
(1999) 12 BOM CK 0020

In the Bombay High Court

Case No : Criminal Appeal No. 465 of 1995

Longuram Tariram Thakur and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 15-12-1999

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 41, 41(1), 41(2), 41(3)

Citation : (2000) CriLJ 1654 : (2000) 4 MhLj 513

Hon'ble Judges : Vishnu Sahai, J;D.G. Deshpande, J

Bench : Division Bench

Advocate : Shrish Gupte and Sharmila Kaushik, for the Appellant; Usha Kejariwal, APP, for the Respondent

Final Decision : Dismissed

Judgement

D.G. Deshpande, J.—This appeal has been preferred by both the appellants i.e. the original accused against their conviction in NDPS Special Case No. 126 of 1993 by the Special Judge T.N. Nalawade, Pune, for offences u/s 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the N.D.P.S. Act") by which they were sentenced to suffer R.I. for ten years and to pay a fine of Rs. 1,00,000/- in default R.I. for two years.

2. Since Mr. Gupte counsel for the accused raised mainly two legal questions, we are narrating the facts of the case in brief.

P.W. 4 PSI Parameshwar Baburao Bhagat was attached to police chowky under Bundgarden police station on 12-10-1992. At about 19.00 hours he received an information that two persons were carrying a suit case containing large quantity of narcotic drugs at Pune S.T. stand and would shortly leave Pune by S.T. bus for Goa. PW 4 therefore called two panchas, sent intimation to the P.I. of the police station, obtained permission to carry out the raid and proceeded to the spot where they found the information was correct and two persons with the same description and two suit cases were there at platform No. 1 of the bus stand. He,

therefore, surrounded them with the police party and the panchas told them that they were required to be searched, apprised them of their right u/s 50 of the N.D.P.S. Act and examined the two suitcases which were found to contain about 8 kgs. and 9 kgs. of charas in small vials and tubes. The property was seized, packed, sealed and labelled and thereafter offence was registered against the accused. The entire property was thereafter sent to the C.A. and on receipt of C.A. report, the charge sheet was filed.

3. The defence of the accused, when the trial commenced was of denial. The prosecution thereafter examined five witnesses including the C.A. The Special Judge however accepted the prosecution case and convicted the accused, as stated above, It is this conviction that is challenged by the applicants-accused.

4. It was mainly contended by Mr. Gupte that firstly there is non-compliance of Section 50 of the N.D.P.S. Act and also noncompliance of Sections 41 and 42 of the N.D.P.S. Act. So far as Section 42 is concerned Mr. Gupte contended that it was admitted by PW 4 Mr. Bhagat that he had received prior information from somebody on phone in Marathi, by which along with the description of the accused he was informed that the accused were carrying charas in huge quantity along with them. According to Mr. Gupte PW 4 Bhagat did not reduce this information into writing and committed breach of the mandatory provision of Section 42 of the N.D.P.S. Act. Further, according to him P.W. 4 admitted in his cross examination that he had reduced the information in writing on a chit of paper which he did not maintain or preserve but which he tore away, and so far as Section 50 of the N.D.P.S. Act was concerned, it was contended by him that even though the officer P.W. 4 informed the accused that they could be searched by or before a Gazetted Officer or a Magistrate the accused were not made aware of their right as contemplated by the Full Bench decision of the Supreme Court in the case of State of Punjab Vs. Baldev Singh, , and therefore for noncompliance of these two provisions the accused were entitled for acquittal.

4. On the other hand it was contended by Ms. Kejariwal, APP for the State that so far as Section 50 of the N.D.P.S. Act was concerned there was compliance and at any rate there was substantial compliance and so far as Section 42 is concerned, the same was not applicable in the instant case.

5. The question is therefore whether Section 42 of the N.D.P.S. Act applies in the present case and whether the submissions made by Mr. Gupte have any legal basis. In order to appreciate the rival submissions, it is necessary to reproduce Sections 42 and 43 :

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 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 psycho tropic 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 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 forthwith send a copy thereof to his immediate official superior.

