

Brijesh Kumar Gupta Vs. Narcotics Control Bureau

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SooperKanoon Citation : sooperkanoon.com/1136752

Court : Delhi

Decided On : Apr-03-2014

Judge : V. K. Jain

Appellant : Brijesh Kumar Gupta

Respondent : Narcotics Control Bureau

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment reserved on:

31. 03.2014 Date of Decision:

03. 04.2014 + CRL.A. 1242/2010 BRIJESH KUMAR GUPTA Appellant
Through: Ms Nandita Rao, Adv. versus NARCOTICS CONTROL BUREAU
Respondent Through: Mr Rajesh Manchanda and Mr Rajat, Advs. CORAM:
HON'BLE MR. JUSTICE V.K. JAIN JUDGEMENT V.K. JAIN, J.

On 05.05.2006, in the night intervening 4/5th May, 2006, at about 2.00 AM, Shri Prem Khanduri, Intelligence Officer (IO), NCB, DZU, New Delhi, received a secret information that one Brijesh Kumar Gupta, a resident of Mainpuri, U.P., who was engaged in supplying heroin in Delhi, would come to Mayur Vihar, Akshar Dham Chowk between 03.00 to 4.00 AM, to supply huge quantity of heroin to his customers. Shri Prem Khundari recorded the aforesaid information and forwarded the same to his Superintendent Shri R.R. Kumar, who directed him to take necessary action. Crl. A. No1242/2010 Khanduri collected the seal of NCB, DZU-5

from Shri R.R. Kumar, who was having charge of the seals. A raiding party consisting of NCB officers then reached the above-referred spot in a Government vehicle, driven by Shri Bhuvnesh, Sepoy, NCB, at about 2.30 AM. Three persons found present on the above-referred spot were requested to join the raiding party as witnesses. Out of them, two persons, namely, Ajit Singh, S/o Shri Ram Singh and Babu Khan, S/o Shri Akhlaq Khan agreed and were joined in the raiding party. At about 3.30 AM, the appellant/accused Brijesh Kumar Gupta came there carrying a bag on his right shoulder and stopped at the side of Nizamudding bridge, waiting for someone to come. When the aforesaid person started stopping some auto-rickshaws to go towards Nizamudding bridge, the IO stopped him, introduced himself as well as the other NCB officers and the witnesses and also informed him about the secret information he had. A notice under Section 50 of NDPS Act was also served on him and he was told that if he wanted, he could opt to be searched before any Gazetted Officer or a Magistrate, under his legal right. The appellant, however, declined the said option, whereupon Shri Prem Khanduri took the bag which the appellant was carrying on his right shoulder and searched the same. It was found to contain three transparent packets containing light brown coloured powder wrapped in a towel. On testing powder from the said packets, it gave positive test for heroin. On weighing, two packets, which were marked as A and B, were found to contain 2kg each of heroin, whereas the third bag, which was marked C, contained 3 kg of heroin. Two representative samples of five gram each were drawn from all the three packets, which were marked as A1, A2, B1, B2 and C1, C2. The sample packets as well as the residual substance were sealed with the seal of Narcotics Control Bureau DZU-5, after separate paper slips bearing signatures of the appellant, the witnesses and the IO were pasted on them. The above-referred seal was also fixed on the test memos, prepared on the spot.

2. A summon under Section 67 of the NDPS Act was, thereafter, served upon the appellant, directing him to appear in NCB office at 7.00 AM on 05.05.2006. Accordingly, the appellant appeared before Shri Akhilesh Mishra, Intelligence Officer, NCB and made a voluntary statement, inter alia, admitting that the substance recovered from him was heroin.

3. Immediately, on returning to NCB office, Shri Prem Khundari deposited the samples, test memos as well as the residual substance in the Malkhana of NCB, whereas the seal of Narcotics Control Bureau DZU-5 was returned to Shri R.R. Kumar. The appellant was got medically examined in Safdarjung Hospital on 06.05.2006 and produced in the Court on the same date. The samples A1, B1 and C1 were sent to CRCL along with the test memos on 08.05.2006 through Shri Bhuvnesh, Sepoy, NCB, which were received by Shri A.K. Singh, an official of CRCL. On being analysed in the laboratory, the aforesaid substance was found to be heroin. The appellant was, therefore, prosecuted under Section 21(c) of NDPS Act.

