Najmunisha Etc vs The State Of Gujarat on 9 April, 2024

Author: Aniruddha Bose

Bench: Aniruddha Bose

2024 INSC 290

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS. 2319-2320 OF 2009

1. SMT. NAJMUNISHA ….SOLE APPELLANT IN CRIMINAL APPEAL NO.2319/2009

2. ABDUL HAMID CHANDMIYA
ALIAS LADOO BAPU ...SOLE APPELLANT IN CRIMINAL APPEAL NO.2320/2009

VERSUS

1. THE STATE OF GUJARAT

2.NARCOTICS CONTROL BUREAU ... RESPONDENTS

JUDGMENT

AUGUSTINE GEORGE MASIH, J.

1. The instant criminal appeals arise out of SLP (Criminal) No(s). 7419□7420 of 2009 assailing the 17:48:02 IST Reason:

> Common Impugned Judgment dated 16.03.2009 of the Division Bench of Gujarat High Court in Criminal Appeal Nos. 1702 of 2004 and 2097 of 2004 moved by the Original Accused No. 01 (Smt. Najmunisha – Appellant in Criminal Appeal No. 1702 of 2004 before the High Court) and Original Accused No. 04 (Abdul Hamid Chandmiya alias Ladoo Bapu – Appellant in Criminal Appeal No. 2097 of 2004 before the High Court).

2. Smt. Najmunisha (hereinafter referred to as “Accused No. 01”) was originally convicted under Sections 29 read with 20(b)(ii)(c) and 25 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “NDPS Act 1985”). The Trial Court had sentenced her to ten years of rigorous imprisonment and fine of INR 30,000/-(Rupees Thirty Thousand only) for the charge under Section 29 read with Section 20(b)(ii)(c) of the NDPS Act 1985 and in default, she had to undergo one year of simple imprisonment. No separate sentence was imposed under Section 25 of the NDPS Act 1985. This sentence was subsequently modified by the High Court of Gujarat while partly allowing her appeal to the effect that her fine was enhanced to the minimum prescribed fine of INR 1,00,000/-(Rupees One Lakh only) and reduced the sentence in default of paying the fine from simple imprisonment of one year to simple imprisonment of three months.

2A. Abdul Hamid Chandmiya alias Ladoo Bapu (hereinafter referred to as “Accused No. 04”) is the husband of Accused No. 01 who was originally convicted under Section 29 read with 20(b)(ii)(c) of the NDPS Act 1985 and sentenced to thirteen years of rigorous imprisonment and fine of INR 1,00,000/-(Rupees One Lakh only). The same was affirmed by the High Court of Gujarat while also dismissing his appeal.

3. Accused No. 05 (Nazir Ahmed alias Nazir Bazara) was convicted under Section 20(b)(ii)(a) of the NDPS Act 1985 and was sentenced to six months of rigorous imprisonment along with fine of INR 5,000/-(Rupees Five Thousand only) which he completed during the trial and therefore did not prefer any appeal before the High Court of Gujarat.

4. The facts leading to the present set of appeals are that on 10.12.1999 at about 06:30 PM, the PW-02 Mrs Krishna Chaube (Intelligence Officer/Inspector) (hereinafter referred to as “Mrs Chaube”) had received a secret information that the Accused No. 04 would be carrying narcotic substances in an auto rickshaw bearing registration number GJ-9T-2355 at about 07:00 AM on 11.12.1999 and shall be passing through one Shahpur Darwaja. The said secret information was recorded by her and reported to her superior officer (PW-03), namely Mr Pawan Singh Tomar – who was the Zonal Officer (hereinafter referred to as “Mr Tomar”).

5. Thereby, on 11.12.1999, it is submitted by the prosecution that on directions of Mr Tomar, they assembled at about 06:30 AM near the raiding point and arranged for the panchas and waited for the Accused No. 04 at different points showed up in the said vehicle as per the information, they attempted to stop the auto rickshaw, instead it sped away at a high speed. Therefore, the members of the raiding party arranged for and chased the said auto rickshaw which was eventually, after covering a certain distance, found abandoned near a road and the Accused No. 04 was said to have escaped. On conducting the search of the said auto rickshaw, the raiding party found a driving license of one Shri Abdulgafar Gulamali Shaikh alias Rajubhai in addition to charas to the tune of 1.450 Kilograms.

6. As Accused No. 04 had run away, the raiding party eventually was led to the house of Accused No. 04 wherein the Accused No. 01 was already present. Thereinafter, the son of Accused No. 01 and Accused No. 04 – namely Abdul Rajak (hereinafter referred to as “Accused No. 02”) – came inquiring. Eventually the raiding party conducted a search of the said house wherein in the open

kitchen there was a cement bag which had yellow coloured wires beneath which they are said to have found one bundle wrapped in newspaper which was fastened with a linen thread inside which a transparent plastic bag contained 2.098 Kilograms of substance of which turned out to be charas. Thereafter, the necessary formalities were completed and Accused No. 01 and Accused No. 02 were arrested. Eventually, the panchnama was also recorded with two independent witnesses.

