
(2000) 12 DEL CK 0047
In the Delhi High Court
Case No : Criminal Appeal No. 248 of 1997

Kulwant Singh

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 13-12-2000

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 4, 41, 42, 50

Citation : (2001) CriLJ 1021 : (2001) 73 ECC 438 : (2001) 2 RCR(Criminal) 290

Hon'ble Judges : R.S. Sodhi, J

Bench : Single Bench

Advocate : R.L. Mehta, Sunil Mehta and T.R. Kakkar, for the Appellant; K.K. Sud, Addl. Solicitor General, Satish Aggarwala, Rajesh Manchanda, Sanjay Kataria, Naresh Gupta and Sunit Purohit, for the Respondent

Judgement

This Judgment has been overruled by : State Vs. Kulwant Singh, AIR 2003 SC 1599 : (2003) CriLJ 1527 : (2003) 86 ECC 33 : (2003) 2 JT 470 : (2003) 2 SCALE 11 : (2003) 9 SCC 193 : (2003) 1 SCR 995 : (2003) 1 UJ 755 : (2003) AIRSCW 982 : (2003) 2 Supreme 33

R.S. Sodhi, J.—Criminal Appeal 248 of 1997 seeks to challenge the judgment and order dated 24.5.1997 of the learned Additional Sessions Judge in Sessions Case No. 73/96 arising out of a complaint filed by the Narcotic Control Bureau (for short "NCB") through Mr. Surinder Singh wherein it is alleged that the accused, Kulwant Singh, on secret information dated 16.4.1996, (Ex. PW-4/B) was apprehended in front of Sachha Sodda Gurudwara while he was going in his Maruti car bearing DBG 4157.

2. A raiding party, on the aforesaid secret information, was constituted which comprised of Mr. Shailender Sharma, PW-5, Mr. Surender Singh, PW-4, Mr. Manoj Sharma, PW-3, Mrs. Suman Kumari, PW-10. Acting on the information, the aforesaid car was signaled to stop but it spread away and was, as already stated, apprehended in front of Sachha Sodda Gurudwara. On the evidence adduced

before him, the learned Judge found the appellant guilty of offence punishable u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "Act") and by his order dated 26.5.1997 sentenced him to rigorous imprisonment for ten years and a fine of Rs. 1,00,000/- and in default of payment of fine a further rigorous imprisonment for six months.

3. It was the case of the prosecution before the trial Court that two panchwitnesses , PW-1 and PS-2 were joined in the raiding party which attempted to stop the car and that PW-5 had to fire six shots at the car which caused minor damages to the car and the accused also received injury but was in his senses. Search was effected after notice u/s 50 of the Act was served upon the accused and warning given. On search of the vehicle, a sky blue polythene bag (Ex. P-4) was recovered. On opening the same it contained light brownish substance which was tested on the spot with the field testing kit and tested positive for heroin.

4. It is the case of the prosecution that as light had failed during the process of search, the recovered material was kept with PW-2, the panchwitnesses Mr. Balbir Singh inside the Sachha Sodda Gurudwara where the accused was also held in custody. The total weight of the recovered material was 0.980 Kg. Two samples of five grams were drawn and kept in two separate polythene bags. The recovered material as also the samples were sealed with the seal of NCB and paper slips signed by the accused, two panchwitnesses PW-4 and PW-5. Panchnama (Ex. PW-1/A) was drawn on the spot. Statement of the accused (ex. PW-3/D) was recorded u/s 67 of the Act. Subsequently, on the summons served upon him (Ex. PW-3/B) by Mr. Manoj Sharma, the accused was arrested vide Memo (Ex. PW-3/E). The sample was sent for analysis to the CFSL through Constable Devinder Singh (PW-8) and tested by PW-13. The report (Ex. PW-3/A) showed the substance tested positive for heroin.

5. On the basis of the investigation, charge dated 7.8.1996 was framed u/s 21 of the Act against the appellant for having been found in illegal and unlawful possession of 0.980 Kg. of heroin recovered from his vehicle No. DBG 5147. The prosecution in the usual manner tendered witnesses to prove their case and finally the learned Judge upon appraisal of the material before him came to the conclusion that the prosecution had successfully brought home the guilt of the offence punishable u/s 21 of the Act and accordingly convicted the accused-appellant by order dated 24.5.1997.

6. This case has been pending in this Court since 8.7.1997 and has come up for hearing nearly 37 times when the appellant, it appears, has been making attempts to have the matter adjudicated upon a question of law raised by him to show that the complaint filed by the NCB (Ex. PW-4/A) is without authority of law. It was argued even before the trial court that NCB has got no power to effect search, seizure and arrest without warrant or authorisation and, Therefore, search, recovery or action taken by NCB which forms the basis of the conviction is bad at law. This important question of law, as it appears, could not be

adjudicated upon for whatever reasons. I am of the opinion that this Court must address itself to this question of law immediately: it has wide ramifications. Therefore, I propose to dispose it of without further delay.

