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STATE OF HARYANA
v.
JARNAIL SINGH AND ORS.

APRIL 29, 2004

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[N. SANTOSH HEGDE AND B.P. SINGH, JJ.]

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Narcotic Drugs and Psychotropic Substances Act, 1985—Sections 50 and 42—Recovery of contraband article on search of vehicle at public place, Superintendent of Police being the member of search party—Application of Sections 50 and 42—Compliance of the mandatory requirement—Held: In such factual situation, Section 50 not applicable since contraband recovered on search of vehicle in public place and not personal search—Also Section 42 not applicable since there was no requirement of the officer conducting search to record grounds of his belief as contemplated by proviso to Section 42—Moreover Superintendent of Police being member of search party and exercising his authority, Section 42 not attracted.

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According to the prosecution, Superintendent of Police along with other members of the force while checking vehicles moving on the high way, intercepted a tanker. Respondent-persons sitting in the cabin of the tanker were interrogated, tanker was searched and 73 gunny bags containing 18 kg. poppy husk each, were found. Samples were sealed and all necessary steps were taken under the NDPS Act and Rules. Respondents were put up for trial and were convicted and sentenced by trial court under section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985. However, High Court acquitted them for non-compliance with the requirements of Sections 42 and 50 of the Act. Hence the present appeal.

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Appellant State contended that the High Court erred in applying the provisions of Sections 42 and 50 of the NDPS Act to the facts and circumstances of the case since the search was made on a highway—a public place and not in a private enclosed place, thus Section 42 was not applicable; and Section 50 did not apply because the contraband article was not recovered on personal search of the accused, but on search of the vehicle.

Allowing the appeal, the Court

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HELD: In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. On facts, Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, was not applicable since the contraband was recovered on search of a vehicle and there was no personal search involved. Further, there was no prior information regarding the contraband being carried in a vehicle, and the recovery was the result of checking of the vehicle in normal course. The requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42 was also not required to be complied with since the recovery was made at a public place and was, therefore, governed by Section 43 which did not lay down any such requirement. Moreover, since the Superintendent of Police was a member of the search party and was exercising his authority under Section 41, the proviso to Section 42 was not attracted. Therefore, the Order of High Court being clearly erroneous, is set aside and respondents are sentenced to undergo rigorous imprisonment for ten years, each under Section 15 of the NDPS Act and to pay fine of Rs 1,00,000 and in default to suffer further rigorous imprisonment for two years.

[869-E-H]

State of Punjab v. Baldev Singh, [1999] 6 SCC 172; *Kalema Tumba v. State of Maharashtra and anr.*, [1999] 8 SCC 257; *Gurbax Singh v. State of Haryana*, [2001] 3 SCC 28; *Madan Lal v. State of H.P.*, [2003] 7 SCC 465; *Birakishore Kar v. State of Maharashtra*, [2000] 9 SCC 541; *Saikou Jabbi v. State of Maharashtra*, [2004] 2 SCC 186 and *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence*, [2003] 8 SCC 449, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 918 of 1998.

From the Judgement and Order dated 29.8.97 of the Punjab and Haryana High Court in CrI. A. No. 146-SB of 1996.

D.P. Singh, V.K. Garg, Ms. Avneet Toor and Manu Sharma for the Appellant.

R.K. Talwar, Amit Talwar and Y.P. Dhingra for the Respondents.

The Judgment of the Court was delivered by

B.P. SINGH, J. The State of Haryana has preferred this appeal by special leave against the judgment and order of the High Court of Punjab and

A Haryana at Chandigarh dated August 29, 1997 in Criminal Appeal No.146-SB/96 whereby the High Court acquitted the respondents of the charge under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') for non compliance with the requirements of Sections 42 and 50 thereof. Earlier, the respondents were tried by the Additional District Judge, Ambala who found them guilty of the offence under Section 15 of the NDPS Act and sentenced them to rigorous imprisonment for 10 years each and to pay a fine of Rs. 1 lakh each and in default of payment of fine to undergo further rigorous imprisonment for two years.

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C The facts of the case are not in dispute. The case of the prosecution is that on February 20, 1992 Sub-Inspector Mehar Singh, SHO Police Station Mullana alongwith Head Constable Om Prakash and other members of the police force, was on patrolling duty and was moving about in a government jeep. On the way they met Mahinder Singh Ahlawat, Superintendent of Police, whereafter alongwith him they started checking vehicles moving on the highway

D at about 8.00 p.m. For this they held a naka bandi on the turning of village Dhanora. At about that time a tanker bearing No.URM-2092 came from the side of Sadhora. It was signalled to stop, but rather than stopping, the tanker sped away. This gave rise to suspicion and therefore the tanker was chased and compelled to stop. It was found that there were three persons sitting in the cabin of the tanker and it was being driven by respondent Mohan

E Krishan. The others two, namely Jarnail Singh and Prithvi Raj were sitting with him. They were interrogated and thereafter the tanker was searched in the presence of the witnesses and the Superintendent of Police. On the opening of the lid of the middle chamber of the tanker a lot of gunny bags were found lying there. One of the gunny bags was taken out and on being

