

Bombay High Court

M/S. B.J.S. Finance And Leasing ... vs State Of Maharashtra & Others on 24 February, 1998

Equivalent citations: 1998 (5) BomCR 601, 1999 CriLJ 4892

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Bench: V Barde, D Sinha

ORDER V.K. Barde, J.

1. Heard Mr. A.H. Kapadia, Counsel for the petitioners; Mr. K.M. Babhulgaonkar, Additional Public Prosecutor, for respondent No. 1 - State; and Mr. R.D. Mane, Counsel for respondent Nos. 2 and 3.

2. The facts, in brief, giving rise to this writ petition are that the petitioner No. 1 is Finance and Leasing Company engaged in the business of financing and purchase of motor vehicles. Petitioner No. 1 advanced a sum of Rs. 2,50,000/- to the petitioner No. 2, on 15-4-1994, and further sum of Rs. 1,12,500/- to the petitioner No. 2 by way of hire purchase agreement in favour of petitioner No. 2, for purchase of truck AP-16-V-7794. Thus, petitioner Nos. 1 and 2 both are the owners and the persons who claim right to the said truck.

3. On 2-8-1995, the Police of Nagar Taluka Police Station received information that Ganja was being transported by the said truck and the truck was parked in front of Driver Dhaba situated at Nagar-Jamkhed road at village Chinchodi Pati. On the basis of this information, the Police raided the spot in the presence of panchas. The truck was there. The three persons, Shaikh Barhanuddin Mohamad Jan Sharif, Krushna Brahman Shriniwas and Baiu Laxman Kokate were also there who were engaged in unloading the bags of Ganja from the truck. All the three persons were stopped. A panchanama was prepared. Seven bags containing Ganja were found in the truck and 16 bags containing Ganja were unloaded and were kept in a room in Dhaba. After carrying out the procedure regarding search and seizure and after preparing panchanama, the truck, seized bags of Ganja and the three persons were taken to the Police Station and there Crime No. 100/95 for offence punishable under sections 22, 25, 27 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "N.D.P.S. Act" for the purpose of brevity) and for offence punishable under section 66(1)(b) of the Bombay Prohibition Act was registered. After completion of investigation, charge sheet was submitted against the three accused before the Court of Sessions at Ahmednagar and Sessions Case No. 324/1995 was registered.

4. During the pendency of this Sessions Case, the present petitioners had filed application for giving the custody of the truck during the pendency of the trial. However, the learned IIIrd Additional Sessions Judge by his order dated 19-10-1995, rejected that application.

5. The trial against the three accused proceeded and ended in conviction as per the judgment and order dated 19-6-1997 by the IIIrd Additional Sessions Judge, Ahmednagar. In the said order, the learned IIIrd Additional Sessions Judge passed the order regarding confiscation of the truck and further directed that the said truck be sold by public auction as per Narcotic Drugs & Psychotropic Substances Rules, 1985, and the sale proceeds be credited to the State of Maharashtra. Being aggrieved by the order of conviction and sentence, the three accused have filed Criminal Appeal Nos. 209/1997 and 219/1997, in this Court, and both the appeals are pending.

6. The petitioners have filed the writ petition on the following grounds :

The order regarding confiscation of the truck is passed without issuing any notice to the petitioners. They were not heard before passing the order regarding confiscation. Thus, the procedure as prescribed under section 63 of the N.D.P.S. Act, is not at all followed by the learned IIIrd Additional Sessions Judge. Not only that, even the principles of natural Justice are not followed by the learned IIIrd Additional Sessions Judge before passing the order of confiscation of truck. Thus, the learned IIIrd Additional Sessions Judge has not exercised the jurisdiction vested in him properly and legally while passing the order of confiscation. It is further contended that the order is bad in law, perverse and, therefore, deserves to be set aside. The petitioners have contended that they have left with no other alternatives with speedy and efficacious remedy and, therefore, they have filed the present petition.

7. The petitioners, therefore, have prayed that during the pendency of this petition, order passed regarding confiscation of the truck be stayed. The truck be given in custody of the petitioners by way of interim custody till the final disposal of the writ petition and it is also prayed that the order of confiscation passed by the learned IIIrd Additional Sessions Judge be quashed and set aside and truck be delivered to the petitioners.

