

Chattra Ram Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Nov-06-1990

Reported in : 1990(2)WLN233

Judge : B.R. Arora, J.

Appeal No. : S.B. Criminal Appeal No. 422 of 1988

Appellant : Chattra Ram

Respondent : The State of Rajasthan

Disposition : Appeal allowed

Judgement :

B.R. Arora, J.

1. This appeal arises out of the judgment dated August 2,1988, passed by the Additional Sessions Judge No. 1, Hanumangarh, by which the learned Additional Sessions Judge convicted the appellant Under Section 8/18 of the Narcotics Drugs and Psychotropic Substances Act (hereinafter referred to as 'the Act') and sentenced him to ten year' rigorous imprisonment and a fine of Rs. 1 lac, and in default of payment of fine to further undergo two years' rigorous imprisonment.

2. The incident, which led to the prosecution of the accused Under Section 8/18 of the Act, took place on May 17,1986, at about 10.30 p.m. when the appellant was

apprehended by the Station House Officer Shri Raghuveer Singh (PW 4). The case of the prosecution is that on May 17, 1986, at about 8.15 p.m., the Station House Officer Shri Raghuveer Singh, the Deputy Superintendent of Police Shri Raghuveer Singh Gangadhar Sharma, Kaliyan Singh F.C., Satyadeo Singh Constable and Hakam Singh F.C., went on patrolling duty. At about 10.30 p.m., when they reached near the Gurudwara situated near Bhagatsingh Choraha, Hanumangarh Junction, the accused appellant was coming--out from the Gurudwara, who was carrying a white bag in his hand. After seeing the police party, he returned back and tried to run away. Suspicion arose and the police party caught-hold of him and on search of the bag, 1.850 kgs. of opium was found in that bag. A sample from this material was taken, which was spirally sealed and the remaining opium was also sealed in a separate cover. After sealing the opium, the accused-appellant was arrested and the memo of arrest was prepared at the place of the occurrence and thereafter, after returning to the Police Station, a First Information Report was drawn at the Police Station at about 11.50 p.m. The sample was, therefore, sent for Forensic Science Laboratory (F.S.L.) examination, which on examination, was found as opium. The police, after necessary investigation, presented a Challan and the appellant was tried for the offence Under Section 8/18 of the Act by the Additional Sessions Judge No. 1, Hanumangarh. After trial, the learned Additional Sessions Judge No. 1, Hanumangarh, convicted and sentenced the appellant, as mentioned above.

3. The learned counsel for the appellant challenging the conviction of the appellant, submitted that while making the recovery from the appellant, an independent witness was called though the place, from where the appellant was arrested, is situated in the main market and numerous independent witnesses were available. His further submission is that the S.H.O. Raghuveer Singh was not authorised to make a search, arrest the accused and to investigate the matter, and, thus, his prosecution is without any authority of law and is illegal, which vitiates the whole trial. In support of his contention, the learned Counsel for the appellant has placed reliance on *Nand Lal v. The State of Rajasthan* 1987 (2) RLR 679, *Umrao v. The State of Rajasthan* 1988(1) RLR 796, *Chhoteylal v. The State of Rajasthan* 1989(1) RLR 262, *Prithvi Raj v. The State of Rajasthan* 1989 RCG 474, *Aila alias Aidan v. The State of Rajasthan* 1988 RCC 532; 1989 Cr.LR (Raj.) 413,

Suresh Lal Gupta the State of Rajasthan 1990 RCC 121 and Bhanwar Singh and another The State of Rajasthan 1990 RGC 268. The next argument of the learned Counsel for the appellant is that the sample in the present case was not properly sealed and there is no evidence on record, from which it could be gathered that the seals of the sample remained intact throughout from the day the articles were seized and sealed till it reached the Forensic Science Laboratory and was chemically examined.

