

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.530 of 2016

Arising Out of PS.Case No. -215 Year- 2014 Thana -KUDRA District- BHABHUA (KAIMUR)

=====

1. Virendra Kumar Lohara Son of Bisheshwar Lohra Resident of Village- Sili, PS. Sili District Ranchi (Jharkhand) at Present residing /at in the house of Girdhari Mahto at Chutia PS chutti, Distt Ranchi.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Vidramdeo Singh, Advocate
Mr. S.N. Prasad, Advocate

For the Respondent/s : Mr. Mayanand Jha, APP

=====

CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
and

HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA)

Date: 18-12-2017

This appeal has been preferred by the appellant against the judgment dated 12.02.2016 and order of sentence dated 17.02.2016 passed by Sri Arun Kumar, Sessions Judge, Kaimur at Bhabhua in S.T. No. 132 of 2012, whereby the appellant was convicted for the offence punishable under Sections 20(b)(ii)(C) and 22(C) of the NDPS Act (hereinafter referred to as “the Act”) and was sentenced to undergo rigorous imprisonment for fifteen years with a fine of Rs. One Lakh and further under Section 476 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment of five years with a



fine of Rs. 5,000.

2. Main plank of the submission of the appellant, challenging the legality of the impugned judgment is non – compliance of provisions of Section 50(1) of the Act. It would be profitable for the court before proceeding to consider the submission made at the bar to narrate the facts that have emerged from the record. They are as follows;-

3. The raiding team consisted of P.W. 5, who was then posted as Circle Officer, Kudra. It was so on getting information about the transportation of the narcotic /psychotropic substance in the vehicle, a request was made to P.W. 5 to be present with the raiding team. P.W. 5 has specifically deposed to this effect. The aforesaid factum has not been disputed by the defence. According to the prosecution case, when the vehicle was about to be intercepted by the raiding team while moving towards *Mohania*, the appellant driving the vehicle took a U-turn and drove back to *Kudra*. The vehicle was, however, intercepted on the highway when he deserting the vehicle attempted to flee away but on chase apprehended by the raiding team. The person of the appellant was searched in presence of P.W. 5 and other members of the raiding team, whereby, a mobile and some sim cards were recovered. A seizure memo was drawn, which was signed by the witnesses to the seizure as well as P.W. 5. The signature of the



appellant was also obtained thereon. Thereafter, the informant (P.W. 3) searched the vehicle and recovered 25 polythene packets containing *ganja*, total weight of which was 96 kilograms. It was recovered from the dicky of the vehicle. Seizure memo (Ext. 7) was drawn by the informant in presence of the witnesses including P.W. 5. A copy was also given to the appellant and endorsement to this effect was obtained on the seizure memo. Thereafter, samples were drawn and sealed.

4. It has been argued with much vehement that as the raiding team had also searched the person of the appellant, it was incumbent on the prosecution to strictly comply with the provision of Section 50(1) of the Act. There is no evidence available on record that the appellant was even orally informed about his right of being searched of his person in presence of the Gazetted Officer or the Magistrate. On account of such breach of the provision of the Act, the prosecution is bound to fail. Reliance in this regard has been placed on the decision reported in **AIR 2014 SC 1384, State of Rajasthan v. Parmanand and Anr.** He also relied on the decision in the case of **State of Punjab v. Baldev Singh** reported in **AIR 1999 Supreme Court 2378.**

