

**CALCUTTA HIGH COURT CIRCUIT BENCH
AT JALPAIGURI**

**07.2.2023
Sh-6
Court No.3**

C. R.R. 199 OF 2022

**In the matter of: Roshan Chowdhury @ Roshan Chudhary
. Vs.
The State of West Bengal**

Ms. Ashima Mandla,
Ms. M. Singh,
Ms Anwasha Halder,
Mr. Deborshi Dhar.

For the Petitioner.

Mr. A.S. Chakraborty,
Mr. Sourav Ganguly,
Mr. Aniruddha Biswas,
Mr. Kallol Nag

For the State.

Petitioner, in this revision has challenged the very initiation and continuance of the proceedings against him vide NDPS Case No. 17 of 2021, now pending in the court of Sessions Judge Special Court under the Narcotic Drugs and Psychotropic Substance Act, 1985 at Jalpaiguri (henceforth Spl. Court). The said case has been initiated against the petitioner under section 23(c) of the Narcotic Drugs and Psychotropic Substance Act, 1985 (henceforth the NDPS Act), pursuant to the FIR lodged on April 29, 2021.

At the very outset the relevant provision of law may be extracted, which is as follows :

23. Punishment for illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances.—Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence or permit granted or certificate or authorisation issued thereunder, imports into India or exports from India or tranships any narcotic drug or psychotropic substance shall be punishable,—

c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

The petitioner who is owner of a travel agency, was arrested on April 29, 2021, on the allegation for committing an offence under the afore mentioned provision of law. His principal ground of challenge is that the prosecution initiated against him suffers from inherent and palpable illegality which cannot be maintained and

proceeded with. On his behalf the FIR has firstly been relied on to show that there is no accusation made of import, export or transshipment of any narcotic drugs or psychotropic substances by him. Such being the facts, initiation of a prosecution against him under section 23(c) of the NDPS Act, would only be inappropriate and illegal, more so when there is no recovery of any contraband article from the petitioner's possession. It is urged that the same may be set aside.

The other major and relevant point of challenge by the petitioner is the glaring discrepancy as regards the nature and category of the contraband in this case. It is pointed out that though the contraband has been mentioned to be "heroin" in the FIR, the chargesheet has mentioned the same to be "morphin, codeine and thebaine (covered under the NDPS Act) and papaverine (covered under the NDPS Act)", on the basis of the chemical examination report of the contraband alleged to have been seized in this case. It is emphasised that the very foundation of the case is shaken and the entire prosecution should go for the said reasons.

Judgments of the Hon'ble Supreme Court have been relied on, which are as follows :

(I) Union of India. Vs Sheo Shambhu Giri reported in (2014) 12 SCC 692;

(II)

- (III) Umar Abdul Sakoor Sorathia vs Intelligence Officer, Narcotic Control Bureau. reported in (2000) 1 SCC 138;
- (IV) (1994) SCC Online Pat 258
- (V) Ashok Chaturvedi and Others vs Shimul H. Chanchani and Another reported in (1998) 7 SCC 698; And
- (VI) An unreported judgment dated November 4, 1997, in M/S Pepsi Foods Limited and Another vs Special Judicial Magistrate and Others.

The State has defended its action of initiation of prosecution on the ground that the same should not be vitiated on the ground of imputation being made under the alleged wrong provision of law in so far as it is the power and prerogative of the Trial Court to assess the applicable provision of law under which the trial would be conducted, at the time of framing of charge under section 228 of the Code of Criminal Procedure 1973. Ld. Counsel for the State, particularly on the basis of the available materials has submitted that when in this case there is seizure of contraband article and also arrest been made, it would not be proper for the Court to interfere with the prosecution.

Ld. Counsel for the State has further submitted that the word "or" used in section 23 of the NDPS act is a disjunctive word and

therefore implying illegal import, export or transshipment of the contraband article, individually and in exclusion of each other to be punishable under the said provision of the statute. Upon such interpretation of the statute, he emphasises that the allegations against the present petitioner have very well made out a cognizable case against him.

Now, before dwelling upon the second point urged by the petitioner, let the initial point of challenge be first dealt with as it touches the very maintainability of the prosecution itself. For this , relevant portion of the judgment of ***Sheo Shambhu Giri (supra)*** may be extracted herein bellow.

“6 . On the other hand, the learned counsel for the respondent submitted that Section 23 of the NDPS Act creates three offences and they are : (i) import into India, (ii) export out of India; and (iii) transshipment of any narcotic drug or psychotropic substance. If any one of the three activities is undertaken in contravention of any one of the provisions of the Act or the Rules made thereunder or in contravention of an order made or condition of licence or permit granted or certificate or authorisation issued either under the Act or the Rules. The expression “transships” occurring under Section 23 must necessarily be understood in the context of the scheme of the section and the preceding

expressions "imports into India" and "exports from India" to mean only transshipment for the purpose of either import into India or export out of India. The learned counsel further submitted that the High Court rightly concluded in the absence of any proof that the respondent was carrying contraband either in the course of import into India or export out of India, Section 23 is not attracted.

