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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: December 03, 2013*

+ **CRL.A. 174/2005**

MANTOON KUMAR Appellant
Through : Ms.Charu Verma, Adv.

versus

STATE Respondent
Through : Mr.Firoz Khan Ghazi, APP for State.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (Oral)

Appellant has filed the present appeal under Section 36-B of the NDPS Act 1985 read with Section 374(2) of the Code of Criminal Procedure 1973 against the judgment and order on sentence by which the appellant stands convicted and sentenced to two years rigorous imprisonment and fine of Rs.1000/- under Section 20 of the NDPS Act.

Case of the prosecution as noticed by the learned Trial Court is as under:-

(1) A secret information was received by SI K.L.Yadav which was recorded by him and conveyed to the SHO. A raiding party consisting of constable Dilbag, constable Ramesh and inspector Satyavrat was formed along with the informer. IO requested 4/5 passerby to join the investigation but none agreed and at about 10:10 pm accused was apprehended when he came from the side of Nabi Karim. Accused was having a bag in his right hand. The secret information was conveyed to the accused. Notice u/S 50 NDPS Act was given to him. The bag was taken from the hand of the accused and on checking the bag 1 kg 600 gram ganja was found in it. IO completed the other formalities under the NDPS Act and sent the ruqqa to police station through constable Dilbagh for the registration

of the case. Accused was arrested and sent up for trial.

(2) On the basis of the ruqqa FIR bearing No.429/02 was registered at police station Sadar Bazar and investigation went underway. After completion of the investigation Challan u/S 20-61-85 NDPS Act was prepared and filed in court.

(3) Copies of challan statement of witnesses and other documents were supplied to accused.

(4) After hearing arguments on charge a prima facie case was found to try the accused for the offence u/S 20 NDPS Act vide order dated 19.2.2003 and accordingly a charge u/S 20 NDPS Act was framed against the accused to which accused pleaded not guilty and claimed trial.

(5) In order to prove the guilt of the accused the prosecution examined as many as 10 witnesses.

Counsel for the appellant submits that the conclusions drawn by the learned Trial Court are erroneous and against the law. Ms.Verma contends that there was no independent public witness or respectable person was joined at the time of raid. No notice was served upon the witnesses or passerby who refused to join the raiding party as required under Section 100(4) Cr.P.C. It is also the case of the appellant that he has been falsely implicated in the case. Counsel for the appellant submits that no proper notice under Section 50 of the NDPS Act was given to the appellant. Counsel submits that merely giving an offer or option to the appellant would not cover the mandatory requirements of Section 50 of the NDPS Act. Reliance is placed by learned counsel for the appellant in the case of Gurjant Singh @ Janta v. State of Punjab reported at 2013 (13) SCALE 295.

Mr.Ghazi, learned counsel for the State submits that the prosecution has been able to establish its case beyond any shadow of doubt. Notice under Section 50 of the NDPS Act was given to the appellant and the appellant had declined the offer given to him and he had put his thumb impression on the reply given by him to the notice.

Ms.Verma submits that in fact the thumb impression of the appellant

was taken on a blank piece of paper and suggestion was put to PW-8 in this regard during his cross-examination.

It is no longer *res integra* that Section 50 of the NDPS Act is mandatory in nature and the same is to be applied strictly. In the case of State of Delhi v. Ram Avtar @ Rama reported at 2011 (7) SCALE 428 it has been categorically held as under:-

“In the present case, we are concerned with the provisions of Section 50 of the Act as it was, prior to amendments made by Amending Act 9 of 2001 w.e.f. 2.10.2001. In terms of the provisions, in force at the relevant time, the petitioner had a right to be informed of the choice available to him; making him aware of the existence of such a right was an obligation on the part of the searching officer. This duty cast upon the officer is imperative and failure to provide such an option, in accordance with the provisions of the Act, would render the recovery of the contraband or illicit substance illegal. Satisfaction of the requirements in terms of Section 50 of the Act is sine qua non prior to prosecution for possession of an unlawful narcotic substance.