7. By Notification No. S.O. 96-E dated 17.3.1986 of the Ministry of Finance, Department of Revenue, published in the Gazette of India Extra Part-II, Section 3(ii), in exercise of the powers conferred by Sub-section (3) of Section 4 of the Act, the Central Government constituted an authority to be known as "Narcotic Control Bureau" which, according to the Notification, was subject to the supervision and control of the Central Government and provisions of the Order, required to exercise powers and functions of the Central Government for taking measures in respect of the following matters referred to in Sub-section (2) of Section 4, namely,

1. Co-ordination of actions by various officers, State Governments and other authorities under the principal Act, the Customs Act, 1962 (52 of 1962), the Drugs and Cosmetics Act, 1940 (23 of 1940) and by other law for the time being in force in connection with the enforcement of the provisions of the principal Act.

2. Implementation of the obligations in respect of counter-measures against illicit traffic, under:-

(a) the Single Convention on Narcotic Drugs, 1961;

(b) the Protocol of 1972 amending the aforesaid Convention ;

(c) the Convention on Psychotropic Substances, 1971; and

(d) any other international convention or protocol or other instrument amending an international convention relating to narcotic drugs or psychotropic substances which may be ratified or acceded to by India hereafter.

3. Assistance to concerned authorities in foreign countries and concerned international organisations with a view to facilitating co-ordination and universal action for prevention and suppression of illicit traffic in narcotic drugs and psychotropic substances.

8. The powers, Therefore, required to be exercised by NCB were circumscribed by the Order/Notification that brought it into existence, namely, those powers mentioned above.

9. At this juncture it would be necessary to advert to Section 4 of the Act which reads as under:

"4. Central Government to take measures for preventing and combating abuse of and illicit traffic in narcotic drugs, etc.

(1).....

(2) In particular and without prejudice to the generality of the provisions of Sub-section (1), the measures which the Central Government may take under that

sub-section include measures with respect to all or any of the following matters, namely:

(a) coordination of actions by various officers, State Governments and other authorities -

(i) under this Act, or

(ii) under any other law for the time being in force in connection with the enforcement of the provisions of this Act.

(b) obligations under the International Conventions ;

(c) assistance to the concerned authorities in foreign countries and concerned international organizations with a view to facilitating coordination and universal action for prevention and suppression of illicit traffic in narcotic drugs and psychotropic substances ;

(d) identification, treatment, education, after-care, rehabilitation and social re-integration of addicts ;

(e) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act and preventing and combating the abuse of narcotic drugs and psychotropic substances and illicit traffic therein.

(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or a hierarchy of authorities by such name or names as may be specified in the order for the purpose of exercising such of the powers and functions of the Central Government under this Act for taking measures with respect to such of the matters referred to in Sub-section (2) as may be mentioned in the order, and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers and take the measures, so mentioned in the order as if such authority or authorities had been empowered by this at to exercise those powers and take such measures."

10. It would be noticed that in Sub-section (3) of the aforesaid Section, the power lay with the Central Government if it considered it necessary or expedient so to do for the purposes of the Act to constitute an authority by such name as may be specified in the Order for the purposes of exercising such powers and functions of the Central Government under the Act for taking measures in respect of such matters referred to in Sub-section (2) or as may be mentioned in the Order. This authority could exercise the powers and take measures so mentioned in the Order as if such authority or authorities had been empowered by the Act to exercise those powers and take all such measures.

11. The Order bringing into existence NCB did not confer the power u/s 4(2)(e). Having Therefore, confined the powers of NCB to the aforesaid Notification, NCB

could not act beyond the powers that were conferred on it by its creator and became a creature of the statute.

12. In Section 41(2) of the Act, such officers, of gazetted rank of 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..... if he has reasons to believe from personal knowledge or information given by any person and taken in writing to the effect that any person has committed the offence punishable under Chapter IX or any narcotic drug or psychotropic substance in respect of which any offence has been committed which is punishable under Chapter-IV or any document or other article which may furnish evidence of the commission of such an offence has been 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 constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

13. It is evident from the reading of the aforesaid Section that only those officers can be empowered by a special or general order of the Central Government or State Government who are mentioned therein, NCB could not be one such authority, since it came into existence by a Notification dated 17.3.1988 under the Act and that too to perform those functions as enumerated in the Notification dated 17.3.1988.

