

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.3/2011 with
Crl.M.C.No.75/2022

Date of order: 03.10.2023

Union of India	vs.	Shri Atindranath Sarkar & ors
Biplob Halдар	vs.	Union of India (Customs)

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Appellant : Dr. N. Mozika, DSGI with
Ms. K. Gurung, Adv

For the Respondents : Mr. S. Kumar, Adv with
Ms. R. Kharkongor, Adv
Ms. N. Kharsahnoh, Adv

-
- | | | |
|-----|--|--------|
| i) | Whether approved for reporting in Law journals etc.: | Yes |
| ii) | Whether approved for publication in press: | Yes/No |
-

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The short question that arises in this appeal is as to the effect of admitted non-compliance with the condition laid down in the second proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and the impact of such non-compliance on the seizure.

2. By the judgment and order impugned dated February 22, 2011, the two accused persons were acquitted by the trial court primarily on the ground that the sanctity of the seizure of contraband could not be accepted and on an incidental ground that Section 55 of the said Act had also not been complied with.

3. The Union, through the Customs Department, is in appeal since it was a Customs official who had made the alleged recovery. According to the Union, there was substantial compliance with the relevant provision and, in any event, since the recovery was made from a vehicle in a public place, the trial court ought to have read the situation in the light of Section 43 of the said Act instead of Section 42 thereof. As to the incidental ground indicated in the impugned judgment pertaining to Section 55 of the said Act, the Union claims that such provision would have no manner of application since the seizure in this case was not by the police but by Customs authorities. The Union submits that the appropriate provision in this case, instead of Section 55 of the Act, would have been Section 52(3)(b) thereof. However, the Union contends that in the light of the much larger issue as to whether the conditions precedent to the applicability of Section 42 of the Act

were complied with, it is only upon the Union succeeding on such aspect would it be necessary to go into the incidental aspect, whether under Section 55 or under Section 52(3)(b) of the Act.

4. It is, thus, that the matter is taken up for consideration, primarily as to whether it was necessary to comply with Section 42 of the Act or the conditions precedent to its application; or, whether by virtue of Section 43 of the Act, the strict rigours of Section 42 of the Act need not have been adhered to.

5. Sections 42 and 43 of the said Act have to be seen in the context of Section 41 thereof and as distinct situations which are exceptions to the rule which is recognised in Section 41 of the Act. Section 41 of the Act is the first provision in Chapter V of the said Act. The relevant chapter covers Sections 41 to 68 and is intitled as “Procedure”. Such chapter is followed by an entire chapter which has been incorporated by an amendment and covers forfeiture of illegally acquired property.

6. Section 41 of the Act recognises the power to issue a warrant and authorisation, inter alia, for the arrest and for the search, whether by day or by night, of any building, conveyance or place, in certain circumstances. In either case of issuing a warrant or authorisation, it is a

high official as a designated magistrate or a gazetted officer who must have reason to believe that action in terms of such provision is required to be taken.

7. Section 41(1) of the Act authorises a metropolitan magistrate or a magistrate of the first class or any magistrate of the second class specially empowered by the State government to issue a warrant, whether the purpose for issuance of the warrant is for the arrest of any person whom such magistrate has reason to believe to have committed any offence punishable under the Act or for the search of any building, conveyance or place in which such magistrate has reason to believe that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the Act has been committed is kept or concealed. The search can be by day or by night pursuant to such warrant. In addition, the search-warrant authorised by such provision may pertain to any document or other article which may furnish evidence of the commission of any offence under the Act or any illegally acquired property and may also relate to any article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of the Act.

8. Sub-section (2) of Section 41 of the Act confers similar authority on a gazetted officer, whether of the Central government or of the State government, and from various departments as long as such official is empowered in such behalf by a special or general order by the appropriate government.

9. Section 41(3) of the Act gives authority to the officer in whose favour a warrant under Section 41(1) of the Act is issued or authority under Section 41(2) of the Act is conferred to have all the powers of an officer acting under Section 42 of the Act.

