
(2004) 01 CAL CK 0047
In the Calcutta High Court
Case No : Criminal A. No. 243 of 2000

Md. Ismail @ Gultania

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 30-01-2004

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 41, 42, 42(2), 43

Citation : (2004) 2 CHN 198

Hon'ble Judges : Amit Talukdar, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : S.S. Roy and R.K. Ghosal, for the Appellant; A.K. Mukherjee and Ratna Dutta, for the Respondent

Final Decision : Dismissed

Judgement

Amit Talukdar, J.—Two questions which crop up in this jail appeal can be met with the single answer. The conviction of the convict/appellant recorded by the learned Trial Court in respect of the charge of Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the said Act) and sentence of rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- (Rupees one lakh); in default, to suffer further rigorous imprisonment for a period of two years on 15.3.2000, has been questioned on the ground that the provisions of Section 42 of the said Act was not complied with in so much as PW, 3, who acted on a source information and apprehended the convict/appellant, did not send information to his Superior Officer as required under Sub-section (2) of Section 42 of the said Act and there was non-compliance of Section 50 of the said Act as the right to be searched in the presence of either a Gazetted Officer or a Magistrate, was not informed to him.

2. Learned State Defence appearing in support of the jail appeal referred to the decisions of Vinod v. State of Maharashtra, 2003 SCC (Cri.) 14, Beckodan Abdul Rahiman v. State of Kerata, 2002 Cri LR (SC) 522 and K. Mohanan v. State of

Kerala, 2000 SCC (Cri.) 1228, in support of his contention that unless the Police Officer concerned conducting a search on the basis of prior information, informs the accused of his right, the mandatory requirements of Section 50 of the said Act cannot be said to be complied with. He showed from the evidence of PW. 3 and PW. 4 both the members of the raiding team that nowhere the question of the said right was informed to the convict/appellant; whereas only the word "offer" was stated by both PW. 3 and PW. 4.

3. Learned State Defence showed from the evidence of PW. 4 that the intimation was not given to the Superior Officer in writing which violated the provisions of Section 42 of the said Act. He referred to the decision of a Division Bench of our Court in Abdul Khalek @Raja v. Narcotic Control Bureau, Eastern Zonal Unit 2002(1) CHN 85 and prayed for setting aside the conviction recorded against the convict/appellant.

4. Learned Public Prosecutor arguing the appeal on behalf of the State has referred to the decision of M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence 2003 SCC (Cri.) 2024"and submitted that since PW. 4 was himself a Gazetted Officer the question of complying with both the provisions did not arise and as he himself was member of the team so the question of compliance with Sections 42 and 50 of the said Act did not arise. Learned Public Prosecutor referring to the decision of M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence submitted that by the same analogy when Section 42 of the said Act was made inapplicable by virtue of the fact that the search and seizure was conducted by the Gazetted Officer himself. Section 50 of the said Act would also become inapplicable in the present fact situation since PW. 4 was himself a Gazetted Officer and the point canvassed by the learned State Defence did not deserve any consideration and he prayed for dismissal of the appeal.

5. In reply, learned State Defence distinguished the decision of M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence (supra) and submitted here PW. 3 conducted the search and seizure in respect of the offending article from the possession of the convict/appellant and PW. 4, the Gazetted Officer was merely a member of the team whereas in the decision of M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence (supra), Gazetted Officer himself conducted the entire operation and according to learned State Defence the decision of M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence (supra) was of no help to the State.

6. We have heard the submissions made at the Bar and perused the decisions cited. Firstly, we take up the question with regard to Section 42 of the said Act. For profitable discussion text of the said section is reproduced hereinbelow :

"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 authorization 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 ground 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."

7. From a plain reading of the said section it appears that any empowered officer either on the basis of reason to believe or on an information taken down in writing with regard to commission of any offence relating to any narcotic drug or psychotropic substance which is concealed in any building, conveyance or enclosed place can between sunrise and sunset conduct search in respect thereof and when such information has been taken down 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.

But, we find from the evidence that PW. 3 on a source information being accompanied by his team which consisted of PW. 4 a Gazetted Officer "had been to G. R. Road near Howrah Station Sub-way for holding a raid. That was on 29.8.96 at about 9.20 a.m. On reaching there we find that one person was selling heroin to the customers."

8. As such, it is quite evident that the place where the convict/appellant was found dealing in the offending article was a public place i.e. the open road and clearly the provisions of Section 43 of the said Act will have full application. The provisions of Section 43 of the said Act reads as follows :

"43. Power of seizure and arrest in public place.--Any officer or 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 purpose 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."

9. So, as we find the article, in question was seized from the possession of the convict/appellant, who was dealing with the same on a open road which is a public place within the meaning of the Explanation of Section 43 of the said Act the provisions of Section 42 of the said Act cannot be attracted. We are emboldened by the decisions of Narayan Swami Ravishankar v. Asstt. Director, Directorate of Revenue Intelligence 2002 SCC (Cri.) 1865 and Rajendra and Anr. v. State of Madhya Pradesh, 2003(8) Supreme 786, in this regard and do not find any merit in the submission made by learned State Defence in this context. The Division Bench decision of Abdul Khalek (supra) has no manner of application.

