

Chinta Devi and ors. Vs. the State

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SooperKanoon Citation : sooperkanoon.com/873461

Court : Kolkata

Decided On : Jan-29-1997

Reported in : (1997)1CALLT367(HC)

Judge : Dibyendu Bhushan Dutta, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161 and 482; ;
[Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 25, 42, 50
and 161; ;Evidence Act

Appellant : Chinta Devi and ors.

Respondent : The State

Advocate for Def. : A.R. Saha, Adv.

Advocate for Pet/Ap. : Amit Talukdar, ;Ashutosh Pal, ;Fazle Rabi and ;T. Ghosh,
Advs.

Disposition : Application dismissed

Judgement :

Dibyendu Bhushan Dutta, J.

1. A proceeding being C case No. 7 of 1996 arising out of G.R. Case No. 228 of 1996 pending in the court of learned Judge, Special Court, (under the Narcotic

Drugs and Psychotropic Substances Act), Suri, in connection with Bolpur P.S. case No. 106 of 1996 dated 25.6.96 under Sections 20/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 forms the Subject matter of challenge in the instant application that has been filed under Section 482 of the Code of Criminal Procedure.

2. The aforesaid police case was started on the allegations which may, in Substance, be stated as follows. On 25.6.96 around 1-45 hrs., while the O.C., Bolpur P.S. along with his force was on night patrol duty under the direct supervision of S.D.P.O., Bolpur, he received a secret source information that some people were possession some packets of Ganja in the house of one Anup Singh at Bolpur (Kalipukur) Hattala, At once, the patrol party rushed to the spot under the direct supervision of the S.D.P.O., Bolpur, and got the house identified. On entering into that house which is a pucca house, the raiding party found three persons including the owner of the house, Anup Singh, sitting in the open room on the Western side of the house with six packets wrapped with polythene papers and jute. They all tried to flee away at the sight of the police party, but failed. Those three persons were found sitting surrounding those six packets. On search, the packets were found to contain Ganja. On demand, they could not account for possession of the said Ganja. Ganja was seized in presence of witnesses under a seizure list. The three persons from whose possession the Ganja was seized were arrested and along with the seized articles and they were brought to Bolpur P.S. and on the basis of the FIR lodged by the O.C. the case was started under Sections 20/25 of the NDPS Act, 1985 (for short, 'the Act) against them.

3. Mr. Amit Talukdar, the learned counsel appearing for the accused petitioners has raised the following grounds for quashing the impugned proceeding.

The first ground is that the search in the instant case having been carried out at a time between sunrise and sunset, the officer carrying out the search was required under the proviso to Section 42(1) of the Act to record the ground of his belief that a search-warrant or authorisation could not be obtained without affording opportunity for the concealment of evidence or facility for the escape of the offender. But from the FIR it is not shown that the grounds of his belief were

recorded. It is Sub-mitted by Mr. Talukdar that the provisions of this proviso to Section 42(1) are mandatory and the proceeding is liable to be quashed by reason of non-compliance with the requirement of this proviso.

The second ground is that under Section 42(2), a copy of the grounds for belief under the proviso to Section 42(1) is required to be sent by the officer concerned forthwith to his official superior. This provision, according to Mr. Talukdar, is also mandatory and when the grounds for belief under the proviso to Section 42(1) have not been recorded, the question of compliance with Section 42(2) or for that matter, sending a copy of such grounds to immediate official superior cannot arise and as such the proceeding is liable to be quashed by reason of non-compliance with the requirements of Section 42(2) of the Act.

The third ground is that of non-compliance of provisions of Sub-section (1) of Section 50 of the Act. It is Sub-mitted that it is obligatory on the part of the officer concerned while acting under Section 42 to inform the persons to be searched that if they so required before the nearest Gazetted Officer or the nearest Magistrate as provided under Sub-section (1) of Section 50 and that failure to take them to the Gazetted Officer or the Magistrate would amount to non-compliance with the requirements of Sub-section (1) of Section 50 which are also mandatory and there is nothing in the FIR to suggest that the petitioners were so informed before the search was actually carried out Accordingly, it is Sub-mitted that the proceeding is liable to be quashed for non-compliance with the provisions of Section 50(1).

The fourth ground urged is non-compliance with the provisions of Sub-section (4) of Section 50 of the Act which prohibits search of a female by anyone excepting a female. In the instant case one of the accused petitioners was a female and the FIR does not indicate that the raiding party included a female member. This provision is also mandatory and according to Mr. Talukdar, by reason of non-compliance with this mandatory provision, the impugned procedure is liable to be quashed at least so far as it relates to the petitioner No. 1, who is a female.

