

(1987) 12 GUJ CK 0014
In the Gujarat High Court

Mangalsingh Bhansingh Rathod

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 17-12-1987

Acts Referred:

Central Excises and Salt Act, 1944 — Section 21, 9
Criminal Procedure Code, 1973 (CrPC) — Section 154, 157, 158, 165, 167
Customs Act, 1962 — Section 37
Evidence Act, 1872 — Section 25, 26
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 41, 42, 51, 52, 53

Citation : (1989) CriLJ 460 : (1988) 2 GLR 1028

Hon'ble Judges : R.A. Mehta, J

Bench : Single Bench

Judgement

R.A. Mehta, J.—This is a bail application in respect of an offence under The Narcotic Drugs and Psychotropic Substances Act, 1985. 985 grams of brown sugar valued at Rs, 59,100/- is the subject matter of the offence. On 23-9-1987, the Preventive Officer of Central Excise, Headquarters Office, Ahmedabad had received an information to the effect that accused No. 1 Bharatji was to deliver brown sugar to accused No. 2 Bansi G. Chauhan at about 1-00 O'clock. As a result of this information, there were watch, search and seizure and the quantity of 985 grams of foreign brown sugar valued at Rs. 59,100/- was seized under a Panchanama.

2. The accused No. 3, the present petitioner was not present and was not shown to be involved in the offence. However, it appears from the statements of accused Nos. 1 and 2 that this narcotic drug i.e. brown sugar was supplied by the present petitioner—accused No. 3 about a week before its seizure and was given for disposal and preservation. The statements of the co-accused were recorded by the authorised officer of Excise Department u/s 67 of the Act. Accused No. 2 has stated that this muddamal was supplied by the petitioner about seven days before its seizure and 3 to 4 days thereafter i.e. on 20-9-1987,

this petitioner had also asked for money and price of the brown sugar. However, the accused No. 2 had expressed his inability to make any payment because the brown sugar was not till then sold and, therefore, he had stated that either the petitioner might take back the brown sugar or might take money after it is sold. However, the petitioner had insisted only on payment. It also appears from the statement of accused No. 2 that even on the date of the seizure of muddamal, this petitioner had gone to the house of the accused No. 2, however, the petitioner had returned having realised the situation prevailing there as the officers of Central Excise were present. There is also a statement of the petitioner himself recorded in his language Hindi. Therein he has admitted having bought and supplied the brown sugar.

3. The petitioner applied for bail to the learned Chief Metropolitan Magistrate. However, he rejected his application by his order dated 5-10-1987. The learned Sessions Judge also rejected his bail application by his order dated 16-10-1987.

4. The learned Counsel for the petitioner has submitted that there is no material or evidence to connect the petitioner-accused No. 3 with the offence. He was not found in possession of the brown sugar now as he was present at the time when it was seized and he has submitted that the statements have been falsely recorded and they are inadmissible in evidence and, therefore, there is no material on the evidence on the basis of which it can be said that there is reason to believe that this petitioner is involved in the serious offence alleged against him. He has submitted that u/s 25 of the Evidence Act, no confession made to the police officer shall be proved as against a person accused of any offence. He has also relied on Section 26 of the Evidence Act and submitted that no confession made by any person while he is in the custody of a police officer, unless it is made in the presence of a Magistrate shall be proved against that person. In the present case, the confession and incriminating statements of the accused have been made before the authorised Excise Officer and it is the contention of the learned Counsel for the petitioner that these officers are police officers and, therefore, these statements are directly hit by Section 25 and 26 of the Evidence Act. Sections 25 and 26 read as under:

Section 25:

No confession made to a police officer shall be proved as against a person accused of any offence.

Section 26:

No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

The learned Counsel for the petitioner, for that purpose, has also relied on Section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 which reads as under:

Section 53(i):

The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the department of central excise, narcotics, customs, revenue intelligence or Border Security Force or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act.

(2) The State Government may, by notification published in the Official Gazette, invest any officer of the department of drugs control, revenue or excise or any class of such officers with the powers of an officer in charge of a police station for the investigation of offences under this Act.

It is on the basis of the provisions of Section 53 read with the notification which confers on the central excise officer powers of an officer-in-charge of a police station, that the argument is made that these officers are police officers and, therefore, the statements made before them by accused or co-accused are inadmissible in evidence.

