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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.07.2020

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P.No.5607 of 2020
& Crl.MP.No.3171 of 2020

Abdinasir Ugas Ali,
S/o. Ugas Ali,
Door No.592, CLV Nagar,
2nd Street, Sangaveerayan Petai,
East Coast Road,
Chennai - 600 112.

... Petitioner/Accused

Vs.

The Assistant Commissioner of Customs,
Prosecution Unit (AIR),
New Customs House,
Meenambakkam,
Chennai - 600 027.

... Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C. praying to call for the records pertaining to C.C.No.06 of 2020 in R.R.No.07 of 2018 in O.S.No.1 of 2018-PAD-INT (AIR) on the file of I-Additional Judge, EC and NDPS Act, Chennai and quash the same.

For Petitioner : Mr.Mano Ezhilmani
For Mr.TM.Mano

For Respondent : Mr.Vishnu,
Special Public Prosecutor (Customs)

ORDER

This petition has been filed to quash the proceeding in C.C.No.06 of 2020 in R.R.No.07 of 2018 in O.S.No.1 of 2018-PAD-INT (AIR) on the file of learned I-Additional Judge, EC and NDPS Act, Chennai, thereby taken cognizance for the offences under Section 8(C) r/w Sections 22, 23, 28 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act) r/w Sections 135 and 135 (1) (a) of the Customs Act, 1962, as against the petitioner.

2. The learned counsel appearing for the petitioner submitted that the petitioner is an Ethiopian National and he



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is doing his under graduation degree in BBA in Chennai. The respondent filed a complaint alleging that on 24.02.2018, an import parcel was booked in Kenya by one Abdihakim Nur Muhidin containing a package weighing 7.9 Kgs of Khat Leaves, a stimulant containing Catha Edulis. The said package contains the name of the petitioner and his cousin has booked the same and sent to him. The alleged package reached the shores of Chennai on 05.03.2018. On examination of the package, the respondent found it was to be Cathua Edulis. Hence the impugned proceedings have been initiated as against the petitioner under the NDPS Act and also r/w Customs Act.

2.1. The learned counsel appearing for the petitioner further submitted that the Khat Leaves were neither a narcotic drug nor psychotropic substance under the NDPS Act. It came to be included in the list of psychotropic substances under the NDPS Act, by virtue of a notification No.S.O.821(E) dated 27.02.2018. According to the complainant, the package was booked prior to 27.02.2018 i.e., on 24.02.2018. Hence no offence can be tried, since as on date of the booking of the package, the substance was not banned. He also relied upon the judgment of the Hon'ble Gujarat High Court dated 09.05.2018 passed in Criminal Misc. Application No.28230 of 2018, in the case of Chirag Hasmukhrai Bhojani anr Vs. State of Gujarat. Therefore he vehemently contended that when the notification was issued, the said act is not an offence triable under the NDPS Act and it cannot be applied retrospectively. Hence, he sought for quashment of the entire proceedings.

3. Per contra, the learned Special Public Prosecutor (Customs) appearing for the respondent would submit that on 24.02.2018, an imported parcel No.301532 was booked from Kemakup, Kenya by one Abihakim Nur Muhidin, Mombasa, Kenya, addressed to the petitioner herein. The said parcel reached the shores of Mumbai on 03.03.2018 and reached the Foreign Post Office at Meenambakkam, Chennai on 05.03.2018. The parcel was scanned by the Postal Appraisal Department under the supervision of the Superintendent attached with the Postal Appraisal Department. The images appeared to be of leaves and might be of narcotics in nature and the same was detained for examination. On 12.03.2018, the parcel was examined and the contents of the parcels were suspected to be narcotic in nature and the same was referred to Postal Appraisal Department Intelligence Unit for further investigation. Thereafter, on 27.04.2018, in the presence of two independent witnesses, the officers concerned taken up the above parcel for examination and found that the parcel contains dried leaves green in colour in two pink polythene bags weighing 7.9 kg in total. Therefore, the complaint is lodged as against the petitioner for the offences under Sections 8(C) r/w Sections 22, 23, 28 of NDPS Act r/w Sections 135 and 135(1)(a) of the Customs Act, 1962.



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3.1. The ground raised by the learned counsel appearing for the petitioner cannot be applied in the case on hand, since the parcel sent by the cousin of the petitioner from Kenya was examined only on 12.03.2018 and found to be a narcotic drug. Thereafter only on 27.04.2018, the parcel was examined and found as dried khat leaves. Therefore, after notification dated 27.02.2018, the parcel reached the shores of Mumbai and also reached the Foreign Post Office, Meenambakkam on 05.03.2018. On that date the alleged contraband khat leaves are declared and notified as psychotropic substance and therefore, the petitioner is liable to be tried for the offences under Sections 8(C) r/w Sections 22, 23, 28 of NDPS Act r/w Sections 135 and 135(1)(a) of the Customs Act, 1962. Therefore, he sought for dismissal of the quash petition.

