

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 708 of 2014

**Bimal Mahato
-Vs-
The State of West Bengal**

For the Appellant : Mr. Partha Sarathi Bhattacharya
Mr. Mrinal Kanti Biswas
Mr. Manish Biswas
Mr. Bhaskar Seth

For the State : Mr. Bidyut Kumar Roy
Ms. Sima Biswas

Heard on : 05.10.2023, 03.01.2024, 05.01.2024

Judgment on : 21.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of conviction dated 31.05.2014 passed by the Learned Special Judge, (N.D.P.S. Act) 1st Court, Raiganj, Uttar Dinajpur in connection with N.D.P.S. Case No. 05 of 2009 which arose out of Kaliaganj Police Station Case No. 297/2009 dated 07.03.2009, convicting thereby the appellant for commission of an offence punishable under Section 18(c) of the Narcotic Drugs & Psychotropic Substances Act and sentencing him to suffer rigorous imprisonment for

three years and to pay a fine of Rs. 10,000/-, in default, to suffer rigorous imprisonment for a further period of six months.

2. The prosecution case precisely stated on 17.03.2009 on the basis of a secret information, the Deputy Excise Collector along with force had been to village Tomchari Mothbari and had detected opium cultivation over two spots of land covering about 10 kottahs comprising Dag No. 226/341 under Khatian No. 142.
3. It was further alleged that the present appellant was found on the spot and could not provide any satisfactory explanation for such cultivation.
4. The Block Land & Land Reforms Officer identified the plots in the name of the appellant. It is alleged that the aforesaid opium poppy plants which were 15,000 in number, were attached by the appellant. Two poppy plants were seized and labelled by the Deputy Excise Collector as sample while the rest of the opium plant cultivation was destroyed in his presence as also in presence of the witnesses.
5. Thereafter the sample was sent to the Botanical Survey of India and the appellant was arrested. Moreover, one General Diary Entry was lodged at the Police Station.
6. On the basis of the aforesaid complaint, Kaliyaganj Police Station Case No. 297/2009 dated 17.03.2009 under Section 18(b) of the Narcotic Drugs & Psychotropic Substances Act was registered for investigation.
7. After completion of investigation, the Excise Department submitted Prosecution Report against the appellant.

8. Subsequently charge for commission of an offence punishable under Section 18(b) of the Narcotic Drugs & Psychotropic Substances Act was framed against the appellant and the contents of such charge were read over and explained to the appellant to which he pleaded not guilty and claimed to be tried.
9. In order to prove its case, the prosecution examined as many as 4 witnesses and exhibited certain documents.
10. Learned Advocate for the appellant submitted that:-
 - a) Drawing of sample by the I.O. at the site of recovery in absence of Magistrate was not in conformity with the scheme of the NDPS Act.
 - b) Destruction of poppy plants without any order of the learned Magistrate was bad in law and the consequent seizure of the sample loses its significance.
 - c) Identity of the land in question from where the alleged seizure of poppy plants was effected, was not proved through any contemporaneous document to show that the land in question was in exclusive possession of the appellant in as much as PW-4, S.I. of Excise (O.C.), being the I.O. of the case had specifically deposed in his cross examination that *"during investigation it was not ascertained as to who were in possession of the particular land"*.
 - d) PW-2, Superintendent of Excise, Uttar Dinajpur, in his cross examination deposed that he did not verify any document

relating to ownership of the particular land, which makes it clear that the seizure of poppy plants from the land in question was not proved.

- e) Only one witness, i.e., PW- 3, only independent public witness was examined by the prosecution but said witness was declared hostile. In his cross examination by prosecution are not at all helpful for the prosecution, rather in his cross examination by the defence, he categorically stated that *"I had no occasion to meet the officials of Excise Department at my village. I put my signature (Exhibit- 1/2 at the P.S. I put my signature at P.S. on the following date of his (appellant's) arrest."* From the evidence of PW-3, it clearly appeared that PW-3 could not be termed as a witness to the said seizure which took place on the land in question, rather it might be said that he was a stock witness.
- f) From the initial stage of the case, prosecution had miserably failed to prove all the ingredients of Sections 52 and 52A of the said Act.
- g) The LCR reflected that on the first date when the appellant was produced before the Court, the representative samples were not produced but on the subsequent date the representative samples were produced which created a doubt whether the seizure samples were seized on the date so claimed or not.
- h) PW-4, I.O. of the case, could not totally ignore the provision of the provisions of Sections 52, 55 and 57 of the NDPS Act, as

such failure cast suspicion regarding arrest of the accused or seizure of the article.

