

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.881 of 2016

Arising Out of PS. Case No.-176 Year-2016 Thana- GOVERNMENT OFFICIAL COMP.
District- Muzaffarpur

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Rajeev Ranjan @ Rajeev Kumar Ranjan @ Chhotan Singh S/o Sri Ram
Nadan Prasad Singh r/o Brahampura, P.S. Brahampura, District -
Muzaffarpur.

... .. Petitioner/s

Versus

1. The State Of Bihar Through The Collector, Muzaffarpur and Ors
2. The Superintendent of Excise, Muzaffarpur.
3. The Sub-Inspector of Excise, Nagar Circle, Muzaffarpur.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Satyabir Bharti Ms. Sushmita Sharma Mr. Abhishek Anand Ms. Kanu Priya
For the Respondent/s	:	Mr. Sunil Kumar Mandal SC 3 Mr. Bipin Kumar, AC to SC 3

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CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT
Date : 15-09-2023

This application has been filed for quashing of the entire proceeding arising out of Complaint Case bearing C-II Case No. 176 of 2016 registered under Sections 47(a), 53(a) and 53(c) of the Bihar Excise Act, 1915 as amended by the Bihar Excise Amendment Act, 2016, pending in the Court of Sub-Divisional Judicial Magistrate, West Muzaffarpur. Further prayer is to quash the consequential confiscation notice dated 23.08.2016 initiated vide Confiscation Case No. 22 of 2016-17, by which the petitioner has been given a show-cause as to why the premises from which 500 ml of foreign liquor was



recovered may not be confiscated.

2. As per the Complaint, the land bearing Khata No. 224, Khesra No. 622 having an area of 8.43 decimal situated at Damodarpur, P.S. Kanti, District Muzaffarpur is owned by Smt. Neelam Kumari, who is the mother of the petitioner. On the said land, the petitioner was running a cement shop in the name and style of Neelam Traders. It is alleged that the Sub-Inspector of Excise, Town Circle, Muzaffarpur raided the shop premises of the petitioner and 500 ml of foreign liquor was recovered. It is also alleged that upon breath analyzer test, it was found that the petitioner has consumed liquor. Accordingly, seizure memo was prepared and the petitioner was arrested.

3. Learned counsel for the petitioner submits that the State Government by notification dated 05.04.2016, in exercise of powers conferred under Section 19(4) of the Bihar Excise Act, 1915, imposed ban on wholesale or retail trade and consumption of foreign liquor by any license holder or any person in the whole of the State of Bihar and from perusal of the aforesaid notification, it would appear that sale and consumption of foreign liquor has been banned in the entire State but its possession has not been prohibited. Therefore,



mere possession of foreign liquor within the prescribed limit is not an offence under the provisions of Bihar Excise Act, 1915 and the notification issued thereunder.

4. Learned counsel for the petitioner further submits that Section 19(1) of the Bihar Excise Act, 1915 permits possession of intoxicant by any person not being a licensee to the extent as prescribed under Section 5 of the said Act, which is maximum up to three liters of foreign liquor but in the present case there is recovery of 500 ml. of foreign liquor from the cement shop of the petitioner, which is well within the prescribed limit for possession and therefore no offence under Section 47(a) of the Bihar Excise Act, 1915 is made out.

5. Learned counsel for the petitioner further submits that the offences under Section 53 (a) and 53 (c) of the Bihar Excise Act, 1915 are also not made out against the petitioner as the petitioner had admittedly possessed and consumed liquor within the prescribed limit inside the cement shop, which is neither a public place nor an unauthorized place as defined under Section 2(17)(A) and 2(22) of the Bihar Excise Act, 1915 as amended by the Act 3 of 2016 and in the complaint petition there is no such allegation against the petitioner that he has assembled unsocial elements in his shop



premises. As such, no offence under Sections 53 (a) and 53 (c) is made out against the petitioner.

6. Learned counsel for the petitioner has relied upon a Division Bench Judgment of this Court rendered in the case of *Ram Sumir Sharma Vs. State of Bihar* reported in *2016 (4) PLJR 435*.