The fifth ground relates to some infirmity in the seizure list itself. Mr. Talukdar points out that in the seizure list there is reference to the P.S. Case which gave rise to the present proceeding. Seizure is alleged to have been effected between

2-30 hrs and 3 hrs. while the FIR was lodged at 8-15 hrs. Mr. Talukdar argues that if the seizure was first made and thereafter the FIR was lodged and on the basis of that FIR the P.S. Case was started how is it that the case number was available to the O.C., author of the seizure list, before even he had lodged the FIR. Accordingly, Mr. Talukdar Sub-mits that the seizure list cannot be believed and if so, possession of the narcotic which constitutes the gravamen of the offence cannot also be believed and on that score, the impugned proceeding is liable to be quashed.

4. In support of the above contentions on behalf of the petitioners, reliance was placed in the Supreme Court decisions in the case of State of Punjab v. Balbir Singh, 1994 AIR SCW 1802 and in the case of Mohinder Kumar v. The State, Panaji reported in 1995 AIR SCW 1208; the Division Bench decision of our High Court in the case of Md. Aslam Khan v. State of West Bengal reported in 1995 (II) CHN 377; the Single Bench decision of our High Court in the case of Pratima Ghosh v. The State of West Bengal reported in 1995 C Cr LR (Cal) 309 and a Division Bench decision of our High Court in the case of Ram Pher Jadav v. The State reported in 1992 C Cr Lr. (Cal) 427.

5. Mr A.R. Saha, learned counsel appearing for the State, on the other hand, Submitted that this is not the proper state for going into the question whether the requirements of the proviso to Section 42(1), 42(2), 50(1) and 50(4) of the Act were complied with or not and on those grounds alone, the FIR or the investigation that has already been completed cannot be quashed. It is contended that even if those provisions were mandatory, mere non-compliance with those requirements would not necessarily lead to the conclusion that search in question would necessarily lead to the conclusion that search in question would render the recovery of the articles irrelevant evidence nor the discovery of the facts inadmissible at the trial. Such non-compliance may ultimately affect the weight of the evidence in support of the search or may furnish a reason for disbelieving the evidence produced by the prosecution unless the prosecution properly explains, such circumstances which made it impossible for it to comply with those provisions. According to Mr. Saha, even if the search was not legal, property seized on the basis of the search would still form basis for further investigation and

prosecution against petitioners and if the factum of the discovery is otherwise proved during trial, then the manner in which the discovery was made would become immaterial. He relies on the latest Supreme Court decision in the case of State of H.P. v. Pirthi Chand reported in : 1996 CriLJ1354 and contends that this is not at all the rarest of the rare cases as per guidelines laid down by the apex court in the State of Haryana v. Bhajan Lal AIR 1992 SC 81 where exercise of inherent power of this court would be Justified in scuttling the prosecution at this stage. That apart, regarding the third ground that was urged on behalf of the petitioner, Mr. Saha places his reliance on a Division Bench decision of Bombay High Court reported in 1994 Cri L J 87: G.R. Makwana v. State of Maharashtra and contends that as the FIR reveals the fact that a police officer of the Gazetted rank being the Sub-Divisional Police Officer was a member of the raiding party and the whole operation relating to the raid, search and seizure was carried out under the direct supervision of that officer, it must be said that there was due compliance of the provisions of Sub-section (1) of Section 50 and as such no exception can be taken in that regard.

6. On behalf of the State, the Case Diary has been produced before this court. It would go to suggest that besides the FIR and the seizure list, other materials had also been collected during the investigation which was completed even before the instant application was filed and that the charge-sheet is ready to be filed against the present petitioners under Sections 20/25 of the Act.

7. So far as the provisions of the proviso to Section 42(1), 42(2) and 50(1) of the Act are concerned, it was held in Balbir Singh's case (supra) that they are mandatory and as regards the provisions of Sub- Section (4) of Section 50 they were held to be mandatory in the Single Bench decision of our High Court reported in 1995 C Cr Lr (Cal) 309 (Pratima Ghosh v. State of West Bengal).