4. Heard Mr. Mano Ezhilmani, learned counsel appearing for the petitioner and Mr. Vishnu, learned Special Public Prosecutor (Customs) appearing for the respondent.

5. The petitioner is arrayed as accused in C.C.No.06 of 2020 in R.R.No.07 of 2018 in O.S.No.1 of 2018-PAD-INT (AIR) on the file of learned I-Additional Judge, EC and NDPS Act, Chennai. The only ground raised by the learned counsel appearing for the petitioner is that the plant khat was neither a narcotic drug nor psychotropic substance and it came to be included in the list of psychotropic substances under the NDPS Act, 1985 by virtue of a notification No.S.O.821(E) dated 27.02.2018. The alleged package was booked prior to the notification i.e., on 24.02.2018. Therefore, no offence can be tried as on the date of booking of the package and the substance was not banned in India. In support of his submission, he also relied upon the judgment of the Hon'ble Gujarat High Court passed in Criminal Misc. Application No.28230 of 2018, in the case of Chirag Hasmukhrai Bhojani anr Vs. State of Gujarat, dated 09.05.2018. The relevant portion of the said judgment is extracted hereunder as follows :-

"4 The principal argument of Mr. Mehta, the learned senior counsel appearing with Ms. Patel, the learned counsel for the applicants is that when the prosecution came to be instituted against the applicants, the plant "Khat" was neither a narcotic drug nor psychotropic substance. It is submitted that Catha Edulis came to be included in the list of psychotropic substances under the Act, 1985 by virtue of a Notification No.S.O.821(E) dated 27th February 2018. It appears that an application was filed in this regard under the Right to Information Act. The



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applicant No.1 was informed by the Government of India, Ministry of Finance, Department of Revenue, vide letter dated 1st March 2018 as regards the inclusion of "Khat Leaves" as a psychotropic substance. The communication is extracted hereunder:

"Subject: Information sought under RTI Act, 2005. Sir, Please refer to your RTI application dated, received in this Department on 31.01.2018 from National Academy of Customs Excises & Narcotics. 2 In this regard, it is informed that Government of India, Ministry of Finance vide notification No.S.O.821(E), dated 27th February, 2018 has notified Catha Edulis (Dry Chatt or Mira Leaves Dry Chat Edulis) as a psychotropic substance under Narcotic Drugs and Psychotropic Substances, 1985."

5.Thus, for the first time, "Khat Leaves" came to be included in the list of psychotropic substances under the Act, 1985 only from 27 th February 2018.

6.Mr. Desai, the learned standing counsel appearing for the respondent No.2 fairly conceded that the applicants cannot be prosecuted for the alleged offence as on the date of commission of the offence, "Khat Leaves" were not included as a psychotropic substance.

7. Having regard to the stance of the respondent No.2, there should not be any difficulty in allowing this application and quashing the prosecution against the applicants.

8.In the result, this application is allowed. The proceedings of the Sessions Case No.4 of 2017 pending in the Court of the Principal Sessions Judge, Ahmedabad are hereby quashed. All consequential proceedings pursuant thereto stand terminated. Rule is made absolute. Direct service is permitted."

In the above case cited by the learned counsel appearing for the petitioner, on the date of commission of the offence, the contraband called khat leaves were not included as psychotropic substances. It is notified only on 27.02.2018 and the khat leaves came to be included under NDPS Act after the notification.



6. In the case on hand, the package was reached the shores of Mumbai on 03.03.2018 and thereafter it reached the Foreign Post Office, Meenambakkam, Chennai on 05.03.2018. Thereafter, on 12.03.2018, the parcel was examined and referred to Postal Appraisal Department. Thereafter only on 27.04.2018, in the presence of two independent witnesses, the officer in-charge taken the parcel for examination and found two pink polythene bags containing khat leaves weighing 7.9 kg, addressed to the petitioner herein. Therefore, the commission of the offence had taken place on 27.04.2018 as such, on the date of commission of offence, the contraband called khat leaves were included as psychotropic substances and the same was notified by the Government of India, Ministry of Finance vide notification No.S.O.821(E), dated 27.02.2018. Therefore, the above judgement is not applicable to the case on hand and on the date of commission of offence the contraband called khat leaves were very much included in the list of psychotropic substances under the NDPS Act, 1985. In view of the above discussion, this petition is devoid of merits and liable to be dismissed.

7. Accordingly, this Criminal Original Petition is dismissed. Consequently connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-VI)

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Sub Assistant Registrar

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To

1. I-Additional Judge, EC and NDPS Act,
Chennai
2. The Assistant Commissioner of Customs,
Prosecution Unit (AIR),
New Customs House,
Meenambakkam,
Chennai - 600 027.
3. The Public Prosecutor,
Madras High Court,
Chennai.

CRL.O.P.No.5607 of 2020
& CrI.MP.No.3171 of 2020

NMI (CO)
CB(28/09/2020)