

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

CRM-M-15692-2018 (O&M)

Date of Decision :-14.11.2018

Manjit Singh

..... Petitioner

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. Piyush Khanna, Advocate for the petitioner.

Ms. Ruchika Sabherwal, Assistant Advocate General, Punjab.

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GURVINDER SINGH GILL, J.

1. The petitioner seeks grant of regular bail in respect of a case registered against him vide FIR No.136 dated 2.10.2016 registered under Sections 21 of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as '*the Act*') at Police Station City, Hoshiarpur.
2. It is the case of prosecution that on 2.10.2016, when the police party had raised barricading in the area of Bullawadi Chowk, Hoshiarpur, then a person was seen coming on foot from Bajwara side, who upon noticing the police party tried to turn back but was apprehended by the police on the basis of suspicion. The said person upon inquiry disclosed his name as Manjit Singh. An offer in terms of Section 50 of the Act. was extended to him informing of his right to get his search effected in the presence of some Magistrate or a Gazetted Officer but said Manjit Singh reposed confidence

in the ASI. A search of said Manjit Singh led to recovery of intoxicating substance, which he had kept wrapped in a polythene paper, which upon weightment was found to be 110 grams. It is further the case of prosecution that subsequently upon chemical analysis, the said recovered contraband was found to contain "Amphetamine".

3. The learned counsel for the petitioner has submitted that he has falsely been implicated in the present case and that in fact Section 50 of the Act has not been complied with in letter and spirit. The learned counsel, in this context, places reliance upon Arif Khan @ Agha Khan Vs. State of Uttarakhand 2018(2) R.C.R. (Criminal) 931.
4. It has next been submitted that recovery in the present case stands vitiated since it is the Recovery Officer himself, who had investigated the case and places reliance upon a judgment of Hon'ble the Supreme Court reported as 2018 AIR (SC) 3853 Mohan Lal Vs. State of Punjab. The learned counsel has thus prayed for grant of regular bail.
5. The learned State counsel, while opposing the contention of petitioner that investigation of the matter by the recovery officer himself was impermissible submitted at the time of apprehension of accused the police officer could not have known for certainty as to whether the petitioner had committed any offence and it was only after the search of petitioner had been effected that it came to be known that he was carrying contraband constituting an offence under NDPS Act but by the said time the relevant and important documents i.e. the document pertaining to extension of offer under Section 50 of NDPS Act, recovery memo and consequently arrest memo, 'ruqa' etc had already

been prepared. The learned State counsel cites a judgment of Constitution Bench of Hon'ble the Supreme Court rendered in State of Punjab Vs. Baldev Singh 1993(3) RCR (Criminal) 533 wherein it has been held as follows:

“ The provisions of Sections 100 and 165 Criminal Procedure Code are not inconsistent with the provisions of the Narcotic Drugs And Psychotropic Substances Act and are applicable for effecting search, seizure or arrest under the Narcotic Drugs and Psychotropic Substances Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure comes across a person being in possession of the narcotic drugs or the psychotropic substance, then he must follow from that stage onwards the provisions of the Narcotic Drugs And Psychotropic Substances Act and continue the investigation as provided thereunder. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the Narcotic Drugs And Psychotropic Substances Act, who should thereafter proceed from the stage in accordance with the provisions of the Narcotic Drugs And Psychotropic Substances Act. In Balbir Singh's case after referring to a number of judgments, the Bench opined that failure to comply with the provisions of Criminal Procedure Code in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 *per-se* does not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view.”

6. The learned State counsel while referring to the words “and continue the investigation as provided thereunder”, from the above cited judgement has submitted that that the Constitution Bench while noticing the scheme of the Act had held that it is the recovery officer himself who has to continue with the proceedings in accordance with the provisions of the Act.
7. As regards the contention of the learned counsel for the petitioner to the effect that provisions of section 50 of NDPS Act have not been complied with in letter and spirit in view of Arif Khans's case(supra) and that despite the accused having reposed confidence in the recovery officer the recovery officer was obliged to get the search of the accused effected in the presence of either a Gazetted officer or a Magistrate, the said aspect has been dealt with in detail by two Constitution Benches of Hon'ble Supreme Court. Hon'ble Supreme Court in 1999(3) RCR(Criminal) 533 State of Punjab vs. Baldev Singh held as follows:

“31. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it *imperative and obligatory* and cast a *duty* on the Investigating Officer (empowered officer) to ensure that search of the concerned person (suspect) is conducted in the manner prescribed by Section 50, *intimating* to the concerned person about the existence of his right, **that if he so requires**, he shall be searched before a Gazetted Officer or a Magistrate and **in case he so opts**, failure to conduct his search before a Gazetted Officer or a Magistrate, would cause prejudice to an accused and 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 during a search conducted in violation of the provisions of Section 50 of the Act.” (Emphasis supplied)

8. The aforesaid judgement in Baldev Singh's case(supra) was approved in a subsequent Constitution Bench of Hon'ble Supreme Court in a judgement reported as 2010(4)RCR (Crl) 911 Vijaysinh Chandubha Jadeja v. State of Gujarat, wherein while approving, it was held 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 and 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 sub-section (1) of Section 50 of the Narcotic Drugs and 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.” (Emphasis supplied)

9. Having heard the learned counsel for the petitioner and also the State counsel, although this court does find that there would be some arguable issues to be thrashed at the stage of trial, but bearing in mind the fact that the recovered quantity falls within the category of ‘commercial quantity’, which would attract fetters as imposed by section 37 of NDPS Act in the matter of grant of bail as it cannot be said at this stage that the accused had not committed any offence or that the accused, if released on bail, would not indulge in any identical offence, there is no ground to release the petitioner

on bail. There is no merit in the application and the same is hereby dismissed.

14.11.2018

pankaj

(Gurvinder Singh Gill)

Judge

Whether speaking /reasoned	Yes / No
Whether Reportable	Yes / No