10. It is now necessary to see the entirety of Section 42 of the Act and even refer to Section 43 thereof since certain judgments have been cited on behalf of the Union which, on the face of it, appear to have been in serious confusion as to the applicability of Sections 42 and 43 of the Act and have, quite erroneously, used the two provisions as interchangeable. Sections 42 and 43 are set out:

“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 forces 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 or special order of the State Government, 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, 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) detain 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 in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further 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 sub-section (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.”

“43. Power of seizure and arrest in public place.— Any officer of any of the departments mentioned in section 42 may—

- (a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure of freezing or forfeiture under Chapter VA of this Act;
- (b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled

substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.— For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

11. Section 42 of the Act permits any officer above the rank of peon, sepoy or constable of the State and Central governments, if empowered in such regard by the appropriate government by any general or special order, “if he has reason to believe from personal knowledge or information given by any person and taken down in writing” that any substance in respect of which an offence punishable under the Act has been committed or any document or other article which may furnish such evidence or any illegally acquired property or any other 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 the Act is kept concealed in any building, conveyance or enclosed place; to undertake the acts and activities enumerated in clauses (a), (b), (c) and (d) of the sub-section, provided that such act or activity is conducted between sunrise and sunset. The only pre-condition is that the relevant official must record

the information given by any other person in writing that gives him the reason to believe that any offence under the Act has been committed or any incriminating material may be discovered or contraband recovered.

12. For the present discussion, the first proviso to Section 42(1) of the Act is not relevant. The second proviso to Section 42(1) of the Act has carved out an exception from the substantive provision by indicating the special procedure to be followed if the search or the like is to be conducted between sunset and sunrise. The additional requirement in such a scenario is that the concerned official should have recorded the grounds of his belief as to why a search warrant or authorisation, in accordance with Section 41 of the Act, could not have been obtained without compromising the purpose of the exercise. In other words, as long as an official above the rank of peon, sepoy or constable is empowered generally or specially to carry out a search under the Act, such person would have the authority to do the things indicated in clauses (a) to (d) of Section 42(1) of the Act during the period of daylight hours between sunrise and sunset, on personal knowledge or upon receiving information from which he has reason to believe that any offence under the Act has been committed or such

information pertains to anything which ought to be seized or frozen or forfeited under Chapter VA of the Act. As long as the relevant person is empowered, as long as such person records the information received from another and as long as any of the activities indicated in clauses (a) to (d) of Section 42(1) of the Act is to be conducted by such official between sunrise and sunset, he can go ahead and do the same.

13. However, if the activities indicated in clauses (a) to (d) of Section 42(1) of the Act were to be undertaken at a time not between sunrise and sunset but between sunset and sunrise, the additional duty cast upon the relevant official is to record reasons of his belief that unless such search was conducted at such hour, the purpose of the exercise would be defeated or the evidence would be lost. The second proviso to Section 42(1) of the Act mandates that when a search or like activity under Section 42(1) of the Act is to be conducted between sunset and sunrise, a warrant or an authorisation in terms of Section 41 of the Act would have to be obtained. The need to record reasons to dispense with such requirement is the ground of practicality, when there may not be enough time for the same. The recording of the grounds of

impracticality or inadequacy of time is in lieu of the warrant or authorisation.

14. There is a further duty cast on the concerned official referred to in the relevant provision. Such official is free to do all that he is otherwise empowered under Section 42(1) of the Act and also at a time between sunset and sunrise as long as he complies with the second proviso to Section 42(1) of the Act and, in addition, within 72 hours of making the recording under such provision, such official forwards whatever he was required to record to his immediate official superior.

15. It is evident, therefore, on a plain reading of the relevant provision that it is only when some information is received by an empowered official that he can enter into any building, conveyance or enclosed place between sunrise and sunset for the purpose of searching or seizing or arresting without any warrant or authorisation in terms of Section 41 of the Act. By virtue of the second proviso to Section 42(1) of the Act, he is further empowered to do all such activities between sunset and sunrise, ordinarily, by obtaining a prior warrant or authorisation; or, in extraordinary circumstances, only upon recording his belief or reasons as to why it is imperative so to do without

obtaining any warrant or authorisation. The only additional requirement is to communicate such recording of grounds to his superior within 72 hours of recording the same in terms of Section 42(2) of the Act.

