

Kerala High Court

Revision vs Shajahan on 28 October, 2019

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Present:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

Monday, the 28th day of October 2019/6th Karthika, 1941

Crl.Rev.Pet No.1440/2018

CRMP No.595/2017 of the SPECIAL COURT (NDPS ACT CASES), VADAKARA

REVISION PETITIONER/PETITIONER/RC OWNER

SHAJAHAN, AGED 35 YEARS

S/O KAHAHUSAIN VARIKKODAN HOUSE PAINKANNUR POST TIRUR TALUK

KUTTIPPURAM MALAPPURAM DISTRICT

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE

1. INSPECTOR OF EXCISE
EXCISE ENFORCEMENT AND ANTI NARCOTIC SPECIAL SQUAD MALAPPURAM
MALAPPURAM DISTRICT PIN-676505
2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM-682 031
3. ADDL. RESPONDENT THE SECRETARY TO THE GOVERNMENT OF INDIA,
MINISTRY OF HOME AFFAIRS IS SUO MOTU IMPEADED AS ADDL. RESPONDENT
AS PER ORDER DATED 28.03.2019 (COMMON ORDER) IN CRL.R.P. 1440/18
AND OTHER CONNECTED CASES.

Criminal Revision Petition praying inter alia that in circumstances stated in the affidavit filed along with the Crl.Rev.Pet the High Court be pleased to .

This petition coming on for orders upon perusing the petition and the affidavit filed in support of Crl.Rev.Pet and upon hearing the arguments of M/S S.K.PREMJI MENON, BINU V V VEETTIL VALAP Advocates for the petitioner and the PUBLIC PROSECUTOR for respondent, and of M/S SUMAN CHAKRAVARTHY, SENIOR GOVT.PLEADER, Advocate for the respondents, the court passed the following:

Crl.R.P.No.1440/2018 & conn.cases

-:2:-

"C.R."

ORDER

Crl.R.P.Nos.1440/18, 1707/18 & Crl.M.C.Nos.6429/18, 7765/18, 8168/18, 8393/18, 8681/18, 8884/18, 14/19 & 120/19 Dated this the 28th day of October 2019 Shaffique, J.

These matters have come before us by way of a reference as per order of the learned Single Judge dated 9/4/2019. It was noticed that this Court in Hassainar Aseez B. v. State of Kerala (2017 (2) KLT 741) held that a vehicle which was seized under the Narcotic Drugs and Psychotropic Substances

Act, 1985 (hereinafter referred to as NDPS Act) could be released subject to certain conditions if an application is filed u/s 451 of the Criminal Procedure Code. It was observed that S.52A of the NDPS Act read with the judgment of the Apex Court in *Union of India v. Mohanlal and Another* [(2016) 3 SCC 379] indicates that the Magistrate does not have jurisdiction to pass orders u/s 451 Cr.P.C. In the light of the aforesaid controversy, the matter has been referred to this Court.

2. The issue has been well covered by the judgment of Crl.R.P.No.1440/2018 & conn.cases the Apex Court in *Mohanlal* (supra). In that case, the Apex Court had occasion to consider the manner in which narcotic drugs and psychotropic substances are being seized, sampled and being kept safe. It was noticed that several of the contraband articles were being stored for a considerably long period which may ultimately result in destruction and though there were provisions for destruction of contraband articles, it remain so incurring storage space, time, money and other difficulties. S.52A was introduced into the statute book to get over the difficulties that were being faced in disposal of seized narcotic drugs and psychotropic substances. Necessarily, the procedure prescribed u/s 52A requires to be followed when any narcotic drugs, psychotropic substances, controlled substances or conveyances are seized and forwarded to the officer in charge of the police station or the officer empowered u/s 53 or the officer referred to in sub-section (1), who shall prepare an inventory of such articles and take such procedures as prescribed therein. The idea of disposing the narcotic drugs and other substances including conveyances is after getting it certified by the Magistrate and the Magistrate's jurisdiction is confined to ensure compliance of Crl.R.P.No.1440/2018 & conn.cases Section 52A(2) and (3). Sub-section (4) is a non obstante clause which clarifies the situation and it reads as under:-

"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 or 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".

