

UNION OF INDIA

v.

SHEO SHAMBHU GIRI

(Criminal Appeal No. 1027 of 2008)

MARCH 25, 2014

[DR. B.S. CHAUHAN AND J. CHELAMESWAR, JJ.]

*Narcotic Drugs and Psychotropic Substances Act, 1985: s.23 - Applicability of - Held: s.23 creates three offences i.e. import into India, export out of India; and transshipment of any narcotic drug or psychotropic substance - Word "transshipment" occurring u/s.23 must necessarily be understood in the context of the scheme of the section and the preceding expressions of "import into India" and "export out of India" to mean only transshipment for the purpose of either import into India or export out of India - In the instant case, no evidence to prove that the respondent was carrying contraband either in the course of import into India or export out of India - Therefore, High Court rightly set aside conviction u/s.23.*

**The sole respondent along with two other accused was tried for offences under Sections 23 and 29 of the NDPS Act. The trial court found the respondent guilty of an offence under Section 23 of the NDPS Act but found that the charge under Section 29 of the Act was not proved against him. He was, therefore, convicted for an offence under Section 23 of the NDPS Act and sentenced to undergo RI for 10 years and also directed to pay a fine of Rs. 1 lakh for an offence under Section 23 of the NDPS Act.**

**The High Court held that prosecution could not prove that the contraband was of foreign origin and set aside his conviction under Section 23 of the NDPS Act.**

A Hence the instant appeal.

Dismissing the appeal, the Court

B HELD: 1. 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. The word "tranships" occurring under Section 23 must necessarily be understood in the context of the scheme of the Section and the preceding expressions of "import into India" and "export out of India" to mean only transshipment for the purpose of either import into India or export out of India. [Para 7] [807-A-D]

D 2. It can be seen from the language of the Section 9(1) of NDPS Act that the Central Government is authorized 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 the E 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 to India and export out of India, Parliament employed the expression transshipment in Section 9(i)(a)(vii). Therefore, the F High Court rightly concluded that the conviction of the respondent under Section 23 of the NDPS Act cannot be sustained. There is no reason to interfere with the same. [Paras 9 and 10] [808-G-H; 809-A-B]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1027 of 2008.

H From the Judgment and Order dated 19.05.2006 of the High Court of Judicature at Patna in Criminal Appeal No. 359 of 2003.

Dr. Ashok Dhamija, Binu Tamta, Sonia Dhamija, B.K. Prasad, Bhawna Singh Dev, B.V. Balaram Das for the Appellant.

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Ardhendumauli Kumar Prasad, Nirmal Kumar Ambastha, Aviral Shukla for the Respondent.

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The Judgment of the Court was delivered by

**J. CHELAMESWAR, J.** 1. Aggrieved by the judgment in Criminal Appeal No. 359 of 2003 of the High Court of Patna, the instant appeal is preferred by the Union of India.

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2. By the judgment under appeal, three appeals came to be preferred by the three different accused who were convicted for different offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") by the Court of 5th Additional District and Sessions Judge, Mothari of East Champaran District in Excise Case No. 31 of 2001 by its judgment dated 12th June, 2003. By the judgment under appeal, the conviction of all the appellants was set aside. It is not very clear whether any appeals are preferred against the acquittal of the other two accused except the respondent herein.

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3. The sole respondent along with two other accused was tried for offences under Sections 23 and 29 of the NDPS Act. The trial court found the respondent herein guilty of an offence under Section 23 of the NDPS Act but found that the charge under Section 29 of the Act is not proved against him. He was, therefore, convicted for an offence under Section 23 of the NDPS Act and sentenced to undergo RI for 10 years and also to pay a fine of Rs. 1 lakh for an offence under Section 23 of the NDPS Act.

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4. The High Court, allowed the appeal of the respondent and set aside his conviction under Section 23 of the NDPS Act. Relevant portion of the judgment reads as follows:-

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A “17. So far as appellant Sheo Shambhu Giri of Cr. Appeal  
 No. 359 of 2003 is concerned he has also assailed his  
 conviction on many grounds including that the Ganja was  
 recovered from his possession. His submission was also  
 that though he was charged under sections 23 and 29 of  
 B the act but he was acquitted under Section 29 of the act  
 and was not considered to be a part of conspiracy and  
 admittedly he was only a carrier at the instance of other  
 persons. As such his punishment under section 23 of the  
 Act is also not tenable in the eye of law. That apart it has  
 C been submitted that the ingredients of section 23 of the  
 Act is not attracted in this case because there is no  
 evidence to prove that the Ganja was imported from  
 foreign land. As per the wording of the section there must  
 be import of the contraband to attract punishment under  
 D this section but the prosecution could not prove that the  
 Ganja was of foreign origin. Even prosecution could not  
 prove whether the substance so seized was actually Ganja  
 or not because no chemical examination report has been  
 produced in the court in original form neither the chemical  
 examiner was examined to prove them. It has also been  
 E submitted that the mandatory provision of, sections 42, 52  
 and 57 of the act has not been strictly complied with. That  
 apart it has also been submitted that there is no  
 independent witness to support the recovery of contraband  
 and the prosecution failed to examine them. Only  
 F independent witness is a witness to Panchnama (Ext. 18)”

5. Dr. Ashok Dhamija, learned counsel appearing for the  
 appellant submitted that the High Court grossly erred in coming  
 to the conclusion that in the absence of proof that the Ganja  
 G allegedly seized from the custody of the respondent is of foreign  
 origin, Section 23 of the NDPS Act is not attracted.

6. The learned counsel further assailed the conclusion of  
 the High Court that the prosecution could not prove that the  
 H material seized from the respondent was ganja.

7. 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 authorization issued either under the Act or the Rules. The expression "tranships" occurring under Section 23 must necessarily be understood in the context of the scheme of the Section and the preceding expressions of "import into India" and "export out of 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.

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8. We agree with the submission made by the respondent on the construction of Section 23 of the NDPS Act, the expression "tranships" 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. Section 9(1)(a)(vii) also employs the expression transshipment. Section 9(1) reads as follows;

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**"9. Power of Central Government to permit, control and regulate. -**(1) Subject to the provisions of section 8, the Central Government may, by rules-

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(a) permit and regulate-

(i) the cultivation, or gathering of any portion (such cultivation or gathering being only on account of the Central Government) of coca plant, or the production, possession,

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- A sale, purchase, transport, import inter-State, export inter-State, use or consumption of coca leaves;
- (ii) the cultivation (such cultivation being only on account of Central Government) of the opium poppy;
- B (iii) the production and manufacture of opium and production of poppy straw;
- (iv) the sale of opium and opium derivatives from the Central Government factories for export from India or sale to State Government or to manufacturing chemists;
- C (v) the manufacture of manufactured drugs (other, than prepared opium) but not including manufacture of medicinal opium or any preparation containing any manufactured drug from materials which the maker is lawfully entitled to possess;
- D (vi) the manufacture, possession, transport import inter-State, export inter-State, sale, purchase, consumption or use of psychotropic substances;
- E (vii) the import into India and export from India and transshipment of narcotic drugs and psychotropic substances;
- F (b) prescribe any other matter requisite to render effective the control of the Central Government over any of the matters specified in clause (a)”

9. It can be seen from the language of the Section that the Central Government is authorized 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 the 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 to India and export out of India, Parliament employed the expression transshipment in Section 9(i)(a)(vii).

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10. 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.

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11. In view of such conclusion, we do not deem it necessary to examine the correctness of other conclusions recorded by the High Court for acquitting the respondents. The appeal is, therefore, dismissed.

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Appeal dismissed.