CASE NO.:
Appeal (crl.) 486 of 2003

PETITIONER:
M. PRABHULAL

RESPONDENT:
ASSISTANT DIRECTOR, DIRECTORATE OF REVENUE INTELLIGENCE

DATE OF JUDGMENT: 19/09/2003

BENCH:
Y.K. SABHARWAL & B.N. AGRAWAL

JUDGMENT:
JUDGMENT

2003 Supp(3) SCR 958

The Judgment of the Court was delivered by

Y.K. SABHARWAL, J.: The Special Judge, Salem under narcotics Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act'), ried 11 accused for various offences. Six were convicted. Two of the convicted accused succeeded in the criminal appeal and the remaining four whose conviction and sentence has been maintained by the High Court by the impugned judgment are appellants before us. They are original accused Nos. 1, 2, 3 and 6. The trial judge convicted accused Nos. 1, 2 and 3 for offences under Section 8(c), 29 read with Section 18 and Section 8(1), 29 read with section 21 of the NDPS Act and awarded on each appellant the sentence of 10 years' rigorous imprisonment and also fine amount of Rs.

1 lakh and in default of payment fine for each offence, they were directed to undergo further rigorous imprisonment for two years. The substantive sentences were, however, directed to run concurrently. Accused Nos. 6 was also found guilty for offence under Sections 8(c), 29 read with Section 21 of the NDPS Act and sentenced to undergo 10 years' rigorous imprisonment and fine of Rs. 1 lakhs and in default of payment of fine, to undergo further rigorous imprisonment for two years.

In brief, the case of the prosecution is that on 15th May, 1993, a truck and car were apprehended. Accused No. 6 was in truck and accused Nos.

2 and 3 were in car. From them heroin weighing 66.1 kg. was seized. Accused No. 1, the main kingpin, is the brother of accused No. 2. Both were resident of Trichirappali. Accused No. 1 has been receiving narcotics from Mandasore, Madhya Pradesh, a place to which he belonged. Another brother of accused No. 1 named Durga Shankar was staying in the village Khonti in Mandasore District, Madhya Pradesh along with his parents. The father of accused Nos. 1 and 2 used to cultivate opium and their brother Durga Shankar used to get opium and heroin and send the same to Trichy. The consignment in question was to be received and sold with the help of accused No. 3 for ultimate export to Sri Lanka through accused No. 6, Mohd. Sabeer. The High Court in appeal having confirmed the conviction and sentence of accused Nos. 1,2,3 and 6, they are in appeal on grant of leave.

The conviction of the appellants is based primarily on their statements recorded under Section 67 of the NDPS Act as also on the recovery except from accused No. 1/appellant No. 1.

Assailing, therefore, the statements made by each of the appellant under Section 67, It was vehemently contended by Mr. R.K. Jain, Senior Advocate that the statements on basis whereof the appellants have been found guilty are not voluntary and thus their conviction cannot be sustained. The statements of the appellants have been recorded by officers of Department

of Revenue Intelligence who are not police officers within the meaning of Section 25 of the Evidence Act, 1872. The confessional statements recorded by such officers are admissible in evidence. Learned counsel though not questioning the admissibility of the said statements contends that the same were obtained by torture and harassment and are involuntary and, therefore, the conviction of the appellants cannot be sustained. The delay in recording of the statements of the appellants is put forth as one of the reasons to support the contention that the statements were involuntary. Learned counsel submits that after apprehending truck and the car on the road at about noon time on 15th May, 1993, the seizure of the narcotics had taken place between 6 to 9 p.m. at the Customs House and the statements of accused Nos. 2, 3 and 6 were recorded on the next day i.e. 16th May, 1993 and the statement of accused No. 1 was recorded on 17th May, 1993. It may be noted that accused Nos. 2, 3 and 6 were apprehended on the spot on 15th May, 1993 whereas accused No. 1 was arrested on 16th May, 1993. The courts below on appreciation of evidence have neither doubted the recovery nor has found the statements to be involuntary.

It has been established that the Customs Office was about 20 kms. from the place were the truck and the car were apprehended. Having regard to the large quantity of the heroin, the said vehicles with accused Nos. 2, 3 and 6 were brought to the Customs Office. Further accused Nos 1 and 2 did not know Tamil. A Hindi knowing officer had to be arranged. There was under the circumstances no delay in recording the statements of the appellants. Further, it is also to be borne in mind that the appellants did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the trial judge under Section 313 of Code of Criminal Procedure that a vague stand about the torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made the basis of appellants' conviction.

