
(2001) 03 BOM CK 0074

In the Bombay High Court

Case No : Criminal Appeal No's. 622, 643 and 649 of 1994 and Criminal Appeal No. 82 of 1995

Shri Jayantilal Modi and Another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 09-03-2001

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 42, 42(1), 42(2), 43

Citation : (2001) ALLMR(Cri) 601 : (2001) BomCR(Cri) 908 : (2001) 3 BOMLR 385 : (2002) 81 ECC 33 : (2001) 2 MhLj 615 : (2002) 1 RCR(Criminal) 326

Hon'ble Judges : Vishnu Sahai, J;S.S. Parkar, J;Pratibha Upasani, J

Bench : Full Bench

Advocate : Mr. Yogesh Yagnik, Mr. Jayesh Yagnik, Ganesh Gole, Ms. Q.M.N. Ziaee, Mr. A.P. Munderggi and M/s. Ayaz Khan, for the Appellant; Mr. S.G. Aney, Special Counsel, Ms. P.H. Kantharia and Ms. Usha Kejriwal, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai. J.

1. On 14th July. 2000, while S. A. Bobde, J. was hearing Criminal Appeal Nos. 622 of 1994, 643 of 1994, 649 of 1994 and 82 of 1995, two conflicting decisions of this Court were cited before His Lordship; Longuram Tariram Thakur v. State of Maharashtra, wherein this Court had taken the view that since in pursuance of prior information the accused were found in possession of charas at the S.T. stand Pune, which was a public place, as contemplated by section 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to by us as the N.D.P.S. Act) it was not necessary to comply with the provisions of section 42 of the N.D.P.S. Act in terms that the information had to be recorded in writing and its copy sent forthwith to the official superior and Bindarsingh v. State of Maharashtra, wherein it was laid down that even if the information pertained to recovery of a narcotic substance under the N.D.P.S. Act was in relation to a public place, it was obligatory to comply with section 42 of the

N.D.P.S. Act and to record the information in writing and to send its copy forthwith to the official superior.

To resolve this apparent conflict S. A. Bobde, J. felt that the following questions arose for determination for a Larger Bench :-

"Whether in respect of an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985, it is necessary for an empowered officer to comply with the provisions of section 42, when the information received by him is regarding the commission of an offence in a public place of the like mentioned in the explanation to section 43"

His Lordship was pleased to direct the Registry to place the papers along with the Judgment in the said cases before the Honourable Chief Justice for appropriate orders.

2. In the said factual matrix, the Honourable Chief Justice was pleased to constitute the present Bench for the decision of the said question.

3. We have heard Mr. A. P. Mundargi for the appellants and Mr. S. G. Aney, for the respondents.

In our view, to answer the questions referred to us, it would be necessary to extract the provisions contained in sections 42 and 43 of the N.D.P.S. Act.

Section 42 reads thus :-

"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 department 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 any 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 subsection (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

Section 43 reads thus :-

"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 a 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."

4. A perusal of Section 42(1) would show that wherein an empowered officer has reason to believe :- (i) from his personal knowledge; or (ii) from information given by any person and taken down in writing that a narcotic drug or psychotropic substance etc. is kept or concealed in any building conveyance or enclosed place, he may between sunset and sunrise enter the building and take any of the actions stipulated in (a) (b) (c) and (d) of the said section.

The proviso to the said section makes it manifest that the-empowered officer can also take action under (a) to (d) between sunset and sunrise, after obtaining a

search warrant or authorisation unless he is of the view that in obtaining the search warrant or authorisation there were chances of concealment of evidence or escape of an offender, in which contingency he could straight away take action under (a) to (d) after recording the grounds of his belief.

Section 42(2) shows that where an information has been taken down by an officer u/s 42(1) or where he records the grounds of belief under proviso to Section 42(1) he shall forthwith send a copy thereof to his immediate official superior.

5. A perusal of Section 43 would show that the seizure therein relates to a public place or of an article in transit. The explanation defines "public place" as a place which includes a public conveyance, hotel, shop or other place intended for use by or accessible to public.

6. A perusal of the language used in Sections 42 and 43 of the N.D.P.S. Act bears out that Section 42 would be applicable where an empowered officer has reason to believe either from personal knowledge or from information given by any person of the likelihood of a narcotic drug etc. being kept or concealed in any building, conveyance or enclosed place and Section 43 does not stipulate that the empowered officer should have reason to believe either from personal knowledge or from information given by any person and taken down in writing and pertains to seizure of narcotic drug etc. at a public place.

