

Present:
The Hon'ble Justice Rai Chattopadhyay

CRAN 2 of 2016
(Old No. CRAN 381 of 2016)

For the Petitioner	: Mr. Milon Mukherjee, Ld. Senior Adv., : Mr. Ranadeb Sengupta, : Mr. Biswajit Manna.
For the Respondents/Customs Authorities	: Mr. Vipul Kundalia, : Mr. Tapan Bhanja, : Mr. Anurag Roy, : Ms. Uneaza Ali.

Judgment on : 29/07/2024

Rai Chattopadhyay,J.

1. The criminal case has been initiated against the present petitioner, that is, NDPS Case No. 16 of 2014 dated February 4, 2014, under Section 21 read with Sections 22 and 29 of the NDPS Act, 1985. The corresponding Case No. is 01/NDPS/CL/CUS/COBPU/13-14 dated February 4, 2014.
2. The petitioner has filed the present revision under Section 482 of the Code of Criminal Procedure, seeking quashing of the said proceeding.

- 3.** Section 21 of the NDPS Act, 1985 provides for punishment for contravention of the statutory provisions in relation to manufactured drugs and preparations. Section 22 thereof, has dealt with punishment for contravention in relation to psychotropic substance and section 29 of the said Act is for punishment for abetment and criminal conspiracy with relation to an offence under the said Act.
- 4.** Section 21 of the NDPS Act, 1985 has provided that any manufacture, possession, sale, purchase, transportation, inter-state imports and exports or uses of any manufactured drug or any preparation containing the manufactured drug, in contravention of the provisions of the Act or Rules or order made or conditions of license granted thereunder, shall be punishable with that as prescribed.
- 5.** Similarly, manufacture, possession, sale, purchase, transportation, inter-state imports and exports or uses of any psychotropic substance, in contravention of the provisions of the Act or Rules or order made or conditions of license granted thereunder, shall be punishable as per the provisions of section 22 of the said Act.
- 6.** Section 29 thereof is to provide that an abettor or a party to a criminal conspiracy to commit an offence punishable under the Act (Chapter), is liable for punishment as provided for that offence itself, irrespective of the fact whether such offence has been or not committed in consequence of such abetment or in pursuance of such criminal

conspiracy. The rigours of the provision has further depicted that it has been provided that, an act of abetment or criminal conspiracy under the said Act shall be punishable, notwithstanding anything contained in section 116 of the Indian Penal Code.

- 7.** Mr. Mukherjee, learned Senior Counsel, appears for the petitioner. The following grounds have been made out by him, in this case.
- 8.** Firstly, that the petitioner does not fall within the stipulated six categories of persons who can be implicated for an offence under section 21 or 22 of the said Act. That is, no material is available to find the petitioner's role in commission of the alleged offence, either as a manufacturer, or as a possessor, seller, purchaser, transporter, importer or exporter of the contraband recovered. On the contrary, the petitioner is the owner of drug license and also owns a medicine shop at Indore. That, no material could be collected to establish direct or indirect involvement of the petitioner with the supply or transportation of the alleged contraband. That, the foundational facts on which the prosecution has tried to rest its case against the petitioner, would not be eligible for acceptance, being de hors the law.
- 9.** Next, is that the petitioner's performance as an abettor or conspirator under the said Act, for commission of an offence thereunder, has also not come on record, by dint of any sufficient material. That, in order

to book a person under Section 29 of the NDPS Act, there has to be prior meeting of minds to do an illegal act, as contemplated in the statute. That, in the petitioner's case, there is no such material available. Therefore, in absence of even any prima facie material as to the petitioner's involvement in an alleged offence under section 29 of the said Act, any prosecution against him under the said provision of law, would be an abuse of the process. Also that, there is no evidence of the petitioner either having supplied the contraband or possessed the same. The alleged seizure of the same is neither from the possession of the petitioner nor from any place in his control. That, there is no evidence of his being involved. Therefore, he cannot be treated as an 'abettor' or a 'conspirator', as alleged.