4. Since the appellant pleaded not guilty to the charge framed against him, the prosecution examined nine witnesses in support of its case. Two witnesses were examined by the appellant in his defence.

5. Shri Prem C. Khanduri came in the witness-box as PW-2 and inter alia stated that at about 2.00 AM on 05.05.2006, he received a secret information, from an informer who came to his office, that one Brijesh Kumar Gupta, resident of Mainpuri, U.P., who used to supply heroin in Delhi, was about to deliver huge quantity of heroin between 3.00 AM to 4.00 AM near Mayur Vihar, Akshardham Chowk. The information was recorded by him and the writing Ex.PW-2/1 was put up to Shri R.R. Kumar, Superintendent, who was present in the office. Shri R.R. Kumar constituted a raiding team and instructed him to take necessary action. He also made an endorsement to this effect on the written information Ex.PW-2/1. The witness further stated that thereafter, he collected the seal of Narcotics Control Bureau DZU-5 through Shri R.R. Kumar and reached the abovereferred spot at about 3.00 AM, along with other NCB officials and informer. At about 3.30 AM, the accused came there carrying a black colour bag on his right shoulder and stopped near Nizamuddin bridge. The informer left the spot, after identifying the accused. After some time, the accused tried to stop some auto-rickshaws to go towards Nizamuddin bridge, whereupon he was apprehended. He (the witness) introduced himself and other NCB officials as well as the witnesses to the accused and apprised him of the information he had with him. A notice under Section 50 of NDPS Act was then served upon him. The appellant, however, declined to be

searched in the presence of a Magistrate or a Gazetted officer, whereafter the IO took the aforesaid bag from the appellant and searched it. Three polythene packets were recovered from the bag which, on being tested, gave positive test for heroin. Two bags weighed 2 kg each, whereas the third bag weighed 3kg. He took out two samples from each of the packets and gave them mark A1,A2, B1, B2 and C1, C2. CrI. A. No1242/2010 The samples as well as the Page 5 of 33 remaining heroin were sealed with the seal of Narcotics Control Bureau DZU-5 and CRCL Form was filled on the spot. He served summon under Section 67 of NDPS Act on the accused, who voluntarily accompanied them to his office. On reaching office, he deposited the case property and test memos in the Malkhana and made entry in this regard in the godown register, which is Ex.PW-2/7. He also returned the seal to Shri R.R. Kumar.

6. PW-6 Shri Akhilesh Kumar Mishra, Intelligence Officer, was a member of the NCB team which went to the spot on 05.05.2006. He corroborated the deposition of PW-2 Shri P.C. Khanduri as regards the appellant having come near Akshardham, at about 3.00 AM, on 05.05.2006 with a bag on his shoulder, his having been intercepted and heroin being found in the bag, which he was carrying. He further stated that subsequently the appellant Brijesh Kumar appeared before him in NCB office in response to the summons which had been issued to him under Section 67 of the NDPS Act and made statement Ex.PW-6/2, which bears the signature of the appellant at point B and the signature of the witness at point A. PW-8 Manoj Kumar Aggarwal is another member of the NCB team which went to the spot in the night of 4/5 th May, 2006. He also corroborated the deposition of Shri P.C. Khanduri with respect to the appellant having come near Nizamuddin bridge and recovery of heroin from the bag he was carrying on his shoulder.

