

GAHC010221622022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./4/2023

SUSHIL PRASAD SAHU @ SUSHIL SAHU AND ANR.
R/O HOUSE NO. 09
EKTA PATH
BHASKAR NAGAR

AMBARI
P.S. FATASIL AMBARI
DIST. KAMRUP (M)
ASSAM

2: DHANIKLAL PRASAD @ PAPPU
S/O LATE BHOLA PRASAD
R/O TELIPATTI
P.O. AND P.S. POROMPAT
DIST. IMPHAL EAST

MANIPUR.
VERSUS

THE UNION OF INDIA AND ANR.
REP. BY NARCOTIC CONTROL BUREAU (NCB)
GUWAHATI.

2: THE INTELLIGENCE OFFICER

NARCOTIC CONTROL BUREAU (NCB)
ZONAL UNIT
GUWAHATI.

Advocate for : MR. P K ROYCHOUDHURY
Advocate for : SC
NCB appearing for THE UNION OF INDIA AND ANR.

**BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA**

ORDER

Date : 10.01.2024

1. Heard Mr. P. K. Roy Chowdhury, learned counsel for the petitioners. Also heard Mr. S.C. Keyal, learned standing counsel, NCB.

2. This application under Section 482 of the Code of Criminal Procedure, 1973 has been preferred by the petitioners, namely, (1) Sushil Prasad Sahu @ Sushil Sahu, and (2) Dhanik Lal Prasad @ Pappu praying for setting aside the chargesheet dated 03.05.2021 on the basis of which NDPS Case No. 18/2021 was registered.

3. The facts relevant for consideration of the instant application, in brief, as follows: -

i. On 03.05.2021, the Union of India represented by, the Narcotics Control Bureau through the Intelligence Officer, Guwahati Zonal Unit, Guwahati filed a complaint before the learned Sessions Judge, Kamrup (M), *inter-alia*, stating that on 06.11.2020 the Intelligence Officer, NCB, Guwahati got an information through reliable source that one person namely, Sushil Sahu would be carrying 1.5 kg to 2 kg of methamphetamine tablets for delivering the said consignment to some unknown person.

ii. Accordingly, a search team was constituted and on 06.11.2020 at about 5:20 PM when a scooty bearing registration No. AS 01 BG 7311 arrived at Bye Lane No.1, Rajgarh Road, Chandmari, Guwahati, the same was intercepted. The person driving the scooty

parked the scooty near the road and opened the boot of the scooty and took out one white coloured polythene packet from the said scooty. The Intelligence Officer, NCB introduced himself to the said person whose name was Sushil Prasad Sahu, who was at that time holding one white coloured plastic packet. After opening the said white coloured packet, two plastic packets were found inside the said packet and in one of the packet 986 gram of methamphetamine tablets was found. In the second packet 858 gram of methamphetamine tablets was found. The total weight of methamphetamine tablets recovered was 1.844 kg.

iii. Thereafter, on the same day after getting information from the petitioner Sushil Prasad Sahu, a search operation was conducted in his house at Bhaskar Nagar, Ambari, Kamrup (M) and 234 gram of methamphetamine tablets was recovered from there. The co-accused Dhanik Lal Prasad @ Pappu, who was there in the said house, was also arrested from there.

iv. Both the petitioners were arrested on 06.11.2020 and since then, they are detained behind the bars, whereas, the trial of NDPS Case No. 18/2021 is yet to commence as charges are not yet framed against the present petitioners.

4. Learned counsel for the petitioners has submitted that though the NCB team at the time of doing the search also recovered Rs.5760/-from the person of Petitioner No.1, however, no information was provided to him by the team conducting the search that he has a legal right to be searched in presence of a Gazetted Officer or a Magistrate, hence it is submitted that there was a total non-compliance of the mandatory requirement of Section 50 of the NDPS Act,

1985. Learned counsel for the petitioners has submitted that as the mandatory provision of Section 50 of the NDPS Act, 1985 was not followed in the instant case, the complaint/chargesheet submitted by the NCB in the instant case is liable to be set aside on that ground only.

