

Sewa Ram and ors. Vs. State

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Court : Allahabad

Decided On : Apr-09-1992

Reported in : 1992CriLJ2929

Judge : I.S. Mathur, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20B, 35, 37, 41, 42, 43, 50 and 54; [Constitution of India](#) - Articles 14 and 21

Appeal No. : Criminal Misc. Case No. 14475 of 1991 and 14120 of 1992

Appellant : Sewa Ram and ors.

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : T. Rathore, Adv.

Disposition : Application allowed

Judgement :

ORDER

I.S. Mathur, J.

1. In these two bail applications in cases under the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S. Act) similar questions of

fact and law arise, and as such, they are being disposed of by this common order.

2. In CrI. Misc. Case No. 14475 of 1991 (Crime No. 249 of 1991 under Section 20-B of the Narcotic Drugs and Psychotropic Substances Act, P. S. Baberu, District -- Banda) applicant Sewaram was arrested on 26-8-1991 for the alleged offence under Section 20(b) of the N.D.P.S. Act for allegedly being in possession of one Kilogram ganja and two and a half Tolas opium for the purposes of selling. It is alleged that, while on patrol duty, Sub-Inspector Harish Chandra Tripathi, S.O. got the information from an informer that the applicant was selling Ganja and opium in front of the Government Opium Shop. The S.O., accompanied with the public witnesses Ram Chandra Gupta and Shiv Mangal Chaubey, searched the applicant and found the aforesaid Ganja and opium from a plastic bag, as also some money in another bag. This was sealed at the spot and recovery memo was prepared. A copy of the memo was given to the applicant but allegedly he tore it of.

3. In CrI. Misc. Case No. 14120 of 1992 (Crime No. 273 of 1991 under Section 20(b) Narcotic Drugs & Psychotropic Substances Act, 1985 P. S. Baberu, Distt. Banda) the applicant was arrested on 10-9-1991 for an offence under Section 20(b) of the N.D.P.S. Act and about four kilograms Ganja in 'pudia' and one kilogram opium was recovered from a gunny bag in his possession. It is said that, while on patrol duty, S. I. Harish Chandra Tripathi got the information from an informer that the applicant was selling Ganja and opium in the Government Opium shop, He, accompanied by the public witness Jagdish, searched the applicant and recovered the aforesaid Ganja and opium from a bag. The recovery memo was prepared at the sport and a copy thereof was given to the applicant, but he allegedly tore it of.

4. In both the cases, bail applications were moved before the learned Sessions Judge, Banda but he rejected the same vide his orders dated 8-1-91 and 16-9-91 on the ground that, considering the quantity of Ganja and opium recovered and having regard to the provisions of Section 37 of the N.D.P.S. Act, these were not fit cases for granting bail. Pleas regarding violation of Sections 42 and 50 of the N.D.P.S. Act were raised before him, but he rejected the submissions in regard thereto with the observation that it is a matter of evidence to be looked into at the

stage of trial.

5. The learned counsel for the applicants, Sri Rathore, has canvassed the same grounds before this Court as were canvassed before the learned Sessions Judge. He has submitted that provisions of Sections 42 and 50 of N.D.P.S. Act are mandatory and violations thereof must be presumed to have caused prejudice to the applicants. It is urged that the information received by S.I.H.C. Tripathi was not reduced in writing as is required under Section 42 N.D.P.S. Act, nor the applicants were given any opportunity of getting themselves searched before a gazetted officer or a Magistrate as is provided under Section 50 of N.D.P.S. Act. It is submitted by him that the learned Sessions Judge should have considered these pleas on merit and consideration thereof could not have been postponed until the trial. It is also contended by the learned counsel that, if these two provisions are interpreted to mean that these mandatory requirements could be circumvented by the police officers or the other authorities that would be violation of the mandate under Article 21 of the Constitution.

6. It is difficult to accept the view of the learned Sessions Judge (Special Judge) that the matters regarding the alleged violation of Sections 42 and 50 of the N.D.P.S. Act or the other procedural safeguards, contained in Chapter-IV of the Act, could not be looked into at the stage of bail and that could be considered only at the stage of trial. The N.D.P.S. Act is different from other criminal statutes in as much as minimum sentence of ten years imprisonment and Rs. 1 lac fine is prescribed for offences under the Act and the burden of proof is thrust upon the accused (vide Sections 35 and 54 of the N.D.P.S. Act). In view of these stringent and unusual provisions, the legislature, in its wisdom, thought it fit to introduce certain salutary procedural safeguards to protect the accused against false or vexatious arrest. These are contained in Chapter-IV of the N.D.P.S. Act, more particularly in Sections 42 and 50 of the Act.