10. Now, the next question touching on the impact of Section 50 of the said Act on account of the failure of the raiding team to apprise the convict/appellant with

regard to the fact that he had a right to be searched in presence of either a Gazetted Officer or a Magistrate is taken up for consideration.

11. We have perused the decisions: Vinod v. State of Maharashtra (supra), Beckodan Abdul Rahiman v. State of Kerala (supra) and K. Mohanan v. State of Kerala (supra) in the light of the submission made by learned State Defence that both PW. 3 and PW. 4 spoke about the question of "offer". We are emboldened by the decision of the Hon"ble Supreme Court in Prabha Shankar Dubey Vs. State of Madhya Pradesh, and find that the Supreme Court while dealing with this question held :

"7. It is not disputed that there is no specific form prescribed or intended for conveying the information required to be given u/s 50. What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or strait-jacket formula."

"8. Section 50 does not involve any self-incrimination. It is only a procedure required to protect the rights of an accused (suspect) being made aware of the existence of his right to be searched if so require by him before any of the specified officers. The object seems to be to ensure that at a later stage the accused (suspect) does not take a plea that the articles were planted on him or that those were not recovered from him."

As such, even if we take it that in so many words the phrase "RIGHT" was not used by PW. 3 and PW. 4 will the entire conviction recorded by the learned Trial Court be vitiated?

12. As we find the prosecution case otherwise inspires the confidence in the mind of the Court and we have no hesitation to accept the same. PW. 1, PW. 2 (both police constables), PW. 3 then Sub-Inspector of Police, who held the raid being accompanied by PW. 4, Inspector of Police and a Gazetted Officer, all uniformly spoke about the apprehension of the convict/appellant and the recovery of the offending articles (Mat. Ext. 1) from his possession supported by an independent seizure list (Ext. 1) witness (PW. 5) and the opinion of the Chemical Analyst (PW. 6), who found that the seized sample was heroin. His report was marked Ext. 3.

13. We have also seen the evidence of PW. 5 and have gone through the contents of Ext. 1 the seizure list witnessed by him under his dated signature (Ext. 1/3) and we do not find any occasion to come to the conclusion that it was obtained under any coercion or threat.

14. We are of the view that the steps taken during the course of the search and seizure is covered by the sweep of Section 50 of the said Act and stands covered by the impact of the ratio of Prabha Shankar Dubey v. State of M. P. (supra).

15. That apart, we also find substance in the submission of the learned Public Prosecutor for the State and feel the decision of (M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence (supra), relied upon by him has much force. We find from the evidence that PW. 4, Inspector of Police was very much a Gazetted Officer himself who took part in entire operation. We do not subscribe to the view expressed by the learned State Defence that the raid was conducted by PW. 3; and PW. 4 was merely a member of the said team. We have found from the evidence of P.W. 4 the Gazetted Officer that he took active role in the apprehension and was involved right from the beginning in the entire process. The evidence of P.W. 4 - a Gazetted Officer is :

"On 29.8.96 I was attached to Golbari P. S, as I/C. On that date at about 9.05 a.m. on getting a source information myself and other police officers and force had been to G. R, Road near Howrah/Calcutta Bus Stand. On reaching there we noticed that one person was selling heroin to the customers. We detained that person. We have an offer to that person whether he required the presence of any Magistrate for the purpose of search. He denied. Thereafter observing the formalities we searched that person. On being asked that person disclosed his name as Gultania @ Md. Ismail. On search we recovered two punas of heroin and cash of Rs. 40/- from his chest pocket. A seizure list was prepared. The purias of heroin and the cash sum were seized under the seizure list in presence of witnesses. We made in collected public witnesses also. The search and seizure was presence of public witnesses also. This is my signature (Ext. 1/2) in the seizure list. Accused Md. Ismail @ Gultania is present in Court (identified). The seizure list was prepared by S.I. Prabir Das of Galabari P. S. The seized purias were duly sealed and labelled in my presence and in presence of the witnesses. Then we returned to Gqlabari P. S. along with accused persons and alamat." (Lay emphasis on the word "we").

16. Upon an assessment of the said evidence we feel that not only PW. 4 was very much involved with the investigation but he being a Gazetted Officer himself was also a member of the team; as such, within the meaning of the ratio of the decision of M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence (supra) that-

"Since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting u/s 41 and, therefore, it was not necessary to comply with Section 42."

17. In the same analogy, we feel the agony of the learned State Defence with regard to infraction of Section 50 of the said Act would also be contained in this order and we are of our considered opinion that there has not been any breach on the basis of our discussion in the light of the decisions of Prabha Shankar Dubey v. State of Madhya Pradesh (supra), and Rajendra and Anr. v. State Madhya Pradesh (supra) and find no merit in the appeal and accordingly we dismiss the same.

Alok Kumar Basu, J.

I agree.