F checked it was found to contain poppy husk. Thereafter all the bags were taken out numbering 73 and on checking, it was found that they also were filled with poppy husk. Weighing scales were brought and the bags were weighed separately. It was found that each bag contained 18 kgs. of poppy husk. Thereafter the samples were sealed as required by law and thereafter

G all necessary steps were taken under the NDPS Act and the Rules. The respondents were put up for trial and were convicted by the trial court as noticed earlier. On appeal by the respondents the High Court held that they were entitled to acquittal in view of the fact that the mandatory requirements of Section 50 and Section 42 of the NDPS Act were not complied with. The High Court held that the provisions of Section 50 of the NDPS Act applied

H and before searching the vehicle the accused had to be informed of his right

to be searched in the presence of a Magistrate or a gazetted officer. It made no difference that a Superintendent of Police, who was a gazetted officer, was a member of the searching party who searched the vehicle. It further held that Section 42 of the Act had not been complied with inasmuch as the SHO Mehar Singh did not record the grounds for his belief before entering upon the search that he had reasons to believe that some contraband offending the NDPS Act was being carried in the vehicle and that an attempt to get a search warrant from a competent Magistrate would frustrate the object or facilitate escape of the offender. Consequently the trial was vitiated also for non-compliance of the provisions of the proviso to Section 42(1) of the NDPS Act.

In the appeal before us counsel for the State of Haryana contended that the High Court was entirely wrong in holding that the provisions of Sections 42 and 50 of the NDPS Act applied to the facts and circumstances of this case. He argued that the search was not made in a private enclosed place but in a public place, namely the highway. Thus, Section 43 of the NDPS Act was applicable and not Section 42. There was, therefore, no obligation to comply with the requirements of Section 42. Secondly, Section 50 of the NDPS Act did not apply to the facts of the case because the contraband article was not recovered on personal search of the accused, but on search of the vehicle. Section 50 is limited in its application to personal search.

Learned counsel for the respondents, however, sought to support the findings of the High Court.

Having heard learned counsel for the parties, we are of the view that the judgment and order of the High Court are clearly erroneous and must be set aside. A Constitution Bench of this Court in *State of Punjab v. Baldev Singh*, [1999] 6 SCC 172, exhaustively considered the various provisions of the NDPS Act. As regards application of Section 50 of the NDPS Act, the Court came to the following conclusion :-

“On its plain reading, Section 50 would come into play only in the case of search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act, makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.”

A The same view has been reiterated in several decisions of this Court including *Kalema Tumba v. State of Maharashtra and anr.*, [1999] 8 SCC 257; *Gurbax Singh v. State of Haryana*, [2001] 3 SCC 28; *Madan Lal v. State of H.P.*, [2003] 7 SCC 465; *Birakishore Kar v. State of Orissa*, [2000] 9 SCC 541 and *Saikou Jabbi v. State of Maharashtra*, [2004] 2 SCC 186. The language of Section 50 is clear and unambiguous and the law so well settled that it is not possible to take a different view. We must, therefore, hold that the Section 50 of the NDPS Act did not apply to the facts of this case, where on search of a tanker, a vehicle, poppy husk was recovered. This not being a case of personal search, Section 50 was not applicable. Moreover, there was no prior information regarding the contraband being carried in a vehicle, and the recovery was the result of checking of the vehicle in normal course.

C The next question is whether Section 42 of the NDPS Act applies to the facts of this case. In our view Section 42 of the NDPS Act has no application to the facts of this case. Section 42 authorises an officer of the departments enumerated therein, who are duly empowered in this behalf, to enter into and search any such building, conveyance or place, 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 etc. is kept or concealed in any building, conveyance or enclosed place. This power can be exercised freely between sunrise and sunset but between sunset and sunrise if such an officer proposes to enter and search such building, conveyance or enclosed place, he must record the grounds for his belief 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.

E Section 43 of the NDPS Act provides that any officer of any of the departments mentioned in Section 42, may seize in any public place or in transit any narcotic drug or psychotropic substance etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorized to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that 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.

F Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into, and search of, any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public

place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and the sunrise.

In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. Section 43, therefore, clearly applied to the facts of this case. Such being the factual position there was no requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42. Moreover, it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence*, [2003] 8 SCC 449, that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act.

We, therefore, hold that in the facts of this case Section 50 of the NDPS Act was not applicable since the contraband was recovered on search of a vehicle and there was no personal search involved. The requirement of the proviso to Section 42 was also not required to be complied with since the recovery was made at a public place and was, therefore, governed by Section 43 of the Act which did not lay down any such requirement. Additionally, since the Superintendent of Police was a member of the search party and was exercising his authority under Section 41 of the NDPS Act, the proviso to Section 42 was not attracted.

In the result this appeal is allowed, the judgment and order of the High Court are set aside and the respondents are sentenced to undergo rigorous imprisonment for ten years, each under Section 15 of the NDPS Act and to pay a fine of Rs.1,00,000, in default to suffer further rigorous imprisonment for a period of two years. The respondents shall be taken into custody to serve out the sentence subject to the provisions of Section 428 of the Criminal Procedure Code.