43. Power of seizure and arrest in public places.- 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, 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.

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.

6. Admittedly, the search in the instant case has taken place in open place i.e. at bus stand which is also a public place. However, according to Mr. Gupte Section 42(1) has to be divided into two parts as follows :

First part as : "Any such officer...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

Second part as : "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,-

According to Mr. Gupte the word or preceding the words "in respect of which an offence punishable under Chapter IV has been committed" and followed by "any document or other article...or enclosed place" creates two separate and distinct provisions in Section 42(1) itself and therefore according to him information received by an officer, he is legally bound to take down in writing. According to Mr. Gupte these provisions are mandatory and has to be followed irrespective of whether subsequent search has taken place in open place or in a building, conveyance or enclosed place.

7. Mr. Gupte placed reliance on the Judgment of the Supreme Court in the matter of State of Punjab Vs. Balbir Singh, in support of his argument and also relied upon the full bench judgment of the Supreme Court in the case of Baldev Singh. Our attention, in particular, was drawn to paragraphs 4, 8, 9, 10, 11 and 25 of the judgment in Balbir Singh's case, in that regard. In para 25 sub para (2C) the Supreme Court has observed as under at page 3718; of Cri LJ :

(2-C) u/s 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 materials 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 out such search between sunset and sunrise he must record the grounds of his belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

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

8. Even though we had minutely considered the judgment of the Supreme Court in Balbir Singh's case, we are unable to agree with the submissions made by Mr. Gupte for the following reasons :

9. Section 42 is included in Chapter V and it is preceded by Section 41. The title of Section 41 is "Power to issue warrant and authorisation" and title of Section 42 is "Power to entry, search, seizure and arrest without warrant or authorisation" and title of Section 43 is "Power of seizure and arrest in public places".

10. Section 41 has 3 Sub-Sections, 1, 2 and 3. Sub-section 1 lays down that a Metropolitan Magistrate or a Magistrate of first class or any Magistrate of second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom, or for the search, whether by day or by night, of any building, conveyance etc. in which he has reason to believe any narcotic drug etc. in respect of which an offence is committed are kept.

Sub-section (2) of Section 41 empowers an officer of the gazetted rank to authorise any officers subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building.

Sub-section (3) of Section 41 provides that the officer to whom a warrant under Sub-section (1) is addressed and the officer who is authorised under Sub-section (2) shall have all the powers of an officer acting u/s 42.

From the aforesaid provisions of Section 41 it is clear that either a Magistrate may issue a warrant for search, seizure and arrest, or a gazetted officer may issue such authorisation in that regard to a subordinate and in any case both, that is, the person to whom the Magistrate issues the warrant or the officer to whom authorisation is given will have powers to affect and carry out seizure or arrest.

10A. Wordings of Section 42(1) and Section 41(2) of the N.D.P.S. Act are almost identical. However, the difference between these two provisions is that in Sub-section (2) of Section 41 an officer of the gazetted rank is empowered to delegate his powers to a subordinate who is above the rank of peon, sepoy or constable; whereas Sub-section (1) of Section 42 allows any officer above the rank of peon, sepoy and constable to take action for enforcement of the N.D.P.S. Act in the nature of entry, search, seizure and arrest. Section 42(1) is therefore of wider implications than Section 42(2). u/s 41(2) an officer who is not of the gazetted rank cannot act without authorisation, whereas u/s 42(1) any officer above the rank of peon, sepoy and constable can act without any authorisation. Section 42(1) appears to have been included to enable the officers above the rank of peon, sepoy and constable to take quick and prompt action without being required to move the Magistrate for search warrant u/s 41(1) or (2), contact and consult their superiors for due authorisation u/s 41(2). Section 42(1) therefore

empowers every officer superior in rank to peon, sepoy and constable to take action necessary for enforcement of the N.D.P.S. Act.

