

(1999) 08 CAL CK 0059
In the Calcutta High Court

Case No : Criminal Revisional Jurisdiction Criminal Rev. No. 1358 of 1999

Rajendra Kumar Mohta

APPELLANT

Vs

Abhijit Das Gupta and Others

RESPONDENT

Date of Decision : 18-08-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401, 482
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 36A(1),
42, 42(1), 52A(2)

Citation : (1999) 2 CALLT 655 : (1999) 2 CHN 471 : (1999) CriLJ 4733 : (2000)
1 RCR(Criminal) 204

Hon'ble Judges : Sujit Barman Roy, J

Bench : Single Bench

Advocate : Mr. D.K. Dutta, Mr. S. Moitra, Mr. A.K. Chowdhury and Mr. Arup Chatterjee, Mr. S.N.S. Alquadri and Mr. R. Ghosal, for the Appellant; Mr. Ashim Roy and Mr. Debasish Roy, for the Respondent

Judgement

S. Barman Roy, J.—By this application u/s 482 Cr.PC petitioner has prayed for quashing complaint being NDPS Case No.7 of 1999 pending before the learned Special Judge, 6th Bench (NDPS Act), Calcutta.

2. Case in short it that Respondent No. 1 being the Senior intelligence Officer. Directorate of Revenue intelligence, Calcutta Zonal Unit lodged a complaint in the court of the learned Special Judge, 6th Bench , City Sessions Court, Calcutta u/s 21 of the Narcotic Drugs and psychotropic substance Act, 1985 alleging, inter alia , that acting upon an intelligence that some stamps of the office of the director General of Foreign Trade, Commissioner of Customs and other Government offices and documents relating to Illegal importation and clearance of copper cathode and other goods under Duty Exemption entitlement certificate scheme were secretly kept in the office room of the petitioner at Room No. 354, Marshall House, 3rd floor, 25, Strand Road, 33/1, Netrajl Subhas Road. Calcutta-1, raided and searched the said office premises after obtaining search authorisation issued by the Assistant Director of the Directorate, Revenue

intelligence, Calcutta. Aforesaid and search commenced at 1.35 P.m . on 18.2.99 and it was conducted at 10 P.m on the same day. During such search operation petitioners, one Bijendra Kedia apart from others were personally present. Search yielded recovery and seizure of some documents not connected with any offence under the N.D.P.S. Act. However, in the midst of search complainant received further information that some narcotic drug was secretly kept " in the narrow space between writing table, side table wooden cum glass partition and the sliding door" of the said office premises. On receipt of such information complainant on further search could recover " one polypack containing one brown coloured paper packet with two small polypacks containing brown coloured powder weighting 100 gms (approx) believed to be narcotic drug....." On the brown colour paper followings were written:--

From : To D. Hussain Rajendra Mohta Samru Marshal House, Karachi N.S. Road, Calcutta, India 3. It has further been alleged in the said complaint that aforesaid papers/documents and the aforesaid polypack suspected to contain narcotic drug were seized under a seizure list in presence of the petitioner and other witnesses. Statements of the petitioner and others were recorded u/s 67 of the Act. Petitioner and others who were found present in the said office premises at the time of search and seizure disowned ownership of the said polypack suspected to contain narcotic drug. However, all of them admitted in their respective statements recorded u/s 67 of Act that the polypack was in fact found in the office premises. It further appears that complainant drew samples of the said substance tn triplicate each weighing about 5 gms. and the same were sealed in 3 packets over the signature of the petitioner and independent witnesses. After drawing samples, as aforesaid, rest of the substance suspected to be narcotic drug was sealed in a separate packet over the signatures of the petitioner and independent witnesses. Said samples were sent to the Chemical examiner. Customs House, Calcutta on 9.3.99 for chemical analysis and report. Chemical examiner upon examination held on 31.3.99 opined in his report that all the said samples responded to the test of Heroin (Diacetyl Morphin).

4. Along with the said complaint, all relevant documents were annexed.

5. On perusal of the complaint and various documents annexed therewith, learned special Judge took cognizance of the matter u/s 21 of the N.D.P.S. Act. Being aggrieved by and dissatisfied with the cognizance taken by the learned special Judge in this matter, petitioner has approached this court in this application u/s 482 Cr.PC to quash the same.

