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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 1490/2020& CRL.M.A. 7224/2020

AIR CUSTOMS

.....Applicant

Through: Mr.Satish Aggarwala, Sr.Standing
Counsel with Mr.Gagan Vaswani,
Advocate.

versus

MOSAFIER ALIZAH I & ORS

...Respondent

Through: Mr. Pushpender Kumar, Advocate for R-
1 to 4. (DHCLSC)
Mr. Anju Lata, Advocate for R-5 to 7.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER

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06.06.2020

CRL.M.C. 1490/2020 & CRL.M.A. 7224/2020

In view of the appearance on behalf of the respondent nos. 1 to 4 by the learned counsel Mr. Pushpender Kumar, Advocate, the matter has been taken up qua the petition CRL.M.C. 1490/2020, vide which the prayers made by the petitioner, the Air Customs are to the effect:-

“(i) Set aside the order dated 01.06.2020 of Ld. Duty Metropolitan Magistrate, Dwarka, New Delhi;

(ii) Direct the Ld. Metropolitan Magistrate to submit report as to how the matter had been taken up and dismissed without forwarding link to the counsels for the parties;

(iii) Direct the Ld. Metropolitan Magistrate/ jurisdictional Sub-Divisional Magistrate, Vasant Vihar, New Delhi to draw samples and conduct proceedings within two working days of the filing of the application by the department;

(iv) Direct the Central Revenues Control Laboratory to submit its report in respect of representative samples within a week after receipt of the samples from the office of the petitioner department;

(v) Extend period for one month for the detention of the respondents with effect from the date of drawl of samples by the Metropolitan Magistrate, Dwarka, New Delhi/ SDM, Vasant Vihar, New Delhi;

In the alternative, direct the Additional Sessions Judge, Dwarka, New Delhi to dispose of the application of the department by 07.06.2020 as the time has extended till 10.06.2020.

(vi) Any other order(s) as may be deemed fit or appropriate 'may also kindly be passed.'"

Learned Senior Standing counsel for the petitioner presently confines the prayer that has been made through the petition and through the accompanying application CRL.M.A. 7224/2020 seeking that the impugned order dated 01.06.2020 of the learned Duty, Metropolitan Magistrate, South West District in Miscellaneous No.12823/20 be set aside, in as much as, vide the said order, the learned Duty Metropolitan Magistrate had observed to the effect:-

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***Mis. No.12823/2020
Air Customs Vs. Mosafier Alizahi
u/s23/21/29 NDPS Act***

01.06.2020

Proceedings in the present matter have taken place through Video Conferencing via CISCO WEBEX.

Present: None.

Ld. counsel was invited to join the VC on CISCO WEBEX by the Reader of the Court. Ld. counsel did not join the proceedings till 1.15 PM through his email ID.

Perusal of the record reveals that the present application has been filed u/s 52A of the NDPS Act for collection of samples.

It is a settled law that the said application is not maintainable before this Court and the proceedings are to be conducted by the Executive Magistrate.

Accordingly, the application is dismissed as the same is not maintainable.

Copy of this order be sent to the facilitation centre for onward transmission to Ld. counsel for the applicant through email.

File be consigned to the record room after necessary compliance.”,

and thus, had dismissed the application that had been filed on behalf of the Air Customs under Section 52 A of the NDPS Act, 1985 for collection of samples observing to the effect that the said application is not maintainable before the said learned Court and that the proceedings are to be conducted by the Executive Magistrate and the application was dismissed as being not maintainable.

Submissions have been made on behalf of either side.

Inter alia reliance is placed on behalf of the petitioner/Air Customs on the verdict of this Court in W.P.(Crl.) No.556/2014 titled as **“Department of Customs Vs. M/s. Siddhant Enterprises and Another”**, order dated 27.08.2014; verdict of the Hon’ble Supreme Court in Special Leave to Appeal (Crl.) No.10280/2015 in **“Department of Customs Vs. M/s. Siddhant Enterprises and Another”**, order dated 27.10.2017; verdict of this Court in CRL.M.C. No.526/2013 titled as **“Directorate of Revenue Intelligence, N.D. Vs. State of NCT of Delhi”**, order dated 21.02.2013 submitting thus to the effect that even in cases under the Customs Act where samples have to be drawn, the Hon’ble Supreme Court in *Special Leave Petition (Crl) 2152/2014* titled as **“Directorate of Revenue Intelligence, N.D. Vs. State of NCT of Delhi”** vide order dated 01.05.2017, in view of the consent of the parties observed to the effect that verification of the stocks in question for the purpose of Section 110(IB) of the Customs Act, 1962 be made by the Judicial Magistrate or any person authorized by him for that purpose and that no objection would be raised in this regard by the parties concerned and that vide the said order dated 01.05.2017, the question of law raised in the special leave petition had been left open.

It has also been submitted on behalf of the petitioner that in several cases, the applications under Section 52A of the NDPS Act, 1985 have been taken up by the Metropolitan Magistrate and samples have been drawn.

On behalf of the respondent nos. 1 to 4 and on behalf of the respondent nos. 5 to 7 represented by their respective counsel, it is submitted that there is no opposition to the prayer made by the petitioner seeking that the impugned order dated 01.06.2020 of the learned Duty Metropolitan Magistrate be set aside and that the samples in the matter in terms of Section 52A(2) of the NDPS Act, 1985 be drawn and taken in the presence of the Metropolitan Magistrate.