7. The statements of Accused No. 01 and Accused No. 02 were recorded under Section 67 of the NDPS Act 1985 wherein it was stated that Accused No. 01 aids the business of drug trafficking as conducted by Accused No. 04 – who was absconding. Eventually, Accused No. 04 is also said to have been arrested on 26.06.2000 and per his statement under Section 67 of the NDPS Act 1985 he had confessed to be transporting and selling the contraband which he sold regularly to Accused No. 05.

8. Eventually, the charges were framed and a total of five prosecution witnesses were examined with PW□01 being one of the panch witnesses, PW□02 to PW□04 being members of the raiding party, and PW□05 being the FSL expert. Per contra, the defence had examined a total of seven witnesses in their favour.

was concluded by the Additional Sessions Judge in Sessions Case No. 143 of 2000 and Sessions Case No. 295 of 2000 vide judgment dated and Accused No. 03 were acquitted, Accused were convicted as aforementioned.

9A. Since both the Accused No. 01 and Accused No. 04 had moved in respective appeals before the High Court of Gujarat their conviction stood affirmed, while the fine imposed on Accused No. 01 was enhanced as aforementioned and the default sentence was reduced. As stated above, Accused No. 05 did not prefer any appeal.

10. The High Court of Gujarat had observed that the statements of the appellants herein under Section 67 of the NDPS Act 1985 were prima facie voluntary and without inducement, threat refers to dealing of narcotic substances by Accused No. 04 for a long period of time in which she aided as well. Therefore, there exists a presumption in favour of the prosecution under Section 114 of the Indian Evidence Act, 1872 (hereinafter referred to as “IEA 1872”). None of the accused had either retracted the said statements or they had moved any complaints alleging perversity. The defence, despite leading evidence, could not establish their version that the officers had come inquiring about house of Accused No. 04 and eventually arrested Accused No. 01 and Accused No. 02 as against all legalities. Furthermore, there was consistency in the statements of prosecution witnesses and that no specific unreliability was established in the panchnama by the defence. As to the necessary compliance laid down in the provisions of the NDPS Act 1985, the procedure established under Section 52A of the NDPS Act 1985 was not to be considered and that there was no requirement of any authorization under Section 41 of the NDPS Act 1985. Since Mr Tomar, being a Gazetted Officer, had accompanied the raiding party pursuant to the information communicated by Mrs Chaube on 10.12.1999, defence has also not raised any contention as to breach of Section 36 or Section 53 of the NDPS Act 1985.

11. The High Court of Gujarat had also observed in paragraph number 36 of its judgment that there is compliance of Section 57 of the NDPS Act 1985 as established from the reports (Ex. 87 and Ex. 112) submitted to the Zonal Officer. Furthermore, it rejected the defence that the prosecution failed to prove documentary evidence as the defence did not raise any objection to the exhibiting of said documents, including arrest reports recorded in compliance of Section 57 of the NDPS Act, arrest memo of Accused No. 04 and Accused No. 01 and intimation given to the next kin of the accused persons.

12. The High Court of Gujarat was of the opinion that except two minor inconsistencies, namely, apropos who called the panchas and the recording of statement of Accused No. 02, there was no reason to question the veracity of the depositions of the members of the raiding party. Those minor fallacies in the statements of the prosecution witnesses do not go to the root of the matter. Thereafter, while acquitting Accused No. 02, the High Court believed that there was no evidence implicating him to the criminality involved. In the same breath, the Court observed that such finding of acquittal does not throw prosecution's case as against other accused persons, inter alia, Accused No. 01 and Accused No. 04, which is established beyond any reasonable doubts.

13. With respect to the objection that no independent witnesses were examined to prove and Accused No. 04, the High Court of Gujarat placed reliance on the depositions of Defence Witness (brother of Accused No. 04), who testified that the said accommodation was occupied by the accused persons to entertain their guests. The fact of possession of the house by Accused No. 01 and Accused No. 04 is bolstered by their own confessional statements and corroborated by the testimony of an independent witness PW□01. Thereupon, perusing the statements of Mrs Chaube and PW□05, the High Court held that there was no infirmity regarding the receipt of muddamal with seals intact on the goods being sent to the Forensic Science Laboratory for examination.

14. Delving into the question of compliance of Section 42(2) of the NDPS Act 1985, the High Court was inclined to accept the argument of the prosecution that the statement of Mrs Chaube with respect to recording of secret information and conveying it to her superior officer stood established by consistent testimonies of Mrs Chaube and Mr Tomar and clarified that the testimony of the former cannot be thrown on the premise that there was variation on the point that who called the panch witness. Considering the aforementioned, theHigh Court of Gujarat affirmed the case of conviction of the Accused No. 01 and Accused No. 04.

