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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.L.P. 710/2015

STATE OF NCT OF DELHI

..... Petitioner

Through: Mr. Avi Singh, ASC with Ms. Megha
Bahl, Adv. for State

versus

ABDULLA

..... Respondent

Through: Mr. Viraj R Datar, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER
24.01.2017

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1. The State has preferred this petition to seek leave to appeal against the judgment dated 09.01.2015 rendered by the learned Special Judge, NDPS Act, Karkardooma Courts, Delhi in SC No.04A/13 for the offences under Section 20 of the NDPS Act (the Act) arising out of FIR No.26/2012 registered at PS Crime Branch, whereby the respondent/ accused has been acquitted. The acquittal of the respondent is premised on non compliance of Section 42 and 50 of the Act.

2. Mr. Singh, learned ASC has submitted that the Trial Court has erred in invoking section 42 of the Act since, in the present case, the seizure had taken place at a public place, namely, under the flyover at Ghazipur.

According to Mr. Singh, section 43 and not section 42 of the Act would apply.

3. Section 42 and 43 of the Act reads as follows:

“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 persons 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 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 or 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”.

4. Mr. Singh has argued that section 42 is applicable where the seizure, freezing or forfeiture is in respect of the contraband which is “*concealed in any building, conveyance or in closed place*”. However, if the said seizure is to be made from “*any public place or in transit*”, it is not essential that the requirements of section 42, namely, of taking down in writing the personal knowledge or information received by the officer concerned and of the same being sent to the immediate official superior to the officer concerned, is met.

5. In support of his submission, Mr. Singh has sought to place reliance upon several decisions. He has, firstly, relied upon ***Mohan Lal v. State of Rajasthan***, 2015 V AD (SC) 581 and in particular para 25 thereof, which read as follows:

“25. In the present case, the High Court has noted that the information was given to the competent authority. That apart, the High Court has further opined that in the case at hand Section 43 applies. Section 43 of the NDPS Act contemplates seizure made in the public place. There is a distinction between Section 42 and Section 43 of the NDPS Act. If a search is made in a public place, the officer taking the search is not required to comply with sub Sections (1) and (2) of Section 42 of the NDPS Act. As has been stated earlier, the seizure has taken place beneath a bridge of public road accessible to public. The officer, Sub-Inspector is an empowered officer under Section 42 of the Act. As the place is a public place and Section 43 comes into play, the question of non-compliance of Section 42(2) does not arise. The aforesaid

view gets support from the decisions in Directorate of Revenue and Anr. v. Mohammed Nisar Holia[35] and State, NCT of Delhi v. Malvinder Singh”.

6. He has also placed reliance on ***Directorate of Revenue & Anr. v. Mohammed Nisar Hola***, (2008) 2 SCC 370, wherein the Supreme Court observed in para 14 as follows:

“14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance with Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance with the said provision would not render the search a nullity. A distinction therefore must be borne in mind between a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. It is also possible to hold that rigours of the law need not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance therewith is insisted upon. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefor coupled with the fact that the place which is required

to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or housekeeping of the room, the guest is entitled to maintain his privacy. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammelled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right to privacy deals with persons and not places”.

7. Lastly, he has placed reliance on the decision of the Supreme Court in ***State, NCT of Delhi v. Malvinder Singh***, (2007) 11 SCC 314. He places reliance on para 9 and 10 of the said decision, which read as follows:

“9. In *State of Haryana v. Jarnail Singh* [(2004) 5 SCC 188 : 2004 SCC (Cri) 1571] it was held as follows: (SCC pp. 191-92, paras 7-10)

“7. The next question is whether Section 42 of the NDPS Act applies to the facts of this case. In our view Section 42 of the NDPS Act has no application to the facts of this case. Section 42 authorises an officer of the Departments enumerated therein, who are duly empowered in

this behalf, to enter into and search any such building, conveyance or place, 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, etc. is kept or concealed in any building, conveyance or enclosed place. This power can be exercised freely between sunrise and sunset but between sunset and sunrise if such an officer proposes to enter and search such building, conveyance or enclosed place, he must record the grounds for his belief 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.

8. Section 43 of the NDPS Act provides that any officer of any of the Departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance, etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorised to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that 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.

9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious

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 of the NDPS Act for searching the vehicle between sunset and sunrise.

10. In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. Section 43 therefore clearly applied to the facts of this case. Such being the factual position there was no requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42. Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in M. Prabhulal v. Asstt. Director, Directorate of Revenue Intelligence [(2003) 8 SCC 449 : 2003 SCC (Cri) 2024] that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act.”

10. Above being the position of law, the order of the High Court is clearly unsustainable. Section 42 has no application to the facts of the case. The order of the High Court is set aside and that of the trial court is restored. The respondent-accused shall surrender forthwith to custody to serve remainder of sentence”.

