

(2002) 08 CAL CK 0027
In the Calcutta High Court
Case No : Criminal Appeal No. 149 of 1999

Abdul Khalek alias Raja	APPELLANT
Vs	
Narcotic Control Bureau, Eastern Zonal Unit	RESPONDENT

Date of Decision : 23-08-2002

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 41, 42, 43

Citation : (2003) 1 CALLT 59

Hon'ble Judges : Sujit Barman Roy, J;Gorachand De, J

Bench : Division Bench

Advocate : Sekhar Basu and Phiroze Edulji, for the Appellant;Ashim Roy and Dipak Kumar Sengupta, for the Respondent

Final Decision : Allowed

Judgement

S. Barman Roy, J.—This appeal is directed against the judgment dated 8.4.1999 and sentence dated 9.4.1999 passed by the learned Special Judge (NDPS Act), Calcutta in NDPS Case No. 40/95 convicting the appellant u/s 21 of the NDPS Act and sentencing him thereunder to suffer rigorous imprisonment for 10 years and a fine of Rs. 5,000/- and in default to suffer rigorous imprisonment for further one year.

2. The prosecution story, as alleged, in brief is that in the complaint filed against the appellant by the Intelligence Officer, Narcotic Control Bureau, Eastern Zonal Unit, Calcutta, it was, inter alia, alleged that acting upon an intelligence, a batch of Officers of the Narcotic Control Bureau, Eastern Zonal Unit, Calcutta intercepted the appellant at a place on Raja Ram Mohon Roy Sarani in front of City College, Calcutta at 8 p.m. on 4.9.1995. On being challenged the appellant voluntarily brought out from his right pocket of the trouser a polythene packet containing some brown colour powder and handed over the same to the Officer in presence of two independent witnesses. A small quantity of the said substance was tested with field test kit and it responded positive to the taste of heroine. Said substance believed to be heroine was found to measure 100 gms. in weight.

Accordingly, said substance was seized u/s 43 of the NDPS Act in presence of the two independent witnesses and other persons. Samples in duplicate of 5 gms. each were drawn from the said seized substance for chemical test and the said two samples so drawn and the balance quantity of the seized substance were kept in three separate envelopes and were sealed upon the signature/LTI of the appellant, two independent witnesses and the seizing Officer. Thereupon the appellant was served with notice u/s 67 of the said Act and he accordingly accompanied the Officers of the seizing party to the Narcotic Control Bureau office, Calcutta. On interrogation as well as in his written statement dated 4.9.1995 and 5.9.1995 the appellant admitted his guilt for possessing and transporting the seized substance. Thereafter, the appellant was shown arrested on 5.9.1995 at 10.30 p.m. u/s 41 of the NDPS Act. The representative sample already drawn from the seized substance was sent to the chemical laboratory, Customs House, Calcutta for chemical analysis and ultimately the chemical examiner in his report dated 28.9.1995 certified that the sample so analysed responded positive to the taste of heroine. In these circumstances appellant appeared to have violated the prohibitions provided by or u/s 8 of the Act rendering him liable for punishment u/s 21 thereof. On the basis of the said complaint learned Special Court took cognizance of the offence.

3. On the basis of the materials on record the learned Special Judge framed a charge u/s 21 of the Act for possessing 100 gms. of heroine in contravention of the said Act. To the said charge, appellant pleaded not guilty. In course of the trial prosecution in all examined in this case 7 PWs. Appellant adduced no evidence on his behalf. His defence was that of complete denial of the prosecution case is alleged. On conclusion of the trial appellant was convicted and sentenced as already stated.

4. We have heard learned counsel for the appellant as also learned counsel for the Narcotic Control Bureau. Both of them have taken us through the evidence on record.

5. Various points were agitated before us by the learned counsel for the appellant for setting aside the impugned judgment. First contention of the learned counsel for the appellant is that Section 42 of the Act applies to this case and requirements of Section 42 having not been complied with, the trial was vitiated and hence the appellant is entitled to acquittal. We will first deal with the first contention of the appellant.

6. The admitted position is that seizure was made in the evening at about 8 p.m. on road in front of a college in Calcutta. Seizure was not made in any building, vehicle or enclosed place. Section 42(1) provides that 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 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 sun set (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; (d) and 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 drugs or substance. Proviso thereto further provides that if such Officer has reason to believe that a search warrant or authorization 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. Sub-section (2) of Section 42 further provides 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. Relying upon the provision of Section 42, it was contended by the learned counsel for the appellant that as seizure was made by the seizing party acting upon some intelligence, it was their statutory obligation to reduce such intelligence/information into writing and also to forward such writing to their immediate official superior. He further contended that it is not the case of the prosecution that, such intelligence/information was ever reduced into writing nor any such writing was proved during the course of the trial. It is also the case of the appellant that such information/intelligence was not forwarded to immediate official superior in accordance with the legislative mandate as provided under Sub-section (2) of Section 42. Relying upon these circumstances and in view of the aforesaid provision of Section 42 of the Act, it is contended by the learned counsel for the appellant that the prosecution is vitiated and hence the impugned judgment should be set aside.

