

(2018) 04 RAJ CK 0104

In the Rajasthan High Court

Case No : Criminal Misc(Pet.) No. 2436, 1919 of 2017

Baljeet Singh @APPELLANT@Hash State of Rajasthan

Date of Decision : 03-04-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482

Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 8, 15, 25, 41, 42, 43

Indian Penal Code, 1860 — Section 482, 483

Constitution of India, 1950 — Article 141

Citation : (2018) 04 RAJ CK 0104

Hon'ble Judges : SANDEEP MEHTA, J

Bench : Single Bench

Advocate : S.D. Purohit, Rajesh Bhati, M.S. Panwar

Final Decision : Dismissed

Judgement

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The instant misc. petition under Section 482 Cr.P.C. has been preferred on behalf of the accused petitioner Baljeet Singh with a prayer for quashing

of entire criminal proceedings pursuant to the charge-sheet filed against him before the special court NDPS Act cases after investigation of the FIR

No.111/2016 registered at the Police Station Gulabpura, District Bhilwara for the offences under Sections 8/15, 8/25 of the NDPS Act and Sections

482 and 483 IPC.

Facts in brief are that Shri Mahendra Singh, Sub-Inspector and his team of police officials of Police Station Gulabpura were conducting a routine

nakabandi on the National Highway No.79. It is alleged that at around 12.10 am., the police party flagged down a suspicious looking white colored

Safari car bearing registration No.MH-04-CT-5200. The driver of the car sped the car away in an attempt to escape from the nakabandi. The vehicle

collided against the barricades erected by the police party. The driver abandoned the vehicle about 100 mtrs. from the barricades and tried to escape.

Two constables Shrawan Kumar and Sanjay Kumar were sent in his pursuit. Meanwhile, the car was inspected. It bore signs of damage owing to

collision with the barricades. On looking from the rear window, some gunny bags/ plastic bags were seen lying in the vehicle and poppy straw like

smell was emanating therefrom. The two constables who had been sent to pursue the fled driver of the vehicle brought back a man who identified

himself to be Baljeet Singh son of Gurucharan Singh (the petitioner herein). He was having few injuries and upon inquiry being made, Baljeet Singh

told that he got injured by a fall while trying to escape from the police party. On further inquiry being made about the bags lying in the suspect

vehicle, Baljeet Singh replied that the same contained poppy straw. The offending vehicle was brought back to the nakabandi point and search thereof

was conducted. It was found that a total of 107Kgs. of poppy straw packed in gunny bags was concealed in the vehicle being driven by the present

petitioner. The requisite seizure, sampling procedure was carried out at the spot. While the car was being searched, a duplicate number plate bearing

Registration No.HR-26-BF-9588 was also recovered therefrom. The accused was arrested and thereafter, the Sub-Inspector Mahendra Singh

returned to the police station and presented a report whereupon, an FIR No.111/2016 was registered at the Police Station Gulabpura for the offence

under Section Sections 8/15, 8/25 of the NDPS Act and Sections 482 and 483 IPC and investigation commenced. On an inquiry being made about the

second registration number from the concerned Transport Office, a reply was received that the car was owned by the petitioner and approval to

transfer the registration had been issued. After investigation, a charge-sheet was filed against the petitioner for the offences under Sections 8/15, 8/25

of the NDPS Act and Sections 482 and 483 IPC. The petitioner has now approached this Court by way of this misc. petition with a prayer for

quashing of the FIR, the charge-sheet and all proceedings sought to be taken against him in furtherance thereof.

Mr. S.D. Purohit learned counsel representing the petitioner relied upon the Supreme Court decision in the case of State of Punjab vs. Balbir Singh

reported in AIR 1994 SC 1872 and this Court's judgment in the case of Gopal & Ors. vs. State of Rajasthan (S.B. Criminal Misc. Petition

No.3073/2014) decided on 01.09.2017 and contended that ex-facie, as the seizure was made by Mahendra Singh, Sub-Inspector who was not posted as incharge of the Police Station Gulabpura at the relevant point of time, therefore, the entire seizure and search proceedings are vitiated because the same were effected by an officer not expressly authorised in this regard of the governing act. He urged that Section 42 of the NDPS Act clearly applies to the case at hand and since, the seizure officer was not authorised under Section 41/42 of the Act to conduct the search proceedings, manifestly, the seizure is bad in the eye of law and the entire proceedings are vitiated. On these grounds, he implored the Court to quash the impugned charge-sheet and all subsequent proceedings sought to be taken thereunder against the petitioner.

