

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M No.28067 of 2021
Date of decision: 02.11.2021

Sunil	Versus	 Petitioner
State of Haryana		 Respondent

Coram: Hon'ble Mr. Justice B.S. Walia.

Present: Mr. Preetinder Singh Ahluwalia, Advocate and
Mr. Shaurya Puri, Advocate for the petitioner.

Mr. Gurbir Singh Dhillon, AAG Haryana (Argued by
Mr. Naveen Kumar Sheoran, DAG, Haryana).

B.S. Walia, J.,

1. Prayer in the petition under Section 439 Cr.P.C. is for grant of regular bail to the petitioner in case FIR No.41 dated 22.01.2021 registered under Sections 21 and 25, NDPS Act, 1985 at Police Station Kundli, District Sonipat.

2. Sole argument of learned counsel for the petitioner is that although the alleged recovery from the petitioner, co accused Mukdar, Arvind, Vikas all of whom were travelling in a car, is of 523, 394, 20, and 803 grams respectively of powder alleged to be heroin, i.e. commercial quantity, since the petitioner was not informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate if he so desired, therefore, there was non-compliance with Section 50 NDPS Act, consequentially, the bar under Section 37 NDPS Act would not apply, resultantly the petitioner is entitled to grant of bail during the pendency of the trial.

3. Per contra, Mr. Naveen Sheoran, learned DAG has referred to the notice u/S 50 NDPS Act (Annexure P/4) dated 22.01.2021 to contend that the petitioner was informed, of apprehension of the police that he had some intoxicating material / heroin with him, his rights, besides option to get his search conducted by a Magistrate or Gazetted Officer for which the said Officer could be called on the spot, therefore in the circumstances, there was due compliance with the mandate of Section 50 NDPS Act.

4. I have considered the submissions of learned counsel.

5. Hon'ble the Supreme Court in **Vijay Chandubha Jadeja vs. State of Gujarat, 2010 (4) RCR (Crl.) 911** on account of divergence of opinion in the case of **Joseph Fernandez v. State of Goa, (2000) 1 SCC 707 Prabha Shankar Dubey v. State of M.P., 2004(1) RCR (Criminal) 104 : 2004(2) Apex Criminal 54 : (2004) 2 SCC 56** on the one hand and **Krishna Kanwar (Smt) alias Thakuraeen v. State of Rajasthan, (2004) 2 SCC 608** on the other, with regard to the dictum laid down by its the Constitution Bench in **State of Punjab v. Baldev Singh, 1999(3) RCR (Criminal) 533 : (1999) 6 SCC 172** was pleased to consider the following question :-

“The short question arising for consideration in this batch of appeals is whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “the Narcotic Drugs and Psychotropic Substances Act”) casts a duty on the empowered officer to ‘inform’ the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a

Gazetted Officer can be said to be due compliance with the mandate of the said Section?

6. Hon'ble the Supreme Court after considering the provisions of law as well as its various decisions 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 subsection (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.

7. In *State of Delhi vs. Ram Avtar, 2011 (4) RCR (Crl.) 191*

Hon'ble the Supreme Court held as under :-

“10. Still in the case of **Ahmed vs. State of Gujarat, (2000)(3) RCR (Criminal) 759 : (2000) 7 SCC 477**), a Bench of this Court followed the above cases including Baldev Singh's case (supra) and held that even where search is made by empowered officer who may be a Gazetted Officer, it remains obligatory for the prosecution to inform the person to be searched about his right to be taken to the nearest Gazetted Officer or Magistrate before search. In this case, the Court also noticed at sub-para (e) at page 482 of the judgment that the provisions of Section 50 of the Act, which afford minimum safeguard to the accused, provide that when a search is about to be made of a person under Section 41 or Section 42 or Section 43 of the Act, and if the person so requires, then the said person has to be taken to the nearest Gazetted Officer of any department mentioned in Section 42 of the Act or to the nearest Magistrate.

22. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the

denial of a fair trial. To secure a conviction under Section 21 of the Act, the possession of the illicit article is a sine qua non. Such contraband article should be recovered in accordance with the provisions of Section 50 of the Act, otherwise, the recovery itself shall stand vitiated in law.....

23. Once the recovery itself is found to be illegal, being in violation to the provisions of Section 50 of the Act, it cannot, on the basis of the statement of the police officers, or even independent witnesses, form the foundation for conviction of the accused under Section 21 of the Act. Once the recovery is held to be illegal, that means the accused did not actually possess the illicit article or contraband and that no such illicit article was recovered from the possession of the accused such as to enable such conviction of a contraband article.”

8. ***In Nirmal Singh Pehlwan @ Nimma vs. Inspector Customs, Customs House, Punjab (SC), 2011 (3) RCR (CrI.) 831*** a case involving search before a Gazetted Officer in terms of option given to accused to be searched before a Gazetted Officer or Magistrate without informing the accused of his right to be searched in the presence of a Gazetted Officer or a Magistrate, Hon’ble the Supreme Court held that a consent memo could not be said to be information conveyed to an accused as to his right under Section 50 of the Act in view of the decision of the Constitution Bench in Vijaisingh Chandu Bha Jadeja’s case (supra) and since the provisions of Section 50 of the Act were mandatory and strict compliance was called for, any deviation

therefrom would vitiate the prosecution. Relevant extract of the same is reproduced as under :

“7. We have examined the facts of the case in the light of the arguments raised by the learned counsel for the parties and the case law cited. Ext. P.A. is the consent memo under which the appellant had opted to be searched in the presence of a Gazetted officer. This memo is in the Gurmukhi script and has been read to us and we see that it cannot by any stretch of imagination be said to be informing the appellant of his right to be searched in the presence of a Gazetted Officer or a Magistrate as he was only given the option to be searched before one of the other.

