

Shaik Afsar And Another vs The State Of Telangana on 10 June, 2022

Author: K. Lakshman

Bench: K. Lakshman

HON'BLE SRI JUSTICE K. LAKSHMAN

CRIMINAL PETITION Nos.5619, 5638, 6421 OF 2020;
3314, 6926, 7361, 7391, 7455, 7543, 7873, 7885, 8116,
8461, 8716, 8998, 9020, 9044, 9053, 9065, 9068, 9071,
9072, 9073, 9077, 9079, 9095, 9098, 9099, 9101, 9105,
9107, 9112, 9116, 9121, 9124, 9143, 9153, 9168, 9205,
9226, 9252, 9256, 9264, 9266, 9294, 9298, 9339, 9341,
9343, 9368, 9461, 9469, 9489, 9518, 9534, 9569, 9583,
9587, 9599, 9629, 9651, 9655, 9753, 9759, 9764, 9788,
9793, 9864, 10195, 10311 & 10314 OF 2021 AND 308,
469, 471, 537, 559, 574, 598, 606, 615, 627, 759, 776,
777, 783, 788, 947, 1131, 1141, 1192, 1205, 1206, 1369,
1472, 1606, 1751, 1756, 1772, 1853, 1854, 1863, 1934,
1944, 2004, 2042, 2047, 2050, 2154, 2376, 2432, 2433,
2459, 2635, 2640, 2733, 2768, 2822, 2823, 2981, 3040,
3093, 3094, 3110, 3233, 3290, 3297, 3362, 3373, 3378,
3386, 3543, 3673, 3758, 3769, 3824, 4055, 4087, 4103,
4104, 4154, 4159, 4209, 4307, 4322, 4323 & 4586 OF
2022.

COMMON ORDER:

All these Criminal Petitions are filed by the respective petitioners under Section - 482 of the Code of the Criminal Procedure, 1973, to quash the proceedings in the respective KL,J Crl.P. No.5619 of 2020 & batch Crimes/Calendar Cases/Sessions Cases registered for the offences under Sections - 188, 269, 270, 272, 273, 328, 336 & 420 read with 34, 149, 511 of IPC; Sections - 3 (m), 20 (2), 21 (1), 21 (2), 22, 7 (3) and 7 (5) of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (for short 'COTP Act') and Sections - 58 and 59 (i) of the Food Safety and Standards Act, 2006 (for short 'FSS Act').

2. The nature of allegations in all these offences relate to transportation, sale, possession, manufacture, storage, etc. of tobacco products including khaini, zarda, pan masala and other such allegedly harmful and banned products.

3. Heard learned counsel for the respective parties and learned Public Prosecutor appearing on behalf of the respondents - State, and perused the record.

4. Perusal of the record would reveal that the lis involved in this batch of cases had already dealt with by this Court extensively vide common order dated 05.07.2021 in CrI.P. No.152 of 2020 and batch which was reported as Mohd. Jameel Ahmed v. State of KL,J CrI.P. No.5619 of 2020 & batch Telangana¹. This Court in the said case by relying on various decisions of the Supreme Court explained and interpreted the relevant provisions with which the Petitioners herein are charged.

5. With regard to offences under Sections - 58 and 59 (i) of the FSS Act, 2006 it was held by this Court that police cannot initiate prosecution and investigate the offences under the FSS Act, 2006. The power to initiate prosecution is conferred only on the Food Safety Officers appointed under the FSS Act, 2006. Further, this Court held that 'tobacco' does not fall within the definition of 'food' under the FSS Act, 2006. Therefore, the Petitioners herein cannot be charged for offences under Sections - 58 and 59 (i) of the FSS Act, 2006.

6. Further, in relation to the offences under Sections - 188, 269, 270, 272, 273, 328, 336 & 420 read with 34, 149, 511 of the IPC, this Court gave detailed findings as to how the said provisions do not attract merely because tobacco products were being sold, transported, possessed, etc. This Court relying on the decisions of the Apex Court held that only the COTPA Act, 2003 will apply in relation to offences relating to sale, manufacture and distribution of 2022 CrILJ 642.