5. Counsel for the State combating the said submission of the



defence has argued that the Magistrate (P.W. 5) was present with raiding team and in his presence the person of the appellant as well as the vehicle occupied by him before leaving the same, were searched. It is not the prosecution case that the search was carried out by a Police Officer duly authroised under Section 42 of the Act. As the prosecution case would reveal, initially the vehicle was attempted to be intercepted at *Mohania*. Apprehending danger, the vehicle took a U-turn and drove towards *Kudra*. As there was sufficient time, an information was given to *Kudra* police about the details of the vehicle and at the same time, P.W. 5 was also informed to be present with the raiding team. On these facts, clearly established at the trial, it has been argued that the protection to the suspect given under Section 50(1) of the Act, shall not be applicable. Undisputedly, the person of the appellant as well the vehicle, he was moving on, were searched in presence of P.W. 5. It has also been submitted that if the evidence on record relating to search & seizure is found cogent and reliable, a presumption in law arises with respect to the culpable mental state of the accused as provided under Section 35 of the Act and with regard to the possession of the illicit article/contraband substance. Faced with this presumption in law raised against the appellant, materials on record placed by the defence including the statement of the appellant



made under Section 313 of Code of Criminal Procedure, do not emphatically, rebut the same. In this regard, he placed the evidence of P.W. 3 (informant), P.W. 5 (Magistrate) and P.W. 6 (the Investigating Officer), wherein, they are consistent with regard to the compliance of other formalities required under the Act. It is a case, where, the samples drawn from the packets recovered from the vehicle along with the accused were produced before the learned court below on the following day. Nothing has been shown by the defence to discredit their evidence. Under order of the trial court, samples were drawn in presence of the Judicial Magistrate, which was sent to two laboratories by the Judicial Magistrate, which are Exts. 8 and 8/1. The F.S.L. report submitted by the F.S.L., Patna, (Ext. 9) unerringly established that the samples drawn from the packet (s) recovered from the vehicle was *ganja*/psychotropic/addictive substance.

6. Altogether six witnesses have been examined. They are :- P.W. 1 – Ramadhar Sharma (S.I. of police), P.W. 2- Raj Kumar Chaubey, (seizure list witness, who was declared hostile as he did not support the prosecution case), P.W. 3- Ram Rahan Singh (informant and S.I. of Kudra police) P.W. 4- Nutan Kumar, (driver of the vehicle and saif jawan as well as member of raiding team), P.W. 5 – Md. Allaudin Ansari, (the Circle Officer, Kudra) and P.W. 6 – Rajiv Ranjan (



Investigating Officer).

7. P.W. 3 is the informant in this case, according to his evidence, on 14.11.2014, he on getting an information that a car was coming with some contraband articles, he requested for deputation of a Magistrate. His evidence further shows that he along with other police party and Circle Officer, Kudra, intercepted the vehicle on the National Highway, near Kudra coming from Mohania and the driver and other person sitting in the car tried to escape but were caught and in presence of Circle Officer, car was searched, from which 25 polythene packets were recovered, which was ganja/Psychotropic addictive substance and total weight of the seized articles was 96 kilogram. Further from the car, four number plates of different numbers were also recovered. Apprehended person disclosed their name as Virendra Kumar Lohara (appellant) and Chottu Yadav. Thereafter, their persons were also searched and one Mobile phone and some sim cards were recovered and seizure list was prepared in presence of Vikash Kumar Gupta, Raj Kumar Chaubey, (P.W. 2) and Circle Officer (P.W. 5) and the signature of appellant and co-accused Chottu Yadav was obtained. Seizure list was marked as Ext. 2. His evidence further disclosed that the accused persons confessed their guilt in their confessional statement. His evidence also shows that



accused persons were kept in the *Thana Hazat* and seized articles were kept in *Malkhana* and, thereafter, he and Investigating Officer produced the accused persons and the seized articles before the Court. Samples were prepared and photography of the process was also done. This witness has been cross-examined at length but there is nothing in his cross examination to doubt his testimony rather in para -10 of his cross-examination, he has stated that he made the entry in the station diary and he was also present along with Investigating Officer at the time of production in the court.

