

Case :- CRIMINAL MISC. WRIT PETITION No. - 7559 of 2022

Petitioner :- Saroj Kumar And Others

Respondent :- State Of U.P. Thru. Secy. Deptt. Home, Up Civil Sectt. Up Lko. And Others

Counsel for Petitioner :- Arvind Kumar

Counsel for Respondent :- G.A.

Hon'ble Rajan Roy,J.

Hon'ble Sanjay Kumar Pachori,J.

Heard Mr. Arvind Kumar, learned counsel for the petitioners and Mr. Badrul Hasan, learned Additional Government Advocate appearing on behalf of the State.

By means of the present petition the petitioners have sought the following reliefs:

“(I) issue a writ order or direction in the nature of Mandamus commanding the opposite parties to take immediate positive decision on representation dated 12.09.2022 contained as Annexure no.1 to this writ petition by which petitioners are seeking utilization of modern scientific technique of “brain mapping test” like “NARCO” or “lie detector test” upon the petitioners as well as complainant to lead the investigation in right direction and contract out the truth of case pertaining to F.I.R. no.86/2022 dated 04.03.2022, U/S 302, 201 I.P.C. Police Station-Mohd. Pur Khala, District Barabanki.

(II) issue a writ order or direction in the nature of mandamus commanding opposite party no.-4 to obtain viscera analysis report from Forensic Scientific Laboratory Lucknow pertaining case/ F.I.R. no.86/2022 dated 04.03.2022, U/S 302, 201 I.P.C. Police Station-Mohd. Pur Khala, District Barabanki.

(III) issue a writ order or direction in the nature and manner

which deemed just and proper in the circumstances of the case.

(IV) allow the writ petition with costs.”

The petitioners are the accused in F.I.R. No.86 of 2022, under Sections 302, 201 I.P.C. Police Station Mohd. Pur Khala, District Barabanki. They have filed this petition seeking a writ of mandamus commanding the opposite parties to take immediate positive decision on representation dated 12.09.2022 annexed as Annexure No.1 to the petition by which the petitioners have sought utilization of modern scientific technique of ‘brain mapping test’ like ‘NARCO’ or ‘lie detector test’ upon petitioners as well as complainant to lead the investigation in right direction and to extract the truth of the case. Another relief has been sought in the nature of mandamus commanding opposite party no.4 to obtain viscera analysis report from Forensic Scientific Laboratory, Lucknow pertaining to the aforesaid case as viscera has been preserved.

Learned counsel for the petitioners has relied upon a judgment of this Court dated 21.08.2015 rendered in the case of ***Madhuri Devi Vs. State of U.P. and others; Writ Petition No.7590 (MB) of 2015***. He has also relied upon another judgment dated 15.11.2019 rendered in the case of ***Ram Prasad Vs. State of U.P. and others; Writ Petition No.31348 (MB) of 2019*** in support of his case.

On the other hand learned A.G.A. Mr. Badrul Hasan has placed before the Court a judgment of Single Judge Bench of the Kerala High Court in the case of ***Louis Vs. State of Kerala and others; Crl. MC No.4007 of 2021*** wherein a similar request at the behest of the accused was denied on the ground that such narco analysis test etc. are not admissible as evidence and also that the accused does not have any such enforceable right.

We specifically asked the learned counsel for the petitioners as to whether such tests as are referred in the relief clause i.e. narco or lie detector test or brain mapping test are admissible in evidence under the Indian Evidence Act or not, learned counsel for the petitioners fairly submitted that they are not admissible in evidence, however, they would help in giving direction to the investigation and to reveal the truth.

We have gone through the decision of a Coordinate Bench of this Court in the case of ***Madhuri Devi*** (supra). That was a writ petition filed by the informant seeking a writ of mandamus directing the investigating agency to take action against the accused, respondents 4 to 9 in the course of investigation of the case. In effect, the petition sought issuance of a writ directing the investigating agency to conduct proper investigation. In the said judgment the Coordinate Bench referred to a decision of Hon'ble the Supreme Court in the case of ***Union of India and another Vs. W.N. Chadha; 1993 Cr.L.J. 859***. In para 92 of the judgment it has been categorically observed that the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under Section 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under Section 204 of the Code, as the case may be. The Court further observed that at the same time there are certain provisions under the Code empowering the Magistrate to give an opportunity of being heard under certain specified circumstances. It also referred to other decisions specifically the decision of the Hon'ble Supreme Court in the case of ***State of Bihar v. J.A.C. Saldanha, 1967 (3) SCR 668***