6. It must be mentioned in this connection that no stay of further proceeding in the trial court was granted as with consent of the learned counsel for the Parties it was decided that this petition should be disposed of at motion stage. For this purpose a short adjournment was granted to enable the respondent/complainant to file affidavit-in-opposition. Meanwhile trial court framed charges against the petitioner. For this reason a supplementary affidavit has been filed on behalf of the petitioner to bring the aforesaid fact regarding framing of charges on record

and to quash the same.

7. I have heard Mr. D.K. Datta, learned counsel for petitioner: Mr. A. Roy, learned counsel for the respondent No.1/complainant and learned counsel for the State. Learned counsel for the State has adopted submissions made by Mr. A. Roy, learned counsel for the respondent No.1/ complainant.

8. In course of his submissions following contentions were raised by Mr. Dutta, learned counsel for the petitioner :--

(i) According to the complainant 3 samples were drawn from the seized substance each weighing about 5 grams. But as per report of the Chemical examiner, samples received by him weighed 3.6 gms, 3.9 gms and 4.02 gms and, therefore, samples analysed by the Chemical examiner were not the samples drawn from the seized substance.

(ii) As per the complaint, samples were taken in three packets and same were sealed on the signatures of the petitioner and other witnesses. But the Chemical examiner's report is silent as to whether he noticed signatures of the petitioner etc. on the packets of such samples beneath the seals. Therefore, it must be held that there was no such signature of the petitioner and other witnesses beneath the seals on the packets of the samples and accordingly, samples analysed by the Chemical examiner were not the Samples actually drawn from the seized substance.

(iii) Alleged narcotic/psychotropic substance seized from the said office premises was not dealt with in accordance with section 52A(2) of the Act and hence possibility of its substitution cannot be ruled out and, therefore, the proceeding is vitiated by reason of total breach of section 52A(2).

(iv) Complainant/respondent has not been authorised by the Central Government or the State Government within the meaning of section 36A(1)(d) of the Act and, therefore, cognizance taken in this case on the basis of a complaint filed by complainant/respondent No. 1 is bad in law.

(v) Complainant/respondent No. 1 was not an empowered officer within the meaning of section 42(1) of the Act and, therefore, all his actions like search, seizure etc. are bad in law.

(vi) Information received by the complainant that some narcotic drug was secretly kept in the said office premises was never taken down in writing and, therefore, whole proceeding is vitiated, and accordingly, no useful purpose will at all be served by subjecting petitioner to go through the whole process of trial.

(vii) From the facts and circumstances of the case it is manifest that such information that some narcotic drug was kept concealed in office premise was received by the complainant between Sunset and Sunrise and yet the complainant/respondent conducted search, seizure etc. without obtaining search warrant/authorisation or without recording the "grounds of his belief that search

warrant/ authorisation cannot be obtained without affording opportunity for concealment of evidence or facility for the escape of the offender and hence, it amounted to clear breach of mandatory provision contained in the proviso to sub-section (1) of section 42. Such breach of mandatory provision of the Act has vitiated the whole proceeding.

9. Aforesaid are the grounds, in brief, raised before me by Mr. D.K. data, learned counsel for the petitioner for quashing the cognizance taken in this case and the proceedings pursuant thereto including the charges framed against the petitioner.

10. Question whether due to failure of the Chemical examiner to mention in his report about existence of signatures of the petitioner and other witnesses beneath the seals on the packets of the samples, a presumption should be drawn that the samples analysed by the Chemical examiner were actually not drawn from the seized substance it a question of fact that should be decided on the basis of the evidence at the end of the trial and not at this premature stage. In fact what has been suggested by the learned counsel for the petitioner is that the samples actually drawn from the seized substance have been substituted by fake samples and these fake samples were analysed by the Chemical examiner. In my view this is too early a stage to embark upon appreciation of evidence and give a decision on such question. Appreciation of evidence can be resorted to only at the end of the trial. Therefore, I decline to give any decision on this question in view of the stage of the case.

11. Discrepancy as regards weight of the samples is also a question of fact that should be decided at the end of the trial. Scientific explanation may also be available from the Chemical examiner as to whether loss of weight of the samples due to natural process of dehydration or for other reasons is possible or not. Therefore, such questions cannot be decided in advance before parties adduce their evidence.

