SUPREME COURT OF INDIA

State of Rajasthan

Vs.

Bheru Lal

Crl.A.No.36 of 2006

(B.S.Chauhan and Dipak Misra,JJ.,)

28.05.2013

JUDGMENT

Dipak Misra,J.,

1. The present appeal is directed against the judgment of acquittal dated 9.4.2004 passed by the learned single Judge of the High Court of Judicature of Rajasthan in S.B. Criminal Appeal No. 659 of 2002 whereby he has reversed the judgment of conviction and order of sentence passed by the learned Special Judge, NDPS cases, Chittorgarh on 7.8.2002 and acquitted the respondent of the offences punishable under Sections 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act").

2. The broad essential facts leading to trial of the respondent are that on 4.4.2001 about 5.45 p.m. Parveen Vyas, temporary in-charge S.H.O., Police Station Chittorgarh, received information from a reliable informer that the respondent would come with illegal opium on his Hero Honda Motor Cycle No. 5902 from Phkhliya towards Chittorgarh and would sell it to some person. The information was entered into Daily Diary at report No. 146 and dispatched to higher officers through Constable Davender Singh. Thereafter, Parveen Vyas, along with other police officials and independent witnesses, namely, Abdul Kareem and Haider Ali laid a trap at Sarhad Kheri Road and when the respondent came to the spot with a plastic bag, he was informed about his right to be searched by a gazetted officer or a Magistrate and, thereafter, after proper search two polythene bags containing 3 Kgs. opium in each bag were seized. Following due procedure, the samples were sent for chemical analysis and, after completing the investigation, charge-sheet was placed for the offences punishable under Sections 8/18 of the Act.

3. The accused denied the charges, pleaded false implication and claimed to be tried.

4. The prosecution to bring home the charges examined Abdul Raheem, PW- 1, Parveen Vyas, PW-2, Rais Mohammad, PW-3, Narayan, PW-4, Madan Lal, PW-5, Arjun Lal, PW-6, Mithu Lal, PW-7, RodSingh, PW-8, Rameshwar Prasad, PW-9, Davender Singh, PW-10, and Kailash, PW-11. The accused examined Bheru Lal, DW-1, and Shanti Lal, DW-2.

5. The learned trial Judge, analyzing the evidence and other material brought on record, and considering the contentions raised by the learned counsel for the prosecution and defence, found the accused guilty of the offence punishable under Sections 8/18 of the Act and sentenced the accused to undergo rigorous imprisonment for ten years and to pay a fine of rupees one lakh and in default of payment of fine, to suffer further rigorous imprisonment for one year.

6. Challenging the conviction and sentence an appeal was preferred by the respondent before the High Court. The principal contention that was raised in appeal was that Parveen Vyas was not authorised under Section 42 of the Act to search, seize or arrest a person and hence, the whole trial was ab initio void. The High Court, scanning the statutory provision and the notification issued by the Government, came to hold that Parveen Vyas was not the Station House Officer of Police Station, Chittorgarh, as Rameshwar Prasad was the only Station House Officer and hence, Parveen Vyas did not have the authority to conduct any search, seizure and arrest and, therefore, the whole trial was vitiated. Being of this view, the learned single Judge dislodged the judgment of conviction and acquitted the accused.

7. We have heard Dr. Manish Singhvi, learned Additional Advocate General for the State of Rajasthan, and Mr. Atul Agarwal, learned counsel appearing for the respondent. It is submitted by Dr. Manish Singhvi that the High Court has failed to appreciate the language employed in the Section 42 of the Act and the notification issued by the State of Rajasthan in that behalf as a consequence of which the ultimate conclusion of the High Court has become wholly unsustainable. It is urged by him that Rameshwar Prasad, Station House Officer of the police station, had gone out of police station and handed over the charge to Parveen Vyas, Sub-Inspector and he had conducted the search and seizure and, therefore, there has been substantial compliance of the provision in view of the Constitution Bench decision in *Karnail Singh v. State of Haryana*[1].

8. Mr. Atul Agarwal, learned counsel for the respondent, would submit that the High Court has correctly interpreted the provision and as per the notification only those Sub Inspectors of Police who are posted as Station House Officers are authorised to carry out the search and seizure and Praveen Vyas, not being the permanent S.H.O. could not have carry out the search and seizure, and hence, the judgment of acquittal cannot be flawed.