7. PW-4, Shri Bhavnesh, Sepoy, NCB, was the driver of the vehicle in which NCB officials went to the spot in the night intervening 4/5th May, 2006. He is also the official who took four samples along with two duplicate test memos and a forwarding letter to CRCL, New Delhi on 08.05.2006. According to him, the aforesaid samples, test memos and forwarding letter were handed over to him by Shri R.R. Kumar and he delivered the same to Shri A.K. Singh in CRCL, with seals intact on them. PW-5 Shri R.R. Kumar, inter alia, stated that on 05.05.2006, Shri

P.C. Khanduri put up the information Ex.PW-2/1 before him. He discussed the information with him and passed necessary instructions to constitute the team and take suitable action. Thereafter, he issued departmental seal of Narcotics Control Bureau DZU-5 to Shri P.C. Khanduri. The seal was returned to him by Shri Khanduri at 7.30 AM on the same day. On 06.05.2006, Mr Khanduri submitted seizure report under Section 57 of the Act to him and the same is Ex.PW-2/11. The arrest report of the appellant under Section 57 of the Act was also submitted to him and is Ex.PW-2/11A. He also stated that on 08.05.2006, samples were sent by him to the Chemical Examiner through Bhuvnesh Kumar, Spoy, vide forwarding letter Ex.PW2/1.

8. PW-1 Shri Ajay Kumar Singh is the Assistant Chemical Examiner, CRCL, who received the samples from Shri Bhuvnesh Kumar on 08.05.2006. According to him, the samples, when received by him, were sealed with the seal of Narcotics Control Bureau DZU-5 and the same were in intact condition. The samples were handed over by him to Shri S.K. Mittal, Assistant Chemical Examiner on 10.05.2006 with seals intact on them. Shri S.K. Mittal, Chemical Examiner came in the witness-box as PW3 and inter alia stated that the samples, which were received in CRCL, were taken out from strong room, which was under lock and key under his supervision. The seals were found intact on the samples when they were taken out from the strong room and each of them was pasted with one paper slip on one side which has some signatures on them. All the packets were sealed with the seal Narcotics Control Bureau DZU-5, which tallied with the facsimile given on the test memos. On being analysed, the samples tested positive for heroin.

9. In his statement under Section 313 Cr.P.C., the appellant denied the allegations against him and claimed that he was lifted from Choraha Mother Darwaja at Mainpuri, U.P. in the night and made to sit in the NCB office. He also stated that his scooter was still lying in Devi Road Police Station in Mainpuri. DW-1 Shri Kanhiya Lal stated that on 04.05.2006, he along with the accused was going to Sheetla Mata Mandir. According to him, next day, the father of the accused, came to him at about 9.00 AM and enquired about the accused and told him that he had not returned as yet. During cross-examination, he stated that he did not meet the

accused after 3.30 PM on 04.05.2006. DW-2 Shri Rajesh Gupta stated that on 04.05.2006, at about 3.00 PM, the accused had left for Darshan and in the evening, the mother of the accused told him that he had not returned home. Next day, he met Kanhiya Lal (DW-1), who told him that he had gone with the accused to the temple. He took Kanhiya Lal to Mainpuri Kotwali and reported the matter.

10. Vide impugned judgment dated 01.07.2010, the appellant was convicted under Section 21(c) of NDPS Act and vide impugned Order on Sentence dated 06.07.2010, he was sentenced to RI for 10 years and to pay a fine of Rs 10,000/- or in default, to undergo SI for one year. Being aggrieved from his conviction and sentence awarded to him, the appellant is before this Court by way of this appeal.

11. The learned counsel for the appellant, who has also filed written synopsis on his behalf, assailed the conviction of the appellant primarily on the following grounds:(a). no public witness was examined, despite the arrest having been alleged on a busy road; (b). no Gazetted Officer was present when the raid was conducted; (c). presence of PW-5 Shri R.R. Kumar in NCB office in night is not believable and, therefore, his deposition with respect to handing over the seal to Shri P.C. Khanduri and constituting a raiding party cannot be believed; (d). the application of the appellant for re-testing the samples was wrongfully declined by the Trial Judge; (e). there was some correction in the NCB register Ex.PW-2/7, which creates a suspicion of manipulation.