12. Decision on the question whether or not requirements of subsection (2) of section 52A were complied with by the complainant so far as seized substance is concerned and also on the question whether there was a possibility that the seized substance might have been substituted can be decided on the basis of evidence on conclusion of the trial and certainly not now. This is too premature a stage to decide such questions.

13. On the question whether complainant/respondent was an empowered officer within the meaning of section 42 of the Act to take various actions contemplated thereunder, I find from the following general order issued by the Central Government that he was certainly an empowered officer within the meaning of the said provision. Said general order issued by the Central Government reads as under :-

"Notification No. S.O, 822 (E), dated November 14, 1985. published in the Gazette of India, Extra., Part II, section 3(ii), dated 14th November, 1985. In exercise of the powers conferred by sub-section(1) of section 42 and section 67

of the Narcotic drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby empowers the officers of and above the rank of sub-Inspector in the department of Central Excise Custom and Revenue intelligence and in Central Economic intelligence Bureau (and Narcotics Control Bureau) to exercises the powers and perform the duties specified in section 42 within the area of their respective Jurisdiction and also authorises the said officers to exercise the powers conferred upon them u/s 67."

14. Complainant/respondent being a senior intelligence Officer of the Directorate of Revenue intelligence, he it certainly an officer above the rank of Sub-Inspector and hence he was competent to lake all actions under section. 42.

Referring to section 36-A(1)(d) of the Act, it was contended by Mr. Dalta, learned counsel for the petitioner, that the complainant it not an officer authorised either by the Central Government or the Slate Government within the meaning of the said provision on whose complaint or report special court could take cognizance of any offence under the Act and, therefore, cognizance taken in this case it bad in law. in this regard Mr. Roy, learned counsel for the complainant respondent No. 1 produced before the court a photocopy of the letter bearing No. F. No. 66499/88-oplum dated 27.9.1989 issued by or on behalf of the Government of india, Ministry of Finance. It relates to authorisation of certain classes of officers u/s 36-A(1)(d) of the Act. Complainant being a senior intelligence Officer of the Directorate of Revenue intelligence is certainly an officer far above the rank of inspector of the department and hence, in view of the contents of the above letter dated 27.9.89 and publication of the notification in this regard in the official gazette and in view of the provisions of sections 36A(1)(d) and 53 of the Act, there cannot be any doubt that the complainant it a duly authorised officer within the meaning of section 36A(1)(d) and, accordingly, cognizance taken on the basis of complaint lodged by him cannot be quashed on that ground alone. Said letter dated 27.9.89 issued by or on behalf of the Government of india. Ministry of Finance reads as under :-

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F.No. 664/99/88 OPIUM GOVERNMENT OF INDIA MINISTRY OF FINANCE
(Department of Revenue)

dated the 27th September, 1989.

To

Collectors of Customs (Preventive). New Custom House, 2nd Floor, Ballard Estate, Bombay-400 038

Sir,

Subject: Authorisation of officers u/s 36A(1)(d) of the Narcotic Drugs and Psychotropic Substances Act. 1985-Reg.

I am directed to refer to this Ministry's letter of even Number dated the 24th

July, 1989, authorising such of those officers of the Central Government as are invested u/s 53 of the above Act, with the powers of an officer-in-charge of a police station for investigation of offences under that Act, for the purpose of making complaints before a Special Court competent to try the offences under the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Further clarifications have been sought for on the issue of a notification under the aforesaid Act since the courts concerned do not take cognizance of the complaints filed by the officers so authorised in the absence of a valid notification u/s 36A(1)(d) *ibid*. The matter has been further examined at this end and a notification, duly authorising the officers of and above the rank of inspector in the Departments of Customs, Central Excise, Narcotics, Revenue intelligence, Central Economic intelligence Bureau and the Narcotics Control Bureau under the Ministry of Finance (Government of Revenue) for filing of complaints relating to an offence under the said Act before Special Courts has since been issued in the official Gazette. A copy of the same is sent herewith for taking further action in this regard by you.

3. Hindi version will follow.

Yours faithfully,

Sd/- (R.K. Tewari) Director (Opium) (TF. 3012616)

End : As above.

