

CRM-M-6951-2018

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-6951-2018

Date of Decision: 23rd May, 2018

Balbir Singh @ Beera

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Mr. Divjyot S. Sandhu, Advocate,
for the petitioner.

Mr. Kuldeep Singh, Sr. DAG, Punjab.

AUGUSTINE GEORGE MASIH, J. (ORAL)

Petitioner has approached this Court for grant of regular bail by filing this petition under Section 439 of the Code of Criminal Procedure, 1973, in FIR No.60, dated 20.05.2016, registered at Police Station Sadar Kapurthala, under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act'), where recovery of 150 grams of alprozolam, which is commercial in quantity, has been recovered from him.

It is the contention of the learned counsel for the petitioner that the petitioner is in custody since the date of his arrest i.e. 20.05.2016 and out of total 7 prosecution witnesses, only 3 witnesses have been examined and the trial is, therefore, not likely to conclude in near future. That apart, provisions of Section 50 of the NDPS Act have not been complied with in this case as the petitioner has only been given an option to be searched in

front of any Gazetted Officer or a Magistrate and on the consent given by him, he has been searched by the Assistant Sub Inspector. Counsel contends that Section 50 of the NDPS Act has not been complied with and in support of this contention, he has placed reliance upon the judgment of the Hon'ble Supreme Court in Criminal Appeal No.273 of 2007, titled as 'Arif Khan @ Agha Khan Vs. State of Uttarakhand, decided on 27.04.2018, to assert that the mandate of the Hon'ble Supreme Court as per Section 50 of the NDPS Act is that the accused must be searched before a Gazetted Officer or a Magistrate only. The search conducted not in the presence of the Gazetted Officer or a Magistrate merely on an option having been given to him where he gives his consent for his search by the police officer, would not be enough compliance of Section 50 of the NDPS Act. He, therefore, contends that the theory of a substantial compliance of the provisions of Section 50 of the NDPS Act is, therefore, not proved as per the assertions in the FIR. He, therefore, prays that the petitioner be granted the concession of bail.

Counsel for the State, on the other hand, contends that the judgment of the Hon'ble Supreme Court is *per incuriam* as it is contrary to the judgments of the Larger Benches of the Hon'ble Supreme Court as also the provisions of the statute itself. On merits, he contends that Section 50 of the NDPS Act has been duly complied with. Apart from that, he asserts that the prosecution is in the process of examining its witnesses and it is at the request of the counsel for the petitioner that the cross-examination of the witnesses have been deferred. He further states that only four witnesses are

left to be examined out of the total seven witnesses. Examination-in-chief of the three witnesses is over and the case is being adjourned at the request of the counsel for the petitioner for cross-examination of these witnesses. It has been informed that apart from the present case, there are two other criminal cases registered against the petitioner, in one of which, for small quantity of 4 Kg. of poppy husk in his possession, he has been convicted and sentenced for a period of one month with a fine of ₹ 500/- and in another case, the trial is in progress, where recovery is 130 grams of intoxicant substance. He, therefore, prays that the present petition may not be allowed.

I have considered the submissions made by the counsel for the learned counsel for the parties and have gone through the judgment of the Hon'ble Supreme Court, on which reliance has been placed by the learned counsel for the petitioner.

Perusal of the judgment of the Hon'ble Supreme Court in *Arif Khan @ Agha Khan's* case (supra) would show that the said case was an appeal, in which, the Court had proceeded to evaluate the evidence which has been led by the prosecution and on consideration thereof, it has been concluded that the mandate of Section 50 of the NDPS Act has not been complied with as is apparent from concluding part of the judgment in paras 28, 29 and 30. Search and the recovery was, therefore, found to be faulty and not complied with leading to the observations of the Court in that context regarding the provisions of Section 50 of the NDPS Act. There is a reference to the earlier judgments passed by the Hon'ble Supreme Court,

one of which is of Five Judges Bench in Vijaysinh Chandubha Jadeja Vs. State of Gujarat 2011 (1) SCC 609, wherein, with reference to the provisions of Section 50 of the NDPS Act, it has been held in para 22 as follows:-

“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. As observed in **Re Presidential Poll, (1974) 2 SCC 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."

Keeping in view the ratio of the judgment in *Vijaysinh Chandubha Jadeja's* case (supra), the contentions of the learned counsel for the petitioner cannot be accepted.

That apart, even on merits, firstly keeping in view the recovery which has been effected from the petitioner is of commercial quantity; secondly the trial is not being delayed at the hands of the prosecution rather

it is the counsel for the petitioner who is being seeking adjournment(s) for cross-examination of the prosecution witnesses and thirdly, apart from the present case, there is two other cases registered against the petitioner, in one of which, recovery is of 130 grams of intoxicant powder and the same is pending and in other case, he stands convicted and sentenced as has been stated by the counsel for the State, which has been referred to above.

In view of the above, finding no merit in the present petition for grant of regular bail to the petitioner, the same stands dismissed.

23rd May, 2018
Harish

(AUGUSTINE GEORGE MASIH)
JUDGE

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