Apart from the factum that learned counsel for the respondent nos. 1 to 7 do not oppose the prayer made on behalf of the petitioner to this extent, it is essential to observe that Section 52A(2) of the NDPS Act, 1985 prescribes to the effect:-

“Section 52A: Disposal of seized narcotic drugs and psychotropic substances.

(1)

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered Under Section 53, the officer referred to in Sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in Sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3)

(4) ”,

making it apparent thus, that such an application under Section 52A(2) of the NDPS Act, 1985 would certainly be maintainable before a Judicial Magistrate.

It is essential also to observe that in view of the verdict of the Hon'ble Supreme Court in *Noor Aga V. State of Punjab and Ors. (2008) 16 SCC 417* vide paragraph 129 thereof, it has been observed to the effect:

“129. The question which arises for our consideration is as to whether it is permissible to do so. Evidently it is not. Firstly because taking recourse to the purported general practice adopted by the Customs Department is not envisaged in regard to prosecution under the Act. Secondly, no such general practice has been spoken of by any witness. A statement made at the Bar as regards existence of such a purported general practice to say the least cannot be a substitute of evidence whereupon only the court could rely upon. Secondly, the High Court failed to take into consideration that a certificate issued under Section 110(1B) of the 1962 Act can be recorded as a certificate of authentication and no more; authority for disposal would require a clear direction of the Court in terms of Section 52A of the Act. Thirdly, the High Court failed and/or neglected to consider that physical evidence being the property of the Court and being central to the trial must be treated and disposed of in strict compliance of the law.”

whereby it has been observed to the effect that the authority for disposal would require a clear direction of the Court in terms of **Section 52(A)** of the NDPS Act, 1985.

Furthermore, the verdict of the Hon'ble Supreme Court in *Union of India V. Mohal Lal& Ors*; 2016 1 ACR 704, a verdict dated 28.1.2016 also takes into account the process of drawing of samples to be in the presence or under the supervision of a Magistrate which entire exercise has to be certified to be correct and that this is specially so when according to Section 52A (4) of the Act samples drawn and certified by the Magistrate and compliance of Sub-Section 2 and Sub-Section 3 of Section 52 A constitute the primary evidence for the purpose of the trial.

It has also been laid down vide this verdict to the effect:

“.....12. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

Section 52A: Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered Under Section 53, the officer referred to in Sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in Sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in

any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made Under Sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn Under Sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]

13. It is manifest from Section 52A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered Under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the

Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with Sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

14. Mr. Sinha, learned Amicus, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that

an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by Sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.

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21. Keeping in view the importance of the subject we request the Chief Justices of the High Courts concerned to appoint a Committee of Judges on the administrative side to supervise and monitor progress made by the respective States in regard to the compliance with the above directions and wherever necessary, to issue appropriate directions for a speedy action on the administrative and even on the judicial side in public interest wherever considered necessary.”,

and these directions thus itself make it apparent that an application under Section 52 A of the NDPS Act, 1985 filed before a Judicial Magistrate is maintainable.

In the circumstances, it is apparent that the sanctity of the provision of Section 52A(2) of the NDPS Act, 1985, for drawing of the samples in the presence of a Judicial Magistrate is fortified and strengthened by the provisions of Section 52A(4) of the NDPS Act, 1985, which reads to the effect:

52A: Disposal of seized narcotic drugs and psychotropic substances.—

(1)

(2)

(3)

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence].”,

which thus fortifies the sanctity of the proceedings before the Judicial Magistrate in relation to inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under Section 52A(2) and certified by the Magistrate, as being *primary evidence in respect of such offence*.

In the circumstances the impugned order dated 1.6.2020 of the learned Duty Metropolitan Magistrate in Misc. No. 1283/2020 titled as *Air Customs v. Mosafier Alizahi Etc.*; is set aside and in view thereof the learned Judicial Metropolitan Magistrate on duty on 8.6.2020 is directed to take up the application under Section **52A(2) of the NDPS Act, 1985**, in File No. VIII(AP)10/P&I/2665-C/Arrival/2019 of the case for drawing the samples in accordance with law, which samples are directed to be drawn and the certificate in relation thereto is directed to be drawn up on 8.6.2020 itself in the proceedings to be conducted at 3 p.m.

Learned counsel for the respondents No.1 to 7 may be present through video conferencing at the time of drawing of the said samples and the learned counsel are thus apprised of the same.

A copy of this order be sent to the learned Trial Court through the District & Sessions Judge (South-West) to ensure compliance.

Furthermore, in as much as the alleged recovery of the contraband in the instant case is 1957 gms of Heroine which falls within the ambit of the commercial quantity in terms of serial no. 56 of the table prescribed under Clause vii (a) and Clause xxxiii of Section 2 of the NDPS Act, 1985, the learned Additional Sessions Judge seized of the application under Section 36A(4) of the NDPS Act, 1985 in File No.VIII(AP)10/P&I/2665-C/Arrival/2019 which is to be taken up for consideration on 10.6.2020 shall dispose of the said application on the date fixed. A copy of this order be sent to the learned Additional Sessions Judge (South-West) on duty through the District & Sessions Judge (South-West) Dwarka for compliance.

The petition is disposed of.

ANU MALHOTRA, J

JUNE 06, 2020

'neha chopra'/SV