8. The learned Counsel for the petitioners has argued that the present petitioners were not prosecuted for the alleged offence under the N.D.P.S. Act. They had applied before the learned IIIrd Additional Sessions Judge for interim custody of the truck during the pendency of the Sessions Case. That application was rejected by the learned IIIrd Additional Sessions Judge. In such circumstances, there was on record a circumstance that the present petitioners were the owners of the truck and they were claiming the truck. In such circumstances, before passing any order of confiscation of the truck, notice ought to have been issued to the present petitioners and they ought to have been heard by the learned IIIrd Additional Sessions Judge. But no notice was issued and the petitioners were not heard before passing the order of confiscation and, therefore, the order is perse illegal. Even the principles of natural justice are not followed by the learned IIIrd Additional Sessions Judge before passing of the order. The order, therefore, is liable to be set aside.

9. The learned Counsel for the petitioners has argued that section 63 of the N.D.P.S. Act, lays down the procedure for making an order regarding confiscation, and sub-section (3) of section 63 provides for an appeal against the order of confiscation. However, this provision will be applicable only when a person is tried and not convicted. If the person is not at all tried for any of the offences under the N.D.P.S. Act, then he will not be covered by the provisions of section 63, and for such a person, if there is an order confiscating his property, the only remedy is to file a proceeding in the High Court.

10. The learned Counsel for the petitioners has further argued that when the petitioners are not prosecuted either for keeping in possession the contraband or for allowing the conveyance i.e. the truck to be used for transporting the contraband, under section 25 of the N.D.P.S. Act, then in ordinary course, the truck ought not to have been confiscated. The case made out by the State itself suggests that both the petitioners are innocent and, therefore, they are entitled to claim the truck. It is, therefore, contended that the order passed by the learned IIIrd Additional Sessions Judge be set

aside and the truck be given to the petitioners.

11. The learned Counsel for the petitioners has also argued that the petitioner No. 2 has taken large amount from petitioner No. 1 by way of loan. He has to repay that loan and the repayment is possible only from the income of the truck. If the truck is not released, then the petitioners will not get any income from the truck and they will suffer heavy loss. It is also contended that the truck is lying in the Police Station. It is not being properly attended to. So, it is likely to be damaged completely and will be out of use, if allowed to be remained in the custody of Police. So, considering these circumstances, the truck be released.

12. The learned Additional Public Prosecutor has argued that the truck was being used for transporting Ganja. Accused No. 1, Shaikh Barhanuddin, was the driver on the truck. Accused No. 2, Krushna, was cleaner of the truck. Both of them were employed by the petitioner No. 2. Seven bags of Ganja were found in the truck and sixteen bags of Ganja were unloaded from the truck. The total quantity of Ganja being transported by the truck was 807 Kg. So, a very serious offence had taken place. The prosecution has established that the three accused committed said offence and they are convicted and sentenced for the said offence. As the truck was used for transportation of Ganja, it is liable to be confiscated as per the provisions of section 60 of the N.D.P.S. Act. The learned IIIrd Additional Sessions Judge has, therefore, rightly passed the order of confiscation.

13. It is further argued by the learned Additional Public Prosecutor that sub-section (3) of section 63 of the N.D.P.S. Act provides that a person not convicted and who claims any right to the property which has been confiscated under section 63, may appeal to the Sessions Court against the order of confiscation. So, here the two petitioners who are not convicted have remedy open by way of appeal before the Court of Sessions. There is alternative efficacious remedy available to the petitioners and, therefore, writ petition is not maintainable. If the learned IIIrd Additional Sessions Judge has not followed the procedure, the Appellate Court can set aside the order. The High Court need not interfere in the order under Article 226 of the Constitution of India. The learned Additional Public Prosecutor has, therefore, prayed that the writ petition be dismissed. It is also prayed that considering the circumstances of the case, the truck which is likely to be used again for transporting contraband, be not released even during the pendency of the matter.

14. The order regarding confiscation of the truck is passed by the learned IIIrd Additional Sessions Judge at the conclusion of the trial. The judgment delivered by the learned IIIrd Additional Sessions Judge does indicate that no hearing was given to the present petitioners before passing the order of confiscation. He has only considered one aspect of the case that it is proved by the prosecution that the contraband was being transported by the said truck and on that count, the order of confiscation is passed. So, to this extent, the contention of the petitioners is made out that without giving hearing to them, the order of confiscation is passed.

15. It is, however, not acceptable that as the present petitioners were not accused in the said proceeding, and they were not tried, the truck which was used for the purpose of transportation of contraband cannot be confiscated. Section 25 of the N.D.P.S. Act, is applicable only when the owner of the vehicle knowingly permits it to be used for transportation of the contraband. If the

prosecution had no sufficient evidence to allege that the present petitioners were knowing that the truck was being used for transporting contraband, then prosecution against them was not possible. But section 25 of the N.D.P.S. Act, creates a criminal liability for act done with intention or knowledge. As against the liability for confiscation of the conveyance used for transportation of contraband is altogether on different principle.

