

RAJASTHAN HIGH COURT

Umrav

Vs.

State of Rajasthan

S.B. Criminal Appeal No. 490 of 1987
(Farooq Hassan, J.)

19.02.1988

JUDGMENT

F. Hassan, J.

1. Had Chhaganlal PW8 SHO, PS Khendela no authority to conduct impugned search in the absence of a specific notification under section 42 of the Narcotic Drugs & Psychotropic Substances Act, 1985 which was only issued and came into effect after the impugned search, if so, was trial against, the appellant vitiated and could the conviction and sentence not sustain; is a twin question which calls for an answer in this appeal arising, out of the judgment dated 27-11-1987 passed by the Additional Sessions Judge, Neem-ka-Thana, in the offences which have the nefarious effect playing havoc with the health and well-being of a large segment of the society; So, in the preface of this judgment I must make it abundantly clear that I do not look upon with equanimity on offences under the Narcotic, Drugs & Psychotropic Substances Act, 1985.

2. Factual narration has little relevance to the issues raised and canvassed at the hearing. The chronology of events herein narrated would bring to surface the contentions raised in this appeal.

3. Chhaganlal PW8 was posted as the Station House Officer, Police Khandela District Sikar Station, (Raj) on August 1, 1986. On that very date he, himself, had lodged a report at the same police station with the averments, inter-alia that on August 1, 1986 at about 5 P.M. he was informed by one Mukhbir' that in village Salwadi, Umrav (appellant) herein was having Opium in his possession, and occupation. On this

information Chaganlal along with Sikhpalsingh ASI, Om Prakash Ratanlal Surjitsingh, Uttamsingh and Prabhu Dayal proceeded from Khandela to the said Umrav's house, and reached Umrav's house at about 6 A.M. in village Salwadi from where Umrav tried to run away but he was caught. On interrogation, Umrav answered and desired to discharge excrement, which created a doubt in the mind of Chhaganlal and he directed Sepoy Prabhudayal to make a search on the person of Umrav, on which Prabhudayal found a pack in the fold of his 'Dhoti' and upon opening of the said pack the opium weighing 1800 grams was found which was seized. The appellant, Umrav was asked about license but he failed to show it. Two samples were taken out from opium seized, and after observing the necessary formalities, the samples were sealed. The recovery memo was prepared and the appellant was arrested.

4. On the aforesaid report, case No. 46/86 for the offences under Sections 17, 18 & 61 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (for short, the Drugs Act') was registered. (Ex. P. 1), Arrest memo (Ex. P. 2) and recovery memo of opium were prepared. The samples were sent to the Forensic Science Laboratory for chemical examination, a report of which was received in a positive form. After usual investigation a Challan was filed against the appellant, Umrav. The learned Additional Sessions Judge, Neem ka Thana after recording evidence of the parties, and hearing them, found the appellant only guilty of offence under section 17 of the Drugs Act and sentenced him to undergo ten years' R.1. with a fine of Rupees One lac, in default of payment of fine, to further undergo one year's simple imprisonment, though the appellant had denied the charges leveled against him for the offences under sections 17 and 18 of the Durga Act. Hence this appeal.

5. The principal and foremost contention wrangled by the learned counsel Shri N.L. Tibrewal, appearing on behalf of the appellant, is that neither Chhagan Lal who has investigated the case nor Prabbudayal (PW 2), a police constable has any authority to make any search on the person of the appellant, in as much as Chhagan Lal, under section 42 of the Durga Act, was not authorized to investigate the case. Thus, according to Sri Tibrewal the whole trial is vitiated and the conviction against the appellant does not sustain and as such the appellant is entitled to have the acquittal in his favor.

6. Where as, on the contrary, Sri Ajai Purohit, learned Public Prosecutor, strenuously contended that under section 42 of the Drugs Act, a Police Officer of the rank of the

Sub-Inspector has power to enter, search, seize and arrest without warrant or authorization.

7. For a proper appreciation of the points in controversy, it is necessary to deal With the statutory provisions in issue. First I may refer to the provisions of section 42 of the Drugs Act which run as under :-

"42. Power of entry, search, seizure and arrest without warrant or authorization.

