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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO.127 OF 2000**

Union of India	]	
(At the instance of Intelligence Officer,	]	
Narcotic Control Bureau,	]	..Appellants
Mumbai	]	(Original Complainant)

Versus

1.	Babu Vishwanath Verma	]
	of Mumbai, Indian Inhabitant	]
	residing at Hrudayanarayana Rigad	]
	Mishra Chawl, Nagardeo Road,	]
	Mograpada, Andheri(East),	]
	Mumbai – 400 069.	]

2.	Yeshwant Gopal Sangare	]
	of Mumbai, Indian Inhabitant	]
	Residing at Room No.3, Mohd.	]
	Pathan Chawl, Mograpada,	]
	Old Nagardas Road, Andheri(East),	]
	Mumbai – 400 069.	]

..Respondents

3.	The State of Maharashtra	](Nos.1 and 2 Original Accused)
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Mr.Venegavkar, for the Appellant.

Mrs.S.V. Sonawane, for the Stat/Respondent No.3.

Mr.Anikekt Nikam, Amicus Curie appointed Advocate for Respondent Nos.1 and 2.

**CORAM : INDRAJIT MAHANTY &
V.K. JADHAV, JJ.**

JUDGMENT RESERVED ON : 12TH DECEMBER, 2018
JUDGMENT PRONOUNCED ON : 20TH DECEMBER, 2018

JUDGMENT [Per : INDRAJIT MAHANTY, J.]

1. This is an Appeal under Section 378(4) of the Code of Criminal Procedure, 1973, filed by the Union of India against the two accused/ Respondents who have faced trial for the offences punishable under Section 20(b)(ii) read with 8(c) so also Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, NDPS Act), in the court of Special Judge under NDPS Act in NDPS Special Case No.390 of 1996 and came to be acquitted by Judgment and order dated 12th January, 1998.

2. The relevant facts of the present case are as under :

(i) On 4th June, 1996, information was received regarding alleged involvement of the Respondent Nos.1 and 2 in a drug transaction and that such transaction would take place at 4.30 p.m. at Andheri (East), Old Nagardas Road and Intelligencen Officers Shri R.S. Gavde-PW 1 and ShriM.D. Kale-PW 2 claims to have produced information before the Superintendent Shri V.S. Shahasane . Thereafter, they claimed to have discussed the matter with the Assistant Director Shri R.N. Prasad.

(ii) It is further stated that the accused/Respondent Nos.1 and 2 were apprehended on 4th June 199 and the Intelligence Officer-PW 1 Shri R.S. Gavde is stated to have informed the Respondents that they had information regarding possession of “Charas” with the said Respondents and further claimed to have informed that they could be searched before Gazetted Officer or Magistrate , if they so desire, and further informed that Superintendent Shri V.S. Shahasane (who was part of police team) was the Gazetted Officer. Apparently, the Respondents showed willingness for the search before the raiding party and produced a plastic bag with name “Saibaba Selection Tailoring Shop”, on opening of which four labs of black substance were found therein. On testing it was found that the contents of the black slabs was “Charas” and each slab weigh 500 Grams amounting total to 2 Kg.

3. On the basis of the aforesaid allegations, trial was taken up by the learned Special Court (NDPS Act) and the learned Special Judge came to the conclusion that there had been non compliance of Section 42(2) and Section 50 of the NDPS Act. Apart from the above, various other offences also arrived at.

4. Shri Venegavkar, learned counsel appearing for the Union of India, essentially challenged the findings of the learned Special Judge, in particular, regarding non-compliance of requirements of Section 42(2) as well as Section 50 of the NDPS Act. He asserts that the learned Special Judge had taken a hypo-technical view of the matter and submitted that “substantial compliance” was adequate in the matter.

5. In this respect, Shri Venegavkar placed reliance on the Judgment rendered by the Hon'ble Supreme Court in the case of **Jarnail Singh vs. State of Punjab**¹. In the said case, the Hon'ble Supreme Court dealt with the plea raised by the Appellant in the said case on the allegation of non-compliance of Section 50 of the NDPS Act and that the requisite “option” was not given to the Appellant as to whether he wanted to be searched in the presence of a Gazetted Officer or a Magistrate.

6. In Para 16 of the aforesaid Judgment the Hon'ble Supreme Court came to finding of fact that the narcotic/opium i.e. 1 kg and 750 gm was recovered from the bag (thaili) which was being carried by the Appellant; in such circumstances, Section 50 would not be applicable; since the aforesaid section can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused;

¹ (2011)3SCC 521

in case the recovery of the narcotic is made from a container being carried by the individual, the provisions of Section 50 would not be attracted.