Copy forwarded for information to :--

1. All collectors of Customs & Central Excise including Customs (preventive).
2. Chief Secretaries of all States/Union territories with the request that they may also consider the feasibility of issuing such notification in respect of their officers working in State Excise, Drug Control, etc.
3. Directors-General of police of All States/U.Ts.
4. Director-General, Narcotics Control Bureau, New Delhi.
5. Narcotics Commissioner of India, 19, the Mall Morar, Gwalior 474 006.
6. Chief Controller of Factories, 10C Hari Om Colony. Gwalior 474 006.

Sd/-- (S. NARAYANASWAMY) for Director (opium) (TF 3016656)

15. Sub section (1) of section 42 of the Act, *inter alia*, provides that if the empowered officer has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychographic 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 my 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 reason to believe to be liable to confiscation under the 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 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. Proviso thereto further provides that if such officer has reason believe that search warrant or authorisation cannot be obtained without offending opportunity for concealment of evident or facility for the escape of an offender, he may enter and search such building conveyance or enclosed place at any lime between sunset and sunrise after recording grounds of his belief. Sub-section (2) of section 42 further provides that 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.

16. Referring to aforesaid provisions of section 42 of the Act, Mr. Datta contended that without reducing the information received into writing, complainant proceeded to make search, seizure etc. He further submitted that alleged information was received by the complainant after sunset and soon thereafter he made search, seizure etc. during night without obtaining search warrant or authorisation and yet complainant did not record grounds for his belief as required under the proviso to sub-section (1) of section 42 nor did he send copies thereof to his official superior as required under sub-section (2) of section 42. These provisions are mandatory. Breach of these provisions has vitiated the whole proceeding. Accused it bound to be acquitted. Therefore, when acquittal of the petitioner is predictable with certainly in view of breach of aforesaid provisions, no purpose will be served by subjecting the petitioner to a prolonged process of trial.

17. On the other hand Mr. Roy, learned counsel for the respondent No. I submitted that the question as to whether there has been any breach of section 42 should be decided on evidence on conclusion of trial. This is not the stage at which such question should be decided. in this connection Mr. Roy heavily relied upon a decision of the apex court in State of Himachal Pradesh Vs. Shri Pirthi Chand and another, in this case trial court discharged the accused at charge framing stage on the ground that mandatory provision like section 50 of the Act was violated which requires that before a person it searched, he must be informed that he has a right to be searched in presence of a gazetted officer or Magistrate, if he so demands and if he ultimately so demands, he cannot be searched except in presence of a gazetted officer or a Magistrate. High Court also affirmed this order. On further challenge before the Supreme Court, it was held that at charge framing stage it cannot be predicted what evidence prosecution

would adduce during trial on the question of compliance with mandatory provision like section 50 etc. Only on conclusion of trial this question should be decided on the basis of evidence on record. On perusal of the said decision in Sri Pirthi Chand's case what appears to me is that the officer making search and seizure it not required by any express provision of the statute to record it in writing whether he complied with the requirements of section 50. in the absence of any such statutory requirement Imposing mandatory obligation upon the officer to record it in writing, it was held by the apex court in the case of Sri Pirthi Chand (supra) that it was not possible to hold at charge framing stage that requirements of section 50 were not complied with. This question can be decided only upon conclusion of trial after both sides adduce their evidence. in other words, question of compliance with the requirements of section 50 and hence, ultimate result of the case on conclusion of the trial on that ground cannot be predicted with certainty at charge framing stage as the officer making search/seizure is under no statutory obligation to reduce it into writing that when the accused was offered he declined to be taken before a gazetted officer or Magistrate for search. Had it been otherwise, it seems to me that the decision of the apex court in Sri Pirthi Chand's case would have been quite different.

18. But to decide the question as to whether empowered officer reduced the information he had received into writing as required u/s 42(1) before making search/seizure etc., court it not required to wait till the trial is over. This question can be decided with absolute certainty at the time of taking cognizance. If the information was in fact reduced into writing. Its mere production it enough to prove it and in that case. It can certainly be produced and proved at any stage of the case after the search is over.

For this purpose a decision on the question of compliance with the requirements of section 42(1) being totally dependent on documentary evidence, court it not required to wait for oral evidence to be adduced during trial.