7. On the other hand learned counsel for the Narcotic Control Bureau drew our attention to Section 42 and Section 43. His submission is that Section 42 applies when search, seizure etc. are made in any building, conveyance or enclosed place. But in the present case search, seizure etc. having been made in an open place on a public road, Section 42 cannot apply in respect of such search and seizure. With reference to Section 43 it is also contended by the learned counsel

for the Narcotic Control Bureau that when search and seizure etc. are made in open place on a public road or a public place, it is Section 43 which should apply and not Section 42. Now, Section 43 provides that any Officer of any of the departments mentioned in Section 42 may (a) seize in any public place or in transit any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under chapter (iv) has been committed, and, along with such drug or substance any animal or conveyance or article 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 an offence punishable under chapter (iv) relating to such drug or substance; (b) detain and search any person whom he has reason to believe to have committed an offence punishable under chapter (iv), and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company. The explanation thereto further provides that for the purposes of Section 43, the expression public place includes any public conveyance, hotel, shop or other place intended for use by or accessible to the public. According to the learned counsel for the Narcotic Control Bureau, it would be evident from marginal note of the section that Section 43 relates to seizure and arrest made in public places. The explanation to Section 43 also clearly indicates that Section 43 relates to search and seizure made in public places. In respect of search and seizure made in public places, Section 42 has no manner of application. The search and seizure at public places is guided by Section 43 only. Hence to search and seizure made at public places, requirements of Section 42 are inapplicable. Now recording of the intelligence/information received by the seizing party in writing before search/seizure were made will not vitiate the trial inasmuch as these requirements are not at all applicable in case of search and seizure made at public places. Admittedly search and seizure made in this case from the appellant were on public road.

8. Mr. Sen, the learned counsel for the Narcotic Control Bureau referred to the cause title of the remand report under which the appellant was for the first time produced before the learned Special Court after his arrest. In the cause title it has been clearly stated that this complaint related seizure of 100 gms. of brown powder substance believed to be heroine and arrest of the appellant u/s 43 of the Act. He further contended that the search and seizure were made in this case u/s 43 and not u/s 42. Therefore, there is no justification to smuggle the requirements of Section 42 into a case fully covered by Section 43 of the Act. In support of his contention learned counsel for the Narcotic Control Bureau referred to a Constitution Bench decision of the Apex Court in the State of Punjab Vs. Baldev Singh, . Mr. Sen drew our attention particularly to paragraph 10 of this judgment of the Apex Court. In paragraph 10 of the decision it was observed by the Apex Court as follows:--

"The proviso to Sub-section (1) lays down that if the empowered Officer has reason to believe that a search warrant or authorizations cannot be obtained

without affording opportunity for 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. Vide Sub-section (2) of Section 42, the empowered Officer who takes down information in writing or records the grounds of his belief under the proviso to subsection (1), shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the powers of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting u/s 43 of the Act, the empowered Officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

9. Relying upon the aforesaid observations of the Apex Court Mr. Sen, learned counsel for the Narcotic Control Bureau submitted that requirements of Section 42 cannot have any application whatsoever to the facts of the present case. In the present case as the search and seizure were made on a public road, and hence the case is fully covered by Section 43 where requirements of Section 42 are totally inapplicable.

10. On the other hand, learned counsel for the appellant contended that as the process of search and seizure was made pursuant to some information/intelligence received by the seizing party, the requirements of Section 42 must be held to be applicable to the present case irrespective of whether search and seizure etc. were made at public place or not. In this connection learned counsel for the appellant heavily relied upon a subsequent decision of the Apex Court in Beckodan Abdul Rahiman Vs. State of Kerala, . From the facts of that case as narrated in paragraph 3 of this decision of the Apex Court it appears that according to prosecution in that case the Sub-Inspector of police received a telephonic message at 8.30 a.m. on 6.10.1990 that narcotic drugs were being sold at T.C. Junction. He recorded the information in the G.D. and proceeded to the scene of occurrence in a jeep. On reaching the T.C. Junction at about 8.45 a.m. he saw the accused carelessly walking from the bus shelter towards kathu parambu side. Noticing the accused in suspicious condition, said Sub-Inspector along with his party approached the accused and after disclosing his identity searched the person of the accused in presence of witnesses. It was found that inside the dhoti which the appellant was wearing opium had been concealed in a polythene bag. As he was found unauthorisedly possessing the opium, he was arrested and the opium so seized was weighed to be 11 gms. From the narration of facts of that case it is apparent that search and seizure were made on a public place.

11. After narrating the aforesaid facts in the case of Beckodan Abdul Rahiman (supra), the Apex Court further came to a finding that the information recorded in the G.D. was not forwarded as required by or under Sub-section (2) of Section 42 to the immediate official superior. For this reason the Supreme Court in the aforesaid case held in paragraph 6 as follows:-

"We are of the firm opinion that the provisions of Sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted. Both the trial Court as well as the High Court have failed to consider this aspect of the matter which warrants the setting aside of the impugned judgment."

