CASE NO.:
Appeal (crl.) 1127 of 2004

PETITIONER:
G. Srinivas Goud

RESPONDENT:
State of A.P.

DATE OF JUDGMENT: 03/10/2005

BENCH:
Arun Kumar & A.K. Mathur

JUDGMENT:
JUDGMENT

ARUN KUMAR, J.

These two appeals arise from a common judgment of the High Court maintaining the conviction of the appellants under Section 22 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act) and sentencing both of them to rigorous imprisonment for ten years and a fine of Rupees one lakh each, in default of payment of fine further imprisonment of six months to the defaulter.

As per the prosecution case, P.W. 1, who happens to be the Assistant Commissioner Prohibition and Excise, received information about illegal possession of Diazepam in premises bearing No. 12-13-700/2 Nagarjuna Nagar, Tarnaka, Secunderabad. Diazepam is a banned drug under the Act. On receipt of this information he prepared a memo of search proceedings and proceeded to the place in question along with two constables. On his way he took two persons along, one of them being a police constable to act as a mediators/independent persons. The memo of search proceeding is Exhibit P.1. After reaching the spot, he prepared a panchnama, Exhibit P.2 which is signed by the accused persons, two panch witnesses in addition to the three officers of the department. A copy of the panchnama was supplied to both the accused. According to the panchnama, on reaching the premises, the main doors were found open. The raiding party entered the house. They found two persons, the present appellants, sitting in a room. The house was searched and a plastic bag containing some chemical was found in a corner. The bag weighed about 20 kg. It was opened. It had white powder like substance. The two persons present in the house said that the substance was Diazepam. They were informed that the officer, P. Sivarama Sastry, was a gazetted officer. The officer took around one gram of chemical in a clean dish and made a spot verification about what it was by using some chemical which he was carrying with him and found that the substance contained in the bag was Diazepam. The occupants of the room did not have permit or licence for possessing the substance. The officers were informed that the substance had been purchased by one of the occupants viz. G. Sreenivisa Goud, A.1, from the other occupant, M. Uma Maheswar, A.2. The prosecution examined six witnesses, besides exhibiting the search memo as Exhibit P.1 and the panchnama as Exhibit P2. MOs 1, 2, 3 are the main bag containing Diazepam and the two samples respectively. Exhibit P.4 is the report of the Government Chemical Examiner, Regional Excise Lab., Hyderabad (A.P.). According to the report the sample contained diazepam and urea. The defence of the appellants was that of total denial. The trial court convicted both the accused for offence under Section 22 of the NDPS Act and sentenced them as aforesaid. The High Court maintained the conviction while dismissing the appeals of both the accused.

The learned counsel for the appellant raised the following points:

1. Non-association of independent witnesses,

2. Non-compliance of Section 42 of the NDPS Act, inasmuch as the information said to have been received by the Assistant Commisisioner of Prohibition and Excise, P.W. 1, was not reduced into writing before proceeding for search and not sending copy of information to immediate official superior as per Section 42 (2) of the Act.

We have heard the learned counsel for the parties at length. We find no substance in either of the above points urged on behalf of the appellants.

So far as the point regarding non-association of independent witnesses is concerned, the same is intended to throw doubt upon the recovery of the contraband drug. Exhibit P.2 is the panchnama which is signed by the two independent witnesses, the three officers of the department and the two accused. It contains clear description of how the search was made and the contraband was seized. It is a case of recovery of 20 kg. of Diazepam which is a banned drug as per the Schedule to the Act. When the quantity recovered is so large, it does not appear to be a case of planting. Further a perusal of the panchnama leaves no scope for doubting the seizure. So far as association of independent witnesses is concerned it will be seen that the time of search was 5.30 a.m. in the morning. At that hour it is difficult to get people from general public to act as independent witnesses. Still the officer managed to get two witnesses one of whom has been examined. Referring to the statement of PW 5, the learned counsel for the appellant tried to pick holes in it. In our view, there is no substance in the argument. P.W. 5 is a reserve policeman and there is no bar in law for a policeman to act as a mediator/panch witness. It should be kept in view that this was a raid which was conducted by excise officials and not by the police.