Per contra, learned Public Prosecutor vehemently opposed the submissions advanced by the petitioner's counsel and contended that both the judgments relied upon by Shri Purohit in support of his contentions have no application to the case at hand because the search and seizure was conducted during a routine nakabandi from a vehicle in transit at a public place and therefore, the proceedings would be covered by Section 43 of the NDPS Act which does not require any prior/ special authorization of the officer conducting search and seizure. He further urged that the Hon'ble Supreme Court, in the decisions of State of Rajasthan vs. Rajendra Singh & Ors. (Criminal Appeal No.513 of 2005), and State of Rajasthan vs. Bheru Lal reported in (2013) AIR (SCW) 3414 has conclusively resolved the matter and the issue put beyond the pale of doubt. In both of these judgments, it has been laid down that if a search is made at a public place, the officer taking search is not required to hold an authorization under Section 41/ 42 of the NDPS Act. He urged that as the search in the case at hand was undertaken on the National Highway No.79 and because the offending vehicle was stopped while it was in transit, manifestly, the provisions of Section 43 of the NDPS Act would apply and the ratio of this Court's judgment in Gopal's case (supra) and the Supreme Court decision in Balbir Singh's case (supra) have no application whatsoever in the present situation.

They thus implored the Court to reject the misc. petition as being merit less.

I have given my thoughtful consideration to the arguments advanced by the learned counsel for the parties and have gone through the material

available on record. The relevant provisions of law around which the entire controversy hinges i.e section 41,42 and 43 of the NDPS Act are quoted

herein below for ready reference:-

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 this Act, 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 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.

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the

Central Government including the paramilitary forces or the armed forces 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 this Act or that any narcotic drug or psychotropic substance or

controlled substance in respect of which any offence 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 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 such 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

including para-military forces 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 persons 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.

[43.Â Power of seizure and arrest in public place. 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 or controlled substance in respect of which he has reason to

believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to

confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence

punishable under this Act 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;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any

narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and

any other person in his company. Explanation. For the purposes of this section, the expression— ""public place"" includes any public conveyance, hotel,

shop, or other place intended for use by, or accessible to, the public.â??

It is an admitted position emerging from the record that the seizure was made during a routine nakabandi without there being any prior information by

the Sub-Inspector Shri Bhawani Singh from a vehicle in transit through a National Highway which is a public place. Thus manifestly, the entire search

and seizure proceedings would be governed by Section 43 of the NDPS Act and not by Sections 41 or 42 thereof so as to question competence of the

seizure officer in reference to these provisions. The requirement of examining authorization of the seizure officer would only arise, had the search

been conducted in furtherance of a prior information from an enclosed space, conveyance and in any of the situations covered by Section 41/42 of the NDPS Act. Ex-facie, since the search and seizure proceedings were undertaken at a public place and as the vehicle carrying the contraband was stopped while in transit without there being any prior information, manifestly the provisions of Sections 41 and 42 of the NDPS Act would have no application whatsoever. As per Section 43 of the NDPS Act, any officer (above the rank of a constable) of any of the departments referred to in Section 41 and 42 of the NDPS Act, can carry out the search and seizure from a public place or in transit through a public place. Thus, the challenge laid by the petitioners to the validity of the search and seizure proceedings by referring to Sections 41 and 42 of the NDPS Act is totally frivolous and unsustainable.

In the cases of Gopal & Ors. vs. State of Rajasthan and Surja Ram vs. State (S.B. Cr. Misc. Petition No.315/2016) decided on 13.09.2017, relied upon by Shri Purohit, the search and seizure was conducted from vehicles in transit through public areas. However the learned single bench, while deciding the matters, did not consider the statutory provision viz. section 43 of the act which clearly governs the search and seizure and went on to hold that the proceedings were vitiated as the seizure officer was not authorized under Section 41 of the act. Thus both the judgments are silent on the issue that the search was made from vehicles/ conveyance carrying contraband narcotic through a public place and thus, the proceedings would be governed by Section 43 of the NDPS Act. As has been discussed above, questioning authorization of the officer conducting the search and seizure is immaterial when the search is conducted without there being any prior information in the situations governed by Section 43 of the NDPS Act. The aspect of considering the authorisation of the seizure officer would only arise when the seizure is made within the specific confines of the situations defined in Sections 41 and 42 of the Act. Hence, considered in light of the facts of the case of Gopal and Surja Ram, it has to be held that as the Court did not consider the specific provision of law viz. Section 43 of the NDPS Act governing the situation and hence, both the judgments do not lay down the correct proposition of law as suffering from vice of sub-silentio.

The searches under Sections 41 and 42 of the NDPS Act are essentially

conducted in furtherance of information either received personally or from any other source regarding commission of the offences under the NDPS Act whereas those conducted under Section 43 of the Act are basically what can be termed as surprise checks without any prior information regarding commission of such offence. The said marked distinction in the two sets of statutory provisions puts it beyond pale of doubt that a surprise check may be made by any police officer from a public place or while the contraband is in transit without being specially empowered in this behalf whereas, the search conducted in furtherance of information/ knowledge either personal or received from other source has to be made by an officer specially empowered in this behalf. This marked difference in the two provisions was not considered in the cases of Gopal or Surja Ram.