7. The relevant portions of Sections 42 and 50 of N.D.P.S. Act read as follows:

42. (i) Any such officer... 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...may, between sun rise and sunset, --

(a) enter into and search any such building, conveyance or place;

(b)...

(c)...

(b) 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:

(2) Where an officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior :

Section 50. (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in Sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched any one excepting a female.

8. These provisions cast a statutory duty upon the police officers or the other authorities to reduce the information in writing and also give an option to the accused to be searched before a Gazetted Officer or a Magistrate. These provisions are mandatory and violation thereof must, prima facie, be held to cause prejudice to the accused.

9. The question as to whether these provisions are mandatory and their violation shall per se be deemed to have caused prejudice was considered in an outstanding decision of the Punjab and Haryana High Court in *Hakam Singh v. Union Territory Chandigarh*, 1988 Cri LJ 528 and it was held that these provisions are mandatory and the violation thereof causes prejudice per se. The same view has been taken by the Bombay High Court in *Lawarance D'Souza v. State of Maharashtra*, 1992 Cri LJ 399 with the rider that the prosecution may collect independent material which may, with the reasonable explanation as to why any particular requirement in a given case could not have been followed shows that no prejudice has, in fact, been caused.

10. There is another aspect of the matter. If these provisions are not held mandatory and their violation is overlooked or permitted that would be against the mandate contained in Article 21 of the Constitution. The word 'law' in the expression, 'procedure prescribed by law' in Article 21 has been interpreted in *Menaka Gandhi's case* AIR 1978 SC 597 to mean that the procedure must be right, just and fair and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 could not be satisfied. If it is arbitrary, it would be violative of Article 14 of the Constitution also See *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675 : (1978 Cri LJ 1741). The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14; it must be right, just and fair and not arbitrary, fanciful or oppressive *Smt. Menka Gandhi v. Union of India*, AIR 1978 SC 597.

11. Any action taken by any public authority which is invested with statutory power, has, therefore, to be tested by the application of two standards; The action must be within the scope of the authority conferred by law and secondly it must be reasonable, if any action within the scope of the authority, conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken, is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes *Olgatellis v. Bombay*

Municipal Corporation, AIR 1986 SC 180.

12. Having regard to the mandate of Articles 21 and 14 of the Constitution and the law laid by the Supreme Court in the aforesaid cases, it must necessarily be inferred that the provisions contained in Sections 42 and 50 of the N.D.P.S. Act are mandatory. The words in these two sections are unambiguous and have no scope for an interpretation to the effect that the police officer or any other authority can violate these provisions at their whims and pleasure. The intention of the legislature obviously is that, when such stringent punishments are provided under the Act, there should be sound safeguards to ensure that innocent persons are not harassed or unnecessarily detailed by any arbitrary or whimsical actions of the police or the other authorities. If it had been provided by the legislature in Section 42 of the Act, that the information may be reduced in writing 'wherever it is practicable' or it were said in Section 52 that the accused may be produced before a gazetted officer or a magistrate, if he so desires, 'only when it is practical to do so', then it may have been a case for consideration whether these provisions suffer from arbitrariness and are violative of Articles 14 and 21 of the Constitution. When the legislature has not provided any such ifs and buts, could be read such provisions therein ?

13. Since the provisions contained in Sections 42 and 50 of the N.D.P.S. Act are meant to ensure just and fair action on the part of the police and other authorities, it would not be right to tell the accused that the alleged violation of these provisions could not be looked into at the stage of bail application, and that he must wait until the trial. How unfair it would be to brush aside the violation of the mandatory provisions and force the accused to languish in Jail four years and leave the question of violation of these provisions until the trial is over, wherein it may be found that the accused was entitled to acquittal on account of the violation of these provisions. Such a situation is fraught with the danger that the investigating or prosecution agency may ignore altogether the mandatory provisions of law and thereby thwart the intention of the legislature at their whims and pleasure. As already noted, that would be against the spirit of the Articles 21 and 14 of the Constitution. That would bring into peril the liberty of the citizen guaranteed under Article 21 of the Constitution. It would leave the doors wide open for mischief. The

accused, therefore, should be entitled to rely upon the infirmities even at the stage of bail. It would be quite unfair to keep the accused in Jail for several years which a trial is bound to take.

