
(2013) 08 AHC CK 0192

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition (Tax) No. 1018 of 2011

Smt. Seema Tiwari

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 27-08-2013

Acts Referred:

Citation : (2013) 8 ADJ 364 : (2014) 1 ALJ 796 : (2013) 100 ALR 586 : (2014) 3 AWC 2537

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Advocate : Keshari Nath Tripathi and Rajnish Kumar Rai, for the Appellant;
Murtuza Ali, for the Respondent

Final Decision : Allowed

Judgement

Pankaj Mithal, J.—Notwithstanding the alternate remedy of revision u/s 11(2) of the United Provinces Excise Act, 1910 (herein after referred to as the "Act"), the writ petition against the order dated 19.7.2011 passed on remand by respondent No. 3, Additional Excise Commissioner (Administration) deciding Excise Appeal No. 35 of 2010 was entertained vide order dated 27.7.2011 as the matter had earlier been remanded in revision to the first appellate authority and for the reason that a pure question of law arises for consideration. The parties in the meantime have exchanged pleadings and therefore I do not consider it proper to relegate the matter to the revisional authority and thus proceeds to decide it on merits with the consent of the parties.

2. The question of law which has been posed in this writ" petition is whether in exercise of powers of search and seizure u/s 54 of the Act strict compliance regarding search and seizure as laid down in Chapter VII Cr.P.C. more precisely Section 100(4) Cr.P.C. is imperative?

3. The facts leading to the present writ petition lie in the narrow campus.

4. Bhupendra Singh respondent No. 6 was admitted as licensee to do retail

business in country made liquor at Shivali in the year 2009-10. The license was renewed for the next year 2010-11. A search and seizure operations were carried out at his shop at about 10.15 p.m. in the night on 5.2.2011 by a team of excise officers. During the aforesaid operation the stock register was not found; two bundles of fictitious holograms weighing about 1 kg. were seized; a bottle with two litres of country made liquor having concentration of 31.7% VV; and 115W wrappers/labels of Karina brand country made liquor etc., were found and taken into custody.

5. The said search and seizure operations were carried out in the presence of one Deva Tiwari, son of Putain Tiwari, the owner of the sweet shop in the vicinity and in the presence of Arvind Kumar Singh, the salesman of respondent No. 6.

6. On the basis of the material seized during search operations, the authorities after a show-cause notice and on consideration of the reply of respondent No. 6 thereto passed an order dated 28th February 2011 cancelling the license of respondent No. 6. The appeal of respondent No. 6 against the aforesaid order was dismissed on 9.3.2011 but in revision the matter was remanded to the appellate authority for reconsideration. On remand, the impugned order has been passed allowing the appeal and setting aside the cancellation order.

7. In the meantime as the license of respondent No. 6 was cancelled an advertisement was issued for resettlement of the said shop. Petitioner applied for license and he was selected for the purpose. Petitioner was accordingly granted license to run the said retail shop of country made liquor for the year 2010-11 vide letter dated 9.3.2011. The said license had been renewed in favour of the petitioner in the year 2011-12.

8. It is in the above back-ground that the petitioner has invoked the writ jurisdiction challenging the impugned appellate order dated 19.7.2011 which set asides the order of the District Magistrate as licensing authority cancelling the license of respondent No. 6 alleging that the impugned order has the effect of ousting his license. The Principal Secretary, Excise had earlier remanded the matter to the first appellate authority holding that u/s 100(4) Cr.P.C. read with Section 54 of the Act, there is a provision for having two or more independent and respectable inhabitants of the locality as witnesses to the search whereas the search in question was carried out in the presence of only one independent witness and since the provisions of Section 74 and 74-A of the Act have not been considered, the order of the first appellate authority is being set aside and the matter is being remanded to take into account the aforesaid provisions and to re-decide the matter.

9. It is pursuant to the above remand that the first appellate authority has passed the impugned order holding the search to be invalid as the procedure prescribed for the search was not followed and consequentially setting aside the order cancelling the license of respondent No. 6.

