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State Vs. Vidya Devi and Etc.

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Court : Himachal Pradesh

Decided On : Apr-19-1993

Reported in : 1993CriLJ3556

Judge : Bhawani Singh, Actg. C.J.,; Kamlesh Sharma and; D.P. Sood, JJ.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 37, 41, 41(1), 41(2), 42, 42(1), 42(2), 43, 44, 45, 48, 49, 50, 50(1), 51, 52, 52(1), 52(2), 52(3), 52A, 52A(2), 53, 55, 57, 58, 61 and 62; ;Opium Act, 1957; ;Opium Act, 1878 ; ;Dangerous Drugs Act, 1930; ;Customs Act, 1962; ;Code of Criminal Procedure (CrPC) , 1973 - Sections 2, 4(2), 5, 156 and 190; ;Narcotic Drugs and Psychotropic Substances Rules

Appeal No. : Cr. A. Nos. 147, 152 and 292 of 1988, Cri. Revn. Nos. 100 and 116 of 1987, 14, 98, 99 and 103 of 198

Appellant : State

Respondent : Vidya Devi and Etc.

Advocate for Def. : H.K. Bhardwaj,; K.D. Shreedhar,; A.K. Goel,;

Advocate for Pet/Ap. : R.K. Sharma, Dy. Adv. General

Judgement :

Bhawani Singh, Actg. C.J.

1. Certain provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter shortly the Act') came for consideration before the Division Bench of this Court in State of Himachal Pradesh v. Sudarshan Kumar, 1989 Cri LJ 1412. In these cases the accused had either been discharged since the prosecution had failed to produce the notifications under Sections 41 or 42 and/or the trial Court had found that the provisions of Sections 50 and 55 of the Act had not been complied with although they were mandatory in nature. In some cases, the accused had been convicted and sentenced to the minimum rigorous imprisonment prescribed under the Act and the decisions had been assailed on merits. In these cases also it had been submitted that the mandatory provisions of the Act had not been complied with and the convictions were liable to be set aside.

2. The matter was examined quite exhaustively and it was held that the provisions of Sections 41(2), 42(2) and 50(1) of the Act are mandatory in nature, in case the investigation is started on the basis of an advance information. Similarly, Sections 52(1) and 57 of the Act were also found mandatory in character but Sections 52(2), 52(3) and 55 of the Act were held directory, unless miscarriage of justice to the accused was there.

3. Although, as noticed above, the Bench had before it cases detected on the basis of prior information, but it discussed cases of chance recovery. It is important to reproduce the opinion of the Court on this question, (at page 1418 of Cri LJ):

'The possibility of recovery of such articles without there being any advance information cannot be overruled. In fact, it certainly exists. For example, a member of the Central Reserve Police Force looking for illicit arms and ammunition or a member of the Armed Forces in a border engagement may hit upon such a chance recovery. It will be too much to say that such a recovery would not constitute an offence under the Narcotic Act. Take another instance. A designated officer of Police Department conducting search for stolen property in a theft case, illicit liquor or arms may happen to recover smack, brown powder, heroin, opium, charas etc. Can the prosecution case be faulted on the short ground of non-compliance of the provisions of Section 50 of the Narcotic Act? The answer has to be in a firm negative. Therefore, the upshot of the above discussion is that only a

designated officer having advance information is under a legal obligation to comply with Section 50. It also follows as a necessary corollary that only such an officer can take in writing the grounds of his personal knowledge or information given by any person that some one has committed an offence under the Narcotic Act, as postulated under Section 41(2) and Section 42(1) and further record the grounds of his belief under proviso to Section 42(1) and, once again, it is only such an officer who is required to send a copy of information under Section 42(1) and ground of belief forthwith to his immediate official superior (see subsection (2) of Section 42). In case of situation not specifically covered as outlined above, there Could be no question of complying with the aforesaid provisions. Such cases will be, obviously enough, governed by the provisions of the Criminal Procedure Code and the accused, if found guilty, liable to be convicted under the Narcotic Act.'