8. P.W. 6 is the Investigating Officer in this case and his evidence also disclosed that the investigation of this case was handed over to him and he has produced the appellant and co-accused along with copy of F.I.R, confessional statement and the sealed seized articles in Court. His evidence further shows that he prayed for preparation of samples and as per order of District & Sessions Judge, one Judicial Magistrate was deputed and in his presence, the samples were prepared and photography of the said process was also done. The aforesaid samples were sealed and countersigned by the Magistrate and marked as A1 - A2 and Y1 -Y2, which were sent to FSL Patna and Kolkata. This witness has also stated that he has recorded the statement of witness Raj Kumar Chaubey, who had stated before him



that dickey of red colour Hyundai car was searched in his presence and *ganja*/contraband articles were recovered. His evidence also shows that report of F.S.L. has been received after submission of charge-sheet, which he has submitted in the Court.

9. P.W. 5 is the Circle Officer in this case and his evidence shows that in his presence, dickey of the car was searched, from which *ganja* was recovered in presence of two independent witnesses. His evidence also shows that the person of those accused persons were also searched in his presence but no objectionable articles were recovered. Thereafter the seized articles were weighed on electronic weighing machine, which revealed the total weight of seized article as 96 kgs. Thereafter, the packet was sealed, on which signatures of the witnesses were obtained and he also put his signature and identified his signature in the court.

10. P.W. 2 is the seizure list witness, though he has been declared hostile by prosecution and has been cross-examined on his previous statement before police but his evidence shows that he along with Vikash Kumar Gupta, went at the place of occurrence and saw a red colour Hyundai car standing there and he stated that car was searched. However, again he stated that search was not made there and the police took the car and the accused persons to police station and he



was called at the police station, where dickey of the car was searched from which, 25 small packets containing *ganja* and four different number plates were recovered. As such even in spite of the fact that this witness has been declared hostile, he has admitted about the recovery of *ganja* from the dickey of the car and also about the arrest of accused persons, who were sitting in the car and attempted to flee away.

11. So far other witnesses i.e. P.W. 1 and P.W. 4 are concerned, they are also police personnel and their evidence also supports the prosecution case of recovery as well as seizure.

12. Learned counsel for the appellant has drawn our attention towards evidence of P.W. 5 in para -15, wherein it has been stated that at 8. A.M., he had returned to his house, whereas it is the prosecution story that at 7'O clock, they received information and at 7.05 'O' Clock, proceeded from the police station. Thereafter, the vehicle was intercepted and seizure list was prepared, which certainly casts doubt about the interception of the vehicle and seizure of contraband articles. However, the said argument of learned counsel for the appellant cannot be acceded to as there is consistent evidence of witnesses with regard to search & seizure of the vehicle and recovery of huge quantity of contraband articles. The minor discrepancy in the evidence of



Circle Officer (P.W. 5) is not of much relevance as his evidence was recorded in this case after lapse of two years from the date of occurrence, hence some discrepancy is bound to occur due to long gap.

13. Learned counsel for the appellant has mainly confined his argument on non compliance of Section 50(1) of the Act, which provides that before search of a person, authorities concerned are bound to inform the person to be searched about his right to be searched in presence of a Magistrate or Gazetted Officer and in absence of any Magistrate, his right to be produced before the Magistrate for his search. In this context, he has relied upon a five Judge Bench Judgment in the case of **State of Punjab v. Baldev Singh** reported in **AIR 1999 Supreme Court 2378**, in which it was held that non – compliance of the above provision shall vitiate the conviction. Submission of learned counsel for the appellant is that in this case also, though seizure of *ganza* is from dickey of the car but person of the appellant has been searched, which would appear from seizure list Ext. 2. as such the requirement of compliance of Section 50(1) of the Act, is necessary in the facts of the present case also. In support of his contention, he relied upon a decision of Hon'ble Apex Court in the case of **State of Rajasthan v. Parmanand and Anr** (supra).