7. Shri Venegavkar, learned counsel for Union of India submitted that in the case at hand since the contraband/charas was found from the plastic bag being carried by the appellant the finding of the learned Special Judge regarding non-compliance of Section 50 was erroneous.

8. Shri Venegavkar, learned counsel for Union of India also placed reliance on the Judgment in the case of Karnail Singh vs. State of Haryana² wherein, the Hon'ble Supreme Court, took note of the Judgment referred by it in the case of Abdul Rashid Ibrahim Mansuri v.s State of Gujarat (2000) 2 SCC 513, in which a three-Judge Bench held that compliance with Section 42 is mandatory and failure to take down the information in writing and is also required to forthwith, send a report to his immediate official superior would cause prejudice to the accused. The Hon'ble Supreme Court also considered the judgment in the case of Sajan Abraham vs. State of Kerala (2001) 6 SCC 692, in which a three-Judge Bench held that Section 42 was not mandatory and substantial compliance was sufficient.

9. In this respect, our attention was drawn by Mr.

2 (2009)8 SCC 539

Venegopal, learned counsel for Union of India to para no. 35 d, where the Hon'ble Apex Court stated as follows :

“ Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

10. Shri Aniket Nikam, Amicus Curie appearing for the private respondent on the other hand also placed reliance on the Constitution Bench Judgment of the Hon'ble Supreme Court in the case of Karnail Singh vs. State of Haryana and in particular para 35, in which it is observed thus :

“35. In conclusion, what is to be noticed is that Abdul Rashid' did not require literal compliance with the requirements of Sections 42 (1) and 42 (2) nor did Sajan Abraham hold that the requirement of Sections 42 (1) and 42 (2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42 (1) and thereafter, as soon as it is practical, record the information in writing and forthwith

inform the same to the official superior.

(c) In other words, the compliance with the requirements of Section 42 (1) and 42 (2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy so such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

11. Shri Aniket Nikam sought to contend that the Constitutional Bench of the Hon'ble Supreme Court clearly laid down in para (a) as noted above that the Officer on receiving the information of the nature referred to in sub-section (1) of Section 42 from any person had to record it in writing in

the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

12. Shri Aniket Nikam further submitted that the Hon'ble Supreme Court also laid down in the very same Judgment the consequences of non-compliance in para 35(d), where the Hon'ble Apex Court came to hold as follows :

“While total non-compliance with requirements of sub-section (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42.

13. Shri Aniket Nikam submitted that the facts of the present case would clearly indicate that there has been complete non-compliance of sub-section (1) and (2) of Section 42 of the NDPS Act, which is held to be impermissible by the Hon'ble Apex Court and therefore, contention advanced on behalf of the Appellant-Union of India about “subsantial compliance” does not at all rise for consideration in the present case.

14. In this respect, Shri Aniket Nikam drew out attention to the evidencen of PW 1-Ramchandra Shridhar Gawde who was Intelligence

Officer of the Narcotic Control Bureau, who had claimed to have received information from an informant on 4th June, 1996 at 7.45 a.m. informing him about the likelihood of two persons being involved in narcotic drugs, likely to be making a transaction in such narcotic drug later on. He further stated that the informant came to their office at 11.30 a.m. on the same day and he told regarding narcotic transaction by two persons in the morning at Andheri at about 4.30 a.m. In his cross-examination, he has categorically stated that the information received in the morning was not taken down in writing in information book but there was no signature of the superior officer on copy of information in token of having received the same. In this regard, the said witness claimed that he recorded the gist of information on 4th June 1996, in which the informer, PW 1 and other colleagues have signed thereon. Admittedly, this piece of document is a "loose sheet of paper" which has been typed out. The answer in cross-examination to Question No.124 clearly confirms that while the office did maintain an "information book", the information received by him was never entered in the said book. But to the contrary PW 1 Ramchandra Gavde claims in para 13 of his examination-in-chief that they discussed the said information with Assistant Director, A.N. Prasad. In the light of aforesaid submissions, Shri Aniket Nikam contends that there has been non-compliance of Section 42(2) and requirements of Section 50 at all. -

15. Insofar as the judgment being relied upon by the learned counsel for the Union of India i.e. the case of **Jarnail Singh vs. State of Punjab is concerned**, Shri Aniket Nikam contends that in the facts of the said case, there had been no search of the body of the accused/appellant therein. Apart from that, he placed reliance on the earlier Judgment of the Hon'ble Supreme Court in the case of **Dilip & Anr. v. State of M.P.**³, in which the Division Bench of the Hon'ble Supreme Court noted that, when a search is carried out on the basis of information, of both of the persons of the accused and nothing was found on their person, but on search of the scooter that they were riding, "Opium" contained in plastic bag was recovered and it was held that :

"Indisputedly, however, effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses, which would of course be considered on the facts and circumstances of each case."

