

Anil Vs. Union of India (Uoi)

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Court : Rajasthan

Decided On : Jul-19-2004

Reported in : RLW2004(4)Raj2736; 2004(4)WLC508

Judge : Shiv Kumar Sharma, J.

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

Appeal No. : S.B. Criminal Appeal No. 876 of 2001

Appellant : Anil

Respondent : Union of India (Uoi)

Advocate for Def. : Pankaj Bohra, Adv. for; Ravi Bhansali, Adv.

Advocate for Pet/Ap. : G.M. Khan and; M.L. Vishnoi, Advs.

Disposition : Appeal allowed

Judgement :

Shiv Kumar Sharma, J.

1. Instant appeals arise out of the judgment dated November 22, 2001 of the learned Special Judge, NDPS Cases Chittorgarh rendered in Sessions cases No. 7/98, whereby each of the appellants were convicted and sentenced under Section 8/18 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short

'NDPS Act') to undergo rigorous imprisonment for ten years and fine of Rs. one lac in default to further undergo imprisonment for one year.

2. The prosecution story as woven is like this Devi Lal Inspector Central Narcotic Bureau Jhalawar Camp Chittorgarh instituted a complaint against the appellants Anil and Madhu, wherein it was alleged that on November 6, 1997 Madan Lal Meena on receiving a secret information reached at the spot and found four persons sitting in a hut of Madhu. Two of them ran away, but Madhu and Anil were apprehended. The search was taken and 3.600gm. and 4.600gm. Opium was recovered from their possession. Necessary memos were drawn and after usual investigation charge sheet was filed. Charge under Section 8/18 NDPS Act was framed against the appellants, who denied the charge and claimed trial. The prosecution in support of its case examined as many as eight witnesses. The appellants in their explanation under Section 313 Cr.P.C. claimed innocence and three witnesses in defence were examined. On hearing the final submissions learned trial judge convicted and sentenced the appellants as indicated above.

3. I have reflected over the rival submissions and scanned the material on record.

4. A look at the memos Kx.P-1, Ex.P-2, Ex.P-3, Ex.P-4 and Ex.P- 5 demonstrate that they got drawn at 6 AM on November 7, 1997. The appellants Madhu and Anil were arrested vide memo respectively Ex.P-6 and Ex.P-7. A bare perusal of the said memos reveals that initially 6 AM was shown as the time of arrest of both these appellants, but afterwards 6 AM was made as 8 AM. It further appears from Ex.P-1 and Ex.P-2 that both these memos are cyclostyled copies and blank columns were filled in afterwards.

5. At this juncture I deem it appropriate to have a close look at Section 50 of the NDPS Act, which reads as under:-

'S.50. Condition under which search of person 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 delay to the

nearest Gazetted Officer of any of the departments mentioned in Section 42 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 by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior'.

6. 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 Section 41 and 42 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. 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. Requirement of Section 50 may be summarised thus:-

(i) It is mandatory for the officer conducting search and seizure to inform the suspect his right to be searched in presence of the Magistrate or Gazetted Officer.

(ii) It is mandatory for the officer conducting search and seizure to follow the mandate of sub Section (3) and to inform the suspect that Gazetted Officer or the Magistrate, if sees no reasonable ground for search, shall discharge the person.

7. Coming to the facts of the instant case, I find that vide written notice (Ex.P-1) and (Ex.P-2) under Section 50(1) of the NDPS Act the appellants were informed that they could be searched in the presence of either Magistrate or Gazetted Officer and if the appellants agree they could be searched by the officer himself. The written notice bears signatures of Madhu and Anil. Obviously the appellants were not informed that the Magistrate or Gazetted Officer, if sees no reasonable ground for search, shall discharge the appellants.

8. Prior to incorporation of sub Section (5) in Section 50, the authorised officer himself could not search the suspect, but with effect from October 2, 2001 the authorised officer in an emergant situation may effect the search and seizure subject to the checks provided in sub Section (6). These amended provisions are not applicable to the search and seizure effected on November 6, 1997 in the instant case. By effecting search and seizure by himself the Seizure Officer flouted the mandate of Section 50. Looking to his convenience the officer made attempt to stretch the mandatory provisions and illegally gave additional option to effect search and seizure himself.

9. Their Lordships of the Supreme Court in State of Punjab v. Balbir Singh (1), indicated that Section 50 of the NDPS Act confers a valuable right on the person to be searched in the presence of Gazetted Officer or Magistrate if he so requires, since such a search would impart much more authentic and creditworthiness to the proceedings while equally providing an important safeguard to the accused and that, therefore, the safeguard conferred under Section 50 is to be taken as an important requirement and as a legislative imperative and non- compliance would vitiate the trial.

10. In the case on hand the appellants were not fully informed of their right to be searched before the Magis-trate or Gazetted Officer who, in the absence of reason- able ground for search had power to discharge the appellants. Since the appellants were not fully made aware of their right and the officer himself played

the role of Gazetted Officer and Magistrate by effecting the search and seizure, the appellants could not have been convicted. The accused has the right to choose his forum and if he is not completely informed of his right he is not expected to exercise his option.

11. For these reasons I allow the appeals and set aside the impugned judgment dated November 22, 2001 of learned Special Judge, NDPS Cases, Chittorgarh. I acquit the appellants of the charge under Section 8/18 of NDPS Act. The appellants Anil and Madhu, who are in jail, shall be set at liberty forthwith, if not required to be detained in any other case.

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