7. Mr. A.P. Mundargi, learned counsel for the appellants emphatically urged that the decision of the Division Bench in Longuram Tariram Thakur's case (supra) per se appears to be bad law in view of the decision of the Apex Court in Abdul Rashid Ibrahim Mansuri v. State of Gujarat, and Koluttumottil Razak v. State of Kerala.

Mr. Mundargi invited our attention to paras 3 and 14 of Mansuri's case. He urged that a perusal of para 3 shows that the information received by Premsingh M. Vishen P.W. 2. Inspector of Police, at Dariapur Police Station was that on 12th January, 1988, one Iqbal Syed Husen was trying to transport charas upto Shahapur in an auto rickshaw bearing No. GTH 3003 and in pursuance of that information. Inspector Vishen collected the police personnel and proceeded on the main road in a quest of the contraband and at about 4 p.m. they saw an auto rickshaw driven by the appellant coming on the main road which they stopped and on checking found that four gunny bags placed inside it contained charas.

Mr. Mundargi urged that a perusal of para 14 shows that the said information had not been recorded in writing nor its copy sent by Inspector Vishen to his immediate official superior. He also urged that it shows that on behalf the respondent (State of Gujarat) it was contended that since section 43 was applicable, the officer was not required to take down the information or forward its copy to his immediate official superior u/s 42. He urged that a perusal of the said para would show that the Supreme Court repelled the said contention and observed thus :-

"We are unable to appreciate the argument because, in this case P.W. 2 admitted that he proceeded on getting prior information from a constable and the information was precisely one falling within the purview of Section 42(1) of the Act. Hence, P.W. 2 cannot wriggle out of the conditions stipulated in the said sub-section. We therefore, unhesitatingly hold that there was non-compliance with section 42 of the Act."

We now take up Kolluttumottil Razak's case (supra), Mr. Mundargi invited our attention to paras 5 and 6. He urged that a perusal of para 5 shows that the Senior Inspector of Police (P.W. 1) admitted that he got reliable information on the evening of 31.3.1991 that one man was selling brown sugar near Sarda Mandiram Bus - stop and during cross-examination, he also admitted that he did not reduce the said information in writing nor informed his superior officers about it.

Mr. Mundargi urged that inspite of the fact that the information related to recovery of contraband at a public place, the Supreme Court in para 6 held that section 42 would be applicable and therein made a reference to Mansuri's case (supra). In our view, it would be useful to reproduce para 6 of the said decision. It reads thus :

"It is a mandate of Section 42 of the Act that when an officer referred to in sub-section (1) thereof "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 is kept or concealed he may detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence under the Act. The other requirement of law is that the officer who takes down the information in writing or records grounds for his belief shall forthwith send a copy thereof to his immediate official superior. A three Judge Bench of this Court held in Abdul Rashid Ibrahim Mansuri v. State of Gujarat, that non-compliance with the requirements of section 42(1) and (2) would render the resultant search and seizure suspect, though that by itself may not vitiate the proceedings."

8. Mr. Mundargi also invited our attention to the decision of the Supreme Court in Karnail Singh v. State of Rajasthan. He candidly stated that although in this case, the recovery was not on prior information, as is evident from para 5, but, the ratio laid down by the Supreme Court in para 8 is categorical in terms that if an empowered officer has reason to believe either from his personal knowledge or information regarding the movement of narcotic drug or substance, section 42 would be applicable but in the converse situation not Mr. Mundargi invited our attention to the last few lines of para 8 which read thus :-

"For attracting the applicability of section 42, it is necessary that the officer empowered thereunder, before exercise of his right, has reason to believe from personal knowledge or information regarding the movement of narcotic drug or psychotropic substance. However, if the action is taken not upon his personal

knowledge or information, the requirements of section 42 would not be applicable".

9. Mr. Mundargi also invited our attention to paras 9 and 10 of the decision of the Constitution Bench of the Supreme Court in *State of Punjab v. Baldev Singh*, and to para 10 of the decision of the Supreme Court in *State of Punjab v. Balbir Singh*.

Paragraphs 9 and 10 of the former decision read thus :

9. Sub-section (1) of section 42 lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that 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 he may do so without recording his reasons of belief.