- i) Best evidence would have been the seized materials which ought to have been produced during the trial as marked material objects, but mere oral evidence as to their feature and production of seizure list did not discharge the heavy burden which lay on the prosecution, particularly, where the offence was punishable with a stringent sentence under the NDPS Act.
- j) Non production of seized poppy plants was not a mere procedural irregularity which caused prejudice to the appellant and thus fatal to the prosecution case.
- k) Link evidence as to seized poppy plants and preparation of representative samples was missing and as such no just conclusion could have been drawn therefrom.
- l) Inventory of seized property as provided under Section 52 of the NDPS Act was not performed. Further it was the duty of the prosecution to ascertain as to who was in real possession of the land in question and such question was never gone into.
- m) Due to the lapses on the part of the prosecution to prove the guilt of the appellant beyond reasonable doubt the appeal should be allowed.

11. Learned Advocate for the State submitted that the appellant was cultivating the land of his father having grown the poppy plants and,

therefore, was responsible for the offence committed under Section 18C of the NDPS Act.

12. A circumsppection of the prosecution witnesses revealed as follows:

- i. PW-1 Subir Kr. Goswami in his deposition stated that he was now posted at Sadar Deputy Excise Collector, Sadar Range, Raiganj. On that date he along with Santi Kr. Dey (PW-2) , Superintendent of Excise, Tuhinmoy Chhatui, Additional Superintendent of Excise, S.I. Niren Biswas and his staff and police personnels of Kaliyaganj P.S. had been to village Tomchari Mothbari under Kaliyaganj P.S., on the basis of a secret information received and verified by O.C. Raiganj Excise Circle. The spot was verified by O.C. Raiganj, Excise Circle. The spot was verified by O.C. Raiganj, Excise Circle on previous day. On 17.03.09 after going to that village they found two spots covering 10 kathas of land where opium plantation was going on. The cultivator Bimal Mahata was found on spot and identified in presence of witnesses. Those poppy plants were attached by O.C. Two numbers of poppy plants were seized, sealed and labelled. After being attached rest poppy plants were destroyed by them at the spot. Bimal Mahata searched and interrogated in presence of the witnesses and the reason of arresting him was informed to him and then he was arrested. That was his signature on the seizure list. The signature was marked as Exbt.-1. From the spot they came to Kaliyaganj P.S. with the arrested accused, seized alat including the sample and they lodged a G.D.E.

there. That was the said alamat. That was his signature on the label. That was marked as Exbt.-2.

- ii. In his cross-examination PW-1 stated that their office was situated at Karnojora, Raiganj. The distance between P.O. and their office was around 40 to 45 kms. On 16.03.09 the O.C. Raiganj Excise communicated the said communication after verifying it. He received the information. It was not mandatory for them to maintain to G.D. O.C. Raiganj maintained General Diary. They excluding O.C. Raiganj started from their office at about 10:15 a.m. At first they went to Kaliyaganj P.S. Requisition was submitted to Kaliyaganj P.S. by the O.C. Raiganj, Excise Circle. Then with the police personnel of Kaliyaganj they started for the P.O. Around 11:00/11:15 a.m. they reached the P.O. Bimal Mahata was not previously known to him. He could not say the dag and khatian no. of the said 10 kathas of land on which poppy cultivation was done. He had no idea regarding the owner of the particular land. He went to the spot for the first time on the date of raid and as such he had no occasion to see Bimal to cultivate the poppy plants but he was found at spot. He could not say as to whose lands are situated are surrounding the P.O. That label affixed on the alamat does not bear any G.D.E. number as the lable was prepared at the spot. There were about 20 persons in their team including police personnel's also. It took about 2 hrs. and 45 minutes for completion of search seizure and arrest. During that period 200 to 300 local

assembled at the spot. Around 4 p.m. they left the Kaliyaganj P.S., after lodging the G.D.E.

