

The High Court Of Madhya Pradesh

MCRC-36890-2019

(RAEES KHAN Vs THE STATE OF MADHYA PRADESH)

Jabalpur, Dated : 02-12-2019

Shri Anurag Sahu, learned counsel for the applicant.

Shri Rajesh Tiwari, learned G.A. for the respondent/State.

Original papers of the motorcycle bearing registration No.MP/12-MP/0880 has been produced by the learned counsel for the applicant.

Case diary is available.

The case is heard finally with the consent of both the parties.

This petition has been filed under Section 482 of Cr.P.C. against the order dated 16/08/2019 passed by Special Judge, Special Court under Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") Khandwa in Special Case NDPS No.3/2019, whereby learned Special Judge rejected the applicant's application filed u/S.457/451 of Cr.P.C to get the interim custody of the motorcycle bearing registration No.MP/12-MP/0880, seized by the Police Station Kotwali, District Khandwa in Crime No.776/2018 registered for the offence Punishable under Section 8, 20 of the NDPS Act.

2. It is alleged that the Police seized motorcycle bearing registration No.MP/12-MP/0880 in connection with Crime No.776/2018 for the offence punishable under Section 8, 20 of the NDPS Act and after investigation, police filed the charge-sheet and on that charge sheet Special Case NDPS No.3/2019 was registered, which is pending before Special Judge (NDPS), Khandwa (notified under NDPS Act). During pendency of the case, the applicant, who is the registered owner of the said motorcycle bearing registration No.MP/12-MP/0880 filed an application under Section 457/451 of Cr.P.C. before Special Judge Khandwa for getting interim custody of the said vehicle. The learned Special Judge rejected the application vide order dated 16/08/2019. Being aggrieved by that order, applicant filed this petition.

3 . Learned counsel for the applicant submitted that applicant is the registered owner of the motorcycle bearing registration No.MP/12-MP/0880, so he is entitled to get the custody of said vehicle. He further submitted that learned Special Judge committed mistake in rejecting the prayer of the applicant and not giving the said vehicle in his interim custody. In this regard, counsel has relied on the Apex Court judgment passed in the case of *Sunderbhai Ambalal Desai vs. State of Gujarat (2002)10 SCC 283*, whereby the Court held that whatever be the situation, it is of no use to keep seized vehicle at Police Stations for long period. It is for the Magistrate to pass appropriate orders immediately by taking bond and guarantee as well as security for return of said vehicle, if required at any point of time. Hence counsel prayed that the application be allowed.

4 . On the contrary, learned counsel for the respondent/State has opposed the submissions of learned counsel for the applicant and has submitted that the said vehicle was seized by the police under the NDPS Act, therefore, looking to the provisions of Section 52A of the NDPS Act and the Notification dated 16/01/2015 in which it is mentioned that seized conveyance will also be disposed of by the Drug Disposal Committee learned trial Court has rightly rejected the applicant's application.

5 . This Court has gone through the record and arguments put forth by both the parties. It appears from the record that learned Special Judge rejected the applicant's prayer only on the ground that as per the notification dated 16/01/2015 issued by the Central Government under Section 52A of the Act, all narcotic drugs and psychotropic substances, controlled substances or conveyances seized under the NDPS Act shall be disposed of by the Drugs Disposal Committee and according to Sub-rule (5) of the Rule 9 of the said notification, seized vehicles can be disposed off by the Committee through auction. If the vehicle is given in the interim custody to the applicant, then the proceedings of the Drug Disposal Committee will be

hampered. But the reasons assigned by the learned Special Judge for rejecting the applicant's application does not appear to be correct.

