

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

477

CRA-S-584-SB-2005 (O&M)

Reserved on:-08.02.2023

Date of Decision:22.02.2023

Gurmukh Singh

...Appellant

Versus

State of Haryana

... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. G.S. Goraya, Advocate
for the appellant.

Ms. Sheenu Sura, DAG, Haryana.

N.S.SHEKHAWAT, J.

The present appeal is directed against the impugned judgment of conviction dated 04.03.2005 and order of sentence dated 09.03.2005 passed by the Additional Sessions Judge (Special Court under NDPS Act 1985) Kurukshetra, whereby, the appellant was convicted under Section 15 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (in short '**the NDPS Act**') and was sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 40,000/-, alongwith the default stipulation,

The brief facts of the case are that ASI Siya Nand alongwith other police officials was present on the turning of village Talheri on Ambala-Pehowa Road on 26.06.2001 and in the meantime, a secret information was received by him. The informer told him that Gurmukh Singh son of Virsa Singh, resident of village Talheri was habitual of selling poppy husk and had brought the contraband, which was kept hidden in his *Bara* (outside house) and, if raid was conducted, he could be apprehended in possession of huge quantity of the contraband. The information was found worth placing reliance

and the information was sent to the police station for registration of a criminal case. The police team started for the place disclosed by the secret informer. While leading to the disclosed place, Sahab Singh, resident of village Talheri met the Investigating Officer and was associated by the raiding team. When the police party reached village Talheri, a man was found running away from his *Bara*. Sahab Singh, member of the raiding party had identified the said person to be Gurmukh Singh son of Virsa Singh, accused.

On getting the information, Rajbir Singh Dhiman, Tehsildar, Pehowa, reached at the spot after some time and verified the facts from ASI Siya Nand. On his directions, ASI Siya Nand conducted the search in the *Bara* of the accused and poppy husk weighing 41 kgs was recovered from the *Bara*. A quantity of 250 gms was taken out as a sample and the sample as well as the remaining quantity of the contraband were converted into separate parcels and were sealed with the seal of "RD" of Rajbir Singh Dhiman, Tehsildar, Pehowa. The seal was kept by the Tehsildar with himself after use. The samples and the remaining quantity were taken into possession by the police vide a separate recovery memo and rough site plan was prepared. The case property was deposited with the MHC in the intact condition. The accused was apprised of his grounds of arrest, at the time of his arrest on 11.09.2001 and was formally arrested. SI Darshan Singh, SHO Police Station Ismailabad prepared the report under Section 173 Cr.P.C., which was filed before the competent Court.

Finding the prima-facie case against the accused, charge under Section 15 of the NDPS Act was ordered to be framed against the accused/appellant for keeping in his possession 41 kgs of poppy husk (*choora post*), without any permit or licence. The accused pleaded not guilty and claimed trial.

In order to bring home the guilt of the accused, the prosecution examined 10 witnesses.

Prem Chand was examined as PW1, who was posted as ASI in Police Ismailabad on 26.06.2001. On receipt of *rukka* Ex.PA, he recorded formal FIR Ex.PA/1. He also sent special reports to the S.P. Kurukshetra and the learned Judicial Magistrate 1st Class, Kurukshetra at 11.30 a.m. The prosecution examined PW2 Darshan Singh, SI/SHO, who prepared the report under Section 173 Cr.P.C. on completion of the investigation. Still further HC Rattan Singh, who was posted as Reader to the DSP, Pehowa, was examined as PW3. He received a report Ex.PB under Section 57 of the NDPS Act and the same was put up before DSP Pehowa by him, who after perusal made his endorsement Ex.PB/1. HC Dayal Singh and EHC Mam Chand tendered their affidavits Ex. PC and Ex.PD in evidence and their testimonies were formal in nature. Bir Bhan, Inspector, who was posted as SI/SHO in Police Station Ismailabad on 26.06.2001, was examined as PW6. He clearly stated that ASI Siya Nand produced before him the case property, sample parcels, specimen sealed impression and the witnesses. After affixation of his seal “BBS” on the sealed parcels, he also sent a report under Section 57 of the NDPS

