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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-691-SB-2004

Date of Decision: 21.08.2015

BHOLA RAM

.....Petitioner

Vs.

STATE OF HARYANA

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Sanjiv Gupta, Advocate
for the appellant.

Mr. Arun Luthra, AAG, Punjab

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *To be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*

RAJ MOHAN SINGH, J. (Oral)

- 1) Appellant-Bhola Ram has been convicted under Section 15(c) of NDPS Act for keeping 100 kg of poppy-husk in 5 bags of 20 kg each which were recovered from his conscious possession. The appellant could not produce any licence and therefore, he was held guilty for the aforesaid offence. Appellant has been sentenced to undergo RI for 10 years and to pay fine of Rs.1 lac under Section 15(c) of the Act. In the event of default in payment of fine, appellant would further undergo RI for 2 years.

Appellant has assailed the judgment of conviction and order of sentence. The prosecution story is that on 10.02.2001, ASI Guria Ram, was posted in CIA staff, Fatehabad and he was going towards village Nakta from village Khumber on a kacha path in government vehicle along with other companions on patrolling duty. When the police reached about 2 kilometers from village Khumber, accused-appellant was seen dragging bags from cotton sticks and was apprehended on suspicion. A notice under Section 50 of NDPS Act was served upon the accused to the effect that the police had suspicion of presence of some contraband in the bags and therefore, police wanted to search the same. Offer was given to the accused whether he wanted to get the search conducted by Magistrate or by a Gazetted Officer. The contents of the notice were read over and explained to him. The accused-appellant thumb marked the same in token of its acknowledgment in the presence of police party and desired that the search be effected in the presence of Magistrate. Accordingly, Naib Tehsildar-cum-Executive Magistrate was called at the spot. The Investigating Officer apprised the Magistrate about the facts and thereafter, on his instructions, conducted the search of the bags. On search, poppy husk was found. On weightment, 20 kg poppy husk was found in each of the bag. Sample of 100 grams was separated from each bag and 5 samples were prepared and were converted into sealed parcels. Seal of GR was affixed. Seal after use was handed over to HC Tarsem Singh. All the sealed parcels were taken into police possession vide separate recovery memo which

was attested by HC Tarsem Singh. Therefore information was sent to the police station through Constable Suresh Kumar on the basis of which formal FIR was registered. The Investigating Officer conducted investigation. Rough site plan of the place of recovery with marginal notes was prepared. Statements of witnesses were recorded. On return to police station, case property along with accused and witnesses were produced before the SHO Shingara Singh who on verification put his seal 'SS' on each of the sample. The Investigating Officer also submitted a separate report under Sections 55-57 of the Act which was also endorsed by the Station House Officer. Thereafter, the Investigating Officer handed over the case property and samples to the MHC and put the accused in police lock up.

2) Samples were sent to the office of chemical examiner for analysis. On completion of investigation, challan was presented against the accused in Court. And after necessary commitment, trial progressed. Accused-appellant was charge-sheeted under Section 15 of NDPS Act for keeping 100 kg of poppyhusk in 5 bags without any valid permit or licence. Accused-appellant pleaded not guilty and claimed trial.

3) Prosecution examined as many as 9 witnesses namely Om Parkash HC as PW1, C. Mahavir Parshad as PW2, Shakti Singh SI as PW3, SI Balwan Singh as PW4, Inspector/SHO Vijay Kumar as PW5, Jiwan Ram, Naib Tehsildar as PW6, HC Tarsem Singh as PW7, Guria Ram, SI as PW8 and Inspector/SHO

Shingara Singh as PW9. Thereafter, evidence of the prosecution was closed by learned Public Prosecutor after tendering report of Chemical Examiner/FSL. The incriminating circumstances were put to the accused in his statement under Section 313 Cr.P.C. Accused pleaded false implication. Thereafter, accused-appellant was called upon to enter into defence evidence, but he failed to bring any defence evidence and closed the same.

4) The trial Court convicted and sentenced the appellant. Prosecution relied upon statement of Jiwan Singh, Naib Tehsildar, PW6, HC Tarsem Singh, PW7 and Guria Ram, SI/SHO as PW8 and pleaded that all the aforesaid witnesses being party to recovery proceedings have unequivocally supported the prosecution story and mandatory provisions of NDPS Act were duly complied with. Link evidence has also been established from the stage of recovery of contraband till its deposit in the malkhana and then to the office of chemical analyst for analysis thereof.

5) Learned counsel for the appellant has contended that no independent witness has been joined by the prosecution despite the fact that police party had ample opportunities to join some independent witness from the locality as well as from the place from where the contraband was allegedly recovered. Secondly, learned counsel for the appellant has contended that even if the case was based on suspicion, once the police party proceeded to issue notice under Section 50 of NDPS Act, thereafter, compliance of the mandatory provisions became

mandatory. Before giving offer to the accused, Investigating Officer is legally required to apprise the accused that he has a right in terms of Section 50 and thereafter, offer is to be made to the accused. Section 50 of NDPS Act has not been complied inasmuch as that the appellant was not informed about existence of his right to be searched before the Gazetted Officer or the Magistrate.