10. The so-called incriminating material available against the petitioner is the statement of the other accused person, in this case. It is stated that, the statement made by the other accused person before the officers of Customs, who are empowered under section 53 of the NDPS Act, 1988, cannot be taken as a valid piece of evidence and to be incriminating, against another person, as they deem to be the police officers for the purpose of section 25 of the Evidence Act and a confession made to such an officer by a person accused of an offence is inadmissible in law. That is in view of the law laid down by the Supreme Court in the case of ***Tofan Singh vs State of TamilNadu [reported in (2021) 4 SCC 1]***. That, the other accused person Dalbir Singh Choudhury, has disclosed in his statement recorded under

section 67 of the NDPS Act, regarding the involvement of the petitioner, in the offence. However, the Supreme Court has held that the officers empowered under section 53 of the NDPS Act, including DRI officers, are to be the police officers, for the purpose of section 25 of the Evidence Act and any confession made before such an officer by an accused person, is inadmissible in law. Thus, it has been argued that a statement obtained by an officer, who would be treated under the law as a police officer for the purpose of section 25 of the Evidence Act, would not be admissible and on the basis of the same, the petitioner's implication would be, unlawful and not maintainable. That, excepting the statement of the other accused person, there has not been any single independent witness examined to justify the petitioner's implication. Therefore, the statement of the co-accused having no legal sanctity, as discussed above, there is virtually no material against the petitioner in this case, to show his involvement in any way whatsoever.

On this the other two cases of this Court have also been relied on, that is:-

- (i) ***Ashok Jain vs. Narcotics Control Bureau*** reported in **2019 SCC OnLine Cal 2072**.
- (ii) ***Subhas Debnath vs. Union of India*** reported in **2022 SCC OnLine Cal 2097**;

- 11.** Next is that the legally prescribed procedure for seizure of the alleged contraband, having not been maintained in this case, in terms of the mandatory provisions under section 52 of the NDPS Act, the seizure in this case is made de hors the law and is thus illegal. Thus, according to the petitioner, the complaint itself is unfounded and is not competent to initiate any trial.
- 12.** Further argument of the petitioner is that the alleged contraband was not seized on the day of apprehension that is, 4th February, 2014. Also, that the FIR and the seizure memos were produced in the Court, beyond the mandatory statutory time limit, that is on 6th February, 2014. The petitioner has also stated that the inventory of the alleged contraband has not been made immediately after the seizure but after a substantial period of time, upon prayer of the Public Prosecutor on 20th February, 2014. Thus, it is argued that due compliance with the statutory mandatory provisions have been overlooked, rendering the entire action as illegal. Though the petitioner has been implicated in spite of there being no sufficient material against him, the manufacturer of the alleged contraband, that is, the Abbott Healthcare Private Ltd, a company, admitted to have manufactured the drugs seized in this case, has not been implicated as an accused.
- 13.** For these reasons as above, the petitioner has sought for an order that the said criminal proceeding against him, may be quashed.

14. The State has raised strong objections as to the contentions and prayer of the petitioner. Mr. Kundalia has represented the State. It has been stated inter alia that :-
15. On 3rd February, 2014, at about 6 p.m. a truck was apprehended near Mathabhanga, while it was heading towards Cooch Behar. When intercepted, the driver disclosed that 260 bags of poultry feed was being carried therein and submitted tax/VAT invoice. The driver, helper and the loaded truck were apprehended and brought to the office at Cooch Behar. There a thorough search was made, in presence of the driver, the helper and two other independent witnesses. 260 plastic bags packed in carton packets, were found. Beneath these packets and in a concealed manner, were kept cartons of Abbott Health Care Private Limited. Those contained Phensedyl Cough Syrup. A total of 78,000 bottles were found, containing 100 ml. material in each. Total Codeine content was 15.6 kilograms, that is, of commercial quantity. For these materials no valid documents were produced. The statements of the driver and the helper were recorded. Such materials were inventoried and seized on 4th February 2014, under sections 42 and 43 of the NDPS Act. The driver and the helper were arrested on 4th February 2014 at 12:30 am, in the midnight. The Authority thereafter undertook the follow up enquiry.
16. According to the prosecution, the petitioner's involvement was revealed that he booked the offending truck from Dalbir Singh