The main thrust of the argument on behalf of the appellants is about non-compliance of Section 42 of the Act. It is a two pronged attack. First, it is said to be non-recording of the information about contraband drug being stored at the premises in question. Second, it is not sending copy of information in terms of sub-section (2) of Section 42 of the Act to immediate official superior. The first point is answered by a reference to memo of search proceeding, Exhibit P.W.1 which shows that the officer noted "I have received a reliable information regarding storage and possession of Diazepam in a house bearing No. ....." The officer has further noted that there was no time to obtain a search warrant from the court and delay is likely to cause material to disappear. He believed the information to be correct and, therefore, decided to raid the premises. In our view, this is sufficient compliance of the provision regarding making a note in writing about the information received by an officer. Therefore, there is no basis for the argument regarding not making a note of the information.

Coming to the second point, which is the main point of attack on behalf of the appellants, the argument is that the officer conducting the raid did not send a copy of the information received by him which led to the search and seizure, to his immediate official superior as required under Section 42(2) of the Act. Due to non-compliance of this provision, the case of prosecution must fail. To deal with this argument one must carefully analyse Sections 41 and 42 of the Act. These sections occur in Chapter V, which has the heading "Procedure". This Chapter deals with the procedure regarding search and seizure of the contraband items. Section 41(1) is about issuance of warrant for arrest and for search by empowered Metropolitan Magistrates or Magistrates of the first class or of the second class etc. etc. Under Section 41(1) the empowered Magistrates mentioned in the Section have the power to issue warrants for arrest of any person and for search of any premises. Sub-section (2) of Section 41 refers to issue of authorisation for arrest, search and seizure by officers of gazetted rank of different government departments. On the basis of authorisation the authorised officers proceed to make arrests and carry out searches and seizures. It is worth emphasising that it is only the empowered officers of gazetted rank of the various departments mentioned in the sub-section who

exercise the power of authorisation to carry out arrest, search and seizure etc. Section 42 is about arrest, search and seizure being carried out. Section 42(1), as its heading suggests, applies to cases of officers carrying out search and seizure without warrant or authorisation under Section 41(1) or 41(2) of the Act. It is a general power of search, seizure and arrest. Section 42 does not use the words "officers of gazetted rank'. It covers all empowered officers of the central excise, narcotics, customs, revenue intelligence or any other department of Central Government including officers of para military and armed forces and officers of State Governments. What is important is that the officers acting under Section 42(1) act without authorisation. Since the officers act without authorisation, sub-section (2) contains the requirement of sending copy of information on which they take action which they are required to note in writing at the time they receive it. The information is to be sent to their immediate official superiors.

The question for our consideration is: whether it is necessary for officers of the gazetted rank to comply with sub-section (2) of Section 42, i.e. send the information taken down in writing by the officers to immediate official superior within seventy two hours? According to the learned counsel for the appellants Section 42(2) is mandatory and covers all officers including officers of gazetted rank. It does not make any distinction between a gazetted and a non-gazetted officer and, therefore, all empowered officers must comply with sub-section (2) of Section 42.

It will be seen from Section 41(2) that it refers to only officers of gazetted rank and it is such officers who can authorise their subordinates, not below the rank of peon, sepoy or constable, to carry out arrest, search or seizure. The function of arrest, search and seizure carried out under Section 42(1) is by officers who do not have warrants or authorization in their hands before proceeding to take action. This is as per the heading of the Section which reads: "Power of entry, search, seizure and arrest without warrant or authorization". Under Section 41 it is the specified Magistrates who issue warrants of arrest and it is officers of gazetted rank who give authorisation in favour of their juniors. Provisions of sub-section (2) of Section 42 are meant to cover cases falling under Section 42(1). Therefore, in our view, the requirement under Section 42(2) need not to be extended to cases of arrest, search and seizure by officers of gazetted rank. The officer of gazetted rank while authorising junior officers under Section 41(2) knows what he is requiring them to do and, therefore, there is no need for reporting. For this reason Section 41 does not contain any such requirement. The need for reporting under Section 42(2) arises because the officer proceeds without authorisation in terms of Section 41(1) or 41(2). The requirement of informing the immediate official superior under Section 42(2), in our view, has to be confined to cases where the action is without authorisation by officers below the rank of gazetted officers.

