(1970) 02 PAT CK 0013

In the Patna High Court

Case No : Criminal Revision No. 1097 of 1969

Traders Syndicate APPELLANT

Vs

State of Bihar RESPONDENT

Date of Decision : 05-02-1970

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 81
Criminal Procedure Code, 1898 (CrPC) — Section 439, 5(2), 50, 51, 523

Citation : AIR 1971 Patna 133 : (1971) CriLJ 770

Hon'ble Judges : P.K. Banerji, J;K.B.N. Singh, J

Bench : Division Bench

Advocate : Shyama Prasad Mukherji and P.B. Gupta, for the Appellant; Kameshwari Nandan Singh, for the Respondent

Final Decision : Dismissed

Judgement

K.B.N. Singh, J.—The petitioner, a company carrying on business of financing hire-purchase of motor vehicles, has filed this revision application against an order dated the 17th April, 1969, of the Sub-divisional Magistrate, Motihari, refusing to release an ambassador car bearing registration No. WBG 3919,

2. According to the petitioner, on the 27th July, 1967, the car in question was let out on hire-purchase agreement to one Sabir Ibrahim Chiniwala, and one Mahesh Jha of village Barhonia, District Monghyr, was the guarantor of the hire-purchase. It is alleged that only four monthly instalments were paid after the hire-purchase agreement and Rupees 9,600/- was not paid to the petitioner by the hirer in spite of demands. The petitioner, while enquiring into the matter, learnt that the car has. been seized by the Police and is lying at Motihari for violation of some Excise law, and filed an application before the Sub-divisional Magistrate for the release of the car on security, which was rejected by the Sub-divisional Magistrate by the impugned order.

3. The car in question was seized on the 16th December, 1968, at Mehsi, containing non-duty paid contraband Nepali Ganja, weighing 161 kilograms, and

one Sajiwan Yadav was arrested by the mobile squad of the Excise Department. A case u/s 47(a) of the Bihar and Orissa Excise Act, 1915, (hereinafter referred to as the Excise Act) was instituted and Sajiwan Yadav was forwarded to the Sub-divisional Magistrate, Motihari, by Shree Krishnadeva Singh, Sub-Inspector of Excise. Subsequently, some more persons were arrested and forwarded to the Sub-divisional Magistrate. Thereafter the petitioner filed an application for release of the car, which was rejected by the impugned order of the Sub-divisional Magistrate, against which the present revision application has been filed.

4. This revision application was placed for hearing before a learned Single Judge, who referred it to a Division Bench by his order dated the 28tb July, 1969. That is how the application is before us. The learned Single Judge in his order has observed, that while deciding the case of The State Vs. Ramyas Thakur, , taking the view that u/s 523 of the Code of Criminal Procedure (hereinafter referred to as the Code), in a case under investigation by the Excise Officers, a Magistrate has no power to order for release of the seized articles, the provisions of Section 81 of the Excise Act have not been taken into account.

5. Mr. Shyama Prasad Mukherjee, learned Counsel for the petitioner, has urged that a Magistrate has power to order for the release of the seized articles, in the instant case the car, u/s 523 of the Code, and the case in The State Vs. Ramyas Thakur, has not been correctly decided. In the alternative he has submitted that u/s 81 of the Excise Act, the Magistrate has power to order for the release of the seized car pending investigation by the Excise Officers. Learned Counsel for the State, on the other hand, urged, relying on the decision of this Court, in The State Vs. Ramyas Thakur, , that during the course of investigation, a Magistrate has no power to release the seized car. These rival contentions fall for consideration in this case.

6. It will be useful to refer to Subsection (1) of Section 523 of the Code, which is relevant for our consideration:--

"(1) The seizure by any police officer of property taken u/s 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained; respecting the custody and production of such property."

Sub-section (2) of Section 523 of the Code deals with the procedure to be followed by a Magistrate when the owner of the seized property is unknown, and is not relevant for our consideration.

7. Reading the aforesaid provisions, it appears that a Magistrate can pass orders for the disposal of the properties taken into; custody by a police officer while making arrest u/s 51 of the Code, and, thereafter the section recites the words

used in Section 550 of the Code regarding seizure of the properties by a police officer, that is to say, the order u/s 523 of the Code can be passed in respect of properties seized by a police officer u/s 51 and Section 550 of the Code. The seizure of the car in question, carrying contraband Nepali Ganja, not being seizure u/s 51 or u/s 550 of the Code, order for release of the car in question, in course of investigation of the offence by the excise officers, could not be passed by the Magistrate, unless the seizure itself was under orders of the Magistrate. Section 5(2) of the Code also does not make the provisions of Section 523 of the Code applicable. This sub-section reads thus:

"(2) All offences under any other law shall be investigated, 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 investigating, inquiring into, trying or otherwise dealing with such oSences."