Choudhury (the other accused person), proprietor of M/s Indore Calcutta Roadways, for the purpose of transportation of Phensedyl Cough Linctus (contraband seized in this case) through the north eastern states and to its ultimate destination, that is, Bangladesh, in the guise of soya DOC, under fake invoice number 15-0346/13 dated 20.01.2014 of M/s Sunil Enterprises, a dealer in business of soya DOC. A statement of Dalbir Singh Choudhury dated 25th July, 2014 has been instrumental in establishing the link of the petitioner with the alleged crime, when he disclosed that on 23rd July, 2014, he had a meeting with the petitioner to discuss about the possible modes of release of the offending vehicle and the driver and helper detained by the Customs officers. Before that also, on the previous day that is, 22nd July, 2014, Akhilesh Shukla @ Guddu (the other co-accused), a mediator for the petitioner, called the petitioner over mobile phone and discussed over the same issue of releasing the truck and the others. Thus, the prosecution says that there has been sufficient materials revealed regarding the petitioner's involvement in the occurrence. Rather, it has been emphasised that the petitioner has been the mastermind or the kingpin in the entire conundrum. That, the other accused persons have never retracted from the statements they have made earlier.

17. Clarification was received from Deputy Director General NCB, Eastern Region. The goods seized being Phensedyl Cough Linctus, that is, a

manufactured drug in commercial volume, not to be treated as medicines and having been transported under cover of a fake invoice describing the article as 'poultry feed', the same was found to be in contravention of the provisions of the NDPS Act, 1988 and the case was registered against the petitioner along with the other co-accused persons.

- 18.** So far as the other points raised in argument by the petitioner are concerned, the respondent No.1 has responded that neither during the seizure nor during preparation of the inventory list, there has been any illegality committed to vitiate the process so far undertaken. That, the seizure list as well as inventory list have been prepared in presence of the independent witnesses and in accordance with law. Therefore, according to the respondent No.1, there would not be any sufficient ground in this case for interference of the Court, in exercise of its power under section 482 of the CrPC.
- 19.** Before delving on the grounds put forth for quashing of the said criminal case against him by the writ petitioner, let the complaint be scrutinized for proper adjudication of this case.
- 20.** In the said complaint, that is, NDPS Case No. 16 of 2014 the complainant has alleged about contravention of provisions of Section 8(c) of the NDPS Act, 1985, punishable under sections 21, 22 and 29

of the said Act and Rules made thereunder. The date of occurrence is mentioned to be February 4, 2014. The complainant is the Superintendent of Customs, Dinhata Customs Circle under Siliguri Commissionrate, Dinhata, invested with the powers of an officer-in-charge of a police station, for investigations of the offences, under Section 53 of the NDPS Act, 1985. He says in the complaint as follows:-

About the incidence :

- On February 3, 2014, a vehicle, that is, ten wheel Tata Truck (bearing Registration No. MP-09/HF-4764), was apprehended on the basis of reasons to believe the same to be plying with huge quantity of contraband. The time was at about 6pm in the evening and the place was near Hindustan More, at Mathabhanga, Cooch Behar. 260 plastic bags packed in cartons were found therein which were disclosed by the driver and helper of the truck, to be soya DOC poultry feed consignment. Tax/Vat invoice was also produced, which was subsequently revealed to be a forged document. The vehicle was detained and brought by the officers to the premises of Coochbehar P.U. at Sunity Road, Coochbehar.
- From underneath the said 260 plastic bags, huge quantity of Phensedyl Cough Linctus were recovered, which were kept therein, in a concealed manner. No piece of paper could be

produced in support of lawful carriage of the said alleged contraband. Total of 78, 000 bottles of Phensedyl Cough Linctus of 100 ml each, containing Codeine Phosphate, were recovered, with total codeine content of 15.6 kilograms within the category of *commercial quantity*.

