(1971) 01 KL CK 0015

In the High Court Of Kerala

Enforcement Officer APPELLANT

Vs

Sub Inspector of Public and Another RESPONDENT

Date of Decision : 29-01-1971

Acts Referred:
Criminal Procedure Code, 1898 (CrPC) — Section 54

Citation : (1971) CriLJ 1019

Hon'ble Judges : K. Sadasivan, J

Bench : Single Bench

Judgement

K. Sadasivan, J.—This criminal revision arises under the following circumstances:

One Abdul Jaleel (2nd respondent) was arrested by the Mundakayam police on 31-7-1970 at Chotti on the KottayamKumili road Under Sections 54 and 550, Criminal P.C. He was found to possess at the time Rs. 4,04,950/-. The police suspected that the money was either stolen, or was concerned in a cognizable offence. But on questioning him it was revealed that the money was obtained by him in violation of the Foreign Exchange Regulation Act, VII of 1947. Information was thereupon conveyed by the Sub Inspector, Mundakayam (1st respondent) to the Enforcement Officer, Enforcement Directorate, Ministry of Home Affairs, Government of India, Trivandrum that the 2nd respondent had received the payment of the said amount from persons by order or on behalf of persons residing outside India in contravention of the provisions of Section 5 (1) (c) of the Foreign Exchange Regulation Act, 1947 and the said amount was meant for payment to some other persons by order, or on behalf of persons resident outside India in contravention of the provisions of Section 5 (1) (c) of the said Act.

Later, the 2nd respondent was produced by the S. I. before the Sub Divisional Magistrate, Kanjirapally along with the said amount of Rs. 4,04,950/-. On 7-8-1970, the 2nd respondent was released on bail by the Magistrate. On the same day, the petitioner (Enforcement Officer) filed a Criminal Miscellaneous Petition before the Magistrate, stating that on investigation there were reasonable grounds to believe that the 2nd respondent had contravened the provisions of Section 5 (1) (c), and attempted to contravene the provisions of Section 5 (1) (c) of the Foreign Exchange Regulation Act punishable u/s 23 (1-B) of the Act. It was also submitted before the court that the Enforcement Directorate was entitled to retain the said amount Under Sections 19-A, and 19-G of the Act for purposes of investigation. Notice was also issued by the Chief Enforcement Officer, Enforcement Directorate to the 1st respondent u/s 19-E of the Act on 7-8-1970. In the circumstances, it was prayed that the said amount and other documents might be ordered to be handed over to the petitioner for further investigation.

Affidavits touching the matter were also filed by the petitioner and 2nd respondent before the Magistrate. The 2nd respondent claimed that the amount belonged to him jointly with four other persons, entrusted to him for purchasing two estates. Rajamudi and Ranimudi at Peermade belonging to one Hameed Rowther of Athirampuzha pursuant to an agreement entered into on 15-7-1970 between the said Rowther on the one side and the 2nd respondent and the four other persons on the other. The learned Magistrate by order dated 24th September, 1970. has refused the petitioner''s prayer for disbursement to him of the amount and directed the 2nd respondent and the four other persons mentioned by him to adduce evidence in support of their claim. The learned Magistrate has also made it clear that each side will be at liberty to impeach the evidence produced by the other side by cross-examination of the witnesses etc. It is against this order that the Enforcement Officer has come up in revision.

2. On a careful and anxious consideration of the matter, I am of the view that the learned Magistrate has misdiretced himself in directing the parties to adduce evidence. The Magi- strate is not expected to inquire into the matter, because the offence stated to have been committed is not one triable by him or cognizable by the police. The offence is one to be investigated by the officers of the Enforcement and prosecuted by them. The Act has invested them with very wide powers in this regard. Section 19-E and 19-F of the Act provide for the summoning and examination of witnesses. A full-dressed inquiry is provided for in the Act. There is also the provision for appeal by the aggrieved party to the Appellate Board and from the decision of the Board, finally to the High Court. So, the inquiry is to be conducted by the Director of Enforcement and the evidence if any, intended to be produced by the party, is to be produced before that authority and not before the Magistrate.

The 1st respondent has in his report, submitted to the court stated that the investigation conducted by him disclosed that the accused had contravened Sections 5(1) (aa) and 5 (1) (c) of the Foregin Exchange Regulation Act, 1947 and that he had moved the Enforcement Directorate in the matter. This report of the S. I. should prima facie have been accepted by the learned Magistrate and issued the necessary directions to hand over the amount to the Enforcement Officer for purposes of further investigation. The learned Magistrate seems to think that u/s 523, Cr.PC he is bound to make an inquiry to find out the person entitled to the possession of the property. The section no doubt, gives the Magistrate power to make an order for the disposal of the property seized by the police, but such an inquiry is not contemplated in the present instance for the obvious reason that the property is not claimed by the Enforcement Officer as a rival claimant. They are asking for custody of the article only for the purpose of investigation.