15. The learned Counsel for the appellants herein contends that the statement of the appellants/accused in the instant case recorded under the provision of Section 67 of the NDPS Act 1985 was not admissible and ought not to have been the basis of conviction of the Accused No. 01 and Accused No. 04. It has been brought to our attention that the High Court has critically scrutinized the said statements of Accused No. 01 to Accused No. 04 and has observed that the same being voluntary in nature and having been corroborated by other evidence can form the basis of their conviction. For this purpose, reliance has been placed on the decision in Tofan Singh v. State of Tamil Nadu (2021) 4 SCC 1 whereby it has been categorically held that a statement recorded under Section 67 of the NDPS Act 1985 is inadmissible in evidence. The majority opinion herein had held that power of recording of statement under Section 67 of the NDPS Act is limited in nature and

conferred upon subject to the safeguards as set out in Sections 41 to 44 of the NDPS Act 1985 for the purpose of entry, search, seizure and arrest without warrants and for conducting of only an enquiry and not in the course of investigation. It is for the initiation of an investigation or enquiry under the NDPS Act 1985 and it does not meet the threshold of a confessional statement.

16. It is submitted that the secret information received by Mrs Chaube was only related to the auto rickshaw wherein the Accused No. 04 was to be carrying the contraband – which was eventually seized. However, there existed no secret information apropos the house wherein the subsequent search/raid was conducted by the raiding party. The latter was totally out of the scope of the information received and recorded and thereby the search therein was absolutely illegal and in violation of the provisions of Section 42 of the NDPS Act 1985. The learned Counsel has further drawn our attention to the fallacies and inconsistencies in the panchnama recorded by the raiding party in addition to the depositions of the prosecution witnesses.

17. The learned Counsel further relies on Darshan Singh v. State of Haryana (2016) 14 SCC 358 which deals with scope of Sections 41(1) and (2) of the NDPS Act 1985 and the need of their independent compliance against each other. This Court herein went on to hold that mere registration of FIR at the instance of the SHO and its subsequent communication to the Superintendent of Police would not amount to sufficient compliance with Section 42(2) of the NDPS Act 1985. For this purpose, reference is made to paragraph number 13 of the said judgment at Page 364 as follows:

> "13. Having given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the respondent, we are of the view that the mandate contained in Section 42(1) of the NDPS Act, requiring the recording in writing, the details pertaining to the receipt of secret information, as also, the communication of the same to the superior officer are separate and distinct from the procedure stipulated under the provisions of the Criminal Procedure Code. Sub□section (1) of Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of Second Class specially empowered by the State Government may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Sub□section (2) of Section 41 refers to issuance of authorisation for similar purposes by the officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc. Sub□section (1) of Section 42 of the NDPS Act lays down that the empowered officer if he has a prior information given by any person, 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 warrant between sunrise and sunset and he may do so without recording his reasons of belie. The two separate procedures noticed above are exclusive of one another. Compliance with one, would not infer compliance with the other. In the circumstances contemplated under Section 42 of the NDPS Act the mandate of the procedure contemplated therein will have to be

> followed separately, in the manner interpreted by this Court in Karnail Singh case [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887] and the same will not be assumed, merely because the Station House Officer concerned had registered a first information report, which was also dispatched to the Superintendent of Police, in compliance with the provisions of the Criminal Procedure Code."
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> 18. The aforesaid reference places its reliance on a judgment of the Constitution Bench of this Court, i.e., Karnail Singh v. State of Haryana (2009) 8 SCC 539 which is also relied upon by the learned Counsel for the appellants.

It is a well celebrated judgment on the statutory requirement of writing down and conveying information to the superior officer prior to entry, search and seizure as per Section 42(1) and (2) of the NDPS Act 1985, requiring a literal or substantial compliance. The learned Counsel has brought our attention to paragraph number 35 of the judgment at page 554 which dealt with effect of the decisions in Abdul Rashid Ibrahim Mansuri v. State of Gujarat (2000) 2 SCC 513 and that in Sajan Abraham v. State of Kerala (2001) 6 SCC 692. By virtue of this, it was observed that while a total non□compliance of Section 42 of the NDPS Act 1985 would be impermissible, a delayed compliance with satisfactory explanation about the said delay could be an acceptable compliance of statutory requirements under Sections 42(1) and (2). For a better clarity of the judgment, paragraph number 35 is reproduced as follows:

> "35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 :
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> 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:
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> (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).
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> (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."

19. Per contra, the learned Counsel for the Respondent No. 02 herein contents that there is no infirmity in the concurrent findings of the Trial Court and the High Court. There has been well recorded compliance of the statutory requirements and the evidences have been sufficiently appraised by the Courts below.

Moreover, there has been no material contradiction in the testimonies of the prosecution witnesses and the same aspires confidence. It is a settled law that the concurrent findings of the facts must not ordinarily be interfered with unless there exists a prima facie perversity or absurdity in light of the observation in paragraph number 26 in the decision delivered in Balak Ram v. State of Uttar Pradesh (1975) 3 SCC 219.