Thereafter, Hon’ble the Supreme Court referred to the question considered in Vijaisingh Chandu Bha Jadeja’s case (supra) by the Constitution Bench as also the answer to the same and as have been reproduced in the preceding part of this order and allowed the appeal against conviction on account of non compliance with Section 50 NDPS Act as well as confession made to a Customs Officer being hit by Section 25, Evidence Act by observing as under

“8. It is therefore apparent that the precise question that was before the Constitution Bench was as to whether a consent memo could be said to be information conveyed to an accused as to his right under Section 50 of the Act. The Constitution Bench clearly stated that a consent memo could not be said to be such information as the provisions of Section 50 of the Act were mandatory and strict compliance was called for and any deviation therefrom would vitiate the prosecution. It was further

held that it was not necessary that this information should be in a written form but the information had to be conveyed in some form or manner which would depend on the facts of the case. We have accordingly gone through the evidence of PW.4 Prem Singh. He did not utter a single word as to whether he had informed the appellant of his right and he merely took his option as to whether he would like to be searched before a Gazetted Officer or a Magistrate as noted in Ex.P.A. In the light of the judgment in Vijaisingh's case (supra) we find that there has been complete non- compliance with the provisions of Section 50 of the Act. “

9. Hon’ble the Kerala High Court in **Labeebul Mubarack vs. State of Kerala, 2018 (3) KLT 363** held that non-compliance with the mandatory provisions of Section 50 would vitiate a conviction for illegal possession of contraband, and in such circumstances, it would be a failure of justice to compel the applicant to remain in custody till the conclusion of the trial and further that the courts satisfaction within the meaning of Section 1(b)(ii) of Section 37 of the NDPS Act that there were reasonable grounds for believing that the accused was not guilty of such offence, did not amount to recording of a finding that the accused was not guilty within the meaning of Section 248 Cr.P.C., as a finding of guilty / not guilty could only be recorded upon conclusion of the trial whereas the satisfaction that there were reasonable grounds for believing the accused to be not guilty had to be arrived at before the conclusion of trial, and that in the circumstances, a Court could not shirk its responsibilities by postponing the consideration of the fact whether reasonable grounds existed for believing that the accused

was not guilty till the actual trial was concluded, that the court was not required to consider the matter as if it were pronouncing a judgement of acquittal and recording a finding of not guilty and as regards the question whether the Court would be justified in holding that the applicant was not likely to commit any offence while on bail, since it was not the case of the prosecution that the applicant was a person with criminal antecedents or that he was involved in a similar offence earlier and the recovery had been made in contravention of the mandatory provisions of Section 50, the applicant could not be prima facie held responsible for unlawful possession of contraband, accordingly, for the limited purpose of consideration of the bail application, it was satisfied that there were reasonable grounds for believing that the applicant was not guilty of the offence and that he was not likely to commit any offence while on bail.

10. In the instant case, no doubt, notice under Section 50 of the NDPS Act mentions the petitioner having been apprised of his rights but the said notice is absolutely silent as to what rights were apprised to the petitioner as also whether he was apprised of his right under Section 50 NDPS Act, to be searched in the presence of a Magistrate or a Gazetted Officer. The said notice merely mentions the petitioner having been informed of his rights as also the option if he so desired to get his search conducted by a Magistrate or Gazetted officer. To my mind, merely informing the petitioner that he had rights under the NDPS Act, without specifying what rights the petitioner had under the NDPS Act, would not constitute compliance with the mandatory requirement under Section 50 sub-Section (1) NDPS Act. The mandatory requirement under Section 50(1) NDPS Act not having been complied with and the punishment provided for an offence under the NDPS Act being very stringent, failure to comply with

Section 50 NDPS Act renders the recovery of the illicit article suspect. It is also not the stand of the prosecution that the petitioner is a person with criminal antecedents or that he is involved in similar offences earlier. Since, the requirement under Section 50 NDPS Act is not merely a technical breach, and the petitioner is not involved in any other case under the NDPS, therefore, in the circumstances, in view of the position as noted above, for the limited purposes of the instant petition, it can safely be recorded that this Court is satisfied that there are reasonable grounds to believe that the petitioner is not guilty of such offence and that he is not likely to commit any such offence while on bail.

11. The petitioner is in custody since 21.01.2021, there has been non compliance with Section 50 (1) NDPS Act, investigation is complete, besides Challan has been presented. Accordingly, taking into account the position as noted above, the petition for regular bail is allowed and the petitioner - Sunil is ordered to be released on regular bail during the pendency of the trial on his furnishing bail bond and surety bond to the satisfaction of the learned trial Court / Chief Judicial Magistrate / Duty Magistrate concerned, provided he is not required in any other case. The petitioner shall also comply with the conditions contained in Section 437(3) Cr.P.C. However, nothing stated hereinabove shall be construed as an expression of opinion on the merits of the case.

(B.S. Walia)
Judge

02.11.2021
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1. Whether speaking/reasoned: Yes/No.
2. Whether reportable: Yes/No.