7. Lastly, learned counsel for the petitioner submits that the breath analyzer test conducted upon the petitioner is illegal and violative of Article 20(3) of the Constitution of India as under the Bihar Excise Act, 1915 there is no such provision for breath analyzer test.

8. In support of the aforesaid submissions, learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court in the case of *Selvi Vs. State of Karnataka reported in (2010) 7 SCC 263*.

9. By making the aforesaid submissions, learned counsel for the petitioner submits that no offence whatsoever under Section 47(a) or under Section 53(a) and 53(c) are made out against the petitioner and therefore the initiation of confiscation proceeding under Section 68(A) of the Bihar Excise Act is also illegal and the same is fit to be quashed.

10. A counter affidavit has been filed on behalf of



the respondents. In the counter affidavit, nothing new has been stated apart from repeating the prosecution case and the respondents have also opposed the prayer of the petitioner.

11. I have heard and considered the submissions of the parties and also perused the materials available on record.

12. Section 19 (1) of the Bihar Excise Act, 1915 reads as follows:-

19(1).- No person not being licensed to manufacture, cultivate, collect or sale any intoxicant, shall have in his possession any quantity of any intoxicant in excess of such quantity as the Board, has, under Section 05, declared to be the limit of a retail sale, except under a permit granted by the Collector in that behalf".

13. From perusal of aforesaid Section 19(1), it would appear that the notification permits a person, who is not a licensee, to possess foreign liquor beyond the maximum limit, as prescribed under Section 5 of the notification. Section 5 permits the limit of 3 liters of foreign liquor. In terms of Section 19(1) of the Bihar Excise Act, 1915, three litres of foreign liquor can be possessed by a person who is not a licensee. In the present case, only 500 ml of foreign liquor has allegedly been recovered from the cement shop of the petitioner, which is well within the permissible limit as per Section 19(1) of the aforesaid Act. Mere possession of foreign liquor within the



permissible limit was not banned till the date of alleged search and seizure i.e. on 08.08.2016.

14. A Division Bench of this Court had an occasion to consider this issue in the Case of ***Ram Sumir Sharma Vs. State of Bihar(supra)***. In the aforesaid case the search and seizure was made on 21.05.2016. Paragraph nos. 19 and relevant portion of paragraph 20 of the aforesaid decision reads as follows:-

“19. A reference to the aforesaid Section 19(1) of the Act and the notification would show that the notification does not prohibit possession simplicitor. Possession of liquor above the prescribed limit is, thus, an offence by the person, who is found in possession thereof. Possession has to be conscious possession of a person.

20. Thus seen, there is no concept of vicarious or constructive liability. That being so, the position in law would be that only the person, who is in conscious possession of liquor beyond the prescribed limit, can be prosecuted.....”

15. Section 47 (a) of the Bihar Excise Act, 1915 reads as under:-

47. Penalty for unlawful import, export, transport, manufacture, possession, sale, etc. -
Whoever, in contravention of provision of this Act or of any rule or order made or notification issued under this Act or in contravention of any condition of any license or permit or pass, granted under this Act or without a valid license, permit or pass issued under this Act -

(a) manufactures, possesses, sells, distributes, bottles, imports, exports, transports or removes



any intoxicant.

.....

Shall be punishable with imprisonment for a term not less than ten years but which may extend to imprisonment for life and with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees.

16. On going through the aforesaid provisions of the Act coupled with the facts of the present case, as discussed above, I am of the view that no offence under Section 47(a) of the Excise Act, 1915 is made out against the petitioner as it is a case of lawful possession of liquor within the prescribed limit as permitted under the Act.

17. Chapter VIII of the Bihar Excise Act, 1915 dealt with “Offences and Penalties”, by Bihar Excise(Amendment) Act, 2016 a new Section 53-Penalty for consumption of liquor in public place' has been inserted. Section 53 of the Bihar Excise(Amendment) Act, 2016 is as follows:-

53. (a) consumes liquor in a public place or an unauthorized place; or

.....