14. It is possible that, during the trial and even before it, the prosecution might be able to give a reasonable explanation as to why a particular provision could not be followed in its entirety and no prejudice has, in fact been caused and thereby rebut the prima facie presumption or enforce of (sic) prejudice but until that is done, the violation of these mandatory provisions cannot be taken lightly, only to be discussed and decided until the stage of the trial.

15. Such a question arose before Madhya Pradesh High Court in Mari Appa's case 1990 Cri LJ 1990. The Court, on an examination of the provisions contained in Sections 42 and 50 as also of Section 37 of the N.D.P.S. Act held:

If the procedure laid down under the Act is not followed, it would not be proper for the Court to refuse bail, particularly when the procedural safeguards violated have a material bearing on trial of the case. Therefore in the instant case non-compliance with the provisions of Sections 42 and 50 of the Act entitles the accused to be released on bail.

16. The decision in Mari Apps' case 1990 Cri LJ 1990 was referred to and followed by the Bombay High Court in Lawrance D'Souza v. State of Maharashtra, 1992 Cri LJ 399 and the Bombay High Court held at Page 403:

The burden under Sections 54 and 35 of the N.D.P.S. Act would shift upon the accused only after the prosecution discloses prima facie, that he is guilty....For that purpose the compliance with procedural requirements must be insisted upon and must be shown at least, prima facie, at the stage of bail.

The Court further observed :

The accused, therefore, should be entitled to rely upon the infirmities with all its vigour even at the stage of bail.

17. It must, therefore, be held that the question of the violation of the mandatory provisions, contained in Chapter-IV of the N.D.P.S. Act, could and ought to be considered even at the stage of bail and pleas thereof may not be brushed aside by mere observation that those will be considered only during evidence or in the trial.

18. In the present case, it is urged by the learned counsel for the applicants that S.I. H.C. Tripathi is said to have got information from an informer but this information was not reduced in writing, as is required under Section 42 of the Act. This fact has been stated specifically in the affidavits filed with the two petitions. This factual assertion has not been controverted or disputed. It has already been noted above that this section is mandatory. The provisions requiring the information received to be reduced in writing has a definite purpose. The purpose is that the story of secret information may not be concocted to support any version that is put in the Court. It is intended that the accused must know what information has been given to enable him or his Counsel to cross-examine with reference to it. It cannot be a defence to the violation of this mandatory requirement that information of this mandatory requirement that information was received while on patrol duty or while being away from police Station. Even in such a case the information can be reduced in writing.

19. In Hakam Singh's case 1988 Cri LJ 528 the facts were similar. In that case, it was said that secret information was received by A.S.I. Manjeet Singh in the course of patrolling and it was sought to be urged that it was for that reason it could not be reduced in writing. The sequence of events narrated by the prosecution witnesses excluded even an attempt by the police party to have the alleged secret information reduced in writing. It was held that failure to reduce the information in writing is a material violation of this provision.

20. The facts, at present, on record do not explain as to why the information could not have been reduced in writing. One mandatory provision contained in Section 42 of the Act has, prima facie, been violated. It may be that during the trial the prosecution may be able to show that, notwithstanding the non-compliance of this provision, there was no prejudice caused to the accused, but it may also be that

the prosecution may fail in this attempt. Until the prosecution is able to show that no prejudice has been caused the accused must be found entitled to take benefit of this failure to comply with this provision, and he held entitled to bail on that account.

21. The provisions of Section 50 of the N.D.P.S. Act would also appear to have been violated. As noted above, Section 50 inter alia, requires that the accused shall, if he so requires be taken to the gazetted officer of the departments mentioned in Section 42 or to the nearest magistrate. In Hakam Singh's case 1988 Cri LJ 528, the view taken is that the police officer is bound to inform the accused that he could, if he so desires, be taken to the nearest gazetted officer or magistrate for the purposes of search. In Wilfred Joseph v. State of Maharashtra, 1990 Cri LJ 1034 however it has been held that there is nothing in Section 50 of the Act to suggest that the police officer was duty bound to inform the accused that if he so desires, he shall be searched in the presence of the gazetted officer or the magistrate. With respects, I am unable to accept this view of the Bombay High Court, and in my opinion, the view taken in Hakam Singh's case is the correct view.