6) Thirdly, the acceptance given by the accused-appellant was to be searched by the Magistrate, whereas Naib Tehsildar cannot be presumed to be either Magistrate or the Gazetted Officer. No material has been adduced by the prosecution to show that the Naib Tehsildar was conferred with the powers of Executive Magistrate in terms of any notification or authorization by the competent authority.

7) Fourthly, as per prosecution case, the accused appellant was dragging the alleged bags of poppy husk with the help of cotton stick. The conscious possession of the accused-appellant cannot be presumed for want of ownership of the site from where the alleged contraband was statedly recovered. No material has been produced on record to prove the ownership of the land from where the contraband was recovered by the prosecution. Moreover, the bags were not connected in any manner with the person of the accused and therefore, concept of conscious possession is not applicable to the instant case.

8) Fifthly, police party remained at the site for about 4 hours. In view of that, police had ample opportunity to ask anybody from the locality or from nearby fields to join the investigation as independent witness. Learned counsel for the appellant vehemently contended that at the time of preparation of seizure memo and other documents at the spot, police party was not in the knowledge of number of FIR which was subsequently given to the case when the accused along with contraband were produced before the Station House Officer. The seizure memo surprisingly carried the number of FIR which showed that everything was done at the same convenient place after registration of FIR. Seizure memo was prepared at the spot at the time when FIR was not in existence. Very presence of FIR number on the seizure memo made the entire exercise to be in a manipulated affair. Learned counsel for the appellant relied upon case law **2002 Volume 4 RCR 474, State of Punjab versus Harchand Singh and 2003, Volume 2 RCR Criminal 437 Ram Pal Versus State of Haryana** on the point of independent corroboration and **2003, Volume 1 Judicial Reports (Crl.) 534 State of Orissa versus Sitansu Shekhar, Kanungo**, on the point of appearance of FIR on the seizure memo, making the same to be a manipulated affair.

9) Provision in terms of Section 50 of the NDPS Act was required to be followed in letter and spirit. If the accused was not informed about his legal right to be searched before Gazetted Officer or Magistrate then the accused is entitled benefit of acquittal. On this

premise, learned counsel for the petitioner relied upon 2002, Volume (3) RCR 404, Abdul Rahiman Vs. State of Kerela.

10) Learned counsel also contended that the presence of Naib Tehsildar, Jiwan Ram is very doubtful as the case property was not sealed by him with his seal. No seal was affixed by the Naib Tehsildar. Ex.D1, the statement of the witness allegedly recorded by the Investigating Officer did not carry his signature. On the aforesaid premise it has been contended by learned counsel that it was legally incumbent upon the Naib Tehsildar, Jiwan Ram (who has been labeled as Magistrate) to witness the recovery from the accused and in token thereof, put his seal on contraband and sample. Since the act has stringent punishment, therefore, each requirement has to be strictly complied with. Any infraction of mandatory requirement, would lead to acquittal of the accused.

11) Learned counsel further contended that link evidence is not established on record inasmuch as that alleged recovered things Ex.P7 to Ex.P11 are not found to be the same which were allegedly recovered from the site. At the time of recovery of these bags, according to prosecution case, seals were duly affixed. Seals were found broken and even not visible. Even the number of seal and make up as found in these bags are also different as alleged by the eye-witnesses. Material evidence has been found to be tempered with. According to learned counsel, no reliance can be placed on the prosecution version and the accused deserves to be acquitted. Learned counsel point out contradictions in

the statements of witnesses inasmuch as that according to Jiwan Ram, Naib Tehsildar, writing was done by ASI, Guria Ram, PW8 whereas HC Tarsem Singh, PW7 has submitted that part of the writing was done by him and part of the writing work was done by PW8, Guria Ram, ASI. The aforesaid fact was also endorsed by ASI Guria Ram-PW8. In this way, contradiction has appeared in the statement of PW6, Jiwan Ram, Naib Tehsildar and statement of PW7, HC, Tarsem Singh which was endorsed by Guria Ram, ASI, PW8. Again, according to statement of Jiwan Ram, Naib Tehsildar, PW6, seal affixed on the case property and sample was kept by Guria Ram, I.O, PW8 with himself whereas Guria Ram, ASI, PW8 stated that seal after use was handed over to HC Tarsem Singh, PW7. Moreover, according to Naib Tehsildar, Jiwan Ram, no public witness came to the spot during the course of proceedings at the site, whereas the I.O., PW8, Guria Ram has admitted that some of the persons came to the spot which on being requested, refused to oblige.

12) Learned counsel for the State on the other hand has argued that Section 50 of NDPS Act is not attracted inasmuch as that the contraband was recovered from the bag and not from the person of the appellant. Section 50 of the Act would apply only where the search of the person is to be conducted and not of the object. On the aforesaid proposition, learned counsel relied **2014**

Volume 1 RCR (CrI.) Page 41 Rajpal Singh @ Raju Vs. State of

Punjab.

