
(1988) 12 P&H CK 0053

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 370-SB of 1987

Murli Dhar

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 12-12-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156, 190

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 41, 42, 50, 52

Scheduled Districts Act, 1874 — Section 5, 5A

Citation : (1989) 2 ILR (P&H) 204 : (1990) 3 RCR(Criminal) 656

Hon'ble Judges : S.S. Dewan, J;A.L. Bahri, J

Bench : Division Bench

Advocate : S.C. Sibal, for the Appellant; Ram Avtar Singh, Addl. A.G., for the Respondent

Final Decision : Allowed

Judgement

A.L. Bahri, J.—On August 28, 1987, I. S. Tiwana, J. after referring to different provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 and of the Code of Criminal Procedure referred the following question to the larger Bench:

Is the power of the Executive Police as envisaged by Section 156 of the Code to investigate cognizable offences, in any way ousted, curtailed or controlled by the provisions of the Act ?

The other cases (Criminal Appeals No. 449 SB of 1986, 620 SB of 1986, 786 SB of 1986, 264 SB of 1987, 282 SB of 1987, 316 SB of 1987, 318 SB of 1987, 319 SB of 1987, 330 SB of 1987, 337 SB of 1987 and 3Y1 SB of 1987; were also likewise referred. We have heard the learned Counsel for the parties at great length.

2. The above question arose on the following premises. Murli Dhar Appellant was

convicted by Sessions Judge, Jind u/s 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as Act) on May 18, 1987 and sentenced to rigorous imprisonment for ten years and to pay a fine of one lac rupees. In default of payment of line he was further ordered to undergo rigorous imprisonment for two years. As per the prosecution allegations on November 26, 1985, 7.5 Kgs. of opium was recovered from the possession of the Appellant by Hira Lal Sub-inspector of Police.

3. The Act came into force with effect from November 14, 1985. On that very day Central Government issued notifications under Sections 41, 42 and 53 of the Act. However State of Haryana issued notification under Sections 41, 42 of the Act authorising certain persons to exercise the powers enumerated therein on 29th December, 1986, which read as under:

No. S.O. 104/C.A. C1/85/S. 41/80--In exercise of the powers conferred by Sub-section (2) of Section 41 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Governor of Haryana hereby empowers the officers, of and above the rank of Assistant Excise and Taxation Officer in the Excise and Taxation Department; of and above the rank of Tehsildars in the Revenue Department and of and above the rank of Deputy Superintendent of Police in Police Department, to exercise the powers specified in Sub-section (2) of that section within the area of their respective jurisdiction.

No. S.O. 103/C.A. 61/85/S. 42 and 67/86-- In exercise of the powers conferred by Sub-section (1) of Section 42 and Section 67 the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Governor of Haryana hereby empowers the officers, of and above the rank of Excise Inspector in the Excise and Taxation Department; of and above the rank of Naib Tehsildars in the Revenue Department and of and above the rank of Assistant Sub Inspector in the Police Department to exercise the powers and perform the duties specified in Section 42 within the area of their respective jurisdiction and also authorise the said officers to exercise the powers specified in Section 67.

The recovery in the present case was effected as already noticed above before the Haryana Government issued the notifications. The question debated is as to whether Sub Inspector of Police, who effected the recovery of opium on November 26, 1985 was authorised to do so. In other words, whether after enforcement of the Act, the action of the Sub Inspector of Police in effecting the recovery could not be challenged u/s 156 of the Code of Criminal Procedure as he was not authorised and had failed to observe the provisions of the Act with regard to search and seizure. It was in this background that the question was formulated as above; As to whether the provisions of Section 156 of the Code of Criminal Procedure are ousted, curtailed or controlled by the provisions of the Act ?

Brief reference to the provisions of the Act would be necessary. Sections 41, 42 and 74 of the Act read as under:

41. Power to issue warrant and authorisation.--(1) A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe 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.

(2) Any such officer of gazetted rank 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 or in this behalf by general or special order by the Central Government, or any such officer 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 in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such 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 a 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.