wherein it was opined that the field of investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation. In para 38 of the decision in the case of **Madhuri Devi** (supra) relevant extracts of the judgment in the case of **W.N. Chadha** (supra) have been considered. The Court has nevertheless observed that although an accused would have no right of hearing, however, a duty is cast on the investigating agency to conduct fair and impartial investigation. If the investigator receives relevant information in regard to the facts of a case under investigation, be it from the complainant informant, a witness or even the accused, a duty is cast on the said investigating officer to investigate that aspect. In case the investigation is select and one sided, the truth cannot be unearthed. If facts or some evidence/material is brought to the notice of the investigator, on consideration of which it can be demonstrated that the accused is not connected with commission of the crime, surely in such cases, the investigating agency would be obliged to investigate that aspect, in the interest of fair play and purity of administration of criminal justice. For this purpose, the information given by the accused cannot be ignored on the analogy that he has no right to be heard. The Coordinate Bench referred to decisions of Hon'ble Supreme Court in the case of **Ram Lal Narang versus State (Delhi Administration)**, (1979)2 SCC 322 wherein also it has been indicated that When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, it would be a duty of that agency to investigate the genuineness of the plea of alibi. In para 42 of the decision in

the case of ***Madhuri Devi*** (supra) it has also been observed that in a case of mala fide implication of an accused if the investigating officer also considers the version of the accused in that context and takes into consideration the evidence/material then there would nothing be wrong in it. We are in agreement with the above view expressed by the Coordinate Bench, however, in the case at hand the facts are very different. Here it is not a case where some relevant facts as defined in the Indian Evidence Act is available and the same is not been taken into consideration by the Investigating Officer. In fact in this context we may like to refer to the definition of investigation as contained in Section 2 (h) of Cr.P.C. The said term is defined to include all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. Now, admittedly, the result of Narco test etc. would not be admissible as evidence as already noticed herein above. We may in this context refer to the decision relied upon by learned Additional Government Advocate as rendered by a Single Judge Bench of the Kerala High Court in the case of ***Louis Vs. State of Kerala*** (supra) wherein the court had considered the definition of ‘evidence’ in Section 3 of the Indian Evidence Act and the definition of term ‘fact’ contained therein as also the submission of the Public Prosecutor that the said definition of fact provides that that only mental condition of which any person is conscious comes under the definition of fact. The Kerala High Court has thereafter opined in the abovesaid case which is extracted as under:

“18. So when a Narco Analysis test is conducted with the intervention of some medication, when a person is not conscious and make some revelations from the sub conscious mind the credibility of that revelation stands far short of the fact described under the Evidence Act. The possibility of some

persons concocting fanciful stories in the course of hypnotic stage also cannot be ignored. The responses of different individual in such circumstances would vary the result of not having any uniform criteria for evaluating the efficacy of the Narco Analysis technique is a matter of another concern as per the dictum in the Selvi's case.

19. The possibility of the testimony being not voluntary even if the person freely consents to undergo the test also is there. The danger of the person not being able to exercise an effective choice of remaining silent and imparting personal knowledge is CRL.M.C.4007/21 also there since the results are derived from the psychological responses. Apex court also had foreseen the danger of such test being permitted at the instance of prosecution since on the principle of parity of procedure if the accused files such application that also has to be allowed. That would result in re opening of cases or even can be used for the purpose of attacking the credibility of witnesses during trial.

20. Hence even if the petitioner voluntarily submits for subjecting himself for Narco Analysis Test, there is no guarantee that the statements would be voluntary. So even if the court permits the petitioner to undergo a Narco Analysis test, it has no acceptability in the eye of law.