14. In the present case, as discussed above, contraband article was seized from the dickey of the car, which was occupied by the appellant and a seizure list was prepared in presence of the Circle Officer (P.W. 5) and, thereafter, seized articles were produced before the Special Judge, who



authorized a Magistrate for preparation of sample. Thereafter, sample was prepared on which, the signature of witness as well as accused persons has also been obtained, thereafter, seized articles were sealed in presence of the accused persons and the Magistrate. Evidence available on record also shows that samples were sent to FSL, Patna and CRCL, Kolkata and report submitted by F.S.L., Patna, (Ext. 9) clearly shows that it was *ganja*/psychotropic addictive substance. It further appears that during the trial, witnesses though are police witness but they have supported the prosecution case of recovery of *ganja* from the dickey of the car and also supported the prosecution that the appellant was arrested while trying to escape from the car. Hence, consistent evidence is available so far recovery of *ganja*/psychotropic addictive substance from dickey of car is concerned and further appellant and another accused person were arrested on the spot. It further appears that remaining of sample has been produced in the court as Ext. M/1. In the aforesaid background, there shall be a presumption under Section 35 of the Act, of culpable state of mind of the accused persons and also there shall be presumption under Section 54 of the Act.

15. Considering the aforesaid facts proved by enough evidence, learned counsel for the appellant has rightly confined his argument only to non compliance of Section 50(1) of the act in this case, which is mandatory and non-compliance of the same has vitiated the conviction. For better appreciation of the fact, Section 50 of the Act,



is reproduced herein below for ready reference:-

50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

16. On plain reading of Section 50 of the Act, it appears that the safeguard or protection to be searched in presence of Magistrate or Gazetted Officer has been incorporated in Section 50 of the Act, to ensure that persons are only searched with a good cause. The Hon'ble Apex Court, while considering the application of Section 50 of the Act, in the case of **State of Punjab v. Baldev Singh** (supra) has observed in para -53 and 55 as follows:-

“53. We, therefore, hold that an illicit article seized from the person of an accused, during 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 the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.”



“55. On the basis of the reasoning and discussion above, the following conclusions arise :

(1) That when an empowered officer or a duly authorised officer acting on 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 making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of [Section 50](#) of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by [Section 50](#) at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in [Section 50](#) have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of [Section 50](#), and



particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial;

(6) That in the context in which the protection has been incorporated in [Section 50](#) for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of [Section 50](#) are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of [Section 50](#), may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in [Section 50](#) of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under [Section 54](#) of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of [Section 50](#). An illegal search cannot entitle the prosecution to raise a presumption under [Section 54](#) of the Act

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of [Section 50](#) of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case.”

17. It appears that after amendment, procedural requirement has been diluted by the insertion of Sub-Section 5 and 6 to this Section by Act 9 of 2001, which read as follows:-

1[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document,



he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior

18. In view of the same, this matter was again referred in the case of **Karnail Singh v. State of Haryana** reported in (2009) 8SCC 539, wherein, it has been held that *“Through this amendment the strict procedural requirement as mandated by Baldev Singh's case was avoided as relaxation and fixing of the reasonable time to send the record to superior official as well as exercise of Section 100 of CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance of Section 50 by Baldev Singh's case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh's case is diluted”*

19. Later on the said question again arose for consideration before



the Constitution Bench of Hon'ble Apex Court in the case of **Vijaysinh Chandubha Jadeja vs. State of Gujarat** reported in **(2011) 1 PLJR 100 SC** and the Hon'ble Apex Court, considering all the cases including the case of **Karnail Singh v. State of Haryana** (supra) as well as the case of **State of Punjab v. Baldev Singh** (supra) and has come to following conclusion in para 22:-

"22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under [Section 50\(1\)](#) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of [Section 50](#) of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in Re Presidential Poll¹⁴, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of [Section 50](#) of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of [Section 50](#) nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of [Section 50](#) had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though [Section 50](#) gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and



creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of (1974) 2 SCC 33 the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.”