4. The question answered hereinabove was not directly raised before the Court in any of the cases before it but the Court took note of circumstances where the contraband is detected all of a sudden or on suspicion or while investigating some other kind of cases. These are named chance recovery cases. The question was whether in such a case the prosecution case could be faulted on the ground of non-compliance of the provisions of Section 50 of the Act and it was held that it would not. The learned Judges held that it is only a designated officer having advance information who is under legal obligation to comply with Section 50 of the Act. It is he who can write the grounds of his personal knowledge or information given by a person that some one had committed an offence under the Act, as required under Sections 41(2) and 42(1) of the Act and further record the ground of his belief under proviso to Section 42(1) of the Act and it is this officer who is required to send; a copy of the information under Section 42(1) and the ground of his belief forthwith to his immediate superior officer. In case the situation is not covered, there could be no question of complying with the aforesaid provisions and such cases will be governed by the provisions of the Code of Criminal Procedure (hereafter shortly 'the Code') and the accused, if found guilty, liable to be convicted under the Act. The correctness of this conclusion was doubted by two of us (Bhawani Singh and D. P. Sood, JJ.) in view of Section 51 of the Act making the provisions of the Code applicable in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and

seizures made under this Act. The cases involving this question were referred to a larger Bench for examination by order dated August 19, 1992. This is how these cases have come before us.

5. Illegal trafficking in narcotic drugs and psychotropic substances has become a terrible menace tending to destroy the very fibre of our society being also instrumental in subverting the young generation which is easily falling prey to its temptation in a very alarming proportions. In order to curb the activities of mafia world and realising that the existing legislations were not strong enough to deal with the evil and evil-doers, the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) (hereinafter referred to as 'the Act') was passed by the Parliament. It is pertinent to quote the observations of the apex Court recorded in (1990) 1 SCC, 95 : (AIR 1989 SC 1966) (Durand Didier v. Chief Secretary, Union Territory of Goa) (at p. 1971 of AIR):

'With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 61 of 1985 specifying mandatory minimum imprisonment and fine.....'

This Act came into force from November 14, 1985. It has repealed the following Acts:

(a) The Opium Act, 1957 (Act No. 13 of 1957);

(b) The Opium Act, 1878 (Act No. 1 of 1878); and

(c) The Dangerous Drugs Act, 1930 (Act No. 2 of 1930).

6. A look at the Act demonstrates that it is divided into various chapters. Chapter I contains the title of the Act, definitions of various terms and expressions used therein and provisions enabling additions to and omission front the list of psychotropic substances. Chapter II of the Act empowers the Central Government as well as the State Governments to make appointments of certain officers etc. for the purpose of the Act. Chapter II-A provides for the constitution of a national fund for control of drug abuse. Chapter III of the Act provides for prohibition, control and regulation for cultivation, production, manufacture etc. of any narcotic drugs and psychotropic substances. Chapter IV of the Act deals with the offences 'punishable under the Act and prescribes severe penalties therefor, minimum being ten years with fine extending to rupees two lakh. Death penalty has also been prescribed when commission of the offence is repeated by a person after the previous conviction. The offences have been made cognizable by Section 37 of the Act, notwithstanding the provisions of the Criminal Procedure Code, hereinafter referred to as 'the Code'. Chapter V prescribes the procedure to be followed by the officers appointed for the implementation of various provisions of the Act. Sub-section (1) of Section 41 of the Act empowers a Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class, specially empowered, to issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under the provisions of Chapter IV of the Act and for the search of any premises, conveyance or place in which such person is suspected of having kept or concealed any narcotic drugs and psychotropic substances. Sections 41(2), 42, 43 and 44 of the Act confer on the officers named in the Act, power of arrest, search and seizure without any order or warrant from the concerned Magistrate. Section 42 of the Act enables certain officers, duly empowered in this behalf by the Central or the State Governments, to enter into and search any building, conveyance or enclosed place between sunrise and sunset without any warrant or authorisation if there is reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug and psycho-tropic substance in respect of which such an offence has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept far concealed therein to seize the same. The proviso requires that the

