

HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

CRIMINAL PETITION No. 2919 of 2016

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ORDER:

The petitioners, who are A-1 and A-2, in Crime No.441 of 2015-16 of Paderu Excise Police Station, Visakhapatnam, preferred the present application under Sections 437 and 439 Cr.P.C., seeking enlargement on bail in the above crime, registered for the offences punishable under Sections 8(c) read with 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances (for short "the Act") Act, 1985.

The prosecution case is as under :

On 25.01.2016 while the S.I. of Police, Excise P.S., Paderu, along with his staff were conducting general route watch, found one brown colour lorry bearing No.A.P.28-T/9233 coming from Kedapally village. On suspicion they stopped the vehicle and found two persons in the cabin and a white colour jute bags kept in the back side of the lorry. When the police stopped the vehicle, another person who sat on the back side of the vehicle escaped. On enquiry, Accused 1 and 2 disclosed that they purchased 500 kgs of Ganja from one unknown person in Orissa State @ Rs.25/- per kg for selling the same @ Rs.5,000/- per Kg. at Hyderabad. Then the police seized the Ganja which was weighing about 500 kgs, packed in 20 bags each bag weighing 25 Kgs. After drawing the sample, the same were sent to chemical laboratory. Basing on the search and seizure, the above case came to be registered against the petitioners for the offences punishable under sections 8(c) read with 20(b)(ii)(c) of NDPS Act.

Learned counsel for the petitioners submits that the petitioners are poor persons and are eking out their livelihood by doing the job of a driver and cleaner. He further submits that the petitioners are entitled for bail as mandatory provisions are not complied with effecting search and seizure.

Learned Additional Public Prosecutor opposed the application contending that all the statutory requirements are complied with and in view of Section 37 of the Act the petitioner is not entitled for any relief. He further submits that even earlier the petitioner moved an application for bail, which was rejected. Hence, he submits that as there are no changed circumstances, the request of the petitioner cannot be considered.

In order to appreciate the rival submissions made certain facts are to be referred to from the averments made in the panchanama prepared at the time of search. As seen from the record, on receipt of a credible information, the Inspector of Police along with the raid party while conducting route watch near Pedabayalu of Paderu Mandal, stopped a vehicle coming from Kedapally village. The driver of the vehicle stopped the vehicle and ran away. Then the staff found two persons in the cabin and some white jute bags in the cabin. On questioning, the two persons informed that the bags contain dry ganja. They were informed about search to be made either before the Tahasildar or before the Inspector himself who is a Gazetted Officer. The Accused are alleged to have stated that no other Gazetted Officer is required as the Inspector of Police being Gazetted Officer they opted for search by the Inspector of Police. After seizing the contraband, the samples were taken from each bag and were kept in a paper and on that paper box chits containing the signatures of mediators and accused were pasted.

The learned counsel for the petitioners mainly relied upon the judgment of the Constitutional Bench in **State of Punjab v. Baldev Singh**^[1] to show that there was non-compliance of Section 50 of the Act. In the said case, the Constitutional Bench of the Apex Court was dealing with an issue, where the contraband was seized from the person of the accused. Dealing with the said aspect, it has been held that when empowered officer or a duly authorized Officer acting on a prior information is about to search a person, it is imperative for him to

inform the concerned person of his right under sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for a search. It was held that if there is any failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate, the same would cause prejudice to the accused. It was also held that whether or not the safeguards provided in Section 50 have been duly observed or not would have to be determined by the Court on the basis of evidence adduced at the trial. The finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. It has also been held that the presumption under Section 54 of the Act can be raised only after prosecution has established that the accused was found in possession of the contraband in a search conducted in accordance with the mandate of Section 50.

From the judgment of the Apex Court referred to above, it is clear that the mandate of Section 50 would apply if the search is made on the person of the accused and the contraband is sought to be recovered from the person of the accused. But the situation on hand is different. Here is a case where the contraband was seized from a lorry.