The words "investigated", "inquired into" and "tried" will obviously not cover an order made u/s 523 of the Code. Such an order will also not come under the expression "otherwise dealt with", as this expression has a reference to offences and an order of disposal of the properties u/s 523 is not an order dealing with any offence. No provision of the Excise Act has been referred to us under which the provisions of Section 523 of the Code have been made applicable pending investigation. It is thus manifest that Section 523 of the Code does not authorise a Magistrate to pass orders for the release of seized articles, while the case is under investigation by an Excise Officer. The position, however, would be different, if the seizure itself has been made under the orders of the Magistrate which is not the position in the instant case. The question then arises, whether a Magistrate has such a power u/s 81 of the Excise Act. Before considering this question, it will be useful to examine, in this connection, relevant provisions of the Excise Act.

8. Section 2 (8) of the Excise Act defines "Excise Officer" to mean "the Collector or any officer or other person appointed or invested with powers" to investigate offences under the various sections of this Act. Section 7(1) lays down that the administration of the Excise Department and the collection of the excise revenue within a district shall ordinarily be under the charge of the Collector. Sub-section (2) deals with the powers of the State Government to appoint certain classes of officers. It is under this provision that a Commissioner of Excise is appointed, as also a Superintendent of Excise, Inspector of Excise and Sub-Inspector of Excise and the Superintendent of Excise, is invested with certain powers of the Collector, to whom he is a Subordinate. Chapter VIII of the Excise Act deals with offences and penalties under the Act and consists of Sections 47 to 68. The offence in the instant case is one u/s 47 (a), which deals with panalties for unlawful import, export, transport manufacture, possession, sale, etc., and the relevant portion of which runs thus:

"If any person, in contravention of this Act, or of any rule, notification or order made, issued or given, or license, permit or pass granted, under this Act--

(a) imports, exports, transports, manufactures, possesses or sells any intoxicant; or

X X X X he shall be liable to imprisonment for a term which may extend to one year or to fine which may extend to two thousand rupees, or to both."

Section 66 provides for confiscation of the incriminating articles, and also lays down that "the animals, carts, vessels, rafts or other conveyances used in carrying the same, shall likewise "be liable to confiscation", if the owner thereof is proved to have been implicated in the commission of the offence. Section 67 authorises the Magistrate, while trying a case, to order for confiscation or to accept fine in lieu of confiscation. Power of confiscation has also been given to the Collector under the circumstances mentioned therein. Section 68 provides that the Collector or any excise officer specially empowered by the State Government in this behalf, not below the rank of a Deputy Collector or Superintendent of Excise, may compound the offence in certain circumstances on payment of a fine of a, sum of money, not exceeding five hundred rupees, in lieu of cancellation or suspension of any licence, permit or pass issued under this Act. It also provides that such officer may release the property seized and liable to confiscation on payment of any sum not exceeding the value thereof. Such power can be exercised by the aforesaid officers before an order of confiscation has been passed u/s 67 (1) by a Magistrate at the trial. The effect of such compounding will be the discharge of the accused, release of the seized property and the termination of the exceeding against such person or property.

9. Chapter IX of the Excise Act deals with detention, investigation and trial of offences and procedure, and consists of Sections 69 to 88. Section 69 provides that the Excise Commissioner, Collector, or any Excise Officer, not below such rank as the State Government may prescribe, may, subject to any restrictions prescribed by the State Government by rule made u/s 89, enter and inspect any place of manufacture, storage or sale of any intoxicant, etc. Section 70 authorises any officer of the Excise, Police, Salt, Customs or Land Revenue Department, or, any person empowered by the State Government in this behalf by notification, subject to any restrictions prescribed by the State Government by rules made u/s 89, to arrest, without warrant, any person found committing an offence punishable u/s 47, 49, 55 or 56 of the Act, and to seize and detain any article which he has reason to believe to be liable to confiscation under this Act or any other law for the time being in force and to detain and search any person upon whom, and any vessel, raft, vehicle, animal, etc. upon which he may have reasonable cause to suspect any such article to be. Sections 71 and 72 provide for the Collector or any Magistrate empowered to try offences punishable under this Act, to issue warrant for arrest of any person whom he, has reason to believe to have committed or abetted any offence punishable u/s 47, 49, 55 or 56, and to issue warrant to search for any intoxicant, material, etc. in respect of which the alleged offence has been or is likely to be committed.