- The value of the seized article in terms of money is Rs.68,25,000/-; the value of the vehicle would be Rs. 749970/-;
- The articles recovered and the said vehicle were seized in the early morning next day, that is, February 4, 2014. Accused persons, the driver and the helper thereof, namely, Sri Raj Kishore Jaiswal and Mrityunjay Bharti, were arrested from the place of occurrence; they tendered their voluntary statements – the driver admitting the fact of carrying narcotic drugs phensedyl cough syrup containing codeine phosphate without any valid document and the helper, to have assisted the driver.

About involvement of the petitioner, in the alleged offence;

- The petitioner/ Rajesh Kumar Baranwal @ Bablu was first named by the other accused person, Dalbir Singh Choudhury, proprietor of M/s Indore-Calcutta Roadways at Dewas Naka, Indore. Dalbir Singh Choudhury disclosed that he arranged for the vehicle, at the request of one 'Bablu' who runs a wholesale medicine shop at Dawa Bazar, Indore and his mobile No. is 93029366325 (11digits). Dalbir Singh Choudhury informed

that the truck was booked for loading soya DOC and the goods were loaded at the godown of the requisitioning party, that is, Rajesh Kumar Baranwal @ Bablu. He has informed further, that the godown is situated near office of M/s Seva Transport, at S.R. Compound, Dewas Naka, A.B. Road, Indore. He has also stated regarding receipt of Rs.70,000/- from Bablu in cash, as rent of the vehicle, of which he retained Rs.5000/- for himself and handed over the rest to the owner of the vehicle, namely Ramjeevan Singh.

- The enquiring officer obtained confessional statement of Dalbir Singh Choudhury under section 67 of the NDPS Act, 1988, on July 25, 2014. There he stated that on July 23, 2014, he had a meeting with Rajesh Kumar Baranwal @ Bablu at Vijaynagar Chowraha to discuss about release of the truck and the other persons detained by the customs officers. He has also mentioned in his confessional statement that, on the previous date, that is July 22, 2014, he talked over phone with Akhilesh Shukla @ Guddu, a confederate and mediator of Rajesh Kumar Baranwal @ Bablu to discuss on the same issue, that is, release of the truck and the other persons therein.
- The petitioner has been linked to the alleged commission of criminal act by way of the same being established also through the mobile call record. Dalbir Singh Choudhury had disclosed mobile number of the petitioner to the customs officers, as

stated earlier. Prosecution could track several calls, from the mobile phone number, unauthorizedly and illegally used by one Ramu Biswas (Mobile No. 9883484771) to the said confederate of the petitioner, namely, Akhilesh Shukla @ Guddu (Mobile No. 9826062535), on February 3, 2014.

- Ramu Biswas has antecedents of offence of similar nature, his brother Nitai being an accused person in another case under the NDPS Act. Nitai's mobile phone data confirms Ramu's mobile number, that is, 9883484771.
- Thus by working out the information, disclosed in the statement of Dalbir Singh Choudhury and by tracking call records of mobile Nos. 9883484771 (Ramu Biswas) and 9826062535 (Akhilesh Shukla) – the prosecution has arrayed the petitioner, as an accused person, in this case.

21. The trite law is that jurisdiction of this Court under Section 482 of the Criminal Procedure Code ought to be exercised with care, caution and circumspection and should not be used to stifle or axe down a legitimate prosecution. But at the same time, the Court should also not hesitate to quash a proceeding which may amount to abuse of the process of law.

22. Whether a proceeding would be legitimate or not would depend on as to how far the prosecution, through the FIR/complaint or materials brought on record, has been able to establish to a sufficient extent the

allegation of a cognizable offence, against the accused person. The law is settled that the complaint having narrated with sufficient precision about Commission of the alleged offence and petitioner's role being mentioned therein, an investigation and a trial as to the same would be justified and valid. It is otherwise, if the allegations made are inherently improbable or the proceeding is a result of *mala fide*, *malice*, or personal grudge against the accused.