It is only in certain circumstances that the property recovered from the possession of a person may be handed over to some other person, such as when the person from whose possession the property is recovered denies that it was recovered from his possession. Such a situation might arise in those cases where some stolen property is recovered and the plea of the person from whose possession it is recovered is that it was planted, or where the property is recovered from the possession of a person, but this possession has been acquired either in a dishonest or unlawful manner, or, where the person from whose possession the property is seized alleges that he is only in temporary custody of this property and it belongs to someone else. It is only in such and similar circumstances that a Magistrate is given a discretion to hold an inquiry. In other cases the Magistrate should not conduct an inquiry. The words of the section are very clear and they specifically mention that the property should be delivered to a person who is entitled to its possession and not to a person who owns it." (Page 3337 of Sohoni''s Code of Criminal Procedure Vol. IV, 1967 Edition).

The direction by the learned Magistrate that the parties should adduce evidence would tend to show that he is contemplating an inquiry into the ownership of the property. This, he is not competent to do u/s 523 of the Code. The Enforcement Officer is asking for temporary possession or custody of the money by virtue of his right under the provisions of the Foreign Exchange Regulation Act to be in such possession or custody.

3. learned Counsel Sri Easwara Iyer appearing for the 2nd respondent stated that u/s 19-A (2) of the Act when any Officer of Enforcement Is about to search any person under the provisions of the section, such officer will be bound to take the person without unnecessary delay to the nearest gazetted officer of Enforcement superior in rank to him, or a Magistrate if so required by the person to be subjected to the search, and this right will be lost to him if in the instant case, the money is straightway handed over to the Enforcement Officer by the court. Under Sub-section (4) of Section 19-A the person will be entitled to a discharge, if he succeeds in satisfying the officer that there is no reasonable ground for such search. But none of these questions need detain the court now, as the stage of the search is already over. The search was already made by the Sub Inspector and the article was seized and if the magistrate is to disburse the money to the accused, he could immediately be arrested with the money by the Enforcement Officer the moment he gets out of the premises of the court and in such a

situation, the plea that he should be produced before the nearest gazetted officer of Enforcement superior in rank, or to a magistrate, will not be available to him because that will only be a meaningless formality.

Power of search, seizure and arrest has been vested in the Enforcement Officer by the relevant section of the Act, and such power can be exercised by him under any circumstance, when he has reason to believe that a person is expected to have contravened any of the provisions of the Act. In such circumstances, I do not see any material difference in the procedure of the magis- trate in whose custody the money seized is, directing its disbursement to the Enforcement Officer, and the Magistrate returning the money to the accused from whom it was seized, and allowing him to be arrested by the Enforcement Officer in the next moment, and seizing the money from him. It is in this background that in Bavajee Fakkir Muhammed and Another Vs. The State of Kerala and Another, and Krishnan Sukumaran Vs. Enforcement Officer, Cochin, this Court had to observe that

It would be an empty formality, in the face of the application moved by the Enforcement Officer, to have the property delivered to the petitioners u/s 523, Criminal P.C. and then seized by the Enforcement Officer from the hands of the petitioners at the gate of the Magistrate''s court.

4. this Court in arriving at the above conclusion had followed the observations of the Supreme Court in Godavari Shamrao Parulekar Vs. State of Maharashtra and Others, where the appellants were detained by an order dated November 7, 1962 of the Commissioner of Police under the Preventive Detention Act. On November, 10 that order was revoked and another order for their detention was made by the Government under the Defence of India Rules and served on the appellants in jail. The Supreme Court observed:

In these circumstances, it would be in our opinion, an empty formality to allow the appellants to go out of jail on the revocation of the order of November 7, and to serve them with the order dated November 10, 1962, as soon as they were out of jail.

So also in the present case, it would be an empty and meaningless formality for the court to release the prisoner with the money, and allow the Enforcement Officer to arrest him at the entrance of the court premises under the provisions of the Foreign Exchange Regulation Act. The 2nd respondent, it appears, has made a confessional statement to the Enforcement Officer on 1-8-1970, confessing his guilt under the provisions of the Foreign Exchange Regulation Act. But that has been retracted by an affidavit dated 10-9-1970, stating that it was extracted from him by physical torture. The admissibility or otherwise of the confession also need not engage the attention of the Magistrate, as it is for the officer enquiring into the matter under the Act. to sit in judgment over it. I would, therefore, set aside the order of the learned Magistrate and direct him to order delivery of the money to the petitioner Enforcement Officer on getting the necessary acknowledgment from him.