7. We agree with the submission made by the respondent on the construction of Section 23 of the NDPS Act, the expression "transships" occurring therein must necessarily be understood as suggested by the learned counsel for the respondent. There is yet another reason apart from the construction of the language of Section 23 which compels us to accept the submission made by the learned counsel for the respondent.

9. It can be seen from the language of Section 9 that the Central Government is authorised to make rules which may permit and regulate various activities such as cultivation, gathering, production, possession, sale, transport, inter-State import or export of various substances like coca leaves,

poppy straw, opium poppy and opium derivatives, etc. while Parliament used the expression "transport" in the context of inter-State import or export of such material in sub-section (1)(a)(vi), in the context of importing into India and export out of India, Parliament employed the expression transshipment in Section 9(1)(a)(vii). Therefore, the High Court rightly concluded that the conviction of the respondent under Section 23 of the NDPS Act cannot be sustained. We see no reason to interfere with the same."

After perusal of the above, one should have no doubt about the settled provision of law with regard to the reading and interpretation of section 23 of the NDPS Act, 1985. The arguments advanced on behalf of the State on this point is refuted only to find the expression "transships" occurring under Section 23 must necessarily be understood in the context of the scheme of the section and the preceding expressions "imports into India" and "exports from India" to mean only transshipment for the purpose of either import into India or export out of India. In case the circumstances of a particular case does not fall within the four corners of the interpretation of section 23 of the NDPS Act as above, section 23 would not be attracted therein.

It is the best time to examine the facts and circumstances of this particular case so far as this aspect is concerned.

The FIR indeed does not disclose allegation of any import or export or transshipment of the contraband. According to the FIR, circumstances of this case is different altogether, to which section 23 of the NDPS Act should have no manner of application. Considering the ingredients of the said provision of law it is only unconceivable regarding application of the same, in the circumstances of this case as explicit from the FIR. Hence this Court is constrained to hold that the prosecution initiated against the petitioner is not only illegal but perverse and liable to be vitiated. However, objection of the State must be dealt with before finally deciding on the issue. According to it, section misquoted should not vitiate the trial, as the Court would be exercising its power to decide on the materials available, as to under which section of law the trial should proceed, that is, at the stage of framing of charge. On this aspect the petitioner is protected by the ratio of the judgment of the Hon'ble Supreme Court in ***Ashok Chaturvedi's case (supra)***. The Hon'ble Court held that an accused is not debarred from approaching the Court at the earliest, just for the reason that he would have a right to plead at the time of framing of charges about insufficiency of material for such framing of charges. It has been

held that the accused has a right to espouse at the threshold, his grievance as to the invalidity of the allegations leveled against him.

To the arguments of the State that wide power is vested on the court, to consider the materials on record while framing charge in a case, upon which the trial would proceed, and determine appropriate provision of law under which charges would be framed in a trial, it can be stated that the same does not, however, in any way bestow liberty upon the authorities to initiate prosecution, in whatever manner it finds convenient. This would definitely lead to anarchy and arbitrariness and render the statutes and legislations of a State as nugatory. This must not be the justification of the prosecuting agency to book a person under a particular section of law unless there are materials to satisfy the ingredients of the said provision of law against that particular person. In a case under the NDPS act, the responsibility of the prosecuting agency is much more serious, considering the stringent nature of the statute itself. One must not forget that in disgression of the principle under the criminal law of presumption of innocence of the accused person, this particular statute, that is the NDPS act holds the presumption of guilt of the accused person at the threshold which the accused person himself has to rebut, in order to mitigate the presumption. Casually entangling a person under this specific statute may result into serious infringement of his valuable personal rights of life and

liberty, enshrined under the Constitution of the country. Besides that such a reckless start of prosecution against any person shall definitely mislead the investigation, jeopardising fair trial in a case.

At this stage the court may revert back to the judgment of the Supreme Court of **Bhajanlal's** case [**reported in 1992 Supp.(1) SCC 335**] and according to the guidelines framed there in, find in this case that the FIR has not made out a case against the petitioner under the aforementioned provision of the statute. Accordingly, proceeding further against the petitioner in this case would amount to gross abuse of the process of court and the law as well. The present case is therefore found to be an appropriate one for interference of this Court by exercising power under section 482 CrPC.

The second point urged by the petitioner is therefore found not necessary to be gone into for the purpose of making decision in this case, though it would not be out of place to take judicial notice of the glaring discrepancy occurred as regards the category, type and nature of the seized contraband in the FIR and the chargesheet. The very basis of prosecuting against the petitioner is shaken in this case, to the disadvantage of prosecution.

On the premises as above, the revision succeeds. NDPS Case No. 17 of 2021, now pending in the court of Sessions Judge Special Court under the Narcotic Drugs and Psychotropic Substance Act,

1985 at Jalpaiguri , is quashed and set aside. The petitioner be released immediately from incarceration, if is now detained and also from the bail bond.

CRR 199 of 2022 is allowed along with pending application, if any. Certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

(Rai Chattopadhyay, J.)