diesel from the possession of the accused persons as per the FIR the offence under Section 4 is not attracted within the definition of Section 2 of the Explosive Substance Act (punishable under Section 4 of ES Act) and hence the same order is bad in law (inasmuch as framing of charge under Section 4 of the ES Act.)

The learned counsel has drawn the attention of the Court towards the FIR which indicates that 4 drums petrol and diesel 5 drums seized from the possession of the accused person which was found in his rented shop and it was suspected to be stolen one. After completion of the investigation, Investigating Officer submitted charge-sheet under Section 379/411 IPC read with Section 4 of ES Act. At the time of framing charge the learned counsel for the petitioner (defense side) raised objection for framing charge under Section 4 of ES Act and also relies at the decision of the apex court and other High Court on the subject matter. But the learned trial court has not discussed anything about the submission made by the learned defense counsel and has framed charge on the basis of the charge-sheet, as reflected from the impugned order.

Needless to say, the Court should not be a mouth speech of prosecution while framing charge and the Court has to apply his mind to the allegation as well as the material collected during the investigation as well as provision of law at the time of framing of charge. As in the instant case, there were simple recovery of article which was suspected to be stole one, the Court has to consider as to whether the offence under Section 4 of ES Act will also attract in the given background of the case, as well as within the provision of the said Act.

Section 2(d) defines the order explosive substance read as follows:

> "*(a) the expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement.*
> *(b) the expression "special category explosive substance" shall be deemed to include research development explosive (RDX), penta erythritol tetra nitrate (PETN), high melting explosive (HMX), tri nitro toluence (TNT), low temperature plastic explosive (LTPE), composition exploding (CE) (2, 4, 6 phenyl methy nitramine or tetryl), OCTOL (mixtaure of high melting explosive and tri nitro toluene), plastic explosive kirkee-1 (PEK-1) and RDX/TNT compounds and other similar type of explosives and a combination thereof and remote control devices causing explosion and any other substance and a combination thereof which*

the Central Government may by notification in the Official Gazette, specify for the purpose of this Act.

Section 4 defines punishment as follows:

4. Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property.- Any person who unlawfully and maliciously— (a) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion in 1[India] of a nature likely to endanger life or to cause serious injury to property; or (b) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in 1*[India], or to enable any other person by means thereof to endanger life or cause serious injury to property in India, shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished-*

(i) in the case of any explosive substance, with imprisonment for life, or with imprisonment of either description for them which may extend to ten years and shall also be liable to fine

(ii) in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

Now from the statement of the witnesses also reveals that they have stated about the seizure of petrol and diesel from the accused person but nothing about explosive substance within the preview of law. Storage of petrol and diesel is covered by the Petroleum Act and not within the provision of Explosive Act.

After going through all documents like FIR, charge-sheet, statement of witnesses under Section 161, seizure etc. it reveals that the learned trial court has not applied his judicial mind regarding the matter and has mechanically framed the charge under Section 4 of Explosive Substance Act without considering the legal provision.

The learned Additional Public Prosecutor has also conceded to the aforesaid aspect.

Taking note of all above, the impugned order dated 22.09.2014 passed by the learned Sessions Judge, Nagaon in Sessions (t-2) Case No. 317(N)/ 2014 is hereby quashed and set aside with a direction to the learned trial Court to frame a charge under proper provision of law after hearing the learned counsel for both the parties, having regard to the provision of law.

The petitioner will appear before the trial court on 01.06.2020 and the learned trial court will proceed accordingly.

This petition is accordingly disposed of.

True copy be furnished under the seal and signature of the Court Master.

JUDGE

Comparing Assistant