16. In a manner of speaking, the strict requirements under Section 41 of the Act are diluted to meet the exigencies of the situation if a scenario in terms of Section 42(1) of the Act arises and it leaves a small window of time to take action. Further, the additional restriction between sunset and sunrise has also been removed upon a suitable condition in respect thereof being provided by virtue of the second proviso to Section 42(1) of the Act and the safeguard in Section 42(2) thereof.

17. Now to turn to Section 43 of the Act. There is no doubt that Section 43 of the Act, and even Section 49 of the Act that comes later, are also exceptions to the general rule in Section 41 of the Act just as Section 42 of the Act is another species of exception to the general rule in Section 41 of the Act. However, Section 42 of the Act can never be mixed up with Section 43 of the Act though Section 43 and Section 49 of the Act may be of a somewhat similar nature.

18. On the one hand, Section 42 of the Act envisages action on the basis of personal knowledge or information being received but contemplates that despite receipt of such knowledge or information, there may not be enough time to either obtain a warrant or obtain an authorisation in terms of Section 41 of the Act. In such a scenario, an empowered officer is permitted to go ahead and do whatever he could have done upon obtaining a warrant or an authorisation under Section 41 of the Act, provided that the search or other activity that he undertakes is within daylight hours between sunrise and sunset. The legislature then contemplated that there could also be a scenario where it was necessary to intervene during night hours or between sunset and sunrise and the time available may not be sufficient to obtain either a warrant or an authorisation in terms of Section 41 of the Act. Accordingly, the legislature added an additional condition in such regard to the other condition already included in the substantive part of Section 42(1) of the Act by way of the second proviso thereto. As long as in a search or the like activity being conducted between sunrise and sunset, the fact that the information has been received that leads to reason to believe is recorded, the empowered official has all the

authority as if he was supported either by a warrant or by an authorisation in terms of Section 41 of the Act. Where such search or other activity has per force to be conducted between sunset and sunrise, or else the evidence would be lost, upon recording the additional reason, the search or other activity may be conducted by the empowered official without obtaining any warrant or authorisation as long as all the grounds are forwarded, within 72 hours of the recording, to the immediate official superior of the empowered official.

19. Section 43 of the Act is not based on personal knowledge or any information being received as to any offence under the Act having been committed or as to anything that may be seized or frozen or forfeited under Chapter VA of the Act or pertaining to any illegally acquired property in terms of the Act.

20. Section 43 of the Act covers what is come to be known as a chance recovery. When an empowered official undertakes checking activities in a public place, say, looking for an escaped convict or for extremists or for illegal arms or in course of security operations pertaining to any high official and incidentally comes across any prohibited substance in respect of which he has reason to believe that an

offence under the Act has been committed, he may proceed to seize any incriminating material, or detain and search any person if he has reason to believe such person may have committed any offence. Such empowered official also has the authority to recover anything contraband from any person's possession. Section 49 of the Act extends the similar provision to any animal or conveyance which is used to ferry contraband, though such provision is not confined to any public place. Further, like Section 42 of the Act, Section 49 of the Act also requires the previous reason to suspect that the animal or conveyance is or is about to be used to transport any contraband.

21. The distinction between the scenario covered by Section 42 of the Act and that under Section 43 thereof is obvious: in the first, the concerned official has some reason to believe of any offence under the Act having been committed and there is likelihood of discovery of any material to substantiate the suspicion. In the second case, there is no suspicion as to the commission of any offence under the Act. It is only in course of conducting another activity that a concerned official has reason to believe, incidentally, of the commission of an offence under the Act of 1985 that Section 43 of the Act is triggered off. The two

distinct situations covered by the differently worded provisions of Section 42 and Section 43 of the Act cannot be seen in the same light or even compared.

22. Indeed, the very kind of places indicated in Section 42 and the kind of places indicated in Section 43 of the Act show the extent of distinction sought to be made by the legislature in such regard. No one would have, or ought to have, any reason to enter into any building or like place unless there is an element of reasonable suspicion. The number of places covered by Section 42 of the Act has been extended to conveyance, in addition to building and has generally been kept open, without being exhaustive, in the use of the word “place” at the end. But the suspicion has to be there and the place can even be a packet left hanging from somewhere as long as there is some reason to believe based on personal knowledge of the empowered official or on the information in such regard received from any other person, which information is recorded in writing.