21. The learned counsel for the de facto complainant brought to my attention Vipin Kushwaha v. The State of M.P. in M.Cr.C.No.11699/2021 dated 6.9.2021 of Madhya Pradesh High Court. That was also a petition filed under Section 482 of the Code aggrieved by an order rejecting an application filed by the applicant seeking direction to perform his Narco Test. In that decision the High Court quoted Yogesh @ Charu Ananda Chandane v. State of Maharashtra, an order passed in M.Cr.C.No.11699/2021, petition No.2420/2016 wherein the High Court of Bombay rejected the similar prayer for Narco Analysis. The relevant paragraph No.7 has been quoted in the above CRL.M.C.4007/21 decision which reads thus :-

"In fact, the order passed by the learned Sessions Judge does not warrant any interference. That the evidence which is recorded in the course of the Narco Analysis Test or Polygraph Test is not admissible in evidence. It would be a hazardous situation to permit any/every accused to undergo narco

analysis test for proving his innocence. It is incumbent upon the prosecution to substantiate its case and prove the guilt of the accused beyond reasonable doubt. Criminal Jurisprudence contemplates that an accused has a right to silence and it is the duty of the prosecution to prove its case beyond reasonable doubt. The technique such as polygraph test and narco analysis test would be helpful technology for the investigating agency or to seek a direction in the course of investigation.

"We must also account for the uses of this technique by persons other than investigators and prosecutors. Narco Analysis tests could be requested by defendants who want to prove their innocence."

22. In the present case also, the petitioner wanted to subject himself to Narco Analysis Test which according to the learned counsel, is necessary to buttress his statements under Section 313 Cr.P.C. The above settled principles of law unequivocally lay down the position that the revelations brought out during Narco Analysis under the influence of a particular drug cannot be taken as a conscious act or statement given by a person. The possibility of accused himself making exculpatory statements to CRL.M.C.4007/21 support his defence also cannot be ruled out. There is no mechanism or the present Investigating Agency is also not equipped to assess the credibility of such revelations of the accused. The Investigating Officers also would find themselves difficult to come to a definite conclusion regarding the veracity of the revelations so made and the other evidence already collected by them. So the contention of the learned counsel for the petitioner that in order to buttress his statements under Section 313 Cr.P.C , these materials collected through Narco Analysis Test can be used as corroborative piece of evidence etc, is not at all sustainable in law.

23. In the result, Crl.M.C is found to be devoid of any merit and hence dismissed."

The evidentiary value of a narco analysis test has been considered threadbare and it has been recorded that revelations brought out during Narco Analysis under the influence of a particular drug cannot be taken as a conscious act or statement given by a person. The possibility of accused himself making

exculpatory statements to support his defence also cannot be ruled out. There is no mechanism or the present Investigating Agency is also not equipped to assess the credibility of such revelations of the accused. The Investigating Officers also would find themselves difficult to come to a definite conclusion regarding the veracity of the revelations so made and the other evidence already collected by them.

The Court rejected the contention of learned counsel for the petitioner therein that in order to buttress his statements under Section 313 Cr.P.C, these materials collected through Narco Analysis Test can be used as corroborative piece of evidence etc. as not being sustainable in law. The Court clearly held that the Narco Analysis Test or Polygraph Test is not admissible in law.

We are also in agreement with the opinion expressed by the Kerala High Court considering the aforesaid discussions as the result of the brain mapping test or narco or lie detector test would not be admissible in evidence, therefore, we see no reason to issue any such mandamus for disposal of the petitioners/accused application for undertaking such exercise by the Investigating Officer. This of course does not mean that if the Investigating Officer on his own decides to get the said tests conducted then he cannot do so, meaning thereby that if he so decides he can always get the test conducted subject to consent of the accused.

So far as the judgment of a Coordinate Bench in the case of ***Ram Prasad*** (supra) is concerned the same does not consider or lay down the law on the subject. It is only the ratio of a judgment which is binding and not its operative portion.

Now we proceed to consider the other relief prayed for

regarding the viscera analysis report. We find from the postmortem report that though the cause of death mentioned therein is due to asphyxia as a result of ante mortem drowning however to rule out poisoning viscera for chemical examination has been preserved. Therefore as far as this relief is concerned the Investigating Officer shall consider this aspect of the matter as per law.

We accordingly reject the relief no.1 and dispose of the petition as far as relief no.2 is concerned with the aforesaid observations.

The petition is ***disposed of.***

No orders as to the costs.

[Sanjay Kumar Pachori, J.] [Rajan Roy, J.]

Order Date :- 13.10.2022

Ram.