Section 73 empowers the Collector or Sub-divisional Magistrate or Magistrate of the first class to arrest or direct the arrest in his presence of any person, and to search or direct a search to be made in his presence of any place, in respect whereof he be competent to issue warrant for arrest or search warrant. Section 74 empowers an Excise Officer, not below such rank as the State Government may by a notification prescribe, to arrest certain offenders, when such officer has reason to believe that an offence had been committed or was being committed and when the obtaining of a search warrant might afford the offender an opportunity to escape or conceal evidence of the offence. Section 77 speaks of the classes of such officers who may investigate such offences. It lays down that (i) a Collector, without the order of a Magistrate, can investigate any offence punishable under this Act, and (ii) any Excise Officer, specially empowered by the State Government in respect of all or any specified class of offences punishable under this Act, can, without the order of a Magistrate, investigate any such offence which a Court having jurisdiction over the local area to which such officer is appointed, would have power to inquire into or try under the provisions of Chapter XV of the Code.

The State Government has specially empowered Inspectors and Sub-Inspectors of Excise to investigate offences punishable under this Act. Section 80 provides that articles seized and persons arrested under the Warrant of the Collector shall be produced before the Collector and that articles seized and persons arrested under the Act by persons or officers not having authority to release arrested persons on bail on their own bond, shall be produced before or forwarded to the Collector or an Excise Officer empowered u/s 77 (2) to investigate the offence, or, to the nearest Excise Officer who has authority to release arrested persons on bail or on their own bond, or the officer-in-charge of the nearest police station, whoever be nearer.

10. Section 81 speaks of custody by police of articles seized and it runs thus:--

"(1) All Officers-in-charge of police stations shall take charge of and keep in safe custody, pending the orders of a Magistrate, or of the Collector, or of an Excise Officer empowered u/s 77, Sub-section (2), to investigate the case, all articles seized under this Act which may be delivered to them and shall allow any Excise Officer who may accompany such articles to the police Station or who may be deputed for the purpose by an official superior, to affix his seal to such articles and to take samples of and from them.

(2) All samples so taken shall be sealed with the seal of the officer-in-charge of the police station."

11. Section 82 refers to reports of arrests, seizures and searches by any Excise Officer below the rank of a Collector or any officer-in-charge of a police station. Section 83 speaks of execution of Collector''s warrants. Section 84 lays down that any person arrested under this Act shall be informed, as soon as may be, of the grounds for such arrest and shall be produced before the nearest Magistrate within a period of twenty-four hours, and no such person shall be detained in

custody beyond such period without the authority of the Magistrate. Section 85 lays down that save as otherwise provided under this Act, "the provisions of the Code of Criminal Procedure, 1898, relating to arrests, detentions in custody, searches, summons, warrants of arrest, search warrants and the production of persons arrested, shall apply so far as may be, to arrests, detentions and searches made, summonses and warrants issued, and the production of persons arrested under this Act" and that the Collector, for these provisions, shall be deemed to be a Court. Section 86 lays down that a Magistrate, whose powers are not less than those of a Magistrate of the second class, and a Magistrate of the third class, specially empowered by the District Magistrate in this behalf, may try any offence punishable under this Act.

Section 86-A makes special provision regarding imposition of a fine exceeding Rs. 1,000/- by specially empowered Magistrate of 1st Class. Section 87 deals with initiation of certain prosecution and lays down that no Magistrate shall take cognizance of an offence referred to in Section 47, 49, 55 or 56, except on his own knowledge or suspicion, or on the complaint or report of an Excise Officer or an officer empowered in this behalf by the State Government, and in case of offences u/s 47, 61 Clauses (d) or (e), or Section 62 except on the complaint or report of the Collector or an Excise Officer authorised by the Collector in this behalf. These are all the relevant provisions tinder this Chapter.

