

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 2358 of 2001

**Gostor Hossain (Budhu) @ Khustor Hossain
-Vs-
State of West Bengal & Anr.**

For the Petitioner : Mr. Somnath Banerjee
Mr. Pranajit Roy

For the State : Mr. Avishek Sinha

Heard on : 30.06.2023, 01.12.2023

Judgment on : 11.12.2023

Ananya Bandyopadhyay, J.:-

1. The instant criminal revisional application is filed against the judgment and order dated 1st February, 2001 passed by Learned District and Sessions Judge, Birbhum in Criminal Appeal No. 4 of 2000 arising out of judgment and order dated 14th December, 1999 passed by Learned Judicial Magistrate, 2nd Court, Rampurhat in C.R. Case No. 564 of 1990 under Section 3(a) of the Railway Property (Unlawful Possession) Act, sentencing the petitioner to suffer imprisonment for six (6) months and to pay a fine of Rs.2,000/- in default, further imprisonment of 20 days.

2. The petitioner stated that a criminal case was started against the petitioner being the C.R. Case No. 564 of 1990 under Section 3(a) of the R.P. (U.P.) Act.
3. The prosecution case precisely stated that on 4th November, 1990, A.S.I., N.C. Dey along with other staff were on patrolling duty between Chatra and Nalhati when they noticed one person moving with something in his gunny bag at about 3-10 hours and on search of the said bag 15 numbers of two way keys and 10 numbers of splint cutters were found from the possession of the said person, who failed to justify the possession of the said Railway Property by producing relevant document. The matter was investigated by R.P.F. Police and prosecution report against the accused was submitted.
4. The prosecution after completion of investigation filed a charge-sheet and accordingly charge against the petitioner was framed on 15th November, 1994 under Section 3(a) of the R.P. (U.P.) Act. to which he pleaded not guilty and claimed to be tried.
5. The aforesaid case was heard by the Learned Judicial Magistrate, 2nd Court Rampurhat, and by an order dated 14th December, 1999, the C.R. Case No. 654 of 1990 was disposed of by the Learned Judicial Magistrate convicting the petitioner under Section 24B (2) of the Criminal Procedure Code. The petitioner was sentenced to undergo imprisonment for six months and to pay a fine of Rs. 2000/- in default to further undergo imprisonment of 20 days.
6. The petitioner preferred an appeal before the Learned Session Judge, Birbhum being Criminal Appeal No. 4 of 2000 and the Learned Session

Judge upheld the Judgment and order of the Learned Judicial Magistrate dismissing the appeal.

7. The petitioner stated that the appeal court it passed the judgment without hearing the Learned Advocate for the petitioner since the same could not be present in the court due to illness and in that circumstances the appeal was dismissed upholding the order of the Learned Trial Judge.
8. The Learned Advocate for the petitioner submitted that :-
 - i. The Learned Appeal Court passed the order without hearing the Learned Advocate for the appellant.
 - ii. The Learned Appeal Court as well as Learned Trial Court passed the Judgment and order without appreciating the evidence on record.
 - iii. The Learned Judge should appreciate that the P.W. 1 in cross-examination failed to find out the label on the properties though he told that at the time of seizure he prepared the label with signature.
 - iv. The Learned Judge failed to appreciate that P.W.2 who is an eyewitness to the seizure said five numbers of the two way keys were recovered, but he failed to show any signature on the gunny bag and also failed to show any signature of the accused on the label.
 - v. The Learned Judge failed to appreciate that P.W. 3 who happened to be a R.P.F. personnel, stated that he had signed the seizure list

only, but he could not say anything as regards the signature on any label or any property.

- vi. The Learned Judge failed to appreciate that P.W.4 who filed the prosecution report failed to show the manner in which the materials were handed over to him.
 - vii. The examination of the expert is very clear to show the identification of materials to be placed before him and the materials were produced in hand bag which was different from gunny bag and the P.W. 5 being the expert stated at the time of examination there was no seal on the bag which was open.
 - viii. The P.W.5 being the expert did not mention any date and time of production of materials before him.
 - ix. The Judgment of the Learned Trial Judge as well as the Appeal Court is liable to be cancelled and/or set aside.
9. Learned Advocate for the petitioner argued that as per Section 2(d) of R.P. (U.P.) Act, it must be proved that the property belonged to railway administration or was in-charge of or in possession of railway. In ***Nishit Ranjan Vs. State of Assam, 1982 CrL. L.J. 2253 (Gau)***, the Gauhati High Court has taken the view that before anyone can be convicted under Section 3 of the Act, it must be established that he was in possession of the railway property which was used or intended to be used in the construction, operation or maintenance of the railway.