In fact, the Constitution Bench in the case of Vijaysinh Chandubha Jadeja v. State of Gujarat, [(2007) 1 SCC 433], in para 25, has even taken a view that after the amendment to Section 50 of the Act and the insertion of sub-section 5, the mandate of Section 50(2) of the Act has not been nullified, and the obligation upon the searching officer to inform the person searched of his rights still remains. In other words, offering the option to take the person to be searched before a Gazetted Officer or a Magistrate as contemplated under the provisions of this Act, should be unambiguous and definite and should inform the suspect of his statutory safeguards.

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It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), the theory of ‘substantial compliance’ would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must

be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial.....”

Further in the recent decision rendered by the Apex Court in Gurjant Singh @ Janta's case (supra), where a person was coming on a tractor loaded with three gunny bags, the police party became suspicious and checked the tractor-trolley and in the gunny bags poppy husk was recovered. In the aforesaid matter, a notice was given and search was conducted. However, the person in presence of whom search was conducted was in fact not a gazetted officer. Relevant portions (paragraphs) of the decision read as under:-

“15. However, while analyzing the importance of Section 50 of the NDPS Act in that very decision, this Court has held as under in paragraph 20:

“20. In *Miranda v. Arizona* the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus:

“At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it — the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”

It was further observed thus:

“The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest.”

When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable. Therefore it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory.”

16. If the ratio of the said decision had been properly understood, the flaw committed by the trial Court and as confirmed by the High Court in our considered opinion would not have arisen. The distinct feature in the case on hand was that on the date of occurrence i.e. on 04.04.1996 at 00.15 AM, the police party headed by P.W.6, accosted a tractor trolley coming from the side of village Ugrahan, which was stopped by him and that when the driver after stopping the tractor tried to escape was apprehended by the police team. The most crucial aspect of the case was that P.W.6 noticed three gunny bags lying in the tractor of the appellant and felt that some incriminating substance was kept in those gunny bags. P.W.6, therefore, took the view that before effecting search of the gunny bags, the necessity of affording an opportunity to the appellant to conduct the search in the presence of a Gazetted officer or a Magistrate was imperative. In other words, after noticing three gunny bags, P.W.6, as an investigating officer, felt the need to invoke the provisions of Section 50 and thereby provide an opportunity to the appellant for holding any search in the presence of a Gazetted officer or a Magistrate. When once P.W.6 could assimilate the said legal requirement as

stipulated under Section 50 of the NDPS Act, we fail to understand as to how principle No.1 in paragraph 25 of the decision reported in Balbir Singh (supra) could be applied. Unfortunately, the trial Court failed to understand the said principle set out in Balbir Singh (supra) in the proper perspective while holding that neither Section 42 nor Section 50 was attracted to the facts of this case.

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22. In Pawan Kumar (supra) wherein the Constitution Bench decision was referred to and was reiterated as under in paragraph 26:

“26.....Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used a very strict view of Section 50 of the Act was taken and it was held that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word “person” occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him.”

23. The aforesaid observations of the above Constitution Bench decision in Baldev Singh (supra) and the three Judge Bench decision in Pawan Kumar (supra), clearly highlight the legal requirement of compliance of Section 50 in its true spirit. It will have to be stated that such compliance of the requirement under Section 50 of holding of a search and seizure in the presence of Gazetted officer or a Magistrate, cannot be an empty formality. In other words, the offer to the person to be searched in the presence of a Gazetted officer or a Magistrate, should really serve the purpose of ensuring that there was every bona fide effort taken by the prosecution to bring forth the grave offence of possession of narcotic substance and proceed against the person by way of prosecution and thereby establish the truth before the appropriate judicial forum. In the same breath such a course of compliance of Section 50 would also enable the person