22. The provisions of a statute have to be interpreted inter alia with reference to the intention of the legislature. It may also be assumed that the legislature would always intend to ensure just and fair action. Most of the population in India is not literate and, in any case, there are very few who understand their legal rights and duties or the provisions of law, much less the provision of such special law as N.D.P.S. Act. It would not be just and proper to hold that the accused in these cases must necessarily be deemed to know his rights given under Section 50 of the Act. In quite a number of cases the accused are riskshaw pullers and poor and illiterate section of the society. It is too much to expect that they will know their legal rights contained in Chapter-I of the Act. Justice demands that the authorities who have special knowledge of the Act must inform the accused of their right under Section 50 of the Act and their failure to do so must lead to the inference that the mandatory provision has not been complied with.

23. Right given to the accused under Section 50 of the Act is valuable right. Sub-section (3) of this section authorises the Gazetted Officer or the Magistrate before whom such an accused is brought, to discharge him, if he sees no reasonable ground for search. It is obvious that if accused is informed of this right he may, in quit a number of cases want to exercise this option.

24. In the present case, as noted above, there is nothing to show that the police Officer who arrested the accused-applicants informed them that they could have the search made before a gazetted officer or a magistrate. Therefore, this mandatory provision has also been violated.

25. There is yet another apparent infirmity in the searches made in both the cases and that is in regard to the recovery memo. The recovery memos in both the cases, inter alia, mention towards the end that copy of the recovery memo was given to the accused but they tore it of. It is not understandable how this averment could be made in the body of the recovery memo. Copy of the recovery memo is to be given to the accused only after it is complete and signed. Once the copy has been given to the accused, it could not be mentioned in the body of the recovery memo that he tore it of. This also, prima facie, casts doubt on the authenticity of the recovery memo. It may be that the police officer concerned be able to explain as to how this averment could have been made in the body of the recovery memo but until then a lingering doubt must remain.

26. It is true that the provisions of the N.D.P.S. Act are in the nature of social legislation and it is in the interest of the community that the real culprits must be apprehended and severely punished but at the same time care has to be taken that the innocent persons are not unnecessarily harassed and for that purpose the mandatory procedural safeguards are complied with. The social need lends special responsibility on the investigating prosecuting authorities as also on the public prosecutors. The public prosecutor has a vital role to play in the whole process of reaching the required satisfaction by the Court in regard to the culpability of the accused. The Investigating Officer the Public Prosecutor and the concerned authorities can, by placing and pointing out the relevant material, collected against the accused, effectively and meaningfully oppose the application

for bail by showing that mandatory provision has been followed and no reasonable grounds exist for believing that the applicant is not guilty of the offences charged.

27. It may also be noted the observations made in this order are not intended to foreclose the case of the prosecution and they can still establish their case against the accused. At the stage of bail, the material considerations are not necessarily the same as may be at the time of the trial. Different tests may have to be applied at the stage of bail for two important reasons; firstly, at that stage, the accused has no opportunity to cross examine the witnesses or to establish prejudice which he can hope to establish at the stage of trial; secondly the mandatory provisions would be attracted right from the inception of the investigation, subject, of course, to their detailed consideration at the stage of trial. As already noted, the prosecution may also be able to establish during the trial that, notwithstanding the non-compliance of the mandatory provisions, no prejudice has, in fact, been caused to the accused and that the evidence indicates that he is guilty of the offences.

28. For reasons indicated above, the bail applications in both the cases must be allowed without prejudice to the right of the prosecution to prove the relevant facts and circumstances at the time of trial.

29. The applicants Sewa Ram (Crl. Misc. Case No. 14475 of 1991) and Rajuwa (Crl. Misc. Case No. 14120 of 1992) shall be released on bail on their executing personal bond each in the sum of Rs. 20,000/- (Rs. twenty thousand) and on furnishing two sureties each in the like amount to the satisfaction of the Special Judge, Banda and subject to the further conditions that they shall keep the Court and the police station Baberu, District Banda informed about their whereabouts and shall not have the jurisdiction of the Court without the permission of that Court.