6. The relevant provisions of the NDPS Act and the notification dated 16/01/2015 reads as under:-

"ÂœSection 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:-

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

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

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

as the officer referred to in sub-section (1) may consider relevant to the identity of narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

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

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

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

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

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

Sub Clause 5 of clause 9 of Notification dated 16.01.2015 in which the provision has been made for disposal of the narcotic drugs and psychotropic substances, controlled substances or the conveyances under Section 52A of the NDPS Act provides as under:-

(5) Narcotic drugs, psychotropic substances and controlled substances having legitimate medical or industrial use, and conveyances shall be disposed of in the following manner:-

(a) narcotic drugs, psychotropic substances and controlled substances which are in the form of formulations and labeled in accordance with the provisions of the Drugs and Cosmetics Act, 1940

(23 of 1940) and the rules made thereunder may be sold, by way of tender or auction or in any other manner as may be determined by the Drug Disposal Committee, after confirming the composition and formulation from the licensed manufacturer mentioned in the label, to a person fulfilling the requirements of the Drugs and Cosmetics Act, 1940 (23 of 1940) and the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and the rules and orders made thereunder, provided that a minimum of 60% of the shelf life of the seized formulation remains at the time of such sale;

(b) narcotic drugs, psychotropic substances and controlled substances seized in the form of formulations and without proper labeling shall be destroyed;

(c) narcotic drugs, psychotropic substances and controlled substances seized in bulk form may be sold by way of tender or auction or in any other manner as may be determined by the Drug Disposal Committee, to a person fulfilling the requirements of the Drugs and Cosmetics Act, 1940 (23 of 1940) and the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), and the rules and orders made thereunder, after confirming the standards and fitness of the seized substances for medical purposes from the appropriate authority under the Drugs and Cosmetics Act, 1940 (23 of 1940) and the rules made thereunder;

(d) controlled substances having legitimate industrial use may be sold, by way of tender or auction or in any other manner as may be determined by the Drug Disposal Committee, to a person fulfilling the requirements of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and the rules and orders made thereunder;

(e) seized conveyances shall be sold off by way of tender or auction as determined by the Drug Disposal Committee.

7 . Sections 60(3) and 63 of NDPS Act also have relevance to the

issue involved in this case for determination. Section 60(3) and Section 63 of the NDPS Act reads as follows:-

"60. Liability of illicit drugs, substances, plants, articles and conveyances to confiscation.-

(1) xxxxx (2) xxxxx (3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance, or any article liable to confiscation under sub-section (1) or sub-section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use.

63. Procedure in making confiscation.- (1) In the trial of offences under this Act, whether the accused is convicted or acquitted or discharged, the court shall decide whether any article or thing seized under this Act is liable to confiscation For Subsequent orders under section 60 or section 61 or section 62, and, if it decides that the article is so liable, it may order confiscation accordingly.

(2) Where any article or thing seized under this Act appears to be liable to confiscation under section 60 or section 61 or section 62, but the person who committed the offence in connection therewith is not known or cannot be found, the court may inquire into and decide such liability, and may order confiscation accordingly:

Provided that no order of confiscation of an article or thing shall be made until the expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence, if any, which he produces in respect of his claim:

Provided further that if any such article or thing, other than a narcotic drug, psychotropic substance [or controlled substance] the opium poppy, coca plant or cannabis plant is liable to speedy and

natural decay, or if the court is of the opinion that its sale would be for the benefit of its owner, it may at any time direct it to be sold; and the provisions of this sub-section shall, as nearly as may be practicable, apply to the net proceeds of the sale."

8. From the perusal of the above-mentioned provisions of NDPS Act and the Notification, it emerges that earlier in the Act there were no provisions regarding the pre-trial disposal of the seized narcotic drugs and psychotropic substances. The storage of seized narcotic drugs and psychotropic substances up to the final conclusion of the trial of the cases created many problems. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. So, to counter the problems like vulnerability to theft, substitution, constraints of proper storage space and other relevant problems the Central Government in the exercise of that power has issued said notification, which prescribes the procedure of pre-trial disposal and destruction of seized narcotic drugs, psychotropic substances and conveyance.

9 . However the legislature has not given any power to the Drugs Disposal Committee to decide the claim of a person who place claims on the conveyance (vehicle) seized under the provisions of NDPS Act for illegal transporting of any narcotic drugs and psychotropic substances, as given by the legislature to the special Court under Section 60 and 63 of the Act. Where a person claims for release the vehicle seized under the provisions of NDPS Act for illegal transportation of any narcotic drugs and psychotropic substances, there are no provisions in the notification to decide that claim. So, in that case, the provisions of Section 60 & 63 of the NDPS Act would prevail on the provisions of the notification issued by the Central Government under Section 52A of the NDPS Act. According to the provisions of Section 60 & 63 of the NDPS Act, seized conveyance cannot be disposed of without

deciding the claim of the person who claimed that conveyance and the power to decide the claim of such a person is only given by the legislature to special court under Section 60 & 63 of the NDPS Act. In Sections 52 and 52A of NDPS Act, the word 'confiscation' is not used because the trial is yet to come and it is the discretion of the trial Court "to confiscate or not to confiscate" the conveyance seized under the NDPS Act as per the legal provisions.

