

Murugeswari and Etc. Vs. State

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Court : Chennai

Decided On : Sep-06-1999

Reported in : 2000CriLJ1138

Judge : S. Thangaraj, J.

Acts : Narcotic Destructive and Psycrotropic Prevention Act, 1985 - Sections 37(1), 42(2), 50 and 50(4); Code of Criminal Procedure (CrPC) - Sections 439

Appeal No. : Crl. Original Petn. Nos. 15454, 15455 and 15456 of 1999

Appellant : Murugeswari and Etc.

Respondent : State

Advocate for Def. : C.M. Gunasekaran, Govt. Adv

Advocate for Pet/Ap. : K.R. Veeraswami, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

S. Thangaraj, J.

1. These three petitions are filed by the accused/petitioners in C.C. Nos. 475/ 99, 474/99 and 476/99 respectively on the file of the Special Judge for NDPS Cases,

Madurai, Under Section 439, Cr. P. C. for their release on bail.

2. On 3-5-99, on prior intimation, the Sub-Inspector of Police, Gudalur, at about 6.00 a.m. saw the accused at Mamundi Lane, Kottaisamy St., Gudalur, that after observing the conditions as per the provisions of law, seized 20 kgs. of ganja from a gunny bag which was in the possession of Selvi, 18 kgs. of ganja from the gunny bag in the possession of Murugeshwari and 18 kgs. of ganja from the gunny bag in the possession of Karupayee, that arrested the accused , and after investigation has filed charge sheet against each one of them.

3. Learned counsel for the petitioner has raised three major questions on the basis of the provisions of NDPS Act, 1985, to satisfy Sec. 37(l)(b)(ii) of NDPS Act for the release of each one of these petitioners.

4. The first and foremost ground raised by learned counsel for the petitioner is that Section 50(4) of NDPS Act has not been followed as all the petitioners are females and as per the said provision search should be conducted only by a female. Learned counsel further argued that no female was present at the time of search and seizure, which were effected by the Sub-Inspector and his party, and as such the said provision has not been complied with.

Section 50(4) of NDPS Act says--

No female shall be searched by anyone excepting a female.

5. Learned Govt. Advocate has produced the entire C.D. File in Court. The FIR reads that the Sub-Inspector of Police, Gudalur, and his party went near the petitioners herein and when the Sub-Inspector asked the name and address of each one of the petitioners, they revealed their names and addresses and further when he questioned, they admitted that in the gunny bags they had ganja. Thereafter, when he informed them of their right, to be searched before a gazetted officer nearby or a Magistrate, they informed him that the search can be conducted by the Sub-Inspector and his party, to that effect they gave statements. Thereafter (sic) the gunny bags were searched and the contrabands seized. The said Section is very clear that 'no female shall be searched' which means that the person of a

female should not be searched 'by anyone excepting a female'. However, there are decisions to the effect even if a bag which contains any contraband substances, the possession of which is punishable under Act 61/85, it is also a search within the meaning of the said Act. The said search cannot be equated with the search of a person of a female. From the wordings used in Section 50(4) NDPS Act it would mean the person of a female and not the other articles which are in the possession of the said female. When Sub-section (4) of Section 50 NDPS Act itself is specific, distinct and clear, we need not interpret the word 'search' in such a way that even if a female is in possession of a bag or a parcel containing some Narcotic or Psychotropic substance, the possession of which is punishable under Act 61 /85, then a female alone should search that parcel or bag containing the said incriminating substance. The legislature in its wisdom in order to respect the dignity of women and to prevent the misuse of male officers, who are empowered to make search and seizure under the Act (sic) have introduced (sic) Sub-section (4) of Section 50 NDPS Act. In the instant case, when the sub-inspector -- an officer empowered under the Act, had questioned, the petitioners herein informed that the gunny bags in each one of their possession was containing ganja. Subsequently, the bags were searched and seized. The facts of the case show that as search and seizure were made from the bags, handed over by the female petitioners to the officer concerned, there was no necessity to have a female for the search.

Learned counsel for the petitioner has relied on a Full Bench decision of the Gujarat High Court in *Bherulal Virajikumavat v. State of Gujarat* (1999) 1 OCR 166. In the said decision, the accused was not a female and therefore Sec. 50(4) NDPS Act was not considered by their Lordships of the Gujarat High Court. The meaning of the word 'search' was considered and held in para 18 of the said decision--

Thus, 'search' is a process where a person has to be examined carefully or thoroughly. It requires acute observance or penetration. Search requires careful examination and not merely taking an article in custody. It does not apply to a case when an article is merely seized at a look.