Act Ex.PE. The prosecution examined PW7 Sahab Singh, the independent witness, who refused to support the case of the prosecution and was turned hostile. However, in his cross-examination, he admitted that recovery memo Ex.PG was bearing his signatures. Rajbir Dhiman, Tehsildar, Pehowa was examined as PW8, who stated that on receipt of a message, he reached at the place of recovery to act as gazetted officer and at his instance, the contraband was recovered from the present accused. The samples as well as the remaining quantity of the contraband were sealed with the seal of “SN” of the Investigating Officer and “RD” of the Tehsildar. He retained his seal with himself after use whereas the seal “SN” of the Investigating Officer was entrusted to Sahab Singh, who was also present at the place of recovery. The residue, sample parcels and the specimen seal impressions were taken into possession vide recovery memo Ex.PG and he had also attested the recovery memo alongwith Sahab Singh and HC Jai Raj. Even, the case property was produced in the Court as Ex.P1. ASI Jai Raj was examined as PW9, who was posted as HC in C.I.A. Kurukshetra on 26.06.2001 and was part of the raiding team. He supported the case of the prosecution in totality. ASI Siya Nand was examined as PW10, who was the star witness of the prosecution. He also supported the case of the prosecution and was subjected to lengthy cross-examination by the learned counsel appearing on behalf of the appellant.

After the closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded and he pleaded his false implication. However, he assigned no reasons for false implication by the police nor any motive was attributed on behalf of the police to involve him in a criminal case.

To prove his defence, the accused examined DW1 Baba Balkar Singh, Incharge, Academy Sahibjada Ajit Singh Jujhar Singh, Anandpur Sahib, who stated that Gurmukh Singh accused was on Kar Sewa from 01.06.2001 to 30.06.2001 in their academy. He exhibited a document Ex. D1 to prove the same. However, in his cross examination, he stated that the original Ex.D1 was written by the Principal of the academy and Ex.D1 was not bearing any date or year. The accused further examined DW2 Gurdeep Singh, who remained Sarpanch of village Talheri. He stated that in the month of June 2001, unclaimed poppy husk was recovered by the police in the river of Markanda and 10/12 persons were arrested by the police. But all of them were freed by the police after some consideration. In the month of June 2001, Gurmukh Singh accused was busy in Kar Sewa of Baba Balkar Singh at Anandpur Sahib and after three months, it was known that Gurmukh Singh was falsely implicated in the present criminal case.

I have heard learned counsel for the parties at length and with their able assistance, I have gone through the trial Court record carefully.

The learned counsel for the appellant vehemently argued that as per the admitted case of the prosecution, ASI Siya Nand, PW10 had received a secret information about the crime and on receipt of the said information, he had not reduced the said information in writing in the same words and the said information was not sent to the higher officers, which is in violation of Section 42 of the NDPS Act. Since, the mandatory provisions of Section 42 of the NDPS Act was not complied with, the appellant was entitled to be acquitted. The said submission has been opposed by the learned State counsel on the ground that the recovery of the contraband in the instant case had taken place from a public place and, consequently, the provisions of Section 43 of the Act would apply and there was no requirement to follow the procedure as laid down in Section 42 of the NDPS Act.

Before proceeding further, I would consider it appropriate to refer to the law laid down by the Hon'ble Supreme Court in the matter of **Karnail Singh Vs. State of Haryana 2009 (8) SCC 539**, wherein, the Hon'ble Supreme Court held as follows:-

12. The material difference between the provisions of Sections 42 and 43 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.

It was further held as follows:-

14. The Constitution Bench in Baldev Singh (supra) considered the compliance of Section 50 of the Act. While doing so, the Bench also considered the provisions of Sections 41 and 42 of the Act. It observed as follows :

"8. Section 41 of the Narcotic Drugs and Psychotropic Substances Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide sub-section (2) the power has also been vested in gazetted officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, empowered in that behalf by a general or special order of the State Government to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband or document or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place.

9. Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal

knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without a warrant between sunrise and sunset, and he may do so without recording his reasons of belief.

10. The proviso to sub-section (1) lays down that if the empowered 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. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas 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."

