

Gopal Reddy Vs. State

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Court : Orissa

Decided On : Sep-19-1994

Reported in : 1995(I)OLR224

Judge : A. Pasayat, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 42, 43 and 50

Appeal No. : Jail Criminal Appeal No. 56 of 1994

Appellant : Gopal Reddy

Respondent : State

Advocate for Def. : D.K. Misra, ASC

Advocate for Pet/Ap. : S.K. Misra, Adv.

Disposition : Appeal allowed

Judgement :

A. Pasayat, J.

1. On the accusation of having committed an offence punishable under 5ec. 20 of the Narcotic Drugs and Psychotropic Substances Act (in short 'the Act') appellant Gopal Reddy (hereinafter described as 'accused') faced trial. He was found guilty

by learned First Additional Sessions Judge, Puri and sentenced to undergo rigorous imprisonment for two years and pay a fine of Rs. 5,000/- with default sentence of six months.

2. Background facts as stated by prosecution are as follows. On 25-11-1392 while S. I. of Excise, Balugaon (PW 4) was performing patrol duty along with other members of staff near Balugaon Bazar, he got a secret information about a person carrying Ganja. He proceeded to Bus Stand and ultimately noticed accused on the road to the west of the Bus Stand with a carton over his head. Accused was detained and 5 kilograms of Ganja kept in the said carton were recovered. After drawing necessary sample, the carton box was sealed. Similarly, sample packet was sealed and accused produced before learned Judicial Magistrate, First Class, Banpur, along with the seized articles. In presence of learned Judicial Magistrate, sample packet was sent to Chemical Examiner, State Drugs Control and Research Laboratory, Bhubaneswar, for necessary chemical test. Prosecution report was submitted against the accused. Accused pleaded innocence. He took a positive stand that he had no link with the alleged offence, and he has been falsely implicated. Placing reliance on evidence of four witnesses examined to further prosecution case, learned First Additional Sessions Judge, Puri, found accused guilty, convicted and sentenced him as aforesaid.

3. Sole point urged by Mr. S K. Misra, learned counsel for accused-appellant in support of appeal is that there was non-compliance of statutory requirements stipulated in Section 50 of the Act. According to him, concerned officer was obliged to inform accused of his right to be taken to the nearest Gazetted Officer of any of the departments mentioned in Section 42. or to the nearest Magistrate. It is submitted with reference to evidence of Excise Sub inspector (PW 4) that accused was only asked whether he wanted to be taken before a Magistrate. That cannot be treated to be compliance of mandatory requirements set out in Section 50. Learned counsel for State, on the other hand, contended that the purpose of asking the option is to rule out false implication and malicious prosecution. Accused was given option of being taken before a Magistrate. He declined to do so. Therefore, he cannot make a grievance that there has been non-compliance with Section 60, without establishing any prejudice.

4. Since primal question is whether there was compliance of the requirements set out in Section 60 of the Act, a reference to the said provision which reads as under is necessary ;

'50. Conditions under which search of persons shall be conducted ; (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 directory to the nearest Owned-Officer of any of the Departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such a 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 by any one excepting a female.'

As observed by the Apex Court in *State of Punjab v. Balbir Singh and Ors.* 1994 (I) OLR 327, (1994) 7 OCR 283. Section 50 has been introduced with the obvious intent to avoid any harm to innocent persons and to avoid raising of allegation of planting or fabrication by prosecuting authorities. It mandates that if a person to be searched so requires, the Officer who is about to search him under the provisions of Sees, 41 to 43, shall take such person without any unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. There was divergence of view on the question whether a person to be searched was required to indicate his choice, or the concerned authority was required to inform of the available options. That controversy has been set at rest by the Apex Court in *Balbir Singh's* case (*supra*). It has been held that it was obligatory on the part of the officer to inform the person of his right. Safeguards under Section 50 are of primary importance and confer a valuable right. Therefore, it is to be taken as an imperative requirement on the part of the

officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in presence of a Gazetted Officer or a Magistrate. If the submission of learned counsel for State is accepted, it would bring in the concept of an alternative choice being given to the officer to choose the authority before whom search is to be made. That is not the intention of Legislature as is evident from bare reading of the provision. Section 50 of the Act is not attracted if a police officer, without any prior information as contemplated under the provisions of the Act, makes a search or arrests a person in the normal course of investigation into an offence of suspected offence as provided under the Code of Criminal Procedure, 1973 in short, 'the Code') and when such search is completed at that stage. If during such search or arrest, there is a chance recovery of any narcotic drugs and psychotropic substance, then the police officer who is not empowered is required to inform the empowered officer, who has to Director proceed in accordance with the provision of the Act. If he happens to be an empowered officer also, then from that stage onwards, he is required to carry on the investigation in accordance with the provisions of the Act. Mr. D. K. Misra, learned Additional Standing Counsel places great emphasis on a decision of this Court in *Brajabandhu Parida v. State*, 1993 (II) Crimes 1111. With reference to the factual aspects involved in that case, it is submitted that the person who was to be searched was given the option of being searched before a Magistrate who was accompanying the raiding party and on the accused accepting to be searched in his presence, the search was made. That was held to be in compliance with the requirements of Section 60. There are some distinctive features in that case and the fact situation is not similar. The offer to be searched in presence of Magistrate was accepted by the accused and in that background it held that there was compliance with the requirements of Section 50. The position is entirely different here. Evidence of PW 4 shows that he asked the accused whether he would like to be taken before a Magistrate. Not a word has been breathed about any offer to be taken to any Gazetted Officer of the departments indicated in Section 42 of the Act. Partial compliance with the requirements would not meet the mandate prescribed by Section 50. Both the alternatives have to be indicated to the person who is to be searched. Indication of one of the alternative choices does not conform to the mandatory requirements and is, therefore, in violation of Section

50. Similar view has been taken by Delhi High Court in Chameli Devi v. State, 1993 (III) Crimes 418. and Jagdish Prashad v. State, II (1994) CCR 1413. The inevitable conclusion is that there was non-compliance with the mandatory requirements of Section 60, which vitiates the trial. The appeal is consequently allowed and appellant is acquitted of the charge. Unless he is required to be in custody in connection with any other case, he shall be released forthwith.

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