RAJENDER SINGH

v.

STATE OF HARYANA

(Criminal Appeal No. 1051 of 2009)

AUGUST 08, 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

Narcotic Drugs and Psychotropic Substance Act: s.42 – Non-compliance of – Held: s.42 pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the Section itself – s..42(2) is categorical that the information if taken down in writing shall be sent to the superior officer forthwith – Non-compliance with the provisions sub-section (1) and (2) of s.42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced – In the instant case, appellant was convicted u/s.18 on the basis of statement of PW-5, DSP and PW-6, Inspector and recovery of opium from the residence of the appellant – PW-6 clearly admitted that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities – Likewise, PW-5 did not state that he received any written information from his junior officer Inspector – Dispatch of a wireless message to PW-6 does not amount to compliance with s.42(2) of the Act – There was, therefore, complete non-compliance with the provisions of s.42(2) of the Act which vitiated the conviction of the appellant.

The prosecution case was that on 30.1.1997, PW-6, inspector of the CIA staff sent a Ruqa to Police station that while he was present at the bus adda of the village

A in connection with the investigation of a case, he had received secret information that the appellant was an opium addict and was also dealing in its sale and that he had kept some opium in the shed used for storing fodder in his farm house. On the basis of said Ruqa, a formal FIR B was drawn up for the offence punishable under section 18 of the NDPS Act, 1985. A wireless message was also sent to the DSP, PW-5 to reach the spot. The effort of the police party, however, to join some independent witnesses from the public was unsuccessful. In the C meanwhile, PW-5 also reached that place and the police party made its way to the farm house of the appellant. The fodder room was opened after taking the key from the appellant and searched which led to the recovery of 3.500 kilograms of opium. 50 grams was taken out for sampling D and the remainder of the opium was sealed. The appellant was also arrested by the DSP and after completion of the investigation, was charged under Section 18 of the Narcotic Drugs and Psychotropic Substance Act and was accordingly brought to trial. The E prosecution placed almost exclusive reliance on the statements of PW-5 DSP and PW-6 Inspector as also the recovery of the opium from the residence of the appellant. In his statement under Section 313, Cr.P.C. the appellant admitted that he had already been convicted by the Additional Sessions Judge, Hisar on the 15th March 1997 F for having been found in possession of 14 Kilograms of Heroin, though an appeal had been filed against the conviction. He also stated that he was on bail in that appeal.

G The trial court relying on the said evidence and circumstances held that the case against the appellant had been proved beyond doubt and merely because no independent witness had been associated with the proceedings could not be taken against the prosecution H as an effort had been made to associate some witness,

but no one agreed to the police request. The court also found that the provisions of Sections 52, 55 and 57 of the Act were complied with and no prejudice could, therefore, be claimed by the appellant. The court further observed that it was clear from the evidence of PWs.5 and 6 that the provisions of Section 42 of the Act had been complied with as the secret information received by PW-6 were recorded by him in a Ruqa which had been sent to the Police Station for registration of a FIR and that he had also informed PW-5 on wireless about the information received by him on which the latter had reached the place of search and seizure. The trial court further noted that as the appellant was a previous convict, a lenient view could not be taken in his case. He was accordingly sentenced to undergo 20 years RI and to pay a fine of Rs.2,00,000/- and in default of payment of fine to undergo RI for 2 years. The judgment of the trial court was confirmed in appeal by the High Court. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. A reading of Section 42 of the Narcotic Drugs and Psychotropic Substance Act pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the Section itself. Section 42(2) is categorical that the information if taken down in writing shall be sent to the superior officer forthwith. The total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced. PW-6 clearly admitted in his cross-examination that he had not prepared any record

A **about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP did not utter a single word about the receipt of any written information from his junior officer Inspector. The dispatch of a wireless**
B **message to PW-6 does not amount to compliance with Section 42(2) of the Act. There was, therefore, complete non-compliance with the provisions of Section 42(2) of the Act which vitiates the conviction. [Paras 4, 5, 6] [886-G-H; 887-A-B; 888-G-H; 889-A-B]**

C *Karnail Singh vs. State of Haryana* **(2009) 8 SCC 539: 2009 (11) SCR470;** *State of Karnataka vs. Dondusa Namasa Baddi* **(2010) 12 SCC 495: 2010 (9) SCR 670 – relied on.**

Case Law Reference:

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2009 (11) SCR 470	**relied on**	**Para 2**
2010 (9) SCR 670	**relied on**	**Para 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
E No. 1051 of 2009.

From the Judgment & Order dated 09.08.2004 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 218-DB of 1999.

F Zafar Sadique, Asghar Khan, Balraj Dewan for the Appellant.

Manjit Singh, AAG, Tarjit Singh, Kamal Mohan Gupta for the Respondent.

G The Judgment of the Court was delivered by

HARJIT SINGH BEDI,J.

This appeal arises out of the following facts.