20. It is further submitted by the learned Counsel for the Respondent No. 02 that there has been substantial compliance of the statutory requirements under Section 42 of the NDPS Act 1985 as Mrs Chaube recorded the secret information in writing and conveyed the same to her superior officer namely, Mr Tomar prior to and Accused No. 01. It is contended that the search undertaken at the residence of Accused No. 04 whereby Accused No. 01 was also present, was in continuation of the action taken on the basis of the said secret information. For this, the learned Counsel has brought to our attention the testimonies of Mrs Chaube (PW-

02) and Mr Tomar (PW□03). Alternatively, even assuming that the said latter part of the and Accused No. 04 was not in continuation of the action taken towards Accused No. 04 as per the secret information, there has still been appropriate compliance of Section 42 of the NDPS Act 1985 for the reason that the same was based on the personal knowledge of Mr Tomar, who is a Gazetted Officer. It is further contended that the provision of Section 42(2) of the NDPS Act is to be read disjunctively and henceforth there is no requirement to take down the information in writing where it emanates from the personal knowledge of the superior officer. To further this argument, the learned Counsel has distinguished the facts of the present case from the ratio in decisions in State of Punjab v. Balbir Singh (1994) 3 SCC 299 and Karnail Singh (supra) as they refer only to the process to be followed upon receipt of information from any person and not to "personal knowledge" of the officer.

21. Furthermore, it is submitted that there has been a substantial compliance of Section 42(1) of the NDPS Act 1985 as during the action being taken against the Accused No. 04 and his absconding therefrom, an emergent situation arose which necessitated the search in his house – which was nearby to the place where auto rickshaw was abandoned. There was a grave possibility that if the Accused No. 04 was at his house then he might run away and/or if there was any further amount of contraband at his residence, he would have appropriated that as well. Thence, the raiding party had their hands tied down to necessarily carry out the said search at the house of Accused No. 04 in light of the ratio in Karnail Singh (supra) not necessitating literal compliance rather substantial compliance contingent on the facts of each case.

22. The learned Counsel for the Respondent No. 02 further contends that the scope of Section 50 of the NDPS Act 1985 is limited to the search on the person of an individual and does not include adherence to the search made on any premise(s). Reliance is placed on State of Himachal Pradesh v. Pawan Kumar (2005) 4 SCC 350 wherein it was held that presence of a Gazetted Officer is required only at the time of the search which is on the person and is not applicable during search of premises. To bolster this argument, it is submitted that the said interpretation fits into the reading of Section 42 of the NDPS Act 1985 as Section 42(1)(a) of the NDPS Act 1985 comprehends search of a building or conveyance or place while Section 42(1)(d) of the NDPS Act 1985 contemplates for search of a person.

23. Apropos, the presumption pertaining to the recovery of contraband, the learned Counsel for the Respondent No. 02, submits that once the recovery of the contraband has been made from the possession of an individual, there arises a rebuttable presumption as per Section 54 of the NDPS Act 1985 that the said individual has committed an offence under the NDPS Act 1985. To further build this contention, the learned Counsel has brought our attention to the decision in Madan Lal v. State of Himachal Pradesh (2003) 7 SCC 465 whereby at paragraph numbers 22 to 26 of the judgment, it was has been laid down that the aforesaid possession of contraband includes constructive possession and it need not be only an actual possession of the contraband. On the basis of these above recorded submissions, he prays for dismissal of the instant appeals.

24. Before we delve into the factual analysis based on the legal principles and jurisprudence existing in each contention, it is pertinent to refer to the heart and soul of the Constitution of India, 1950 (hereinafter referred to as "Constitution of India") – Article 21 – necessitates a just and fair trial to

be a humane and fundamental right and actions of the prosecution as well as the authorities concerned within the meaning of the NDPS Act 1985 must be towards ensuring of upholding of the rights of the accused in order to allow to have a fair trial. The harmonious balance between the Latin maxims salus populi suprema lex (the safety of the people is the supreme law) and salus republicae suprema lex (safety of the State is the supreme law) is not only crucial and pertinent but lies at the core of the doctrine that welfare of an individual must yield to that of the community subject to the State being right, just, and fair as was iterated in the decision of Miranda v. Arizona (1966) 384 US 436.

25. The NDPS Act 1985 being a special law with the purpose to curtail the drug menace in the republic necessitated the comprehensive control in favour of the authorities. The same is well reflected in the decisions of this Court across the last couple of decades. Accordingly, the key provisions to be contemplated for the purpose of appraising the present factual matrix are Sections 41, 42, and 67 of the NDPS Act 1985. The same are thereby analysed herein after.

