

CASE NO.:
Appeal (crl.) 918 of 1998

PETITIONER:
State of Haryana

RESPONDENT:
Jarnail Singh and others

DATE OF JUDGMENT: 29/04/2004

BENCH:
N. SANTOSH HEGDE & B.P. SINGH

JUDGMENT:
J U D G M E N T

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 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.

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 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 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 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 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 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 was made 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 is clearly erroneous and must be set aside. A Constitution Bench of this Court in *State of Punjab vs. 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 a 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."

The same view has been reiterated in several decisions

of this Court including *Kalema Tumba vs. State of Maharashtra* and another : (1999) 8 SCC 257 ; *Gurbax Singh vs. State of Haryana* : (2001) 3 SCC 28 ; *Madan Lal vs. State of H.P.* : (2003) 7 SCC 465 ; *Birakishore Kar vs. State of Orissa* : (2000) 9 SCC 541 and *Saikou Jabbi vs. 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 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.

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.

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.

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 vs. 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 were not attracted.

In the result this appeal is allowed, the judgment and order of the High Court is 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.