23. Section 43 of the Act, however, is extended to public places since the general screening or combing or scrutiny would be conducted in a public place and may, generally, not involve entering into a

building or the like. Thus, the larger sense that the word “conveyance” conveys both in Sections 42 and 43 of the Act would include vehicles. But in terms of Section 42 of the Act, the vehicle could be parked inside any premise or within a garage and there may be information of some contraband therein. In the Section 43 scenario, however, this can never be as the vehicle has to be in a public place and must have been stopped in the usual course of the checking or the combing operation undertaken by the authorities or the concerned official.

24. In short, nothing in Section 42 of the Act can take colour from anything contained in Section 43 thereof and vice versa as they cover mutually exclusive situations.

25. There is a cardinal principle that when a law requires a certain thing to be done in a certain manner, such thing has to be done in such manner or not at all. The rule attaches with greater force when there are harsh consequences for committing a particular act. In such a case, when the procedure established by a particular provision in the relevant statute requires adherence thereto, the failure to comply with the relevant conditions will free the accused of the harsh consequence of the statute.

26. There are several provisions in the Act of 1985 that would require strict compliance. The search and seizure provision would require a degree of seriousness to be attached thereto. The Act recognises that since the activity of producing, manufacturing and transporting drugs is generally clandestine, any delay in taking steps may result in the delayed steps being futile. It is for such purpose that the rule has been enunciated in Section 41 of the Act before the general exigencies have been recognised in Section 42 thereof and a special exigency in the second proviso to Section 42(1) of the Act and, as a consequence, the rule in Section 41 of the Act has been relaxed.

27. There is also a purpose for providing a different provision as in Section 43 of the Act for an accidental or chance recovery which is not based on any prior information or suspicion or reason to believe in the commission of an offence under the Act. Even the limited rigours under Section 42 of the Act, thus, stand relaxed and are absent from a scenario covered by Section 43 of the Act.

28. But that does not mean that the two provisions are interchangeable and when a recovery is made from a vehicle, the fact that previous information may or may not have been available is

irrelevant. That would make a mockery of the statute and the relevant provisions. There is a clear distinction in what is to be done upon information being received and upon having reason to suspect an offence under the Act having been committed and in a situation where there is no such reason to believe or harbour any suspicion in such regard.

29. In a sense, Section 43 of the Act is the residuary provision pertaining to the rule in Section 41 of the Act. Such residuary provision cannot be resorted to, as is the sacrosanct principle in statutory interpretation, when there is a specific provision in such regard. Section 49 of the Act is a special provision confined to modes of transportation used for ferrying any prohibited substance.

30. In the present case, it is the admitted position that information pertaining to a particular truck carrying drugs was received by the concerned Customs official, who examined himself as PW-8 at the trial, at 4:30 am on March 20, 2009. The information received was that the truck had or was about to leave Silchar at that time and that such truck was carrying some prohibited substance.

31. Such Customs official, who was otherwise empowered under Section 42 of the Act, proceeded to record in writing the information that he received. However, at the trial, such official candidly and unreservedly admitted that though the relevant truck was apprehended at or about 1 am on March 21, 2009, he had not recorded any grounds for proceeding with the search between sunset and sunrise without seeking any warrant or authorisation or run the risk of missing the truck altogether.

32. Once so much was admitted that the search was conducted between sunset and sunrise and the additional condition required in the second proviso to Section 42(1) of the Act was not complied with, the entire search operation would be suspect and would be otherwise than in accordance with law and, consequently, vitiated. As a result of the concerned official not complying with the additional requirement in the second proviso to Section 42(1) of the Act, there was no vetting of the requisite grounds in terms of Section 42(2) of the Act by any immediate official superior.