In **Gurbax Singh v. State of Haryana**^[2], the Apex Court distinguished the search of person from search of the premises. It has been held that where an empowered officer or a duly authorised officer acting on prior information is about to carry out search of a "person" as distinguished from search of "premises", it is imperative for that officer to inform the person concerned of his right under sub-section 1 of Section 50 of being taken to the nearest Gazetted Officer or nearest Magistrate for making the search.

In **State of Himachal Pradesh v. Pawan Kumar**^[3] the Apex Court explained the meaning and scope of the word "person". A Three Judge Bench held that search of a 'bag, briefcase' or any such article

or container etc., which is being carried by the accused is not a search of a person and Section 50 of the Act would not apply.

Therefore, the argument of the learned counsel for the petitioners that the mandatory requirement of Section 50 viz., informing him about the search before a Magistrate or a Gazetted Officer has not been complied with, cannot be accepted. Apart from that, it is also to be noticed that the averments in the panchanama clearly indicate that the accused were informed about their right to be searched before a Tahasildar or a Gazetted Officer. But the accused opted to be searched by the Inspector himself as he is also a Gazetted Officer. Therefore, even under this count, it cannot be said that there was no compliance of Section 50, which in strict terms may not be required since it is not the case of the prosecution that the contraband was seized from the person of the accused.

The next ground urged by the learned counsel for the petitioner is that the contraband was not seized as per the guidelines laid down in standing orders. It may be useful to extract the relevant portion of standing order, which is as under :

"2.9: The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelope should bear the S.No. of the package(s)/containers from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope which should also be sealed and marked "secret-drug sample/Test memo" to be sent to the chemical laboratory concerned."

As per the standing order referred to above, the sample and duplicate should be kept in heat sealed plastic bag as it is convenient and safe. The said plastic bag should be kept in a paper envelope which is sealed properly. Such sealed envelope may be marked as original and duplicate. Though the learned counsel for the petitioners tried to impress upon the Court by contending that the said requirement is not followed, but the averments in the panchanama

clearly disclose that the sample was initially kept in a paper and on that paper packet chits containing the signatures of mediators and accused and then the same was sealed giving markings. Therefore, the grievance of the petitioners that the requirement of the standing orders are not complied with, cannot be considered. But, however the learned Public Prosecutor submits that these standing orders are not mandatory and they are issued only as guidelines for the Investigating Officer. In **State of Punjab v. Makhan Chand**^[4], the Apex Court after referring to **Khet Singh v. Union of India**^[5], held as under :

“10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody.”

Even assuming for the sake of arguments that there was no strict compliance of standing order but as held by the Apex Court they are only guidelines given to be followed by the Investigating Agency and any violation there of does not invalidate either search or seizure.

As held by the Apex Court in **State of Madhya Pradesh v.**

Kajad, ^[6] Section 37 of the N.D.P.S. Act enjoins that a person accused of an offence for imprisonment of five years or more shall generally be not released on bail. It has been held that negation of the bail is a rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For the purpose of granting bail, the Court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of offences with which he is charged and further he is not likely to commit any offence while on bail. It has been held that the conditions for grant of bail specified in Clause (b) of subsection (1) of section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. It has been held that liberal approach in the matter of bail under the N.D.P.S. Act is uncalled for. Since the court is satisfied that there is enough material on record to prove the guilt of the accused and in the light of Section 37 of the Act, I am afraid the petitioners are not entitled for the relief. Having regard to the circumstances stated above, I am not inclined to consider their request and accordingly, the same is dismissed.

Accordingly, the Criminal Petition is dismissed.

JUSTICE C.PRAVEEN KUMAR

Date: 30.03.2016
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^[1] AIR 1999 SC 2378

^[2] (2001(3) SCC 28)

^[3] (2005)4 SCC 350

^[4] (2004(3) SCC 453)

^[5] (2002)4 SCC 380

^[6] (2001)7 SCC 673