

(2002) 12 AHC CK 0158

Allahabad High Court (Lucknow Bench)

Case No: Writ Petition No's. 3352 and 3502 (M/B) of 2001

Rajni	APPELLANT
Vs	
Union of India (UOI)	RESPONDENT

Date of Decision: Dec. 2, 2002

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 13, 19, 9AA

Citation: (2003) CriLJ 2062 : (2003) 156 ELT 28 : (2003) 2 RCR(Civil) 394 : (2003) 2 RCR(Criminal) 478

Hon'ble Judges: P.K. Chatterji, J; Jagdish Bhalla, J

Bench: Division Bench

Advocate: Vishal Chaudhary, for the Appellant; B.B. Saxena, Senior Standing Counsel, for the Respondent

Final Decision: Partly Allowed

Judgement

@JUDGMENTTAG-ORDER

P.K. Chatterji, J.

As common question of law and fact are involved in these petitions, hence they are being disposed of by a common judgment.

2. By means of these petitions, the petitioners have prayed to issue a writ, order or direction in the nature of certiorari for quashing the complaint u/s 9AA/13/19 of the Central Excise Act, 1944 and also prayed to issue a writ order or direction in the nature of mandamus commanding the opposite parties not to arrest the petitioners in connection with the aforesaid case.

3. The petitioners are running a Private Limited Company known as Harsingar Gutka Pvt. Ltd. and the company manufactures Harsingar Gutka Pan Masala. Petitioner No. 3 Smt. Anita Singh is the Director of the company, while her husband Sri Mahesh Singh is the Managing Director of the Company. Petitioner No. 2 Smt. Anju Singh is

the sole proprietor of M/s. Anju Agencies, which is the distributing concern of the company. Petitioner No. 1 Km. Rajni is the proprietor of M/s. Gopal Grinding, which crushes the Supari and other material used in manufacturing Gutka by the company.

4. A raid was conducted on 4-7-2001 at the company premises and it was found that the company was selling Pan Masala without paying Excise Duty. Three persons namely Mukesh Bajpai, Rajneesh Tewari and Amit Srivastava were arrested for offences punishable under Sections 9/9AA and u/s 13 of the Central Excise Act, 1944 (hereinafter to be referred as Act) and were produced before the Magistrate and in accordance with Section 19 of the Act.

5. A preliminary objection has been raised by the learned Advocate General regarding the maintainability of the writ petition and submitted that till date no F.I.R. has been lodged against the petitioners and no complaint has been lodged against them but the petitioners are apprehending their arrest. The learned Counsel for the petitioners submitted that this objection could have been raised at the initial stage of the writ petition, therefore, we propose to dispose of these writ petitions on merit.

6. The learned Counsel for the petitioners submitted that according to Section 9A of the Act, offences u/s 9 shall be deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, 1898. He further submitted that a combined reading of Sections 13, 19, 20 and 21 of the Act shows that a person cannot be remanded to custody for pending investigation. The learned counsel for the petitioners further submitted that Section 21 of the Act says about the inquiry and not about investigation.

7. It has been admitted by the learned Counsel for the petitioners that till date no F.I.R. has been lodged against the petitioners nor any complaint has been lodged against them but the petitioners apprehend that they may be arrested in connection with the case in which three persons have already been arrested. In support of his contention, Sri Virendra Bhatia, learned Counsel for the petitioners placed reliance on decision of S.M.D. Kiran Pasha v. Government of Andhra Pradesh reported in 1990 S.C.C. 110.

8. Sri S.C. Misra, learned Advocate General has vehemently opposed the ground of threat of arrest of the petitioners and submitted that by means of this writ petition, the petitioners are trying to get anticipatory bail. He relied upon the decision rendered in Dukshiyam Benupani v. Arun Kumar Bajoria reported in 1998 S C C 261 : (A.I.R. 1998 S.C. 696) and [Enforcement Officer, Ted, Bombay Vs. Bher Chand Tikaji Bora and Another,](#)

9. We have heard the learned Counsel for the petitioners and Sri S.C. Misra, learned Advocate General and gone through the record.