33. Since the general rule as to search and seizure is recorded in Section 41 of the Act and an exception is carved out therefrom in

Section 42(1) thereof, the exception would be limited to all that is covered by Section 42(1) thereof and nothing beyond. When a further exception, in addition to the general exception under Section 42(1) of the Act, is made out in the application of the general rule recognised in Section 41 of the Act, and a condition imposed for such further exception to apply, the non-adherence to the condition would not permit the provision as to the additional exception to be availed of. This is elementary in interpreting the effect of a statute and its provisions.

34. The circumstances that revealed themselves at the trial rightly attracted the attention of the Court. The trial court was justified in coming to the conclusion that since the condition precedent to the additional exception envisaged by the second proviso to Section 42(1) of the Act had not been complied with, the concerned official had no authority to undertake the search or any related exercise. In the absence of such authority and the statutory bar as a consequence of Section 41 of the Act, all that followed had to be regarded as irrelevant.

35. It is in such circumstances that the Union submits that if the Union's contention on substantial compliance of Section 42 of the Act

is not upheld, the further ground under Section 55 of the Act would not be required to be looked into.

36. In addition, the Union fairly submits, as is expected of such exalted litigant, that though the trial court overlooked the matter, it is also the admitted position that Section 52A of the Act was also not complied with in the present case.

37. The Union has referred to three judgments in support of its contention that when it was a vehicle that was being searched and such search was conducted in a public place, the strict conditions under Section 42 of the Act would not apply.

38. In the first of the cases cited, reported at (2006) 9 SCC 170 (*Union of India v. Major Singh*), there is the following paragraph 4 from the report which is placed:

“4. Turning now to Section 42(2) of the Act, in this regard, it may be stated that from the prosecution case and evidence it would be clear that the search and seizure was made of a public carrier at a public place and 127 bags of poppy straw (opium) were seized from a public carrier. This point is also concluded by a judgment of this Court in *State of Haryana v. Jarnail Singh* in which it has been categorically laid down that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 for searching the vehicle between sunset and sunrise. In the case in hand the search was made of a

public conveyance at a public place between sunrise and sunset. Therefore, the provisions of Section 42(2) of the Act shall have no application to the case. This being the position, the High Court was not justified in acquitting the respondents and the trial court was quite justified in convicting them.”

39. However, the relevant order cited runs into just about a page and spills over five paragraphs without the basic facts being revealed therein. It is not indicated in the report whether the relevant case was one based on personal knowledge or information received as to the commission of offence or as a case of chance recovery only.

40. Accordingly, the dictum, so to say, may not be read as wide as canvassed by the appellant, in the absence of the relevant facts being evident.

41. A Punjab and Haryana judgment has next been brought by the Union which is reported at 2002 SCC OnLine P&H 762 (*Dharminder Kumar v. State of Punjab*). The facts in such case are recorded at paragraph 2 of the report. In that case, some secret information was received and within a short time of receipt of the information, the vehicle carrying the contraband was apprehended and the offending material recovered therefrom. An argument was made that Section 42(2) of the Act had not been complied with in that case. Upon noticing

such requisite condition, a Division Bench of the High Court referred to both Sections 42 and 43 of the Act before recording as follows at paragraph 10 thereof:

“10. While Section 42 empowers the officers of the specified departments to carry out search, seizure and arrest in any building, conveyance or enclosed place, Section 43 deals with the similar power of seizure and arrest in public places. Powers under both these sections can be exercised if the concerned officer has reason to believe that some offence relating to narcotic drugs or psychotropic substances has been committed. Section 49 is another section in the series which empowers officers to stop and search animals and conveyance used for illegal transport of narcotic drugs or psychotropic substances. The words building, conveyance and enclosed place as used in Section 42 have been used for the specific purpose of protecting the persons who are living in the buildings, conveyance and enclosed place. The Legislature in its wisdom considered proper to draw a demarcating line between building, conveyance and enclosed place on one side and public place or in transit on the other side. The words have been specifically mentioned to show the demarcating line between the two otherwise, the legislature could have used any place instead of narrating the words ‘building, conveyance or enclosed place’. Even a private open place does not fall within the purview of Section 42 unless it is enclosed. So, this demarcating line will have to be kept in mind. Under Section 43 of the Act, the words used are ‘any public place or in transit’. The requirement of recording of information in writing and communicating it to superiors is intended to protect the possible harassment to residents and to maintain personal liberty and human dignity. The term conveyance used in Section 42 is to be understood as *ejusdem generis* to the terms building or enclosed place. It is not every conveyance whether in public or private that would fall within the scope of Section 42 of the Act. A conveyance in a public place would fall within

Section 43 of the Act and Section 49 gives power to the empowered officer to stop such conveyance for the purpose of search.”

