M.Cr.C.No.4639/2017

(Girish Bhatnagar v. State of M.P.)

28/04/2017

Shri Rajiv Sharma, counsel for the applicant.

Ku. Sudha Shrivastava, Panel Lawyer for the respondent/State.

Heard finally.

This petition under Section 482 of CrPC has been filed for quashing the FIR in Crime No.164/2016 registered by Police Station Dimni, District Morena under Section 34 of M.P. Excise Act as well as the charge sheet and cognizance taken by the Magistrate.

The brief facts of the case are that on 31.07.2016, an information was received that in village Navali, Bhairo Singh Tomar is selling illegal country made liquor. On the information of the informant, when the police team reached at the spot, one person was found sitting on the platform. On interrogation, he disclosed his name as Bhairo Singh Son of Kaptan Singh Tomar, resident of Navali. On search of the cartoon, 22 quarters of illegal country made liquor were found. On asking about the licence, no licence could be produced. The accused was arrested and FIR was registered against him.

It is submitted by the counsel for the applicant that the Court could not have taken cognizance in view of Section 61 of Excise Act and also there is no admissible evidence against the applicant.

Per contra, it is submitted by the counsel for the State that charge sheet has been filed, therefore, the defence of the applicant may not be considered. It is

further submitted that arrest warrants have been issued by the Court and the applicant is absconding, therefore, this petition under Section 482 of CrPC is not maintainable.

In reply, it is submitted by the counsel for the applicant that when the court could not have taken cognizance of the matter, then all the proceedings taken by the Magistrate are nullity and without jurisdiction, therefore, the petition is maintainable.

Heard the learned counsel for the parties.

The charge-sheet has been filed against the applicant on the basis of statement made by the co-accused under Section 27 of the Evidence Act. The case has been registered on the complaint of a Police Constable.

It is contended by the counsel for the applicant that in view of the newly incorporated Section 61 of the Excise Act, the Court can take cognizance only on the complaint or report of the Collector or an Excise Officer not below the rank of District Excise Officer as may be authorized by the Collector in this behalf. However, the Court has taken cognizance of the offence on the basis of charge sheet which is bad in the light of Section 61 of Excise Act.

Newly amended Section 61 of the Act reads as under:-

> "61. Limitation of prosecution.-(1) No court shall take cognizance of an offence punishable- (a) under [Section 34 for the contravention of any condition of a licence, permit or pass granted under this Act, Section 37],

> section 38, section 38- A, section 39, except on a complaint or report of the Collector or an Excise Officer not below the rank of District Excise Officer as may be authorised by the Collector in this behalf; (b) under any other section of this Act other than section 49 except on the complaint or report of an Excise Officer or Police Officer.
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> (2) Except with the special sanction of the State Government no Judicial Magistrate shall take cognizance of any offence punishable under this Act, or any rule or order thereunder, unless the prosecution is instituted within six months from the date on which the offence is alleged to have been committed."

Complaint has been defined under Section 2 (d) of Cr.P.C. which reads as under:-

> "2(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

It is clear that if a person is found to be flouting the conditions of licence and if he is required to be prosecuted then the complaint has to be filed by the Collector or an Officer authorised by the Collector as contemplated under Section 61 of the Act. The coordinate Bench of this Court by **order dated 23.11.2016** passed in the case of **Gajendra Singh Bhadoria v. State of M.P. (M.Cr.C.No.11870/ 2016)** has held as under:-

> "Meaning thereby, if a person is found to be flouting the licence conditions and is required to be prosecuted then the private complaint has to be filed by the Collector

or an Officer authorised by the Collector as contemplated in Section 61 of the Act then only prosecution can be maintainable against any person who is having a licence. In some special circumstances, power to file a private complaint has been given to a competent authority/designated officer and therefore, complaint in any manner should have been filed by the Collector or his Authorised Officer as per Section 61 of the Act. Report regarding contravention of any of the conditions of licence could have been made by the Collector or an Excise Officer while registering an offence by competent Police Station or Police Station (Excise). Therefore, the police may exercise the power to register the FIR provided the said report is made by either Collector or any other Officer authorised in this behalf by the Collector. Here in the present case, report is admittedly not by either Collector or other Officer authorised by him, therefore, the prosecution against the present applicant is against Section 61 of the Act.

In the instant case,the prosecution in respect of offence under Section 34 of the Act has been initiated at the instance of police and therefore,learned Magistrate could not have taken cognizance of the offence in view of the provisions embodied in Section 61 (1) (a) of the Act. The power of authorisation by the Collector is not absolute, it is circumscribed. It is not open to him to authorise any officer. The said view is further supported by the view expressed earlier by this Court in the matter of Shankarlal and Ors. Vs. State of M.P., 1990 JLJ 782 and Vijay Kumar & Rajendra Kumar & Co. Vs. State of M.P., 1987 (II) MPWN 54 as well as Gomti Prasad & Ors. Vs. State of M.P., 1976 MPWN 232.