KL,J CrI.P. No.5619 of 2020 & batch tobacco products. Therefore, in light of this Court's decision in Mohd. Jameel Ahmed (Supra), the offences alleged under the IPC are not made out against the Petitioners herein.

7. In relation to offences under Sections - 20 (2), 7 (3) and 7 (5) this court in Mohd. Jameel Ahmed (Supra) had held as follows:

29. With regard to the offences under COTPA Act, it is relevant to mention the objects and the reasons of the said Act itself clearly state that the act is meant to prohibit the advertisement of, and to provide for the regulation of trade and commerce in, and production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto. A reading of the said objects of the said Act would reveal that a total ban of tobacco products was not envisaged by the said Act. The Parliament merely felt it expedient to control the advertisement and sale of tobacco products. As noted earlier in the order, Section-3 (p) of the COTPA Act and the schedule therein define tobacco products. Pan masala, gutkha and chewing tobacco are included in the definition of tobacco products. Section-5 of the COTPA Act deals with prohibition of advertisement of cigarette and other tobacco products only. No person, who is engaged in the production, supply or distribution of cigarettes or other products shall advertise the same.

Similarly, no person having the control over a medium can advertise cigarettes or tobacco products, and no person shall be a part of any advertisement.

KL,J CrI.P. No.5619 of 2020 & batch

30. Section-7 of the COTP Act deals with the imposition of restriction on the sale, trade, commerce of tobacco products unless every package of cigarette or tobacco product contains a specified warning (pictorial or otherwise). Section-4 of the COTP Act, bans smoking in public places. In addition, Section-6 of the COTP Act, prohibits the sale of cigarettes or other tobacco products to a person who is under the age of 18 years are in an area within 100 yards of any educational institution.

31. A reading of this Act, particularly Sections-4, 5, 6 and 7 clearly shows that there is no general ban or general prohibition on the manufacture/sale of tobacco products. 22 What is barred is merely the sale of these products to a person, who is below the age of 18 years and in an area within 100 yards of an educational institution. The other aspects covered by Sections-5 and 7 of the COTP Act, deal with the advertisement and the warning, which is to be contained on a package, in which the tobacco product is packed. This is a regulatory mechanism only. Therefore, according to this Court, the above said allegations of transportation, possession, storage, sale and purchase of banned tobacco products will not attract the offence under Section-7 of the COTP Act.

32. As far as Section-20 of the COTP Act is concerned, as stated above, the allegations against the petitioner in respective complaints/charge sheets are that they were transporting, possessing, storing, selling and purchasing the banned tobacco products to the customers illegally in order to gain wrongful profits. In view of the said allegation, it is apt to refer to Section-20 (2) of the KL,J Crl.P. No.5619 of 2020 & batch COTP Act for better appreciation of the case and to decide the issue in question, and the same is as under:

"20. Punishment for failure to give specified warning and nicotine and tar contents.-

(1) ...

(2) Any person who sells or distributes cigarettes or tobacco products which do not contain either on the package or on their label, the specified warning and the nicotine and tar contents shall in the case of first conviction be punishable with imprisonment for a term, which may extend to one year, or with fine which may extend to one thousand rupees, or with both, and, for the second or subsequent conviction, with imprisonment for a term which may extend to two years and with fine which may extend to three thousand rupees."

33. Thus, Section-20 of COTP Act deals with punishment for failure to give specified warning and nicotine and tar contents. But, in the complaints/charge sheets, there is no allegation against the petitioners that they were carrying on trade or commerce in contraband or any other tobacco products without label and specified warning on the said products. In view of the same, the contents of the complaints/charge sheets lack the ingredients of Section-20 (2) of the COTP Act. Even, there is no allegation that the seized products do not contain labels with statutory warning. Thus, registering the crimes for the said offence against the petitioners is not only contrary to Section-20 (2) KL,J Crl.P. No.5619 of 2020 & batch of COTP Act, but also contrary to the principle laid down in Chidurala Shyamsubder1. In view of the same, the offence under Section-20 (2) of COTP Act is also

liable to be quashed against the petitioners. I once again reiterate that I agree with the principle laid down by the learned Single Judges of the High Court of Andhra Pradesh in Chidurala Shyamsubder¹, Sri. Jaganath Enterprises 2020 (1) ALT (Crl.) 215 (APHC) and V. Nageswara Rao 2020 Supreme (AP) 348.