16. Section 60 of the N.D.P.S. Act, provides for liability for confiscation of illicit drugs, substances, plants, article and conveyance. Sub-section (3) of the section 60 of the N.D.P.S. Act, reads as follows :

"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."

This clearly means that even if the owner of the conveyance is not prosecuted for offence punishable under N.D.P.S. Act, to escape from the liability of confiscation of the conveyance, the onus is placed upon him to make out the case that the conveyance was used without his knowledge or connivance and knowledge or connivance of the agent of the person incharge of the conveyance. So, merely because the owner is not prosecuted for any offence punishable under the N.D.P.S. Act, the owner of the conveyance cannot claim discharge from liability of confiscation. The very purpose of making this provision is that there should be utmost control on everybody who may be directly or indirectly connected with dealing in contraband articles.

17. It is, therefore, very clear that a complete procedure is prescribed under sections 60, 61, 62 and 63 of the N.D.P.S. Act, for confiscation of the contraband, articles used for the purposes of dealing in contraband and the conveyance. From this point of view, sub-section (1) of section 63 makes it clear that:

"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 under section 60 or section 61 or section 62 and, if it decides that the article is so liable, it may order confiscation accordingly."

This means that irrespective of the decision in the trial, the Court has power to pass an order regarding confiscation. So, whether the owner of the conveyance is tried along with other accused or not will not create any restraint on the authority of the Court to pass an order regarding confiscation of the conveyance.

18. The learned Counsel for the petitioners has also argued that the provisions of section 63 are restricted to only those persons who are tried for the offence punishable under the N.D.P.S. Act. When the owner of the vehicle is not tried for offence punishable under the N.D.P.S. Act, then he has no remedy by way of appeal against the order of confiscation and he must avail the remedy by

approaching the High Court.

19. However, this interpretation is not flowing from the provisions of section 63 of the N.D.P.S. Act. Sub-section (2) of section 63 reads as follows :

"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."

On reading this sub-section, it will be clear that if the person who committed the offence is not known or cannot be found, the Court may inquire into and decide such liability and the Court may order confiscation after holding enquiry and the proviso makes it clear that if there is any person who can claim any right to the thing or article seized, then he must be given hearing by the Court. This provision makes it clear that person who has committed the offence is not being tried because he is not known or he is not being found, at the same time, person who not being tried who claims any right to the property is to be heard before passing any order regarding confiscation.

20. The clear meaning of sub-section (2) of section 63 is that any person who is tried or not tried for offence punishable under the N.D.P.S. Act, but who claims any right to the article or things seized, must be given an opportunity to make out his case before passing the order regarding confiscation.

21. In view of this interpretation, sub-section (3) of section 63 has to be considered. It reads as follows :

"Any person not convicted who claims any right to property which has been confiscated under this section may appeal to the Court of Session against the order of confiscation."

The words "any person not convicted" cannot be interpreted as the person tried but not convicted. If such interpretation is put, then the provisions of sub-section (2) quoted above, would be redundant. The harmonious interpretation of section 63 is that irrespective of decision in the trial, the Court has jurisdiction to pass an order regarding confiscation of the article or things seized in connection with the offence punishable under the N.D.P.S. Act. But before passing any such order, the Court must give opportunity of hearing to any person whether accused for such offence or who claims any right to property, and then after considering the evidence on record, the Court shall pass order regarding confiscation. If such person is not satisfied with the order regarding confiscation, then he has remedy of filing an appeal against the order of confiscation, that too, before the Court of Sessions. The contention of the learned Counsel for the petitioners, that only the person who is tried for the offence punishable under the N.D.P.S. Act and acquitted has the remedy of appeal against the order of confiscation, is not acceptable.

22. If all these circumstances are taken into consideration, then it is very clear that the present petitioners who were not heard before passing the order of confiscation can challenge the order of confiscation before the Court of Sessions. Appeal can be filed against the order of confiscation on the ground that the evidence led before the Special Court was not properly appreciated or on the ground that the procedure prescribed was not followed by the Special Court. Here, the main contention is that no hearing was given to the present petitioners and, therefore, the order is illegal. The order can be challenged before the Court of Sessions on this ground. It cannot be said that the only remedy is by way of writ petition because the procedure prescribed is not followed by the trial Court.

23. The learned Counsel for the petitioners has, however, argued that even if there is another remedy, the High Court has authority to exercise its powers under Article 226 of the Constitution of India to give relief to the parties in the light of the circumstances of the case which has come before the High Court. However, the learned Additional Public Prosecutor has strongly contended that when all these matters can be decided by the Appellate Court, High Court need not interfere in the matter.

