

CASE NO.:
Appeal (crl.) 1368 of 1999

PETITIONER:
UNION OF INDIA & ORS.

Vs.

RESPONDENT:
L.D. BALAM SINGH

DATE OF JUDGMENT: 24/04/2002

BENCH:
U.C. Banerjee & Y.K. Sabharwal

JUDGMENT:

Banerjee, J.

While it is true that Army personnel ought to be subjected to strictest form of discipline and Article 33 of the Constitution has conferred powers on to the Parliament to abridge the rights conferred under Part III of the Constitution in respect of the members of the Armed Forces, but does that mean and imply that the Army Personnel would be denuded of the Constitutional privileges as guaranteed under the Constitution? Can it be said that the Army Personnel form a class of citizens not entitled to the Constitution's benefits and are outside the purview of the Constitution? To answer above in the affirmative would be a violent departure to the basic tenets of the Constitution. An Army Personnel is as much a citizen as any other individual citizen of this country. Incidentally, the provisions as contained in Article 33 does not by itself abrogate any rights and its applicability is dependent on Parliamentary legislation. The language used by the framers is unambiguous and categorical and it is in this perspective Article 33 may be noticed at this juncture. The said Article reads as below :-

"33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc. - Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to, -

- (a) the members of the Armed Forces; or
- (b) the members of the Forces charged with the maintenance of public order; or
- (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or
- (d) persons employed in, or in connection with, the telecommunication system

set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c),

be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

A plain reading thus would reveal that the extent of restrictions necessary to be imposed on any of the fundamental rights in their application to the armed forces and the forces charged with the maintenance of public order for the purpose of ensuring proper discharge of their duties and maintenance of discipline among them would necessarily depend upon the prevailing situation at a given point of time and it would be inadvisable to encase it in a rigid statutory formula. The Constitutions makers were obviously anxious that no more restrictions should be placed than are absolutely necessary for ensuring proper discharge of duties and the maintenance of discipline amongst the Armed Force Personnel and therefore Article 33 empowered the Parliament to restrict or abridge within permissible extent, the rights conferred under Part III of the Constitution in so far as the Armed Force Personnel are concerned. (In this context reference may be made to the decision of the Supreme Court in the case of B. Viswar & Ors. vs. Union of India & Ors., reported in AIR 1983 S.C. 658) as also a judgment of the Calcutta High Court in the case of Lt. Col. Amal Sankar Bhaduri vs. Union of India & Ors. (1987 CLT 1) of which one of us (U.C. Banerjee, J.) was a party.

This Court in the case of Prithi Pal Singh vs. The Union of India (AIR 1982 SC 1413) observed :

"It is one of the cardinal features of our Constitution that a person by enlisting in or entering armed forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution. More so when this Court held in Sunil Batra v. Delhi Administration (1979) 1 SCR 392 at p. 495 : (AIR 1978 SC 1675 at p. 1727) that even prisoners deprived of personal liberty are not wholly denuded of their fundamental rights. In the larger interest of national security and military discipline Parliament in its wisdom may restrict or abridge such rights in their application to the Armed Forces but this process should not be carried so far as to create a class of citizen not entitled to the benefits of liberal spirit of the Constitution. Persons subject to Army Act are citizens of this ancient land having feeling of belonging to the civilized community governed by the liberty oriented Constitution."

While answer to the first question posed above is in the affirmative, the contextual facts bear out and pose a further issue as regards availability of substantive and procedural safeguards under a specific legislation the High Court answered it in the affirmative since such procedural safeguards are said to be mandatory in nature.