With the amendment Act of 2014, M.P.Excise (Amended Act), 2014 has

> included Section 34 into the ambit of Section 61 of the Act. Thus, intention of legislature is clear wherein the offence coming under Section 34 of the Act also are to be treated and prosecuted in a manner as provided under Section 61 of the Act. In the light of Section 4 and 5 of the Cr.P.C., potency and effect of Section 61 becomes more vigorous because it is settled in law that Special Law prevails over General Law. Here the previsions of M.P. Excise Act,1915 would prevail over the provisions of Cr.P.C."

Thus, it is clear that since the complaint has not been filed either by the Collector or by his authorised officer and the FIR was not lodged on the report of the Collector or any officer authorised by him in this behalf, therefore, the Court below could not have taken cognizance of the case.

Learned counsel for the applicant submits that a false FIR has been registered against the applicant. No investigation has been made against the applicant. The applicant is having a valid license issued by the Collector, District Morena to sell the country made liquor and the license is valid from 01.04.2016 to 31.03.2017. The applicant has been implicated on the information of co-accused. The applicant is a valid licensee, hence, no offence has been committed by the applicant as he has not breached any condition of license granted to him. Therefore, the prosecution of the applicant is bad and without any admissible evidence. Hence, prayed that the FIR registered against the applicant, the charge-sheet and consequent proceedings may be quashed. The learned

counsel also relied upon order dated 19.10.2016 passed by coordinate Bench of this Court passed in the case of **Gajendra Singh Bhadoria v. State of M.P. (M.Cr.C.No.11870/ 2016)** and **order dated 23.11.2016** passed in the case of **Gajendra Singh Bhadoria v. State of M.P. (M.Cr.C.No.11873/2016)**, and submitted that on similar allegations the FIR has been quashed.

Learned Public Prosecutor fairly conceded that except the statement of the co-accused recorded under Section 27 of Evidence Act, there is no other admissible evidence available against the applicant.

I have considered the submissions of the learned counsel and on perusal of FIR, it appears that accused Bhairo Singh has been apprehended by the police having found in possession of country made liquor and was not having any license. He had disclosed that liquor has been purchased from the shop of the applicant.

On behalf of the applicant, copy of the license has been produced which reveals that license has been granted by the Collector District Morena in favour of the applicant for retail sale of country made liquor from 01.04.2016 to 31.03.2017. The applicant is having a valid license, therefore, he has a right to sell the liquor. Even if it is assumed that co-accused has purchased the liquor seized from his possession, *prima facie*, it cannot be said that the applicant has committed any offence under Sections 34 & 42 of M.P. Excise Act as there is no breach of any condition of

the license granted in favour of the applicant. In such circumstances, the prosecution of the applicant certainly amount to a breach of process of law. Hence, it is fit case to exercise the inherent powers of this Court.

The next question for determination is with regard to the maintainability of the present application under Section 482 of CrPC.

From the order-sheets filed by the applicant along with the application, it is clear that the Trial Court after taking cognizance of the matter has declared the applicant as absconder and perpetual arrest warrant has been issued.

This Court, in the case of **Rajendra Singh and another Vs. State of M.P. and another** (M.Cr.C. No. 5778/2013) by judgment dated 17/1/2017 has held that where a person is absconding, then petition under Section 482 of CrPC for quashing the proceedings is not maintainable. However, if the facts and circumstances of the present case are considered, then it would be clear that in view of Section 61 of M.P. Excise Act, the Court cannot take cognizance of an offence except on the complaint whereas in the present case, the cognizance has been taken by the Magistrate on the basis of the charge-sheet filed by the police. Thus, it is clear that the Magistrate has wrongly taken cognizance of the charge-sheet which has been filed by the police. Where the Court has wrongly taken cognizance of the matter then all the subsequent proceedings would be without jurisdiction

and would be nullity. Under these circumstances, where the proceedings pending before the Court below are void ab initio then asking a person to surrender before the Court and then to move an application under Section 482 of CrPC for quashment of the proceedings would be nothing but a too technical and futile attempt.