23. On these perspectives when the fact of the present case is considered, it appears that the accusation against the present petitioner is based on two counts, firstly, the statement of the other co-accused person and secondly the link established through the mobile phone call records.
24. So far as the statement of the other co-accused person, recorded under Section 67 of the NDPS Act, by the enquiry officer who is the customs officer empowered under Section 53 of the NDPS Act, is concerned, the Hon'ble Supreme Court by dint of a majority decision in the case of **Tofan Singh (supra)**, has laid down the law. The Apex Court by 2:1 majority has held then that the officers empowered under Section 53 of the NDPS Act, including DRI Officers are deemed to be police officers for the purpose of Section 25 of the Evidence Act, and confession made to such an officer by an accused person would be inadmissible in law. There cannot be any quarrel with the proposition as above and the law is now settled.

- 25.** However, in the present case the allegation against the petitioner is not only based on a statement of the other co-accused person but also on the other materials like mobile call record etc., as discussed above. Therefore, the Court cannot be in unison with the submission made on behalf of the petitioner that the prosecution against the petitioner would be baseless. Instead, the materials available, appears to have *prima facie*, made out a case against the accused person.
- 26.** The petitioner has raised one point, that, manufacturer of the seized article is M/s. Abbott Health Case Pvt. Ltd at Solan, Himachal Pradesh and allegation of contamination therein should be levelled against the manufacturing company and not the petitioner. However, Abbott, though have identified the batch numbers have declined any responsibility after sale of the same to the distributor. It is seen that the truck was loaded at the godown of the petitioner and loading poultry feed, without any valid document appear to be an eyewash to conceal detection and identity of the contraband.
- 27.** A well spread chain of activities is forthcoming, upon inquiry. Not only there is meeting of minds apparent but a well-prepared cross border plan of action has been seen to have been tried to be executed, with synergy and precision, to the level of almost being perfect.

Therefore at the stage, where the standardized level of scrutiny by the Court should be to the extent if *prima facie* material to make out a case against the petitioner, is available or not and not proof of

his guilt, beyond all reasonable doubts, the Court has to decide in this case, in affirmative, on the basis of the available materials.

28. So far as the other points raised as against prosecuting by the accused person in this case, that is, the manufacturer company of the alleged contraband having not been made an accused here or illegality as regards recovery and seizure or the alleged illegality as regards the inventory being prepared etc, the Court is of the considered opinion that those are the issues to be decided at the stage of trial by the trial Court. As discussed earlier while exercising the jurisdiction under Section 482 of the Criminal Procedure Code, the Court is duty bound to look into the materials available, only to find if those are convincing *prima facie* to justify to proceed in a trial. Whether or not the prosecution would be able to bring home the charges against the accused person, would depend on how far successfully the prosecution can bring on record the evidence by proving the same. At this stage, the Court considers that materials are sufficiently indicating about petitioner's involvement in the alleged offence. That would be sufficient for the Court to be satisfied that a trial in this case would be imperative.

29. For the reasons as above the Court does not find any merit in petitioner's case seeking quashing of the NDPS Case No. 10 of 2014 against him. Accordingly, the criminal revision no CRR 1041 of 2015, merits no success and is dismissed. Connected application being

CRAN 2 of 2016 (Old No. CRAN 381 of 2016 is disposed of. It is however, made clear that none of the observations and findings of the Court in this case shall bear any relevance in the trial of the case, since the same is for the purpose of deciding the instant revision only.

- 30.** Let the learned trial Court be requested to expeditiously proceed in this case, without granting unnecessary adjournments to any of the parties.
- 31.** Urgent Photostat certified copy of this judgment, if applied for, be given to its parties on usual undertaking.

(Rai Chattopadhyay, J.)