- iii. PW-2 Santi Kr. Dey in his deposition stated that he was now posted as Superintendent of Excise, Uttar Dinajpur. On 17.03.09 also he was in the same post. On that date he along with Additional Superintendent of Excise Tuhin Chhatui, Subir Goswami, Deputy Excise Collector, S.I. Nirendra Nath Biswas of Excise and staff had been to the village Tomchari Mothbari under Kaliyaganj P.S. Police personnel's of Kaliyaganj P.S. also were with them. During their visit they found standing poppy plants with flower and fruits were on a piece of land at Tomchari Mothbari. The owner of the land namely Bimal Mahata who was present for identified and detained. After taking sample of the said poppy plant rest were destroyed by burning. The sample were sealed and labeled at the spot. That was the said seized sample. That was his said signature. The signature was marked as Exbt-2/1. That was his signature on the seizure list. That was marked as Exbt.-1/1. Then they came back to Kaliyaganj P.S. with the arrested accused and the seized alamat.
- iv. In his cross-examination PW-2 stated that since August 2008 he had been working as Superintendent of Excise, Raiganj. So long he had visited Tomchari Mothbari once during his tenure at Raiganj. He could not remember as to who identified Bimal Mahato to them. He did not verify any document relating to ownership of the particular land. Around on 10 kathas of land the cultivation was made but he could

not say total area of the particular plot of land. He could not say the boundary of the particular land.

- v. PW-3 Anil Mahato in his deposition stated that he was a resident of village Tomchari Mothbari under P.S. Kaliyaganj. An incident happened in their village about two years back in connection with plantation of opium. He heard that Bimal Mahato of their village had been arrested by police as he had been cultivated opium. He did not knew as to whether anything else happened at that time. He did not hear it. He had no occasion to meet the officials of Excise Department who came to their village and arrested Bimal Mahato. He did not knew anything more.

The witness was declared hostile.

- vi. In cross-examination by prosecution of PW-2 stated that not a fact that he had the occasion to meet the officials of Excise Department on particular day and he stated to them that he was present on that day of visit of Excise Officials i.e., on 17.03.09 in their village and that in his presence Excise Officials uprooted and destructed 1500 numbers of opium plants planted on 10 kathas of land belonging to Bimal Mahato and that the particular land had been in possession of Bimal Mahato and he had been cultivating the said land for a long.
- vii. In his cross-examination PW-3 stated that Bimal Mahato dealt in vegetable in different hats. He did not know whether he had a landed property. He had no occasion to meet the officials of Excise Department at his village. He put his signature (Exbt.-1/2) at the

police station. He put his signature at police station on the following day of his arrest. He put that signature in anticipation that Bimal Mahato would be released if he put signature.

- viii. PW-4 Nirendra Narayan Biswas in his deposition stated that he was now posted as S.I. of Excise, Panjipara Circle. On 17.03.09 he was posted as O.C. Excise, Raiganj Circle. On that date he went to hold raid at village Tomchari Mothbari under P.S. Kaliyaganj. He was accompanied by Superintendent of Excise Santi Kr. Dey, Additional Superintendent Tuhinmoy Chhatui, Deputy Excise Collector Subir Goswami and others. They went to the land of Bimal Mahato in that village and found that illegal poppy cultivation was going on the said land. They found 15000 of poppy plants on 10 kathas of land. They found Bimal Mahato on the said land when they went there. At about 12 O' clock we arrived there. On being asked Bimal Mahato could not give any satisfactory reply for making such cultivation and he could not produce any document. Then as per instruction of Superintendent of Excise the said poppy plants were uprooted and he destroyed by burning in presence of two witnesses. Statements of those two witnesses were recorded. They prepared the relevant documents following prescribed procedures. Form-F was prepared by Superintendent of Excise, Uttar Dinajpur. He was acquainted with his signature. Form-F was marked as Exbt.-3. The statement of two local witnesses Anil Mahato and Bimal Mahato was recorded. They came to Kaliyaganj P.S. with the arrested person and lodged a G.D.E. As their

Circle Office was situated with a jurisdiction of Raiganj P.S. they handed over the accused to Raiganj P.S. They sent the sample of the expert through court.

