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(2013) 01 PAT CK 0093

In the Patna High Court

Case No : Criminal Miscellaneous No. 3769 of 2011

Mishri Rai and Another — APPELLANT

Vs

The Union of India and Another — RESPONDENT

Date of Decision : 23-01-2013

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 4(2), 460
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 23, 36, 36A(1)(d)

Citation : (2014) 1 PLJR 66

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Advocate : Dhirendra Kumar, for the Appellant; Abu Haidar for Union of India and Mr. Arun Kumar Pandey for the State, for the Respondent

Judgement

Shivaji Pandey, J.—Heard learned counsel for the petitioners and learned counsel for the Union of India, Custom Department. This application has been filed for quashing the order dated 11.1.1989 passed in Custom Case No. 13 of 1988, Complainant Case No. 780 of 1988 by the Chief Judicial Magistrate, Samastipur by which he has taken cognizance against the petitioners u/s 23 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as ''the Act'').

2. A complaint case vide Complaint Case No. 780 of 1988 was filed stating therein that on 7.5.1988 a tractor bearing registration no. BEA-2681 with trolley no. BEA-2682 were seized and from that trolley 500 Kgs. of Ganja was recovered and four persons, namely, Santlal Rai, Jay Mangal Rai, Naresh Rai and Mahendra Manjhi were arrested out of whom Jay Mangal Rai confessed that 180 Kgs. of Ganja belonged to him. Santlal Rai confessed 160 Kgs. of Ganja belonged to him and Naresh Rai confessed 160 Kgs. of Ganja belonged to him total being 500 Kgs. of Ganja. It has further been stated that Santlal Rai and Jay Mangal Rai also took the name of Mishri Rai, son of Bhagwan Rai and Jawahar Rai, son of Ram Briksh Rai. The aforesaid complaint petition was filed before the Chief Judicial Magistrate Samastipur and vide order dated 11.1.1989 the court below took

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cognizance u/s 23 of the Act against all the seven accused persons including the petitioners and the case was transferred to the Court of the Judicial Magistrate, 1st Class, for trial and disposal.

3. Learned counsel for the petitioners submits that the Chief Judicial Magistrate who had taken the cognizance was not competent court to take cognizance of the offence as Section 36A(1)(d) of the Act has conferred the power to the Special Court only to take cognizance and try the case. As the Special Court has been dealt with in Section 36 of the Act where it has specially been mentioned that Judge of Special Court shall not be below the rank of Sessions Judge or Additional Sessions Judge and as such the order of cognizance itself is bad in law.

4. Learned counsel for the Union of India representing Custom Department has filed counter affidavit and accepted that the Chief Judicial Magistrate is not the Special Court as taking cognizance of offence is merely irregularity and does not go to the root of the matter and is saved by Section 460 of the Code of Criminal Procedure (hereinafter referred to as ''the Code''). He has relied on the judgment of the Hon''ble Supreme Court in the case of Purshottam Jethanand Vs. The State of Kutch,

5. For coming to the right conclusion it is necessary to consider the provisions of the Act as well as Section 460 of the Code. Section 36 of the Act provides that the Government may, for the purpose of providing speedy trial of the offences under this Act may appoint the Special Court, by notification in the official Gazette and in sub-clause (2) of the Act it has been provided that the Special Court shall consist of a single Judge who shall be appointed by the Government with the concurrence of the Chief Justice of the High Court. Further sub-clause (3) of the Act provides that a person shall not be qualified for appointment as a Judge of a Special Court unless he immediately before such appointment was holding the post of Sessions Judge or an Additional Sessions Judge. Section 36A(1)(d) provides that a Special Court may upon a perusal of police report or upon a complaint made by an officer of the Central Government or a State Government authorized in this behalf constituting an offence take cognizance of that offence.

6. On examination of the aforesaid two provisions of the Act it is specifically clear that the Chief Judicial Magistrate cannot be said to be the Special Court as sub-clause (3) of Section 36 provides that a person shall not be qualified for appointment as a Judge of a Special Court unless he immediately before such appointment was holding the post of a Sessions Judge or an Additional Sessions Judge and Section 36A(1)(d) specifically provides, only the power of taking cognizance and trial has been conferred on the Special Court and no other court has been authorized either to take cognizance of the offence or to try the offence under N.D.P.S. Act cases as well.

7. Learned counsel for the Custom Department has drawn attention of this Court towards Section 460 of the Code where it has been provided, if any Magistrate

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not empowered by law to take cognizance of an offence takes cognizance will be irregularity, not illegality. Section 4(2) of the Code specially provides that all offences under any other law shall be investigated and inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences.

8. On conspectus of aforesaid sections it is clear, in Special Act special provision has been made for the investigation, enquiry and trial, in that circumstances the provisions of the Code will not occupy the field in the aforesaid area but it is the Special Act occupies the area of investigation enquiry and trial. It is also well known principle of law, the special procedure will prevail over the general procedure. This view is fortified from the judgment in the case of Khatri and Others Vs. State of Bihar and Others, . On examination of the provision of the N.D.P.S. Act vis-?-vis Criminal Procedure Code it is apparent that the separate and special provisions has been engrafted under the N.D.P.S. Act in the field of investigation, enquiry and trial, Act will prevail over the provision of the Code. N.D.P.S. Act has defined special court which has been authorized to take cognizance and try the case.

9. The aforesaid view is also fortified from the well known principle of law, when statute provides certain power has to be exercised by particular and certain authority in a particular way in that circumstance that should be exercised by that Officer and in that way alone following judgments are relevant: (i) Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others, , (ii) Rakesh Kumar Singh vs. The State of Bihar, 2010 (1) PLJR 827, paragraph 9, Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, and (iv) Dr. Ram Deen Maurya Vs. State of U.P. and Others, . In view of the aforesaid discussions, the order of cognizance u/s 23 of the N.D.P.S. Act dated 11.1.1989 passed by the Chief Judicial Magistrate, Samastipur is not sustainable in law and the same is quashed. As the Chief Judicial Magistrate is not competent authority under the Act to take cognizance. Accordingly this application is allowed and order of cognizance dated 11.1.1989 is quashed. However, the Chief Judicial Magistrate is directed to transmit the case to the Special Court, Economic Office (sic--Offences?), Muzaffarpur who will examine the matter and would act in accordance with law.

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