

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

CRA-S-1954-SB-2004 (O&M)

Reserved on: 16.01.2023

Date of Pronouncement: 10.03.2023

Isham Singh

...Appellant

vs.

State of Haryana

...Respondent

Coram : Hon'ble Mr. Justice N.S.Shekhawat

Present : Mr. Keshav Pratap Singh, Advocate for
for the appellant.

Ms. Sheenu Sura, Deputy Advocate General, Haryana,

N.S.Shekhawat J.

The present appeal has been preferred against the judgment of conviction dated 14.09.2004 and the order of sentence dated 15.09.2004 passed by Learned Special Court, Kurukshetra, whereby the present appellant has been convicted under Section 15 of the Narcotic Drugs and Psychotropic Act, 1985 (herein after referred to as the NDPS Act) and was sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.6000/-, along with default stipulation.

The case of the prosecution in brief is that on 07.03.2001, Prem Narain, SI of Anti Narcotics Cell, CID Crime, Madhuban Karnal along with other police officials was present on GT Road and he received a secret information that Isham Singh, accused, owner of JVG Dhaba used to sell poppy husk to truck drivers and if an immediate raid be conducted at his Dhaba, he

might be caught red-handed. Prem Narain, SI formed a raiding party and also informed DSP, Headquarter, Kurukshetra about the said facts. He raided JVG Dhaba and found accused going towards back side of the Dhaba carrying a gunny bag. He was apprehended on suspicion and Prem Narain, SI served a notice under Section 50 of the Act on the accused and informed him about his right of getting the search conducted either in the presence of a Gazetted Officer or a Magistrate. In reply to the said notice, the accused opted to get himself searched before a Gazetted Officer vide a separate memo. In the meantime, Anil Kumar Dhawan, DSP, Headquarter Kurukshetra reached at the spot. He was apprised of the fact and on his direction, Prem Narain SI conducted the search of the gunny bag, which was found containing poppy husk in a wax paper of white colour. Two samples of 200 grams each were separated from the recovered poppy husk and the residue quantity of poppy husk weighed to be 11 Kgs 600 grams. The two samples as well as the remaining quantity of poppy husk were converted into separate parcels and duly sealed with the seal impression 'PN' of Prem Narain SI and 'AKD' of Anil Kumar Dhawan, DSP. The specimen of seal impressions were also prepared. The case property as well as specimen seal impressions were taken into possession vide a separate recovery memo. A ruqa was sent to the police station and the formal FIR was recorded. The initial investigation was conducted by Prem Narain SI at the spot. After returning to the police station, the accused, witnesses and the case property were produced before Satbir Singh, SI/SHO and apprised him of the facts by submitting a report under Section 55 of the Act. The SI/SHO also verified the facts, affixed his seal 'SS' on the parcels and directed the case property as well as specimen seal impressions to be deposited with MHC and

the accused was formally arrested. Prem Narain, SI also prepared a report under Section 57 of the Act and submitted the same to DSP, Headquarter, Kurukshetra. The sample parcels were sent to FSL, Madhuban in due course and on receipt of the report of FSL, Madhuban, the challan was presented against the accused in the competent Court.

Finding a prima facie case, the accused was charge-sheeted for the offence punishable under Section-15 of the NDPS Act, to which he pleaded not guilty and claimed trial.

To prove the charge against the accused, the prosecution examined nine witnesses. HC, Bhushan Dass was examined as PW-1, who tendered his duly sworn affidavit Ex. PA as his statement. C. Satyan was examined as PW-2 and he tendered his affidavit Ex. PB in evidence. The prosecution examined SI Satbir Singh as PW-3, who was posted as SHO in Police Station, Shahabad on 07.03.2001. Prem Narain, SI produced the accused, witnesses and the case property before him and he made enquiries from the witnesses and the accused. He also had put his seal impression 'SS' and directed to lodge the accused in the lock up and to deposit the parcels with the MHC. He had forwarded report under Section 57 of the Act to the higher police officer. HC Amar Singh was examined as PW-4, who was posted as Reader with Anil Dhawan, DSP, Headquarter, Kurukshetra, He had received a report Ex. PC/4 under Section 57 of the Act and he had put this report before Anil Dhawan, DSP. Satpal Singh, ASI was examined as PW-5, who had recorded the formal FIR Ex.PD/1, on receipt of the ruqa Ex. PD. The prosecution further examined PW-5 (wrongly numbered as PW-5) Paras Kumar, SI, who was posted as SI/SHO at Police Station Shahabad and had prepared a report under Section 173 Cr.P.C. The

