

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

LPA No.636 of 2015 (O&M)

Date of Decision : 19.09.2017

Suba Singh

..... Appellant

Versus

State of Punjab and others

..... Respondents

**CORAM : HON'BLE MR. JUSTICE MAHESH GROVER
HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI**

Present : Mr. Vipul Jindal, Advocate
for the appellant.

Mr. P.P.S.Thethi, Addl. A.G., Punjab.

MAHESH GROVER, J. (Oral)

This appeal is directed against the judgment dated 06.04.2015,
passed by the learned Single Judge.

The appellant who is facing number of cases under the
Narcotic Drugs & Psychotropic Substances Act, 1985 (in short 'the NDPS
Act') approached the writ Court with a prayer that in order to allay his
apprehension of false implication, his request for getting his personal
search before a Magistrate ought to be granted as a measure of compliance
of Section 50 of the Act which is extracted herebelow:-

**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.

(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 drugs 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.”

The learned Single Judge while noticing the observations of the Hon'ble Supreme Court which were brought to its notice by the appellant himself declined the prayer by observing that the observations of the Hon'ble Supreme Court did not have an element of a mandate. Before

us, a similar argument has been raised as was before the learned Single Judge and reliance has been placed on a judgment of Hon'ble Supreme Court in **State of Punjab versus Baldev Singh 1999 (3) RCR (Criminal) 533** wherein it is observed as under:-

“27 This Court cannot over-look the context in which the Narcotic Drugs and Psychotropic Substances Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shrink from affording a real opportunity to the suspect, by intimating to him that he has a right “that if he requires” to be searched in the presence of a Gazetted Officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve dual purpose – to protect a person against false accusation and frivolous charges as also to lend creditability to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed 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.”

Reliance has also been placed on the judgment of Hon'ble Supreme Court in **Vijaysinh Chandubha Jadeja versus State of Gujarat** **2011 (1) SCC 609** wherein it is observed as under:-

*“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 Narcotic Drugs & Psychotropic Substances 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 subsection (1) of Section 50 of the Narcotic Drugs & Psychotropic Substances 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 Poll, (1974) 2 Sc 33**, 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 Narcotic Drugs And Psychotropic Substances 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 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.”

Further the reliance has been placed on the judgment of

Hon'ble Supreme Court in **Narcotics Central Bureau versus Sukh Dev Raj Sodhi 2011 (2) SCC (Criminal) 981** wherein it is observed as under:-

“6 From the perusal of the conclusion arrived at by this Court in Vijaysinh Chandubha Jadeja's case, it appears that the requirement under Section 50 of the Narcotic Drugs And Psychotropic Substances Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate and in para 32 the Constitution Bench made it clear that in order to impart authenticity,

transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate.

In all these judgments, it has been observed that in order to uphold the transparency and to infuse confidence in the accused, proceedings of the search before a Magistrate is desirable.

The learned Single Judge was right in observing that the observations of the Hon'ble Supreme Court do not have an element of mandate and rightly so the statute itself, directs an offer to the accused with an option to get searched before a Magistrate or before a Gazetted Officer.

Section 50 of the Act mandate the procedure. There can be no quarrel with the observations of the Hon 'ble Supreme Court that it would lend greater transparency and legitimacy to the search process but non-adherence to the request of an accused for a search before a Magistrate does not obviously vitiate the whole process as the statute mandates search before a Gazetted Officer 'or a Magistrate'.

Infact, we need not comment any further. In view of the observations of the Hon'ble Supreme Court which are more than clear in this regard, it will be for the accused in a given case to plead and demonstrate prejudice in case of any violation of Section 50 of the Act which obviously would depend on the procedure adopted by the Investigating Agency and if it so manifests then obviously, the trial Court necessarily has to give the benefit to the accused. The prayer as such made before us and also before the writ Court is merely based on an apprehension of a future involvement and non-compliance of the process of law. We are

of the firm opinion that such prayers ought not to be entertained by the Courts.

In view of the aforesaid discussion, no ground to interfere in the impugned judgment is made out.

Accordingly, the instant appeal stands dismissed.

(MAHESH GROVER)
JUDGE

(RAJ SHEKHAR ATTRI)
JUDGE

19.09.2017
mamta-M

Whether speaking/reasoned

Yes/No

Whether Reportable :

Yes/No