CASE NO.:
Appeal (crl.) 311 of 2002

PETITIONER:
Directorate of Revenue & Anr

RESPONDENT:
Mohammed Nisar Holia

DATE OF JUDGMENT: 05/12/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO.311 OF 2002

S.B. Sinha, J.

1. Interpretation of the provisions of Sections 42 and 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) calls for our consideration in this appeal which has been filed by the Directorate of Revenue against the respondent herein aggrieved by and dissatisfied with a judgment and order dated 19 and 20 December, 2000 passed by a learned Single Judge of the High Court of Judicature at Bombay in Criminal Appeal No.462 of 1999 whereby and whereunder the judgment of conviction and sentence passed by a Special Judge at Mumbai in NDPS Special Case No.221 of 1997 was reversed.

2. An information was received in the office of the appellant on 23.1.1997 that one person staying in Room No.305 or 306 at Hotel Kalpana Palace, Grant Road, Mumbai was in possession of a fax copy of consignment note under which Mandrex tablets were being transported from Delhi to Mumbai. The said information was passed on to PW-1, Parmar. He reduced the same in writing. He in turn passed it placing same by reducing it to writing before A.D. Patekar, Senior Intelligence Officer (PW-10) allegedly as advised by Assistant Director, Atul Dixit, Assistant Director. PW-1 along with two other officers, namely, Dhani and Petkar visited the said hotel. They came to know that the accused was staying in Room No.306. Two of the employees of the said hotel were asked to be panch witnesses. The door of the said room was knocked; Appellant opened it. He allegedly was given an option to get himself searched in presence of a Gazetted Officer or a Magistrate. He opted for the former. He was searched by the said officers. A sum of Rs.4,25,000/- in cash and a fax copy of a receipt of Green Carriers from Delhi showing the consignment of medicine was found in the said room. A xeroxed copy of the said fax message was retained.

3. It appears that the statement of the accused was also recorded in terms of Section 67 of the Act. The consignment arrived as per the said receipt within a couple of days. Respondent herein was arrested on 27th January, 1997, inter alia, relying on or on the basis of recovery of the said fax message which was marked as Exhibit-8 and the purported xerox copy thereof which was marked as Exhibit-8A.

4. The learned Trial Judge relying on the provisions of Section 66 of the NDPS Act held the respondent guilty of commission of an offence under Section 8(c), 22 and 29 of the NDPS Act. He was not provided any opportunity to be heard on the quantum of sentence. The minimum sentence of 10 years and a fine of Rs.1,00,000/- was imposed on him.

5. On an appeal having been preferred against the said judgment of conviction and sentence, the High Court, however, without going into the other question, opined that as the statutory requirements of Section 42 of the Act had not been complied with, the judgment of the Trial Court could not

be sustained, holding :
"As observed earlier though the information seems to have been received by the office of DRI, it was not reduced to writing by the officer who received it but by the PW-1, Parmar who was later on conveyed the message by the office. Thus, there was no compliance to Section 42(1) of the Act."

6. The High Court, in arriving at the said finding, principally relied upon the decisions of this Court in State of Punjab v. Balbir Singh [AIR 1994 SC 1872]; Karnail Singh v. State of Rajasthan [(2000) 7 SCC 632]; and Abdul Rashid Ibrahim Mansuri v. State of Gujarat [2000 AIR SCW 375] where the provisions of Section 42 were held to be mandatory in nature.

7. Mr. Ashok Bhan, learned counsel appearing on behalf of the appellant, in support of this appeal, inter alia, would submit that as a hotel is a public place within the meaning of Section 43 of the Act, it was not necessary to comply with the provisions of Section 42 thereof.

8. Mr. Harinder Mohan Singh, learned amicus appearing on behalf of the Respondent, however, would support the judgment.

9. NDPS Act is a penal statute. It invades the rights of an accused to a large extent. It raises a presumption of a culpable mental state. Ordinarily, even an accused may not be released on bail having regard to Section 37 of the Act. The Court has the power to publish names, address and business etc. of the offenders. Any document produced in evidence becomes admissible. A vast power of calling for information upon the authorities has been conferred by reason of Section 67 of the Act.

