

**412 IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA S-641-SB of 2015.

Date of Decision: 12.05.2017.

Gagan Khanna

... Appellant

Versus

State of Punjab

... Respondent

CORAM : Hon'ble Mr. Justice Jitendra Chauhan

Present : Mr. Veneet Sharma, Advocate,
for the appellant.

Mr. Luvinder Sofat, AAG Punjab.

JITENDRA CHAUHAN.J.

This appeal is directed against the judgment and order dated 07.01.2015, passed by Judge, Special Court, Amritsar vide which the appellant was convicted under Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short “the Act”) and sentenced to undergo RI for two years and to pay fine of Rs.2000/- with default stipulation.

In brief the case of the prosecution as mentioned in the judgment passed by the trial Court is as under:-

“In nutshell, story of the prosecution is that on 25.12.2012, ASI Gurwinder Singh, along with other police officials, was going from Namak Mandi Chowk to Shati Nagar, in connection with patrol

duty. When police party reached near Gagan tea stall, one clean shaven person having polythene envelope/Lifafa in his right hand tried to throw the same. He was apprehended. He told his name as Gagan Khanna. Witness from public was tried to be joined, before conducting his search, but none agreed. On search of polythene envelope, loose capsules of Parvon Spas were found. 20 Capsules were taken out and put in a small plastic box, which was converted into a parcel. Remaining capsules were 580 and same were put in a separate plastic box and converted into a parcel. Both the parcels were sealed with his seal impression "GS" by ASI Gurwinder Singh, who also prepared form M-29 and sample impression of seal. Gagan Khanna could not produce any license or bill for keeping the capsules. Ruqa was sent through HC Kulwinder Singh to the police station for registration of a case under Section 22 of NDPS Act against accused Gagan Khanna. He was arrested. Necessary memos were prepared. Site plan of spot was also prepared. On completion of formalities at the spot, ASI Gurwinder Singh took case property and accused to police station and presented them before Inspector Ashok Kumar SHO, who put his seal "AK" on both

the parcels and on form M-29 and kept them in double lock of malkhana. Gagan Khanna was kept behind bars. On 26.12.2012, ASI Gurwinder Singh produced the aforesaid articles before the Magistrate and got the same seen. On 28.12.2012, sample parcel was sent to the office of chemical examiner, Kharar through HC Narinder Kumar.”

On the presentation of challan, copies of documents as required under Section 207 Cr.P.C were supplied to the accused free of cost.

Charge under Section 22 of the NDPS Act was framed against the accused to which the accused pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined PW-1, ASI Gurwinder Singh. I.O., PW-2, ASI Vinod Kumar, PW-3 HC Narinder Kumar, PW-4 Inspector Ashok Kumar and thereafter closed its evidence.

The statement of accused was recorded under Section 313 Cr.P.C in which all the incriminating circumstances appearing in the prosecution evidence were put to the accused which the accused denied and pleaded false implication.

No evidence in defence was led by the accused.

After appraisal of the evidence, the learned trial

Court, vide judgment and order dated 07.01.2015 convicted and

sentenced the accused as narrated above.

Feeling aggrieved against the judgment and order dated 07.01.2015 passed by the trial Court, accused has preferred the present appeal.

The solitary argument advanced by the learned counsel for the appellant is that the provisions of Section 50 of the Act have not been complied with as no offer was given to the appellant of being searched before a Magistrate or a Gazetted Officer. It is further submitted that in case the bag carried by a person is searched without there being any search of his person, Section 50 of the Act will have no application but if the bag carried by the accused is searched and his person is also searched, then Section 50 of the Act will have application. In the present case, since the bag of the appellant was searched and subsequently the personal search of the appellant was carried out, it was mandatory for the I.O. to comply with the provisions of Section 50 of the Act.

On the other hand, the learned State counsel contends that the prosecution has successfully established its case against the accused. The Court below has rightly convicted and sentenced the accused/appellant. It is a case of search of the bag so, the provisions of Section 50 of the Act are not attracted.

I have heard the learned counsel for the parties and have gone through the case file.

As per the case of the prosecution on 25.12.2012, ASI

Gurwinder Singh along with other police officials were going from Nimak Mandi Chowk to Shakti Nagar and when the police party reached Gagan Tea Stall, the appellant carrying polythene bag in his right hand tried to throw the same but was apprehended. On search of the polythene bag, 600 loose capsules of PARVON SPAS were found and accordingly, on the basis of ruqa, FIR in question was registered against the appellant. The personal search of the appellant has been proved on record vide recovery memo Ex.P-6 and an amount of Rs.50/- was recovered from the right pocket of the Pajama worn by the appellant. The factum of recovery has been proved by PW-1 ASI Gurwinder Singh.

In **State of Rajasthan vs. Parmanand and another** **2014 RCR (Criminal) 40** the Hon'ble Supreme Court held as under;-

“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.

Again in **Baljinder Singh vs. State of Haryana** **2015(1) RCR (Criminal) 972** the Hon'ble Supreme Court held as under:-

“During the course of arguments, learned counsel for the State also submitted that there was no necessity of

complying with the provisions of Section 50 of the NDPS Act, therefore, the shortcomings by the Investigating Officer in issuance of the notice (Ex.PG) to the appellant should be ignored. I am afraid that such an argument raised by the learned counsel for the State can be sustained. If the Investigating Officer, an account of a recovery of chance would not have opted for issuance of a notice to the appellant in consonance with the mandate of Section 50 of the NDPS Act, in that eventuality there might not be any compulsion on the part of the Investigating Officer to comply with the provisions of contained in Section 50 of the NDPS Act but once he has opted to comply with the provisions of Section 50 then it was obligatory for him to adhere to the same in letter and spirit.”

Admittedly, in the present case, the personal search of the accused was conducted and no offer of being searched in the presence of a Magistrate or gazetted officer was given to him. The provisions of Section 50 of the Act are mandatory. Since that has not been done, the prejudice caused to the appellant is writ large. The benefit of the same has to be extended to him. Therefore, the conviction and sentence of the appellant cannot be sustained. Consequently, the

present appeal is allowed and the impugned judgment and order are set aside. The appellant is acquitted of the charge framed against him. The bail bonds and surety bonds stand discharged.

12.05.2017.
SN

(JITENDRA CHAUHAN)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No