12. As regards presence of Shri R.R. Kumar in the office of NCB in the night intervening 4/5th May, 2006, I find nothing unusual in his presence even at odd hours at night, considering the nature of the duty, officer of NCB to perform. The documentary evidence produced by the complainant/respondent corroborates the deposition of PW-5 Shri R.R. Kumar and PW-2 Shri P.C. Khanduri in this regard. The information Ex.PW-2/1 was recorded, at about 2.00 AM and immediately thereafter Shri Kumar made endorsement mark B on the same. The seal movement register, a copy of which is Ex.PW-2/8, shows that at about 2.25 AM, the seal of Narcotics Control Bureau DZU-5 was handed over by Shri R.R. Kumar to Shri P.C. Khanduri. The aforesaid register having been maintained in the regular course of the business is an authentic public document, wherein entries

were made as and when the aforesaid seal was handed over to an officer of NCB. The register is maintained in chronological order. Therefore, there was no possibility of inserting the entry with respect to handing over the seal to Shri P.C. Khanduri and return of the same by him on the same date. I, therefore, find no merit in this contention.

13. As regards public witnesses, the case of the complainant is that they had joined two public witnesses, namely, Ajit Singh and Babu Khan, who met NCB officials on the spot. The seizure memo is signed by both the above-referred persons and so are the documents such as notice under Section 50 of NDPS Act. The aforesaid witnesses could not be produced since it was reported on the summons that no such person was residing at the given address. If the public witnesses chose not to disclose their correct address to the NCB officials, NCB cannot be faulted for not producing them in the Court. It is quite possible that though the aforesaid witnesses did agree to join the proceedings on being persuaded by NCB officials, they gave wrong address to NCB officials so that they do not have to visit the Court for the purpose of giving evidence during trial. The other possibility in this regard is that the witnesses had left the place where they were residing at the time of seizure of the drug, without conveying their fresh address to NCB. It would also be pertinent to note here that the statements of both the aforesaid witnesses are recorded under Section 67 of the NDPS Act. The aforesaid statements also lends authenticity to the case of NCB with respect to their having been associated with the seizure of the narcotic drug from the appellant. Presuming, however, that no public witness was joined before seizing drug from the appellant, that by itself cannot be a good ground to reject the testimony of NCB officials, who, on receipt of an information, which was duly reduced in writing and brought to the notice of the superior officer, went to the spot and apprehended the appellant, on his being identified by the informer and seized the narcotic drug from him. The appellant does not claim any previous enmity or ill-will between him and the NCB officials. Therefore, they had no reason to depose falsely against him and implicate him in a false case of recovery of narcotic drugs. In *Ajmer Singh Vs. State of Haryana* (2010) 3 SCC746 it was contended that the evidence of the official witness cannot be relied upon as their testimony had not been corroborated by any independent witness. The Honble Supreme Court,

rejecting the contention, held as under:

16. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.

Rejecting a similar contention in *Kashmiri Lal Vs. State of Haryana* (2013) 6 SCC595 the Honble Supreme Court inter alia observed as under:

9. .it is evincible from the evidence on record that the police officials had requested the people present in the 'dhaba; to be witnesses, but they declined to cooperate and, in fact, did not make themselves available. That apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising the evidence the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle of quality of the evidence weighs over the quantity of evidence. These aspects have been highlighted in *State of U.P. v. Anil Singh* 1988 Supp SCC686 *State, Govt. of NCT of Delhi v. Sunil and another* (2001) 1 SCC652 and *Ramjee*

Rai and others v. State of Bihar (2006) 13 SCC229 Dealing with a similar contention in Ram Swaroop Vs. State (Govt. NCT) of Delhi 2013 (7) SCALE407 where the alleged seizure took place at a crowded place yet no independent witness could be associated with the seizure, the Apex Court inter alia observed as under:

7. .We may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in State of U.P. v. Anil Singh 1988 Supp SCC686 wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for nonexamining the independent witnesses.

In Ramjee Rai and others v. State of Bihar (2006) 13 SCC229 it has been opined as follows:

26. It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward. Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that non- examination of the independent witnesses affect the prosecution case and, hence, we unhesitatingly repel the submission advanced by the learned counsel for the appellant.