prosecution examined PW-6 ASI Baldev Singh, who had conducted the part of the investigation in the present case. HC Guljari Lal was examined as PW-7, who had been posted in Anti Narcotic Cell, Madhuban CID, Crime on 07.03.2001. He was part of the raiding team with SI Prem Narain. He was also a witness to the initial investigation conducted by SI Prem Narain at the spot. In his cross-examination he admitted that they had started from Madhuban complex at 10:00 A.M. for patrolling and crime detection. They had reached at Teora on GT road. They received secret information at 05:15 PM at Teora chowk on G.T. road. The secret information was not reduced into writing and the same was not sent to the police station for registration of the case. He further stated that hundreds of vehicle were coming and going at the place of secret information and the people were also coming and going at that time. He further admitted that four Dhabas were existing in front of JVG, Dhaba on G.T. Road and many trucks were parked at JVG Dhaba. The prosecution further examined PW-8 Anil Kumar Dhawan, DSP, Headquarter, Kurukshetra, who reached at the spot after getting the information. The search was conducted under his directions by SI Prem Narain. The prosecution examined the main witness Prem Narain SI as PW-9. He supported the case of the prosecution in totality and submitted the facts, as mentioned in the F.I.R. in the instant case. He further admitted in his cross-examination that they started from Madhuban at 10:00 AM and 5/6 police personnel had accompanied him. From Madhuban, the place of recovery is about 50/60 Kilometres. They had checked many Dhabas in the way on G.T Road. They had reached at Teora chowk at about 04:45 PM. He admitted that on G.T. Road the traffic was frequently coming and going on the road. He further admitted that the secret information was not

reduced into writing and they did not sent the secret information to the police station. They did not join any independent persons from the nearby shops and other locality. They did not join any Sarpanch or Lambardar of the Village Teora nor they had summoned any officials to call them. He further admitted that there existed a STD Booth as well as a liquor vend near JVG Dhaba. He further admitted that the basis of secret information was not mentioned in the notice under Section-50 of the Act.

After the prosecution completed the evidence, the statement of the accused was recorded under Section 313 Cr.PC. In his statement, the appellant/accused stated that a quarrel had taken place between him and the police party at a liquor vend near JVG Dhaba at Teora and he was brought to the Police Station, Shahabad and a false case was implanted on him. His village was 25 Kilometres away from that place and he was not the owner of JVG Dhaba and did not know the name of the owner of JVG Dhaba. In his defence, the accused examined Jai Parkash son of Bachna Ram as DW-1. He stated that he was a wood cutter contractor. About three years ago, the accused was lying on the liquor vend under the influence of liquor near hotels at Teora. The police party came there and took him along. There was an altercation between accused and the police. The police took away the accused and later on he was falsely implicated in this case. They had approached the higher authorities and were assured that the justice will be done, but the case was not withdrawn. After this, no other evidence was produced by the accused.

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

Learned counsel for the appellant vehemently contended that in the

instant case, there was total non-compliance of the mandatory provisions of Section 42 of the Act, which is impermissible in law. The prosecution examined PW-7 HC Guljari Lal, who was part of the raiding team. He clearly admitted that the secret information was not reduced into writing and was not sent to the police station. Similarly, PW-9 SI Prem Narain also admitted in his cross-examination that the secret information was not reduced into writing and they did not sent the secret information to the police station. Thus, there was breach of mandatory provision of the law and the appellant is liable to be acquitted by this Court. The learned State counsel vehemently opposed the said submission by contending that in the instant case, the information was sent to the higher police officers and Anil Kumar Dhawan, DSP had reached the spot. Even the contraband was seized in his presence and since the higher police officers already been informed by Prem Narain, SI there was sufficient compliance of the provisions of Section 42 of the Act.

I have heard learned counsel for the parties and considered their rival submissions. There is sufficient force in the submissions made by learned counsel for the appellant.