42. With respect, the judgment failed to see the distinction between the scenario covered by Section 42 of the Act and the completely different circumstances in which Section 43 of the Act would operate. Despite it being evident that this was a case where secret information had been received as to the particular vehicle, merely because the search was conducted in a public place, the High Court erroneously applied Section 43 of the Act when such provision had no manner of application in the case. As indicated earlier, Section 42 of the Act covers a situation where a search is conducted upon a reason to believe that an offence under the Act has been committed pursuant to information in such regard being received. On the other hand, Section 43 of the Act comes into play when the object of the search is something quite removed from the 1985 Act and, incidentally, in course of the search, there is reason for the searching official to believe that an offence under the 1985 Act may have been committed. Since the two provisions as indicated more fully hereinabove operate in two distinct situations, the view expressed

in paragraph 10 of the report is found exceptionable and contrary to the statute.

43. In the last of the precedents cited, it was also a case covered by Section 42 of the Act. Though the ratio of the judgment is found at paragraph 19 thereof and there is a comparison of Sections 42 and 43 of the Act though it is a comparison between apples and oranges, the end result, however erroneously arrived at, may be justified on the facts indicated in paragraph 2 of the report. However, to the extent that Sections 42 and 43 of the Act have been put on the same pedestal and compared inter se, such approach is, with respect, found to be erroneous and contrary to the purposes and objects of the two distinct provisions and the independent areas of their operation.

44. The distinction between Section 42 of the Act and Section 43 thereof is not merely in where the search takes place and whether it is a public place or not. The real distinction is in whether there is a reason to believe that an offence under the Act has been committed that leads to the search or like activity in the first place; or, whether upon an exercise in the nature of a search for some other purpose having commenced, the

conducting official gets a reason to believe that an offence under the Act may have been committed. Such distinction is palpable.

45. The need to comply with the conditions, particularly in Section 42 of the Act, is indispensable both when it is appreciated that Sections 42 and 43 of the Act are exceptions to the general rule in Section 41 thereof and in the context of Section 35 of the Act. Section 35 of the Act provides for a presumption as to the culpable mental state of the accused and goes against the grain of the general philosophy in criminal law that a person is innocent unless proven guilty. In the light of such presumption, the procedure laid down for conducting a search or the like has to be followed to the hilt; or else, the presumption will not arise.

46. For the reasons aforesaid, the mistake committed by the relevant Customs official in this case of not adhering to the condition indicated in the second proviso to Section 42 of the Act has to be regarded as fatal. No search or like activity could have been conducted by such official between sunset and sunrise without complying with the condition precedent as indicated in the relevant proviso and the conditions subsequent as mandated in Section 42(2) of the Act. Since

the very search in this case was erroneous, however much the quantity of seizure may be claimed to be, such argument of prejudice cannot influence the Court.

47. The appellants claim that the seizure in this case was of 18 packets containing a total of 511 kg of ganja. The only silver lining may be in such ganja, if it is assumed to have been recovered, may have been dealt with in accordance with law and taken off the streets. However, upon the procedure for search not being followed in terms of Section 42 of the Act which is an exception to the general rule in Section 41 thereof, the prosecution's case has been rightly rejected by the trial court. The reasons indicated in such regard in the impugned judgment do not call for any interference.

48. CrI.A.No.3 of 2011 is dismissed.

49. CrI.M.C.No.75 of 2022 is disposed of.

50. A line of explanation has to be furnished as to why this matter remained pending for nearly 12 years. One of the questions that initially came up in the appeal was whether a statement recorded by a Customs official was admissible in evidence and, as such, the matter was kept

pending till the judgment in *Tofan Singh* reported at (2021) 4 SCC 1 was delivered.

(B. Bhattacharjee)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
03.10.2023
"Lam DR-PS"