10. It is apparent from the record that neither there is any complaint nor there is any F.I.R. instituted by the Excise authorities against the petitioners and further the application by which the remand was sought was not against the petitioners. So far the question of the order is concerned howsoever illegal that may be cannot be adjudicated upon at the present and for this reason the argument by the State Advocate General is maintainable who has relied upon the ruling of Hon'ble Supreme Court as referred above (supra). The prayer in these petitions is not that of anticipatory bail but to issue a direction to the opposite parties not to arrest the petitioners as relief No. 2 so far relief No. 1 is concerned it is not maintainable. It is also apparent from the record that Mukesh, Rajneesh and Amit have been insinuated in the said application that Mukesh Bajpai has given some statement that Pan Masala is despatched from the factory and Bijak is prepared by M/s. Anju Agency, 105, Gora Bagh, Lucknow and the same is also distributed by them and some manipulation is there. Therefore, it is apparent that so far as Mukesh Bajpai is concerned, the department has bailed him out also and all the three persons who were arrested have also been bailed out. A plain reading of the complaint also makes an allegation against Sri Mahesh Singh Patel that he had also knowledge of the said Bijaks along with Kailash Nath Singh Patel.

11. Sri Virendra Bhatia, learned Counsel for the petitioners has argued that he has full apprehension that Mahesh Singh Patel one of the petitioners may also be arrested without any knowledge as it has been done by the respondents in the other cases.

12. It will be relevant to discuss that offence u/s 9A of the Act which prescribes, the levy of Rs. 1,00,000/- as fine with imprisonment for a term which may extend up to seven years u/s 9A of the said Central Excise Act, the offence is said to be non-cognizable within the meaning of Code and u/s 9AA. The petitioner who at the time of offence committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as he shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The position of Mahesh Singh as made in the application dated 4-7-2001 for demanding a remand has to be interpreted by the officer in the light of Section 9AA, before they proceed against Mukesh Singh. Because the allegation in the said application in para 7 against Mukesh Singh is that he is the Manager of Har Shingar Gutka and he is also Managing Director. But from the plain reading of Section 9A, the prosecution has to prove before making the offence that he was in charge and was responsible for the conduct of business of the company and unless that evidence comes, the prosecution cannot proceed with the case against him.

13. The other point argued by the learned Counsel for Union of India and other is with regard to powers to be exercised u/s 13 of the Act. The power of arrest is provided u/s 13 Sub-clause (1) which says,

"Any Central Excise Officer duly empowered by the Central Government in this behalf may arrest any person whom he has reasons to believe to be liable to punishment under this Act."

14. Sub-clause (2) of Section 13 provides -

"Any person accused or reasonably suspected of committing an offence under this Act or any rules made thereunder, who on demand of any officer duly empowered by the Central Government in this behalf refuses to give his name and residence, or who gives a name or residence which such officer has reasons to believe to be false may be arrested by such officer in order that his name and residence may be ascertained."

15. If this argument is accepted even then it does not authorize the period of such detention under this provision. The learned Counsel for the State has also attracted our attention to Section 20 of this Act wherein it is prescribed that,

"Officer in charge of a police station to whom any person is forwarded u/s 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate."

16. Therefore it is quite clear according to Section 19 of the Act that every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send person so arrested to Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer in charge of the nearest police station. Therefore, we observe that the powers and duties of the officer under this Act is not parallel to the power of Station House Officer of the police Station. Chapter XII of the Code of Criminal Procedure deals with the information to the police and their powers to investigate. This does not contemplate the power of investigation to any other officer other than mentioned therein Sub-clause (1) of Section 154 Cr. P.C. deals with the investigation of the cognizable offence which is not attracted in the present case under Excise Act, which has been made non-cognizable. Sub-clause (1) of Section 155 Cr. P.C. deals with the information regarding non-cognizable cases and investigation of such cases and under Sub-clause (2) of the said section wherein it has been provided that the investigation can be made only with the order of the Magistrate having power to try such cases or to commit such cases and under Sub-clause (3) it has been provided any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case. Learned Counsel for the State has tried to draw our attention towards the provision of Section 21 of the Excise Act, which says, inquiry how to be made by Central Excise Officer against persons forwarded to them u/s 19 and under Sub-clause (2) of the section it is further provided that, for this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer in charge of a

police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case. Hence the case being not cognizable case the Central Excise Officer have no powers to that of Officer Incharge of a Police Station. And u/s 22 of the said Act, Sub-clause (b) provides vexatiously and unnecessarily detains, searches or arrest any person shall for every such offence be punishable with fine which may extend to two thousand rupees. Hence the duty has been imposed on the Central Excise Officer to be within the law of Cr. P.C. as well.