4. The learned Public Prosecutor, on the other hand, has supported the judgment passed by the learned Additional Sessions Judge. His submission is that the appellant was arrested at 10.30 p.m. in the night and at that time, no independent witness was available and when there is the evidence of the police witnesses regarding search and seizure, which inspires confidence then the conviction can well be based on their evidence. He has further submitted that the irregularity in the search and seizure will not vitiate the trial when no prejudice has been caused to the appellant. Regarding the competency of Shri Raghuveer Singh, S.H.O., to conduct the investigation, the learned Public Prosecution has further argued that the present case is not covered by Section 42 of the Act, but it is covered by Section 43 of the Act and according to Section 43 of the Act, the S.H.O. was competent to investigate into such a matter. So far as the question of sealing of the sample is concerned, the learned Public Prosecutor has argued that the sample was sealed at the place of the occurrence and was deposited by the S.H.O. in the 'MALKHANA' and there is the evidence of P.W. 2 Jeetsingh, In charge, Malkhana Section, to the effect that the seals of the sample remained intact from the date of its receipt till the sample was sent for F.S.L. examination. P.W. 3 Om Prakash, who took the sample for F.S.L. examination, has, also, deposed that when he took the sample, it was in a sealed condition and after taking the sample from the 'MALKHANA', he deposited the same in the Forensic Science Laboratory in the sealed, condition. According to the learned Public Prosecutor from this evidence produced by the prosecution it stands proved that the seals on the sample remained intact throughout till it was chemically examined.

5. Before dealing with the question raised by the appellant, I would like to deal-with the nature of the evidence produced by the prosecution. P.W. 1 Birbal Ram is the Head Constable posted at the Police Station, Hanumangarh, who, on May 17,1986, was working as the CO. in the Office at Hanumangarh. On that day, he along with the Deputy Superintendent of Police Shri Janardan Sharma, Raghuveer Singh S.H.O. and Kaliyan Singh A.S.I. Police, was on patrolling duty and at about 10.30 p.m., they apprehended the accused and on search of the bag, 1.850 kgs. of opium was recovered from the appellant, which was seized and sealed by the S.H.O. in their presence. A sample of 50 grams of opium was separately taken, which was separately sealed. The recovery memo of the opium Ex. P. I was also prepared, which is signed by him. P.W. 2 Jeetsingh is the 'MALKHANA In charge, who stated that the sealed packets connected with the FIR No. 128/1986, were kere kept in the 'MALKHANA' and one of which was handed-over to Shri Om Prakash (PW 3) for handing-over to the Forensic Science Laboratory for examination in the sealed condition. P.W.3 Om Prakash is the L.C., who took the sample for F.S.L. examination. P.W.4 Raghuveer Singh is the Station House Officer, who conducted the investigation and presented the challan. This is all the evidence produced by the prosecution. No independent witness was called at the time of search and seizure.

6. Now, I take the question: whether any illegality or irregularity has been committed by the prosecution in search/seizure by the Investigating Officer Chapter v. of the Act deals with the procedure. Section 50 of the Act, which is a part of Chapter v. provides the condition, under which the search of a person shall be taken. According to Section 50, when any officer duly authorised Under Section 42 of the Act is about to make a search of any person under the provisions of Sections 41, 42 and 43, he shall, if such person so requires, take such person without any unnecessary delay to the nearest Gazetted Officer of any department mentioned in Section 42, or before the nearest Magistrate. The question that requires consideration is: whether it was necessary for the investigating officer to ask the accused, as required Under Section 50 of the Act as to what her he requires to be searched before a gazette officer or in the presence of the Magistrate. Section 50 of the Act enjoins upon the Officer who is about to search any person Under Sections 42 and 43, if such person so requires to take him

without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The object of making it preemptory on the part of the officer is to ensure that the officer, who is charged with the duty of Conducting the search, to conduct it properly and do no harm or wrong, such as planting of offending drugs by any interested party and to prevent fabrication of any false evidence. The provisions of Section 50 are intended to provide a safeguard against vexatious search, any unfair dealings and to protect and safeguard the interests of the innocent persons. It also provides a protection to the law-enforcing officer against the common allegation that drugs are planted by the investigating agency. In the present case, there is no evidence on record that the appellant was informed of his right at any time before his person was searched. As the investigating officer, in the present case, failed to comply with these mandatory requirements of Section 50 of the Act, which, in my opinion, vitiates the whole trial.

7. The next question which requires consideration is: whether the S.H.O. Raghuveer Singh was authorised and competent to investigate into the matter? It is contended by the, learned Counsel for the appellant that the matter relates to May 17, 1986, and on that day, P.W. 4 Raghuveer Singh was not authorised Under Section 42 of the Act to conduct the investigation. Section 42 of the Act deals with the power of entry, search, seizure and arrest without warrant on authorisation. According to Section 42, any such Officer being an officer superior in rank to a peon, Sepoy or Constable of the department of the Central Excise, Narcotics, Customs, Revenue, Intelligence or any other department of the Central Government or the B.S.F., as is empowered by this provision by the general and specific order of the Central Government or any other such officer (being an officer superior in rank to a peon, Sepoy or a Constable) of the Revenue, Narcotic Drugs Control, Excise, Police or any other department of the State Government as is empowered in this behalf by the general or special order of the State Government, if he has reason to believe from personal knowledge or as per the information given by any person or taken down in writing that any narcotic drug or Psychotropic substance, in respect of which an offence punishable Under Section 4 of the Act, has been committed or any document or any other article which may be furnished in evidence as such, is concealed in any building, conveyance or