3. 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, is treated as primary evidence in respect of any offence. Viewed in that angle, the Magistrate may not have any jurisdiction to deal with the substances or conveyances to any of the articles mentioned therein as held in *Hassainar Azeez* (supra). In *Hassainar Azeez* (supra), a learned Single Judge of this Court who had referred the matter had observed that the vehicles seized under the NDPS Act can be released to the interim custody of the registered owner of the vehicle u/s 451 of the Criminal Procedure Code placing reliance on the Apex Crl.R.P.No.1440/2018 & conn.cases Court judgment in *Sunderbhai Ambalal Desai* (2003 (2) KLT 1089). But the Apex Court judgment in *Sunderbhai Ambalal Desai* (supra) was prior to introduction of S.52A, which provision was introduced by way of substitution on 7/3/2014. Prior to the amendment, the provision reads as under:-

"(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution,

constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances 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."

By way of amendment, the scope of S.52A has undergone some changes. S.52A(1) after the amendment reads as under:-

"(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, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic Crl.R.P.No.1440/2018 & conn.cases 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."

4. The main contention urged by the learned counsel for petitioners is that the conveyances involved in transportation of narcotic drugs or psychotropic substances may not belong to the actual transporter, in which event, confiscation and destruction by the competent officer without any enquiry in that regard may affect the rights of the owner of such vehicle. In fact, S.63 of the Act had provided for a procedure in making confiscations. S.63 gives the power to the Court to decide whether any article or thing seized under the Act is liable to be confiscated in terms of Sections 60, 61 or 62 of the Act. Before the amendment to Section 52A, conveyance was not included as an item which should be seized and disposed. The very fact that conveyance had been incorporated in the amendment itself indicates that the Government intended to provide a special procedure to deal with such conveyance, while taking into account the fact that most of the transportation are done in conveyances which itself is defined Crl.R.P.No.1440/2018 & conn.cases u/s 2(viii) as meaning "a conveyance of any description whatsoever including any aircraft, vehicle or vessel." Therefore, if any vehicle is involved in transportation of narcotic drug, psychotropic substance or controlled substance, such vehicles also could be seized and disposed of in terms of S.52A(1) of the Act. S.63 was a special procedure available at the inception of the Act and when the statute had been amended giving the power of disposal of narcotic drugs, psychotropic substances, controlled substances or conveyances to a special officer, he will have to act in accordance with the procedure prescribed under the Act or the Rules framed thereunder.

5. When a Special Act prescribes the procedure for dealing in specified goods and the NDPS Act being a special statute and latter in time, the provisions of the special statute has to be followed by the Magistrate. In other words, the Magistrate may not have jurisdiction to entertain a petition u/s 451 of Cr.P.C. in the light of the special provision made u/s 52A of the NDPS Act. In fact, in

Mohanlal (supra), the Apex Court had issued certain directions which are extracted hereunder:-

"31. To sum up we direct as under:

CrI.R.P.No.1440/2018 & conn.cases 31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, 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". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.

31.2. The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs and psychotropic and controlled substances and conveyances duly equipped with vaults and double-locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1 of 1989 to ensure proper security against theft, pilferage or replacement of the seized drugs. 31.3. The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

31.4. Disposal of the seized drugs currently lying in the CrI.R.P.No.1440/2018 & conn.cases Police Malkhanas and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading "disposal of drugs".

6. In the light of the aforesaid law laid down by the Apex Court, the said procedure has to be followed in every case and there is no two way of looking at it. Apparently, in such instances, going by the statutory provision under the Special Act, the power of the Magistrate to consider a claim u/s 451 of Cr.P.C. stands denuded. Reference is answered accordingly.

Registry shall place the matters before the regular court as per roster for appropriate orders.

28-10-2019

Sd/- A.M.SHAFIQUE, JUDGE
Sd/- N.ANIL KUMAR, JUDGE

True Copy

PS to Judge

Rp