HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

:SINGLE BENCH:
{JUSTICE ANAND PATHAK, J.}

MISCELLANEOUS CRIMINAL CASE NO.1967/2021

Nikunj Shivhare
Vs.
State of Madhya Pradesh & Ors.

Shri Prashant Sharma, learned counsel for the petitioner.
Shri B.S. Gaur, learned Panel Lawyer for the respondents/State.

Whether approved for reporting : Yes

Law laid down:

1. When any Excise Officer as per Section 2(7) of the M.P. Excise Act, 1915 files the complaint under Section 34(2) or offences mentioned in Section 61 of the Act, then it is sufficient compliance and no injustice has been caused to the accused and therefore, ground of non-compliance of Section 61 of the Act is not available to the accused.

2. Section 537 of Cr.P.C., 1898 was rephrased and reframed as Section 465 of Cr.P.C., 1973 and apparently scope has been enlarged and sufficient discretion and subjective satisfaction has been given to the Court. Therefore, in absence of any failure of justice occasioned to the parties, any error, omission or irregularity in the complaint, summons, warrant, charge,

proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, can not be the usual ground for reversal or alteration of any finding, sentence or order passed by a Court of competent jurisdiction except as provided in Section 465 Cr.P.C.. **H.N. Rishbud and Another Vs. State of Delhi, AIR 1955 SC 196** relied**.**

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ORDER
(Pronounced on 5th day of October, 2021)

1. The present petition is preferred under Section 482 of Code of Criminal Procedure, 1973 for quashment of FIR/charge-sheet preferred against the petitioner for alleged offence under Section 34(2) of M.P. Excise Act 1915 (hereinafter referred to as “the Act”).

2. It is the submission of learned counsel for the petitioner that on 20-02-2020 premises situate in the house of Sankalp Kushwah was raided by the officers of Excise Department wherein Prashant Shivhare was found with 815 cartons of liquor and case under Section 34(2) of the Act was registered. It was the statement of Prashant Shivhare that Nikunj Shivhare (present petitioner) is his owner and is having licence and he is only manager of Nikunj Shivhare. It is further stated that no permit was obtained from the authorities, however, on 24-02-2020 a proved certificate of employee has been seized from the office

of Assistant Excise Officer. After registration of offence, charge-sheet has been filed, therefore, petitioner has preferred this petition taking exception to the charge-sheet and consequential proceedings.

3. It is the submission of learned counsel for the petitioner that present petitioner is FL1 licencee and operates foreign liquor shop at C.P. Colony, Morar, Gwalior. Licence fee has been deposited by the petitioner and delivery challan of the liquor shows that department has seized duty paid liquor. Learned counsel for the petitioner stressed over non-compliance of provisions as contained under Section 61 of the Act to submit that unless the sanction is taken from District Magistrate (Collector) or any other officer authorized by him, no case can be registered or prosecuted against the petitioner and while relying upon the judgment in the case of **Dipak Babaria Vs. State of Gujarat, (2014) 3 SCC 502** submits that non compliance of Section 61 of the Act is fatal. He also relied upon the judgments of **Gajendra Singh Bhadoria Vs. State of M.P., 2017 (1) MPLJ (Cri.) 623**, **Hotam Shivhare Vs. State of Madhya Pradesh passed in M.Cr.C.No.8341/2017 on 17-08-2017** and **order dated 26-02-2019 passed in M.Cr.C.No.52680/2018 (Nand Kishore Sharma Vs. State of Madhya Pradesh) (Indore Bench)**.

4. Learned counsel for the respondents/State opposed the prayer

and submitted that charge-sheet has been filed by the officers of Excise Department, therefore, no plea is available so far as non compliance of Section 61 of the Act is concerned. Petitioner is at liberty to appear in trial and resist the prosecution on merits. He prayed for dismissal of petition.