concerned officer must record the grounds of his belief before exercising power under the said provision. Sub-section (2) of Section 42 enjoins upon an 'officer taking down the information or recording grounds for his belief to forward a copy thereof to his immediate superior. Section 43 of the Act confers on any officer of any of the departments mentioned in Section 42 of the Act, power to seize in any public place or in transit any narcotic drug or psychotropic substance in respect of which he has reason to believe that 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 the Act and any document or other article which furnishes evidence of the commission of the offence relating to such drug or substance. Power has also conferred on such officers to detain and search any person, who, he has reason to believe, to have committed an offence punishable under Chapter IV if such a person has any narcotic drug or psychotropic substance in his possession and such possession appears to him unlawful, arrest him and any other person in his company. Section 44 makes the provisions of Sections 41, 42 and 43 applicable in relation to offences concerning to coca plant, opium poppy and cannabis plant. Section 45 provides that where it is not practicable to seize any goods (including standing crop) which are liable to confiscation under this Act, any officer duly authoritised under Section 42 may serve on the owner or person in possession of the goods, an order that he shall not remove, part with or otherwise deal with the goods except with the previous permission of such officer. Section 48 confers on the Magistrate or any officer of the gazetted rank, empowered under Section 42, power of attachment of crop illegally cultivated. Section 49 empowers an officer authorised under Section 42 if he has reason to suspect that any animal or conveyance is or is about to be used for the transport of any narcotic drug or psychotropic substance in respect of which he suspects that any provision of the Act has been, or is being or is about to be contravened, to stop such animal or conveyance and rummage and search the conveyance or part thereof; examine and search any goods on the animnal or the conveyance; and to stop the animal or the conveyance for which he may use all lawful means and where such means fails the animnal or the conveyance may be fired upon. Section 50 enjoins upon the officer who is about to search any person, 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. Section 51 of the Act makes the provisions of the Code applicable, in so far as they are not inconsistent with the provisions of the Act, to all warrants, arrests, searches and seizures made under the Act. This means that if there is any inconsistency between the provisions of the Act and the Code, the former will prevail over the latter. Section 52 deals with the disposal of persons arrested and articles seized under Section 41, 42, 43 or 44 of the Act. It requires the officer arresting a person to inform him of the grounds for his arrest. It further provides that every person arrested and article seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. However, where the arrest or seizure is by virtue of Section 41(2), 42, 43 or 44 of the Act, the officer has to forward the person arrested and the articles seized to the Officer-in-Charge of the nearest police station or the officer empowered under Section 53 of the Act. Section 52-A deals with the disposal of seized narcotic drugs and psychotropic substances. Section 55 requires an Officer-in-Charge of a Police Station to take charge of and keep in safe custody, pending the orders of the Magistrate, of articles seized under the Act within the local areas of that Police Station which may be delivered to him. Section 57 requires an officer making arrest or effecting seizure under the Act to make a full report of the particulars of such arrest or seizure to his immediate officer superior within 48 hours after such arrest or seizure.

7. The question arises whether an offence, which is cognizable in nature under both the Act and the Code can be investigated simultaneously under both the statutes by the executive police in exercise of its power under Section 156 of the Code and under the Act, and if the answer is in the negative, whether in a chance recovery the investigation can be done by the executive police or by an official not empowered under the Act in the manner held by the Division Bench in Sudarshan Kumar's case (1989 Cri LJ 1412) (Him Pra). For answering these questions, it would be important to refer to certain provisions of the Code and the Act. Section 2(h) of the Code defines 'investigation' as under:

'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate)

who is authorised by a Magistrate in this behalf;'

8. Under Section 4(2) of the Code, all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regualting the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

9. Section 5 states that nothing contained in the Code shall, unless othewise provided; affect any special or local law for the time being in force or any other jurisdiction or| power conferred, or a special form of procedure prescribed by any other law for the time being in force.

10. Now, we turn to Section 37 of the Act. It provides that: ,

'(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -

(a) every offence punishable under this Act shall be cognizable;

xxxx xxxx xxxx xxxx

Section 156 of the Code provides that:

'(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into to try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.'

11. We have already noticed that it is a special Act and all offences under it are to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Act and this procedure is saved by Sub-section (2) of Section 4 and Section 5 of the Code. By virtue of Section 51 of the Act, the provisions of the Code will apply to the extent they are not inconsistent with the provisions of the Act. Therefore, the offences under this Act are to be investigated in accordance with the special procedure laid down in the Act and the executive police will not be able to embark upon a separate investigation under Section 156 of the Code. This is the intention of the legislature and it is not possible to read into these provisions that the legislature has permitted two simultaneous investigations under the Act and the Code by two different sets of investigating agencies. The same view has been taken by the High Court of Punjab & Haryana in (1990) 1 Chand LR (Cri) 369, (Murli Dhar v. State of Haryana), holding that in view of Section 51 of the Act, the provisions of the Code shall apply in so far as they are not inconsistent with the provisions, of this Act, to all warrants issued and arrests, searches and seizures made under this Act, and any action taken contrary to the provisions of the Act would not be saved under Section 156 of the Code which power of the executive police has been ousted, curtailed, and controlled by the provisions of the Act. We, therefore, hold that the provisions of the Code apply only to the extent they are not inconsistent with the provisions of this Act which being special Act will deal with all kinds of offences committed under it and the procedure prescribed therein would be applicable and the Act does not provide for two investigations at the same time, one to be conducted by the executive police and the other by the officials in the manner envisaged in the Act.