14. During the course of arguments, it was contended by the learned counsel for the appellant that the notice issued to the appellant under Section 50 of NDPS Act was not appropriate since he was not informed of his legal right to be searched in the presence of a Magistrate or a Gazetted officer. I, however, find no merit in the contention. The provisions contained in Section 50 of the Act apply only when a person is to be searched. The question as to what is the meaning of the word search any person occurring in sub Section (1) of Section 50, came up for consideration before a three Judge Bench of the Honble Supreme Court in State of Himachal Pradesh v. Pawan Kumar [(2005) 4 SCC350 and the following view

was taken:

10. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

11. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the word "search of person". One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person.

The Bench in this regard also referred to the decision of the Constitution Bench decision in *State of Punjab Vs. Baldev Singh* 1999 CrLJ3672 While allowing connected CrL. A. No.375/2003 titled *State of Rajasthan Vs. Bhanwar Lal*, the Bench noted that in that case the accused was found standing with a attach in his hand. A written notice was given to him that his attach case would be searched as information had been received that the same contained opium. He was also asked as to whether he would like the search to be conducted before a Magistrate or a Gazetted Officer. This fact was also mentioned in the notice. The accused said that he did not want to be searched before any Magistrate or Gazetted Officer. The High Court, however, held that the provisions of Section 50 of the Act were not complied with. Allowing the appeal filed by the State, the Apex Court held that the

view taken by the High Court could not be sustained. Thus, despite a notice under Section 50 of the Act having been given to the accused and a contention having been raised that the notice was not in conformity with the provisions of Section 50 of the Act, the three Judges Bench, allowed the appeal filed by the State and set aside the acquittal of the accused, on the ground that no such notice was required in law. In *Ajmer Singh Vs. State of Haryana* [(2010) 3 SCC746, the appellant before the Apex Court was carrying on his shoulders, a bag which was later found to contain 500 grams of charas. He was served a notice under Section 50 of the Act giving an option to be searched either by the Gazetted Officer or the Magistrate. He was then taken to a DSP where his search was carried out on the directions of the DSP though not by the DSP himself. It was contended before the Apex Court that the provisions of Section 50 of the Act had not been complied with. Rejecting the contention, the Apex Court held that the question of compliance or non-compliance of Section 50 of the Act is relevant only where the search of person is involved and the said Section does not apply where no search of a person is involved. The Court was of the view that the said provision is not attracted in case of recovery from a bag, brief case, container, etc., which do not come within its ambit. In *K. Chithhayan Vs. State of Tamil Nadu* (2008) 11 SCC363 the appellant was found standing near a bus stop with a bag on his right hand. It was conveyed to him that he was entitled for the conduct of the search before a Gazetted Officer or a Judicial Magistrate. The accused, however, gave consent to be search by the police officer himself. It was contended on behalf of the appellant that there was non-compliance of the mandatory provisions of Sections 42(2) & 50 of the Act. Rejecting the contention, it was held that Section 42 of the Act did not apply since the search was made in a public place. It was further held that Section 50 of the Act also did not apply since the search was of the bag carried by the appellant and there was no personal search. Reliance in this regard was placed upon *State of Himachal Pradesh Vs. Pawan Kumar* (supra). In *State of Haryana Vs. Ranbir @ Rana* (2006) 5 SCC167 the contraband was recovered from the plastic bag which the respondent before the Apex Court was carrying. He was told that the search was to be effected in the presence of a Gazetted Officer or a Magistrate if he so desired. The High Court having acquitted him, the State took the matter to the Apex Court by way of appeal. Relying upon