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(1) Any such officer (being an officer superior in rank to a peon, Sepoy or constable) of the departments of the 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 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 substances, 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 & 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 sunset and sunrise after recording 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."

8. For entry, search, seizure and arrest without warrant or authorization, the Officer of the departments of Central Excise, Narcotics Customs, Revenue Intelligence or any other department of the Central Government or the Border Security Force is to have to be empowered by the Central Government by a general or special order, under section 42 of the Drugs Act. So is the provision in the case of Officer of the State Government. However, these Officers should be superior in rank to a peon sepoy or constable either of the Central or the State Government. Thus, section 42 of the Drugs Act makes it patently clear that the Officers must be empowered by the Central or the State Government as the case may be who could make entry, search, seizure or arrest without warrant or authorization if any offence is apprehended or is committed under the Drugs Act and that was the reason that Rajasthan State Government issued a notification on October 16, 1986 to the following effect :

"S.O. 115. In exercise of the powers conferred by section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985) the State Government hereby authorizes all Inspectors of Police and Sub-Inspectors of Police, posted as Station House Officer, 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 the 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."

9. The Central Government in the above context, had already issued notification dated 14.11.1985 earlier which runs as under:

"S.O. 822E-In exercise of power conferred by Sub-Section (1) of section 12 &

section 67 of the Act, the Central Government hereby empowers the officers of and above the rank of Sub-Inspector in the department of Narcotics and of and above the rank of Inspector in the departments of Central Excise. Customs, Revenue, Intelligence and Central Economic Intelligence Bureau to exercise the powers and perform the duties specified in section 42 within the area of their respective jurisdiction and also authorizes said officers to exercise the powers conferred upon them under section 67".

10. A careful look at the afore quoted both the notifications manifests explicit that without any such notification having issued, none of the Officers as envisaged in section 42 of the Drugs Act, can exercise powers of entry, search, seizure and arrest without warrant or authorization. Further, the afore-quoted notification manifests that according to the provisions of the Act the powers of investigation particularly detention, search, arrest and seizure were given as per sections 42 and 43 of the Drugs Act I the Officers of the rank of Sub. Inspectors and above. the rank of Sub-Inspectors; and the departments named were Central Excise Customs. Revenue Intelligence and Central Economic Bureau. Thus, at the time of commission of offence in the case in hand, the notification dated November 14. 1985 was in force and according to it. the only afore named officers were conferred upon the powers of entry, seizure and arrest without warrant or authorization, whereas the Officers of the State Government were not at all authorized to exercise powers under section 42 of the Drugs Act and it was only after issuance of the notification dated October 16, 1986 that the State Government authorized all the Inspectors of Police and Sub-Inspectors of Police as SHO to exercise the powers envisaged in section 42 of the Act The result was that even the Sub-Inspectors of Police or any other Inspector of Police or otherwise, prior to 16-10-1986 could not have exercised the powers as envisaged in section 42 of the Drugs Act.

11. There is one very important consideration, which I must bear in mind while dealing with controversy in the case and it is necessary to advert to it at this very stage And for that, I reproduce here under notification dated 15th January, 1986 :

"S.O. 173-In exercise of powers conferred by section 43 of the Act, the State Government hereby authorizes all Excise Officers (not below the rank of Inspector) to exercise the power mentioned in section 42 of the said Act with immediate effect. Provided. that when power is exercised by an Excise Officer other than Excise Inspector of the Circle concerned. such officer shall immediately hand over the person arrested and article seized to the Excise

Inspector of the Circle concerned. Notification No. F. 1(3) FD/Ex/85 dated 24.11.1986-RG. Ex. Pt. IV-C(II), dated 26 1-1985 page 355."