5. The learned Counsel for the petitioner has also submitted that the comparison with the corresponding provisions of the Customs Act or the Central Excises & Salt Act and the Railway Property (Unlawful Possession) Act is inappropriate because under those Acts, there is no power in the officers under those Acts; to file a charge-sheet. u/s 9 of the Central Excises & Salt Act offences under that Act are non-cognizable. u/s 37 of the Customs Act no cognizance can be taken except when it is authorised by an officer under that Act and under the Railway Property (Unlawful Possession) Act, the powers are of making enquiry and not of investigation. The learned Counsel for the petitioner has also submitted that the Central Excise Officer has been invested with the powers of an officer-in-charge of a police station for investigation of offences under the Act, he is virtually and practically a police officer and that he has power to file a charge- sheet u/s 173 of the Criminal Procedure Code. The petitioner has relied on the decision of the Supreme Court in the case of *Balkishan A. Devidayal Vs. State of Maharashtra*, . In that case, the question was whether an officer of Railway Protection Force making an inquiry in respect of offence under Railway Property (Unlawful Possession) Act, 1966, is a police officer or not. Holding that such officer of Railway Protection Force is not a police officer, the Supreme Court observed that the primary test for determining whether an officer is a police officer is whether the officer concerned under the Special Act, has been invested with all the powers exercisable by an officer-in-charge of a police station under Criminal Procedure Code, qua investigation of offences under that Act including the power to initiate prosecution by submitting a report (charge-sheet) u/s 173 of the Criminal Procedure Code. It was farther observed that in order to bring him within the purview of a police officer for the purpose of Section 25 of the Evidence Act, it is not enough to show that he exercises some or even many of the powers of a police officer conducting an investigation under the Code, It was further observed that from the comparative study of the relevant provisions of

the 1966 Act and the Code, it is abundantly clear that an officer of the RPF making an inquiry u/s 8(i) of the 1966 Act does not possess several important attributes of an officer-in-charge of a police station conducting an investigation under Chapter XIV of the Code. The character of the "inquiry" is different from that of an "investigation" under the Code. The official status and powers of an officer of the Force in the matter of inquiry under the 1966 Act differ in material aspects from those of a police officer conducting an investigation under the Code. Particularly, he has no power to initiate prosecution by filing a charge-sheet before the Magistrate concerned u/s 173 of the Code, which has been held to be the clinching attribute of an investigating police officer. The Supreme Court, therefore, held that any confessional or incriminating statement recorded by him in the course of an inquiry u/s 8(i) of the 1966 Act cannot be excluded from evidence under the said section

6. The learned Counsel appearing for the respondents has submitted that an authorised officer of the Central Excise Department has been authorised u/s 67 to examine any person and the statements recorded by such an officer are not hit by either Section 25 or 26 of the Evidence Act. It is also submitted that these officers, even though they are officers u/s 53 invested with the power of investigation of offence, cannot file a charge-sheet which is a power invested only in a police officer and those officers are not governed by all the provisions of Chapter XII of the Criminal Procedure Code. These officers are not required to follow the procedure of Section 154 of recording the FIR and any information relating to the commission of a cognizable offence under the Narcotic Drugs and Psychotropic Substances Act, if given to an officer under the Excise Act. (even though empowered with the powers of a police station officer) is not required to be reduced to writing or to be read over to the informant nor it is required to be signed by the person nor it is required to be entered in a book prescribed u/s 154 nor it is required to be given to the informant In this connection, a reference is made to section 68 of the Act showing that no officer acting in exercise of powers vested in him under any provisions of the Act or any rule or order made thereunder shall be compelled to say whence he got any information as to the commission of any offence. It is also submitted that such information is not required to be reported to the Magistrate u/s 157 or 158 of the Criminal Procedure Code. Section 51 of the Act was also pointed out which reads as under:

The provisions of the Code of Criminal Procedure, 1973, shall apply in so far as they are not inconsistent with the provisions of this Act to all warrants issued and arrests, searches and seizures made under this Act.