State of Himachal Pradesh Vs. Pawan Kumar (supra) and State of Punjab Vs. Baldev Singh (supra), it was held that Section 50 of the Act was applicable only in a case of personal search of the accused. The Apex Court rejected the contention that the three Judges Bench in State of Himachal Pradesh Vs. Pawan Kumar (supra) had wrongly distinguished the earlier decision of another three Judges Bench in Namdi Francis Nwazor Vs. Union of India (1998) 8 SCC534 15. In the case before this Court since the recovery of heroin was effected from a bag which the appellant was carrying on his person and not from the search of his body, the provisions of Section 50 of the Act, in view of the above referred authoritative pronouncements of the Apex Court would be inapplicable and consequently any defect in the notice would not vitiate the recovery. Moreover, the notice given to the appellant clearly referred to his legal right to be searched in the presence of a Magistrate or a Gazetted officer and, therefore, it confirmed to the legal requirement. In any case, the effect of non-compliance with requirement of Section 50 of the Act, as held by the Constitutional Bench of the Honble Supreme Court in State of Punjab Vs. Baldev Singh 1999 CrLJ3672 would be that it would not vitiate the trial but would render the recovery of an illicit article suspect and vitiate the conviction where the conviction has been recorded only on the basis of the illicit article. In the case before this Court, the conviction and sentence of the appellant is not based solely on the recovery of heroin from him but is also based on the confessional statement made by him under Section 67 of the NDPS Act. Ex.PW6/2 wherein he expressly admitted on that date he was apprehended, he had come to deliver 7 kg of heroin to one Rajeshwar, which he had purchased from one Jamil. Thus, possession of 7 kg of heroin was expressly admitted by the appellant in his aforesaid statement. Though, in his statement under Section 313 Cr.PC, the appellant claimed that his signatures were forcibly obtained on blank papers, there is no evidence of any force having been used on him. The appellant was produced before the learned Special Judge for the first time on 6.5.2006. On that date, he was remanded to judicial custody upto 19.05.2006. The ordersheet does not show any complaint by him to the learned Special Judge with respect to use of force against him. The same was the position when he was produced before the Court on 19.05.2006, 2.6.2006, 15.06.2006. In fact, the record does not show that the aforesaid statement was retracted by the appellant at any point of

time. Ex.PW6/4 is the MLC of the appellant. No injury of any kind was found on his person when he was examined in the hospital on 6.5.2006. Thus, firstly the provisions of Section 50 of the NDPS were not applicable, since the seizure took place from a bag which the appellant was carrying on this person and in any case, the conviction of the appellant is not based solely upon the recovery of heroin from him, same being based also on his statement made under Section 67 of the NDPS Act.

16. The learned counsel for the appellant relied upon Baldev Singh (supra). The aforesaid judgment is of no help to the appellant since the recovery was not effected from the search of his person. The learned counsel for the appellant also relied upon the decision of the Honble Supreme Court in State of Punjab v. Balbir Singh [AIR 1994 SC1872. I have perused the said judgment. The question involved in the aforesaid case was as to whether any arrest and search of a person or search of a place without confirming to the provisions of the NDPS Act becomes illegal and consequently vitiates the conviction or not. In the aforesaid decision, the Apex Court, inter alia, held that only an empowered officer or duly authorized officers as enumerated in Section 41(2) and 42(1) of NDPS Act can act under the provisions of the said Act and any search or arrest made by any officer other than an empowered officer would be illegal. It was also held that only an empowered officer could authorize his subordinate officer to carry out arrest of a person or a search and if there is contravention, that would affect the prosecution case and vitiate the conviction.

17. Section 41(1) of the Act enables a Magistrate to issue a warrant (i) for the arrest of any person whom he has reasons to believe to have committed any offence punishable under the Act; OR (ii) for the search of any building, conveyance or place in which, he has reasons to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence under the Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding of any illegally acquired property which is liable for seizure or forfeiture under Chapter VA, is kept or concealed. Sub-Section (2) of Section 41 empowers

any gazetted officer of central excise, narcotics, customs, revenue intelligence or any other department of the Government as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drug 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, to authorize any officer, subordinate to him but superior in rank to a Peon, sepoy or a constable (i) to arrest a person if he has reason to believe from personal knowledge or information given by any person and taken in writing that he has committed an offence punishable under the Act or (ii) to search a building, conveyance or place, if he has reasons to believe, from personal knowledge or information given by any person and taken in writing, that any narcotic drug or psychotropic substance or controlled substance, in respect of which any offence under the Act has been committed, or any document or other article which may furnish evidence of the commission of such offence, or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property, which is liable for seizure or freezing or for forfeiture under Chapter VA of the Act, is kept or concealed in such building, conveyance or place. Such an officer (for short `empowered officer) can himself also arrest such a person or search such a building, conveyance or place. Section 42 of the Act, to the extent it is relevant, empowers any such officer of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government as is empowered in this behalf by general or special order by the Central Government or 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 (for short `empowered officer), if he has reasons to believe, from personal knowledge or information given by any person and taken down in writing that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of the Act is kept or sealed in any building,

conveyance or enclosed place, to enter into and search any such building, conveyance or place between sunrise and sunset and 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 reasons to believe to be liable to confiscation under the Act and any document or other article which he has reasons to believe may furnish evidence of the commission of any offence punishable under the Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of the Act.