26. Having heard the learned Counsels for both the parties, we deem it appropriate to refer to the jurisprudence of Section 6 of the IEA 1872. It is to be observed that it deals with relevancy of facts forming part of same transaction and therefore, it is crucial to refer the bare provision which reads as follows:

> "6. Relevancy of facts forming part of same transaction.––Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places."

27. This court has laid down the test for "acts forming part of same transaction" in Gentela Vijyvardhan Rao and Anr. v. State of Andhra Pradesh (1996) 6 SCC 241, wherein it has been held that it is based on spontaneity and immediacy of such statement or fact in relation to the fact in issue. Provided that if there was an interval which ought to have been sufficient for purpose of fabrication then the said statement having been recorded, with however slight delay there may be, is not part of res gestae. The same was adopted by a 3□Judges' Bench in the decision of Dhal Singh Dewangan v. State of Chhattisgarh (2016) SCC OnLine SC 983.

28. In the present factual matrix, having perused the material it appears that the attempt towards raiding/searching the residence of Accused No. 04 was not explicitly in pursuance of detaining the said accused but the testimonies of the members of the raiding party showcase the idea of search of the house to be an afterthought with an admitted time gap of 40□45 minutes between having raided the auto rickshaw which was alleged to be abandoned by the driver and Accused No. 04 and subsequent search of the house of Accused No. 04, wherein Accused No. 01 was present. Moreover, it appears from the record that even the idea to search the house was for the purpose of recovery of more contraband and not to apprehend the said absconded accused at the first instance. Thence, it can be safely concluded that the search conducted at the residence of the Accused No. 04 is not a continuance of action of the raiding party towards the search of the auto rickshaw based on the secret information received by Mrs Chaube. Accordingly, it does not appropriately fulfill the

requirements of the test laid down in Gentela Vijyvardhan Rao (supra).

29. Having reached the conclusion that the searches of the abandoned auto rickshaw, and at the house wherein Accused No. 01 was present, to be different transactions, the subsequent consideration is apropos necessary statutory safeguards enlisted in the NDPS Act 1985. Henceforth, we shall further delve into the legal analysis of relevant provisions of the NDPS Act 1985.

30. The next issue that falls for our consideration is with respect to the compliance of Section 42 of the NDPS Act 1985. For the said purposes, an analysis of the bare text of Section 42 of the NDPS Act 1985 is undertaken hereinafter. Section 42 of the NDPS Act 1985 is worded as follows:

> "42. Power of entry, search, seizure and arrest without warrant or authorisation.—
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> (l) 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 personal 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,—
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> (a) enter into and search any such building, conveyance or place;
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> (b) in case of resistance, break open any door and remove any obstacle to such entry;
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> (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 in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:
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> Provided further 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.
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> (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."

31. From the perusal of provision of Section 42(1) of the NDPS Act 1985, it is evident that the provision obligates an officer empowered by virtue of Section 41(2) of the NDPS Act 1985 to record the information received from any person regarding an alleged offence under Chapter IV of the NDPS Act 1985 or record the grounds of his belief as per the Proviso to Section 42(1) of the NDPS Act 1985 in case an empowered officer proceeds on his personal knowledge. While the same is to be conveyed to the immediate official superior prior to the said search or raid, in case of any inability to do so, the Section 42(2) of the NDPS Act provides that a copy of the same shall be sent to the concerned immediate official superior along with grounds of his belief as per the proviso hereto. This relaxation contemplated by virtue of Section 42(2) of the NDPS Act 1985 was brought about through the Amendment Act of 2001 to the NDPS Act of 1985 wherein prior to this position, the Section 42(2) mandated the copy of the said writing to be sent to the immediate official superior "forthwith".

32. The decision in Karnail Singh (supra) has been extensively referred by the learned Counsel for the Appellants and at the cost of repetition, it is observed that absolute non-compliance of the statutory requirements under the Section 42(1) and (2) of the NDPS Act 1985 is verboten. However, any delay in the said compliance may be allowed considering the same is supported by well-reasoned explanations for such delay. This position adopted by the instant 5-Judges' Bench of this Court is derived from the ratio in the decision in Balbir Singh (supra) which is a decision by a 3-Judges' Bench of this Court.

33. Another 3-Judges' Bench while dealing with compliance of Section 42 of the NDPS Act 1985 in Chhunna alias Mehtab v. State of Madhya Pradesh (2002) 9 SCC 363 dealt with criminal trial wherein there was an explicit non-compliance of the statutory requirements under the NDPS Act 1985. It was held that the trial of the Petitioner-Appellant therein stood vitiated.

For a better reference, the judgment is quoted below as:

> "1. The case of the prosecution was that at 3.00 a.m. a police party saw opium being prepared inside a room and they entered the premises and apprehended the accused who was stated to be making opium and mixing it with chocolate.
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> 2. It is not in dispute that the entry in search of the premises in question took place between sunset and sunrise at 3.00 a.m. This being the position, the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act was applicable and it is admitted that before the entry for effecting search of the building neither any search warrant or authorisation was obtained nor were the grounds for possible plea that if opportunity for obtaining search warrant or authorisation is accorded the evidence will escape indicated. In other words, there has been a non□compliance with the provisions of the proviso to Section 42 and therefore, the trial stood vitiated.
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> 3. The appeals are, accordingly, allowed."