From what is stated by the Full Bench of the Gujarat High Court it is clear that what had been taken place in the instant case is not a 'search' within the meaning aforesaid decision.

Learned counsel for the petitioner has relied on a decision of the Delhi High Court in *Smt. Geetha v. State (Delhi Administration)* (1989) 1 PFAC 202 : 1989 Cri LJ 1165 wherein the officers concerned apprehended the accused, who was found carrying in her right hand a yellow colour 'theli' and it was found to contain 15 small paper packets and each packet was found to contain heroin. Earlier documents prepared at the time of search and seizure do not disclose that a female was called for the search. However, later it was introduced as if a female was called for taking personal search of the appellant and she went away expressing her inability to be a witness in that case. Learned Judge in the said decision has not considered the real meaning of Section 50(4) NDPS Act, on the contrary has disbelieved the version of the prosecution on the ground that calling a female for the personal search and her refusal were introduced for the first time in the statements of prosecution witnesses which was totally against the documents prepared on the spot and held no credence can be given to such a statement. Therefore, the said decision was on a different question and not specifically on the point in issue.

Learned counsel has also relied on a decision of Calcutta High Court in *Pratima Ghosh v. State of West Bengal* (1996) 2 Crimes 118 wherein it was held that in the said case two female accused persons have been searched by some male persons and not by female persons as has been enjoined in Sub-section (4) of Sec. 50 of the said Act and as such the mandatory provision regarding search of the female has not been complied with. When we look into the facts of the said case as stated in para 2 of the said decision, the officials apprehended Pratima Ghosh and Fatema Bewa -- two female accused and 'conducted search on them and recovered six purias of brown sugar weighing one gram from the accused petitioner Pratima Ghose and four purias of brown sugar from the accused Fatema Bewa.

From the facts as stated above would go to show that the male officials conducted search on female accused and recovered contraband and therefore the Calcutta High Court held that the mandatory provision enjoined in Sub-section (4) of Section 50 NDPS Act was not followed. In the instant case, no search was conducted on the petitioners, whereas the petitioners themselves handed over the gunny bags saying that they contained ganj a. So, the said decision is not applicable to the facts of the present case.

6. Apart from that, as already stated Sub-section (4) of Section 50 NDPS Act is also clear that in such circumstances it is not necessary to have the search by a female. Therefore, the arguments advanced on the side of the petitioners cannot be accepted.

7. Learned counsel for the petitioner has argued that the mandatory provision of Section 50 NDPS Act has not been followed by the Officer as they had failed to take the petitioners herein to a nearby Gazetted Officer or a Magistrate for the search. F.I.R. clearly says that when the Sub-Inspector of Police, Gudalur informed the petitioner of their right to be searched before a Gazetted Officer or a Magistrate nearby, each one of the petitioners informed him that they need not be taken to a Gazetted Officer or a Magistrate, instead the search can be conducted by the Officer himself. The FIR further reads to that effect each one has given a statement. Therefore, it cannot be said that the rights conferred upon the accused persons Under Section 50 which is mandatory in nature was not followed by the Officer concerned.

In the recent judgment in *State of Punjab v. Baldev Singh* : 1999 CriLJ3672 , their Lordships of the Supreme Court have held--

The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the Court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50, and particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial.

In the instant case, the compliance of Section 50 NDPS Act finds a place in the F.I.R. Prima facie, the FIR discloses the compliance of Section 50 NDPS Act. If any challenge is made, the same has to be decided after giving opportunity to the prosecution at the trial as held by their Lordships in the above decision.

8. It was further argued that, on receipt of information, the Officer concerned has not reduced it into writing and has not sent it to his immediate superior which is a pure violation of the mandatory provisions of Section 42(2) of NDPS Act. To comply with the said provisions, the Officer who has received the information, has sent such an information and also the recorded grounds for his belief, to the superior officer, and the same is found in the records. Learned Govt. Advocate has read-over the said report containing the particulars sent to the superior officer. As such it is clear, Section 42(2) has been complied with.

9. As all the grounds raised by the petitioners are unacceptable and every one of the petitioners were found in possession of huge quantity of ganj a, there is no valid reason to release them on bail.

10. Learned Govt. Advocate has argued that the earlier bail Application Nos. (Crl. O.P.) 11579, 11581 and 11717/99 were dismissed by this Court and thereafter there is no change of circumstance, and on that ground the petitions are liable to be dismissed.

Considering all these reasons, all the three petitions are liable to be dismissed.

In the result, Crl. O. P. Nos. 15454, 15455 and 15456/99 are dismissed.

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