place, may between Sun rise and Sun-set, enter into such building, conveyance or the place, According to the learned Counsel for the appellant, authorisation before taking any search Or set zurels a must. As the S.H.O. was not authorised, on the date of the incident with the power Under Section 42 of the Act, and, therefore, he was not empowered to make search of the appellant and, therefore, the search made by P.W. 4 Raghuveer Singh and the investigation conducted by him on the basis of which the trial was conducted, vitiates the whole trial and the appellant deserves to be acquitted of the offence. In support of his contention, he has placed reliance on: 1987(2) RLR 679,1988(1) RLR 796,1989(1) RLR 262,1989 RCC 474,1989 RCC 532, 1989 Cr. LR (Raj.) 413,1990 RCC 121 and 1990 RCC 268.

8. The learned Public Prosecutor, on the other hand, submitted that the case in hand is covered Under Section 43 of the Act and no authorisation was necessary Under Section 43 of the Act. He has placed reliance on the judgment rendered in Hardeo Gujar The State of Rajasthan 1988(2) RLR 726, I have considered the rival submissions made by the parties and have also looked-into the authorities cited by the learned Counsel for the appellant as. well as by the learned Public Prosecutor.

9. Section 42 of the Act deals with the search being conducted of any building, conveyance or place and not with the search at the public place, in my opinion, Section 42 of the Act Is not applicable so far as the personal search of the person is concerned. The appellant was apprehended while the police party was on patrolling duty and in such a matter, the provisions of Section 43 are applicable and not of Section 42. The learned Counsel for the appellant has placed reliance over the judgments which deal with the search made Under Section 42 in any building, conveyance or enclosed place, while the authority cited by the learned Public Prosecutor deals with the search and seizure at an open place, A close reading of the provisions of Section 43 makes it clear that when a search and seizure is made at an open place then the provisions of Section 43 will apply and not of Section 42.

10. The question which, therefore, requires consideration is: whether an officer not empowered by general or special order of the Central or State Government can

exercise the said powers Under Section 43 of the Act? In Hardeo Gujar The State of Rajasthan 1988(2) RLR 726, Hon'ble D.L. Mehta, J., while deciding the matter, merely held that in the case of search in open place, the provisions of Section 43 of the Act are applicable and any such officer, mentioned in Section 42 of the Act, is authorised to conduct the investigation, but the point whether authorisation by special or general order by Central or State Government is necessary or not, was neither considered nor decided in this judgment. As the point was neither argued nor decided by Hon'ble Mehta, J., therefore, I have to consider: whether the authorisation Under Section 43 is necessary or not? The precedent is an authority only for the point which is actually decided and not for others which logically flows from it and the, decision on the question, which has not been argued and decided by the Court, cannot be treated as a precedent. Section 43 of the Act provides that any officer of any of the departments mentioned in Section 42 of the Act may: (a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under chapter IV relating to such drug or substance: (b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company....

11. Section 43 of the Act specifically mentions any officer of. any departments, mentioned in Section 42. Section 44 of the Act deals with the power of entry, search seizure and arrest in an offence relating to coca-plant, opium and Cannabis plant and provides the applicability of the provisions of Sections 41, 42 and 43 of the Act. Section 50 of the Act deals with the conditions under which search of a person shall be conducted. It provides that when any officer duly authorised Under Section 42 is about to make a search of any person under the provisions of Sections 41, 42 or 43 of the Act, he shall, if such person requires, take such person without unnecessary delay, to the nearest officer of any of the