10. In this case, neither the keys nor the splinter cutters which have been seized from the gunny bag of the petitioner are the railway property and hence the petitioner is entitled to be acquitted. Moreover, PW-1 stated that no complaint was lodged by PW-1 regarding theft of materials thereby meaning that no material belonging to the railways was stolen.
11. Reliance was placed by the Learned Advocate for the petitioner on a decision reported in **(1975) 4 SCC 272**, delivered in the case of **Datar Singh Vs. State of Punjab**, when it was held that expert opinion must be based on his own observation.
12. Reliance was further placed by the Learned Advocate for the petitioner on a decision reported in **AIR 1959 SC 488**, delivered in the case of **Haji Mohammad Ekramal Haq Vs. State of W.B.**, where it was held that expert opinion unsupported by any reason may be ignored. In the case of **Madan Singh Vs. State of Rajasthan**, reported in **(1978)4 SCC 435**, it was held that the prosecution must lead evidence that the articles seized were kept safely till sent to the expert. The articles were seized by PW-1
13. The Learned Advocate for the petitioner argued that no independent witnesses have been examined to prove the seizure.
14. The Learned Advocate for the petitioner submitted that if certain materials are brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal. **Kali Ram Vs. State of H.P., 1973 SCC (Cri.) 1048.**

15. The exhibits and articles alleged to be seized did not bear signatures of the independent witnesses to prove the seizure. PW-1 in cross-examination stated that he did not cite any employee of Eastern Railway and public in the seizure list as witness. Even PW-4 did not take any attempt to collect public witnesses during enquiry.
16. All the witnesses examined are interested witnesses belonging to R.P.F. except PW-5.
17. In ***Binod Kumar Jhunjunwala Vs. State of W.B., 1979 Cri. L.J. 287***, the Hon'ble High Court at Calcutta laid down:-

- i. That the expert had not put any identifying marks on the properties he examined. So, he could not give definite opinion that he had examined those very articles present in the Court.
- ii. That the articles were not in serviceable condition.
- iii. That the expert could not give definite opinion those materials were not easily available with scrap dealer.

In this regard PW-4 has stated that there is no specific mark to show that the railway property was examined.

18. Learned Advocate for the petitioner submitted according to PW-4, K.C. Ghosh, A.S.I., R.P.F. and the enquiry officer stated that alamats of this case was kept in Malkhana and there was no note in Case Diary as to who recognized the seized alamats of this case. So, it can safely be argued/stated that PW-4 did not examine the seized alamats alleged to be the railway

property rather he examined something else from the Malkhana in absence of definite proof.

19. PW-4 in cross-examination stated that he shall not be able to say anything about raid. Besides he did not record the statement of the petitioner. Moreover, there was no specific mark to show that the railway property was examined by expert enquiry. Hence the enquiry report submitted by the expert PW-4 is not the enquiry report in respect of the seized articles.
20. As per the order dated 14.12.1999 passed by Learned Judicial Magistrate, 2nd Court, Rampurhat in C.R. Case No. 564 of 1990/T.R. NO. 152/92, it was observed that on 04.11.1990, A.S.I., N.C. Dey along with other staff apprehended the accused petitioner.
21. It is pertinent to mention that PW-1 and other witnesses except PW-3 found the petitioner on 07.11.1990. So, it appears that FIR/complaint is received prior to the movement of the accused person on 07.11.1990.
22. PW-1 did not find any label on the alleged gunny bags. PW-2 and PW-3 signed on the seizure list. PW-5, in cross-examination stated that the materials were produced in hand bag which was not sealed at that time. The bag was open. So, it can safely be said that the articles which were produced before the Court in a bag which was open did not bear the articles that were seized. Even no label was found.
23. The seizure list showing the seizure of 15 numbers of two way keys and 10 numbers of splint cutters in gunny bag has been marked Ext. 1. It also appears that opinion of the expert has been taken and in Ext. 6 the expert

opined that the seized 15 numbers of two way keys and 10 numbers of splint cutters are exclusively railway property used by the Engineering Department as track fitting and that these articles are not auction-able and not available in open market. The expert further stated that he put his signatures of the labels pasted on each items for future identification.