(3) The officer to whom a warrant under Sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under Sub-section (2) shall have all the powers of an officer acting u/s 42.

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 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 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.

74. Transitional provisions.--Every officer or other employee of the Government exercising or performing, immediately before the commencement of this Act, any powers or duties with respect to any matters provided for in this Act, shall, on such commencement, be deemed to have been appointed under the relevant provisions of this Act to the same post and with the same designation as he was holding immediately before such commencement.

Section 156 of the Code of Criminal Procedure reads as under:

1.56. Police Officer's power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

2. No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

3. Any Magistrate empowered u/s 190 may order such an investigation as above-mentioned.

From the perusal of the provisions referred to above, it is clear that they apply to

the commission of the offence under the Act after enforcement of the Act. The Central Government and the State Governments have been empowered under Sections 41 and 42 of the Act to authorise different categories of officials and officers of different departments including that of the Police who would issue warrants, effect search of the premises or persons in connection with the recovery of incriminating articles as covered by the Act. Section 74 of the Act provides that till such officers are authorised by the appropriate Government, all the officers who were already exercising such powers would continue to do so till such State Government authorises officers or officials as required under Sections 41 and 42 of the Act. This provision has been described as transitional provision u/s 74 of the Act. Reference was made to the decision of Ujagar Singh, J in Hakam Singh Vs. Union Territory, , wherein while referring to the provisions of Section 74 of the Act, it was observed that it did not allow the officer to ignore the mandatory provisions of the Act. As far as this is concerned, there is no dispute. After enforcement of the Act, in the absence, of any notification issued u/s 41, 42 of the Act, the officers who were already exercising the powers of seizure etc, of course, would continue to do so but they will follow mandatory provisions of the Act as they would be deemed to be authorised under the provisions of this Act in view of Section 74 of the Act. Ujagar Singh, J. also observed in Hakam Singh's case (supra) with respect to Section 74 of the Act as under:

The very word "transitional" used in the heading of this section leaves no doubt that this provision was meant only for a very limited period to enable the Central Government or the State Government to specially authorise officers by general or special orders at an early date.

We agree with the general observations as reproduced above that the respective State Governments should promptly authorise officers as required u/s 41 and 42 of the Act as contemplated u/s 74 of the Act. However, this Court cannot fix any time much less reasonable time within which the State Government could be directed to issue notifications authorising persons to act u/s 41, 42 of the Act as non-issuance of such a notification within reasonable time, if so fixed, will not change the legal position. Action taken by the officers, who were authorised to do so even before the enforcement of the Act for the offences committed after enforcement of the Act, will not be vitiated for non-issuing of notification authorising such persons as required u/s 41 and 42 of the Act in view of Section 74 of the Act.

4. On behalf of the Appellants, reference has been made to the decision of the Rajasthan High Court in Nand Lal v. State of Rajasthan 1988 (1) Prevention of Food Adulteration cases 25. The State of Rajasthan had issued one notification in 1985 authorising certain persons to act u/s 41 and 42 of the Act. Another notification was issued in 1986 authorising Assistant Sub Inspectors to act under Sections 41, 42 of the Act. In that context Rajasthan High Court held that before the notification issued in 1986, Assistant Sub Inspectors of Police had no powers

to act under Sections 41 and 42 of the Act. This decision is not helpful in deciding the question referred to as the provisions of Section 74 of the Act were not for discussion. There were no observations of the Rajasthan High Court with respect to the transitional period i.e. after the enforcement of the Act and issuance of the first notification which was done in 1985. Nand Lal's case referred to above was again noticed by the Rajasthan High Court in *Umrao v. State of Rajasthan* 1988 (2) RCR 137. Since implication of Section 74 of the Act was not involved in the case, this judgment is not helpful in deciding the question referred.

Reference may be made to Section 82 of the Act which reads as under:

82. Repeal and savings.--(1) The Opium Act, 1857 (13 of 1857) the Opium Act, 1878 (1 of 1887) and the Dangerous Drugs Act, 1930 (2 of 1930) are hereby repealed.