It is to be noted that Baldev Singh's case (supra) has dealt with Section 50 of the Act and the effect of non-

compliance of the same. It was held that the same provisions of Section 50 containing certain protection and safeguards implicitly make it imperative and obligatory and cast a duty on the investigating officer to ensure that search and seizure of the person concerned is conducted in a manner prescribed by Section 50. The unamended Section 50 as existed during that period is as follows

: "Section 50 - Conditions under which search of persons shall be conducted

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate. (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

" The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. But this strict procedural requirement has been diluted by the insertion of sub-section (5) and (6) to the

Section by Act 9 of 2001, by which the following sub-sections were inserted accordingly :

"(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

Through this amendment the strict procedural requirement as mandated by Baldev Singh's case was avoided as relaxation and fixing of the reasonable time to send the record to superior official as well as exercise of Section 100 of Criminal Procedure Code was included by the legislature. The effect conferred upon the previously mandated strict compliance of Section 50 by Baldev Singh's case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a

consequence the mandate given in Baldev Singh's case is diluted.

Still further, similar views have been expressed by the Hon'ble Supreme Court in the matter of **Boota Singh Vs. State of Haryana AIR 2021 SC 1913.**

Adverting to the facts of the instant case, it is apparent that there was total non-compliance of requirement of Section 42 of the NDPS Act. The law is well settled that total non-compliance of sub-section 1 and 2 of Section 42 of the NDPS Act is impermissible in law. If the information was received and the police officer had sufficient time to take action and if the police officer failed to record in writing the information received, or failed to send a copy thereof, to the superior officer, then it would be construed as a suspicious circumstance, in clear violation of Section 42 of the NDPS Act. Similarly, where police officer did not record the information at all and did not inform the superior officer at all, then it would be a clear violation of Section 42 of the NDPS Act. In the instant case, *Bara* which allegedly belong to the accused was a private place, belonging to some villager and could never be termed as a public place. However, the police officers failed to comply with Section 42 of the NDPS Act, which was mandatory in nature and, thus, the appellant was liable to be acquitted only on this ground alone.

Learned counsel for the appellant further submitted that in the instant case, the identity of the accused was not established by the prosecution. Only one independent witness Sahab Singh had recognized the appellant while running from the spot, but while he

entered into the witness box, he had not supported the case of the prosecution and was declared hostile. The said submission has been opposed by the learned State counsel. I have considered the submissions made by the counsel for the parties and it is apparent that the present appellant/accused was not known to any of the police officers. It has been alleged by the prosecution that Sahab Singh, who was associated by the raiding party knew the accused earlier and had disclosed the identity of the appellant/accused while he was running away from the place of recovery. However, it is apparent that while appearing as PW7, Sahab Singh did not support the case of the prosecution and apart from the same, the prosecution could not lead any evidence to establish the identity of the appellant/accused.

Learned counsel for the appellant further vehemently argued that neither the ownership and exclusive possession of the premises was proved nor the conscious possession of the appellant over the contraband could be proved by the prosecution. The said submission has been opposed by the learned State counsel on the ground that only the appellant/accused was present at the time of effecting the recovery from the *Bara* and on seeing the police party, he fled away from the spot. Since, he was in possession of the *Bara* at the relevant time and no other person was present at the place of recovery, consequently, the conscious possession of the appellant over the contraband stood proved. The prosecution was under no legal obligation to prove the ownership of the *Bara* and since the conscious possession of the appellant over the *Bara* stood proved, the findings

recorded by the learned trial Court are liable to be upheld. I have considered the submissions made by the learned counsel for both the sides and find sufficient force in the submission made by the learned counsel for the appellant. In the present case, the recovery has been shown from the Coop in *Bara* (premises for the custody), but the ownership and exclusive possession of the appellant over the premises was not proved by the prosecution by leading unimpeachable evidence. Neither any witness was examined to prove the ownership nor any documentary evidence was filed by the prosecution to prove the same. Even, no witness of the prosecution ever stated that the premises was in exclusive possession of the accused. Still further, even no evidence was led by the prosecution to show that the appellant was in conscious possession over the recovered contraband. The police had merely stated that the accused fled from the spot, on noticing the raiding party. Thus, the appellant is entitled to the benefit of doubt and the findings recorded by the learned trial Court are reversed.

In view of the above discussion, this Court has no hesitation to hold that the findings recorded by the trial Court are not legally sustainable as the evidence led by the prosecution was not correctly appreciated in the light of settled law. Consequently, the impugned judgment of conviction dated 04.03.2005 and order of sentence dated 09.03.2005 passed by the Additional Sessions Judge (Special Court under NDPS Act 1985) Kurukshetra, are set aside and the appellant is ordered to be acquitted.

All pending applications, if any, are disposed off, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

22.02.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking	:	Yes/No
Whether reportable	:	Yes/No