HIGH COURT OF MADHYA PRADESH PRINCIPAL SEAT AT JABALPUR

CRIMINAL APPEAL NO.924 OF 1996

Bittu

Versus.

State of Madhya Pradesh

For appellant	:	Shri Abhinav Dubey, Advocate.
For Respondent/ State	:	Shri R.S. Shukla,Panel Lawyer.

J U D G M E N T
(12.02.2015)

1. This appeal has been filed by the appellant against the judgment of conviction dated 22.5.1996, passed by Additional Sessions Judge, Gadarwara District Narsinghpur, in Special Sessions trial No.46/95. The trial Court convicted the appellant for commission of offence under Section 20 (k) (i) of Narcotics Drugs and Psychotropic Substances Act 1985 (herein after in short 'the Act 1985) and awarded sentence of R.I. three years and fine of Rs.5,000/-.

2. The prosecution story in brief is that Assistant Sub-Inspector Raghunath Singh (PW-8) on 07.05.1995 when he was on patrolling reached at village Barhata he received information from the informer that cannabis plants were planted by Mr. Bittu the present appellant in his field. On the basis of aforesaid information, he prepared Panchnama (Ex.P-5) of the information in presence of witnesses Ghasiram and Himalaya Bahadur (PW-4 and PW-5) respectively because there was likelihood that the plants may be destroyed, if he had taken search warrant from the Judicial Magistrate. Hence, he prepared the Panchnama (Ex.P.6) to conduct search. PW-8 reached on the field of appellant and searched the field. He informed the accused that whether he would like the search from a Magistrate be called for. The appellant had given his consent for search without Magistrate. Thereafter, at 3.40 PM, in front of witnesses Ghasiram and Himalaya Bahadur , the search of the field of the appellant was carried out and in the search, it was found that appellant had grown 10 plants of cannabis in between the plants of Tomato and sugarcane. A spot map was prepared. The cannabis plants were seized and the appellant was arrested.

3. The Dehati Nalishi (Ex.P.21) was prepared and thereafter, FIR was lodged. The plants were sent for chemical analysis to the Forensic Laboratory Sagar and as per report of the laboratory (Ex.P.24), it was found that there was cannabis in the trees. After investigation the charge-sheet was filed before the Court. The appellant abjured his guilt. He pleaded that he was not owner of the field and he had given the field to his son Dallu and his son had given the same on Sikami to Jasman Kourav. The appellant had not been living at village Barhata, he was living at village Bareli. After trial, the trial Court found the offence proved against the appellant beyond reasonable doubt and awarded the sentence.

4. Learned counsel appearing on behalf of the appellant has submitted that the trial Court has committed an error of law in holding that the prosecution has proved the offence beyond reasonable doubt against the appellant. There was non-compliance of Section 42 of the Act and independent witnesses of seizure have turned hostile. The search was also not proper and the conviction of the appellant is based only on the basis of evidence of sub-Inspector Raghunath Singh (PW-8), who is an interested witness hence, the judgment of the trial Court is liable to be set aside.

5. Learned Panel Lawyer has contended that the judgment passed by the trial Court is in accordance with law. There is enough evidence to convict the appellant. The conviction of the appellant is based on the evidence of PW-8.

6. (PW-1) Ramcharan, who is witness of Panchnama (Ex.P.1) in his evidence deposed that when he was at village Barhata, police persons came there and asked him whether he knows Bittu thereafter, they had taken my signature on paper (Ex.P.1), appellant-Bittu was not there. Apart from me, they had taken signatures of Brijmohan, Himalaya Ghasiram, Satyanarayan and Ramcharan. There is no agricultural land of appellant Bittu in the village.

7. Brijmohan (PW-2) in his evidence deposed that the police persons came to his house and there were some plants in the dickey of the motorcycle. They told me that these plants are of cannabis, they had further told me that they had plucked the plants from the field of Bittu. They had taken my signature on (Ex.P-1). Himalaya Bahadur (PW-3) in his evidence deposed that police persons came to the house of Brijmohan, and they had taken me on the land of Dallu,

however, he was not there. Thereafter, they returned back and after some time, Sub-Inspector (PW-8) showed me 10 plants of cannabis and they had taken my signatures on seizure memo (Ex.P.1) and (Ex.P.4). They had also taken signatures of other persons. Same facts have been stated by Ghasiram (PW-4,) Kotwar of village Barhata. He said that the Assistant Sub-Inspector (PW-8) had told me that there was seizure and signed it, he signed the seizure and obtained my signatures on seizure memo and other documents Ex.P-1, Ex.P-4, Ex.P-4-2 and Ex.P.13.