accused of such a grave offence to be convinced that the presence of such an independent Gazetted officer or a Magistrate would also enable the person proceeded against to demonstrate that there was no necessity for holding any search on him and thereby persuade the concerned Gazetted officer or Magistrate to protect his fundamental right of freedom, from being unlawfully proceeded against. In other words, the purpose of Section 50 was to ensure that on the one hand, the holding of a search and seizure was not a farce of an exercise in order to falsely implicate a person by unscrupulous police authorities, while on the other hand to prevent an accused from committing an offence of a serious nature against the society, warranting appropriate criminal proceedings to be launched and in the event of establishing such offence, conviction and sentence to be imposed in accordance with law. Therefore, such a dual requirement of law prescribed under Section 50 cannot be dealt with lightly by the Courts dealing with the trial of such offences brought before it."

Applying the law laid down by the Apex Court to the facts of this case, it would be useful to reproduce the notice so issued to the appellant under Section 50 of the NDPS Act as also the reply of the appellant to the said notice:

Notice u/s.50 NDPS Act

You, Mantoon Kumar s/o. Chaturi Mandal r/o. Village Chuck, P.S. Chothan Distt. Khagaria Bihar, presently residing at Priya Darshni Jhuggi Colony, S.Bazar is hereby informed vide this notice that that police has an information that you are in possession of ganja (poppy husk) and a personal search has to be carried out on you and if you desire any gazetted officer or a Magistrate can be called on the spot, and before getting searched by police party, if you desire, you may search the police party."

Reply to Notice u/S. 50 NDPS Act

You have given me a written notice u/S. 50 of the NDPS Act which have been read over to me and made me to understand the same. I have understood the notice well. Neither do I want to call any gazetted officer or a magistrate during my search and nor do I want to search the police party before giving my search. You can conduct search on me. You have written my reply which I have heard and understood."

A careful examination of this notice would show that an option was given to the appellant that if the appellant so desired the search could be conducted in the presence of a gazetted officer or a Magistrate, however, he had responded by saying that he did not want his search to be carried out in the presence of a gazetted officer or a Magistrate.

Various decisions rendered by the Apex Court have drawn a distinction between an option being given to a person that he may have the search conducted in the presence of a gazetted officer or a Magistrate and communicating to him in clear words that he has a right in law to be searched in the presence of a Magistrate or a gazetted officer.

In this case, a mere offer was made to the appellant that in case if he so desires, his search may be conducted in presence of a Gazetted Officer or a Magistrate. Thus a mere offer would not satisfy the mandatory ingredients of section 50 of the NDPS Act. In my view the judgment in the case of **Ram Avatar (Supra)** is fully applicable to the facts of this case, as a similar offer was given to Ram Avtar and the Apex Court held that such an offer did not comply with the mandatory requirement of section 50 of the NDPS Act.

It may also be noticed that in this case the learned Trial Court had opined in para 45 of the judgment that since the recovery was made from a bag which the appellant was carrying in his right hand, Section 50 would not apply. In my view Section 50 would be applicable even in those cases where the recovery was made other than from the person of a person. In this case also a notice was given to the appellant. In Gurjant Singh's case (supra) a person was coming on a tractor loaded with three gunny bags. On becoming suspicious the police party checked the tractor trolley and poppy husk was recovered from the gunny bags. A notice was given, however, the Apex Court has held that no proper notice was given. In this case, the appellant was not made aware of his right and it seems that an offer was made to the petitioner as a mere empty formality without appreciating the seriousness and letter and spirit of Section 50 of NDPS Act.

Having held that the mandatory requirement of Section 50 of the NDPS Act was not complied with, recovery itself would be illegal and consequent thereto the conviction and the order on sentence are liable to be set aside. Accordingly the present appeal is allowed. The order on conviction is set aside. Bail bonds of the appellant be cancelled.

(G.S.SISTANI)
JUDGE

DECEMBER 03, 2013
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