In the present case, Section 42 is relevant which is extracted as below:-

"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".

Still further, the Hon'ble Supreme Court as held in the matter of *State of Rajasthan Vs. Jag Raj Singh @Hansa; 2016 (3) RCR (Criminal), 539 as follows"-*

"20. After referring large number of cases, this Court recorded conclusion in paragraph 25 which is to the following effect:

“25, The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or 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 this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case

and vitiate the trial. (3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section. 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 Cr.P.C. and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be

searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

It was further held as follows:-

*"24. It is also relevant to note another Constitution Bench judgment of this Court in **Karnail Singh v. State of Haryana, 2009(5) RCR (Criminal) 515 : 2009(4) Recent Apex Judgments (R.A.J.) 638: 2009 (8) SCC 539**, where this Court had again occasion to consider the provisions of Sections 42 and 50. The Constitution Bench noted the divergence of opinion in two earlier cases which has resulted in placing the matter before the larger Bench. The question was noticed in paragraphs 1 and 2 of the judgment which are to the following effect:*

*"(1) In the case of **Abdul Rashid Ibrahim Mansuri v. State of Gujarat, 2000(1) RCR (Criminal) 611 (2000) 2 SCC 513**, a three- Judge Bench of this Court held that compliance of*

*Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of **Sajan Abraham v. State of Kerala, 2001(3) RCR (Criminal) 808: (2001) 6 SCC 692**, which was also decided by a three-Judge Bench, it was held that Section 42 was not mandatory and substantial compliance was sufficient.*

(2) In view of the conflicting opinions regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest without warrant or authorization, these appeals were placed before the Constitution Bench to resolve the issue.

(3) The statement of objects and reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well organised gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over"

25. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance of requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance of Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in paragraph 5. The present is not a case

where insofar as compliance of Section 42(1) proviso even an arguments based on substantial compliance is raised there is total non-compliance of Section 42(1) proviso. As observed above, Section 43 being not attracted search was to be conducted after complying the provisions of Section 42. We thus, conclude that the High Court has rightly held that non compliance of Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.”

Adverting to the facts of the instant case, from a perusal of the testimonies of PW-7, HC Guljari Lal and PW-9 SI Prem Narain, it is evident that secret information was received at the spot by the police team headed by SI Prem Narain, however, the secret information was not even reduced into writing. Consequently, there was no question of sending the secret information to the police station or higher police officers. Thus, there was breach of mandatory provision of Section 42 of the Act and the learned Trial Court has wrongly convicted the present appellant.

The learned Trial Court mis-interpreted the mandatory provisions of Section 42 of the Act. The learned Trial Court wrongly held that the provisions of Section 42 of the Act were directory in nature and recording of ruqa itself satisfied the requirements of Section 42 of the Act. In fact, sending of ruqa for recording of the FIR in the police station can never be termed as sufficient compliance of Section 42 of the Act. As per the mandate of Section 42 of the Act, when there is total and definite non-compliance of such statutory provisions, the question of prejudice loses its significance. It will per se

amount to prejudice. These are indefeasible, protective rights vested to a suspect and are incapable of being shadowed on the strength of substantial compliance.

In view of the above discussion, it is apparent that there was breach of mandatory provisions of Section 42 of the Act, the appellant is liable to be acquitted. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation in trial. It will be opposed to very essence of criminal jurisprudence, if upon appellant and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance, where the provisions of the Act are directory and are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevance. Absolute duty coupled with strict compliance would rule out the element of prejudice, where there is total non-compliance of the provision.

In view of the above discussion, since there is violation of mandatory provision of law, the instant appeal succeeds. The impugned judgment dated 14.09.2004 and the order dated 15.09.2004 passed by Learned Special Court, Kurukshetra are set aside and the appellant is ordered to be acquitted of the charge. The bail bond and the surety bond shall stand discharged and the accused shall be set at liberty, if in jail and is not required in any other case.

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

Case property, if any, be dealt with, and destroyed after the expiry of period of limitation for filing the appeal, in accordance with law.

The Trial Court record be sent back.

10.03.2023
Hitesh

(N.S.SHEKHAWAT)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No