20. Considering the aforesaid discussion, so far Section 50 of the Act, is concerned, it appears to be mandatory in nature when the search of a person of a suspect is required but the same does not appear to be applicable in a case where the recovery is from dicky or bag etc.

21. Learned Counsel for the appellant has come with an argument that in this case though *ganja* was not recovered from his person but as fact proved the person of the appellant was also searched, as such compliance of Section 50 of the Act was must in the facts and circumstances of the case. In support of his contention, he has relied upon a decision in the case of State of Rajasthan v. Parmanand and Anr. (supra), in which it has been held in para 12 to 14 as follows:-

“12. 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. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, [Section 50](#) of the NDPS Act will have application.

13. It is now necessary to examine whether in this case, [Section 50](#) of the NDPS Act is breached or not. The



police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under [Section 50\(1\)](#) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.

14. In our opinion, a joint communication of the right available under [Section 50\(1\)](#) of the NDPS Act to the accused would frustrate the very purport of [Section 50](#). Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the [NDPS Act](#) carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under [Section 50\(1\)](#) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval. It bears repetition to state that on the written communication of the right available under [Section 50\(1\)](#) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.



22. In this case person of the appellant has also been searched but prosecution is relying on the search & seizure of *ganja*/psychotropic addictive substance, which was made from the dickey of the car and not from the person of the appellant. In such a situation, a question arises as to whether in that case also conviction shall vitiate on the ground that the accused has not been informed of his right of being searched in presence of a Magistrate or a Gazetted Officer or he may be produced before a Magistrate or Gazetted Officer. No doubt, in the case of State of Rajasthan v. Parmanand and Anr. (supra), Hon'ble Apex Court has observed that in that case also requirement of compliance of Section 50 is must, however, testing the aforesaid points from another angle, it appears from perusal of evidence the Circle Officer (P.W. 5), was present at the time of search and in his presence search and seizure was made and seizure list was prepared on the spot itself and signature of the independent witnesses has also been obtained. No doubt one of the independent witness has been examined in this case as P.W. 2, however, he has been declared hostile and another one has not been examined in this case but seizure list shows that the signature of accused was also obtained and a copy of seizure list was also handed over to them. Thereafter, their



confession was recorded by the police. It further appears that accused persons were produced before the Special Judge along with seizure list and a Magistrate was deputed for preparation of samples and in his presence samples were prepared on which signature of witnesses have been obtained as well as the signatures of the accused persons. As such, there appears to be a substantial compliance of Section 50 (1) of the Act, in this case.

23. We are mindful of the fact that under Section 50 of the Act, before search of any accused, he has to be informed about his right to be searched in presence of Magistrate or Gazetted Officer. In the present case recovery of contraband is from the dickey of the car, however, person of the appellant has also been searched and as such submission of learned counsel for the appellant that in the above circumstance non compliance of provision of Section 50 of the Act vitiate the conviction of the appellant as though a Circle Officer was present there and there is nothing available on record to show that they have informed the accused person about his statutory right to be searched before a Magistrate or Gazetted Officer. Hon'ble Apex Court in a recent decision in the case of **Dilbagh Singh v. State of Punjab** reported in **2017 (1) PLJR 294 (SC)**, dealing with a case of similar nature, in which persons of the accused was also searched and the



search yielded currency of 225/- Rs. and 125/- Rs. Respectively, the Hon'ble Court after considering the Judgments in the case of **State of Punjab v. Baldev Singh (supra)** and **Vijaysinh Chandubha Jadeja vs. State of Gujarat (supra)**, in which compliance of Section 50, was held to be mandatory, has observed in para – 13 as follows:-

