

Pandian Vs. State Represented by Inspector of Police

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Court : Chennai

Decided On : Mar-29-1994

Reported in : 1995(76)ELT567(Mad)

Judge : N. Arumugham, J.

Appeal No. : Crl. O.P. No. 2022 of 1994

Appellant : Pandian

Respondent : State Represented by Inspector of Police

Advocate for Def. : Shri R. Regupathi, Additional Public Prosecutor

Advocate for Pet/Ap. : Shri A. Natarajan, Adv.

Judgement :

ORDER

1. Heard. It is seen that a quantity of 112.500 kilograms of ganja was seized from the house of the petitioner on 14-8-1993 by the respondent and since it involves the offence one punishable under Section 8(c) read with 20(b)(i) of the N.D.P.S. Act, law was set in motion, petitioner was arrested and lodged to judicial custody and the case is consequently being investigated. This application is the second attempt made on behalf of the petitioner to enlarge him on bail and the first one was made in Crl. O.P. No. 1625 of 1994, in which, the same learned counsel Mr. A. Natarajan contended that the mandatory nature and directions in built in

Sections 54A read with 2(c) and 50 of the N.D.P.S. Act have not been complied with and after hearing both sides, this Court has dealt with the matter elaborately and after having canalised the same, dismissed the petition for bail on 4-3-1994.

2. In this second attempt, learned counsel would rely upon the judgment rendered by the Supreme Court in *State of Punjab v. Balbir Singh*, : 1994 CriLJ3702 for the position that Sections 50 and 57 of the N.D.P.S. Act to be followed by the investigating agency are pronounced as clearly a mandatory one and that inasmuch as the said position has been laid down by the Supreme Court, the non-compliance of the same would clearly entitle the petitioner to be enlarged on bail. This position however was controverted very seriously by the learned Additional Public Prosecutor by stating that since permission had been obtained from the Superior Officer by the respondent in writing and visited the house of the petitioner, finding that the petitioner was actually engaged in weighting and packaging the contraband of 112.500 kilograms of ganja and the process was going on, the respondent seized the same and arrested the petitioner and accordingly sent a special report on the same day itself and that therefore, there were no mandatory violations committed by the respondent herein. In the context of the above rival position, it is identified that there was no violation of the mandatory nature or directions of any of the provisions of the Act. I am rather inclined to hold further that the same contention has been dealt with by this Court already in the previous Crl. O.P. above referred. But since the Bar has referred the judgment rendered by the Apex Court in the above citation, I have proposed to discuss the case on hand in the light of the legal ratio enuntiated by the Supreme Court, which has been clearly spelt out in paragraph 27 of the Judgment, which is extracted as follows :-

'27. The question considered above arise frequently before the trial courts. Therefore, we find it necessary to set out our conclusions which are as follows :-

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage section 50

of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or Psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act'.

The above principle squarely applies to the facts of the case on hand and is clearly an answer for the contentions raised by the learned counsel for the petitioner.

The further conclusions of the Apex Court in the above citation are as follows :-

(2A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offence punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal.

Likewise only empowered officers or duly authorised officer as enumerated in Sections 41(2) and 42(1) can act under the provisions of the N.D.P.S. Act. If such arrest or search is made under the provisions of the NDPS Act any one other than such officers, the same would be illegal.

(2B) Under Section 41(2) only the empowered officer can give the authorisation to this subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction.

(2C) Under Section 42(1) the empowered officer if he has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such

offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affect the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4A) If a Police Officer, even if he happens to be an empowered Officer while effecting an arrest or search during normal investigation into offence purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165 Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4B) If an empowered officer or unauthorised officer under section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165 Cr.P.C. and if there is not strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial.

The effect so such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

5. On prior information, the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a magistrate as

provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

6. The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.'

It is thus seen that the Supreme Court while pronouncing the judgment in the above referred case, has clinchingly categorised which of the provisions of the NDPS Act are mandatory and which are not. It cannot be held that the various cannons of law can be mechanically made applicable to the facts and circumstances of each and every case but however, the salutary provisions of the N.D.P.S. Act cannot be ignored or overlooked while analysing the factual aspects of each and every case. While doing so only, the scope and object of the N.D.P.S. Act in built in all the mandatory provisions of the same can be identified, which assumes every primordial importance and concern and also provides a ground for the purpose of granting bail or not. The law laid down by the Supreme Court while dealing with the scope of Section 37(b) of the N.P.D.S. Act in *Narcotics Control Bureau v. Kishanlal and Others* : 1991 CriLJ654 , cannot be overlooked and assumes every significance in the circumstances. If the contention raised on behalf of the petitioner is viewed with reference to the above principle of law laid down by the Supreme Court, I am at every difficulty to identify any ground advantageous to the petitioner to enlarge him on bail. Each and every aspect has been dealt with and considered very elaborately. The respondent herein gained entry into the house of the petitioner only on authorisation by his superior officer, duly empowered and seized the contraband, a narcotic substance for the offences

alleged and about the seizure and arrest, it has been duly intimated as claimed by the prosecution. Therefore, it is not at all possible to hold that there is any mandatory violation of the provision of law in this case and that any serious prejudice is made available to the petitioner herein.

3. For all the reasons aforementioned, I do not find any merit in the contentions raised by the learned counsel. Accordingly, I hereby dismiss this petition.

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