

CASE NO.:
Appeal (crl.) 633 of 2003

PETITIONER:
Rajendra and Anr.

RESPONDENT:
State of Madhya Pradesh

DATE OF JUDGMENT: 17/12/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Appellants faced trial for alleged commission of offences punishable under Section 8 read with Section 20 (B)(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act'). Each was found guilty and sentenced to undergo imprisonment for 3 years and to pay a fine of Rs.2,000/- with default stipulation by the learned Special Judge (NDPS) Bhopal. The conviction and sentence were maintained by the High Court of Madhya Pradesh at Jabalpur by the impugned judgment.

Background facts as projected by the prosecution during trial are as follows:

On 31.3.2001, while Inspector Ajay Singh Bisen (PW-10) was on duty at G.R.P. Police Station, Bhopal, he received an information that two persons had got down from Madhya Pradesh Express and were waiting at platform No.2 for Coolie with suitcases and bags in which they were carrying contraband article (Ganja). This information was recorded by him (Ex.P-25) and thereafter, he proceeded with his staff to the place as per the information received by him. He found the appellants standing with the suitcases and bags. On search of the suitcase of appellant no.1 Rajendra, he found 23 kilograms of "Ganja" therein, which was seized. Likewise, on the search of the bag of appellant no.2 Kalicharan he found 17 kilograms of "Ganja" therein, which was also seized. PW-10 prepared the seizure memos (Exh.P-5 and P-8 respectively). He took samples of 25 grams each and sealed the same. The sample Panchnama is Exh.P-7. The seized articles were kept in sealed condition in the Malkhana. PW-10 had sent the sealed samples with specimen of seal to the Forensic Science Laboratory, Sagar vide Exh. P-23 on 12.4.2001 and the report of the laboratory is Exh.P-29. PW-10 sent the full report of the search and seizure to the senior railway police as per Exh. P-28, dated 1.4.2001. K. Barsaiya (PW-3) was posted as Malkhana Moharrir in the Police Station, Government Railway Police, Bhopal and on 31.3.2001, the seized "Ganja" and the sample packets along with the suitcase and bag which were seized from the appellants were deposited by him in the Malkhana in a sealed condition.

Placing reliance on the evidence adduced, the trial Court recorded conviction and imposed sentence as noted supra. Appeal before the High Court did not bring any relief.

In support of the appeal, learned counsel for the appellants submitted that there was violation of Sections 42 and 50 of the Act. There was no proof of endorsement to the superior officer as mandated in Section 42(2) of the Act. Before the search was made the accused persons were not intimated of their right to be searched in the presence

of prescribed authority. There was also non-compliance with the requirements of Sections 55 and 57.

Learned counsel for the State on the other hand submitted that both the trial Court and High Court have analysed the factual and legal position in detail. There is no infraction as alleged and the impugned judgment suffers from no infirmity.

The requirements vis-à-vis Sections 42 and 50 have been dealt with in many cases, more particularly by a Constitution Bench in *State of Punjab v. Baldev Singh* (1999 (6) SCC 172). In para 17 the conclusions in an earlier judgment *State of Punjab v. Balbir Singh* (1994 (3) SCC 299 at para 25) were quoted and approved. We are concerned with conclusions (2-C) and (3) which read as follows:

"(2-C) Under Section 42(1) the empowered officer if has a prior information given by any persons, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecutions case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

Section 42 deals with power of entry, search, seizure and arrest without of authorization. The provision reads as follows:

"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) 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 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 forthwith send a copy thereof to his immediate official superior."

Section 42 enables certain officers duly empowered in this behalf by the Central or State Government, as the case may be, to enter into and search any building, conveyance or enclosed place for the purpose mentioned therein without any warrant or authorization. Section 42 deal with "building, conveyance or enclosed place" whereas Section 43 deals with power of seizure and arrest in public place. Under sub-section (1) of Section 42 the method to be adopted and the procedure to be followed have been laid down. If the concerned officer has reason to believe from personal knowledge, or information given by any person and has taken down in writing, that any narcotic drugs or substance in respect of which an offence punishable under Chapter IV of the Act has been committed or any other articles which may furnish evidence of the commission of such offence is kept or concealed in any "building or conveyance or enclosed place" he may between sunrise and sunset, do the acts enumerated in clauses (a), (b), (c) and (d) of sub-section (1).

The proviso came into operation if such officer has reason to believe that search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escaped offender, he may enter and search such building, conveyance or enclosed place any time between sunrise and sunset after recording grounds of his belief. Section 42 comprises of two components. One relates to the basis of information i.e. (i) from personal knowledge (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates as was noted in Baldev Singh's case (supra) that 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. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place.

The trial Court and the High Court after analyzing the evidence have come to hold that there was compliance of Section 42(2) in the sense that requisite documents were sent to the superior officer, though per se Section 42 had no application to the facts of the case. Though learned counsel for the appellant tried to submit that there was no definite evidence about sending copies of the requisite documents to the superior officers, yet in view of the analysis of evidence done by the trial Court and also by the High Court, we do not find any substance in the plea that there was violation of Section 42(2).

So far as non-compliance of Section 50 is concerned, the said provision reads as follows:

"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."

As in the instant case the search was of the bags and not of the persons, Section 50 has no application and the High Court was right in its conclusions.

A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. (See *Kalema Tumba v. State of Maharashtra and Anr.* (JT 1999 (8) SC 293), *Baldev Singh's case* (supra), *Gurbax Singh v. State of Haryana* (2001(3) SCC 28). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh's case* (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance.

A similar question was examined in *Madan Lal and Anr. v. State of Himahal Pradesh* (2003 (6) Supreme 382).

Coming to the question of alleged non-compliance of the requirement of Sections 55 and 57, we find the trial Court has referred to the evidence of the witnesses and held that articles were kept in Malkhana in safe custody and were sent for chemical examination after necessary orders by the Magistrate and, therefore, the requirement of Section 55 were complied with. Section 57 relates to reporting of arrest and seizure to immediate superior officer. The evidence shows that same has been done. We find no infirmity in the conclusions of the trial Court and the High Court regarding compliance of Sections 55 and 57 to warrant interference.

Learned counsel for the appellant residually submitted that the

accused have suffered about 2 years and 9 months of custodial sentence, and, therefore, sentence should be altered to the sentence undergone. We find no substance in the plea looking to the gravity of the offence committed and large quantity of contraband articles seized. The appeal is without any merit and is dismissed.

JUDIS