

State of H.P. Vs. Man Singh

State of H.P. Vs. Man Singh

SooperKanoon Citation : sooperkanoon.com/890336

Court : Himachal Pradesh

Decided On : Apr-22-2009

Judge : Deepak Gupta and; V.K. Ahuja, JJ.

Appellant : State of H.P.

Respondent : Man Singh

Disposition : Appeal dismissed

Judgement :

Deepak Gupta, J.

1. This appeal is directed against the judgment dated 26.5.1994 passed by the learned Sessions Judge, Shimla in Sessions Trial No. 51-S/7 of 1993, whereby he acquitted the accused of having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act).

2. The prosecution case, in brief, is that on 24.12.1992 PW-5 Dy.S.P. Sunder Lal received secret information that one Man Singh accused had come to Shimla with contraband. Then he formed a raiding party and joined PW-3 S.I. Joginder Singh. Accused was apprehended outside Duke Hotel below Kalibari Mandir. One Purshotam PW-2 who was receptionist in the said hotel was associated with the further proceedings. The bag of the accused was searched and was found to

contain 1 k.g. 650 gms. of charas. Two samples weighing 25 gms each were drawn. The two samples and the remaining bulk charas were sealed with seal 'K' and seal was handed over to PW-2. After completion of the formalities an FIR was registered. The case property was deposited with MHC, Police Station Sadar and the Investigating Officer himself sent one sample to the FSL Bharari. The report was received from the FSL Bharari according to which the sample was of charas and the resin content was 39.5%. Thereafter, challan was filed and the accused was charged with having committed an offence punishable under Section 20 of the Act. After trial the accused has been acquitted. Hence the present appeal.

3. The main grounds which weighed with the learned trial Judge in acquitting the accused were that Sections 42 and 50 of the Act have not been complied with. As far as Section 50 of the Act is concerned in our considered opinion the said Section was not applicable since the search was of the bag. In this regard, reference need only be made to the latest judgment of the Apex Court in State of Haryana v. Mai Ram : (2008)8SCC292 , wherein it has been clearly held that when the contraband substance is recovered from the bag which is carried by the accused, it is not a case of personal search and noncompliance of Section 50 will have no effect.

4. There is no evidence to show that the provisions of Section 42(2) of the Act were complied with in this case. The Investigating Officer appeared as PW-5. In his entire statement he has not stated a word in respect of the compliance with Section 42 of the Act.

5. Section 42 of the Act read as under:

42. Power of entry, search, seizure and arrest without warrant or authorisation.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any

other department of a State Government as is empowered in this behalf by general knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,:

(a) Enter into and search any such building, conveyance or place;

(b) In case of resistance, break open any door and remove any obstacle to such entry;

(c) Seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) Detail and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief

(2) Where an officer takes down any information in writing under subsection

(1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

6. The Apex Court in *State of Punjab v. Balbir Singh* : 1994 CriLJ3702 , *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* : 2000 CriLJ1384 , *Karnail Singh v. State of Rajasthan* : 2000 CriLJ4635 and in many other cases has held that the provisions of Section 42 are mandatory in nature and non-compliance thereof renders the search illegal.

7. The NDPS Act is a penal statute. It invades the rights of an accused to a large extent. It raises a presumption of a culpable mental state. Ordinarily, even an accused may not be released on bail having regard to Section 37 of the Act. The Court has the power to publish names, address and business etc. of the offenders. Any document produced in evidence becomes admissible. A vast power of calling for information upon the authorities has been conferred by reason of Section 67 of the Act. Power to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the term 'reason to believe' has been used in Section 42. Such belief may be founded upon secret information that may be orally conveyed by the informant. This must then be recorded in writing. Draconian provision which may lead to a harsh sentence having regard to the doctrine of 'due process' as adumbrated under Article 21 of the Constitution of India require striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other. The Apex Court in *Balbir Singh's case* (supra) referring to *Miranda v. Arizona* (1966) 384 US 436 while interpreting the provisions of the Act held that not only the provisions of Section 165 of the Code of Criminal Procedure would be attracted in the matter of search and seizure but the same must comply with the right of the accused to be informed about the requirement to comply with the statutory provisions.

8. The Apex Court times without number has laid great emphasis on recording of reasons before search is conducted on the premise that the same would reflect the earliest version which would be available to a court of law and the accused while defending his prosecution. The provisions contained in Chapter-V of the Act are a group of sections providing for certain checks on exercise of the powers of the concerned authority which otherwise would have been arbitrarily or indiscriminately exercised. The statute mandates that the prosecution must prove

compliance of the said provisions. If no evidence is led by the prosecution, the Court will be entitled to draw the presumption that the procedure had not been complied with.

9. Section 42 of the Act clearly lays down that the authorized officer is entitled to enter into or search any building if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug or psychotropic substance liable for seizure or forfeiture under the Act is kept or concealed in such building. The Investigating Officer has not stated that he recorded the information received by him in writing. This is a mandatory provision of law and non-compliance of the same makes the search illegal.

10. Proviso to Section 42 provides that if the Officer receiving such information has reason to believe that a search warrant cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of an offender, he may enter and search the building after recording the grounds of his belief. In the present case the Investigating Officer did not make any attempt to obtain search warrants and he also did not record the grounds for making the search without obtaining the search warrant. This also amounts to non-compliance of the provisions of Section 42. Section 42(2) of the Act provides that the Officer taking down any information in writing under Sub-section (1) or recording the grounds for his belief under the proviso thereto shall within 72 hours send a copy thereof to his immediate official superior. This provision has also not been complied with at all. Therefore, there is total non-compliance with the provisions of Section 42 of the Act.

11. On this ground alone the accused is required to be acquitted. There are other grounds also to reject the appeal.

12. In the present case, the prosecution examined only 5 witnesses. PW-1 recorded the FIR and also states that the case property was deposited with him. He admits that one Madan Lal was the SHO and he was not part of the raiding party. He states that neither the SHO nor he affixed seal on the case property when the same was deposited with him in the Malkhana.

13. PW-2 Purshotam is an independent witness. According to him, the police first recovered the charas and then prepared the memo of consent and other documents. PW-3 Joginder Singh, S.I. is one of the members of the raiding party. PW-4 Ram Nath is the constable who was associated to keep watch on Man Singh accused.

14. PW-5 Sunder Lal is the Investigating Officer. According to him he had retained one sample with himself for sending the same to FSL Bharari and one sample was deposited with the MHC. This statement is totally contradictory to the statement of PW-1 who states that the case property including two samples were deposited with him.

15. No evidence has been led by the prosecution to show who was deputed to carry the sample from the Police Station to the FSL, Bharari. PW-5 states that he retained one sample for sending it to FSL Bharari but does not say how and through whom he sent the parcel. No witness has been produced in this regard. No road certificate has been produced nor the record of Malkhana has been produced. The prosecution has miserably failed to connect the seized material with the report. There is nothing to show that the report of the FSL relates to the sample seized by the Police. The link evidence is totally missing.

16. In view of the aforesaid discussion, we find no merit in the appeal and the same is accordingly dismissed. Bail bonds, if any, furnished by the accused are ordered to be discharged.