24. In this respect, we would like to refer to two rulings of the Apex Court where the Apex Court has specifically held that the existence of statutory remedy does not affect the jurisdiction of High Court to issue writ. The first ruling is in the case of A. V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani & another, . Their Lordships have observed in para 10 of the judgment:

"We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

25. The another ruling of the Apex Court is in the case of M/s. Baburam Prakash Chandra Maheshwari v. Antarim Zilla Parishad now Zilla Parishad, Muzaffarnagar, . Their Lordships have observed :

"There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before a tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course. See the decisions of this Court in Carl Still G.m.b.H. v. State of Bihar, and Bengal Immunity Co. Ltd. v. State of Bihar, . In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice. (See 1958 S.C.R. 595, 605 : A.I.R. 1958 S.C. 86, 93."

26. Thus, it will be clear that when alternative remedy is available, the High Court will not interfere in the matter, is not rule of law but rule of policy and in the given case, even if alternative remedy is available, the High Court may interfere in the matter to meet the ends of justice.

27. In the present case, it is very clear that the learned IIIrd Additional Sessions Judge had not given hearing to both the petitioners before passing the order of confiscation. This is not only non-compliance of provisions of sub-section (3) of section 60 and section 63 of the N.D.P.S. Act but violation of principles of natural justice and, therefore, even if there is alternative remedy, the High Court can interfere in the matter under Article 226 of the Constitution of India.

28. Furthermore, if the petitioners are directed to approach the Appellate Court, there will be same difficulty before the Appellate Court. As the petitioners were not heard on the question of fact, the Appellate Court will not be able to decide the matter finally and the Appellate Court also will have to set aside the order regarding confiscation and will have to direct the trial Court to give hearing to the present petitioners and then to pass the order regarding confiscation. So, by directing the petitioners to the Appellate Court, there will not be any finality and the matter will have to go back to the trial Court for recording the evidence of the petitioners and for recording finding on facts. So it will not be proper to reject the writ petition only because the alternative remedy is available. Hence, we hold that in this matter, though alternative remedy is provided under the N.D.P.S. Act, the High Court should interfere in the matter.

29. Considering all these circumstances, the order of confiscation of the truck, passed by the learned IIIrd Additional Sessions Judge, has to be set aside and the matter has to be remanded back to the trial Court with a direction to give sufficient opportunity to the petitioners to make out their case as per the provisions of sub-section (3) of section 60 and section 63 of the N.D.P.S. Act, and then to pass appropriate orders.

30. The learned Counsel for the petitioners has strongly contended that the motor vehicle is at present in the custody of the Police since last more than two years. There is no proper maintenance on the motor vehicle and, therefore, it is damaged to considerable extent. If it is continued in the custody of Police, it will further damage. It is also contended that the petitioner No. 2 has to repay the loan taken from petitioner No. 1 from the income of the truck and he is suffering great losses because he cannot use the truck. Therefore, the truck be given in the custody of the petitioners till the final disposal of the matter.

31. In this respect, the learned Counsel for the petitioners has relied upon ruling of this Court, in the case of B.S. Rawant v. Shaikh Abdul Karim and another, . We, however think that the observations made by His Lordship in the said ruling cannot be made applicable to the present case. In the said matter, taxi was seized under the provisions of N.D.P.S. Act and the prosecution was pending before the Special Court. The petitioners had prayed for custody of the taxi during the pendency of the criminal proceedings. Here, the criminal proceedings have come to an end. The accused are convicted and it is held by the Court that this truck was used for transporting the contraband. So, now, there is no question of granting any interim custody till the disposal of the criminal case. The circumstances here are quite different and it would not be advisable to give the custody of the truck

to the petitioners unless the matter is thrashed out in the light of the provisions of subsection (3) of section 60 and section 63 of the N.D.P.S. Act. The truck now cannot be given in the custody of the petitioners till the final disposal of the matter.

32. Hence, Criminal Writ Petition is allowed. The order passed by the learned IIIrd Additional Sessions Judge, Ahmednagar, in Session Case No. 324/1995; on 19-6-1997, only with respect to confiscation of the truck No. AP-16/V 7794, set aside. The learned IIIrd Additional Sessional Judge, Ahmednagar, is directed to give proper opportunity of hearing to the petitioners in the matter of confiscation of the truck and then to pass appropriate order regarding confiscation of the truck as per law. The learned IIIrd Additional Sessions Judge, Ahmednagar, to pass orders within a period of 60 days from the date of receipt of this writ.

33. Rule absolute accordingly.

34. Petition allowed.