

(1993) 03 KL CK 0074
In the High Court Of Kerala
Case No : Criminal M.C. No. 183 of 1993

Bhavasingh D. Rathod

APPELLANT

Vs

The Assistant Collector of Customs, Special Investigation
Branch

RESPONDENT

Date of Decision : 15-03-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Customs Act, 1962 — Section 108, 135(1), 135A
Evidence Act, 1872 — Section 3, 30
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 23, 28, 29, 30, 36A(1)

Citation : (1993) 03 KL CK 0074

Hon'ble Judges : L. Manoharan, J

Bench : Single Bench

Advocate : B. Raman Pillai, for the Appellant; K.P.G. Menon, Addl. Central Government Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

L. Manoharan, J.—This petition u/s 482 Code of Criminal Procedure is to quash Annexure A proceedings which is the complaint in C.C. No. 46 of 1992 of the Sessions Court, Ernakulam, filed by the Respondent under Sections 8, 23, 28, 29 and 30 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "The N.D.P.S. Act") and Sections 135(1) and 135A of the Customs Act, 1962.

2. Petitioner is the 4th accused in the said case. Transporewala Engineers, 365, R.K. Industrial Estate, Marol, Andheri Estate, Bombay-59 filed shipping Bill No. 766, dated 15th November 1989 through their Shipping Agent at Cochin for export of a consignment consisting of 100 bundles of fencing wire and 86 pallets of M.S. Grills from Cochin Port to the Consignee, M/s Custom Metal Design, Chig, U.S.A. when the consignment reached Ernakulam Wharf on 16th November 1989 the Shipping Agent presented shipping bill before the Customs Appraiser, Customs House, Cochin for examination of the Cargo. The examination of the

cargo by then was taken over by the Special Investigation Branch, Customs House, Cochin as they entertained suspicion as regards the genuineness of the cargo. On discovering that the exporters were staying in Room No. 315 of Dwaraka Hotel, Ernakulam, Officers of the Investigation Branch conducted a search of the room and apprehended the exporters, who are accused 1 and 2 in Annexure A. On interrogation of the accused 1 and 2 by the officers they admitted that they are the exporters of the consignment and that "Hashish is concealed in the cargo. The officers also seized 85 documents on the search of the room occupied by accused 1 and 2. The officers also got information from the said accused that accused No. 7 who is also connected with the export of the said consignment was staying in Good-Shepherd Tourist Home, Ernakulam; accused No. 7 also was arrested. Their statements were recorded u/s 108 of the Customs Act. On examining the cargo in the presence of accused 1, 2 and 7 and the Shipping Agent the officers recovered 2,404 slabs of "Hashish" having a total weight of 1165.1 kgs kept concealed in the cargo.

3. The complaint states as to what A-1, A-2 and A-7 stated in their statements u/s 108 of the Customs Act. First accused in his statement admitted that, he is a businessman at Bombay engaged in export business and that, he was engaged in export business and that, he was engaged by accused 2 and 3 for arranging shipments of the cargo, that though original documents were prepared for export of cargo through Kandla Port; as advised by a man named "Kaka" who was also directly concerned with the export of "Hashish" he (the first accused) visited Cochin along with the 2nd accused and made arrangement for shipment of the cargo through Cochin Port and that the goods were sent to Cochin from Rajkot the godown of the Petitioner-4th accused.

4. The 2nd accused also implicated the 4th accused in his statement u/s 108 of the Customs Act; he stated that accused 4, 5 and 6 along with Kaka met at Ahmedabad and he was asked by the said persons whether he could arrange to export "Hashish" to U.S.A. by concealing it in packages of M.S. Grills, consequent upon which he undertook the job with the help of the first accused. He also said that, the 4th accused agreed to pay Rs. 5 lakhs and that accused 1 and 3 received a remuneration of Rs. 5 lakhs from Kaka, and he received Rs. 20,000 by way of advance payment. It is also alleged in the complaint that on further investigation it was revealed that, all the 7 accused persons including the Petitioner dealt with the "Hashish" seized by the Customs Officers and that all of them are guilty of the offence mentioned in the complaint.