Therefore, in the present batch of the Petitions, there are no allegations which support the ingredients of Section 7 and 20 of the COTP Act, 2003.

8. It is relevant to note that in some of the cases, the Petitioners were charged under Sections 21 and 22 of the COTP Act, 2003, and the said provisions are extracted below.

"21. Punishment for smoking in certain places.-(1) Whoever contravenes the provisions of section 4 shall be punishable with fine which may extend to two hundred rupees. (2) An offence under this section shall be compoundable and shall be tried summarily in accordance with the procedure provided for summary trials in the Code of Criminal Procedure, 1973 (2 of 1974)."

KL,J Crl.P. No.5619 of 2020 & batch "22. Punishment for advertisement of cigarettes and tobacco products.-Whoever contravenes the provision of section 5 shall, on conviction, be punishable- (a) in the case of first conviction, with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or with both, and (b) in the case of second or subsequent conviction with imprisonment for a term which may extend to five years and with fine which may extend to five thousand rupees."

9. According to this Court, the ingredients of Section 21 of COTP Act, 2003 are not satisfied. There is no allegation against the Petitioners herein that they were smoking in a public place. Therefore, the Petitioners cannot be charged with Section 21 of COTP Act, 2003.

10. Further, the ingredients of Section 22 of the COTP Act, 2003 are also not attracted. There is nothing to suggest that the Petitioners in anyway advertised cigarettes and other tobacco products which is prohibited under Section 5 of the COTP Act, 2003. The allegations only pertain to transportation, sale, possession, manufacture, storage and do not include advertisement KL,J Crl.P. No.5619 of 2020 & batch of such products. Therefore, the Petitioners cannot be charged with Section 22 of COTP Act, 2003.

11. In view of the abovesaid discussion, all these Criminal Petitions except Crl.P. No.7455 of 2021 are allowed quashing the proceedings in the respective Crimes/Calendar Cases/Sessions Cases in terms of the common order, dated 05.07.2021 passed by this Court in Mohd. Jameel Ahmed (Supra).

12. However, it is relevant to note that in Crl. P. No.7455 of 2021, the petitioner - accused was charged with Sections - 270 and 273 of the IPC and Section - 8 (c) read with Section - 20 (b) of the NDPS Act. The allegation against the petitioner in the said case is that he was found in possession of tobacco products and ganja. Therefore, the said Crl.P. No.7455 of 2021 is partly allowed and Crime No.148 of 2021 is quashed as far as the offences under Sections - 270 and 273 of the IPC are

concerned. The Investigating Officer shall proceed with the investigation in relation to the allegations and offence under Section - 8 (c) read with Section - 20

(b) of the NDPS Act.

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13. As the proceedings in the aforesaid Criminal Petitions are quashed against the respective petitioners, the respective Station House Officers/Investigating Officers are hereby directed to return the seized property/vehicles on proper identification and verification of ownership under due acknowledgment. In cases where charge sheets are already filed the respective petitioners are at liberty to file appropriate applications before the concerned Magistrate for return of the seized property/vehicle and the Magistrate shall consider the same in accordance with law.

14. However, it is made clear that if the seized stock of tobacco products or other products are expired, the same shall be destroyed by taking permission from the concerned Magistrate.

15. During the course of hearing, it was brought to the notice of this Court that the learned Magistrates are receiving remand of accused and sending them to judicial remand for the aforesaid offences without going through the order dated 05.07.2021 passed by this Court in Mohd. Jameel Ahmed. In view of the same, the Registrar (Judicial) is directed to circulate a copy of this order and a copy of the said order dated 05.07.2021 to KL,J Crl.P. No.5619 of 2020 & batch all the Magistrates in the State of Telangana for perusal and taking necessary action in the cases relating to the aforesaid offences.

As a sequel, miscellaneous petitions, if any, pending in the criminal petitions shall stand closed.

10th June, 2022

K. LAKSHMAN, J

Note:

Annex a copy of the order dated 05.07.2021 in Crl.P. No.152 of 2020 and batch. (B/O.) Mgr