10. Learned counsel for the petitioner as well as respondent No. 6 and the

learned Standing counsel were all heard for final disposal of the writ petition on merits on their agreement.

11. The primary thrust from the side of the petitioner is under the facts and circumstances of the case as no independent witness was available at the time the search was carried out, strict compliance of procuring two witnesses was not possible and that Section 54 itself makes the application of the provisions of search and seizure as contained in the Cr.P.C. flexible.

12. On behalf of respondent No. 6 it has been submitted that once the revisional Court itself while remanding the matter has recorded that the search was invalid and the said order has attained finality, there is no occasion for the appellate Court to pass the impugned order.

13. Learned Standing counsel on the other hand submitted that once the matter had been remanded, the entire controversy stood re-opened.

14. Section 54 of the Act stipulates that the provisions of Cr.P.C. relating to searches shall be applicable, "as far as may be" to all action taken in that respect under the Act.

Section 54 of the Act reads as under:

54. Procedure relating to arrest, searches etc.--

The provision of the [Code of Criminal Procedure, 1973] relating to arrests, searches, search warrants, production of persons arrested and investigation into offences shall be applicable so far as may be, to all action take in these respects under this Act:

15. The use of expression "as far as may be" are relevant and play an important role in deciding this matter.

16. The procedure for search and seizure is provided under Chapter VII of the Code of Criminal Procedure.

17. The relevant provision is contained in Section 100 Cr.P.C. One of the conditions for search as contained in the above Chapter viz. Section 100 Cr.P.C. is that the officer or the person making a search shall call upon two or more independent and respectable inhabitants of the locality to attend and witness the search.

18. The relevant Section 100(4) of the Cr.P.C. is quoted below:

100(4): Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue any order in writing to them or any of them so to do.

19. A conjoint reading of Section 54 of the Act and 100(4) Cr.P.C. reveals that a search under the Act is to be carried out in the presence of two or more independent and respectable persons of the locality and in case no such inhabitants are available in the locality or willing to witness, a person from other locality may be called.

20. The above provisions of the Cr.P.C. in its applicability in relation to search under the Act has been qualified by the use of the word expression "so far as may be" which connotes that the aforesaid provisions has to be utilized as far as it may be possible or as may be nearly possible giving some flexibility in its application. It means that the provisions of Cr.P.C. in this regard are not to be applied with absolute strictness.

21. In short, in the matters of search under the Act the provisions relating to search as contained in the Cr.P.C. have to be applied in so far as it may be possible. There is no dispute that the raid was conducted in the night at the time when the market had closed and as such no independent witness was readily available. There were no customers at the shop. Therefore, the search team took Deva Tiwari, the owner of the sweet shop as one of the witnesses alongwith Arvind Singh, the salesman of the liquor shop.

22. In the above circumstances as is also reflected from the order of the District Magistrate/licensing authority dated 28th February 2011 that despite an effort to take independent witnesses no one except the witnesses as described above were available.

23. A three Judges Bench of the Supreme Court in *Sunder Singh Vs. State of Uttar Pradesh*, , in dealing with irregularities in conducting a search for failure to call respectable persons of the locality as witness as per provisions of the Cr.P.C. held that even assuming that two Rikshawalas who actually witnessed the search as found by the Courts below were not respectable inhabitants of the locality would not invalidate the search.

24. In *Shiam Lal Vs. King-Emperor*, , His Lordship in considering the provisions relating to search and seizure contained in the erstwhile Cr.P.C. in the light of the expression "so far as it may be" held that the provision of clause 4 of Section 165 of having two independent witnesses during search is not imperative and therefore the search under the circumstances of that case was held to be perfectly illegal.

