

(1999) 06 AHC CK 0016

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 1620 of 1999

Deepak Mishra and Another

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 04-06-1999

Acts Referred:

Constitution of India, 1950 — Article 20(3), 21, 22, 22(1)
Criminal Procedure Code, 1973 (CrPC) — Section 482
Customs Act, 1962 — Section 135
Foreign Exchange Regulation Act, 1973 — Section 35, 40

Citation : (1999) CriLJ 4123 : (2000) 1 RCR(Criminal) 286

Hon'ble Judges : O.P. Garg, J

Bench : Single Bench

Advocate : A.K. Awasthi and Manish Tiwari, for the Appellant; Addl. S.C., Govt. of India and Sanjay Kumar Singh, for the Respondent

Judgement

O.P. Garg, J.—In this application u/s 482 of the Code of Criminal Procedure applicants-Deepak Mishra and Kashi Nath Mishra who are suspect/involved in Case Crime No. Nil 99 u/s 135, Customs Act, P.S. D.R.I., Varanasi, District Varanasi have prayed that their arrest be stayed with reference to alleged recovery of contraband items. It is further prayed that the applicants' statements be directed to be recorded in the presence of their advocate.

2. A counter-affidavit has been filed by Sri B. K. Singh, Intelligence Officer, DRI, Varanasi.

3. Heard Sri Manish Tiwari, learned counsel for the petitioners and Sri Sanjay Kumar Singh, Additional Standing Counsel, Govt. of India, for opposite party No. 2.

4. To begin with it may be mentioned that the first prayer of the petitioners cannot be granted as an application u/s 482, Cr.P.C. is not legally maintainable. During the investigation of the case the arrest of the applicants cannot be stayed. In this connection there is a plethora of decisions on this point including

the Full Bench decision of this Court reported in 1989 ACC 181 : 1990 ALJ 47 Ram LalYadav v. State of U. P. This application, therefore, rejected insofar as it relates to the prayer that the arrest of the petitioner be stayed.

5. The other submission made on behalf of the applicants is that they may be permitted to be represented by their counsel at the time of their interrogation. Sri Sanjay Kumar Singh, learned Additional Standing Counsel, Union of India, urged that the presence of a lawyer during interrogation cannot be permitted as of right. The presence of a lawyer is advisable during interrogation taking such precautionary measures to keep the confidential nature of the statements and secrecy of enquiry. A reference was also made to the decision of the Apex Court in the case of Poolpandi Vs. Superintendent, Central Excise and others etc. etc., in which it has been observed that the person called for interrogation during investigation by authorities under the Customs Act or FERA is not an accused and, therefore, refusal of presence of a lawyer during interrogation does not violate Article 20(3) and 21 of the Constitution of India.

6. Sri Manish Tiwari, learned counsel for the petitioners urged that secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power and that in the name of secrecy the person concerned is subjected to torture and wholly false and fictitious statements are recorded reproduced under duress. It was further urged that in the absence of the lawyer the groundwork of false cases for securing conviction of innocent persons is prepared and, therefore, the benefit of presence of the lawyer should not be denied. Sri Manish Tiwari supported his submission with reference to the decision of Apex Court in the case of Nandini Satpathy Vs. P.L. Dani and Another, in which it was observed that the lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3) is an assurance of awareness and observance of the right to silence. Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the Police to permit the Advocate of the accused, if there be one, to be present at the time he is examined. Over-reaching Article 20(3) and Section 161(2) will be obviated by this requirement. If an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.

7. Reference was also made to the decision of Delhi High Court in the K.T. Advani Vs. The State, in which it was held that if a suspect is entitled to presence of counsel in an investigation, governed by the Code of Criminal Procedure there is nothing in the provisions of the Foreign Exchange Regulation Act, which purport, explicitly or impliedly, to oust such a right. If the right to the presence of counsel be fundamental to the rule of law, it makes little difference if the investigation is one under the Code of Criminal Procedure or independently of it in view of provisions of Article 22(1) of the Constitution.

8. The case of Nandini Satpathy was also considered. For the sake of clarity and ready reference paragraph 8 of K. T. Advani case (supra) be quoted in extenso at page 1331 of Cri LJ :

In the case of Nandini Satpathy Vs. P.L. Dani and Another, Krishna Iyer, J. who spoke for the Court, pointed out that the language employed in Article 22(1) did not mean that the persons, who were not under arrest, or custody can be denied the right to consult counsel and that the spirit and sense of the Article is that it is fundamental to the rule of law that the service of a lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation. The expression "accused" was apparently used in the judgment in the sense of a suspect because the expression "accused" does not occur in Article 22 and there are a number of situations in which a person may be arrested, without being formally accused and Section 35 of the Foreign Exchange Regulation Act is one of them. The corresponding provisions of the Customs Act is another. In that case, the Court examined the right to the presence of counsel at the time of interrogation in the context of Article. 20(3) and Article 22(1) where investigation was regulated by the provisions of the Criminal P.C. The protection of Article 20(3) of the Constitution no doubt would not be available to a suspect in an enquiry or investigation u/s 40 of the Foreign Exchange Regulation Act until he has been formally accused and that is what the Supreme Court has held in a number of cases, Romesh Chandra Mehta Vs. State of West Bengal, , on a narrow construction of the expression "person accused of any offence" used in the said Article. The Court quoted with approval the observations of Dasgupta, J., in his dissenting opinion in the case of The State of Bombay Vs. Kathi Kalu Oghad and Others, and observed that "Third degree is an easy temptation where the pressure to detect is heavy, the cerebation involved is hard and the resort to torture may yield high dividends." These observations, were made in the context of a rule against self-incrimination but would be equally relevant in construing Article 22(1) of the Constitution. It is no doubt true that the observations of the Supreme Court in the case of Nandini Satpathy Vs. P.L. Dani and Another, and the guidelines laid down by the Court in relation to the presence of counsel at the stage of investigation were made in a case governed by the Code of Criminal Procedure but I see no distinction between the provisions of the Code of Criminal Procedure and of the Foreign Exchange Regulation Act in the matter of right to presence of counsel. If a suspect is entitled to presence of counsel in an investigation, governed by the Code of Criminal Procedure there is nothing in the provisions of the Foreign Exchange Regulation Act, which purport, explicitly or impliedly, to oust such a right. If the right to the presence of counsel be fundamental to the rule of law, it makes little difference if the investigation is one under the Code of Criminal Procedure or independently of it.

9. I have given thoughtful consideration to the matter and in the backdrop of legal position, I find that there is no legal bar or prohibition under the Customs Act to prohibit the presence of lawyer at the time of interrogation. Merely in the

name of secrecy the person concerned cannot be deprived of his legitimate right to have the company of his lawyer at the time of interrogation in the absence of any prohibition, there can possibly be no objection if the petitioners are permitted to be represented at the time of their interrogation by a lawyer of their choice.

10. The present application u/s 482, Cr.P.C. is partly allowed with the observations that in case the petitioners wish to have the company of lawyer of their choice at the time of interrogation by the departmental officer i.e., opposite party No. 2, this benefit shall not be denied to them.