- ix. Further examination-in-chief of PW-4 resumed that day i.e. on 07.02.13 and he stated that he collected the report from expert marked as Exbt.-4. On receipt of the report of expert he submitted P.R. u/s 18(b) and Section 25 N.D.P.S. Act against Bimal Mahato. He examined PW-3 Bimal Mahato who stated to him that he was present on the day of visit of excise official i.e. on 17.03.09 in their village and that in his presence excise officials uprooted and destroyed 1500 numbers of opium plants grown on 10 kathas of land belonging to Bimal Mahato and that to particular land had been in possession of Bimal Mahato and that he had been cultivating the said land for a long and that after uprooting and destroying said poppy plant by burning of the some of poppy plants and were seized by the excise officials under a seizure list.
- x. In his cross-examination PW-4 stated that he had the jurisdiction of entire Raiganj Sub-division. He was quite aware of the location of the P.O. It was under the jurisdiction of Kaliyaganj P.S. He had not mentioned the number of G.D. in the complaint, which was lodged at the time of taking police assistance for holding raid. Their office was at situated at Kornojora, Raiganj. The distance between their office and the P.O. was about 30 kms. At the time of departure from their office for holding raid they did not record their movement at their office. At

about 11:00 a.m. they reached the P.O. For about one hour they stayed at the P.O. About 100/150 persons assembled at the P.O. at the relevant time. They obtained the signature of the local witness on the label affixed on the seized sample. He had not mentioned it in his complaint. They obtained the signature of the accused but it had not mentioned in the complaint. They did not preserve copy of the label. They did not place requisition for any gazette officer of the locality or surrounding area before conducting the raid.

During investigation it was not ascertained as to who were in possession of the particular land. Matilal Mahato was the father of Bimal Mahato. During investigation he did not ascertain how many children he had.

On 15.06.02 he sent the sample to the expert. There was no mention in the C.D. as to where those samples had been kept after its seizure and before sending to expert.

- xi. PW-1, Subir Kumar Goswami (Deputy Excise Collector): In his examination in chief stated that poppy plants were attached by the O.C. and only two numbers of poppy plants were seized and rest poppy plants were destroyed by the raiding party and he exhibited Seizure List as Exhibit- 1. In his cross examination he stated that he could not say Dag and Khatian number of the plot wherefrom poppy plants were seized. He had no idea regarding the owner of the particular land and he had no occasion to see the appellant to cultivate poppy plants.

He further stated in his cross-examination that the label affixed on the alamat did not bear any GDE number as the label was prepared at the spot. Though the Excise raiding team left the Kaliaganj P.S. 'after' lodging GDE. However, no GDE number in seized article indicated that they went for raid. The seizure of the poppy plants appear to be doubtful.

- xii. PW-2: Santi Kumar Dey (Superintendent of Excise) in his cross-examination stated that he could not remember as to who identified the appellant to them (raiding party). He did not even verify any document relating to the ownership of the particular land. He also failed to describe the land as well.
- xiii. PW-3, Anil Mahato (Villager/S.L. witness), was declared hostile who stated that he put his signature on Seizure List at P.S. on the following day of the arrest of the appellant.
- xiv. PW-4, S.I. Nirendra Narayan Biswas (O.C. Excise) in his examination-in-chief he stated that he seen the poppy plantation but could not identify in which land - However poppy plants were uprooted and destroyed by burning in presence of the witnesses Prepared Form 'F' (Exhibit- 3). He stated that GDE was lodged after returning to P.S. with arrested appellant.

In his cross examination it appeared that PW-4, being the O.C., Excise did not mention the GDE number in the complaint also which was lodged at the time of taking police assistance for holding raid. He also admitted that he did not ascertain as to who were in possession of the

particular land. He further stated that he sent the sample to Expert on 15.06.2009 and there was no mention in the Case Diary as to where those samples had been kept after its seizure and before sending to Expert (Exhibit- 4).

13. Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has been reproduced below:-

18. Punishment for contravention in relation to opium poppy and opium.--Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable,--

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to ²[one year], or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees;

(c) in any other case, with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees.

14. The prosecution could not prove the motive of cultivating poppy plants as envisaged in Section 18 of the NDPS Act. The poppy plants were set on fire without plausible explanation to such credit. The ownership of the plot of law was not proved. The role of the appellant apart from verbal assertions of the raiding party could not be proved through independent ocular as well

as documentary evidence. The prosecution further failed to prove the cultivation of poppy plants and its yield thereof was contravening the provisions of the NDPS Act to illegally impact the sale and/or consumption transport, import inter-State, export inter-State of poppy plants and seeds.

15. Under the facts and circumstances of the case in absence of proof of commission of the offences by the appellant beyond reasonable doubt, the prosecution has failed to prove its case and accordingly the appeal is allowed.
16. Accordingly, the instant criminal appeal being CRA 708 of 2014 stands disposed of.
17. There is no order as to costs.
18. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
19. 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.)