19. In its various decisions rendered in the recent past, apex court pointed out that some of the provisions of the Act are mandatory and breach thereof vitiate the proceeding/trial , while breach of some other provisions do not vitiate the same. Sections 42(1) and 50 are some of such provisions breach whereof vitiate the proceeding/trial. But some of these provisions Impose a statutory obligation upon the concerned officer to prepare record showing compliance with such provisions, white other provisions do not Impose any such obligation. Section 50 it one such provision which do not Impose any such statutory obligation upon the officer to reduce it into writing that when he offered an opportunity to the accused, he declined to be taken before a gazetted officer or Magistrate for search etc. Therefore, such question cannot be proved by production of any such document in which it was reduced into writing. Such a matter can be decided only on the basis of oral evidence to be adduced by the parties during trial. in such a situation an accused cannot be discharged on the ground of breach of section 50 at the cognizance taking or charge framing stage.

20. But this principle will not apply to provisions like section 42(1) where compliance therewith it required to be reduced into writing. Decision on such question does not depend on the nature of oral evidence that may be adduced during trial. Compliance is required to be compulsorily documented before search is conducted. Therefore, in such a case decision of the apex court in Sri Pirthi Chand's case rendered in the context of section 50 or similar other provisions of the Act cannot apply. Decision on such question being based on documents as to the compliance with the requirements of section 42(1) regarding reduction of the information into writing before commencement of the search operation under the provision of the Act can be given with absolute certainty at cognizance taking or charge framing stage and for this purpose court it not required to wait till trial it over.

21. Undoubtedly, search operation in this case was first started little after noontime in connection with matters not covered by this Act in course of such search operation, searching party received an information that some narcotic drug was secretly kept "In the narrow space between writing table, side table, wooden cum glass partition and the sliding door of the rear cabin from the entrance door" of the said office room and thereafter on search they could recover the contraband packet. They did not reduce the said information into writing before the search for the said contraband packet was started which resulted in its recovery and seizure. Only after search and seizure said information was noted in writing in the seizure memo. It it not the case of the complainant that while conducting search etc. in respect of matters not covered by this Act he accidentally stumbled upon the offending packet. Therefore, search for recovery of the contraband packet which resulted in its recovery and seizure was not preceded by reduction of the information in writing. in *Mohtnder Kumar v. State, Panaji. Goa 1999 SCC (Cal) 79* it has been held by the Supreme Court in paragraph 3 of the report, "... In the circumstances, from the stage he had reason to believe that the accused persons were in custody of narcotic drugs and sent for panchas, he was under an obligation to proceed further in the matter in accordance with the provisions of the Act." Again towards the end of paragraph 15 in *State of Punjab Vs. Balbir Singh*, Supreme Court held that The object of N.D.P.S. Act it to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out search as provided under the proviso to section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and, therefore, vitiates the trial". Same view was again reiterated in a later part of the same judgment in paragraph 25(2C) thereof.

23. Therefore, requirements of section 42(1) to record the prior information

before commencing search it mandatory. It is now settled law that breach of such provision is bound to vitiate the whole proceeding. It is not a question of relevancy or admissibility of evidence obtained through illegal search or seizure. It is a question that touches the very root of the case. When such question can be decided at the cognizance taking or charge framing stage with absolute certainty, there is no point in coercing the accused to go through the whole process of protracted trial. When due to breach of such mandatory provision of law acquittal of the accused is predictable beyond all doubt, it is absolutely meaningless to keep the courts busy with such dead litigation. It will be absolutely an idle exercise.

24. In these circumstances and in view of the legal position in this regard as settled by the apex court, it appears to me that in this case there was clear violation of section 42(1) with regard to reduction of the information to writing before proceeding further under the provisions of the N.D.P.S. Act and a clear decision on this point can be given at this stage on the basis of material placed before the court. Question on this point is of such a nature where no further oral evidence in this regard can be adduced. In these circumstances instead of quashing the cognizance/charge framed against the petitioners, if I am to compel him to go through the whole process of protracted trial, which it is bound to result in an acquittal, nothing will be a better example of abuse of process of law than this.

25. As I have decided to allow this petition for non-compliance with section 42(1), I do not think any decision on the question of compliance with proviso to section 42(1) is at all necessary.

26. I am, therefore, constrained to hold that to secure ends of justice and prevent any further abuse of process of law, cognizance taken in this case and all further proceeding pursuant thereto must be quashed.

27. Accordingly, I allow this petition and quash the cognizance taken in this case and all further proceedings pursuant thereto.

I also direct that the petitioner shall be set at liberty forthwith

28. Petition allowed