2. Notwithstanding such repeal, anything done or any action taken or purported to have been done or taken under any of the enactments repealed by Sub-section (1) shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

Section 24 of the General Clauses Act reads as under:

24. Continuation of orders, etc., issued under enactments repealed and re-enacted.--Where any a (Central Act) or Regulation is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any (appointment notification), order, scheme, rule, former bye-law b(made or) issued under the repealed Act or Regulation, shall so far as it is not inconsistent with the provisions re-enacted continue in force, and be deemed to have been b(made or) issued under the provisions so re-enacted, unless and until it is superseded by any b(appoint-ment, notification) order, scheme, rule form or bye-law b(made or) issued under the provisions so re-enacted c[and when any a (Central Act) or Regulation, which by a notification u/s 5 or 5-A of the Scheduled Districts Act, 1874 (XIV of 1974) d, or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn from and re-extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this section.]

Reading of both these sections alongwith Section 74 of the Act, makes it clear that actions taken under the Repealed Act would be deemed to have been taken under the Repealing Act. Thus the officers who were authorised to conduct investigation or effect recoveries under the Opium Act would be deemed to have been appointed under the provisions of the Act and would exercise such powers and follow the procedure as prescribed under the Act till the State Governments appoint officers to act under Sections 41 and 42 of the Act.

5. On behalf of the State reliance was placed on the decision of the Supreme

Court in Neel alias Niranjana Majumdar Vs. The State of West Bengal, . In that case, an offence was committed, as the person was found in possession of a sword in 1970 i.e. after the repeal of the Arms Act, 1878. That was in contravention of the notification of 1923 issued u/s 15 of the Repeal Act. It was held that despite this repeal, the notification would continue to be in force u/s 4 of the New Act. In my view, the ratio of this decision can aptly be applied to the case in hand. Section 74 of the Act is specific on the subject which gives answer to the question debated.

6. From the discussion of the different provisions of the Act, as referred to above, it is found that for the recoveries of incriminating articles effected after enforcement of the Act, 1985 and before the Notification dated December 29, 1986 by the Police Officers who were already authorised under the Opium Act to act will not be vitiated if they have followed the procedure prescribed under the Act, 1985, as such officers would be deemed to have been duly appointed as required under Sections 41 and 42 of the Act.

7. That Act of 1985 is a code in itself. In view of Section 51 of the Act, the provisions of the Code of Criminal Procedure shall apply in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures, made under this Act. Under the Act the authorised officers under Sections 41 and 42 of the Act, or the officer deemed to be so authorised in view of Section 74 of the Act, are required to follow special procedure laid down under Sections 50, 52, 53, 55, 57 of the Act. The Act now provides minimum sentence of 10 years imprisonment and minimum fine of rupees one lac. Special procedure under Sections 50, 52, 55 and 57 has been provided to be strictly followed. These provisions are mandatory. The officer acting under Sections 41 and 42 of the Act is required to maintain record of following the provisions aforesaid. Now observance of these provisions would vitiate the trial. In case the State Government decide to authorise officers of Departments other than police to exercise powers under Sections 41 and 42 of the Act, the provisions of Section 156 of Code of Criminal Procedure will not at all be attracted. Police officers authorised to act under the Act either in view of Section 74 of the Act as they would be deemed to have been appointed under the Act and appointed under the Act are required to follow) the procedure as provided under Sections 50, 52, 55 and 57 of the Act as observed above. If these provisions are not followed, the action would not be saved in view of Section 156 of the Code of Criminal Procedure. The powers of the Executive Police as envisaged by Section 156 of the Code of Criminal Procedure to investigate offences (committed under the Act, 1985) is thus ousted, curtailed and controlled by the provisions of Act, 1985. The question referred is answered in the affirmative as above, Since on merits the appeals are to be disposed of, separately they are ordered to be listed before the Single Bench.