“(13) Whereas the conditions under which, the search as contemplated in [Section 50](#) are limited only to the contingency of search of any person, [Section 57](#) prescribes that whenever any person makes any arrest or seizure under the Act, he would within 48 hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. As it is no longer res integra that the application of [Section 50](#) of the Act is comprehended and called for only in the case of search of a person as distinguished from search of any premises etc. having been authoritatively propounded by the two Constitution Bench rulings of this Court in [State of Punjab vs. Baldev Singh](#) – (1999) 6 SCC 172 and [Vijaysinh Chandubha Jadeja vs. State of Gujarat](#) – (2011) 1 SCC 609, further dilation in this regard, in the attendant facts and circumstances of the case, is considered inessential. This is more so as the contraband in the case in hand had been recovered from inside the car in which the petitioner and the co-accused were travelling at the relevant point of time and not in course of the search of their person. Noticeably, it had also not been the plea of the defence ever that the alleged seizure according to the accused persons had been from their person. In the contextual facts therefore, [Section 50](#) has no application to espouse the cause of the defence.

24. Facts of the case in hand is also similar to that decided by Hon'ble Apex Court in the case of *Dilbag Singh v. State of Punjab* (supra) as in this case also recovery is from the car and not from the possession of the appellant and though person of the appellant was also searched but nothing except one mobile and some sim cards were



recovered and as stated above, prosecution is also not relying upon the personal seizure of the appellant. Similar view has been taken by Hon'ble Supreme Court in the case of **Babubhai Odhavji Patel and Others v. State of Gujarat** reported in (2005) 8 SCC 725, in that case also no recovery was made from the person of the accused rather there was an admitted recovery from the tanker lorry, of which the appellant was owner. In the present case also, no recovery has been made from the person of the appellant rather it is an admitted fact that recovery has been made from the dickey of the car and the accused persons were arrested on spot, while trying to escape.

25. From the discussion made above, the contention of appellant regarding non – compliance of Section 50(1) does not appear to be convincing and is certainly of no help, whereas, there are sufficient cogent, consistent and reliable materials available on record with regard to recovery of commercial quantity of *ganja*/psychotropic addictive substance from the dickey of the car. It further appears that procedure prescribed under Section 52(A) has also been followed as well as the fact that the remaining of the samples were also produced in the Court, marked as material Ext. M-1. In view of the discussions made above, it appears that there is indeed compliance of Section 52 (A) of the Act and so far compliance of Section 50(1) of the Act is



concerned, in the facts and circumstances of the case, same is not required whereas there are consistent evidence available on record to show the recovery of *Ganja* from the dickey of the car as such, there is presumption of culpable state of mind under Section 35 of the Act against the appellants and also a presumption under Section 54 of the Act for recovery of contraband articles and no satisfactory explanation or evidence has been brought on record to rebut the aforesaid presumption.

26. In this case appellant has been convicted under Section 20(b)(ii)(C) and 22(C) of the NDPS Act as well as under Section 476 of Indian Penal Code as along with contraband articles, four number plates of different registration number was also recovered. However, it has rightly been submitted by learned counsel for the appellant that though it is alleged that four number plates were recovered, however, there is nothing on record to prove that those recovered number plates were verified by the authorities concerned nor there is any evidence that those number plates were being used by the appellant. The trial court in a very mechanical manner convicted the appellant under Section 476 of Indian Penal Code as well.

27. Considering the facts and circumstances of the case so far conviction of appellant under Section 20(b)(ii)(C) and 22(C) of the



NDPS Act is concerned, I do not find any infirmity in the judgment dated 12.02.2016 and order of sentence dated 17.02.2016 passed by Sri Arun Kumar, Sessions Judge, Kaimur at Bhabhua in S.T. No. 132 of 2012 and the same is hereby upheld. So far conviction of appellant under Section 476 of Indian Penal Code is concerned, the same appears to be not sustainable and is hereby set aside.

28. Accordingly, this appeal is disposed of.

(Vinod Kumar Sinha, J)

I agree.

(Kishore Kumar Mandal, J)

sunil/-

AFR/NAFR	NAFR
CAV DATE	12.12.2017
Uploading Date	19.12.2017
Transmission Date	19.12.2017