12. It needs to be mentioned that while coming to above quoted conclusion Supreme Court also considered another decision of the Apex Court in State of Punjab v. Baldev Singh that when search and seizure are made at public place, requirements of Section 42 are inapplicable have not been dealt with by the subsequent decision of the Apex Court in the case of Beckodan Abdul Rahiman, Learned counsel for the appellant while relying upon the decision of the Apex Court in Beckodan Abdul Rahiman case submitted that as requirements of Section 42 in reducing the information/ intelligence in writing was not complied with, It must be held the trial was vitiated and hence impugned judgment must be set aside. Learned counsel for the appellant relied upon another decision of the Supreme Court in Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, . The facts as narrated by the Apex Court in this decision are that Inspector of Police received an information that the accused of that case was trying to transport charas upto Shahpur in an auto-rickshaw. With police force the Inspector proceeded to the main road in search of the contraband movement at about 4 p.m. they sighted the auto-rickshaw which was then driven by the accused. The raiding party stopped it and on search recovered four gunny bags placed inside the vehicle. Police took the vehicle to the Police Station and when the gunny bags were opened, 10 packets of charas were found concealed therein. Value of the said contraband was estimated to be Rs. 5.29 lakhs. In that case the contention of the accused was that the requirements of Section 42 were not complied with and hence the impugned judgments by the trial Court as well as the High Court in appeal holding the accused to be guilty were vitiated. It was admitted case of the prosecution that the information so received about movement of charas in a vehicle on a public road was not reduced into writing nor any such writing was sent up immediately to the Superior Officer. In that case also it was contended on behalf of the State that the search and seizure in that case were made at a public place and, therefore, requirements of Section 42 were not applicable. The search and seizure were made at a public place and hence Section 43 covered the case fully and in such circumstances the raiding party has absolutely no obligation to reduce the information into writing or to forward the same to Superior Officer. And hence requirements of Section 42 were inapplicable. Despite the aforesaid in this case the Apex Court came to a

conclusion that non-compliance of the requirements of Section 42 has vitiated the trial of the case despite the fact that the search and seizure were made at a public place.

13. Similar view was reiterated by the Apex Court in a subsequent decision in *Razak v. State of Kerala*, 2000 SCC (Cri) 829. In this case Sub-Inspector of Police received a reliable information that the accused was selling brown sugar at a particular place. It was admitted by the prosecution witnesses during cross-examination that the Sub-Inspector did not reduce such information into writing nor such information was forwarded to his immediate Superior Officer. Acting upon such information search/seizure were made. From the narration of facts of that case as given in the judgment of the Apex Court it further appears that the search/seizure etc. were made at a public place like bus stop. In the context of these facts the Apex Court in this case held that despite search and seizure having been made at a public place but as search and seizure were made pursuant to an information received by the raiding party, it was their statutory obligation to reduce such information into writing and to forward such information to immediate Superior Officer before embarking upon search and seizure at a public place. According to the Apex Court the provisions of Section 42 are also applicable even if search/seizure are made at a public place provided such search and seizure were made pursuant to an information received in this regard. Therefore, the Apex Court concluded that non-compliance with requirements of Sub-section (1) and (2) of Section 42 vitiated the entire trial and accordingly set aside the judgment of conviction and sentence of the accused in that case. It seems from all these decisions of the Apex Court that if search and seizure are made pursuant to an information received in this connection, it is obligatory on the part of the raiding party to reduce such information into writing and to forward the same to Superior Officer irrespective of whether such search and seizure are made at a public place.

14. Similar view has been adopted by a Full Bench of the Bombay High Court in *Jayantilal Modi v. State of Maharashtra* 2002(1) Crimes 374.

15. From the aforesaid decisions of the Apex Court as well as of the Full Bench of the Bombay High Court, it appears to us that in all these cases an attempt has been made to distinguish the law laid down by the Supreme Court in *Baldev Singh's* case by holding that if search/seizure etc are made pursuant to information received, it is the obligation of the raiding party to first reduce such information/intelligence into writing and to forward the same to the immediate Superior Officer before embarking upon such search/ seizure irrespective of whether same are being made at a public place or not. Accordingly we have no option but to follow the law as laid down in the aforesaid decisions of the Apex Court and also the Bombay High Court that if search and seizure etc. are sought to be made pursuant to some information received in this regard, same shall first be reduced into writing and shall be forwarded to immediate Superior Officer of the department before embarking upon such search and seizure.

16. In view of our aforesaid conclusion on the basis of aforesaid decisions of the Apex Court and Full Bench of the Bombay High Court, we are of the view that other points agitated on behalf of the appellant are redundant and we decline to give any decision on those other points.

17. Accordingly, we hold that as the raiding party did not reduce the information so received by it in this regard and as the same was not forwarded to the Superior Officer of the department before embarking upon the search and seizure in question, the trial was clearly vitiated and the impugned judgment must be set aside on that ground alone.

Accordingly, we allow this appeal and set aside the impugned judgment of conviction and sentence. We further direct that the appellant shall be set at liberty forthwith.

G.C. De, J.

18. I agree.