8. PW-3 Himalaya Bahadur had also signed the papers. (PW-5) Sugandhilal, Patwari of the village, in his evidence deposed that he was posted as Patwari in 1995 in Halka No.41 tehsil Gadarwara. Village Bareli and Barhata are in his Halka. He further deposed that he had prepared the spot map and appellant-Bittu is the owner of the land of Khasara No. 204/3. PW-6 Surendra Kumar, in his evidence deposed that police had came to him along with 10 plants of cannabis and after inspecting and smelling the plants, I found that the plants were of cannabis and I submitted my memo (Ex.P.18). PW-7 Satyanarayan in his evidence deposed that before him, the police has never searched the filed of the appellant, however, they had taken my signature on a Panchnama.

9. (PW-8) Raghunath Singh, in his evidence deposed that he was posted in May, 1995 at Gadarwara as Assistant Sub-Inspector. He had gone to search warrantee on 7.5.1995, when he reached at village Barhata, he received an information from the informer that appellant-Bittu had cultivated some cannabis plants in his field. He prepared the Panchnama (Ex.P-5) before witnesses Ghasiram and Himalaya Bahadur, they signed the Panchnama because the information was received on the spot, hence it was not possible to take search warrant because for that purpose he had go to Gadarwara. I prepared the Panchnama. Constable Devraj and Constable Murari were also present there. The appellant had consented for the search and the Panchnama (Ex.P.8) was prepared on the spot for the aforesaid purpose before Ghasiram and Himalaya Bahadur. I asked the appellant whether he wants to search before the Magistrate. The applicant had given his consent for search in the absence of Magistrate. I found cannabis plants in between the plants of Tomato and Sugarcane. He seized 10 cannabis plants and prepared the Panchnama (Ex.P.4) which was signed by Ghasiram and Himilaya Bahadur. I also prepared the search

Panchnama (Ex.P.10) and another Panchnama (Ex.P.1) before Brijmohan, Himalaya, Ghasiram, Satyanaran and Ramcharan. The map of the spot was prepared (Ex.P.9). The appellant was arrested by arrest memo (Ex.P.13). I informed the son of the appellant about his arrest. The Dehati Nalishi (Ex.P.21) was prepared thereafter, I recorded the evidence of the witnesses. He in his examination by the Court had stated that he had written the Dehati Nalishi after arrest of the appellant at around 4.30, but due to mistake in the Dehati Nalishi, the time has been mentioned as 3 O'clock. In his examination the witnesses admitted the fact that the appellant had given written consent for search without Magistrate. However, he did not sign it, he had given oral consent. He admitted the fact that he had not mentioned anything in the panchnama (Ex.P.10) that the appellant had given oral consent for search without calling the Magistrate.

10. From the evidence on record, it is clear that the independent witnesses of Panchnama, seizure memo and search have turned hostile. PW-8 is only witness who supported the search and seizure of cannabis. He admitted in para 12 of his cross-examination that the appellant had given his consent for search without calling Judicial Magistrate and Gazetted Officer. He also did not mention the fact that he had sent the information in regard to controlled substance cannabis to his immediate Officer or copy of information to the immediate Officer within 72 hours or even thereafter. Section 42 of the Act 1985 prescribes Power of entry, search seizure and arrest without warrant or authorization. The relevant provision which is necessary for determination of the case. Proviso to Section 42(1) and 42(2) of the Act 1985 reads as under:-

> "Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording 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."

11. The aforesaid provision has been considered by the Constitution Bench of the Supreme Court in the case of **Karnail Singh** vs **State Of Haryana 2009 (8) SCC 539.** The findings of the Constitution Bench have been quoted by the

supreme Court in the case of **Kishan Chand** vs. **State of Haryana (2013) 2 SCC 502** as under:-

> "**14**. First and the foremost, we will deal with the question of non-compliance with Section 42(1) and (2) of the Act. It is necessary for us to examine whether factually there was a compliance or non-compliance of the said provisions and, if so, to what effect. In this regard, there can be no better evidence than the statement of Investigating Officer PW7 himself. PW7, Kaptan Singh in his statement while referring to the story of the prosecution as noticed above, does not state in examination-in-chief that he had made the report immediately upon receiving the secret information and had informed his senior officers. In his examination-in-chief, such statement is conspicuous by its very absence. On the contra, in his cross-examination by the defence, he clearly admits as under:-
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> > "....the distance between the place of secret information and the place of recovery is about 1½ kilometre. Secret information was not reduced into the writing so no copy of the same was sent to the higher officer. I did not ask any witness of the public in writing to join the raiding party"
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> **15**. The learned Trial Court in para 34 of its judgment clearly recorded that admittedly in the present case, the secret information was received against the accused. The Investigation Officer did not reduce the secret information in writing nor did he send the same to the higher officer or to the police station for registration of the case. However, stating that if this was done, there was possibility that the accused escaped, the trial court observed that if the Investigating Officer did not reduce into writing the secret information and sent the same to the superior officer, then in light of the given circumstances, it could not be said that any prejudice was caused to the accused.
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> **16**. We are unable to contribute to this interpretation and approach of the Trial Court and the High Court in relation to the provisions of sub-Section (1) and (2) of Section 42 of the Act. The language of Section 42 does not admit any ambiguity. These are penal provisions and prescribe very harsh punishments for the offender. The question of substantial compliance of these provisions would amount to misconstruction of these relevant provisions. It is a settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, ought to be construed strictly. The doctrine of substantial compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the cases where the language of the provision strictly or by necessary implication admits of such compliance.
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> **17**. In our considered view, this controversy is no more *res integra* and stands answered by a Constitution Bench judgment of this Court in the case of *Karnail Singh* (supra). In that judgment, the Court in the very opening paragraph noticed that in the case of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*