5. Learned Counsel for the Petitioner contended that, Annexure A complaint is liable to be quashed as the Respondent who filed the complaint is not competent to institute such a proceeding, and that the allegations in the complaint even if taken on its face value do not disclose any offence. Enlarging on the second point, the learned Counsel contended that the materials relied on in the petition being the confession of co-accused 1 and 2, the same under law since cannot be evidence against the Petitioner, no conviction is being possible and hence on that

ground itself the complaint is liable to be quashed.

6. As regards the first point, viz the Respondent is not competent to institute such a proceeding, Ext. R-1 notification dated 27th September 1989 by the Government of India published under Clause (d) of Sub-section (1) of Section 36A of the N.D.P.S. Act authorises officers of and above the rank of Inspector in the Departments of Customs, Central Excise, Narcotics, Revenue Intelligence, Central Economic Intelligence Bureau and the Narcotic Control Bureau under the Ministry of Finance, Government of India to file complaints relating to the offence under the N.D.P.S. Act. Thus, it is clear from Ext. R-1 that, Respondent is competent to file Annexure A complaint.

7. Reliance was placed by the learned Counsel for the Petitioner on the decision in Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar, to contend that, a confession of a co-accused though can be treated as evidence in the generic sense because of the provisions of Section 30 of the Evidence Act, it is not evidence as defined u/s 3 of the Evidence Act. In the said decision it is held:

The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

So the confession of a co-accused can be used to lend assurance to the conclusion of guilt on the basis of the other acceptable evidence. The said decision itself would show that the confession of a co-accused is not of no relevance; it has relevance as indicated above.

8. In the decision in Haroon Haji Abdulla Vs. State of Maharashtra, the Supreme Court held:

A confession intended to be used against a co-accused stands on a lower level than accomplice evidence because the latter is at least tested by cross-examination whilst the former is not.

This decision also would show the probative value of the confession of a co-accused. All that to be stressed in this connection is, the confession of a co-accused though cannot be the basis of conviction; the same could lend assurance to the conclusion of guilt on the basis of other evidence. Therefore, the question to be considered is, whether materials relied on in the complaint is capable of disclosing any offence. In this connection it has to be noted, the complaint adverts to what some of the accused and other witnesses have stated.

9. Paragraphs 7, 8 and 9 of Annexure A adverts to the materials other than the confession by the co-accused. Paragraph 7 of Annexure A states as to the statement of Bavin Pinto, Driver of the lorry in which the cargo was transported,

he implicates the 4th accused-the Petitioner; he stated that he (A-4) handed over fresh documents at Rajkot for transporting goods to Cochin and paragraph 8 of Annexure A adverts to the statement of Anr. lorry driver to the effect that, he started from Rajkot on 19th December 1989 with a load belonging to the 4th accused consisting of 43 boxes of grills and 50 bundles of wire nets and that he reached Cochin on 25th September 1989 and the goods were unloaded at the godown of Ganesh Mills. Paragraph 9 of Annexure A adverts to the statement of Smt. R. Kasturi of Sree Ganesh Copra Oil Mills and several other witnesses. The allegations in the complaint unambiguously reveal the complicity of the 4th accused in the attempt to export the said "Hashish". The materials thus relied on in the complaint are not only the confession of the co-accused but also the statement of other independent witnesses which if accepted would disclose the offences alleged against the accused persons inclusive of the 4th accused.

10. Learned Counsel for the Petitioner relied on the decision in Crl. M.C. No. 835 of 1988 in support of his contention that in similar circumstance the complaint was quashed, but paragraph 3 of the said order itself would show that, the only evidence against the Petitioner therein was the confession made by the other two accused. The said decision clearly is distinguishable. In the decision in Crl. M.C. 687 of 1992 the learned Judge held that, the statement of one witness in paragraph 8 of the complaint therein could not bring out an offence against the Petitioner. The facts in that case are not similar to the facts disclosed in Annexure A complaint. The said decision too cannot support the Petitioner's case.

11. The Supreme Court in the decision in State of Haryana and others Vs. Ch. Bhajan Lal and others, after adverting to the circumstances where a complaint can be quashed u/s 482 Code of Criminal Procedure cautions that, the power u/s 482 Code of Criminal Procedure should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. The Supreme Court proceeded to hold that, the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint.

12. As indicated, the allegations since are capable of bringing out the offences alleged against the Petitioner, this petition is not maintainable, and consequently the same is liable to be dismissed which accordingly is hereby dismissed.