Adverting to the factual matrix presently under consideration, it appears that on a petition filed under Articles 226/227 of the Constitution of India, the respondent herein prayed for quashing of

the charge-sheet, sentence of the General Court Martial, order of confirmation of General Officer Commanding and also to quash the trial of the General Court Martial. The facts of the matter however briefly are as below:

The petitioner was serving the Indian Army having joined the same on 28.10.1976. He was posted to 18 Cavalry C/o 56 A.P.O. during the year 1990-91 at Patiala Cantt. He was residing with his family in a Government married accommodation being House No.255/30 K.S. Colony, Patiala Cantt. On 28.12.1991 a search of his residence was conducted by Army Officers/Officials and allegedly opium weighing 4.900 Kgs. was recovered from his family quarter. The petitioner was thereafter placed under Arrest in military custody and was put in the quarter guard of his unit aforesaid and F.I.R. No.378 was lodged at Police Station Sadar Patiala on 28.12.1991. A sample of the opium recovered was forwarded to the Chemical Examiner for analysis and the remaining quantity of the opium, a contraband was kept with the Police.

The summary of evidence was ordered by the Commanding Officer of 64 Cavalry and on the basis of directions from the Brigade Commander, the petitioner was put to trial by the General Court Martial convened under the Convening Order. The petitioner was tried under Section 69 of the Army Act for an offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act). After the trial was over, the petitioner was convicted and sentenced by the General Court Martial.

Before advertng, however, to the rival contentions as advanced before this Court, it would be worthwhile to refer to the relevant provisions of the Army Act and the Rules framed thereunder. Chapter VI of the Army Act, 1950 stands ascribed to the offences and Section 69 therein deals with the civil offences, which reads as below :-

69. Civil offences Subject to the provisions of Section 70, any person subject to this Act who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say, -

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned."

It is on this score that Section 109 in Chapter X ought also to be noticed at this juncture. The Section reads as below :

"109. Power to convene a general court-martial. A general court-martial may be convened by the Central Government of [the Chief of the Army Staff] or by any officer empowered in this behalf by warrant of [the Chief of the Army Staff]."

Having outlined the factual score as above and upon noting of the two several provisions of the Army Act, it would be worthwhile to note Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). Needless to record that the petitioner was tried under Section 69 of the Army Act for an offence punishable under Section 18 of the NDPS Act the trial did take place before a General Court Martial and conviction and sentence was also passed therein. It is this sentence and conviction which stands challenged in the writ petition moved before the High Court, as noticed above. The NDPS Act admittedly contains certain safeguards and the law reports are replete with case laws pertaining to these safeguards. Dilution of the safeguards as prescribed in the statute has strongly been criticised and negated and the same were ascribed to be strictly mandatory in nature. The issue thus : whether by reason of the respondent being a member of the Armed Forces would stand denuded of such a safeguard in the event the General Court Martial takes note of an offence under a specific statute. Article 33 of the Constitution though conferred a power but has not been taken recourse to put a bar or restraint as regards the non-availability of the statutory safeguards in terms therewith. Before proceeding further, however, it would be convenient to note certain provisions of the NDPS Act, namely, Sections 18:42:50, which read as under :

18. Punishment for contravention in relation to opium poppy and opium. Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

(c) in any other case, with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees.

42. Power of entry, search, seizure and arrest without warrant or authorisation :

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the department of central excise, narcotics, customs, revenue, intelligence or any other department of the Central Government including para-military forced or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset :-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search and, if he thinks proper arrest any person whom he has reason to believe to have committed any offence punishable under this Act :

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under Sub-Section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

50. Conditions under which search of persons shall be conducted :-

(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

As regards the mandatory effect of the provisions as contained in Section 50 above, the Constitution Bench of this Court in Baldev Singh (State of Punjab v. Baldev Singh (1999) 6 SCC 172) has the following to state :

"24. There is, thus, unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a Gazetted officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a Gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad.

25. To be searched before a Gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a Gazetted officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceedings. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the person concerned of the existence of his right to have his search conducted before a Gazetted officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a Gazetted officer, at the time of the intended search. Courts have to be satisfied at the trial of the

case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with."

