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UNION OF INDIA

v.

SATROHAN

(Criminal Appeal No. 1145 of 2001)

JULY 14, 2008

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[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

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*Narcotics Drugs and Psychotropic Substances Act, 1985 – ss. 41, 42, 50, 57 and 67 – Recovery of 309 kgs of poppy straws from house of accused – Conviction and sentence of 10 years RI – However, acquittal by High Court for non-compliance of ss. 42(2) and 50 and father of accused had licence for opium – On appeal, held: Opium and poppy straws are two different entries and are not interchangeable – Plea that the articles seized might have been covered by father's licence is without any basis – In the confessional statement the accused clearly stated about the ownership – There has been no retraction at any point of time – ss. 42(2) and 50 not applicable to the instant case – Thus, order of High Court set aside.*

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**The Inspector of Narcotics Department along with other officials conducted raid in the house of the respondent on the basis of secret information and recovered bags containing 309 kgs. of poppy straws. The respondent could not explain legal possession of poppy straws and was arrested. Trial Court convicted the respondent u/ss. 8(c) and 15 of the Narcotics Drugs and Psychotropic Substances Act, 1985 and sentenced to him to 10 years rigorous imprisonment. However, High Court acquitted the respondent as there was non-compliance of ss. 42(2) and 50, and that the respondent's father had licence for cultivation of opium. Hence the present appeal.**

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**Appellant-Union of India contended that the trial court had relied upon the confession of the accused respondent; that the High Court acquitted the respondents on**

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the ground of non-examination of independent witnesses, lack of evidence to show exclusive ownership, and the alleged non-compliance of ss. 42(2) and 50 of the Act; that s. 50 is not applicable to the case; that u/s. 57 secret information and the particulars of seizure and arrest have to be sent; that the records if asked for could have been produced; that no evidence was led nor any question was asked about absence of records; and that the Inspector was a Gazetted Officer and, thus, even if it is conceded that there is any incorrect reference, the acts are covered u/s 41 and not u/s. 42 of the Act.

Respondent-accused contended that the confessional statement could not have been relied upon; that the statement was recorded by PW-2 and by the investigating officer-PW-6 on 20.11.1992 whereas PW-6 was entrusted with investigation only on 3.12.1992; that the investigating officer was not a Gazetted Officer, since authorization was obtained s. 57 comes into play; and that the respondent's father had licence.

Allowing the appeal, the Court

HELD: 1. The High Court was clearly in error by setting aside the judgment of the trial court. The judgment of the High Court is set aside and that of the trial court is restored. [Para 17] [899-E]

2.1 Section 2(xv) and Section 2(xviii) of the Narcotics Drugs and Psychotropic Substances Act, 1985 defines "opium" and "poppy straws" respectively. It is the stand of the respondent that since there was licence of opium, there is presumption that there was licence of poppy straws. High Court did not direct acquittal on the ground that there was licence for poppy straws also. The evidence on record clearly shows that the expressions "opium" and "poppy straws" are not interchangeable as s. 2(xiv) clearly makes out a distinction between opium and poppy straws. Opium appears at entry Sl. No.92 while

A poppy straws at Sl. No.110. [Paras 6 and 7] [892-F,G,G, 893-A]

2.2 With regard to the role of PW-6, it is to be noted that there is no reference to the stand highlighted by the High Court. The confessional statement was recorded on 20.11.1992 and the statement u/s. 313 of the Code was recorded on 6.2.1999. In the confessional statement the accused has clearly stated about the ownership. Thus, there has been no retraction at any point of time. The position is also clear from s. 57 of the Code. At the time of production before the Magistrate, there was no allegation of any torture as presently submitted. [Paras 6 and 7] [893-A,B,C,D]

*Kanhaiyalal v. Union of India* 2008 (1) SCALE 165; *A.K. Mehaboob v. The Intelligence Officer, Narcotics Control Bueau* JT 2001 (1) SC 614; *T. Thomson v. State of Kerala and Anr.* 2002 (9) SCC 618; *State, NCT of Delhi v. Malvinder Singh* JT 2007 (9) SC 283 – referred to.