18. It would thus be seen that both, Sections 41 as well as 42 apply only to entry into and search of any building, conveyance or place where, as per the knowledge of or information received by the concerned officer (a) any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the Act has been committed or (b) any document or other article which may furnish evidence of the commission of such offence or (c) any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture, is kept or concealed. As a necessary corollary, the aforesaid Sections would not apply where the knowledge of the officer or the information received by him does not pertain to the narcotic drug/psychotropic substance/controlled substance or illegally acquired property or document or article furnishing evidence of illegally acquired property being kept or concealed in any building, conveyance or enclosed place.

19. Section 43 of the Act empowers any officer of any of the departments mentioned in Section 42 to seize, (i) in any public place or (ii) in transit, any narcotic drug/psychotropic substance/controlled substance in respect of which he has reasons to believe an offence punishable under the Act has been committed. He can also seize, in any public place or transit, any animal or conveyance or article liable to confiscation under the Act as well as any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under the Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for

seizure or freezing or forfeiture under Chapter VA of the Act. The explanation of Sections 41 to 43 of the Act gives only a deeming definition of the expression 'public place' which in terms of the said explanation includes any public conveyance, hotel, shop or other place intended for use by, or accessible to the public.

20. A combined reading of the provisions contained in Sections 41 to 43 would thus show that even where an officer of any of the departments mentioned in Section 42 of the Act carries out search and/or seizure pursuant to receipt of an information, he need not, before carrying out search and/or seizure record such information into writing and convey the same to his immediate official superior, where the seizure is effected either at a public place or in transit. Any other interpretation would substantially curtail the power conferred upon an officer under Section 43 of the Act. In my view, it cannot be said that the provisions of Section 43 of the Act would apply only to those cases where the concerned officer does not have a prior information or knowledge. Any other interpretation, in my view, would be contrary to the express provisions of the Act and substantially defeat the objective behind conferring the power of seizure and arrest in a public place on an officer of the departments mentioned in Section 42 of the Act.

21. The question as to whether Section 42 of NDPS Act applies to a case of seizure of a narcotic drug at a public place or not has come up for consideration of the Apex Court in a number of cases. In *State of Haryana Vs. Jarnail Singh & Ors.* (2004) 5 SCC188 the Apex Court *inter alia* held as under:

7. 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.

8. 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.

9. 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 *Narayanaswamy Ravishankar Vs. Asstt. Director, Directorate of Revenue Intelligence* (2002) 8 SCC7 heroin was recovered from a suit case which the appellant was attempting to transport at the airport. The appellant pleaded non-compliance of Section 42 of the Act. The contention was rejected holding that the seizure had taken place at the airport which was a public place. In *State, NCT of Delhi Vs. Malvinder Singh* (2007) 11 SCC314 the opium was recovered from the body of the accused. The High Court acquitted him on the ground of non-compliance of Section 42 of the Act. Allowing the appeal filed by the State it was held that Section 42 had no application. In taking the aforesaid view, the Apex