9. To appreciate the rival submissions raised at the Bar, it is necessary to refer to the ununamended Section 42 of the Act as the said provision was applicable at the relevant time. The original Section 42 of the Act has been substituted by Act 9 of 2001 with effect from 2.10.2001. Prior to the amendment Section 42 read as follows: -

> "42. Power of entry, search, seizure and arrest without warrant or authorization. – (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 or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or

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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 personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence 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 Chapter IV relating to such drug or substance; 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 Chapter IV relating to such drug or substance: Provided that if such officer has reason to believe that a search warrant or authorization 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 sun set and sun rise 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 forthwith send a copy thereof to his immediate official superior."

10. In pursuance of the aforesaid Section the State of Rajasthan had issued a notification No. F.1(3) FD/Ex/85-1 dated 16.10.1986, which reads as follows: -

"S.O. 115. In exercise of the powers conferred by Section 42 of the Narcotic Drugs andPsychotropic Substances Act, 1985 the State Government hereby authorise all Inspectors of Police, and Sub Inspectors of Police posted as Station House Officers, to exercise the powers mentioned in Section 42 of the said Act with immediate effect: Provided that when power is exercised by Police Officer other than Police Inspector of the area concerned such officer shall immediately hand over the person arrested and articles seized to the concerned Police Inspector or SHO of the Police Station concerned."

11. On a perusal of the aforesaid notification it is manifest that the Sub Inspectors of Police, posted as Station House Officers, were authorized by the State of Rajasthan to exercise the powers enumerated in Section 42 of the Act. There is cogent and reliable evidence on record that Rameshwar Prasad had left the police station for certain length of time and at that juncture, he had given charge of the Station House Officer to Parveen Vyas, PW-2. The learned single Judge has accepted that he was handed over temporary charge of the Station House Officer by Rameshwar Prasad, PW-9. However, he had taken note of the fact that he was not posted as Station House Officer at the police station and by the time the search and seizure had taken place about 8.00 p.m., Rameshwar Prasad had already returned to the police station. As far as the timing is concerned, we are not at all impressed as there are circumstances to negative such a conclusion. However, as far as charge is concerned, there is no difficulty in holding that he was in-charge Station House Officer. The question that emanates for consideration is whether he could have carried out the search, seizure and arrest or there has been violation of the requirements as contained in Section 42 of the Act by which the whole trial becomes ab initio void.

12. In Karnail Singh (supra) the Constitution Bench was required to resolve the conflicting opinions expressed regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest without warrant or authorization. The larger Bench analysed the ratio laid down in Abdul Rashid Ibrahim Mansuri v. State of Gujarat[2] and Sajan Abraham v. State of Karala[3] and opined that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) and similarly in Sajay Abraham's case it was not held that requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The Constitution Bench in paragraph 34 of the report observed as follows: -

> "34. The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policymakers about it. Now for the last two decades police investigation has gone through a sea change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the register/records kept for those purposes in the police station or the respective offices of the authorised officials in the Act if the emergency of the situation so requires. As a result, if the statutory provision underSections 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as a discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug peddlers."

13. After so observing, the Constitution Bench stated in seriatim the effect of the two earlier decisions. Paragraph 35(d), being relevant for the present purpose, is reproduced below: -

> "(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."

14. Though the principle was stated in a different context, yet the dictum laid down therein is clear as crystal that there cannot be literal interpretation of Section 42(1) of the Act. The provision employs the words "empowered in this behalf by general or special order of the State Government." The notification has stated "any Sub Inspector posted as Station House Officer". The High Court has acquitted the respondent solely on the ground that Rameshwar Prasad was posted as the Station House Officer and not Parveen Vyas, who conducted the search, seizure and arrest. It is the accepted position that Parveen Vyas, PW-2, was given temporary charge of the Station House Officer at the relevant time. He received information from the reliable source. He complied with the other necessary requirements and proceeded to the spot to trap the accused. Any delay would have allowed the accused to escape. As per the notification a Sub Inspector of Police can be posted as Station House Officer and at the relevant time PW-2 was in-charge Station House Officer. There is no justification to place unnecessary importance on the term "posted". He was, in fact, in- charge of the post of Station House Officer at that juncture. In our considered view, such a literal and technical approach would defeat the principle laid down by the Constitution Bench in Karnail Singh's case. Therefore, the search, seizure and arrest carried out by him would not make the trial ab initio void. Thus, the irresistible conclusion is that the High Court has fallen into grave error by opining that Section 42(1) of the Act was not complied with as the entire exercise was carried out by an officer who was not authorised.

15. In view of the aforesaid analysis, the appeal is allowed, the judgment passed by the High Court is set aside and the judgment rendered by the learned trial Judge is restored. The learned trial Judge is directed to take steps for arrest of the respondent so that he can undergo rest of the sentence.

[1] *(2009) 8 SCC 0539*
[2] *(2000) 2 SCC 0513*
[3] *(2001) 6 SCC 0692*