7. It is submitted that in this view of the matter, if Chapter XII was applicable by virtue of Section 53, this provision was absolutely unnecessary because Section 165 of the Code is already there in the Chapter regarding such acts. Similarly, Section 52 of the Act provides for arrest of a person and production before the Magistrate showing that all the provisions of Chapter XII are not attracted. It is also submitted that the provisions of Section 167 regarding orders, custody and

detention of the accused and release after 90 days or 60 days where investigation is not over, are not applicable to the present case for offences under the Narcotic Drugs and Psychotropic Substances Act and it is therefore submitted that Section 173 for filing charge-sheet is also not applicable to the excise officer authorised u/s 53 of the Act. The authorised excise officer is not required to file any charge-sheet on completion of the investigation and that duty is cast only on the police officer and not an authorised officer who is deemed-to be in charge of police station.

8. In my view, there is considerable force in the contention of the respondents and the arguments of the petitioner must fail. The reasons follow.

9. The Central Excises and Salt Act, Section 9 shows that offences under that Act are non-cognizable and, therefore, there is no question of a police officer or central excise officer filing a charge-sheet u/s 173 of the Code of Criminal Procedure. However, Section 21 of that Act requires to be seen which reads as under:

21(1):

When any person is forwarded u/s 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to inquire into the charge against him.

(2) 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 (5 of 1898), when investigating a cognizable case:

Provided that:

(a) if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the Central Excise Officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.

10. From reading Sub-section (2) of Section 21, it is clear that the Central Excise Officer has also been vested with the same powers as the officer in-charge of a police station as u/s 53 of the present Act. However, the phraseology mentioned therein is materially significant and deliberately different. The Legislature has made a significant departure. u/s 21(2) of " the Central Excises Act, such central excise officer is not only invested with the powers of an officer in charge of a

police station, but is also subject to the same provisions as the officer in-charge of a police station and is also subject to all other provisions, under the Code of Criminal Procedure. While enacting the present Section 53, the Legislature has made a deliberate departure and not used the words that such officer shall be Subject to the same provisions and subject to the Code of Criminal Procedure. This departure has to be given a meaning and purpose and the purpose is that even though the Central Excise Officer is invested with powers of a police station officer for the investigation of offences, he is not subject to all the provisions of Chapter XII of the Code of Criminal Procedure. If Chapter XII of the Code was applicable in respect of all matters, there was nothing preventing the Legislature to say so. Instead of that, the Legislature has provided for examination of persons and recording of statements u/s 67; for seizure and arrest u/s 51 and 52 of the Act. From reading several provisions of Chapter XII of the Code, it clearly appears that the officer of Central Excise or Customs who is empowered u/s 53 to be a police station officer, is not a police officer and he is not under any obligation of and he is not subject to the provisions of Sections 154, 157, 158, 167 and 173 of the Code of Criminal Procedure. He has only the powers of investigation and he has no power to record FIR or to file a charge sheet. The very fact that he is not constituted a police officer, but only invested with investigative power of a police officer indicates the legislative mention. Several powers of police station officer are expressly conferred That was not necessary if Chapter XII was applicable to the authorised excise officer.

11. In the case of Jagatsinh S. Sodha v. Collector of Customs and Anr. Misc. Criminal Application No. 787 of 1987, decided by J. P. Desai, J. on 1-5-1987, an analogous question was raised whether Section 167 of Chapter XII of the Code would apply to the investigation made by an authorised Customs or Excise officer in offences under the narcotics Act and it was held that the provisions of Section 167 of the Code do not apply to the offences under the Narcotics Act investigated by authorised officers of Customs or excise department. It was held as under:

Section 51 of the said Act, of course, says that the provisions of the Code of Criminal Procedure 1973 shall apply, but it specifically states that they shall apply, in so far as they are not inconsistent with the provisions of the Act, to all warrants issued and arrests, searches and seizures made under the Act. Simply because the offences under the Act are made cognizable, it does not mean that all the provisions of the Code apply. The legislature has made a specific provision when it intended to say that certain provisions of the Act will apply to such offences. The arrest has not been made by an officer in charge of the Police Station and, therefore, Section 57 of the Code of Criminal Procedure cannot apply and therefore Section 167 of the Code cannot apply. Section 51 only says that the provisions of the Code will apply to the warrants which are to be issued, to the arrests, searches and seizures made under the Act. They do not pertain to the investigation. When a warrant is issued, it has to be executed. In absence of any provision in the Act, the warrant has to be executed in the manner provided by the Code. Similarly so far as arrest is concerned, no provision is made in the

Act as to how arrest is to be effected In that case, the procedure laid down in the Code has to be applied while arresting the accused. Similarly, for searches and seizures also, the provisions of the Code will apply because there is no provision made in the Act. Looking to the whole scheme of the Act, it is difficult to accept the contention raised by the petitioner that the provisions of Section 167 of the Code will apply to such offences and therefore that contention deserves to be rejected.