12. Proceeding further, we agree with the opinion of the Division Bench in Sudarshan Kumar's case (1989 Cri LJ 1412) (Him Pra) that in a chance recovery it is not possible to follow the pro visions of Sections 41, 42 and 50 of the Act, but we disagree with the further view of the Bench that the matter would be investigated under the provisions of the Code, although the accused would be liable to be punished in accordance with the provisions of the Act.

13. M/s. A. K. Goel, H. K. Bhardwaj, Rakesh Kanwar and Ashutosh Burathoki contended that if the chance recovery is a result of investigation by an

unauthorised person, the accused cannot be tried and punished for the commission of any offence under the Act, sicne the investigation would be without authority. There is no mode to validate such an investigation under the Act. The lacuna in the legislation cannot be filled by this Court since its jurisdiction is confined to the interpretation of law and not to legislate whereever and whenever a statute is found deficient on any point. In order to substantiate the submissions, reference was made to certain decisions. Some of them are like (1987) 3 Crimes 629 (Raj); (Nand lal v. State of Rajasthan); 1988 Cri LJ 1181 (Punj & Har) (Karam Singh v. State of Punjab); (1990) 1 Chand LR (Cri) 369 (Murli Dhar v. State of Haryana); 1991 Cri LJ 1483 (Gujarat) (Surajmal Kanaiyala Soni v. State of Gujarat); 1992 Cri LJ 1491 (Raj) (Kabul alias Khudia v. State of rajasthan); (1989) 2 Rajasthan LR 127 (Veerpal Singh v. State of Rajasthan); (1990) 3 SCC 682 (Punjab land Development and Reclamation Corporation Ltd., Chandigarh v.Presiding, Officer, Labour Court, Chandigarh) and (1990) 3 SCC 684 (General Manager, Government Electric Factory' (Now Karnataka Vidyut Karkhana Ltd.) Mysore Road, Bangalore v. Mohamed Issaq).

14. On the other hand, Shri R. K. Sharma, learned Deputy Advocate General admitted that the decision in Sudarshan Kumar's case (1989 Cri LJ 1412) (Him Pra) is wrong so far as it holds that in a chance recovery, it is not possible to adhere to the provisions of Sections 41, 42 and 50, the investigation can be carried on under the provisions of the Code and the accused liable to be convicted under the Act. Admitting the gap in the legislation, the learned counsel contended that the legislature enacted this legislation to put a complete stop on the large scale menance of illicit trafficking in narcotic drugs and psychotropic substances and did not intend to leave any kind of escape-route to the criminals, therefore, this Court can provide the mode to deal with the situation so that the wrong-doers do not go scot free and by so doing, the Court would serve the intention of the legislature. On the question of investigation which turns out to have been done by an incompetent officer, the contention of the learned counsel was that the investigation could not be invalidated since it is not possible to follow these provisions in such a case and in the absence of clear miscarriage of justice brought to the notice of the Court by the accused, the investigation made cannot be quashed and the accused acquitted of the charge. Assistance was sought from

certain decisions which are : 1991 Cri LJ 2945 (Ismail v. State of Kerala); 1992 Cri LJ 901 (Madras) (Rekha Parameswari alias Gnanambigal Muthiah v. Assistant Collector of Customs); (1991) 3 SCC 67 (Rattan Chand Hira Chand v. Askar Nawazjung (dead) by LRs); (1991) 3 SCC 655 (K. Veeraswami v. Union of India); 1991 Supp (1) SCC 600 : (AIR 1991 SC 101) (Delhi Transport Corporation v. D.T.C. Mazdoor Congress) and 1991 Supp (2) SCC 18 : (AIR 1991 SC 686) (Municipal Corporation of Greater Bombay v. Indian Oil Corporation Ltd).

15. From out the judgments referred to above, only two deal with chance recovery. In Nand Lai's cae (1987) (3) Crimes 629) (Raj) (supra), the Court set aside the conviction not only on the basis that Head Constable Amanulla Khan had no authority to investigate the case under the Act, but also on the basis of the evidence in the case. The Court did not deal with the contention that the Head Constable should have handed over the matter for investigation to the authority specified in the Act, although it was raised by the counsel for the accused.