2.3 The conclusion that the articles seized might have been covered by the father's licence is a conclusion without any foundation and basis. [Para 10] [894-G, 895-A]

2.4 Section 41(2) deals with two situations. One is relatable to Gazetted Officer while in the other case the Gazetted Officer may authorize his subordinate to do the relevant act or may do it himself. Section 41(3) refers to the power under Section 42 which refers to subordinates. [Para 15] [899-C,D]

*M. Prabhulal v. The Assistant Director, Directorate of Revenue Intelligence* JT 2003 (2) Supp SC 459 – referred to.

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1145 of 2001

From the final Judgment/Order dated 12.7.2000 of the High Court of Judicature at Allahabad sitting at Lucknow in Criminal Appeal No. 593 of 1999

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B.B. Singh, Madhurima Tatia, Anil Katiyar and Sushma Suri  
for the Appellant. A

Ashok Kumar Sharma, H.C. Kharbanda, T.N. Saxena,  
Sanjay Misra and M.P. Shorawala for the Respondent.

The Judgment of the Court was delivered by B

**Dr. ARIJIT PASAYAT, J.** 1. Challenge in this appeal is to  
the judgment of the acquittal passed by learned Single Judge  
of the Allahabad High Court, Lucknow Bench, directing acquit-  
tal of the respondent (hereinafter referred to as the 'accused')  
by setting aside the judgment of conviction recorded by learned C  
Additional District and Sessions Judge, Lucknow in Criminal  
Appeal No.65 of 1993. The trial Court had convicted the re-  
spondent for offences punishable under Section 8(c) and 15 of  
the Narcotics Drugs and Psychotropic Substances Act, 1985  
(in short the 'Act') and sentenced to undergo RI for 10 years D  
and fine of rupees one lakh with default stipulation.

2. Prosecution version in a nutshell is as follows:

On the basis of secret information Sri Naseem Ahmad, an  
Inspector of Narcotics Department along with other officials E  
raided the house of the respondent on 20.11.1992 at about 8.00  
a.m. in village Dadari Jamalpur. The house of the respondent  
was searched and from his house 29 bags containing poppy  
straws were recovered. The respondent could not explain legal  
possession of poppy straws weighing 309 kgs. The respon- F  
dent was arrested and after investigation charge sheet was  
submitted against him. The respondent denied the possession  
and ownership of the property in question and claimed trial.

The trial Court found the evidence adduced to be clear  
and cogent and directed conviction and imposed sentence as G  
afore-noted. In appeal, the High Court directed acquittal by a  
practically non-reasoned order holding that there was non-com-  
pliance of Sections 42(2) and 50 of the Act. It was noted that  
the Narcotics Department has given licence to the father of the  
respondent for cultivation of opium and if there had been recov- H

A ery of poppy straws it might be relatable to the ownership of father of the respondent.

B 3. Learned counsel for the appellant submitted that the trial Court had relied upon the confession of the accused respondent and the grounds on which the High Court directed acquittal are (i) non examination of independent witnesses; (ii) lack of evidence to show exclusive ownership; and (iii) the alleged non compliance of Sections 42(2) and 50 of the Act.

C 4. It is pointed out that Section 50 is not applicable to the case. Additionally, under Section 57 secret information has to be sent and the particulars of seizure and arrest have to be sent. The records if asked for could have been produced. In the instant case there is no evidence led or not even any question was asked about absence of records. In the alternative, the inspector was a Gazetted Officer and, therefore, even if it is conceded for the sake of argument that there is any incorrect reference, the acts are covered under Section 41 and not under Section 42.