12. I am in respectful agreement with the above view. The learned Single Judge has also relied upon the Division Bench judgment of Allahabad High Court in the case of Mahesh v. Union of India in a Habeas Corpus Writ Petition decided on May 6, 1986 reported in 1988 All LJ 411. In that case, the accused had sought release on the sole ground that the charge sheet was not filed against him within a period of 90 days. Section 4(2) of Criminal Procedure Code was referred to providing that all the offences under any other law (other than IPC.) shall be investigated, enquired into, tried and otherwise dealt with according to the provisions of the Code, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Thus, if the special enactment indicated a different procedure of investigation and initiation of prosecution, the said procedure has to be followed and not the procedure prescribed by the Code. The Division Bench of Allahabad High Court, after referring to various provisions of Chapter XII, came to the conclusion that entire Chapter XII deals with the investigation by police and it nowhere refers to any other investigation After referring to the various provisions of the Narcotics Act and the narcotic of fences being cognizable offences, it came to the conclusion that the Act is a complete Code relating to offences under the Act and therefore Chapter XII of the code would not be applicable to investigation of narcotic offences by the authorised excise officers in view of Section 4(2) of the Code. In coming to this conclusion, the Division Bench of Allahabad High Court referred to and considered the provisions of Section 41(2), 42(1), 52(3) and 53 of the Act and observed that these authorised officers are competent to exercise the powers exercisable by an officer in charge of a police station. But thereby they will not become police officers by themselves and that the authorised officers were not police officers in spite of the provisions of Section 53 and Chapter XII would not be attracted to their investigation and therefore the Division Bench ultimately came to the conclusion that the charge sheet could not be filed by the authorised excise officer investigating narcotic offences and they could only file a complaint u/s 180(1)(a) of the Code and they cannot file a charge sheet u/s 178 of the Code. This judgment is a clear answer to the argument of the present petitioner that the excise officer has the power to file a charge sheet and that he is a police officer. Both these contentions stand negatived.

13. This judgment of Allahabad High Court was followed by the learned single Judge of that High Court in the case of Ranjitsingh v. State in Misc. Criminal Case No. 2683(B) of 1986 and other connected cases decided on 4-2-1987. Those

cases were also of bail applications under narcotic offences and the question was about admissibility in evidence of the statements made before authorised Excise Officer. There also, the learned Judge came to the conclusion that such Excise Officers were not police officers and the statements made before them were admissible in evidence.

14. A similar view has also been taken by another learned Judge of this Court (Coram- A.S. Qureshi, J.) in Misc. Criminal Application No. 2082 of 1986 decided on 10-10-1986. In that case, earlier a statement was made by the learned Counsel for the Customs Department that the Custom Officer would file a charge sheet within three weeks. However, later it was realised that the customs officer had no power to file such charge sheet in respect of investigation under Narcotic Drugs and Psychotropic Substances Act and hence an application was made to modify the same so that the customs officer may file a complaint within three weeks instead of a charge sheet. After hearing both the sides and referring to the Supreme Court judgment including *Balkishan A. Devidayal Vs. State of Maharashtra*, , the Court came to the conclusion that no charge sheet could be filed by the customs officer and only a complaint could be filed and therefore the direction was modified accordingly.

15. In view of the aforesaid discussion, it is clear that all the provisions of Chapter XII of the Code cannot be attracted in respect of Narcotics offences investigated by authorised officers of customs, excise and other departments and such authorised officers are not police officers and statements made before them are not inadmissible in evidence and they have no power to file a charge sheet u/s 173 of the Code. In that view of the matter, it cannot be said that there is no material about the involvement of the petitioner in narcotics offences. Hence, this is not a fit case where the petitioner can be granted bail Hence the application for bail is dismissed.