(c) permits drunkenness or allows assembly of unsocial elements in his premises or on the premises of liquor establishment; shall be punishable,

18. In terms of the provision contained under



Section 53(a) of the Act, consumption of liquor in a "public place" or "an unauthorized place" is unlawful. "Public place and Unauthorized place" has been defined in Section 2(17A) and 2(22) respectively which reads as under:-

2(17A). Public Place means any place to which public have access, whether as a matter of right or not and includes all places visited by general public and also includes any open space.

2(22). Unauthorized places means those places which are public places and where consumption of liquor is not allowed except under a valid license or permit.

19. It is an admitted position that the liquor has been seized from the cement shop of the petitioner, where he was found to be consuming liquor, which which is not a "public place" or "unauthorized place" as defined *under Section 2(17) and read with Section 2(22)* of the Act. Further, Section 53(c) permits drunkenness or allows assembly of unsocial elements in his premises. There is no allegation that the petitioner was permitting drunkenness in his shop or had allowed assembly of unsocial elements. Therefore, the allegation against the petitioner in no way can be said to be attracted under Sections 53(a) and 53 (c) of the aforesaid Act. As such, in my opinion,



the offences under Sections 53 (a) and 53(c) are also not made out against the petitioner.

20. Even otherwise, this Court finds force in the submission of learned counsel for the petitioner that breath analyzer test conducted upon the petitioner is unlawful as under the Bihar Excise Act, 1915, under which the petitioner was prosecuted, there was no provision for breath analyzer test. Such test, for the first time, was introduced under Section 75 of the Bihar Prohibition & Excise Act, 2016, which was enforced on 02.10.2016. Hence, in absence of statutory mandate, breath analyzer test conducted upon the petitioner is illegal.

21. Reliance can be placed upon a decision of the Hon'ble Supreme Court in the case of *Selvi Vs. State of Karnataka reported in (2010) 7 SCC 263*, it was held as under:-

159. With respect to the testimonial-physical distinction, an important statutory development in our legal system was the introduction of provisions for medical examination with the overhauling of the Code of Criminal Procedure in 1973. Sections 53 and 54 CrPC contemplate the medical examination of a person who has been arrested either at the instance of the investigating officer or even the arrested person himself. The same can also be done at the direction of the jurisdictional court.

160. However, there were no provisions for authorising such a medical examination in the erstwhile Code of Criminal Procedure, 1898. The absence of a statutory basis for the same had led courts to hold that a medical examination could not be conducted without the prior consent of the



person who was to be subjected to the same. For example in Bhondar v. Emperor [AIR 1931 Cal 601], Lord Williams, J. held at AIR p. 602:

"If it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused there is no knowing where such procedure would stop. Any such examination without the consent of the accused would amount to an assault and I am quite satisfied that the police are not entitled without statutory authority to commit assaults upon prisoners for the purpose of procuring evidence against them. If the legislature desires that evidence of this kind should be given, it will be quite simple to add a short section to the Code of Criminal Procedure expressly giving power to order such a medical examination."

161. S.K. Ghose, J. concurred, at AIR p. 604: (Bhondar case [AIR 1931 Cal 601])

"... Nevertheless the examination of an arrested person in hospital by a doctor, not for the benefit of the prisoner's health, but simply by way of a second search, is not provided for by the Code, and in such a case the doctor may not examine the prisoner without his consent. It would be a rule of caution to have such consent noted in the medical report, so that the doctor would be in a position to testify to such consent if called upon to do so."

A similar conclusion was arrived at by Tarkunde, J. in Deomam Shamji Patel v. State of Maharashtra [AIR 1959 Bom 284], who held that a person suspected or accused of having committed an offence cannot be forcibly subjected to a medical examination. It was also held that if police officers use force for this purpose, then a person can lawfully exercise the right of private defence to offer resistance.

165. At this juncture, it should be noted that the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973 was amended in 2005 to clarify the scope of medical examination, especially with regard to the extraction of bodily substances. The amended provision reads:



"53. Examination of accused by medical practitioner at the request of police officer:-

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation. In this section and in Sections 53-A and 54,- (a) 'examination' shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case:

(b) 'registered medical practitioner' means a medical practitioner who possesses any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

166. The respondents have urged that the impugned techniques should be read into the relevant provisions i.e. Sections 53 and 54 CrPC. As described earlier, a medical examination of an arrested person can be directed during the course of an investigation either at the instance of the investigating officer or the arrested person. It has also been clarified that it is within the powers of a court to direct such a medical examination on its



own. Such an examination can also be directed in respect of a person who has been released from custody on bail as well as a person who has been granted anticipatory bail. Furthermore, Section 53 contemplates the use of "force as is reasonably necessary for conducting a medical examination. This means that once a court has directed the medical examination of a particular person, it is within the powers of the investigators and the examiners to resort to a reasonable degree of physical force for conducting the same.