11. Another distinguishing factor between two provisions of Section 42(2) and 42(1) of the N.D.P.S. Act is that the authorisation u/s 41(2) to a subordinate must follow from officer of the gazetted rank, whereas Section 42(1) does not put any restriction that the officer to act should be of the gazetted rank. It only lays down that such an officer should be superior in rank to a peon, sepoy and constable. This distinction also shows that the object of Section 42(1) was to empower everybody i.e. every officer superior in rank to peon, sepoy and constable to take prompt and quick action under the N.D.P.S. Act.

12. However there is a restraint in the powers conferred to these two types of officers, namely those of the rank of gazetted officer (as provided in Section 41(2)) and those who may not be gazetted officer but who may be superior in rank to peon, sepoy and constable as provided u/s 42(1) and that restriction is, officers acting u/s 41(2) may search, seize and arrest any time by day or by night. However, officers acting u/s 42(1) have been empowered only to act between sunset and sunrise. It appears from these distinguishing lines that officers who are not gazetted officers but who are above the rank of peon, sepoy and constable cannot on their own accord carry out search, seizure and arrest after sunset and between sunrise, that is, in the evening from sunset to the next day dawn/morning.

13. If the authority to carry out search or seizure flows from the Magistrate then there is no time restriction, neither any restriction about the post or status of the person carrying out all those orders of the Magistrate. If the authority flows from an officer of the gazetted rank as provided by Sub-section (2) of Section 41 then also there is no restriction of time but if any other officer who is not a gazetted officer but who is above or superior in rank to peon, sepoy or constable then his authority is restricted upto carrying out search and seizure between sunrise and sunset.

Such an officer of the last category, is however empowered to carry out search and seizure between sunset and sunrise after recording the grounds of his belief in case where the search, warrant or authorisation cannot be obtained to the detriment of the investigating agency or prejudice to the provisions of the N.D.P.S. Act. The proviso in other words makes it clear that if the search is to be carried out between sunrise and sunset as an emergency then the officer is not to record grounds of his belief.

14. There is also Sub-section (2) of Section 42 but before considering the provision of that sub section, we must again resort back to Sub-section (2) of Section 41 and Sub-section (1) of Section 42.

15. Sub-section (2) of Section 41 requires that if an officer of the gazetted rank is given information by any person then he has to reduce it into writing. Similarly, u/s 42(1) any officer who is superior to peon, sepoy and constable

receives any information then it has to be reduced into writing. It is clear from both these sections that writing down information is obligatory under both these provisions i.e. u/s 41(2) and 42(1) and the application in the former provision is on the officer of the gazetted rank and in the later it is the obligation of any other officer superior in rank to peon, sepoy and constable.

16. Since, however Section 42(1) enables an officer to act without authorisation, Sub-section (2) of Section 42 imposes an obligation upon him that whenever such information is reduced into writing or grounds of belief are recorded under the proviso then such an officer shall forthwith send a copy thereof to his immediate official superior.

17. It is pertinent to note that no such provision is made in respect of officers of the gazetted rank who act u/s 41(2). Obviously because the authority to carry out searches and seizure flows from these officers and therefore they are not required to communicate the information received by them to any superior officer. However, for officers acting u/s 42(1) they are acting without authorisation and that to in case of emergency and therefore they have been put under obligation to forthwith communicate the information, reduce it into writing by them or the grounds of their belief to act under the proviso.

18. Having distinguished these two Sections 41 and 42 as above, it has to be seen whether officers acting u/s 42(1) are required to take down in writing the information received by them in respect of offences under the N.D.P.S. Act, is committed in open place or public place as contended by Mr. Gupte. In our opinion to do so would amount to carving out a separate section or a separate provision from the wordings already used in Section 42 which is not permissible for the following reasons :