Court relied upon its earlier decisions in *T. Thomson Vs. State of Kerala & Anr.* (2002) 9 SCC618 and *State of Haryana Vs. Jarnail Singh & Ors.* (supra). In *Union of India Vs. Major Singh & Ors.* (2006) 9 SCC170 the narcotic drug was recovered from a truck at a public place. It was held that since the seizure was made from a public carrier at a public place, between sun rise and sun set, Section 42 of the Act was not applicable. In *Ravindran Vs. Superintendent of Customs* (2007) 6 SCC410 the appellant was arrested at a bus stand pursuant to an information that he was carrying drug with him. Noticing that the arrest and seizure took place at a bus stand and not in any building, conveyance or enclosed place, the Honble Supreme Court held that the case was covered by Section 43 of the Act which did not require information to be taken down in writing and similarly, there was no requirement that the officer concerned must send a copy thereof to his immediate official superior within 72 hours. In *Crl. Appeal No.D-1097-DB of 2009 titled Ankit Kumar Vs. State of Punjab* decided on 21.12.2013, a Division Bench of Punjab & Haryana High Court *inter alia* held as under:

14. A reading of Section 42 of the Act shows that the requirement to take down the secret information in writing and sending to superior officers prior to search is in respect of recoveries made from a private place such as building, conveyance or enclosed place. There is no requirement to record such information in writing in respect of search and arrest in a public place or in transit. The expression 'transit' in Section 43 of the Act is applicable to the expression 'conveyance' used in Section 42 of the Act as well, which is evident from the provisions of Section 49 of the Act, which authorizes an empowered officer to stop any conveyance, if the officer is suspecting that such conveyance is carrying narcotic drug or psychotropic substance or controlled substance. Thus Sections 43 & 49 of the Act, in respect of conveyance, creates an exception to carry out the search and seizure operations in respect of a vehicle in motion. The Supreme Court in *State of Haryana versus Jarnail Singh*, (2004) 5 SCC188 while considering search of a tanker moving on a public highway, found that Section 43 is applicable to the case in question.....

22. As regards the application of fluid in Malkhana Register Ex.PW2/7, I find no merit in the contention. It appears that initially the crime number was written as

25/2006 which was later corrected to 26/2006. The error was corrected and duly initialled by the concerned officer. The details given against the relevant entry leave no doubt that the aforesaid entry pertains only to the seizure effected in the present case. The name of the appellant has been written in column no.7 of the register which requires name and address of the accused. The date and time of the deposit has been recorded in column no.10, the date of sending the sample has been recorded in column no.10 and the date of sending the sample has been recorded in column no.15 of the register. The quantity of drug as well as the weight of the samples has also been noted in column no.5 of the aforesaid register. Therefore, no importance can be attached to the clerical error in recording the crime number particularly when it bears the initials of the concerned officer.

23. As regards, the order declining to send the second sample to the laboratory, the challenge has no merit in view of the decision of the Honble Supreme Court in *Thana Singh v. Central Bureau of Narcotics* [(2013) 2 SCC590 In the aforesaid case, the Apex Court, after considering the law on the subject clearly held as under:

25. Therefore, keeping in mind the array of factors discussed above, we direct that after the completion of necessary tests by the concerned laboratories, result of the same must be furnished to all parties concerned with the matter. Any requests as to re-testing/ re-sampling shall not be entertained under the NDPS Act as a matter of course. These may, however, be permitted in extremely exceptional circumstances, for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period of fifteen days of the receipt of the test report; no applications for re-testing/-re-sampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of re-testing/ re-sampling is strictly prohibited under the NDPS Act.

24. As regards depositions of DW1 and DW2, they, in my view, do not help the appellant in any manner since, as admitted by DW1, the travel time between Mainpuri and Delhi is only 7 hours and according to the witness he did not meet the appellant after 4:00 p.m. on 4.5.2006. Therefore, it was very much possible for the appellant to be present in Delhi on 5.5.2006 at about 3:00 a.m.

25. For the reasons stated hereinabove, I find no ground to interfere with the conviction of the appellant, which accordingly is confirmed. The sentence awarded to the appellant being the minimum sentence prescribed under Section 20(c) of the Act, there is no scope for its reduction. It is, however, directed, unless the fine has already been deposited, the appellant in default of payment of fine, shall undergo RI for three months as against one year, as awarded by the learned trial court. The appeal stands disposed of accordingly. A copy of this order be sent to concerned Jail Superintendent for information and necessary action. Trial court record be sent back forthwith along with a copy of this order. APRIL03 2014
BG/rd/ks CrI. A. No1242/2010

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