34. In Dharamveer Parsad v. State of Bihar (2020) 12 SCC 492, there was non□examination of the independent witness without any explanation provided by the prosecution and even the panchnama or the seizure memo were not prepared on the spot but after having had reached police station only. Since the vehicle was apprehended and contraband was seized in non□compliance of the Section 42 of the NDPS Act 1985 – conviction and sentence of the appellant therein was set aside. Apart from the said reasons there were various suspicious circumstances that inspired the confidence of the Court to set aside the conviction affirmed by the High Court therein. Paragraph numbers 05 and 06 are reiterated below for reference:

> "5. In the present case PW 1, who is the investigating officer, in his deposition has stated that the information i.e. the contraband was being carried from the Indo□Nepal border identified in a vehicle, details of which had also been provided, had been received in the evening of 2□7□2007. PW 1 has further stated that on receipt of this information, he had formed a team and had moved to Raxaul from Patna, which place they had reached by 2.00 a.m. in the morning of 3□7□2007. The vehicle in question had been apprehended and the contraband seized at about 6.00 a.m. of 3□7□2007. No explanation has been offered why the statement had not been recorded at any anterior point of time and the same was so done after the seizure was made.
>
> 6. Even if we were to assume that the anxiety of the investigating officer was to reach Raxaul which is on the international border and therefore, he did not have the time to record said information as per requirement of Section 42 of the Act, the matter does not rest there. There are other suspicious circumstances affecting the credibility of the prosecution case. Though, the investigating officer has stated that he had moved to Raxaul along with a team and two independent witnesses, the said independent witnesses were not examined. No explanation is forthcoming on this count also. That apart from the materials on record it appears that no memos including the seizure memo were prepared at the spot and all the papers were prepared on reaching the police station at Patna on 4□7□2007."

35. The case presented by the prosecution appears to be primarily standing on the fact that initially, Accused No. 04 – who was identified by Mr Tomar to be sitting inside the auto rickshaw which was part of the secret information – had absconded, leaving behind the contraband which was eventually seized by members of the raiding party. It is furthermore admitted that a Driving License was also recovered from the said auto rickshaw. However, it has never been their case that neither the owner of the auto rickshaw was attempted to be identified nor the person whose driving license was found therein was searched for by the authorities for the purpose of the instant case. It is never explained by Mr Tomar how he was able to identify the face of the Accused No. 04 sitting on the passenger seat inside the auto rickshaw while it was being driven at high speed. It is also not their case that any previous photographic identification for the Accused No. 04 was provided as part of the said information or as to how did he know the face of the Accused No. 04.

36. Even further, it is an admitted fact by the PW-01 – the alleged independent witness of the recovery – that the panchnama was not prepared at the time of actual recovery from the auto rickshaw. Same is affirmed by the testimonies of the members of the raiding party, namely, PW-02 to PW-04. It is furthermore intriguing to note that the panchnama which is timed "0930" was prepared and the PW-01 states as part of his cross-examination that he left for his office taking an auto rickshaw after the incident. However, the testimony of Mrs Chaube reveals that the PW-01 and the other panch were present in the NCB Office after the incident and even deposes to the effect that they, being present in the said office, ended up inscribing their signatures on the statements taken by them.

37. It does not transpire from the material on record as to exactly how the Accused No. 04 came into the fiasco here except for the claim by Mr Tomar of having identified him as the auto rickshaw per the secret information fled the scene. It creates a doubt in the mind of the Court apropos the case presented by the prosecution.

38. Adopting the words of V. Ramasubramanian, J., while speaking for the Bench in Ramabora alias Ramaboraiah & Anr. v. State of Karnataka (2022) SCC OnLine SC 996 referred to the mythological Swan, Hamsa and drew an analogy with the following observations made in the decision in Arvind Kumar alias Nemichand & Ors. v. State of Rajasthan (2021) SCC OnLine SC 1099:

> 49. The principle that when a witness deposes falsehood, the evidence in its entirety has to be eschewed may not have strict application to the criminal jurisprudence in our country. The principle governing sifting the chaff from the grain has to be applied. However, when the evidence is inseparable and such an attempt would either be impossible or would make the evidence unacceptable, the natural consequence would be one of avoidance. The said principle has not assumed the status of law but continues only as a rule of caution. One has to see the nature of discrepancy in a given case. When the discrepancies are very material shaking the very credibility of the witness leading to a conclusion in the mind of the court that is neither possible to separate it nor to rely upon, it is for the said court to either accept or reject.