Under the afore quoted notification for the first time the State Government authorised all Excise officers not below the rank of Inspectors to exercise the powers under section 42 of the Drugs Act. Hence it is precisely patent and not latent that police officers up to the rank of Inspector had no jurisdiction on the date of commission of the offence and occurrence, that is on August 1, 1986 to make entry, search, seizure and arrest without warrant of authorization under Section 42 of the Drugs Act, and the powers came for the first time on October 16, 1986 by virtue of the afore-quoted notification S.O. 115. Here, let me examine and discuss a few authorities cited by the Solicitor, and which have been taken note of by my learned brother. V. S. Dave, J. in *Nandlal v. State of Rajasthan*¹

12. In *Heeralal v. State of U.P.*² a tin of oil was seized from the railway goods shed by the Sub-Inspector of Police and a question was raised whether any goods under the Prevention of Food Adulteration Act procedure prescribed by the Criminal Procedure Code would apply; and the Allahabad High Court held as under :-

"Under the Act only the Food Inspectors are authorised to investigate into the offences. There being a specific law which confers jurisdiction only upon the Food Inspector to investigate, police officers can have no jurisdiction to investigate under the Act".

13. In *Delhi Administration v. Ram Singh*³, the Apex Court while dealing with a case under the Suppression of Immoral Traffic Act where a point was raised as to whether a police officer is neither a Special Police Officer under the Suppression of Immoral Traffic in Women and Girls Act, 1956 nor a police officer Subordinate to a Special Police Officer, can validly investigate the offence; held by a majority judgment that the Special Police Officer is competent to investigate and that he and his Assistant Police Officers were only the persons competent to investigate the offence under the Act and the police officers not specially appointed as police officers cannot investigate the offences under the Act, even though they are cognizable offence. Viewed in the light of the aforementioned summing up it can be said with confidence and held that for launching prosecution or for initiating the proceedings the authority doing so must have a clear and unambiguous power. Under section 42 of the Drugs Act, the

legislature has clearly empowered the persons named there in or who are authorized to do so by notification. The legislature intend that a peon, sepoy or constable should in no case be conferred upon power of entry, search, seizure and arrest without warrant or authorization. In the Act, it also did not empower even the police officers unless there was a notification in that behalf, and that was the reason that the notification quoted above, were issued by the State Government in order to confer the powers under section 42 of the Drugs Act upon the police officers as specified there in, and such a sort of reservations in the wisdom of legislature was necessary because, after coming into force of the Drugs Act, a case where the person is accused of a crime under the Drugs Act, where the legislature provides a sentence of ten years with a fine of rupees one lac, it is essential that the intent or the legislature must be carried out in a letter and spirit. The accused has a right to expect a fair investigation and trial keeping in view the legal concept that justice should not only be done but it should appear to have been done.

14. A similar view was taken by this Court (per V.S. Dave, J.) in *Nand Lal v. State of Rajasthan* (supra), and it was found that the police officers who conducted search and made investigation, were not empowered under section 42 of the Drugs Act and as such. the trial had vitiated; and in this view of the matter the accused was acquitted

15. Applying the proposition of law extracted above, I am of the opinion that in the instant case, where the search was made by a police constable without jurisdiction and investigation was also made by an Officer who was not empowered to do so under section 42 of the Drugs Act by a special order of the State Government on the day when the offence is said to have been committed by the appellant, Umrav, because admittedly Chhagan Lal (PW 8) SHO had no jurisdiction express or implied even vested in him on August 1, 1986 the day of occurrence and the powers were only conferred upon such officers like Chhagan Lal, after the notification dated October 16, 1986 came into effect; and as such, very foundation of the case is without authority of law. And the conviction against the appellant under section 17 of the Drugs Act cannot sustain warranting acquittal of the accused. In view of the peculiar circumstances, other points raised need not be gone into as the aforesaid point in alone is sufficient to dispose of this case.

16. In conclusion, I allow this appeal, set aside the judgment dated 27-11-1987 passed by the Additional Sessions Judge, Neem-ka-Thana. The appellant, Umrav, is acquitted

of the charges. He is in jail and shall be released forthwith, if not required in any other case.

Cases Referred.

1. 1987 Cr. L.R. Raj. 698
2. 1977(1) F.A.C. 120
3. AIR 1965 SC 63