D 5. Learned counsel for the respondent on the other hand submitted that the confessional statement could not have been relied upon. The statement was recorded by PW-2 and by the investigating officer (PW-6) on 20.11.1992. There could not have been any recording of statement by PW-6 as he was entrusted with investigation on 3.12.1992. It is pointed out that the investigating officer was not a Gazetted Officer. Since authorization was obtained Section 57 comes into play. It is pointed out that there is licence of the father also. Therefore, the High Court's order does not suffer from any infirmity.

E 6. Section 2(xv) and Section 2(xviii) define "opium" and "poppy straws" respectively. It is the stand of the respondent that since there was licence of opium, obviously there is presumption that there was licence of poppy straws. As a matter of fact the High Court did not direct acquittal on the ground that there was licence for poppy straws also. The evidence on record clearly shows that the expressions "opium" and "poppy straws"

are not interchangeable as contended by learned counsel for the respondent, as Section 2(xiv) clearly makes out a distinction between opium and poppy straws. So far as the role of PW-6 is concerned, it is to be noted that there is no reference to the stand presently highlighted by the High Court.

7. Undisputedly, there are two different entries for opium and poppy straws. Opium appears at Sl. No.92 while poppy straws appear at Sl. No.110. The statement of the accused-respondent in terms of Section 67 throws considerable light on the controversy. In the statement recorded there was no retraction and in fact during examination under section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code') while answering question No.4 it was stated that there was no confession. The confessional statement was recorded on 20.11.1992 and the statement under Section 313 of the Code was recorded on 6.2.1999. Therefore, there has been no retraction at any point of time. The position is also clear from Section 57 of the Code. At the time of production before the Magistrate, there was no allegation of any torture as presently submitted. In this connection a few decisions of this Court need to be noted.

8. In *Kanhaiyalal v. Union of India* (2008 (1) SCALE 165) at para 7 it was noted as follows:

"7. Since the appellant Kanhaiyalal was convicted on the basis of the statement made by him under Section 67 of the NDPS Act, a question has been raised whether such statement made to an officer within the meaning of Section 42 of the said Act could be treated as a confessional statement and whether the accused could be convicted on the basis thereof in the absence of any other corroborative evidence."

9. Similarly in *A.K. Mehaboob v. The Intelligence Officer, Narcotics Control Bueau* (JT 2001 (1) SC 614) it was observed as follows:

A "4. Smt. Malini Poduval, learned counsel for the appellants  
contended that Exhibit P-8 cannot be relied on for more  
than one reason. One is that the said statement had been  
retracted by the accused himself. Second is that on  
B 11.8.1994 appellant- Naushad informed the Magistrate in  
writing that the said statement had been coaxed out from  
him. The third is that the said retracted confession had no  
corroboration and therefore cannot be made the basis for  
conviction.

C 5. There is nothing to indicate that Exhibit P-8 had been  
elicited from A-2 by any coercion, threat or force and  
therefore the learned Single Judge of the High Court had  
spurned down that contention. Regarding the complaint  
alleged to have been made by appellant-Naushad on  
D 11.3.1994 we have perused it. His case therein was that  
he offered himself to be a witness in the case and some  
reward was offered for it. It was on the said offers that he  
agreed to sign the said statement. It must be remembered  
that appellant-Naushad has no case that when he was  
produced before the Magistrate, immediately after his  
E arrest, he made any grievance of any maltreatment  
administered to him by the members of the Narcotics  
Control Bureau. Wisdom downed on him (when the  
complaint dated 11.3.1994 was filed) to put up an advance  
F defence against the statement given by him under his own  
signature. Even then he did not think it necessary to make  
any allegation that any intimidatory tactic, much less any  
third degree method had been applied on him. His case  
in the said complaint that a reward was offered to him and  
hence he agreed to sign the statement is contrary to the  
G present stand adopted by him that he was coerced and  
threatened to made such a statement. The learned Single  
judge had rightly repelled the contentions made on behalf  
of appellant- Naushad relating to Exhibit P-8."

H 10. The inferential conclusion that the articles seized might  
have been recovered by the father's licence is a conclusion

without any foundation and basis.