On the factual matrix Mrs. Indu Malhotra appearing for the respondent rather emphatically contended that it is an admitted situation that there is non-compliance of Sections 41 and 42 of the NDPS Act since no search warrants were issued and officers conducting the search were admittedly not duly authorised under the Act and by reason thereof the resultant effect of state of the situation as above, rendered the entire proceeding stand vitiated. The decision in Baldev Singh (supra) mainly dealt with the provisions of Section 50, which would be dealt with shortly hereafter but presently having a perusal of the relevant statutory provisions (in particular Sections 41 and 42) the submission as above cannot but be termed as it has been inevitable and inescapable. A recent decision of this Court in Roy V.D. v. State of Kerala (2001 SCC (Cri) 42) however, lends credence to conclusion as above since this Court as a matter of fact dealt with the true purport of Sections 41 and 42 of the NDPS Act. The felicity expression as contained therein, however, prompts us to note the same in extenso as below :-

"15. It is thus seen that for exercising powers enumerated under sub-section (1) of Section 42 at any time whether by day or by night a warrant of arrest or search issued by a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class who has been specifically empowered by the State Government in that behalf or an authorisation under sub-section (2) of Section 41 by an empowered officer is necessary. Without such a warrant or an authorisation, an empowered officer can exercise those powers only between sunrise and sunset. However, the proviso permits such an empowered or authorised officer to exercise the said powers at any time between sunset and sunrise if he has reason to believe that such a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence of facility for the escape of an offender and he records the grounds of his belief.

16. Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) of the NDPS Act or make a complaint under clause (d) of sub-section (1) of Section 36-A of the NDPS Act. It follows that any collection of materials, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorised officer under Section 41(2) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a

proceeding in respect of offences under Chapter IV of the NDPS Act and use of such a material by the prosecution vitiates the trial.

17. To the same effect is the view expressed by this Court in *State of Punjab v. Balbir Singh* (1994 (3) SCC 299 : 1994 SCC (Cri) 634). In para 13 Jayachandra Reddy, J. speaking for the Court observed thus : (SCC p. 313)

"13. Therefore, if an arrest or search contemplated under Sections 41 and 42 is made under a warrant issued by any other Magistrate or is made by any officer not empowered or authorised, it would per se be illegal and would affect the prosecution case and consequently vitiate the trial."

....

19. The learned Additional Solicitor General, however, relying upon conclusion No.(3) in para 57 of *State of Punjab v. Baldev Singh* (1999 6 SCC 172 : 1999 SCC (Cri) 1080) contends that a search and seizure in violation of Sections 41 and 42 of the NDPS Act does not vitiate the trial but would render the recovery of illicit article suspect and would only vitiate the conviction and sentence of the accused if the conviction has been recorded solely on the basis of such an illicit article, so the High Court was right in not quashing the proceedings. We are afraid, we cannot accede to the contention of the learned Additional Solicitor General. ."

The appellant herein, however, rather emphatically voiced two specific counts in support of the appeal. On the first, it has been contended that by reason of the fact of the petitioner being a 'person' belonging to the Armed Forces, question of usual formalities as regards the procedural aspect under NDPS Act would not arise, as such infraction of Section 42 of the NDPS Act cannot be said to be of any consequence : On the second count it has been the definite contention that since Section 50 specifically records "about to search any person" and since the contraband item has been in fact recovered from the private residence of the respondent herein, Section 50 cannot be said to be of any application. It is on this score the charge-sheet, though not included in the paper book, but upon leave of the Court, was produced and placed reliance upon in support of the appeal. We also deem it fit and convenient to note the charge-sheet hereinbelow :-

"CHARGE SHEET

The accused No 1059403N LD (Subs) Balam Singh of 18 Cavalry, attached to 64 Cavalry is charged with :-

Army Act	COMMITTING A CIVIL OFFENCE, THAT IS TO
Section 69	SAY, POSSESSING OPIUM IN CONTRAVENTION
OF SECTION 18 OF THE NARCOTIC DRUGS AND	
PSYCHOTROPIC SUBSTANCES ACT, 1985	

in that he,

at Patiala on 28 Dec 91 was found in illegal possession of 4 kgs and 900 grams of opium.