10. Interpretation and/or validity in regard to the power of search and seizure provided for under the said Act came up for consideration in Balbir Singh's case (supra), wherein it was held :
"11. It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 Cr. PC regarding arrest and search under Sections 41, 42 and 43, the provisions of Cr. PC namely Sections 100 and 165 would be applicable to such arrest and search. Consequently the Principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case.
12. But there are certain other embargos envisaged under Sections 41 and 42 of the NDPS Act. Only a magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been committed so on and so forth as mentioned therein. Under Sub-section (2) only a Gazetted Officer or other officers mentioned and empowered therein can give an authorization to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any into writing. Under Section 42 only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirments. One is that the Magistrate or the Officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the

first requirement is concerned, it can be seen that the Legislature intends to only certain Magistrates and certain Officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or Officers mentioned thereunder."

11. Power to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the terms "reason to believe" have been used. Such belief may be founded upon secret information that may be orally conveyed by the informant. Draconian provision which may lead to a harsh sentence having regard to the doctrine of 'due process' as adumbrated under Article 21 of the Constitution of India require striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other.

12. This Court in Balbir Singh (supra) referring to Miranda v. Arizona [(1966) 384 US 436] while interpreting the provisions of the Act held that not only the provisions of Section 165 of the Code of Criminal Procedure would be attracted in the matter of search and seizure but the same must comply with right of the accused to be informed about the requirement to comply with the statutory provisions.

13. Requirements of Section 42 was read into Section 43 of the NDPS Act. A somewhat different view, however, was taken subsequently. Decisions were rendered opining that in conducting search and seizure in public place or a moving vehicle, provisions appended to sub-section (1) of Section 42 would not be attracted. Decisions were also rendered that in such a case even sub-section (2) of Section 42 need not be complied with.

14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefor must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. It is also possible to hold that rigours of the law need not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance thereof is insisted upon. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefor coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or house keeping of the room, the guest is entitled to maintain his privacy. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise

and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammeled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right of privacy deals with persons and not places.

15. A person, if he does not break a law would be entitled to enjoy his life and liberty which would include the right not to be disturbed. A right to be let alone is recognized to be a right which would fall under Article 21 of the Constitution of India. This Court in Sharda v. Dharampal [(2003) 4 SCC 493] dealt with right of privacy to a certain extent. The question came up for consideration in District Registrar and Collector, Hyderabad & Anr. v. Canara Bank & Ors. [(2005) 1 SCC 496] wherein the provisions of Section 73 of the Stamp Act, as amended by the State of Andhra Pradesh, was struck down holding :

"Once we have accepted in Gobind and in later cases that the right to privacy deals with "persons and not places", the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-a-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. If that be the correct view of the law, we cannot accept the line of Miller 30 in which the Court proceeded on the basis that the right to privacy is referable to the right of "property" theory. Once that is so, then unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizure so as to save it from any unconstitutionality."

16. It is not in dispute that the said Act prescribes stringent punishment. A balance, thus, must be struck in regard to the mode and manner in which the statutory requirements are to be complied with vis-'-vis the place of search and seizure.

17. This Court times without number has laid great emphasis on recording of reasons before search is conducted on the premise that the same would the earliest version which would be available to a court of law and the accused while defending his prosecution. The provisions contained in Chapter IV of the Act are a group of sections providing for certain checks on exercise of the powers of the concerned authority which otherwise would have been arbitrarily or indiscriminately exercised. The statute mandates that the prosecution must prove compliance of the said provisions. If no evidence is led by the prosecution, the Court will be entitled to draw the presumption that the procedure had not been complied with. For the said purpose, we are of the opinion that there may not be any distinction between a person's place of ordinary residence and a room of a hotel.