5. Heard learned counsel for the parties and perused the documents appended thereto.

6. This is a case where prime objection taken by the petitioner is in respect of Section 61 of the Act and submits that non compliance of Section 61 of the Act vitiates the proceedings. Section 61 of the Act is reproduced for ready reference:

> *"**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.*
> *(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."

7. Perusal of the same makes it clear that Collector or an Excise Officer not below the rank of District Excise Officer as may be authorized by the Collector in this behalf has been prescribed. Perusal of charge-sheet indicates that charge-sheet has not been filed by any police officer as per Section 173 of Cr.P.C. but it appears to be a complaint filed by Assistant District Excise Officer, Circle -III and therefore, the submission of petitioner regarding non-compliance of Section 61 of the Act does not gain grounds. When complaint has been filed by the Assistant District Excise Officer then the substantial compliance has been made.

8. Even otherwise, guidance of Hon'ble Apex Court from the case of **H.N. Rishbud and Another Vs. State of Delhi, AIR 1955 SC 196** can be profitably referred to wherein, in following manner guidance has been given:

> "*The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme* of the Code *in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory*

provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in section 190 *of the Cr.P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance.* Section 190 *of the Cr.P.C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings. The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e.* sections 193 *and* 195 *to 199.*

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But section 190 *does not. While no doubt, in one sense, clauses (a), (b) and (c) of* section 190(1) *are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause*

(a) or (b) of section 190(1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation section 537*, Cr.P.C. which is in the following terms is attracted:*

> *"Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, unless such error, omission or irregularity, has in fact occasioned a failure of justice".*

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in Prabhu v. Emperor, AIR 1944 PC 73 (C) *and* Lumbhardar Zutshi v. The King*, AIR 1950 PC 26 (D). These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the*

present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

9. Section 537 of Cr.P.C., 1898 is subsequently rephrased and reframed as Section 465 of Cr.P.C., 1973 in following manner:

"465. Finding or sentence when reversible by reason of error, omission irregularity.

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for

the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

10. It appears that scope has been enlarged in Section 465 of Cr.P.C. and sufficient discretion has been given to the Court.

11. Section 537 of Cr.P.C., 1898 was rephrased and reframed as Section 465 of Cr.P.C., 1973 and apparently scope has been enlarged and sufficient discretion and subjective satisfaction has been given to the Court. Therefore, in absence of any failure of justice occasioned to the parties, any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, can not be the usual ground for reversal or alteration of any finding, sentence or order passed by a Court of competent jurisdiction except as provided in Section 465 Cr.P.C..

12. When substantial compliance has been made by way of filing complaint by Assistant District Excise Officer who happens to be an "Excise Officer" as per Section 2(7) of the Act and *prima facie* no injustice has been caused to the petitioner/accused, then in that condition, the ground of non-compliance of Section 61 of the Act is not available to the petitioner and hence rejected.

13. So far as the challenge to the charge-sheet on merits is concerned, perusal of complaint indicates that statement of witnesses purportedly under Section 161 of Cr.P.C. indicates that it was petitioner who stocked the liquor without permit and without any legal sanction. Different statements of witnesses have already been placed on record. To what extent the licence of FL1 was given to the petitioner has been breached as per permit dated 31-03-2019 is yet to be ascertained and same is subject matter of evidence and trial. Licence conditions are prescribed in the licence itself and best forum would be the trial Court where petitioner can plead and prove his part of innocence, if any exists and that cannot be decided on the anvil of statements made by the petitioner before this Court.

14. The judgments relied upon by the petitioner move in different factual realm. Here, the complaint has been filed specifically by the officer of Excise Department and all other related factors can be ascertained by the trial Court in accordance with law.

15. *Resultantly*, petition sans merits and is hereby dismissed with a

clarification that observations so made in the order are only for the purpose of arriving at a conclusion in the instant petition under Section 482 of Cr.P.C. and trial shall be held on its own merits.

16. Petition stands **dismissed**.

(Anand Pathak)
Judge

Anil*