In the case of State of Punjab vs. Balbir Singh (supra), Honâ??ble the Supreme Court has not laid down any preposition whereby, it can be adjudged that an officer conducting a search under Section 43 of the NDPS would required to hold an authorisation under Section 41 of the Act. Thus, the said judgment is also of no aid to the petitioners. The said judgment deals with and has laid down general principles governing searches and seizures under the NDPS Act.

Honâ??ble the Supreme Court in the case of State of U.P. & Anr. vs M/S. Synthetics And Chemicals Ltd. & Anr., reported in (1991)4 SCC 139, considered in detail the legal principalsÂ of sub-silentio and per incuriam and held that an earlier judgment even if passed by a Larger Bench does not take account of a specific provision of law and passes the judgment in ignorance thereof then, such judgment has to be termed as per incuriam/subsilentio and would not have any precedent value. Honâ??ble the Supreme Court held as under:

â??38. The dispute is about levy of purchase tax on industrial alcohol. The High Court held that the State legislature was competent to enact a law imposing purchase tax on it in exercise of power under Entry 54 of List II. But it struck down the levy as it would disturb price structure regulated by Central Government. It was held that control of alcohol industry having been taken over by the Parliament, for purpose of regulation and development the State stood denuded of its taxing power under Entry 54 of List II to the extent the field of price fixation was covered by the price control order

issued by the government. And the purchase price being component of price fixation which squarely fell within the power of Central Government the

imposition of purchase tax amounted to intrusion into the forbidden area of price fixation by Central Government. Support for this was drawn,

principally, from the two Constitution Bench decisions in *India Cement Ltd, v. State of Tamil Nadu* and *Synthetic and Chemicals v. State of U.P.* The

first was relied for the principle that even a taxing legislation by the State could be invalid to the extent it trenched on Central legislation on the same

subject. And the latter for the conclusion that, however, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl

Alcohol (Price Control) Orders sales tax cannot be charged by the State on industrial alcohol. Reliance on *India Cement Ltd.*⁴ was under complete

misapprehension. The State in that case attempted to levy case on royalty. It was held to be invalid. To save it the State attempted to justify it as a tax

in exercise of power under Entry 50 of List II. The submission was negative as the legislative power of State under Entry 50 of List II was subject to

any limitation imposed by the Parliament by law relating to mineral development. The bench held that in view of the Parliamentary legislation under

Entry 54 of List I and the declaration made under Section 2 and provisions of Section 9 of the Act the State legislation was overridden to that extent.

No such restriction or limitation is placed under Entry 54 of List II except that the exercise of power has been made subject to the provisions of Entry

92 of List I.

39. But the problem has arisen due to the conclusion in the case of *Synthetic and Chemicals*. The question was if the State legislature could levy vend

fee or excise duty on industrial alcohol. The bench answered the question in the negative as industrial alcohol being unfit for human consumption the

State legislation was incompetent to levy any duty of excise either under Entry 51 or Entry 8 of List II of the Seventh Schedule. While doing so the

bench recorded the conclusion extracted earlier. It was not preceded by any discussion. No reason or rationale could be found in the order. This gives

rise to an important question if the conclusion is law declared under Article 141 of the Constitution or it is per incuriam and is liable to be ignored.

40. *Incuria* literally means carelessness. In practice *per incuriam* appears to mean *per ignoratium*. English courts have developed this principle in

relaxation of the rule of stare decisis. The quotable in law is avoided and ignored if it is rendered, in ignoratium of a statute or other binding authority.

(Young v. Bristol Aeroplane Co. Ltd. {(1944) 1KB 718 : (1944) 2 All ER 293}). Same has been accepted, approved and adopted by this Court while

interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey {(1962) 2

SCR 558 : AIR 1962 SC 83} this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench

extracted a passage from Halsburys Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such

conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It

has been explained as rule of sub-silentio. "A decision passes subsilentio, in the technical sense that has come to be attached to that phrase, when the

particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In

Lancaster Motor Company (London) Ltd. v. Bremith Ltd. {(1941) 1KB 675,677 } the Court did not feel bound by earlier decision as it was rendered

without any argument, without reference to the crucial words of the rule and without any citation of the authority. It was approved by this Court in

Municipal Corporation of Delhi v. Gumam Kaur. {(1989) 1 SCC 101} The bench held that, precedents sub-silentio and without argument are of no

moment. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not

express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is

contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion

is not ratio decidendi. In Shama Rao v. State of Pondicherry, AIR 1967 SC 1680 it was observed, "it is trite to say that a decision is binding not

because of its conclusions but in regard to its ratio and the principles, laid down therein". Any declaration or conclusion arrived without application

of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint

in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.â??

As an upshot of the above discussion, this Court is of the firm opinion that the challenge laid by the petitioners to the impugned charge-sheet on the

strength of the above decisions and on the ground that the seizure officer was not authorised to conduct the search and seizure is without any

foundation and cannot be sustained.

Hence, the misc. petition preferred by the petitioners under Section 482 Cr.P.C. seeking quashing of the charge-sheet and the subsequent proceedings

fails and is hereby dismissed.