10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence of 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. Vide sub-section (2) of section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1) shall, forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of section 43 and section 42 is that whereas section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, section 43 does not contain any such provision and as such while acting u/s 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

Mr. Mundargi emphasised on the following lines appearing in para 10.

The material difference between the provisions of section 43 and section 42 is that whereas section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, section 43 does not contain any such provision and as such while acting u/s 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

9A. Mr. Mundargi next took us through para 10 of *Balbir Singh's* case (*supra*)

which reads thus :-

"As already noted Chapter V contains the provisions from Section 41 onwards regarding the power to arrest, issue warrants and carrying out seizure etc. and the procedure to be followed. These provisions are attracted if any of the steps mentioned thereunder are to be taken when there is reason to believe that any person who is sought to be arrested and searched, has committed any offence punishable under Chapter IV of the Act. The Magistrate or Officers especially empowered under the Act can proceed under Sections 41 and 42 on the prior information and/or having reason to believe thereupon that an offence under the Act has been committed. We may mention here that Section 43 which deals with the power of seizure and arrest in public places is slightly different from Section 42 in certain respects. Under this provision any empowered officer u/s 42 has the power to seize, detain, search or arrest in public place or in transit if he has reason to believe that an offence punishable under Chapter IV relating to such drug or substance has been committed and seize any document or other article which may furnish evidence of the commission of such offence and can seize any animal or conveyance or article liable to confiscation and can detain and search any person similarly. The empowered officer while acting u/s 43 need not record any reasons of his belief. This section also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to Section 42."

Mr. Mundargi urged that a perusal of the said para would show that section 42 would be attracted if the empowered officer has reason to believe or there exists prior information recorded in writing about recovery of narcotic drug etc. He contended that a perusal of the said para would show that u/s 43, the empowered officer need not record the reasons for his belief and nor does section 43 mention about any empowered officer having prior information from any person or of recording of the same.

10. The short and long of the submission of Mr. Mundargi is that if an empowered officer has reason to believe either from personal knowledge or from the information received by a person about the likelihood of recovery of contraband etc., then even if the said recovery is in relation to a public place u/s 43, the mandatory provisions contained in section 42(1) namely that the information be recorded in writing and those contained in section 42(2) namely its copy be sent forthwith to the immediate official superior have to be complied with.

11. Mr. S.G. Aney, counsel for the respondent, emphatically repudiated the correctness of the submission of Mr. Mundargi. Mr. Aney urged that neither Mansuri's case (*supra*) nor Razak's case (*supra*) lay down any ratio decidendi. He contended that these cases were purely decided on their peculiar facts and cannot be construed as laying down a binding precedent for answering the question referred to the Full Bench. Mr. Aney urged that the decisions of the Supreme Court in *Ganga Bahadur Thapa v. State of Goa*,¹ and *Sayarpuri v. State of Rajasthan*,² on the contrary show that if the recovery is from a public place

then section 43 would have application and consequently failure to comply with the provisions contained in section 42 would be inconsequential.

12. We have reflected over Mr. Aney's submissions and are constrained to observe that we do not find any merit in them.

We would first like to take up his first submission namely that Mansurf's case and Razak's case were decisions on their own facts and do not lay down any ratio decidendi.

A perusal of paragraphs 3 and 14 of Mansuri's case, to which we have referred to earlier, categorically show that although the information was that the contraband was to be recovered on Shahapur main road and it was recovered at the said place and the specific contention of counsel for the respondents (State of Gujarat) was that section 43 and not section 42 would be applicable, the Supreme Court rejected the said submission observing thus :-

"We are unable to appreciate the argument because, in this case P.W. 2 admitted that he proceeded on getting prior information from a constable and the information was precisely one falling within the purview of section 42(1) of the Act. Hence. P.W. 2 cannot wriggle out of the conditions stipulated in the said sub-section. We therefore, unhesitatingly hold that there was non-compliance with section 42 of the Act."

13. A perusal of para 14 would show that the ratio laid down by the Apex Court was that if contraband was recovered on a prior information then the empowered officer was under an obligatory duty to :-

(a) reduce the information in writing as mandated by section 42(1): and

(b) to send its copy forthwith to the immediate official superior as mandated by section 42(2). Hence, Mr. Aney is not justified in urging that Mansuri's case does not lay down any ratio.

We now come to Razak's case (supra).