39. It becomes difficult to accept the case presented against the Accused No. 04 by the prosecution and it is not acceptable to state that the same has been proved beyond a reasonable doubt. The inconsistencies in the testimonies and lack of observation of due process of law by the investigating agency has severely impacted the case of the prosecution.

40. The subsequent and alternate contention put forth by the learned Counsel for the Respondent No. 02 pertains to the non-requirement of the compliance of Section 41 of the NDPS Act 1985. To appreciate the said contention, jurisprudential aspect ought to be dealt with. Section 41 of the NDPS Act 1985 deals with the power to issue warrant and authorization to both a Magistrate and an Officer of Gazetted rank as applicable and the same is reproduced below as follows:

> "41. Power to issue warrant and authorisation.— (1) 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 any person whom he has reason to believe to have committed any offence punishable under this Act, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe 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:
>
> (2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the para-military forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer 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 in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence 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 place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub□section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub□ section (2) shall have all the powers of an officer acting under section

42."

41. In the instant case, we are primarily affected by virtue of the jurisprudence of Section 41(2) of the NDPS Act 1985, which begins from the power of search and seizure conferred by the State upon its executive or administrative arms for the protection of social security in any civilized nation. Such power is inherently limited by the recognition of fundamental rights by the Constitution as well as statutory limitations. At the same time, it is not legitimate to assume that Article 20(3) of the Constitution of India would be affected by the provisions of search and seizure. It is a settled law that the statutory provisions conferring authorities with the power to search and seize are a mere temporary interference with the right of the accused as they stand well regulated by reasonable restrictions emanating from the statutory provisions itself. Thence, such a power cannot be considered as a violation of any fundamental rights of the person concerned. The same is iterated in MP Sharma v. Satish Chandra Sharma, District Magistrate, Delhi 1954 SCR 1077.

42. In light of the aforementioned constitutional backdrop, provisions of general search warrants and seizure were incorporated for the first time in Code of Criminal Procedure, 1882, thereupon, in Sections 96, 97, 98, 102, 103, 105, 165 and 550 of the Code of Criminal Procedure, 1898 and presently, in the Code of Criminal Procedure, 1973 under Sections 93, 94, 100, 102, 103 and 165. Upon perusal of Section 41(1) of the NDPS Act 1985, it is evident that the said provision empowers a Magistrate to issue search warrant for the arrest of any person or for search, whom he has reason to believe to have committed any offence under the provisions of the NDPS Act 1985. Section 41(2) of the NDPS Act 1985 further enables a Gazetted Officer, so empowered in this regard by the Central Government or the State Government, to arrest or conduct a search or authorize an officer subordinate to him to do so, provided that such subordinate officer is superior to the rank of a peon, sepoy or constable. It is pertinent to note that the empowered Gazetted Officer must have reason to believe that an offence has been committed under Chapter IV of the NDPS Act 1985, which necessitated the arrest or search. As per Section 41(2) of the NDPS Act 1985, such reason to believe must arise from either personal knowledge of the said Gazetted Officer or information given by any person to him. Additionally, such knowledge or information is required to be reduced into writing by virtue of expression "and taken in writing" used therein.

43. The learned Counsel of the Respondent No. 02 presents an alternate argument that the expressions "personal knowledge" and "and taken in writing" contemplated by Section 41(2) of the NDPS Act 1985 ought to be read disjunctively, thereby eliminating the requirement of taking down information in writing when it arises out of the personal knowledge of the Gazetted Officer. We are not inclined to accept this interpretation. The position for recording the reasons for conducting search and seizure are well established through the ratio in paragraph number 25 (2C) in Balbir Singh case (supra) as mentioned below:

"(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."

44. Applying the aforesaid legal position to the present factual matrix, we do not find force in the submission that the raiding party proceeded to conduct search at the house on personal knowledge of the Gazetted Officer, Mr Tomar. Foremost, the fact that the secret information received by Mrs Chaube was limited to anticipation of Accused No. 04 carrying contraband from a particular route in an auto rickshaw, remains unchallenged. Accordingly, there was no prior information to the raiding party, including Mr Tomar (Gazetted Officer) that there is contraband in the house of Accused No. 04, thereby necessitating search for the same. Additionally, it is deposed by the PW□01 that he was asked to accompany the raiding party to the house of Accused No. 04, which was located nearby for the purpose of carrying out a search thereof and admits of having no knowledge about any written information with the raiding party for conducting raid at the said house. Further, Mrs Chaube in her examination in chief stated that upon the directions of Mr Tomar that the house of Accused No. 04 was nearby, they proceeded to conduct raid thereof. Per contra, in her cross□examination, she admits that the raiding for the purpose of search of the contraband pursuant to the discussions carried by them and not particularly on the personal knowledge of Mr Tomar.