19. Mr. Gupte wants us to divide Section 42 into two parts as quoted above in paragraph 6. The first part being prior to word "or" and second part being after the word "or" such a division or separation is not permissible because of the manner in which Section 42(1) is provided and worded. The entire Section 42(1) and each part thereof is connected and is in harmony with the heading of Section 42 which is "Power of entry, search, seizure and arrest without warrant or authorisation". Admittedly and obviously as seen above this provision was made with a view to enable officers superior in ranks to peon, sepoy and constable to act without authorisation or warrant. Even if those officers were not of the gazetted rank and Sub-section 42(1) starts from "Any such officer 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; 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;

If the interpretation of Mr. Gupte is accepted then Section 42(1) has to be rewritten as under : "Any such officer..." or and "any document...between sunrise and sunset." In our opinion, neither such creation of two separate and distinct provisions from Section 42(1) is permissible nor it has any sanctity and the roots of interpretation. The action which the officer has to take as mentioned at the end of first part and rest of the contents are conjuncted by the use of the word "may", therefore the section would read as "Any officer... may between sunrise and sunset can enter etc." If Sub-section (1) of Section 42 is separated from the word "or" into two parts then such an interpretation would result in confusion and chaos.

20. Considering all the facts of the submissions and counter submissions we are not in a position to hold that if officer as referred to in Section 42(1) receives information in respect of any offence committed in public place or in an open place or in a place which is not in any building, conveyance or enclosed place is required to reduce the information received by him. He is required to reduce such information only in case the information relates to any search to be taken in any building, conveyance or enclosed place. None of the two cases i.e. Balbir Singh's case or Baldev Singh's case decided by the Supreme Court, (referred to above) referred to and relied upon by Mr. Gupte have laid down that if the information is in respect of search and seizure in open place or a place which is neither a building, conveyance or enclosed place the officer will be duty bound to record the information in writing and consequently we are unable to accept the submissions made by Mr. Gupte in this regard. We, therefore, hold that in the instant case even if the officer had information or prior information was not required to record the same or reduce it into writing because information received by him was that the accused were carrying or were in possession of charas or contraband under the N.D.P.S. Act at the S.T. bus stand, Pune, which was an open place or public place and consequently it cannot be held that there is non compliance on the part of the officer for which the accused can claim benefit of acquittal.

21. P.W. 4 Bhagat has before proceeding to carry out the raid at the S.T. bus stand obtained authorisation from his superior and therefore question of recording the grounds of his belief as per the proviso to Sub-section (1) of Section 42 does not arise.

22. It was next contended by Mr. Gupte, as stated above, that there is non compliance to Section 50 of the N.D.P.S. Act. According to him in the Balbir

Singh's case the Supreme Court has specifically laid down that it is obligatory on the part of the officer to convey to the accused that the accused has right to be searched before the Gazetted officer or a Magistrate and according to Mr. Gupte since in this case P.W. 4 did not inform the accused of such a right, the seizure and recovery of contraband from accused is liable to be disregarded or rejected.

23. We have seen the panchnama, Exhibit 9, and the evidence of the panch and P.W. 4 Bhagat. Through evidence of these two witnesses as well as panchnama the prosecution has proved that before taking search accused were informed about the object of the search and they were also asked whether they wanted their search to be taken by or before the Gazetted Officer or a Magistrate and that the accused refused the offer and they declined to accept the offer. This, in our opinion, is sufficient and total compliance of Section 50 of the N.D.P.S. Act and no fault can be found with the prosecution case, in that regard.

24. It is true that as laid down by the Full Bench of the Supreme Court in Baldev Singh's case that the accused is required to be informed that he has a right to be searched by or before a Magistrate or Gazetted officer. However, merely because the Investigating Officer (P.W. 4) has not used the word "right" in his communication to the accused, it cannot be said atleast in the instant case that there is non-compliance to the provisions of Section 50 of the N.D.P.S. Act.

25. For all these reasons, we are unable to accept the contentions of Mr. Gupte and consequently the appeal is required to be dismissed. Hence, the order :

ORDER

Appeal is dismissed.

Conviction and sentence imposed by the Special Judge Nasik, in NDPS Social Case No. 126 of 1993 dated 7-8-1995 is maintained and confirmed.