H 1. At about 4 p.m. on the 30th January 1997, PW-6

Inspector Kuldip Singh of the CIA Staff, Hisar sent Ruqa Ex. PG to Police Station Bhuna that while he was present at the Bus Adda of village Bhuna in connection with the investigation of a case, he had received secret information that the appellant Rajinder Singh @ Chhinder, was an opium addict and also dealing in its sale, and that he had kept some opium in the shed used for storing fodder in his farm house, and if raid was organized, the opium could be recovered. On the basis of the aforesaid Ruqa, a formal First Information Report was drawn up for an offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the "Act"). A wireless message was also sent to the DSP, Fatehabad PW-5 Charanjit Singh to reach the spot. The effort of the police party, however, to join some independent witnesses from the public was unsuccessful. In the meanwhile, PW-5 also reached that place and the police party made its way to the farm house of the appellant. The lock on the fodder room was opened after taking the key from the appellant and searched which led to the recovery of 3.500 kilograms of opium. 50 grams was taken out for sampling and the remainder of the opium was sealed. The appellant was also arrested by the DSP and after completion of the investigation, was charged under Section 18 of the Act and was accordingly brought to trial. The prosecution placed almost exclusive reliance on the statements of PW-5 Charanjit Singh DSP and PW-6 Kuldip Singh Inspector as also the recovery of the opium from the residence of the appellant. In his statement under Section 313 of the Cr.P.C. the appellant admitted that he had already been convicted by the Additional Sessions Judge, Hisar on the 15th March 1997 for having been found in possession of 14 Kilograms of Heroin, though an appeal had been filed against the conviction. He also stated that he was on bail in that appeal. The trial court relying on the aforesaid evidence and circumstances held that the case against the appellant had been proved beyond doubt and merely because no independent witness had been associated with the proceedings could not be taken against the prosecution as an effort had been made

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A to associate some witness, but no one agreed to the police request. The court also found that the provisions of Sections 52, 55 and 57 of the Act had been complied with and no prejudice could, therefore, be claimed by the appellant. The court further observed that it was clear from the evidence of B PWs.5 and 6 that the provisions of Section 42 of the Act had been complied with as the secret information received by PW-6 had been recorded by him in a Ruqa which had been sent to the Police Station for registration of a FIR and that he had also informed PW-5 on wireless about the information received by C him on which the latter had reached the place of search and seizure. The trial court further noted that as the appellant was a previous convict, a lenient view could not be taken in his case. He was accordingly sentenced to undergo 20 years RI and to pay a fine of Rs.2,00,000/- and in default of payment of fine to D undergo RI for 2 years. The judgment of the trial court had been confirmed in appeal by the High Court leading to the present proceedings before us.

2. Mr. Zafar Sadiqui, the learned counsel for the appellant, has made four submissions during the course of the hearing. E He has first submitted that as the provisions of Section 42(2) of the Act had not been complied with, the conviction of the appellant could not be sustained in the light of the judgment of the Constitution Bench of this Court in *Karnail Singh vs. State of Haryana* (2009) 8 SCC 539. He has further submitted that F no serious effort had been made to associate an independent witness with the search and seizure and that the link evidence in the case was also missing as the Malkhana register pertaining to the recovered opium was deposited had not been produced as evidence. He has finally submitted that as the G provisions of Sections 52, 55 and 57 of the Act had not been complied with was an additional reason as to why the conviction could not be sustained. Mr. Manjit Dalal, the learned counsel for the State of Haryana, has however supported the judgments of the courts below and has pointed out that the Ruqa Exhibit H PA had been sent to the Police Station for the registration of

the FIR and the fact that information had been conveyed on the wireless to DSP Charanjit Singh was sufficient compliance with the provisions of Section 42(2) of the Act. He has also controverted the other submissions made by Mr. Sadiqui. A

3. We have heard the learned counsel for the parties and gone through the judgment impugned. To our mind, the entire controversy hinges on Section 42 which is reproduced below: B

> "42. Power of entry, search, seizure and arrest without warrant or authorization. – (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or 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,- C D E F
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> (a) enter into and search any such building, conveyance or place; G
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> (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 H

A 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
B commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter
C IV relating to such drug or substance.

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the
D 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.

E

(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
F superior.

42(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
G immediate official superior."

4. A reading of the above said provision pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person
H is dealing in a narcotic drug or a psychotropic substance, he

should ordinarily take down the information in writing except in cases of urgency which are set out in the Section itself. Section 42(2), however, which calls for interpretation in the matter before us, is however categorical that the information if taken down in writing shall be sent to the superior officer forthwith. In Karnail Singh's case, this Court has held that the provisions of Section 42(2) are mandatory and the essence of the provisions has been set out in the following terms:

> "In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham 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).
>
> (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*

A *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* B *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* C *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 D 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, E 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* F *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."*

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5. It is therefore clear that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced.. We have gone through the evidence of PW-6 Kuldip Singh. He H

clearly admitted in his cross-examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer Inspector Kuldip Singh. It is, therefore, clear that there has been complete non-compliance with the provisions of Section 42(2) of the Act which vitiates the conviction.

6. Mr. Dalal, the learned counsel for the respondent-State has, however, referred to paragraph 34 of the judgment of the Constitution Bench in which general observations have been made with regard to the provisions of Section 41 (1) and 42(2) with respect to the latest electronic technology and the possibility that the said provisions may not be entirely applicable in such a situation. Concededly the present case does not fall in this category. In any case the principles settled by the Constitution Bench are in paragraph 35 and have already been re-produced by us hereinabove. Likewise, the dispatch of a wireless message to PW-6 does not amount to compliance with Section 42(2) of the Act as held by this Court in *State of Karnataka vs. Dondusa Namasa Baddi* (2010) 12 SCC 495.

7. In the light of the fact what has been held above, we are not inclined to go to the other issues raised by Mr. Sadiqui. We, accordingly allow the appeal, set aside the judgments of the courts below and order the appellant's acquittal.

D.G. Appeal allowed.