The Supreme Court in the case of **State of Karnataka through CBI v. C. Nagarajaswamy** reported in **(2005) 8 SCC 370** has held as under:-

> "20. In Yusofalli Mulla Noorbhoy Vs. R. [AIR 1949 PC 264], it was held:
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> > "[16.] … A court cannot be competent to hear and determine a prosecution the institution of which is prohibited by law, and Section 14 prohibits the institution of a prosecution in the absence of a proper sanction. The learned Magistrate was no doubt competent to decide whether he had jurisdiction to entertain the prosecution and for that purpose to determine whether a valid sanction had been given, but as soon as he decided that no valid sanction had been given the Court became incompetent to proceed with the matter. Their Lordships agree with the view expressed by the Federal Court in Agarwalla case, AIR 1945 FC 16, that a prosecution launched without a valid sanction is a nullity."
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> 21. The matter came up before this Court in Budha Mal Vs. State of Delhi, Criminal Appeal No. 17 of 1952 disposed of on 3rd October, 1952, wherein a trial of the appellant therein for alleged commission of an offence under Section 161 of the Penal Code resulted in conviction but an appeal therefrom was accepted on the ground that

no sanction for the prosecution of the appellant was accorded therefor. The police prosecuted the appellant again after obtaining fresh sanction whereupon a plea of bar thereto in terms of Section 403 of the Code was raised. Mahajan, J. speaking for a Division Bench opined:

> "We are satisfied that the learned Sessions Judge was right in the view he took. Section 403 CrPC applies to cases where the acquittal order has been made by a court of competent jurisdiction but it does not bar a retrial of the accused in cases where such an order has been made by a court which had no jurisdiction to take cognizance of the case. It is quite apparent on this record that in the absence of a valid sanction the trial of the appellant in the first instance was by a Magistrate who had no jurisdiction to try him."

22. The aforementioned cases were noticed by a Constitution Bench of this Court in Baij Nath Prasad Tripathi, 1957 SCR 650, wherein a similar plea was repelled stating: (SCR p. 654)

> "The Privy Council decision is directly in point, and it was there held that the whole basis of Section 403(1) was that the first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal; if the court was not so competent, as for example where the required sanction for the prosecution was not obtained, it was irrelevant that it was competent to try other cases of the same class or indeed the case against the particular accused in different circumstances, for example if a sanction had been obtained."

23. In Mohammad Safi, (2005) 8 SCC 130, this Court held: (SCR p. 471 E-H)

> "[6.] It is true that Mr Ganguly could properly take cognizance of the offence and, therefore, the proceedings before him were in fact not vitiated by reason of lack of jurisdiction. But we cannot close our eyes to the fact that Mr Ganguly was himself of the opinion – and indeed he had no option in the matter because he was bound by the decisions of the High Court – that he could not take cognizance of the offence and consequently was incompetent to try the appellant. Where a court comes to such a conclusion, *albeit* erroneously, it is difficult to appreciate how that court can absolve the person arraigned before it completely of the offence alleged against him. Where a person has done something which is made punishable by law he is liable to face a trial and this liability cannot come to an end merely because the court before which he was placed for trial forms an opinion that it has no jurisdiction to try him or that it has no jurisdiction to take cognizance of the offence alleged against him. Where, therefore, a court says, though erroneously, that it was not competent to take cognizance of the offence it has no power to acquit that person of the offence. An order of acquittal made by it is in fact a nullity.

24. Relying upon Yusofalli Mulla Noorbhoy (supra), it was held: (SCR p. 473 A-B)

> "The principle upon which the decision of the Privy Council is based must apply equally to a case like the present in which the court which made the order of acquittal was itself of the opinion that it had no jurisdiction to proceed with the case and therefore the accused was not in jeopardy."

[See also State of Goa vs. Babu Thomas

(2005) 8 SCC 130.]

> 25. In view of the aforementioned authoritative pronouncements, it is not possible to agree with the decision of the High Court that the trial court was bound to record either a judgment of conviction or acquittal, even after holding that the sanction was not valid. We have noticed hereinbefore that even if a judgment of conviction or acquittal was recorded, the same would not make any distinction for the purpose of invoking the provisions of Section 300 of the Code as, even then, it would be held to have been rendered illegally and without jurisdiction."

In the present case, undisputedly, the police had filed the charge-sheet and the prosecution has not filed the complaint before the Trial Court as required under Section 61 of M.P. Excise Act. As the proceedings before the Magistrate are void ab initio, therefore, it would be unnecessary for this Court to refuse to entertain the petition by holding that the applicant must surrender before the Magistrate. The applicant can be said to be absconding as the warrant of arrest has been issued, but when the Magistrate could not have taken cognizance of the offence, then the entire proceedings would be without jurisdiction, therefore, in the considered opinion of this Court, the present petition would be maintainable due to non-compliance of Section 61 of M.P. Excise Act.

Under the facts and circumstances of the case and considering the non-maintainability of the proceedings before the Magistrate, it is held that merely because the applicant has been declared as an absconder would not debar him from prosecuting this

petition under Section 482 of CrPC.

Consequently, this petition is allowed. FIR registered at Crime No.164/2016 under Section 34 of M.P. Excise Act at Police Station-Dimni, District-Morena as well as the order dated 30.12.2016 passed in Criminal Case No.1753/2016 taking cognizance qua the applicant are hereby quashed.

The petition is disposed of accordingly.

(G.S.Ahluwalia)
Judge

(ra)