5. Learned counsel for the petitioners has cited the ruling of the Apex Court in the case of “***State of Punjab Vs. Baldev Singh***” reported in **(1999) 6 SCC 172**, wherein it was observed by the Apex Court that non-compliance of mandatory provisions of Section 50 of the NDPS Act, 1985 would vitiate the trial.

6. In support of his submissions, learned counsel for the petitioners has also cited the ruling of the Apex Court in “***Raju Vs. State of W.B.***” reported in **(2018) 9 SCC 708**, wherein it was observed as follows

18. In Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345: (2014) 2 SCC (Cri) 563], on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two-Judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two-Judge Bench of this Court in Dilip v. State of M.P. [Dilip v. State of M.P., (2007) 1 SCC 450: (2007) 1 SCC (Cri) 377]] It was held thus : (Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , SCC p. 351, para 15)

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application.”

7. The learned counsel for the petitioners has also submitted that the petitioner No.2 namely, Dhanik Lal Prasad @ Pappu has been implicated in this case only on the basis of the statement of the co-accused, i.e., the petitioner No.1, and nothing was found from his possession and therefore, the chargesheet/complaint against him is liable to be set aside.

8. On the other hand, learned standing counsel, NCB as submitted that in the instant case the first recovery of contraband was made from a polythene bag which was carried by the petitioner No.1, namely, Sushil Prasad Sahu and no personal search of the petitioner No.1 was made at that time and therefore, the question of following the mandate of Section 50 of the NDPS Act, 1985 does not arise. Learned standing counsel, NCB has also submitted that though in the second seizure list it is mentioned that Rs.5760/- was recovered from the petitioner No.1 Sushil Prasad Sahu, however, it is nowhere mentioned that any personal search of the petitioner No.1, was conducted, hence, the question of following the mandate of Section 50 of the NDPS Act, 1985 does not arise.

9. To substantiate his submission, learned standing counsel, NCB has cited a ruling of the Apex Court in the case of “***Dayalu Kashyap Vs. State of Chhattisgarh***” reported in ***(2022) 12 SCC 398***, wherein it was observed as follows:-

“4. The learned counsel submits that the option given to the appellant to take a third choice other than what is prescribed as the two choices under sub-section (1) of Section 50 of the Act is something which goes contrary to the mandate of the law and in a way affects the protection provided by the said section to the accused. To support his contention, he has relied upon the judgment of State of Rajasthan v. Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563] , more specifically, SCC para 19. The judgment in turn, relied upon a Constitution Bench judgment of this Court in State of Punjab v. Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] to conclude that if a search is made by an empowered officer on prior information without informing the person of his right that he has to be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to take his search accordingly would render the recovery of the illicit article suspicious and vitiate the conviction and sentence of the accused where the conviction has been recorded only on the basis of possession of illicit articles recovered from his person. The third option stated to be given to the accused to get himself searched from the Officer concerned not being part of the statute, the same could not have been offered to the appellant and thus, the recovery from him is vitiated.”

5. In the conspectus of the facts of the case, we find

that the recovery was in a polythene bag which was being carried on a kanwad. The recovery was not in person. The learned counsel seeks to expand the scope of the observations made by seeking to contend that if the personal search is vitiated by violation of Section 50 of the NDPS Act, the recovery made otherwise also would stand vitiated and thus, cannot be relied upon. We cannot give such an extended view as is sought to be contended by the learned counsel for the appellant."

10. Learned Standing Counsel, NCB has also cited a ruling of the Apex Court in the case of ***"State of Punjab v. Baljinder Singh,"*** reported in **(2019) 10 SCC 473** wherein it was observed as follows:-

"13. The law is thus well settled that an illicit article seized from the person during personal search conducted in violation of the safeguards provided in Section 50 of the Act cannot by itself be used as admissible evidence of proof of unlawful possession of contraband. But the question is, if there be any other material or article recovered during the investigation, would the infraction with respect to personal search also affect the qualitative value of the other material circumstance?"