13) Secondly, learned counsel for the State relied upon **2015 Volume 2 RCR, (Crl.) 697, Sanjiv Kumar Vs. State of Haryana** wherein it was held that where the recovery is effected not from the person of the accused, in that eventuality Section 50 of the Act is not applicable. In another case, **2013 Volume 3 RLW 1810 Ram Sarup Vs. State of Delhi**, the Hon'ble Apex Court has observed in the context of "search of person" and did not consider any violation in terms of Section 50 of NDPS Act in case recovered contraband was from bags belonging to the accused.

14) I have heard the rival submissions of both the sides. Apparently, the site from where the alleged contraband was allegedly recovered did not belong to the accused-appellant. No effort was made by the prosecution to bring on record any such material, connecting the land with the ownership of the appellant in any manner. The prosecution story is that the accused was dragging the bags of poppy husk with the help of cotton stick. In that context some independent corroboration has to be made from the prosecution side. The availability of independent witness on the site has to be read in conjunction with the conflict appearing in the statement of PW6, Jiwan Ram, Naib Tehsildar and the Investigating Officer, Guria Ram, PW8. Once the prosecution opted to proceed in terms of Section 50 of the NDPS Act, thereafter prosecution cannot turn around and say that since the recovery was based on suspicion, therefore, Section 50 is not mandatory. In such a situation, Section 50 of the Act becomes mandatory from the stage where the prosecution came to

know that some contraband is found in the possession of the accused. Invoking of Section 50 of the Act by the prosecution itself at the initial stage cannot be allowed to be culminated in non-compliance without giving benefit of the same to the accused. Accused was legally entitled to be apprised of right of his search before Gazetted Officer or the Magistrate. It was legally incumbent upon the Investigating Officer to apprise the accused about existence of such right before offer in terms of Section 50 of NDPS Act. **Abdul Rahiman's case (supra)** is the case law to be followed in this context.

15) The prosecution is at variance in terms of handing over seal after use. Firstly, the Naib Tehsildar, Jiwan Ram, PW6 was required to affix his seal over the recovered contraband as well as the sample memos. No such seal was affixed by Jiwan Ram, Naib Tehsildar. No such seal was found with the recovered memo. Ex.D1, the statement of Naib Tehsildar recorded by Investigating Officer did not contain his signature. In view of this, presence of Jiwan Ram, Naib Tehsildar on the spot is very much doubtful.

16) In the context of writing work, by the prosecution witnesses, a conflicting stand has come to fore, thereby making it wholly doubtful. The statements of the witnesses are at variance. Keeping in view the stringent provisions and stringent punishment contained in the Act, the guilt of the accused has to be established beyond all reasonable doubts and the provisions are to be strictly complied with. The aforesaid variance would also lead to creating

prejudice to the rights of the accused when linking evidence is not established on record. Moreover, link evidence is further found to be not established. The recovered contraband were shown credited in terms of Ex.P7 to P11. The bags were not found in order. The seals affixed thereupon were found to be broken and were not visible. The number of seals and make up of the same were found to be different. Once the case property was not found to be intact, reliance can easily be placed on 2003 Volume 1, RCR 132 Nirmal Singh Vs. State of Punjab and 1980 Volume 1 RCR (Crl.) 341 Sarabjit Singh @ Sarbu Vs. State of Punjab.

17) The appearance of FIR number on the recovery memo is also suggestive of the fact that recovery memo was prepared at some convenient place after registration of the case. Apparently, at the time of preparation of recovery memo on the site, FIR was not in existence. Presence of FIR number on the recovery memo remains a mystery on record. It is not the prosecution case that recovery memo was derived from the same information in writing at the spot and thereafter at the time of registration of case, the document was prepared after duly marking number of FIR on it and was submitted along with challan.

18) Lastly, the person who recovered the contraband in the capacity of complainant cannot be allowed to proceed to investigate the case at a subsequent stage in the capacity of Investigating Officer. The complainant cannot be a judge of his own cause. Guria Ram, ASI effected the search and prepared the

recovery proceedings at the spot. Thereafter, he was not supposed to undertake any investigation, being a complainant.

19) In view of above detailed discussion, it is brought out that the prosecution has failed to comply with mandatory provisions to bring out the culpability of the appellant within four corners of stringent provisions of NDPS Act. Link evidence has not been established on record. Mandatory compliance of Section 50 has not been done. Even if, it is held that mandatory compliance of Section 50 is not applicable in case of chance recovery/recovery made on suspicion, then also once the prosecution itself started with the compliance of Section 50 of NDPS Act by giving offer to the accused in the context of his right, the same became mandatory from the stage where the prosecution came to know about presence of contraband with the accused.

20) Looking to the entirety of the facts and circumstances, benefit can be given to the accused-appellant. Judgment of conviction dated 13.02.2004 and order of sentence dated 16.02.2004 are hereby set aside. Accused-appellant is acquitted of the charges. Resultant action to follow.

August 21, 2015
SwarnjitS

(RAJ MOHAN SINGH)
JUDGE