25. In *Durand Didier Vs. Chief Secretary, Union Territory of Goa*, , the argument was that two witnesses to the search under the Narcotics Drugs and Psychotropic Substance Act were not respectable inhabitants of the locality and therefore the search is invalid. Their Lordships negating the argument held that as the search was done in the mid night and that the witnesses were not outsiders but resident of the locality, there is no deliberate intention to violate the statutory safeguard provided in carrying out the search. It was practically impossible to take two independent inhabitants of the locality as witness at that point of time. The

search was not held to be bad in the above score:

26. In *State of Maharashtra Vs. P.K. Pathak*, , the matter related to search and seizure of smuggled goods by custom authorities wherein also the provision of Section 100 Cr.P.C. was applicable. The Court held that neither it was practicable nor reasonable to expect any person of the locality to witness the search. Therefore, absence of independent witness from the locality to witness the search is not material.

27. The Supreme Court considered Section 100(4) Cr.P.C. in *Rakesh Kumar alias Sachdeva alias Deva Vs. State (Delhi Admn.)*, . In the said case the accused was apprehended at the bus station in the evening but no person not even any shop keeper come forward to join the search party as witness. In the circumstances, the Supreme Court held that failure to join independent witness of the locality in the search would not be fatal.

28. Similar was the position in *Jaloba v. State of Haryana*, 1989 Supp. (2) SCC 197 . In the said case also accused was apprehended in the early hours of the morning on lonely road where it was impossible to procure any independent witness. The conviction on the evidence of the Police Officers alone was held to be improper though witness as required u/s 100(4) Cr.P.C. were not there.

29. The Supreme Court in *Ajmer Singh Vs. State of Haryana*, , observed that one cannot forget that it may not be possible to find independent witness at all places at all times. The obligation to take public witness is not an absolute rule, if despite effort public witness could not be associated with the raid or arrest of the culprit, the arrest or the recovery made would not be necessarily vitiated.

30. In *Dharampal Singh Vs. State of Punjab*, , another Bench of the Supreme Court observed that when evidence has come on record that an attempt was made to join a person from public at the time of search but no such person was available it will not render the search and seizure unreliable.

31. In view of the aforesaid facts and circumstances, the search team having made an attempt to get independent witnesses but looking to the time of search operation, if two independent witnesses as required were not available, the search cannot be held to be invalid.

32. This apart, the search has been witnessed atleast by one independent witness of the locality itself and by another who happens to be the salesman of respondent No. 6. Thus, the authenticity of carrying out the search operation stand established. It is not the case that no search was conducted. The factum of seizure of the holograms and other material has not been denied which clearly leads to an inference that the petitioner was involved in sale of spurious liquor by using fake holograms. Accordingly, the license of respondent No. 6 was rightly cancelled and the said order was not liable to be set aside by the appellate authority on a mere technicality that there was no second independent witness to the search as contemplated by Section 100(4) Cr.P.C.

33. The argument that the revisional order holding the search to be invalid having become final and therefore there was no occasion to enter into the above controversy is without force. The revisional order dated 26.6.2011 is an order of remand directing the first appellate authority to reconsider the matter in the light of observation made in the revisional order.

34. The observations made in the revisional order were to the effect that there does not appear to be sufficient compliance of Section 100(4) Cr.P.C. and that the compounding aspect as contemplated by Section 74 and 74-A of the Act was left out from consideration. There is no final verdict that the search was invalid for non compliance of provisions of Section 100(4) Cr.P.C. It is misconceived to contend that the revisional order has expressed any final opinion regarding search. There is no finding by the revisional authority that the search was invalid or that it cannot form the basis for passing any order in exercise of power under Rule 21 of the U.P. Excise (Settlement of Licenses for Retail Sale of Country Made Liquor) Rules, 2002.

35. In fact after the remand, the entire matter stood re-opened to be reconsidered in the light of the observations made above. Thus, the appellate authority was fully empowered to go into the merits of the validity of the search and to pass appropriate orders but the appellate authority has taken a too technical approach in setting aside the order of cancellation of license passed by the District Magistrate/licensing authority for the reason that there was no independent second witness to the search completely ignoring that Section 54 of the Act does makes the provisions of Section 100(4) Cr.P.C., absolute in its applicability to the search operation under the Act which have to be applied "as far as may be" depending upon the facts and circumstances and the situation of each case.

36. In view of the aforesaid facts and circumstances, the impugned order dated 19.7.2011 is quashed. The writ petition stands allowed.