18. It may be placed on record that applying a sophisticated sense enhancing technology called thermal imaging, which when kept outside the residential house of a person to ascertain as to whether the inmate has kept any narcotic substance or not has been held to be infringement of right of privacy of the said person in the United States Supreme Court decision of Danny Lee Kyllo v. United States [533 U.S. 27, 121 S.Ct. 2038, 150

L.Ed.2d 94, 01 Cal. Daily Op. Serv. 4749, 2001 Daily Journal D.A.R. 5879, 14 Fla. L. Weekly Fed. S 329, 2001 DJCAR 2926]. The court opined that :

"(1) use of sense-enhancing technology to gather any information regarding interior of home that could not otherwise have been obtained without physical intrusion into constitutionally protected area constitutes a Fourth amendment "search," and (2) use of thermal imaging to measure heat emanating from home was search."

19. In the instant case, the statutory requirements had not been complied with as the person who had received the first information did not reduce the same in writing. An officer who received such information was bound to reduce the same in writing and not for the person who hears thereabout. Furthermore, in this case, apart from proving the fax and the copy of a challan nothing else has been proved. The fax was illegible. It allegedly was received in the PCO run by PW-17. He could not prove the contents of the fax. He also could not show when the same was received and from whom. It has not been shown that the accused was the person who obtained the said fax from PW-17. Furthermore, contents of the said documents had not been proved. In absence of the aforementioned details, the fax being illegible and its contents being not known, the question of the same being admissible in evidence in terms of Section 67 of the Act would not arise. The xeroxed copy of the said fax had not been proved in the strict sense of the term. No secondary evidence could have been led to prove another secondary evidence. Contents of document are required to be proved. The contents of a document could be held to have been proved in terms of section 66 only when the contents are decipherable and not otherwise.

20. In R.V.F. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple [JT 2005 (11) SC 574], this Court stated :

"The learned counsel for the defendant-respondent has relied on The Roman Catholic Mission v. The State of Madras and Anr. in support of his submission that a document not admissible in evidence, though-brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure

the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the made of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court."

21. In Narayanaswamy Ravishankar v. Asstt. Director, Directorate of Revenue Intelligence [(2002) 8 SCC 7], while dealing with search and seizure at a public place, this Court opined :
"In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant. Furthermore, in the mahazar which was prepared, it is clearly stated that the seizure was made by PW 1. The mahazar was no doubt drawn by one S. Jayanth. But, the contention of the learned Senior Counsel that the prosecution version is vulnerable, because Jayanth has not been examined, is of no consequence because it is PW 1 who has conducted the seizure. With regard to the alleged non-compliance of Section 57 of the NDPS Act, the High Court has rightly noted that PW 3 has stated that the arrest of the accused was revealed to his immediate superior officer, namely, the Deputy Director."

22. In Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513], this Court stated :
"18. When the same decision considered the impact of non-compliance with Section 50 it was held that "it would affect the prosecution case and vitiate the trial". But the Constitution Bench has settled the legal position concerning that aspect in State of Punjab v. Baldev Singh the relevant portion of which has been extracted by us earlier. We do not think that a different approach is

warranted regarding non-compliance with Section 42 also. If that be so, the position must be the following :

If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused."

{See also The State of West Bengal & Ors. V. Babu Chakraborty [JT 2004 (7) SC 216]}

23. In State of Haryana v. Jarnail Singh & Ors. [(2004) 5 SCC 188], this Court, while dealing with the provisions of Section 43 of the NDPS Act, opined :

"8. Section 43 of the NDPS Act provides that any officer of any of the Departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance, etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorised to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that for the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

24. This Court in Union of India v. Major Singh & Ors. [(2006) 9 SCC 170], whereupon reliance has been placed by thelearned counsel, held :

"Turning now to Section 42(2) of the Act, in this regard, it may be stated that from the prosecution case and evidence it would be clear that the search and seizure was made of a public carrier at a public place and 127 bags of poppy straw (opium) were seized from a public carrier.

The said decision has no application in the instant case.

25. For the foregoing reasons, we are of the opinion that the impugned judgment does not suffer from any legal infirmity. There is no merit in the appeal. It is dismissed accordingly.