8. On the other hand, Mr. Datar has submitted that in every case, where prior intimation or knowledge is received or acquired on the basis of which a seizure is planned, it is essential to strictly comply with the provisions of section 42 of the Act irrespective of whether the seizure is, in fact, made at a

public place or at a private or enclosed place. He submits that the said safeguard has been provided by law to prevent false implication of an accused. He submits that section 42 applies to all cases where prior information/ knowledge is derived by the officer concerned and, as opposed to that, section 43 applies where it is a case of a chance seizure being made by the officer on the basis of information received when he is not in office.

9. In support of his submission, he has placed reliance on several decisions. Firstly, he has placed reliance on ***Karnail Singh v. State of Haryana***, (2009) 8 SCC 539, and in particular on para 26 of the said decision, which read as follows:

“26. The material difference between the provisions of Sections 42 and 43 of the NDPS Act is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article, etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful”.

10. He also places reliance on ***Kishan Chand v. State of Haryana***, (2013) 2 SCC 502, and in particular para 17, which read as follows:

“17. In our considered view, this controversy is no more res integra and stands answered by a Constitution Bench judgment of this Court in Karnail Singh [(2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] . In that judgment, the Court in the very opening paragraph noticed that in Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] , a three-Judge Bench of the Court had held that

compliance with Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate superior officer may cause prejudice to the accused. However, in Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] , 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 with 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 para 35 of the judgment held as under: (Karnail Singh case [(2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] , SCC pp. 554-55, para 35)

“35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer 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. (emphasis in original)".

11. Lastly, he has placed reliance on the decision of a coordinate bench of this court in ***Om Prakash v. State***, in CrI A No.453/2014 decided on 23.05.2014 in a fact situation materially same as the one in hand. In this case as well, the prior information had been received in relation to a proposed seizure to be made at a public place and on account of non compliance of provisions of section 42 of the Act, the appeal preferred by the convict succeeded. This court held in this decision as follows:

"74. In the first place it should be observed that Section 43 of the NDPS Act would apply when a police officer apprehends narcotics drugs and psychotropic substances from a person in a public place without any prior intimation. In such a scenario, obviously, there will be no occasion for recording in advance the grounds of belief or communicating it to any superior officer. However, where the raiding officer proceeds to a public place on the basis of prior information which he has recorded in writing, then the question of applicability of Section 43 would not arise. In such circumstances, the proviso to Section 42 mandates that the officer must record the grounds for his belief. If he proceeds to the spot without a search warrant, the evidence may be concealed or the offender may escape".

12. Mr. Datar has also pointed out that the decisions relied upon by the petitioner in ***Mohan Lal*** (supra) and ***Malvinder Singh*** (supra) are not apposite in the facts of the present case inasmuch, as, in ***Mohan Lal*** (supra), the case related to the registration of a FIR beforehand with regard to the

break-in of the malkhana at the police station and the articles being removed therefrom, which included the contraband substance i.e. opium. The recovery had been made on the disclosure statement of the accused. It was in this background that the Supreme Court was dealing with the applicability of section 42 of the Act. Similarly, in **Malvinder Singh** (supra), the police officer while on patrolling duty received secret information and organised the raiding party. The ACP was informed and he was part of the raid party. It was in this background that the court held that section 42 had no application to the facts of the case.

13. So far as the decision in **Mohammed Nisar Hola** (supra) is concerned, Mr. Datar has also placed reliance on the observation made in para 14 of the said decision, wherein the Supreme Court observed that “*A distinction therefore must be borne in mind between a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance*”.

14. Having heard learned counsels, perused the impugned judgment as well as the decisions relied upon by them, I am of the view that the decision in **Om Prakash** (supra), which is a decision of a coordinate bench of this court, is squarely applicable to the facts of the present case. In **Om Prakash** (supra), the secret information has been received on 09.07.2011 at around 6:30 p.m. According to this information, the accused were to come in their own vehicle between 8:30 and 9:00 p.m. on Outer Ring Road near Kali Mata Mandir to supply opium to some person, where they could be apprehended at that time. Thus, it is clear that though the seizure was allegedly made at a public place i.e. on the Outer Ring Road near Kali Mata Mandir, this court

has held after considering the earlier decisions including those rendered by the Supreme Court in *Karnail Singh* (supra) and *Kishan Chand* (supra) that compliance of section 42 of the Act was mandatory.

15. Mr. Singh has also submitted that there was substantial compliance of section 42 inasmuch, as, the prosecution had led in evidence the Reader to ACP, who had testified that the information was received in the office of ACP.

16. I may observe that the Trial Court has disbelieved the said testimony on the ground that no record of the receipt was maintained and the said information was not diarised in the office of ACP. Pertinently, the information under Section 50 and 57 had been diarised in the office of ACP. Since section 42 had not been strictly complied with and the Trial Court has held that the evidence of prosecution with regard to compliance of section 42 is on an infirm ground, and the view taken by the Trial Court is a plausible view, I am not inclined to interfere with the impugned judgment.

17. In view of the aforesaid position, I do not find any merit in the present petition. The same is, accordingly, dismissed.

VIPIN SANGHI, J

JANUARY 24, 2017

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