departments mentioned in Section 42 of the Act. Section 52 of the Act lays down as to how the persons arrested and the articles seized are to be dealt with. Section 55 then casts a duty on an Officer In charge of the Police Station to take charge and keep in safe custody all articles which may be seized under the Act with the local area of that, police station. While doing so, the Officer, who brought the seized articles to the Police Station, has right to affix his own seal on the sample and the articles seized. The sample may also have the seal of the Officer In charge of the Police Station. Section 57 casts a duty on the Officer, who makes the arrest or seizure under the Act of report all the particulars of such arrest or seizure to his immediate superior officer within forty-eight hours after the same has been made. Section 58 of the Act deals with the punishment for veracious entry, search, seizure or arrest. The procedure Laid down in this Section obviously has a purpose behind it. The Act, on the one hand empowers the government and the society concerned to clampdown heavily on the abuses of the man-made drugs and, on the other hand, it also provides certain safeguards for the persons who are to be dealt with under this Act. Sections 50 and 58, also, mentions Sections 41, 42 and 43. The scheme of the Act, thus, clearly shows that for the purpose of Section 43 also, authorisation is a must because Section 43 provides that any officer of any of the departments mentioned in Section 42, which means the persons who are authorised Under Section 42 are only authorised Under Section 43 of the Act to conduct the investigation and it does not mean that the persons who are employees of the departments mentioned in Section 42 of the Act. In my view, the powers of entry, search, seizure and arrest in any building, conveyance or enclosed place Under Section 42, of the seizure and arrest in any public place Under Section 43 and to stop and search of animal and conveyance Under Section 49 can be exercised only by those officers of the various departments enumerated in Section 42, who are empowered in this behalf, by general or specific order by the Central Government or the State Government, as the case may be, and no officer who is not so empowered by general or specific order of any government, can exercise such powers. Even the subsequent Sections 50, 52, 55 and 57 of the Act, which form a part of Chapter V, they also speak of the officer referred to in Sections 41, 42, 43 and 44 of the Act, which, also shows that the powers can be exercised by only those persons/officers who are empowered

by the Central Government or the State Government by special or general powers. The language of Sections 50 and 58 further makes the Intention of the legislature clear. Section 58 clearly shows that the persons acting Under Section 43 should be the persons specially empowered under that Section . The Section reads: any person empowered Under Section 42,43 or 44. The search and seizure can be made by any person or officer specially empowered for this purpose. In Section 50 also, it has been mentioned that any officer duly authorised Under Section 42 can make search of any person under the provisions of Section 41,42 or 43. In this view of the matter, as P.W. 4 Raghuveer Singh, S.H.Q., was not specifically empowered by the State Government to investigate into the matter, therefore the investigation conduct by him is wholly without jurisdiction, which vitiates the whole trial and the appellant deserves to be acquitted.

12. The last point raised by the learned Counsel for the appellant is that there is no evidence on record from which it could be gathered that the seals of the sample remained intact through-out,-i.e. from the time the sample was taken and sealed till it reaches the laboratory for F.S.L. Examination and was chemically examined. In support of its case, on this point, the prosecution has examined P.W.4 Raghuveer Singh, P.W. 2 Jeet singh and P.W. 3 Om Prakash. P.W. 4 Raghuveer Singh has stated that he sealed the articles and deposited the scaled articles in the 'MALKHANA'. P.W. 2 Jeet Singh, who was the In charge of 'MALKHANA' has stated that the articles pertaining to F.I.R. No. 128/86, which were in scaled condition, were kept in the 'MALKHANA' and the entry to this effect is Ex. P. 3. These articles, in the sealed condition, were sent for F.S.L. examination. JP.W.8. Om Prakash, L.C., who took the sealed articles for F.S.L. examination, has stated that he obtained the articles in the sealed condition and deposited the same in the F.S.L., Jaipur. Along with the sample, which was sent to the F.S.L. for examination, the specimen impression of the seal was not sent by the Investigating Agency to the Laboratory. It has also not come in evidence that the articles remained in the same sealed condition throughout and the seals were neither tampered with nor were they broken. What has been stated is only to the effect that the articles were scaled and it was sent in the sealed condition. P.W. Jeet Singh, who is the 'MALKHANA' In charge, has admitted, in cross-examination, that the entry Ex. P. 3 is not in his hand. It is not signed by him. The

entry Ex. P. 3 does not bear the signatures of the person who has taken the articles for F.S.L. examination. The specimen seal impression was, also, not sent. All these circumstances, also, create a doubt in the prosecution case.

13. In this view of the matter, I am of the opinion that the prosecution failed to prove the case against the appellant beyond reasonable doubt.

14. In the result, the appeal filed by the appellant is allowed. The judgment passed by the learned Additional Sessions Judge No. 1, Hanumangarh, convicting and sentencing the appellant, is set-aside and the accused is acquitted of all the charges levelled against him. The accused is in jail. He shall be released forthwith if not required in any other case.

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