17. The learned Counsel for the petitioner has vehemently argued that from the averments made in the application of the Excise Inspector, there is eminent threat of the arrest of the petitioner. At this stage, the mention of Article 21 of the Constitution of India becomes relevant which reads as under :

"No person shall be deprived of his life or personal liberty except according to procedure established by law".

18. Articles 233 and 234 of the Constitution of India provides appointments of the Judges of the subordinate Courts and their powers therefore, the Judges of the subordinate Courts and not other than them can exercise any power restraining or taking away the liberty of a citizen. And the Special Act that is the Excise Act and all other similar Acts provides a provision for filing a complaint or F.I.R. to the appropriate authority. The power of arrest has been enunciated in the Special Act that is Central Excise Act, which has also been subjected to the power of arrest as enunciated above under the Code of Criminal Procedure.

19. In the matter of S.M.D. Kiran Pasha v. Government of Andhra Pradesh (supra) their Lordships of Hon"ble Supreme Court have observed:-

"Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State to observe that right, that is to say, not to act or do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law. In other words, conferring the right on a citizen involves the compulsion on the rest of the society, including the State, not to infringe that right."

20. The question before their Lordships was at what stage the right can be enforced? Does a citizen have to wait till the right is infringed? Can the obligation or compulsion on the part of the State to observe the right be made effective only after the right is violated or in other words can there be enforcement of a right to life and personal liberty before it is actually infringed? When a right is yet to be violated, but is threatened with violation can the citizen move the Court for protection of right? The protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty is guaranteed and the rest of the society, including the State is compelled obligated not to violative that right, and if, someone has threatened to violate it or its violation is imminent and the person whose right is so threatened or its violation so imminent resorts to Article 226 of the

Constitution could not the Court protect observance of his right by restraining those who threatened to violate it until the Court examines the legality of the action? Resort to Article 226 after the right to personal liberty is already violated is different from the pre-violation. Post-violation resort to Article 226 is for remedy against violative and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled.

21. In the instant case, the learned Counsel for the petitioner has argued that there are averments in the application for taking other accused in judicial custody against the petitioner Mahesh Singh Patel that he had knowledge of manufacturing Gutka and manipulation of data of the computer and bungling without paying the tax and distributing the Gutka from their factory, but strange enough in spite of filing of the complaint before the Magistrate u/s 200, Cr. P.C., they initiated an application for getting them in judicial custody of some of the accused named in the application. The learned Counsel for the petitioner has argued that this averment in their application has arisen sufficient doubt in the mind of the petitioners that without going through the process as enumerated in the Section 13 of the Excise Act, they may get the petitioners arrested. The learned Counsel for the State has drawn our attention towards Section 214 of the Act which gives power to summon persons to give evidence and produce documents in inquiries under this Act and it has been provided in the said proviso that exemption under Sections 132 and 133 Code of Criminal Procedure shall be applicable to requisitions for attendance under this section.

22. The learned Counsel for State has further argued that this is an investigation but we failed to understand the argument because Section 14 itself mentions that it is in the nature of enquiry and moreover as dealt above no other person than the police officer under the Code of Criminal Procedure has power to investigate under the Act and no other person under the Excise Act can act as police officer. The further argument of the learned Counsel for the State that under proviso every such enquiry as aforesaid shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code. Therefore, the word used shall be deemed to be a judicial proceeding, cannot be extended beyond the meaning which can be gathered from the context of Section 14 of the Act and therefore, the enquiry conducted by the Central Excise Officer u/s 14 cannot be termed as investigation trial and thus they do not have the powers which in charge officer of police station or person deputed by Court for the investigation has. That an officer in charge of the police station can only register an F.I.R. otherwise it will be interference in law. The result is that they cannot register on information as F.I.R. u/s 154(1), Cr. P.C. or they cannot proceed either u/s 154 as officer in charge of the police station for a non-cognizable offence. Consequently they are also not entitled for the powers under 156 and 157, Cr. P.C., and therefore the Magistrate cannot take cognizance on their report as a police report. The only course open for them is to file complaint u/s