167. The contentious provision is the Explanation to Section 53 CrPC (amended in 2005) which has been reproduced above. It has been contended that the phrase "modern and scientific techniques including DNA profiling and such other tests" should be liberally construed to include the impugned techniques. It was argued that even though the narcoanalysis technique, polygraph examination and the BEAP test have not been expressly enumerated, they could be read in by examining the legislative intent. Emphasis was placed on the phrase "and such other tests" to argue that Parliament had chosen an approach where the list of "modern and scientific techniques" contemplated was illustrative and not exhaustive. It was also argued that in any case, statutory provisions can be liberally construed in light of scientific advancements. With the development of newer technologies, their use can be governed by older statutes which had been framed to regulate the older technologies used for similar purposes.

169. We are inclined towards the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination. Therefore, it would be prudent to state that the phrase "and such other tests" [which appears in the Explanation to Section 53 CrPC) should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. In pursuance of this line of reasoning, we agree with the appellant's contention about the applicability of the rule of "ejusdem generis". It should also be noted that the Explanation to Section 53 CrPC does not enumerate certain other forms of medical examination that involve testimonial acts, such as psychiatric examination among others. This demonstrates that the amendment to this provision was informed by a rational distinction between the examination of physical substances and testimonial



acts.

172. In light of this discussion, there are some clear obstructions to the dynamic interpretation of the amended Explanation to Section 53 CrPC. Firstly, the general words in question i.e. "and such other tests" should ordinarily be read to include tests which are in the same genus as the other forms of medical examination that have been specified. Since all the explicit references are to the examination of bodily substances, we cannot readily construe the said phrase to include the impugned tests because the latter seem to involve testimonial responses. Secondly, the compulsory administration of the impugned techniques is not the only means for ensuring an expeditious investigation. Furthermore, there is also a safe presumption that Parliament was well aware of the existence of the impugned techniques but deliberately chose not to enumerate them. Hence, on an aggregate understanding of the materials produced before us we lean towards the view that the impugned tests i.e. the narcoanalysis technique, polygraph examination and the BEAP test should not be read into the provisions for "medical examination" under the Code of Criminal Procedure, 1973.

Therefore, while the overall intent of the provisions of the Crpc is to ensure the citizens cooperation during the course of investigation, they cannot override the constitutional protections given to the accused persons.

Breath analyser test which is a physical evidence is meant to compel responses which are essentially testimonial. It amounts to compelling a person to submit to testing in which an effort will be made to determine his guilt or innocence and having not been provided in the statute at that point of time, the impugned action of the respondents in conducting breath analyser test upon the petitioner is violative of Article 20(3) of the Constitution of India.

22. Considering the aforesaid facts and also considering the law laid down by the Hon'ble Supreme Court in the case of ***Selvi vs. State of Karnataka (supra)***, I am of the



view that the breath analyzer test conducted upon the petitioner on the basis of which it was alleged that the petitioner has consumed liquor was not authorized under the provisions of the Bihar Excise Act.

23. For the foregoing reasons, this Court is of the view that none of the offences, as alleged in the complaint petition, are made out against the petitioner and the prosecution of the petitioner is an abuse of the process of the Court and the same deserves to be quashed.

24. Accordingly, the complaint case vide C-II Case No. 176 of 2016 against the petitioner for the offence under Section 47(a), 53(a) and 53(c) and all the consequential proceedings arising out of the same are hereby quashed in the interest of justice. In consequence, the confiscation proceeding does not survive. Hence, the confiscation case No. 22/2016-17 initiated against the petitioner is also quashed.

(Sandeep Kumar, J)

Vikas/Pawan

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