Place : Patiala
Date : 12 Mar 92

Sd/ x x x x
(SD Singh)
Colonel
Commanding Officer
The 64 Cavalry

To be tried by General Court Martial.

Station : Patiala
C/o 56 APO

Sd/ x x x x
(Kamaljit Singh)
Major General
General Officer Commanding
1 Armoured Division"

Dated : 14 Mar 92

We shall have the occasion to deal with the specific grievance as submitted in support of the respondent's contention later on in this judgment, but for the present suffice it to record that the same stated to be relating to possession of opium in contravention of Section 18 of the NDPS Act since he was found in illegal possession of 4 Kgs and 900 grams of opium at Patiala on 28th December, 1991. The charge-sheet, however, is stated to be, as noticed above, issued under Section 69 of the Army Act by one Shri S.D. Singh, Colonel/Commanding Officer 64th Cavalry and it is this charge-sheet which has been directed by the General Officer Commanding, Major General Kamaljit Singh to be tried by the General Court Martial.

In the writ petition filed before the High Court after the conclusion of the Court Martial proceedings and recording of the finding of guilt of the charge the petitioner/respondent herein specifically raised a plea of the charge being vague. Before, however, we deal with the same let us get back to the two specific counts noticed hereinbefore, namely, procedural aspect and non-applicability of Section 50. Dealing with the second count first, as regards non-applicability of Section 50 by reason of the factum of the same being made applicable to the person and not the place, we cannot but record our concurrence therewith. Section 50 sub-section (1) by reason of the language used therein, does not and cannot have any manner of application in the facts presently under consideration.

Turning attention on to the procedural aspect, be it noticed that Section 18 is an offence which cannot but be ascribed to be civil in nature in terms of the provisions of Army Act if Section 18 is to be taken recourse to then and in that event the provisions of the statute come into play in its entirety rather than piecemeal. The charge leveled against the respondent is not one of misdeeds or wrongful conduct in terms of the provisions of the Army Act but under the NDPS Act. In the event, we clarify, a particular statute is taken recourse to, question of trial under another statute without taking recourse to the statutory safeguards would be void and the entire trial would stand vitiated unless, of course, there are existing specific provisions therefor in the particular statute. Needless to record that there were two other civilian accused who were tried by the Court at Patiala but were acquitted of the offence for non-compliance of the mandatory requirements of the NDPS Act. Once the petitioner was put on trial for an offence under the NDPS Act, the General Court Martial and the Army authorities cannot

reasonably be heard to state that though the petitioner would be tried for an offence under Section 18 of the NDPS Act, yet the procedural safeguards as contained in the statutory provision would not be applicable to him being a member of the Armed Forces. The Act applies in its entirety irrespective of the jurisdiction of the General Court Martial or other Courts and since the Army authorities did not take into consideration the procedural safeguards as is embodied under the Statute, the question of offering any credence to the submissions of Union of India in support of the appeal does not and cannot arise. There is no material on record to show that the authorities who conducted the search and seizure at the house of the respondent herein has in fact done so in due compliance with Section 42 of the statute which admittedly stand fatal for the prosecution as noticed above as a matter of fact, two of the civilians stand acquitted therefor.

Lastly, it has been contended by the respondent that the charge-sheet is not only vague, but devoid of all material particulars and does not even fulfil the requirements of the Army Rules and the entire proceedings in any event stand vitiated. We are, however, not expressing any opinion thereon, neither the same is required for the purposes of disposal of this matter. Suffice it to record, however, that the same has some substance.

Having considered the matter in the perspective as above, we do not find any infraction of any law in the judgment of the High Court, neither the judgment can be faulted in any other way. This appeal, therefore, fails and is thus dismissed.

J.
(Umesh C. Banerjee)

J.
(Y.K. Sabharwal)

April 24, 2002.