24. The Learned Advocate for the State submitted the seized properties were exclusively railway properties as opined by PW-5 on examination as an expert who was the independent witness. The seized properties according to PW-5 were not available in open market. The Railway officials could not possibly cite any independent public witness to the seizure list for non-availability at odd hours of 3.10 a.m. The seizure was proper and the petitioner was rightly convicted.

25. Sri N.C. Dey, one of the R.P.F. staff on patrolling duty on the said date has deposed as PW-1. He stated that at about 3 a.m. he saw near 115/7 k.m. post that a man was going towards Nalhati having a bag in his hand. He further stated that the seizure of the said bag 15 numbers of two way keys and 10 numbers of splint cutters were found. PW-1 further stated that the accused failed to give satisfactory answer for the unlawful possession of the said articles and so the seizure list was prepared at the spot. PW-1 proved the seizure list prepared by him and also the gunny bag marked Mat. Ext. 1. He further proved the labels which were marked Exts. 2 and 3. In cross-examination, PW-1 admitted that the signatures of accused were obtained in the labels and further stated in Court that he does not find the labels on the

gunny bag. He also stated that he does not find the labels in Court on the seized articles. PW-1, however, corroborated the time of seizure by stating that the seizure was made at 3.10 a.m.

26. PW-2 is the R.P.F. staff who appears to have accompanied PW-1. He corroborated the story of seizure of the Railway property and also proved his signature which has been marked Ext. 1/1 and the signatures on the labels which have been marked Exts. 2/1 and 3/1. In cross-examination after charge he admitted in Court that two labels were prepared for twenty five items. However, he stated that this is his signature on the label which was marked Ext. 3/1. He denied that no articles were recovered from the possession of the accused.

27. PW-3, is the R.P.F. constable who also accompanied PW-1 on patrolling duty. He also stated that on the said date at about 3 a.m. accused was proceeding with gunny bag in his hand and being caught with that bag he failed to give satisfactory account of the Railway property kept in that bag. He further proved the seizure and the label by admitting his signature and stated that the seizure list was prepared on the spot in his presence and identified the Mat. Ext. I in Court. In cross-examination, he admitted that he has signed in only one seizure list.

28. PW-4 appears to be Enquiring Officer who stated that after investigation he submitted prosecution report against the accused. He further proved sketch map which has been marked Ext. 5 and stated that opinion of the expert was taken in respect of the seized property. He also stated that he examined

the witnesses and after due enquiry he submitted the prosecution report. In cross-examination, after charge he admitted that he shall not be able to say anything about the raid. He further admitted that at the time of sending to the expert the entire materials were sent to him.

29. PW-5 seems to be expert who proved the expert opinion marked Ext. 6 given by him in respect of seized property. He further stated that the labels contain his signatures which were marked Exts. 2/3 and 3/3. The material exhibit was identified by him. PW-5 further stated that the materials belong to the Railway which are used in track fitting. In cross-examination, PW-5 admitted that the materials were produced in his hand which were not sold at that time and that bag was open. He further stated in cross-examination, that after damage the materials are sold out on auction.

30. The evidence of PW-5 suggests that he seized property examined by him was the Railway property. In his report marked Ext. 6, PW-5 has opined that the properties are exclusively Railway materials used in Engineering Department as track fitting. Report further suggests that these are not auction-able and not available in open market.

31. Section 3 of the Railway Property (Unlawful Possession) Act, 1966 states as follows:-

“3. Penalty for theft, dishonest misappropriation or unlawful possession of railway property.—Whoever commits theft, or dishonestly misappropriates or is found, or is proved] to have been, in possession of any railway property reasonably suspected of having been stolen or unlawfully obtained shall, unless he proves

that the railway property came into his possession lawfully, be punishable—

(a) for the first offence, with imprisonment for a term which may extend to five years, or with fine, or with both and in the absence of special and adequate reasons to be mentioned in the judgment of the court, such imprisonment shall not be less than one year and such fine shall not be less than one thousand rupees;

(b) for the second or a subsequent offence, with imprisonment for a term which may extend to five years and also with fine and in the absence of special and adequate reasons to be mentioned in the judgment of the court, such imprisonment shall not be less than two years and such fine shall not be less than two thousand rupees.”

