

(2017) 04 KAR CK 0042
In the Karnataka High Court
Case No : 1559 of 2017

Maresh @ Gonne Maresh

APPELLANT

Vs

The State of Karnataka and anr

RESPONDENT

Date of Decision : 07-04-2017

Acts Referred:

[Narcotic Drugs and Psychotropic Substances Act, 1985](#), [Section 41](#), [Section 20](#), [Section 42](#), [Section 43](#), [Section 50](#) - Power to issue warr

Citation : (2017) 04 KAR CK 0042

Hon'ble Judges : John Michael Cunha

Bench : SINGLE BENCH

Advocate : Mahadeva R.K., Sandeep J. Chouta, Vijaykumar Majage

Judgement

1. The petitioner is charge sheeted for the offences punishable under sections 20(b)(ii)(B) and 20(a)(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act") in Cr.No.48/2016.

2. The petitioner/accused No.1 has sought for quashing the entire proceedings now pending on the file of the Principal District and Sessions Judge at Chamarajanagar in Special Case No.48/2016 mainly on two grounds. First, the respondent - Police have not followed the mandatory provisions prescribed in the NDPS Act. Second, the charge sheet discloses that only ganja leaves were seized by the respondent -Police. Leaves and seeds do not fall within the definition of "ganja". Hence, charge- sheet filed by the respondent is bad in law.

3. I have heard the learned counsel for the petitioner and the learned Addl. S.P.P.

4. In support of his argument, learned counsel for the petitioner has placed reliance on the decisions rendered by this court in CrI.P.No.8089/2016, CrI.P.No.8159/2016, CrI.P.No.8659/2016, CrI.P.8193/2016, CrI.P.No.8191/2016, CrI.P.No.8192/2016, CrI.P.No.9319/2016 and CrI.P.No.628/2017 and also the decision rendered by the Hon'ble Supreme Court of India in the case of State of

Rajasthan v. Jag Raj Singh @ Hansa (Crl.A.No.1233/2006) disposed of on 29.06.2016 .

5. Learned Addl. S.P.P. in support of his arguments has referred to the following decisions namely:- 1. (2001) 6 SCC 181 - T.T.Anothony v. State of Kerala

2. Division Bench judgment in Crl.A.No.367/2013 dated 16.12.2016

3. Emperor v. Kwaja Nazir Ahmed (AIR 1954 PC 18)

4. Apren Joseph @ Current Kunjukunju & Others v. The State of Kerala - (1973) 3 SCC 114

5. Hon''ble Apex Court ruling dated 25.11.2016 in Anjandas Gupta v. State of West Bengal

6. (2014) 2 SCC 1 - Lalitha Kumari v. State of Uttar Pradesh

7. (2011) 11 SCC 559 - STATE of Rajasthan v. Tarasingh

8. (2011) 3 SCC 521 - Jarnail Singh v. State of Punjab

9. Judgment of Rajasthan High Court dated 23.1.2017

10. 2008 Criminal Law Journal 1131 - Bombay High Court.

6. On consideration of the law laid down in the above decisions and the material collected by the Investigating Agency as evidenced in the charge-sheet, in my opinion, both the contentions urged by the petitioner for quashing the proceedings are liable to be rejected.

7. In so far as the compliance of the safeguards provided in sections 42, 43 and 50 of the NDPS Act are concerned, the legal position is now well settled. Under section 41(1) of the NDPS Act, only the empowered Magistrate can issue warrant for the arrest or for the search in respect of the offences punishable under Chapter IV of the Act. Under section 41(2), the empowered officer can give the authorization to his sub- ordinate officer to carry out the arrest of a person or search as mentioned therein. As held in the case of State of Punjab v. Balbir Singh reported in (1994) 3 SCC 299, if there is a contravention of section 41(1) and 41(2) that would affect the prosecution case and vitiates conviction. Further under section 42(1), the empowered officer if he has a prior information given by any person that an offence punishable under the Act has been committed 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. It is held in the above decision that to this extent, these provisions are mandatory and contravention of the same would affect the

prosecution case and vitiate the trial.

8. Under section 42(2), the empowered officer who takes down any information in writing or records the grounds under proviso to section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision, the same affects prosecution case. To that extent, it is held to be mandatory. It is also held in the above decision, if there is delay whether it was undue or whether same has been explained or not, will be a question of fact in each case. Further enunciation of law laid down in the above decision which is material for the purpose of this case reads as follows:- (4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

9. In the case in hand, F.I.R. was registered against the petitioner on 22.5.2016. According to the prosecution, the complainant received credible information at about 9.00 a.m. that a person was carrying ganja leaves in a plastic bag. Immediately, the complainant obtained the permission from the Dy.S.P., Kollegala and secured the Gazetted officer and along with panch witness, at about 12.00 noon, the accused was apprehended near T.R.R. Camp situated at Koramana Kattari, Oddarapalya village. The petitioner was holding a blue colour plastic bag in which there was another black colour plastic bag and on examination, it was found to contain 2 kg., dried ganja leaves accompanied by flowerings and tops.

10. The above facts go to show that all the requirements of sections 41, 42 and 43 of the NDPS Act were duly complied. Even with regard to the search conducted by the authorised officer, I do not find any illegality or infraction of section 50 of the Act as contended by the petitioner. It is borne on record that the petitioner was not subjected to any personal search. The seizure mahazar reveals that after informing the petitioner of his right to get searched in the presence of a Gazetted officer or a Magistrate, the white bag held by the petitioner was produced by him and on opening, ganja was found therein. It is held in State of HP v. Pavan Kumar 2005 (4) SCC 350 that Section 50 would not apply to any search or seizure where the article was not being carried on the person of the accused. Admittedly, in the present case, the ganja was carried by the petitioner in a carry bag. The petitioner was not subjected to personal search. Therefore, the provision of Section 50 is not applicable. Hence, the first contention raised by the petitioner is liable to be rejected.

11. The second contention urged by the petitioner is that the seized substances do not conform to the description of "ganja" as defined under the Act. In order to examine this contention, it is necessary to refer to Section 2(iii) of the Act. It reads as under:- (iii) "Cannabis (hemp)" means

a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;

12. In the instant case, the properties seized from the possession of the petitioner are described as "VERNACULAR MATTER OMITTED". A plain reading of the above definition manifests that seeds and leaves are excluded from the definition of ganja when they are not accompanied by flowering or fruiting tops. The definition does not exclude the leaves when they are accompanied by the flowering or fruiting tops of cannabis plant. In the instant case, the seized substance is ganja leaves accompanied by flowering tops which squarely falls within the above definition. Therefore, even the second contention urged by the petitioner does not make out a case for quashing the proceedings.

13. The decisions relied on by the petitioner are rendered on the premise that the seized substance did not fall within the definition of "ganja" and in that background and for non-compliance of the mandatory requirements of sections 41, 42, 43 and 50 of the NDPS Act, the proceedings therein were quashed by this court. But in the instant case the factual matrix is entirely different. Hence, the principles applied in those cases do not enure to the benefit of the petitioner. As the proceedings initiated against the petitioner are prima facie found to be in accordance with the provisions of the Act and no circumstances vitiating the trial having been pointed out, the proceedings cannot be quashed. Hence, the petition is dismissed.