

(1996) 07 GAU CK 0025

In the Gauhati High Court

Case No : Criminal (Jail) Appeal No. 2 of 1990 with Criminal Miscellaneous Application No. 32 of 1995

Beikhokim Alias Veikhokin Kukini

APPELLANT

Vs

State of Manipur

RESPONDENT

Date of Decision : 12-07-1996

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 42(1)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 42(1)

Citation : (1996) 2 GLJ 435 : (1996) 2 GLR 427 : (1996) 2 GLT 449

Hon'ble Judges : B.N.Singh Neelam, J; S.Barman Roy, J and V.Dutta Gyani, J

Bench : Full Bench

Advocate : N.K.Singh, Advocates appearing for Parties

Judgement

V. Dutta Gyani, J.

While deciding a Jail Appeal No.2 of 1990, by appellant Beikhokim against her conviction under section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act), a Division Bench of this Court vide order dated 16.5.94 (1994 (2) GLJ 457) has referred the following question :

1. "Whether recording of the information as required under section 42 (;1) of the Act is mandatory in a case where no prejudice" was caused to the accused at the time of search, and seizure of the contraband goods." for its decision by an "appropriate" Bench, accordingly this Full Bench has been constituted."

2. Restricting ourselves to the question as referred, it is vital to see, at what limited area the question is aimed. The question is in two parts of clauses. Whether recording of information as required under section 42 (1) of the Act is mandatory ? It is the subordinate qualifying clause, (in a case) where no prejudice is caused to the accused at the time of search and seizure of contraband, which holds the key. Really speaking, the question therefore as posed is, whether in a case where no prejudice is caused to the accused at the

time of search and seizure of contraband, recording of the information under section 42 (1) of the NDPS Act is mandatory. It is thus clear from the question itself, that it does not envisage or seek an answer to a general proposition of law, but restricts, itself to a case where no prejudice is caused to the accused. Now, causing of prejudice to an accused at the trial, would depend on facts and vary from case to case, eventually giving rise to yet another question, whether it is actual prejudice or likelihood of prejudice being caused to an accused in a given case, would necessarily depend on facts, the shades of prejudice are¹ so myriad and mercurially fluctuating that it admits of no singular answer.

3. It is the general proposition of law whether recording of information under section 42 (1) of the NDPS Act is mandatory ? Irrespective of the question of prejudice to the accused, that we propose to take up for consideration. If the provision is mandatory, then it must be complied with in the manner required by law. No question of prejudice arises nor can any departure be made or justified on that account. The Privy Council, as back as 1936 in *Nazir Ahmed vs. King Emperor*, AIR 1936 PC 253 has held in unequivocal terms that if a statute requires a thing to be done in a manner it should be done in that manner or not at all other methods of performance are necessarily forbidden. The principle cannot be diluted or departed from, by introducing "prejudice", actual or likely being caused or not being caused to the accused. Before examining the proposition, we would like to add that the Bench referring the question, has already recorded its opinion, in the following words :

"Accordingly we are of the opinion that reducing of the information in writing as required under section 42 (1) and sending of report thereof are not mandatory."

4. It would not be out of place to note that *Nazir Ahmed* (supra) has been followed by the Supreme Court in several cases, to noted below :

(1) *Shiv Kumar Chaddha vs. MPL Corporation*, (1993) 3 SCC 161.

(2) *Kehar Singh vs. Delhi Administration*, (1988) 3 SCC 609.

(3) *AR Antulay vs. Ramdas Nayak*, (1984) 2 SCC 500.

(4) *Sampuran Singh vs. State of Punjab*, (1982) 3 SCC 200. Section 42 of the NDPS Act read as follows :

"42. Power of entry, searchseizure 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 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 of the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after reconsidering the grounds of his belief.

(2) Where as officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

5. In order to have its true import and implication the section should be read in juxtaposition with section 41, which deals with the Magistrate's power to issue warrant of arrest, and for search. When a Magistrate acts under section 41 of the Act, naturally there is written record, it cannot be a verbal matter. There is no difficulty so far as section 41 is concerned. The problem relates to section 42 of the Act, subsection (1) of section 42 empowers the officer mentioned therein to enter into and search any building conveyance or place seize any substance or material, detain and arrest any person without warrant but this power is not absolute, it is subject to a rider, as is evident from the language of the section itself particularly the clause

"If he has reason to believe from personal knowledge or information given by any person and taken down in writing." (emphasis supplied)

6. A Division Bench of this Court, in its judgment as reported in 1990 (2) GLJ 309 has held that the provisions of section 42 (1) and 42 (2) of the NDPS Act are mandatory, so also the provisions of sect, ii 55 of the Act.