16. The provisions of Section 50 might not have been required to be complied so far as the search of scooter is concerned, but keeping in view the fact that persons of the accused was also searched, it was obligatory on the part of the officers to comply with the said provisions which was not done. This view expressed in the aforesaid judgment has been re-affirmed in the case of Union of India v. Shah Alam⁴, where "heroin" was first

³ AIR 2007 SC 369

⁴ (2009)16SCC 644

recovered from the bags carried by the Respondents therein and thereafter their “personal search” was taken, but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. The aforesaid contention was rejected following the Judgment of the Apex Court in the case of **Dilip & Anr. v. State of M.P** and it was held that since the provisions of Section 50 were not complied with, the High Court was right in acquitting the Respondents on that ground.

17. In a later judgment of the Hon'ble Supreme Court in the case of State of Rajasthan vs. Parmanand and Anr.⁵ it has been held thus,

“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 the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

18. Learned counsel for the Union of India placed reliance on a latest judgment of the Hon'ble Supreme Court in the case of **SK. Raju Alias**

⁵ (2014)5 SCC 345

Abdul Haque alias Jagga vs. State of West Bengal⁶ in which it was observed that an empowered officer under Section 42(1) is obliged to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place.

19. Placing reliance on the aforesaid Judgment, learned counsel Mr.Venegavkar asserts that since admittedly in the present case the search was made on the road i.e. public place, section 42 of the NDPS Act was not attracted, and therefore, finding of violation of Section 42 of the NDPS Act is erroneous. In view of the judgment of the Hon'ble Apex Court, cited by the learned counsel for Union of India, we, hold that the finding of the learned Sessions Judge insofar as non-compliance of Section 42 of the Act is concerned, is not in accordance with law laid down by the Hon'ble Apex Court.

20. Insofar as the requirement of Section 50 of the NDPS Act is concerned, it is the stand of the prosecution that the Intelligence Officer claims to have told the accused that they could be searched before the Gazetted Officer or Magistrate if they so desire, but simultaneously PW 1 has

⁶ (2018)9 SCC 708

also told the accused that the Superintendent Shahasane who was also part of the team was a Gazetted Officer.

21. In this respect, Mr. Aniket Nikam correctly placed reliance on an earlier constitution bench decision of the Apex Court in the case of *Vijaysinh Chandubha Jadeja Vs. State of Gujarat*⁷ The findings of the Apex Court in para 24 are extracted hereunder :

“Although the Constitution Bench in Baldev Singh case did not decide its absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to “inform” the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to “inform” the suspect about the existence of his said right would cause prejudice to him, 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 the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce”.

⁷ (2011)1 SCC 609

22. It is clear from the facts of the present case that the mandate of the constitution bench in the case of *Vijaysinh Chandubha Jadeja Vs. State of Gujarat* that consequent sub-section (1) of Section 50 makes it imperative for the empowered officer to inform “the person concerned” about the existence of his right that if he requires he shall be searched before a Gazetted Officer or a Magistrate . Failure to inform the suspect about existence of said right would cause prejudice to him 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 the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act.

23. In our considered view, in the facts of the present case, there has been clear non-compliance of the requirement of Section 50 of the NDPS Act. Consequently, the claim of “substantial compliance” made by Shri Venegaonkar, learned counsel for Union of India, is of no assistance in the present case. In other words, we state that in the fact situation of the present case, there has clearly been non-compliance of the mandate of Section 50 of the NDPS Act, which the constitution bench of the Hon'ble

Supreme Court in the case of Karnail Singh has held as “impermissible”. Hence, we do not find any merit in the present appeal against the order of acquittal passed by the learned special Judge. This matter was argued at length by Shri Venegavkar, learned counsel for Union of India as well as by Shri Aniket Nikam, Amicus Curie. We would also like to place on record our appreciation of the efforts undertaken by both the learned counsels and in particular assistance rendered by the Amicus Curie in this matter.

24. Accordingly, Appeal No.127 of 2000 stands dismissed.

(V.K.JADHAV, J)

(INDRAJIT MAHANTY, J)