10. Although Hon'ble Supreme Court in the case of *Union of India v. Mohanlal*, (2016) 3 SCC 379 held "No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is affected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling".

11. But in that judgment Apex Court has not dealt with the provisions of Section 60(3) and 63 of the NDPS Act and has not held that where a person claims to the conveyance seized under the provisions of NDPS Act for illegal transporting of any narcotic drugs, psychotropic or controlled substances, the committee has the power to dispose of the said vehicle before decision of his claim by the concerned special judge. So in the considered opinion of this Court, the ultimate effect of the provisions of the Section 60 & 63 of the NDPS Act is that where a person claims to get a vehicle seized under the provisions of NDPS Act, for illegal transporting of any contraband, the committee cannot dispose that vehicle unless the claim of the person is decided by the concerned Court. The disposal of conveyance in terms of the Para-9(5)(e) by the committee is only possible after the

confiscation proceeding is complete. As also held by the Single Bench of Tripura High Court in the Case of *Sri Sankar Das Vs The State of Tripura criminal petition No.9 of 2018 Judgement dated 16th March of 2018*.

12. On perusal of the provisions of Section 60(3) and Section 63 of the NDPS Act, as mentioned above it is clear that the conveyance seized under the NDPS Act shall be liable to confiscation only when the owner of the conveyance who was given an opportunity by the Court could not prove that the conveyance was used without his knowledge or connivance. The Court will have to decide whether a vehicle seized under the NDPS Act is liable to confiscation only on conclusion of the trial.

13. There is no provision in the NDPS Act to restrict the power of the trial Court to release the vehicle in interim custody. It has been held by this Court in the case of *Pandurang Kadam vs State of M.P. 2005 (2) ANJ MP 351*, that notwithstanding the fact that the vehicle is liable to be confiscated under Section 60 of the NDPS Act, it may be released in interim custody in appropriate cases. Thus, interim custody should not be denied to the owner of the vehicle, simply because it is liable to be confiscated under Section 60 of the NDPS Act. सत्यमेव जयते

14. There is also no evidence on record to show that applicant has a criminal past and he was involved in similar crimes in the past too. If the seized vehicle is kept lying at the Police Station, the value of the said vehicle would be diminished and its parts would be damaged. So in the considered opinion of this Court learned Special Judge committed mistake in rejecting the applicant's application to get the interim custody of the vehicle.

15. Hence, petition is allowed and it is directed that the said motorcycle bearing registration No.MP/12-MP/0880 seized in Crime No.776/2018 registered at Police Station Kotwali, District Khandwa for the offence Punishable under Section 8, 20 of NDPS Act be released in favour of applicant who is registered owner of the vehicle on the following terms and conditions :-

1 . The applicant Raees Khan S/o Majid Khan shall furnish Supurdiginama to the sum of Rs.5,00,000/- (Rupees Five Lacs Only) and the surety of the like amount to the satisfaction of the trial Court for releasing the vehicle in question.

2. The applicant shall also furnish an undertaking that he shall produce the vehicle in question as and when required during the trial.

3. The applicant shall not alienate the same or make use of such vehicle for any unlawful purpose during pendency of the case.

4. An undertaking shall also be given by the applicant that the nature of the vehicle in question shall not be changed without prior permission of this Court.

15. It is further directed that before releasing the vehicle in interim custody of the applicant, the S.H.O. of concerning Police station shall get photographs sized 18 x 12 inches of the concerned vehicle taken from all sides and also the photographs showing engine number and chassis number. Such photographs shall be filed in the trial Court to be kept along with the record.

16. With the aforesaid directions, this petition stands disposed of.
Certified copy as per rules.

(RAJEEV KUMAR DUBEY)
JUDGE