7. Dr. Singh, learned counsel appearing for the accused appellant placing reliance

on the following two judgments of the Supreme Court as reported in (i) (1994) 3 SCC 299 (State of Punjab vs. Balbir Singh) and (ii) AIR 1995 SC 1157 (Mohinder Kumar vs. State of Goa) urged that in view of these two decisive pronouncements of the Supreme Court on the point the reference has virtually become redundant.

8. Learned Advocate General appearing for the State on the other hand maintained that it is the proviso to subsection (1) of section 42 of the Act which is mandatory, the rest of it is not. Copiously quoting from the judgment in Balbir Singh's case (supra), his whole endeavour was to show that it is the proviso to section 42 (1), which is mandatory and not the subsection itself. Balbir Singh's case came up for consideration in Mahender Kumar vs. State of Goa, AIR 1995 SC 1157. The Supreme Court in Balbir Singh's case while dealing with section 42 of the Act said :

"But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of section 41 and 42. Under section 42, the empowered officer even without a warrant issued as provided under section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape" of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief, subsection (2) of section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior." .

9. In Mahender Kumar's case (supra), the Supreme Court has noted it as a fact that section 42 (1) and 42 (2) were not complied with and the facts as noted by the Court further reveal that the search and seizure had taken place between 7.30 PM and 8.00 PM. It was purely accidentally and not on any prior information that the officer stumbled upon the contraband article. Learned Advocate General therefore appears to be correct in his submission on facts but the legal position as regards the proviso to subsection (1) of section 42 of the Act needs to be considered in some detail.

10. The normal function of proviso is to except something out of the preceding portion of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment as has been held by the Supreme Court in Kedarnath Jute Manufacturing Co Ltd vs. Commissioner Tax Officer, AIR 1966 SC 12. Justice Haridayatulla, as he then was, in Shah

Bhojraj Kuverji Oil Mills vs. Subhas Chandra Yograj Siifha. AIR 1961 SC 1596 stated :

"As a general rule a proviso :s added to an enactment to qualify or create an explanation to what is in the enactment."

11. This is the general function of a proviso as interpreted by the Apex Court The US Supreme Court in DM McDonald vs. United States of America, 279 L S 12 pointed out that for the proper construction of the proviso in question, consideration need not be limited to the subdivision in which it is found, the general purpose of the section may be taken into account and it cannot be gain said that the general purpose of section 42 of the NDPS Act is to afford protection to the accused against subsequent embellishment, improvements and tampering of record. Lord Phillimore in Besant vs. AG of Madras, ILR 43 Madras 146 (PC), dealing with the proviso appended to section 6 of the Indian Press Act, 1910 held.

it is well settled that there is no logic in the words of a proviso and that the plain meaning must be given to the word legislator."

12. Maxwell in his Interpretation of Statutes dealing with a proviso says :

"The true principle undoubtedly is that the sound interpretation and meaning of statute on a view of the enacting clause and proviso taken and construed together is to prevail."

13. This has been approved by the Privy Council in Commissioner of Stamp Duty vs. Atwill, (1973) 1 AH ER 576 (PC) and even by the Supreme Court in Tashildat Singh vs. State of UP, AIR 1959 SC 1012, which deals with the proviso to subsection (1) of section 162 CrPC.

14. Reading "the proviso, as it is, it comes into play where the normal procedure, of obtaining a search warrant or authorisation from a Magistrate as contemplated by section 41 of the Act, is not feasible, the empowered officer is duty bound to record his grounds of belief to justify departure from the ordinary course contained in section 41 of the Act, the information given to the officer must be recorded in writing. Reading section 41 and 42 (1) together, and applying the golden rule of harmonious construction, it is imperative that the information must be taken down in writing.

15. The Supreme Court in Balbir Singh's case has noted :

"But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of section 41 and 42. Under section 42, the empowered officer even without a warrant issued as provided under section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing

that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Subsection (2) of section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior."

16. In view of the foregoing discussion, our answer to the questions posed is that the recording of information as required under section 42 (1) of the Act, is mandatory

17. S. Barman Roy, J.I have had the advantage of perusing the opinion expressed by my learned brother Gyani, J. in his judgment. Even though I fully agree with the opinion expressed in the said judgment, yet considering the importance of the legal issue involved in this reference, it appears to me to be appropriate to add a few words of my own.

18. The question referred to us requires us to answer "whether recording of information as required under section 42 (1) of the Act is mandatory in a case where no prejudice was caused to the accused at the time of search and seizure of the contraband goods." Subsection (1) of section 42 of the Act provides that if any such empowered officer, as mentioned therein, has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotics drugs or psychotropic substance, in respect of which an offence punishable under Chapter IV of the Act 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 the door and remove any obstacle to such entry, (c) seize such drug or substance and all material 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 the 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 (b) 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.