[(2000) 2 SCC 513], a three Judge Bench of the Court had held that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of *Sajan Abraham* (supra), again a Bench of three Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, if there is total non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not, will be a question of fact in each case. The Court in paragraph 35 of the judgment held as under:-

> 35. 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).
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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.
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> > (*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.

> **18**. Following the above judgment, a Bench of this Court in the case of *Rajinder Singh* (supra) took the view that total noncompliance of the provisions of sub-Sections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with a satisfactory explanation for delay can, however, be countenanced.

> **19**. The provisions like Section 42 or 50 of the Act are the provisions which require exact and definite compliance as opposed to the principle of substantial compliance. The Constitution Bench in the case of *Karnail Singh* (supra) carved out an exception which is not founded on substantial compliance but is based upon delayed compliance duly explained by definite and reliable grounds.

12. The judgment of the Hon'ble Supreme Court in the case of **Kishan Chand** (supra) and the constitution Bench of Supreme Court in the case of **Karnail Singh** (supra) has clearly held that compliance of Section 42 of the Act is mandatory, however a substantial compliance may be made based upon reliable grounds.

13. In the present case, there is total non-compliance of Section 42 (2) of the Act 1985. (PW-8) Raghunath Singh, nowhere stated in his evidence that after taking down the information in writing in regard to cannabis plants, he had sent

a copy of the same to his immediate official superior within seventy two hours or any time. Apart from this, all the independent witnesses of seizure memo and preparation of Panchnama have turned hostile. The conviction of the appellant is based only on the basis of evidence of (PW-8) who is an interested witness, his evidence has to be examined carefully as held by the Supreme Court in ***Ashok Rai*** vs. ***State of Uttar Pradesh and others, (2014) 5 SCC 713*** in regard to evidence of interested witnesses.

> "**12**. It is argued that the prosecution case rests on evidence of interested witnesses. No independent witnesses are examined. Unless there is corroboration to the evidence of interested witnesses, their evidence cannot be accepted. We cannot accept this submission. The evidence of interested witnesses is not infirm. It would be good to have corroboration to their evidence as a matter of prudence. But corroboration is not always a must. If the evidence of interested witnesses is intrinsically good, it can be accepted without corroboration. However, as held by this Court in Raju, the evidence of interested witnesses must be scrutinized carefully. So, scrutinized, the evidence of PW1, PW2 and PW4 appears to be acceptable."

From the aforesaid judgment of the Supreme Court, it is clear that the evidence of interested witnesses be scrutinized carefully.

14. The Supreme court in the case of **Kishan Chand** (supra) has further elaborated the purpose of provision of Section 42(2) of the Act 1985 and it's compliance:-

> "**22**. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision.

15. On the basis of aforesaid analysis and the facts that there is non-compliance of Section 42(2) of the Act 1985 and the fact that the (PW-8) has not noted the fact in the Panchnama (Ex.P.9) when, the appellant was agreed to

search without calling the Magistrate or any Gazette Officer and the independent witnesses are hostile and conduct of Raghunath Singh (PW-8) is also suspicious because he has not complied the mandatory provision of the Act 1985, as mentioned above. In my opinion, the conviction of the appellant is unsustainable. The prosecution has failed to prove the commission of offence against the appellant beyond reasonable doubt. The learned trial Judge has not considered the aspect of non-compliance of mandatory provision of the Act 1985 as noted above.

16. Consequently, appeal is allowed. The conviction and sentence awarded by the trial Court against the appellant is hereby set aside. Appellant is acquitted from the charge of commission of offence under Section 20 (k) (i) of the Act 1985. The bail bond furnished by the appellant is hereby discharged. The amount of fine imposed by the trial Court be returned back to the appellant.

(S.K. Gangele)
Judge

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J U D G M E N T

Post for : .02.2015

(S.K. GANGELE)
JUDGE
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