It will be anomalous to say that officers of gazetted rank who are conferred with power to authorise junior officers to carry out arrest, search and seizure, are required to report to their superior officers when they carry out arrest, search or seizure on their own. As already seen the rationale for this provision of informing superiors appears to be that when the arrest, search and seizure is without authorisation by gazetted rank officers, the officers taking action must keep their superiors informed. The superior officers must know about the action taken by their subordinates. However, the position of gazetted rank officers, in view of their rank and seniority and power to authorise subordinates to proceed to action, is totally different. They are the source of power of authorization. The gazetted rank officers enjoy special position and privileges under the Act. They need not be equated to officers taking action without authorisation or warrants. The requirement of sending information to superior officers under sub-section (2) of Section 42 cannot be insisted upon in their case. There is no bar in the statute to functions of arrest, search and seizure being carried out by the officers of the

gazetted rank themselves. When they act on their own, they do not have to report to their seniors on such things.

The view expressed above finds support from a judgment of this court in M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, [2003] 8 SCC 449 where it is observed:

> "Section 41(1) which empowers a Magistrate to issue warrant for arrest of any persons whom he has reason to believe to have committed any offence punishable under the NDPS Act or for search, has not much relevance for the purpose of considering the contention. Under Section 41(2) only a Gazetted Officer can be empowered by the Central Government or the State Government. Such empowered officer can either himself make an arrest or conduct a search or authorise an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a peon, a sepoy or a constable. Sub-section (3) of Section 41 vests all the powers of an officer acting under Section 42 on three types of officers (i) to whom a warrant under sub-section (1) is addressed, (ii) the officer who authorized the arrest or search under sub-section (2) of Section 41, and (iii) the officer who is so authorised under sub-section (2) of Section 41. Therefore, an empowered Gazetted Officer has also all the powers of Section 42 including the power of seizure. Section 42 provides for procedure and power of entry, search, seizure and arrest without warrant or authorisation."

Similarly in State of Haryana v. Jarnail Singh and Ors., [2004] 5 SCC 188 , this court took the view that when an officer of gazetted rank like the Superintendent of Police was a member of the search party he could not be expected to comply with the proviso to Section 42 of the Act which requires that an officer who has reason to believe that a search, warrant or authorisation cannot be obtained without affording opportunity for concealment of evidence or facility for the escape of an offender, must record the reasons for his belief. In this judgment the court relied upon the judgment in Prabhulal's case (Supra).

The learned counsel for the appellants relied upon State of W.B. and Ors. v. Babu Chakraborthy, [2004] 12 SCC 201. This judgment emphasises that the provisions of Section 42 of the Act are mandatory and must be complied with. We have gone through the judgment and in our view this judgment does not advance the case of the appellants. We are by no means suggesting that the provisions of Section 42 are not mandatory. Wherever they are attracted, compliance is mandatory.

Another case cited by the learned counsel for the appellants is Beckodan Abdul Rahman v. State of Kerala, [2002] 4 SCC 229. This judgment again holds that non-compliance of provisions of Sections 42(2) and 50 vitiates the trial. This is correct. But present is not a case of non-compliance of Section 42(2). For this very reason State of Punjab v. Balbir Singh, [1994] 3 SCC 299 and State of Punjab v. Baldev Singh., [1999] 6 SCC 172 are not relevant cases for the present purpose.

Lastly, the learned counsel for the appellants sought to rely on Abdul Rashid Ibrahim Mansuri v. State of Gujarat, [2000] 2 SCC 513. In this case the search was carried out by a Police Inspector who admitted that he had failed to take down in writing the information as required under Section 42(1) and also he had failed to send a copy of the information to his immediate official superior as required under Section 42(2) of the Act. The Inspector of Police was not an officer of gazetted rank. Therefore, it was necessary for him to comply with the provisions of Section 42. He having failed to do so, the conviction of the accused was set aside by this court. The facts of the present case are totally different because in the present case the action has been taken by an officer of the gazetted rank.

As a result of the above discussion, we find no merit in the present

appeals. Both the appeals are dismissed.

If any of the accused/appellants are on bail, steps should be taken to apprehend them so that they may serve the remaining sentence.