32. In the case of ***The State/Railway Protection Force Vs. Raju***¹, it has been held as follows:-

“9. While learned counsel for the Petitioner is right in his submission that the RPF Regulations 1966 stands repealed, it is not as if there are no other rules to replace the said Regulations. Rule 268 of the RPF Rules 1987 titled 'Records and Registers' reads as under:

The records and registers to be maintained in the office of superior officers, Posts, Companies out-posts detachments and other units and the proforma therefor shall be such as may be specified by the Director-General from time to time.

10. Rule 222.1 of RPF Rules 1987 requires that all the cases of crime affecting railway property shall be entered in the "localised" crime register" or in the "unlocalised" crime register, as the case may be. On the facts of the present case, it is clear that the crime that allegedly took place was a "localised" crime since it purportedly took place within the jurisdiction of

¹ MANU/DE/0382/2014

the Railway post. Rule 222.1 is in relation to "theft or pilferages or misappropriation of the railway property". Railway property could be "booked consignment and railway material."

11. It was sought to be submitted by learned counsel for the Petitioner that the aforementioned crime registers are intended only to deal with the situation of theft and pilferage of parcels booked for transport by Railways and are meant only for the purpose of internal inquiry by the Railways. The above submission overlooks the detailed provision in RPF Rules 1987 concerning "investigation and prosecution in Chapter XIV of RPF Rules 1987."

12. Rule 222.1 requires the reports of crimes against railway property to be entered in the records and registers as specified by the Directives. Rule 221.2 requires the Post Commander to convey to the higher authorities, as may be specified by the directives, the gist of the report of the crime against the railway property. The Post Commander is expected to make all possible efforts to investigate the case, recover the stolen property, arrest the offenders and put them up for trial before the Court. Under Rule 221.3, where the Post Commander is not empowered to take action for any crime against the railway property, he shall lodge a complaint with the police station having jurisdiction. Under Rule 221.4, if as a result of inquiry, the Post Commander finds that no offence actually took place, then he could, after obtaining orders from the Divisional Security Commissioner, expunge the case from his records and inform the police station.

13. A collective reading of Rules 221.1 and 221.2 of RPF Rules 1987 shows that the requirement of maintaining a record of crime against railway property is not only mandatory for the purpose of an internal inquiry in every case but also preparatory to the case being registered as a criminal case with the localised police station having jurisdiction. In other words, the inquiry at the level of RPF precedes the investigation by the police since the complaint would be filed on the basis of such inquiry by the RPF.

14. Under Rule 222.5, the localised crime register requires two summaries to be prepared - one cause-wise and the other commodity-wise. The cause-wise summary is to have the following sub-headings:

- (a) Running Train Thefts;
- (b) Yard Thefts;
- (c) Goods Shed, Parcel Godowns and Platform Thefts;
- (d) Pilferages;
- (e) Thefts of fittings from Rolling Stock;
- (f) Thefts of Railway Material including coal (except theft of fittings from rolling stock);
- (g) Miscellaneous

15. Rule 223 deals with seizures and recoveries of railway property. All seizures or recoveries of railway property are to be entered in Malkhana register and an entry to that effect is to be made in the concerned crime register after it is classified as - (a) pertaining to cases in which theft or shortage memo has been issued or received; and (b) where no such memo has been issued or received. Further, Rule 223.1 states that "In respect of the first category, whenever any property is recovered or criminals are taken into custody, relevant entries shall be made in the "Localised Crime Register" against the particular crime already registered. Such a seizure shall not be reflected separately in the RP(UP) Act Register though such seizures shall invariably be taken into account for compilation of statistics in respect of action under the Railway Property (Unlawful Possession) Act, 1966."

16. Rule 223.4 of the RPF Rules underscores that there is an interlinking between the records maintained by the RPF and the action taken by the police. The said Rule reads as under:

Any railway property recovered by the Police shall also be reflected in the records of the Post along with the particulars of the criminal (s) for purposes of accounting.

17. In view of the above clear provisions of law, the Court rejects the submission of learned counsel for the Petitioner that the entries in the above registers are only for the purpose of internal inquiry by the police and are not mandatory as regards the criminal case that would be registered as a consequence with the police.

18. Rule 231 specifically talks of "Prosecution of cases and disposal of seized or recovery property." Under Rule 231.1, on the completion of inquiry in cases where a criminal has been arrested in connection with any offence against the railway property, there could be two courses of action- one is to close the case for lack of sufficient evidence and the other is to launch a prosecution. In the either case, it should be entrusted to the prosecution branch for scrutiny and for conducting the case if any in the Court of law.