Next, learned counsel contends that the independent witnesses of the recovery of the contraband having not been examined and only police witnesses having been examined, the recovery becomes doubtful. Reliance is placed upon the decision in Pradeep Narayan Madgaonkar and Ors. v. State of Maharashtra, [1995] 4 SCC 255. In the decision relied upon while observing that prudence dictates that evidence of police witnesses need to be subjected to strict scrutiny, it was also observed that their evidence cannot be discarded merely on the ground that they belong to police force and are either interested in the investigating or prosecuting agency, but as far as possible, corroboration of their evidence in material particularly should be sought. In that case the observations were made in the light of the fact that the police officials made an attempt to create an impression on the court that the two witnesses were witnesses of locality and were independent, knowing fully well that one of the witnesses was under the influence of the police and available to police as he had been joining the raids earlier also and other witness was a close associate of the said already available witness. The friendship between the two witnesses developed during the days of gambling when the police having admittedly conducted a raid at their den. It was observed that the very fact that the police officer joined the said two witnesses creates a doubt about the fairness of investigation coupled with the manner in which the statements had been recorded in that case. The observations relied upon have no applicability to the facts and circumstances of the present case particularly having regard to the confessional statements of the appellants which we have held were voluntary. On the facts of the case, recovery cannot be doubted for want of non-examination of independent witnesses.

The search and seizure was also faulted for the reason of the same having taken place not on spot but in the customs office. The reason why it had taken place in the customs office has been noticed earlier. In this regard, reference may also be made to Khet Singh v. Union of India, [2002] 4 SCC 380, a case under NDPS Act where decision of the Constitution Bench in

Pooran Mal v. Director of Inspection (investigation), New Delhi & Ors., [1974] 1 SCC 345 was noticed for the proposition that courts in India and England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. The Court declined in that case to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. Further, in the said case though the mahazar was not prepared at the spot but at the office of the Customs Department, it was found that the accused were very much present throughout and there was no allegation or suggestion that the contraband article was, in any way, meddled with by the officers. The position in the present case is also same. Here too, no allegation about meddling with the contraband has been made, in our view, on the facts of the case, there is no illegality in the seizure of the contraband either on account of non-examination of the independent witnesses or by effecting the seizure at the office of the Customs Department, the appellants having failed to establish that any prejudice was caused to them.

Now, we come to the last and rather more serious objections raised on behalf of the appellants regarding the non-compliance of Section 42 of the NDPS Act vitiating the conviction which looks quite formidable but only at the first impression and not on its deeper examination. The contention of Mr. R.K. Jain is that the view of the High Court that when a Gazetted Officer himself conducts a search it is not necessary to comply with Section 42(2) of the Act, is clearly erroneous. Section 42(2) provides that 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. This was the statutory provision at the relevant time. By the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 which came into force on 2nd October, 2001, Section 42(2) was amended whereunder the information taken down in writing under sub-section (1) or grounds of belief recorded under proviso thereto are required to be sent within seventy-two hours to officers' immediate official superior. The contention is that the officer who searched and seized the contraband did so on information received by him as per Ex. Pw-1 but the said information was not forwarded to his superior officer as contemplated in Section 42(2) of the NDPS Act, thus vitiating the entire prosecution. Further argues the counsel that the respondent after grant of bail to the appellants by the High Court taking into consideration the non-compliance of Section 42(2) has tried to fill in the lacuna with a view to show the compliance of this mandatory provision,

The officer who conducted the arrest, search and seizure was an empowered Gazetted Officer of the department. This fact is not in dispute. According to Mr. Vasudev, learned senior counsel for the respondent, Section 42(2) is not applicable when an empowered Gazetted Officer conducts the arrest search and seizure. Counsel submits that there was no obligation on the officer to comply with the requirement of Section 42(2) of the NDPS Act. It was also contended, in the alternative, that Section 42(2) of the NDPS Act was complied with.

The High Court in the judgment impugned was held that, on facts found, Section 41 of the NDPS Act alone was applicable and Section 42(2) was not attracted and, therefore, the judgments rendered under Section 42(2) of the NDPS Act relied upon by the appellants have no relevance.

The gist of intelligence reduced into writing and on basis whereof the officer started to act reads as under :

"One Prabhulal of Anna Nagar, Trichy, his brother Shivanarain of Trichy, Mohammed Shabir of Madhya Pradesh and Loganathan of Dindigul are engaged in dealing in narcotic drugs. Intelligence gathered indicates that Shivanarain and Loganathan are likely to proceed to Salem and stay in National Hotel, Salem and are likely to receive huge quantity of Heroin from Mahammed Shabir of Madhya Pradesh on 15.5.1993 who is accompanying the said consignment in a lorry from North India. Shivanarain and Loganathan are

likely to travel in a car bearing Registration No. TNB 9346 to meet the lorry earring the contraband Heroin at the outskirts of Salem, if this car is followed from national Hotel, Salem we may be able to seize the contraband."