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11. So far as the fulfillment of the requirement of Section 57 of the Act is concerned it is to be noted that the legal position was stated by this Court in *T. Thomson v. State of Kerala and Anr.* (2002 (9) SCC 618) and in *State, NCT of Delhi v. Malvinder Singh* (JT 2007 (9) SC 283). In *Malvinder Singh's* case (supra) at para 6, it was observed as follows:

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“6. At this juncture, it would be relevant to take note of that has been stated by this Court in *T. Thomson v. State of Kerala and Anr.* At para 5 it was observed as follows:

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“5. Learned Senior counsel further argued that the record alleged to have been prepared by PW-1 on getting information regarding the movement of the appellants has not been produced in court. But he conceded that no motion was made on behalf of the appellants to call for the said record. There is no statutory requirement that such a record should be produced in the Court as a matter of course. We are, therefore, not disposed to upset the finding on that score either.”

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12. So far as the applicability of Section 42 is concerned few decisions need to be noted.

13. In *M. Prabhulal v. The Assistant Director, Directorate of Revenue Intelligence* (JT 2003 (2) Supp SC 459) it was noted as follows:

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“8. Now, we come to the last and rather more serious objections raised on behalf of the appellants regarding the non-compliance with Section 42 of the NDPS Act vitiating the conviction which looks quite formidable but only on 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

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A 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  
B time. By the Narcotic Drugs and Psychotropic Substances  
(Amendment) Act, 2001 which came into force on 2-10-  
2001, Section 42(2) was amended whereunder the  
information taken down in writing under sub-section (1) or  
C grounds of belief recorded under the 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 Ext. PW 1 but the said  
information was not forwarded to his superior officer as  
D 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 with Section 42(2) has tried to fill in the lacuna  
with a view to show the compliance of this mandatory  
E provision.

9. 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 Vasdev, learned  
F Senior Counsel for the respondent, Section 42(2) is not  
applicable when an empowered Gazetted Officer conducts  
the arrest, search and seizure. The 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  
G contended, in the alternative, that Section 42(2) of the  
NDPS Act was complied with.

14. 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  
H the NDPS Act or for search, has not much relevance 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 the power of seizure. Section 42 provides for procedure and power of entry, search, seizure and arrest without warrant or authorization. An empowered officer has the power of entry into and search of any building, conveyance or place, break open any 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 an 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 the proviso thereto, is required to be sent by the officer to his immediate superior official. 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

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A 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  
B in sub-section (2) of Section 42. It is clear from the language  
of sub-section (2) of Section 42 that it applies to an officer  
contemplated by sub-section (1) thereof and not to a  
Gazetted Officer contemplated by sub-section (2) of  
C Section 41, when such a 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 a public place. Any officer of any of the  
D 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  
E whereas Section 41(2) requires an officer to be so. A  
Gazetted Officer has been differently dealt with and more  
trust has been reposed in him can also be seen from  
Section 50 of the NDPS Act which gives a right to a person  
about to be searched to ask for being searched in the  
F 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*, *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*  
and *Beckodan Abdul Rahiman v. State of Kerala* on the  
aspects under consideration are neither relevant nor  
applicable.”

G 14. Section 67 reads as follows:

“67. *Power to call for information, etc.*

Any officer referred to in Section 42 who is authorised in  
H 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."

15. Section 41(2) deals with two situations. One is relating to Gazetted Officer while in the other case the Gazetted Officer may authorize his subordinate to do the relevant act or may do it himself. Section 41(3) refers to the power under Section 42 which refers to subordinates.

16. In the confessional statement the accused has clearly stated about the ownership. So, there has been no retraction at considerable length of time.

17. Above being the position, the High Court was clearly in error by setting aside the judgment of the trial Court. We set aside the judgment of the High Court and restore that of the trial Court. The appeal is allowed to the aforesaid extent.

N.J.

Appeal allowed.