

Bijaya Kumar Subudhi Vs. State of Orissa

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Court : Orissa

Decided On : Jan-27-1995

Reported in : 1995(I)OLR481

Judge : D.M. Patnaik, J.

Acts : Narcotic Drug and Psychotropic Substances Act, 1985 - Sections 50

Appeal No. : Criminal Appeal No. 239 of 1991

Appellant : Bijaya Kumar Subudhi

Respondent : State of Orissa

Advocate for Def. : S. Das, Addl. Govt. Adv.

Advocate for Pet/Ap. : P.K. Dhal, Adv.

Disposition : Appeal allowed

Judgement :

D.M. Patnaik, J.

1. Appellant having been convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act. 1995 (hereinafter referred to as 'NDPS Act') and sentenced to R. I. for ten years and fine of rupees one lakh, assails his conviction.

2. Prosecution case is, on 24-10-1989 at about 6 p. m., PW 5 then S. I. of Excise with his other staff was on mobile duty in Puri town for detection of offences under the NDPS Act. On receiving reliable information that the appellant was illegally trafficking in narcotic substances. PW 5 and others reached near the house of the appellant in Daitapara Sahi and found the appellant on the road in front of his house. He was detained and on his personal search there was recovery of 0.050 miligrams of narcotic substance kept in two paper packets each weighing 0.025 miligrams. it is the case of the prosecution that before the search the appellant was asked of his option for being searched in presence of a Gazetted Officer and on his agreeing, ha was searched in presence of PW 4, a member of the raiding party On recovery of this quantity of brown sugar, the same was sea ed in presence of the appellant. He was produced before the SDJM, Puri on 25-10-1989.

The appellant denied the indictment.

3. Mr. P.K. Dhal, learned counsel for the appellant, strenuously urges referring to various mandatory provisions of the Act including Sacs. 42, 43 and 60 to 64 that the trial Court committed gross error in not taking into account the various lapses and infirmities in the prosecution case with regard to non-compliance of the mandatory provisions which vitiated the entire proceeding.

Mr. S. Das, Additional Standing Counsel, for the State, on the other hand supported the judgment of coviction.

4. The main thrust of argument of Mr. Dhal. is firstly with regard to the non-compliance of the provisions of Section 50 of the Act which requires the arresting authority to ask the accused for his option to be searched either in presence of a Gazetted Officer or In presence of a Magistrate. The learned counsel submits that the trial Court committed an error In holding that the search of the appellant before PW 4 who was a member of the raiding party was in due compliance of the provisions of Section 50. The learned counsel has taken me to the evidence of PWs 4 and 5 which shows that PW 5 asked the appellant whether he wanted to be searched before a Gazetted Officer and that he was subjected to search before PW 4.

Predicating an option for an accused to be searched either before a Gazetted Officer or a Magistrate; the legislative intent is apparent that it wanted to safeguard the liberty of an accused against false criminal charge. Needless to point out that in such circumstances the provisions should be strictly followed. In this regard Mr Dhal refers to a decision reported in Vol. IV(1993) Current Criminal Reports 3095. In re B. Ramannamma. It has been held in the said case that:

'...A member of the raiding party even he himself may be a Gazetted Officer or a superior officer of the department cannot himself perform the dual tasks of being a party to the search and arriving at a satisfaction that the search is warranted or not as required by Section 50. '

In another decision referred to by Mr. Dhal. in 1983 Cri L J 2310, Babu Rao v. State of Karnataka, it has been held that the fact that one of the officers was a Gazetted Officer would not amount to the compliance of requirement of Section 60 of the Act. It has further been held that a mere presence of a Gazetted Officer did not validate the search in view of the mandatory provisions contained in Section 50.

5. Going through the two decisions, there is no room for any doubt that it would be improper on the part of the arresting authority to get the accused searched in presence of any member of the raiding party even if he happens to be a Gazetted Officer. In the present case. PW 5 asking option of the appellant to be searched in presence of PW 4 was never in compliance with the mandatory provisions of Section 50 either in letter or in spirit. I would say that the prosecution was only casting a blind eye to the mandatory provisions by resorting to perfunctory way in asking the accused's option for being searched in presence of PW 4 who was none else other than a member of the raiding party.

For this non-compliance' of the mandatory provisions, the appellant deserves to be acquitted. In this regard the latest decision of the Supreme Court reported in (1994) 7 OCR (SC) 283, State of Punjab v. Balbir Singh and Ors., where the apex Court has held that non-compliance of the provisions of the Act with regard to search, recovery and seizure etc. would vitiate the proceeding.

6. The second point raised by Mr. Ohal is with regard to non-compliance of the provisions of sealing of the seized article.

It is already held by this Court in two of the decisions reported in (1994) 7 OCR 108, Laxmidhar Mohapatra v. State of Orissa, and (1994) 7 OCR 445, Ajaya Kumar Nayak v. State of Orissa, that in case of any defect with regard to the proper sealing of the seized articles and the custody of the same, if there is any non-compliance or there is any inadequate compliance of the provisions of the Act. the prosecution case should become doubtful.

In the present case, according to the evidence of PW 5, he gave his personal seal to PW 2 with a direction to produce the same in Court at the time of trial, but PW 2 in para 5 of his evidence denied the fact of being entrusted with the custody of the brass seal. The I. O (PW 5) stated in his evidence to have produced the accused in Court on 25-10-1989. The order-sheet of the Magistrate does not indicate that the seized property was produced on that day as stated to by PW 5 in his evidence. The forwarding report of PW 5 also does not indicate that he produced the impression seal along with the seized property before the Court for examination. Though the order sheet of the Magistrate dated 26-10-1939 merely shows that PW 5 made a prayer to send the material objects as per the list for chemical examination, but there is nothing to find out that the Courts did examine the sealed property and found the same to have been properly sealed. PWs 1 and 2 were the prosecution witness in whose presence the seized article was sealed as stated to by PW 5, but surprisingly they did not support this part of the prosecution case.

PW 3 is the Excise Constable who though stated about PW 5's handing over the personal seal used for the sealing the article to PW 2, yet, he omitted to state in his 161 statement, which omission has been proved vide para 33 of the cross-examination of the I. O.

PW 4 did not name PW 2 as the person to have taken custody of the brass seal from PW 5. The sole evidenc⁹ of PW 5, the I. O. with regard to the fact of his handing over the personal seal to PW. 2 cannot therefore be believed in the facts and circumstances of the case.

Repelling the above two contentions of which discussions have already been made by me. Mr. Oas, learned Additional Government Advocate, submits that all these points raised by learned counsel for the appellant in this Court with regard to the facts of seizure were not raised-before the trial Court and according to him, this, as held in the cases reported in AIR 1972 SC 2473, Bharat Singh v. State of U. P. and (1994) 7 OCR 533, Krushna Chandra Mohanty v. State, the appellant should not be allowed to raise here in appeal.

To this I may point out that the two questions raised and dealt with by me above relate to non-compliance of the mandatory provisions of the Act and, therefore, this being purely point of law, it can be raised in appeal.

7. For the reasons stated above, prosecution has failed to prove the case against the appellant. The criminal appeal is, therefore, allowed, the orders of conviction and sentence are set aside. The appellant is acquitted of the charge and he be set at liberty forthwith

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