A xerox copy of the gist of intelligence was furnished to the appellants during the proceeding under the preventive detention law through the Superintendent, Central Prison, Salem on 22.6.1993. A learned Single Judge of the High Court considering this writing to be a definite information about the definite commission of the offence under the NDPS Act with reference to car number, persons, lorry expected to arrive at that place and holding that Section 42 of the NDPS Act was squarelly applicable and that it being a mandatory provision not having been complied with,;the petitioners were entitled to be released on bail. The view expressed in the order, deciding bail application was of course prima facie. In the background, the further contentiion of Mr. Jain is that if Section 42(2) had been complied with, it would have been so pleaded by the respondent before the High Court when bail application came to be considered and the respondent would also have filed the requisite docu-ment along with challan to show compliance of Section 42(2) of the NDPS Act. The learned counsel submits that the document in purported compliance of Section 42(2) was filed by the respondent only after the decision of the bail application with a view to fill up the lacuna as a result of the observations made by the High Court in the order granting bail.

To consider the contention about the applicability of Section 42(2) where arrest, search and seizure is made by an empowered Gazetted Officer, it is necessary to analyse Sections 41 and 42 of the NDPS Act which read as under :

"41. Power to issue warrant and authorisation -(1) a Metropoli-tan Magistate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Govern-ment 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 Chapter IV, 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 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.

(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 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 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 Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, convey-ance 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 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 officers acting under Section 42.

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 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 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 beileve 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 substances; 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 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 forthwith send a copy thereof to his immediate official superior."

Section 41(1) which empowers a Magistrate to issue warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under the NDPS Act or for search, has not much relavence for the purpose of considering the contention. Under Section 41 (2) only a Gazetted Officer can be empowered by the Central Government or the State Government. Such empowered officer can either himself make an arrest or conduct a search or authorize an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a Peon, a Sepoy or a Constable. Sub-section (3) of Section 41 vests all the powers of an officer acting under Section 42 on three types of officers (i) to whom a warrant under sub-section (1) is addressed, (ii) the officer who authorized the arrest or search under sub-section (2) of Section 41, and (iii) the officer who is so authorized under sub-section (2) of Section 41. Therefore, an empowered Gazetted Officer has also all the powers of Section 42 including power of seizure. Section 42 provides for proceedure and power of entry, search seizure and arrest withuot warrant or authorization. An empowered officer has the power of entry into and search of any building, conveyance or place, break open door, remove obstruction, seize contraband, detain, search and arrest any person between sunrise and sunset in terms provided in sub-section (1) of Section 42. In case of emergent situation, these powers can also be exercised even between sunset and sunrise without obtaining a search warrant or authorization, in terms provided in the proviso to sub-section (1) of Section 42. Sub-section 2 of Section 42 is a

mandatory provision. In terms of this provision a copy of information taken down in writing under sub-section (1) or ground recorded for the belief under proviso thereto, is required to be sent by the officer to his immediate official superior. It is clear from Section 41(2) that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorize his subordinate on the terms stated in the Section. Under sub-section (1) of Section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer. But on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of Section 42. It is clear from the language of sub-section (2) of Section 42 that it applies to officer contemplated by sub-section (1) thereof and to a Gazetted Officer contemplated by sub-section (2) of Section 41, when such Gazetted Officer himself makes an arrest or conducts search and seizure. It would be useful to also notice Section 43 which relates to power of seizure and arrest in public place. Any officer of any of the departments mentioned in Section 42 is empowered to seize contraband etc. and detain and search a person in any public place or in transit on existence of ingredient stated in Section 43. It can, thus, be seen that Sections 42 and 43 do not require an officer to be a Gazetted Officer whereas Section 41(2) requires an officer to be so. A Gazetted Officer has been differently dealt with and more trust has been reposed on him can also be seen from Section 50 of he NDPS Act which gives a right to a person about to be searched to ask for being searched in presence of a Gazetted Officer. The High Court is, thus, right in coming to the conclusion that since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decisions in State of Punjab v. Balbir Singh, [1994] 3 SCC 299, Abdul Rashid Ibrahim Mansuri v. State of Gujarat, [2000] 2 SCC 513 and Beckodan Abdul Rahiman v. State of Kerala, [2002] 4 SCC 229, on the aspects under consideration are neither relevant nor applicable.

In view of our conclusion that Section 42(2) is not applicable when search seizure etc. is conducted by a Gazetted Officer under Section 41(2) and (3), the further contention of Mr. Jain that an attempt was made by the respondent to fill up lacuna to show compliance of Section 42(2) of the NDPS Act as a result of observations made in the order granting bail to the appellants as noticed hereinbefore becomes inconsequential and, therefore, it is not necessary to examine it.

For the foregoing reasons, the impugned judgment of the High Court cannot be faulted. Thus, sustaining the conviction and sentence of the appellants, the appeals are dismissed.