"14. At this stage we may also consider the following observations from the decision of this Court in Ajmer Singh v. State of Haryana [Ajmer Singh v. State of Haryana, (2010) 3 SCC 746 : (2010) 2 SCC (Cri) 475] : (SCC pp. 752-53, para 15)

15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in Madan Lal v. State of H.P. [Madan Lal v. State of H.P., (2003) 7 SCC 465 : 2003 SCC (Cri) 1664] The Court has observed: (SCC p. 471, para 16)

16. A bare reading of Section 50 shows that it

only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see Kalema Tumba v. State of Maharashtra [Kalema Tumba v. State of Maharashtra, (1999) 8 SCC 257 : 1999 SCC (Cri) 1422] , State of Punjab v. Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and Gurbax Singh v. State of Haryana [Gurbax Singh v. State of Haryana, (2001) 3 SCC 28 : 2001 SCC (Cri) 426]). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

15. As regards applicability of the requirements under Section 50 of the Act is concerned, it is well settled that the mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises.”

11. In case of “*Neeharika Infrastructure Pvt. Ltd Vs. State of Maharashtra and*

Others” reported in **2021 SCC OnLine SC 315** the Apex Court has laid down the guidelines for exercise of powers under section 482 of the Code of Criminal Procedure, 1973 which are as follows:-

“80. In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or “no coercive steps to be adopted”, during the pendency of the quashing petition under Section 482 Cr. P.C. and/or under Article 226 of the Constitution of India and in what circumstances and whether the High Court would be justified in passing the order of not to arrest the accused or “no coercive steps to be adopted” during the investigation or till the final report/chargesheet is filed under Section 173 Cr. P.C., while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482 Cr. P.C. and/or under Article 226 of the Constitution of India, our final conclusions are as under:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence

or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the 'rarest of rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not

interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr. P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this

Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr. P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr. P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under

Section 438 Cr. P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr. P.C. and/or under Article 226 of the Constitution of India.

xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr. P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or

misapplied.

12. Thus, from above it appears that the power of this Court under Section 482 of the Code of Criminal Procedure, 1973 for quashing a complaint is to be exercised sparingly only in rarest of rare cases. While examining a complaint, quashing of which is sought, the Court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the said complaint.

13. In the instant case, the first seizure was made from the possession of the petitioner No.1, Sushil Prasad Sahu when he was carrying a polythene bag which he took out from the boot of his scooty and there is nothing on record to suggest that any personal search of the petitioner No.1 was conducted at that time. Similarly, the second seizure of contraband, i.e., 234 gram of methamphetamine tablets, was made from the house of the petitioner No.1 wherein the petitioner No.2 was also found and though in the second seizure list it is mentioned that an amount of Rs. 5760/- was recovered from Sushil Prasad Sahu, however, there is no mention in the seizure list or anywhere else on record that any personal search of the petitioner No.1 was carried out at the time of recovery or seizure of the contraband. It is well settled that the mandate of Section 50 of the NDPS Act, 1985 is confined to personal search only and not to the search of any polythene bag or house as is the case in the instant case. As there is nothing on record to show that any personal search of any of the petitioners was conducted and the seized contrabands were not found from the body of any of the petitioners, the question of applicability of Section 50 of the NDPS Act, 1985 does not arise in this case.

14. As regards the second petitioner Dhanik Lal Prasad @ Pappu is

concerned, there is a categorical statement in the complaint petition that 234 gram of methamphetamine tablets recovered from the store room of the house of the petitioner No.1 was kept in the said store room by the petitioner No.2 Dhanik Lal Prasad @ Pappu. The genuineness of the said allegations made in the complaint can be verified only during the trial on the basis of evidence adduced during the trial and at this stage same cannot be done, therefore, the same cannot be a ground for setting aside the complaint at this stage.

15. For the reasons mentioned hereinbefore, this Court does not find any justification for exercising its powers under Section 482 of the Code of Criminal Procedure, 1973 in the instant case for setting aside the complaint dated 03.05.2021.

16. The instant criminal petition is accordingly dismissed. However, it is hereby made clear that the observations made hereinabove while considering the instant criminal petition shall have no bearing on the trial of NDPS Case No. 18/2021 and the Trial Court shall be free to consider all the contentions raised by the parties during the trial on their own merit.

17. Parties to bear their own costs.

JUDGE

Comparing Assistant