19. Therefore, it is apparent that one of the requirements of section 42 (1) of the Act is that when an empowered officer wants to take any action contemplated thereunder between sunrise and sunset pursuant to any information given to him by any person, he has to take down the same in writing. However, subsection (1) of section 42 does not require any such empowered officer to record the grounds

of his belief that a search warrant or authorisation cannot be obtained without affording opportunity for concealment of evidence or facility for the escape of the offender. This is an fact the requirement of the proviso to section 42 (1) when search, seizure etc are sought to be made by the empowered officer in a building, conveyance or an enclosed place at any time between sunset and sunrise. Section 42 (1) contemplates search, seizure, arrest etc between sunset and sunrise and hence it further mandates that the information received from any person on the basis of which such action is sought to be taken between sunrise and sunset must be reduced in writing. Therefore, it does not require recording "the ground of his belief.

20. The question referred to us is whether recording of information in writing under section 42 (1) is mandatory or not ? In this reference we are not called upon to answer whether recording of the grounds of his belief as required under the proviso to section 42 (1) is mandatory or not. Submission of the learned Advocate General, Manipur, therefore, seems to have emanated from his failure to understand the question referred to us properly. Learned Advocate General submitted that the proviso to section 42 (1) requires recording of "the grounds of his belief in the matter when search, seizure, arrest are sought to be made in building etc between sunset and sunrise and this requirement is certainly mandatory. His further contention is that section 42 (1) does not require recording of "the grounds of his belief."

21. Learned Advocate General is certainly correct in his submission that section 42 (1) does not require recording of "the grounds of his belief when search, seizure, arrest are sought to be made between sunrise and sunset. We are required to answer the question "whether recording of information as required under section 42 (1) of the Act is mandatory in a case where no prejudice was caused to the accused at the time of search and seizure of the contraband goods". Therefore, submission of the learned Advocate General seems to be absolutely irrelevant in the context of the question referred to us.

22. In fact this difference between the requirement of section 42 (1) and the proviso thereto was noted by the Supreme Court in *State of Punjab vs. Balbir Singh*, (1994) 3 SCC 299. In the last paragraph of paragraph 14 of the said decision was observed that "whether there was such reason to believe and whether the officer empowered acted in a bonafide manner, depends upon the facts and circumstances of the case and will have a bearing in appreciation of the evidence. However, if such information is given by any person, the same should be taken in writing as provided both under section 41 (2) and 42 (1).But under proviso to section 42 (1) if such empowered officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of offender, he may enter and search at any time between sunset and sunrise after recording the grounds of his belief. However, if such arrest, search or seizure are to be made by the empowered officer between sunrise and sunset, there is no such

mandatory provision for recording of the reasons to believe.

23. On the question whether recording of the information in writing, as required under section 42 (1) is mandatory or not, reference may also be made to subsection (2) of section 42 which provides that where an officer takes down any information in writing under subsection (1) or record grounds for his belief under the proviso thereto he shall forthwith send a copy thereof to his immediate superior official. This provision clearly brings out intention of the legislature to make the aforesaid provision under section 42 (1) regarding recording of the information, if any, in writing to be mandatory. In fact in the last subparagraph of paragraph 15 of the judgment in Balbir Singh's case (supra) Supreme Court clearly observed in unqualified and unambiguous terms that the aforesaid requirement of section 42 (1) is mandatory. Supreme Court in that case observed as follows:

"The object of NDPS Act is to make stringent provision for control and regulation of operations relating to those drugs and substance. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to section 42 (1). To that extent they are mandatory. Consequently the failure to comply with those requirements this affects the prosecution case and therefore vitiates the trial."

24. In paragraph 25 of the judgment in Balbir Singh's case, Supreme Court has summarised its conclusion. Its conclusions in sub paragraphs (2C) and (3) paragraph 25 are relevant for the present purpose and accordingly they are set out hereunder:

"(2C) Under section 42 (1) the empowered officer if has a prior information given by any person, 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 material 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 such search between sunset and sunrise, he must record the grounds of his belief.

To that extent this provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under section 42 (2) such empowered officer who takes down any information in writing or record the grounds under proviso to section 42 (1) should forthwith send a copy thereof to his immediate official superior. If there is total noncompliance of this provision the same affects the prosecution 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 tact in each case."

25. Conclusions of the Supreme Court in paragraph 15 and sub paragraph (2C) and 3 of paragraph 25 of its judgment in Balbir Singh's case have been expressed without any qualifying words. Therefore, there is absolutely no escape from the conclusion that the provision of section 42 (1) requiring the empowered officer to record the information, if any, in writing before he takes any action as contemplated thereunder is mandatory irrespective of whether noncompliance therewith causes any prejudice to the accused.

26. I am, therefore, in respectful agreement with the order passed by my brother V. Dutta Gyani, J.