

304

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA-S-505-SBA of 2001

Date of Decision: January 28, 2015.

State of Haryana

.....Appellant

Versus

Babu Lal

.....Respondent

CORAM: HON'BLE MRS. JUSTICE SABINA

Present: Mr. Rajiv Doon, AAG Haryana.

Mr. Aman Dhir, Legal Aid Counsel
for the respondent.

SABINA, J.

Respondent had faced trial in FIR No.113 dated 07.02.1998, under Section 18 of Narcotic Drugs and Psychotropic Substance Act, 1985 ('Act' for short), Police Station Ambala City. Trial Court vide impugned order dated 06.06.2000 ordered the acquittal of the respondent. Hence, the present appeal by the State.

Prosecution story in brief was that on 07.02.1998, Inspector Phool Kumar alongwith other police officials were returning to Ambala from Emambari. When they reached near the bus-stand, Inspector Phool Kumar received a secret information that respondent who was in possession of opium was standing near the bus-stand. Thereafter, Inspector Phool Kumar followed the informer and apprehended the respondent. Notice was served on the respondent under Section 50 of the Act. Respondent expressed his desire that the search be

conducted in the presence of a gazetted officer. Thereafter, the respondent along with his bag was taken to the residence of Tehsildar, but the said officer was not available. Then the accused was taken to the residence of Assistant Superintendent of Police ('ASP' for short)-Mrs. Kala Ram Chandra. The said officer verified the facts from the respondent and directed Inspector-Phool Kumar to conduct the search of the bag carried by the respondent. On search of the bag carried by the respondent, a plastic container was recovered. When the said container was opened, it was found that it contained *ghee*. Underneath *ghee*, a polythene bag was recovered and the said bag contained opium. The opium weighed Three Kilograms. Two samples, weighing 10 grams each were separated. Samples as well as remaining opium were made into sealed parcels with seal bearing impression S.K.S. belonging to Surjeet Kumar. ASP initialled all the three parcels. Parcels were taken in possession. Ruqa was sent to the police for registration of case. Rough site plan of place of recovery was prepared. Respondent was formally arrested. After completion of investigation and necessary formalities, challan was presented against respondent.

Learned State counsel has submitted that the trial Court had erred in ordering the acquittal of the respondent only on the ground that provisions of Section 50 of the Act had not been complied with. In fact, in the present case, recovery of the contraband from the accused was effected from the bag, he was

carrying. Hence, provisions under Section 50 of the Act were not applicable to the facts of the present case. In support of his arguments, learned State counsel has placed reliance on **State of Haryana versus Mai Ram son of Mam Chand** 2008(4) R.C.R. (Criminal) 130, wherein it was held as under:-

*“12. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. [(See **Kalema Tumba v. State of Maharashtra and Anr.**, 1999(4) RCR (Criminal) 575 : (JT 1999(8) SC 293), **State of Punjab v. Baldev Singh**, 1999(3) RCR (Criminal) 533 : (1999(6) SCC 172) and **Gurbax Singh v. State of Haryana**, 2001 (1) RCR (Criminal) 702 : (2001(3) SCC 28)]. the language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). A similar question was examined in **Madan Lal and Anr. v. State of Himachal Pradesh**, 2003(4) RCR (Criminal) 100 : 2004 (1) Apex Criminal 426 : (2003(6) Supreme 382).”*

Learned counsel for the respondent on the other hand has opposed the appeal and has submitted that provisions of Section 50 of the Act were mandatory and non compliance of the said provisions, were fatal to the prosecution case. Further mandatory provision of Section 42 of the Act had not been complied with. There was no explanation as to why secret information was not reduced into writing and sent to higher officers. In this regard, learned counsel has placed reliance on **Krishan Chand versus State of Haryana**, 2013(2) RCR (Criminal), 67 wherein it was held as under:-

“17. In our considered view, this controversy is no more res integra and stands answered by a

Constitution Bench judgment of this Court in the case of Karnail Singh (*supra*). In that judgment, the Court in the very opening paragraph noticed that in the case of **Abdul Rashid Ibrahim Mansuri v. State of Gujarat, [2000(1) R.C.R.(Criminal)611 : (2000)2 SCC 513]**, a three judge Bench of the Court had held that compliance of Section 42 of the Act is mandator and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of Sajan Abraham (*supra*), again a Bench of three Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, if there is total non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not, will be a question of fact in each case. The Court in paragraph 35 of the judgment held as under:-

35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirement of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The office on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in

regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

PW3 Inspector Phool Kumar while appearing in the witness box has deposed as per the prosecution story. PW2 Sub Inspector Surjeet Kumar corroborated the statement of PW1. PW6 Mrs. Kala Ram Chandra, ASI also corroborated the statement of PW3 and PW2 qua recovery of the contraband from

the respondent.

In the present case, the contraband was being carried by the respondent in a bag. Thus, in view of the decision of the Apex Court in State of Haryana versus Ambala Mai Ram son of Mam Chand (supra), provision of Section 50 of the Act were not liable to be complied with. Trial Court thus, fell in error in ordering the acquittal of the respondents merely on the ground that compliance of Section 50 of the Act had not been made. In fact, compliance of Section 50 of the Act was not necessary in the present case. However, there was substantial compliance of the said provision in the present case. Exhibit PB is the notice given to the respondent that he could get his search effected in the presence of a gazetted officer or a Magistrate. Although, the response given by the respondent to the said notice was not reduced in writing, but the statement of PW3 to the effect that the respondent had stated that he wanted to get the search effected in the presence of a gazetted officer, is believable as respondent was produced before a gazetted officer before the search of the bag could be conducted. Exhibit PB is duly signed by the respondent.

Recovery of the contraband was effected from the appellant in the presence of a gazetted officer ASP-Mrs. Kala Ram Chandra. The official witnesses were acting in discharge of their official duty and had no reason to falsely involve the respondent in this case.

So far as the compliance of Section 42 of the Act is

concerned, in the present case, as per PW3 (in his cross-examination), he had received the secret information at 4:15 PM that accused was present near the bus stand and could be apprehend forthwith. In terms of the said information, respondent was apprehended at 4:30 PM. Thus, in the present case, if the investigating officer had started doing the writing work, the accused-appellant could have managed to escape from the spot. Keeping in view the urgency of the circumstances, PW3 Inspector Phool Kumar alongwith other police officials by following the informer immediately reached the spot to apprehend the respondent. After recovery, ruqa was sent to the police station for registration of the case. Request was made by Inspector Phool Kumar while sending the ruqa that information be sent to higher officials. There is nothing on record to suggest that information had not been sent to the higher officials. No such query was put to PW3 in his cross-examination. Thus, in the present case, substantial compliance of Section 42 of the Act had been made and judgment relied upon by the learned counsel for the respondent fails to advance the case of the respondent as it is based on different facts.

From the statement of the official witnesses, it is evident that respondent was apprehended while in possession of Three Kilograms opium without any permit or licence. Exhibit PX is the report of the chemical examiner to the effect that the sample was identified as opium.

Accordingly, this appeal is allowed. Impugned order

passed by the trial Court dated 06.06.2000 is set aside. Respondent is held guilty of an offence punishable under Section 18 of the Act and is convicted thereunder. Respondent is sentenced to undergo Rigorous Imprisonment for ten years and shall be liable to pay a fine of ₹1,00,000/-. In case of default of payment of fine, respondent shall further undergo Rigorous Imprisonment for six months. Respondent be arrested forthwith to enable him to undergo the sentence.

**(SABINA)
JUDGE**

January 28, 2015
m.singh