45. She further goes on to admit that it was obligatory for her to obtain a written authorization from her superior officer – which was Mr Tomar in this case. She omitted seeking the said authorization on the premise that there was an emergent need to conduct search at the house. Such major inconsistency as to the 'source' of information of existence of weakens the case of the prosecution. Furthermore, the testimony of Mr Tomar has some glaring irregularities apropos his personal knowledge of having contraband at the house of Accused No. 04. Mr Tomar, on one hand in his testimony admits that the officers of raiding party together decided to conduct raid at the house of Accused No. 04 post recovery from the auto rickshaw, however, on the other hand admits of having knowledge of the residential address of Accused No. 04 from the secret information. However, Mr Tomar nowhere in his depositions stated that he proceeded to conduct raid at the house on his personal knowledge.

46. From the aforementioned, we are of the view that the raid/search conducted at the house of the Accused No. 01 and Accused No. 04 was not based on the personal knowledge of Mr Tomar, rather it was an action on the part of raiding party bereft of mandatory statutory compliance of Section 41(2) of the NDPS Act 1985.

47. Furthermore, even if the learned Counsel for the Respondent No. 02 would justify the raid at the house on account of "reason to believe from .... information given by any person and taken down in writing" as per Section 41(2) of the NDPS Act 1985, still the prosecution is not able to establish its case beyond reasonable doubts. Because the secret information, as received by Mrs Chaube in the present facts was limited to the apprehension that Accused No. 04 was to carry contraband via an auto rickshaw from a particular route. There is no reference to the apprehension of existence of contraband in the house of the Accused No. 04 in the said recorded information. Thence, the raid at the house of the Accused No. 01 and Accused No. 04 is in violation of the statutory mandate of Section 41(2) of the NDPS Act 1985 and the ratio in the precedent of Balbir Singh (supra) and Karnail Singh (supra). Consequently, the conviction of Accused No. 01 premised on the recovery of 2.098 kilograms of charas from the house is not in consonance with the mandatory statutory compliance of Section 41(2) of the NDPS Act 1985.

48. While the facts and evidences are appreciated in the instant case, the testimonies of the PW□01 and the members of the raiding party do not present such a compliance of the information of rights to the Accused No. 01 herein. While a claim is made to this effect, nothing has come up from the perusal of the panchnama or the deposition of the PW□01 to this effect. Accordingly, the authorities have further failed to protect the inherent rights granted to the Accused No. 01 by virtue of the statutory safeguards.

49. Thereinafter, a significant reliance was placed by the High Court on the statements of the accused wherein a categorical admission was substantiated by them, especially Accused No. 67 of the NDPS Act 1985 reads:

> "67. Power to call for information, etc.— Any officer referred to in section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act,—
>
> (a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;
>
> (b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;
>
> (c) examine any person acquainted with the facts and circumstances of the case."
>
> 50. The evidentiary value of confessional statements recorded under Section 67 of the NDPS Act 1985 was dealt with by this Court in the case of Tofan Singh (supra). As per the majority verdict delivered by 3□Judges' Bench in this case has held that the powers conferred on the empowered officers under Section 41 and 42 of the NDPS Act 1985 read with Section 67 of the NDPS Act 1985 are limited in nature conferred for the purpose of entry, search, seizure and arrest without warrant along with

> safeguards enlisted thereof. The "enquiry" undertaken under the aforesaid provisions may lead to initiation of an investigation or enquiry by the officers empowered to do so either under Section 53 of the NDPS Act 1985 or otherwise.

Thus, the officers empowered only under the aforesaid provisions neither having power to investigate nor to file a police report meet the test of police officer for the purpose of Section 25 of the IEA 1872. Consequently, the bar under Section 25 of the IEA 1872 is not applicable against the admissibility of confessional statement made to the officers empowered under Section 41 and 42 of the NDPS Act 1985.

51. Furthermore, it was also held by this Court that Section 67 is at an antecedent stage to the investigation, which occurs after the empowered officer under Section 42 of the NDPS Act 1985 has the reason to believe upon information gathered in an enquiry made in that behalf that an offence under NDPS Act 1985 has been committed and is thus not even in the nature of a confessional statement. Hence, question of its being admissible in trial as a confessional statement against the accused does not arise.

52. The same, therefore, cannot be considered to convict an accused person under the NDPS Act 1985. A reference at this stage may be made to the majority view in the 3❑Judges' Bench decision wherein it was held as follows in paragraph number 158:

> "158. We answer the reference by stating:
>
> 158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.
>
> 158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.

53. By virtue of the decision in Tofan Singh (supra), the benefit is to be granted to the appellants herein in regard to the inadmissibility of their statements under Section 67 of the NDPS Act 1985.

54. In the light of the above, these appeals are allowed by setting aside the impugned judgment of the High Court as well as that of the Trial Court. The appellants are acquitted of the charges framed against them by giving benefit of doubt.

55. Pending applications, if any, stand disposed of.

.....J. (ANIRUDDHA BOSE) .....J. (AUGUSTINE GEORGE MASIH) APRIL 09, 2024;

NEW DELHI