16. Rekha Parameswari's case (1992 Cri LJ 901) (Madras) (supra) is the only case which is nearer to the point in issue before us. Miss Rekha Parameswari, a Sri Lankan national, holding a Sri Lankan passport, was a passenger bound for Colombo by Indian Air Lines flight I.C. 573 on February 21,1989. She proceeded for security check after customs clearance at the Madras International Airport. The lady Security Officer, while frisking her, felt that something was kept concealed on her person. She was therefore taken to a toilet and when her person was searched in the presence of two lady witnesses, her undergrament jetty was found bulging, creating a suspecion that something was kept concealed within. On being asked to remove the jetty for examination, she did so and a polythene bag was kept in between two jetties stitched together and it was found to contain some brown powder, suspected to be narcotic substance weighing 500 gms. When questioned, she was slated to have admitted that the said powder was brown sugar and the same was given to tier by a person to be smuggled out of India to Sri Lanka. She was not holding a permit and, therefore, the same was seized by the Security Officer under a mahazar for taking action under the Customs Act read with the Narcotic Drugs and PSychotropic Substances Act, 1985. She stated before the Customs Officer in her own writing in Tamil, confessing the clandestine

transport of brown sugar from India to Sri Lanka for monetary consideration. After completing the formalities of investigation, the Assistant Collector of Customs, Prosecution Cell, Preventive Department, Customs Department, Madras-1, laid the complaint against her before the Sub-Divisional Judicial Magistrate, Poonamallee, alleging offences under the Customs Act, 1962 and the Narcotic Act and Rules made thereunder. When the matter was before the Sessions Court, the accused came forward to quash the proceedings. It was asserted by her that the provisions contained in Sections 42, 50, 52-A(2) of the Narcotic Act had been flagrantly violated and the prosecution was liable to be quashed. From the other side it was submitted that the invalidity of a proceeding or illegality of search or seizure, did not vitiate the prosecution, unless they have resulted in causing prejudice to the accused. It is relevant to quote para 8 of the judgment:

'. No doubt true it is, as rightly contended by learned counsel for petitioner, that the woman Security Officer in the rank of a Sub-Inspector of Police,.who happened to seize the contraband article from the custody and possession of the petitioner, by search of her person on the relevant date is no an Officer empowered by the Government under Section 42 of the N.D.P.S. Act. Such seizure and arrest in the peculiar facts and circumstances of the case cannot at all be stated to have caused any prejudice to the petitioner. Even an Authorised Officer under this section has to effect initially the search and thereafter, the seizure and arrest, only when he has reason to believe from his personal knowledge or by information given by any other person, that any narcotic drug or other substance, possession whereof is Punishable under Chapter IV of the Act, had been in the possession of the accused. Recapitulating the facts of the instant case, worthwhile it is to mention that the petitioner crossed the frontiers of the Customs Check, and while she was undergoing the security check, suspicion arose as to her keeping certain article concealed in her person. The Security Officer, who effected the search, was completely oblivious of the possession of any narcotic drug or psycho-tropic substance by the petitioner. If such a thing was known to her, there is every possibility for the petitioner to be handed over straightway to the Customs Official without even effecting any search and consequent seizure. The fact of possession of the narcotic substance by the petitioner was brought to the notice of the Security Officer only after the search and seizure of the contraband from the

petitioner. In the very nature of things in the circumstances of the case, this is the only plausible feat to be performed by the Security Officer. What is concerned in such a situation is as to whether the search and seizure were true and the evidence to be adduced by the prosecution through the Security Officer during the course of trial is inspiring confidence in commanding acceptance at the hands of Court. The factum of violation of the procedure by itself can by no stretch of imagination be stated to be causing any sort of material prejudice to the case of the petitioner, vitiating the entire prosecution.'

17. After giving our careful consideration to the problem posed before us, we are of the considered opinion that in a chance recovery compliance of Sections 41, 42 and 50 of the Act may not be possible, however, in order to succeed on this plea, the prosecution will have to satisfy the conscious of the Court that in the facts and circumstances of the case, it could not comply with the requirements of these provisions and that by the non-compliance thereof, no prejudice or miscarriage of justice was caused to the accused. Then, the burden would shift over to the accused to prove prejudice caused to him. Thereafter, the investigation should be immediately handed over to the authorised officer and if circumstances justify, the accused could be detained till the arrival of the competent officers. Thereafter, the investigation has to be carried in accordance with the provisions of the Act and the accused punished in accordance with the provisions of the Act, if found guilty. The provisions of the Act like Sections 52, 52-A, 55, 57, 58, 61, 62 etc. are still applicable and have to be followed while conducting the investigation.

18. In view of the aforesaid discussion, the opinion of the Division Bench in Sudarshan KUmar's case (1989 Cri LJ 1412) (Him Pra) that in a chance recovery where there is no compliance of Sections 41 and 42 of Act, Act, the matter can be investigated under the provisions of the Code is, with respect, wrong and is, therefore, over-ruled to this extent.

19. No other point was argued by the learned counsel for the parties. All these cases will now appear before the appropriate Bench for hearing on merits.

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