14. By Special Orders No. 3776, 3777 and 3778 dated 1.11.1986 amendments were made to include NCB as an authority under Sections 41(2), 42, 53 and 67 of the Act. We have already seen that in Section 41(2), a Special Order or General Order could be passed in favor of authorities mentioned therein and/or in respect of other department of the Central Government/State Government.

15. It is the case of the State that NCB being a department of the Government could be authorised and empowered under Sections 41(2), 42, 53 and 67 of the Act to carry out functions mentioned in the Notification/Special Order Nos. 3776, 3777 and 3778, namely, power to enter, search, seize and arrest without warrant or authorisation etc. Therefore, in nutshell it is the case of the State that Section 4(2) is broad enough to enable an authority appointed there under to be further conferred with powers under Sections 41, 42, 53 and 67 of the Act. The cornerstone being that for the purpose of Sections 41, 42, 53 and 67 of the Act, NCB is a department of the Government and, Therefore, capable of exercising the powers conferred upon it by the Special or General Order.

16. To show that NCB is a department of the Government, the learned Additional Solicitor General has placed before me a letter dated 6.9.2000 appointing him as counsel to argue the present case. The letter head shows that NCB is a Department of Revenue. This, surely, cannot be an argument that can be taken seriously. It appears, the respondents are only arguing for the sake of it and are

not placing material on record to support their contention.

17. Another aspect of the case, to which I find a mention has been made in the written submissions although not argued before me, is that Section 75 of the Act empowers the Central Government to delegate its functions under the Act by way of a Notification. The delegation subject to the conditions specified in the Notification pertaining to powers and functions of the Central Government under the Act (except the power to make Rules) as it may deem necessary or expedient to the Board or any other authority or the Narcotic Commissioner. The "Board or any other Authority" is sought to be read as "NCB".

18. With great respect, I find no force in the arguments advanced before me by the learned Additional Solicitor General. In the first instance, a letter cannot make NCB ipso facto a department of the Government ; secondly, NCB cannot be termed as a "Department of the Central Government" for it is an authority created u/s 4(3) of the Act for the purposes mentioned in the Notification, namely, to take measures in respect of such matters referred to in Sub-section (2) as have been mentioned in the Special Order No. 96-E specifically excluding functions u/s 4(2)(e) of the Act. NCB is a creature of the statute and cannot be, in the absence of material, termed as a "Department of the Government."

19. Let us, for the purpose of testing the argument, deem NCB to be a Department of the Central Government with its powers being restricted by Special Order 96E to execute functions enumerated in Section 4(2)(e), surely these powers could not be enlarged by a Notification under Sections 41, 42, 53 or 67 of the Act as they would be violative of Section 4 which is the creator of NCB.

20. The next submission that Section 75 empowers the Central Government to delegate its functions under the Act, suffice it to say that no such power has been delegated u/s 75 of the Act upon NCB and the argument that this delegation is of those powers mentioned in Sections 41, 42, 53 and 67 of the Act is wholly misplaced . Both the powers i.e. u/s 75 and those sought to be conferred upon NCB by Notification/Special Order Nos. 3776, 3777 and 3778 are totally different. Powers under Sections 41, 42, 53 and 67 are not the delegated powers of the Central Government as envisaged in Section 75 of the Act and to mix the two would be to do violence to the principle of interpretation of statute.

21. Subordinate legislation cannot in any manner over-ride the substantive legislation and, Therefore, by Notifications powers could not be vested in the NCB which is a statutory creation u/s 4(3) to perform functions under Sections 41, 42, 53 and 67 of the Act which are reserved only for those authorities mentioned therein. NCB, not being a Department of the Government, could not be vested authority under Sections 41, 42, 53 and 67 of the Act.

22. From the discussion above, I have come to the conclusion that NCB is not the authority which is empowered to perform functions under Sections 41, 42, 53 or 67 of the Act, any investigation, recovery or proceedings taken by it under the

Act would be void ab initio and, Therefore, cannot be relied upon as material for the purposes of maintaining a prosecution for the purposes of conviction under the Act. For this proposition I need not elaborate more than to refer to the judgments of the Supreme Court in State of Haryana and others Vs. Ch. Bhajan Lal and others, State of Punjab Vs. Baldev Singh, etc. etc., , and State of Punjab Vs. Balbir Singh, as also in a recent judgment of the Supreme Court in Roy V.D. v. State of Kerala, JT 2000 (Supp.2) SC 481. In all these judgments it has categorically been held that any search, seizure effected by an officer not empowered, lacks the sanction of law and is inherently illegal and as such cannot form the basis of the proceedings in respect of the offence under the Act.

23. Consequently, without going into other aspects raised by the appellant, I quasi the order of conviction and sentence dated 24.5.1997 and acquit the appellant of all charges. The appellant shall be set at liberty forthwith, if not wanted in any other case.