8. Now, the apex court in the case of State of Himachal Pradesh v. Pirthi Chand (supra) considered a number of decisions of the Supreme Court including the Balbir Singh's case (supra) and held that the fact whether the accused had been afforded the right contemplated under Section 50(1) and whether the authorised officer has violated the mandatory requirements is a question of fact which has to

be proved at the trial. At paragraph 5, the apex court observed: 'It is settled law that illegality committed in investigation does not render the evidence obtained during that investigation inadmissible. In spite of illegal search property seized, on the basis of said search, still would form basis for further investigation and prosecution against the accused. The manner in which the contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial'. At paragraph 6, the Supreme Court referred to four of its earlier decisions and enunciated the following principles at paragraph 7:

'It would thus be settled law that every deviation from the details of the procedure prescribed of search, does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search, irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on the facts and circumstances in each case. The court is required to scan the evidence with care and to act upon it when it is proved and the court would hold that the evidence would be relied upon'. At paragraph 8, the Supreme Court referred to yet some of its earlier decisions and observed that when the statutory provisions have not been complied with, it may, however, affect the weight of the evidence in support of the search or may furnish a reason for disbelieving the evidence produced by the prosecution unless the prosecution properly explains such circumstances which made it impossible for it to comply with these provisions. The Supreme Court also noted in paragraph 8 that in *Balbir Singh's case* (supra), It was held that if the provisions of the Act have not been complied with the court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of the search in the light of the fact that the provisions have not been complied with and further consider whether weight of evidence is in any manner affected because of the non-compliance. At paragraph 10, the court also began to consider the question whether the High Court would be justified in exercising its inherent power under Section 482 of the Code or under Article 226 of the Constitution to quash the FIR/charge-sheet/complaint. At paragraph 11, it referred to the case of *State of Haryana v. Bhajan Lal* reported in AIR 1992 SC 81 wherein the apex court laid down certain broad tests to exercise the inherent power or extraordinary power of

the High Court and observed: 'The High Court should sparingly and only in exceptional cases, in other words, in rarest of rare cases, and not merely in would be appealable to the learned Judge, be inclined to exercise the power to quash the FIR/charge-sheet/complaint. At paragraph 12 it was observed: 'It is thus settled law that the exercise of inherent power of the High Court is an exceptional one. Great care should be taken by the High Court before embarking to scrutinise the FIR/charge-sheet/complaint. In deciding whether the case is rarest of rare cases to scuttle the prosecution in its inception, it first has to get into the grip of the matter whether the allegations constitute the offence. It must be remembered that FIR is only an initiation to move the machinery and to investigate into cognisable offence. After the investigation is conducted and the charge-sheet is laid the prosecution produces the statement of the witnesses recorded under Section 161 of the Code in support of the charge-sheet. At that stage it is not the function of the court to weigh the pros and cons of the prosecution case or to consider necessity of strict compliance of the provisions which are considered mandatory and its effect of non-compliance. It would be done after the trial is concluded'. At paragraph 14, it was held the evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act.....Though the search may be illegal but the evidence collected, i.e. panchanama etc. nonetheless would be admissible at the trial. At the stage of filing charge-sheet it cannot be said that there is no evidence and the Magistrate or the Sessions Judge would be committing illegality to discharge the accused on the ground that Section 50 or other provisions have not been complied with. At the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law. Even, if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into'.

9. Relying on the aforesaid decision of the Supreme Court in Pirthi Chand's case (supra), it can at once be held that this is not at all the proper stage for deciding that question of non-compliance or otherwise of the mandatory requirements of the Act in relation to the search and seizure that was effected in the instant case and even if the search and seizure was effected in violation of the mandatory requirements of the Act, the evidence collected pursuant to such search would not be inadmissible under the Evidence Act.

10. Then again, infirmity in the seizure list by reason of inclusion of the case reference therein at the time of its preparation even before the birth of the case does not appear to be the only reason for which the possession of the narcotic drug was disbelieved by the Division Bench in the case of Ram Pher Jadav v. State in 1992 C Cr Lr (Cal) 427 that has been cited on behalf of the petitioners. In that case, the Bench was hearing an appeal against a conviction under Section 21 of the Act and the infirmity in the seizure list was one of the infirmities on which the conviction was set aside. So the question what weight should be given to the seizure list of our case is to be gone into only after the trial is over.

11. It is significant to note here that of the cases cited on behalf of the petitioners in the Supreme Court cases the Supreme Court dealt with appeals against convictions and in the Single Bench decision the trial had already commenced but in the instant case, it is virtually at the stage of completion of investigation that the petitioners have approached this court for quashing the proceeding.

12. Upon consideration of the materials on record revealed from the case diary, I cannot persuade myself to hold that this is one of the rarest of the rare cases where the inherent Jurisdiction of this court under Section 482 of the Cr PC should be invoked for quashing the FIR, investigation or the charge-sheet that is ready for submission. In the result, the application falls and is hereby dismissed.