

PETITIONER:
ROY V. D.

Vs.

RESPONDENT:
STATE OF KERALA

DATE OF JUDGMENT: 10/11/2000

BENCH:
Syed Shah Mohammed Quadri, & S. N. Phukan.

JUDGMENT:

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Syed Shah Mohammed Quadri, J.

Leave to appeal is granted.

This appeal is directed against the order dated June 4, 1998 passed by the High Court of Kerala at Ernakulam dismissing Crl.M.C.No.2417 of 1996 which was filed by the appellant praying the Court to quash proceedings in Session Case No.78 of 1993 on the file of Additional Sessions Judge, Thodupuzha.

The appellant was searched by the Excise Inspector, Devikulam. On the allegation of recovering Ganja from his possession the appellant was taken into custody on November 21, 1990. Under Section 20(b)(i) of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, the NDPS Act), a charge was laid against him by the Excise Inspector on February 20, 1991, whereas the statutory notification under which he became competent so to do, was issued by the Government of Kerala in G.O.(MS)No.168/92/TD, authorising officers of and above the rank of Excise Inspectors of the Excise Department to file complaints under Section 36A(1)(d) of the NDPS Act, on October 20, 1992. On the ground that the Excise Inspector was not authorised to file the charge sheet against the appellant and, therefore, the complaint was not maintainable, the appellant was discharged under Section 227 of Code of Criminal Procedure by the learned Additional Sessions Judge, Thodupuzha, on February 22, 1993. The said Excise Inspector, Devikulam, however, filed a fresh charge sheet against the appellant in Crime No.56 of 1990 for the very same offence on May 17, 1993. The case was committed to the court of the Additional Sessions Judge, Thodupuzha, and was numbered as Session Case No.78 of 1993. The appellant filed Crl.M.C. No.2417 of 1996 before the High Court of Kerala praying that the entire proceedings in Session Case No.78 of 1993 on the file of Additional Sessions Judge, Thodupuzha be quashed. By the order under challenge the High Court dismissed the petition. Hence this appeal.

Mr.K.Sukumaran, the learned senior counsel appearing for the appellant, contended that on the basis of recovery of illicit material on search and seizure made by an Excise Inspector, not authorised under Sections 41(2) or 42(1) of the NDPS Act, no charge could have been laid against the

appellant so the High Court ought to have quashed the impugned proceedings.

Mr. Mukul Rohtagi, the learned Additional Solicitor General appearing for the State/respondent, argued that the appellant could as well raise this plea at his trial before the Sessions Court and when the High Court declined to quash the proceedings it would not be appropriate for this Court to quash the proceedings.

On these contentions, the question that arises for consideration is : whether the impugned proceedings in Session Case No.78 of 1993 are liable to be quashed under Section 482 of the Criminal Procedure Code.

The life and liberty of an individual is so sacrosanct that it cannot be allowed to be interfered with except under the authority of law. It is a principle which has been recognised and applied in all civilised countries. In our Constitution, Article 21 guarantees protection of life and personal liberty not only to citizens of India but also to aliens.

The ground on which the proceedings are sought to be quashed is that search, seizure and the alleged recovery of Ganja are all in violation of Section 42(1) being by an Excise Inspector who was not empowered under Sections 41(2) of the said Act.

A reference to Sections 41 and 42 of the NDPS will be apposite. They read as under:

41. Power to issue warrant and authorisation.-

(1) A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence of any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer 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 in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a

constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The Officer to whom a warrant under sub- section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under Section 42.

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 departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force 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, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence 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 Chapter IV relating to such drug or substance; 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 Chapter IV relating to such drug or substance:

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 sun set and sun rise 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 forthwith send a copy thereof to his immediate official superior.

Sub-section (1) of Section 41 of the NDPS Act enables a

Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class who is especially empowered by the State Government in this behalf to issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under chapter IV of the said Act. Such a warrant may also be issued for the search of any building, conveyance or place in which he has reason to believe that any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed. Arrest or search under a warrant issued in this provision can be made at any time whether by day or by night.

Sub-section (2) of Section 41 of the NDPS Act entitles any officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force who has been empowered in that behalf by general or special order of the Central Government, or any officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in that behalf by general or special order of the State Government, to arrest a person or search a building, conveyance or a place or to authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night. Sub-section (3) of Section 41 of the NDPS Act says that the Officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search and the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under Section 42.

Sub-section (1) of Section 42 of the NDPS enumerates the powers of any such officer as is specified therein and who is duly empowered by the Central Government or the State Government, as the case may be. If he has reason to believe either from personal knowledge or on information given by any person and taken down in writing, that (a) any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed; or (b) any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, he may exercise the following powers, between sunrise and sunset. They are: (i) enter into any building and search any such building, conveyance or place and if faced with any resistance, break open any door and remove any such obstacle to such entry; (ii) seize: (a) such drug or substance and other materials any other article or any animal or conveyance which he has reason to believe to be liable to confiscation under the Act and (b) any document or other article which he has reason to believe may furnish evidence of the commission of any offence relating to such drug or substance; and (iii) detain and search and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance. The proviso to sub-section (1) says that an empowered officer may also enter into any building, conveyance or enclosed place at any time between sunset and sunrise if he 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 but in such a case before so proceeding he is enjoined to record the grounds of his belief.

Sub-section (2) of Section 42 contains a procedural directive to the officer who takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto to send forthwith a copy thereof to his immediate official superior.

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 specially 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 or facility for the escape of an offender and he records the grounds of his belief.

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 36A of the NDPS Act. It follows that any collection of material, 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.

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

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.

It is well settled that the power under Section 482 of the Cr.P.C. has to be exercised by the High Court, inter alia, to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the

accused. In our opinion, exercise of power under Section 482 of the Cr.P.C. to quash proceedings in a case like the one on hand, would indeed secure the ends of justice.

The learned Additional Solicitor General, however, relying upon conclusion No.3 in para 57 of State of Punjab Vs. Baldev Singh [1999 (6) SCC 172], contends that a search and seizure in violation of Sections 41 & 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 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 conclusion, referred to above, may be extracted here :

That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

It may be noticed that that conclusion was reached by the Constitution Bench in the context of non-compliance of Section 50 of the NDPS Act. While emphasising that it is imperative on the officer who is making search of a person to inform him of his right under sub-section (1) of Section 50 of the NDPS Act, it was held that the recovery of the illicit article in violation of Section 50 of the NDPS Act would render the recovery of illicit article suspect and use of such material would vitiate the conviction and sentence of an accused. It is manifest that the recovery of illicit article in that case was by a competent officer but was in violation of Section 50 of the NDPS Act. In the instant case, however, the search and recovery were by an officer who was not empowered so to do. Further in Balbir Singh's case (supra) this Court took the view that arrest and search in violation of Sections 41 and 42 of the NDPS Act being per se illegal would vitiate the trial. Therefore, the said conclusion cannot be called in aid to support the order under challenge. If the proceedings in the instant case are not quashed, the illegality will be perpetuated resulting in grave hardship to the appellant by making him to undergo the ordeal of trial which is vitiated by the illegality and which cannot result in conviction and sentence. It is, in our view, a fit case to exercise power under Section 482 of Cr.P.C. to quash the impugned proceedings.

For the afore-mentioned reasons, we set aside the order of the High Court, allow Crl.M.C.No.2417 of 1996 and quash the proceedings in Session Case No.78 of 1993 on the file of Additional Sessions Judge, Thodupuzha. The appeal is thus allowed.