Mr. Aney urged that since its perusal shows that there is no reference in it to section 43, the said case does not have any relevance for deciding the question referred to this Full Bench. We are constrained to observe that we do not find any merit in Mr. Aney's submission.

A perusal of para 5 shows that the Supreme Court was alive to the fact that reliable information received by the Senior Inspector of Police (P.W. 1) was that on the evening of 31.3.1991. one man was selling brown sugar near Sarda Mandiram Bus stop (public place). It would be presumptuous on our part to hold that having been aware of this fact, the Supreme Court was unmindful of the provisions contained in section 43 when it chose to hold that since the Senior Inspector of Police had not recorded the information in writing nor forwarded its copy to his immediate official superior, both section 42(1) and 42(2) were infringed. In our view, it would also be wrong to say that Razak's case does not

lay down any ratio and was only a decision on its facts.

14. Hence, the first submission of Mr. Aney fails.

15. We now come to the second submission of Mr. Aney namely that in view of the decision of the Apex Court rendered in the case of Ganga Bahadur Thapa and Sayarpuri (supra). If the information in respect of recovery of the contraband is in relation to a public place. It is not necessary to comply with section 42.

It is true that in Ganga Bahadur Thapa's case, the Supreme Court held that a room in a hotel which is occupied by a customer, in view of the explanation to section 43, was a public place and consequently, section 42 would not be applicable.

However, Thapa's case is silent on the point whether the recovery was on prior information.

Coming to Sayarpuri's case, it is also true that since the accused was found to be sitting on the bench of Mandya Road, which was a public place, the Supreme Court held that the procedure prescribed by section 42 of the Act was not attracted. But, here again, it is not clear whether there was any prior information relating to the recovery of contraband.

16. Since in our view. Ganga Bahadur Thapa's case and Sayarpuri's case are silent on the aspect of prior information and a perusal of Mansuri's case and Razak's case shows that despite the fact that there was prior information that the contraband was to be recovered at a public place, the Supreme Court held that section 42 had to be complied with it is proper to apply the decision of the Supreme Court in Mansuri's case and Razak's case.

The ratio laid down in them is that even when the information received by the empowered officer relates to a recovery of contraband etc. at a public place, section 42(1) and section 42(2) would still have to be complied with.

We also feel that the ratio laid down in Mansuri's case and Razak's case is in conformity with the ratio laid down in para 9 and 10 of the Constitution Bench decision of the Supreme Court, in 1999 SCC 1080 (supra) and para 10 of the decision of the Supreme Court in State of Punjab Vs. Balbir Singh, . We have earlier seen that the main distinction between sections 42 and section 43, as pointed by the Apex Court in the said decisions, is that section 42 relates to recovery of contraband on a prior information furnished by a person and in section 43 this element of prior information is wanting. We have also seen that section 43 does away with the requirement on the part of the empowered officer to record his reasons of belief.

17. Mr. Aney also urged that if Mansuri's case and Razak's case are construed literally the provisions contained in section 43 of the N.D.P.S. Act would become redundant. We are afraid that we cannot accede to his submission because if the recovery is not on prior information and the place from where it is effected is a

public place, section 43 would have application,

18. Mr. Aney also urged that section 42 stipulates of a private building, private conveyance and private place in contra-distinction to a public place in section 43. We are afraid that neither the judgments of the Apex Court rendered in the case of Mansuri and Razak (supra), nor the text of section 42, which we have extracted in entirety in paragraph 3, warrants such an inference. We make no bones in observing that section 42 only speaks about a building, conveyance and enclosed place and we would be doing violence to its language if we prefix the words building, conveyance and enclosed place by the word private

19. Mr. Aney also made some other submissions. In view of the judgments of the Supreme Court in Mansuri's case and Razak's case, which in our view provide the answer to the question referred to this Full Bench, it is not necessary to refer to them.

20. For the said reasons, we answer the reference made by S. A. Bobde, J. thus :-

"In respect of an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 it is necessary for the empowered officer to comply with the provisions of section 42 even when the information received by him is regarding the commission of an offence in a public place of the like mentioned in the explanation to section 43."

In view of the answer given by us to the question under reference all Division Bench and Single Judge decisions of this Court, wherein a contrary view has been taken are no longer good law.

Let the appeals to be listed forthwith, along with our judgment, before the appropriate Court for final hearing because we find that the accused are in jail from 1991 and have virtually served out their substantive sentence.