The RPF Rules are mandatory

19. The above provisions abundantly make it clear that the actions taken by the RPF have to be strictly in terms of the procedure outlined under the RPF Rules 1987, and any infraction of the said Rules would invalidate such action. There can be no doubt that as far as the present case is concerned, RPF failed to demonstrate before the learned MM that the various theft memos and seizures memos, copies of which were produced before the Court, actually formed part of the original railway record maintained in terms of the aforementioned Rules. The learned MM cannot be faulted for discarding the above evidence since the original registers were not produced.

20. The RPUP Act defines the offences and prescribes the punishment. The offence under Section 3, the ingredients of which were explained by the Supreme Court in *State of Maharashtra v. Vishwanath Tukaram Umale* is punishable with imprisonment for not less than one year and a fine not less than Rs. 1,000 for the first offence and for the second or subsequent offence, the imprisonment may extend to five years. In such event, the imprisonment cannot be less than two years except for special and

adequate reasons and the fine not less than Rs. 2,000. The word 'force' occurring in RPUP Act means the RPF constituted under Section 3 of RPF Act, 1957. Under Section 8(1) read with Section 8(2) of RPUP Act, an officer of the RPF exercises the power of an officer in-charge of a police station under the Cr PC. Section 6 gives him the power to arrest without a warrant. Since police powers have been given to the officers of RPF to deal with the suspects, it is all the more essential that they should scrupulously follow the procedure prescribed under the RPF Rules which govern their functioning.

21. The Court accordingly holds that the procedures outlined under the RPF Rules 1987, and, in particular, those regarding entries to be made in the crime registers, both as regards the theft of railway property as well as the apprehension of a suspect and recovery of the stolen railway property from him, are mandatory.

22. Under the RPF Regulations 1966, there was a requirement for the RPF to maintain registers which would show the movement of the Railway staff on patrolling duty. Although the said Regulations stand repealed, it is not known whether under Rule 268 of the RPF Rules 1987, the proforma of the records and registers for maintaining the entries of such movement have been prescribed. In any event, when the question arises whether an RPF officer was on patrolling duty at a particular point in time when the suspect was apprehended, the burden would be on the RPF to prove before the Court by producing such records and registers in original that the movement of the RPF officers involved in the arrest is reflected in the register maintained for that purpose.

23. The insistence on the procedure established by law being followed is essentially on account of the fact that the vast powers vested in the RPF under the RPUP Act and the RPF Rules has the potential of depriving a person of his liberty and abrogating his constitutional rights. The provisions would, therefore, have to be interpreted strictly and any

violation of the mandatory procedure would result in the benefit of doubt being given to the accused.”

33. In the instant case, the patrolling party instead of verbal assertion did not produce any documents to justify their presence at the spot in compliance of discharging their official duty. The registers to be maintained and the entry of seizure to be recorded in such crime registers concerning the theft of Railway property, apprehension of a suspect and recovery of stolen Railway property from such suspect had not been notified or recorded in any of the registers which were mandatorily required in accordance to the provisions of RPF Rules, 1987. Though, the seized articles were exclusive Railway property and in the opinion of the expert i.e. PW-5, however, there were lapses in terms of the labeling the seized articles wherein the signature of the accused was not found before the Court on its production to be marked as exhibit.
34. It was further stated by the Expert i.e. PW-5 that on damage of Railway properties, the same are auctioned in the open market. The Railway properties were not embossed in any identification to isolate the same from other articles available in the market in terms of its usage. The Railway officials are endowed with ample power and authority in terms of apprehension and seizure of Railway properties in case there is theft or any other offence committed, however, in excessive use or abuse without following procedure as mentioned in the RPF Rules to the prejudice and predicament of any individual compelled to suffer incarceration is not sustainable.

35. In view of the above discussions, the judgment and order dated 1st February, 2001 passed by Learned District and Sessions Judge, Birbhum in Criminal Appeal No. 4 of 2000 arising out of judgment and order dated 14th December, 1999 passed by Learned Judicial Magistrate, 2nd Court, Rampurhat in C.R. Case No. 564 of 1990 under Section 3(a) of the Railway Property (Unlawful Possession) Act are set aside.
36. The criminal revisional application being No. 2358 of 2001 is allowed.
37. Accordingly, CRR 2358 of 2001 stands disposed of. Connected application, if there be any, also stands disposed of.
38. There is no order as to cost.
39. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
40. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)