12. On a reference to the aforesaid provisions of the Excise Act, it is apparent that a complete procedure has been prescribed for investigation of offences under this Act. It gives power to the Collector and Excise Officers specially empowered to search and seize and arrest even without warrant for arrest issued by a competent Magistrate. It also empowers a Subdivisional Magistrate or a Magistrate of the first class, to search, seize and arrest. As regards the custody of the property, reading Section 80 it is apparent that if articles are seized under warrant of a Collector, they shall be produced before the Collector, and the ancles seized under Sections 69, 70 or 72, shall be produced before the Collector or Excise Officer empowered wider Section 77 (2) or the nearest Excise Officer or to the Officer in charge of the nearest police-station, whoever is nearer. Sub-section (4) lays down that when any article seized cannot conveniently be conveyed before an, officer referred to in Sub-section (1) or Sub-section (2), as the case may be, the person making the seizure shall dispose of them in some place of safety and forthwith report the seizure to such an officer. Section 81 enjoins on the officer in charge of a police Station to take charge and keep in safe custody of seized articles under this Act, which may be delivered to them by the Excise Officer, pending orders of a Magistrate or Collector or an Excise Officer empowered u/s 77 (2) to investigate the case. Thus", in course of investigation, if properties have been kept in charge of a Police Officer, he has to Keep the same in custody pending orders of a Magistrate, Collector or an Excise Officer, as aforesaid.

13. Beading Section 81 of the Excise Act, it is apparent that a Magistrate has

power to order for release, while seized articles are in the police custody, in the same way as the Collector or an Excise Officer specially empowered, is authorised. It cannot be disputed that the expression "pending orders of a Magistrate" occurring in Section 81, in substance, empowers the Magistrate to pass orders for release in, appropriate cases. The question is, when this power can be exercised by the Magistrate, whether during the course of investigation, or, trial after cognizance. There being already a provision u/s 516A of the Code authorising a Magistrate to pass orders for release of properties in course of trial, it was not necessary to recite about such powers in Section 81 of the Excise Act, as the provisions of the Code apply to trial of offences under the Excise Act. The power of investigation under the various provisions of the Excise Act, discussed above, given to an Excise Officer is more or less akin to those powers of the police officers making investigation of cognizable offences under the Code, and, it appears to me that, as Section 523 of the Code is not applicable to seizure made by an Excise Officer while investigating an offence under the Excise Act, Section 81 of the Act intends to give similar powers to the Magistrates in those cases, where the articles seized by the Excise Officers have been kept in the police custody. The view I have taken is in consonance with the provisions of the Act, where-under the Magistrate''s powers to order for arrest or issue search warrant u/s 71 or 72 and the power of the Sub-divisional Magistrate and the Magistrate of the First Class u/s 73 to arrest or search have been provided for. Some of those powers may well be exercised during the course of the investigation of the case by the Excise Officer. The goods seized and kept in police custody in course of investigation under the Act may very well be those seized under Magistrate''s orders. It will be idle to contend that although he has powers for ordering seizure, he has no power for ordering for release, while the goods are in police custody in spite of the provisions of Section 81 of the Act. The wordings of Section 81 do not put any limitation on the powers of the Magistrate to order for release of the goods kept in Police Custody during the course of investigation, nor there is anything in Section 81 from which an inference can be drawn that it relates to the stage of trial. For all these reasons, I have no doubt in my mind that a Sub-divisional Magistrate is competent to order for release of seized goods even in course of investigation by an Excise Officer in appropriate cases, if kept in police custody, under the provisions of Section 81 of the Act.

14. At the conclusion of the hearing, learned Counsel for the petitioners urged that charge-sheet has been submitted by the Police and cognizance has been taken. He produced a copy of the charge-sheet and urged that there is no charge-sheet against the financer and there is no possibility of the car being confiscated. At the request of the Counsel for the parties, we called for further records from the court below and on a perusal of the same it appears that on the 21 st August, 1969, cognizance of the offence u/s 47 (a) of the Excise Act has been taken by the learned Sub-divisional Magistrate against certain persons. Therefore, the question for release of the car may now be considered by the learned Magistrate u/s 516A of the Code, if an application to that effect is filed

before him in the light of the further materials brought on the record and in accordance with law. I do not think it advisable to go into these facts for the first time in the exercise of the revisional jurisdiction of this Court, so as to set aside the order of the learned Magistrate and order for the release of the car, in view of the aforesaid facts.

15. In the result, subject to the above observation, the revision application is dismissed.

P.K. Banerji, J.

16. I agree.