200 Code of Criminal Procedure so that the Magistrate can take cognizance u/s 190(a) Code of Criminal Procedure.

23. Their Lordships dealing with the case of S.M.D. Pasha v. Government of A.P. (supra) relied on M.C. Mehta v. Union of India S.C.C. 407-408 para 7, in which it has been held that, if the Court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. On this point paras 19 and 20 of the S.M.D. Pasha v. Government of A.P. become relevant and the same are reproduced herein below :

19. "Analytical positive concept of right has been differently analysed. Hohfeld writing on fundamental legal concepts as applied in judicial reasoning analyses four ideas. One of those is that a right may be a claim right P has a right to do X, it means to indicate that Q or everyone else has a duty to let P to do X. The existence of such a duty gives P some sort of claim against Q. Claim-rights may be either in personam or in rem. A claim-right in personam correlates to a duty of a person, while claim-rights in rem correlates to duties in principle incumbent on everyone. A right enjoyed by one thus correlates to a duty on the part of others."

20. "In Hans Kelsen's analysis it is usual to oppose the concept of right to the concept of obligation and to cede priority of rank to the former as we speak of rights and duties. The behaviour of one individual that corresponds to the obligated behaviour of the other is usually designated as a content of a right as an object of a claim that corresponds to the obligation. "The behaviour of the one individual that corresponds to the obligated behaviour of the other particularly the claiming of the obligated behaviour, is designated as exercising a right". In case of an obligation to tolerate something, the behaviour of the one corresponding to the obligation of the other is spoken of as enjoyment of the right. According to Kelsen the right or a claim of an individual is merely the obligation of the other individual or individual. When we speak of a right as a legally protected interest. In the words of Kelsen, it refers to a right as the "reflex of a legal obligation". Right is often understood as a will power conferred by law. A right in the sense is present if the conditions of the sanction that constitutes a legal obligation includes a motion, normally of the individual in relation to whom the obligation exists, the motion is aimed at the execution of the sanction and has the form of a legal action brought before the law applying organ. Then this organ may apply the general norm to effectuate the right, which is the reflex of the legal obligation by executing the sanction. The right which is the reflex of the legal obligation is equipped with the legal power of the entitled individual to bring about by a legal action the execution of a sanction as a reaction against the non-fulfilment of the obligation whose reflex is his right, or as it is sometimes called, the enforcement of the fulfilment of this obligation. To make use of this legal power of

motion is exercise of the right. In this sense each right of an individual contains a claim to the behaviour of another individual -- namely to that behaviour to which the second individual is obligated toward the first, the behaviour that constitutes the content of the legal obligation identical with the reflex right. If an individual, towards which another individual is obligated to a certain behaviour, does not have the legal power to bring about by a legal action the execution of a sanction as a reaction against the non-fulfilment of the obligation, then the act by which he demands fulfilment of the obligation has no specific legal effect; the act is legally irrelevant, except for not being legally prohibited. Therefore, a claim as legally effective act exists only when a law exists, which means that an individual has the legal power. The subject of a right may be not only one individual but two or several individuals, including the State."

24. From the aforesaid discussion, it is apparent that the authorities working under a Special Act such as Central Excise Act, 1944 cannot override the provisions of the Code of Criminal Procedure as regards the arrest or filing of the complaint. For the convenience of the Court, they may enquire into the facts and determine the *prima facie* case against the accused, may file complaint before the Magistrate and it will be for the Magistrate to issue the process after looking into the gravity of the complaint. Secondly the arrest of a person under this Act has to be made only when there is a *prima facie* case against him and that too by the due process of law.

25. Coming to the conclusion from the aforesaid discussion, it is apparent that the authorities have no power under the Excise Act to arrest anybody except in the cases as prescribed u/s 13 of the said Act, as enumerated in Sub-clause (2) of Section 13 of the said Act. On completion of the enquiry they have also power to file a complaint and pray before the Court for action in accordance with law.

26. Therefore, we held that the petitioners are not entitled for the relief (a) claimed in their petition and the writ petition is dismissed on that count. So far as the relief (b) of the petition is concerned, the opposite parties are directed to act in accordance with law as observed above.

27. The writ petitions are accordingly partly allowed as held above.

28. No orders as to costs.