

national suspiciously wandering on the street with a sack bag on his shoulder. The applicant was, therefore, apprised of his right to be searched in front of a Gazetted Officer or a Magistrate in writing to which the applicant denied. In the presence of panchas, the sack bag was searched and the white powder and other stuff were recovered from the said sack bag. With the help of a drug detection kit the white powder was tested and it was found to be 'cocaine'. It was about 201 gms in weight.

3 According to prosecution, when the applicant was asked to submit his passport, he informed that his passport was at his residence and accordingly the residence of applicant was also searched and he was found in possession of 534 gm of cocaine and other material. First Information Report (FIR) accordingly came to be registered.

4 Mr. Mishra, learned Counsel for the applicant, vehemently submits that there is total non compliance of mandatory provisions of Sections 42 and 50 of the NDPS Act. Therefore, the same has vitiated the prosecution case. This being so, the bar of Section 37

of the NDPS Act will not be applicable for want of compliance of said mandatory provisions of the NDPS Act. In such circumstances, the applicant deserves to be released on bail, argued learned Counsel. Learned Counsel for the applicant also placed reliance in **Arif Khan Alias Agha Khan Vs. State of Uttarakhand**¹.

5 Mr. Dedhia, learned APP, on the other hand, opposed the submissions by contending that there was due compliance of provisions of the NDPS Act. There being no merit in the application, the same is liable to be rejected.

6 Perused the investigation Papers.

7 The short question which arise for consideration in the present Bail Application is, whether the search/recovery made by the informant from the applicant of alleged contraband (cocaine) can be held to be in accordance with procedure prescribed under Sections 42 and 50 of the NDPS Act. In other words, it is to be find out whether the prosecution was able to prove that the procedure prescribed under Section 50 of the NDPS Act was followed by the

¹ (2018) 18 Supreme Court Cases 380

police officials in letter and spirit while making the search and recovery of contraband (cocaine) from the applicant.

8 Section 42 and 50 of the NDPS Act reads as under:-

“42. Power of entry, search, seizure and arrest without warrant or authorisation.— (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in

writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,— (a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has

reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector.

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between

sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

50. 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.

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9 In **Boota Singh and Others Vs. State of Maharashtra**² the Hon'ble Apex Court has observed as under in paragraph 13 :

“13 In **Karnail Singh vs. State of Haryana**³ , the Constitution Bench of this Court concluded:-

“35 In conclusion, what is to be noticed is that **Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496]** did not require literal compliance with the requirements of **Sections 42(1) and 42(2)** nor did **Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217]** hold that the requirements 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)**.

² 2021 SCC Online SC 324

³ (2009) 8 Supreme Court Cases 539

(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 [Sections 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 of 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.”

(Emphasis added)

10 In the case in hand, it would appear from the FIR that while the informant and other staff members were patrolling, they seeing the applicant’s movement become suspicious and accordingly after informing his right of being searched in presence of a Gazetted Officer, took search of sack bag of the applicant. Thus, on the spot they recovered cocaine allegedly from the sack bag of the applicant.

Learned APP is not able to show that even thereafter whether compliance of Section 42 of the NDPS Act was done by the police officials. There is nothing on record to show that the informant had immediately after the raid or within reasonable time had informed his superiors about the raid and seizure of cocaine from the possession of the applicant.

11 Coming to Section 50 of the NDPC Act, what is the true scope and object, what are the duties, obligation and powers conferred on the authorities and whether compliance of requirements are mandatory or directory, remain no more *res integra* and are now settled by the two decisions of the Constitution Bench of the Hon'ble Apex Court in **State of Punjab Vs. Baldev Singh**⁴ and **Vijaysinh Chandubha Jadeja**⁵. These decisions are followed by the Hon'ble Apex Court in **Arif Khan Alias Agha Khan (Supra)**.

12 In **Vijaysinh Chandubha Jadeja's** case (**Supra**), the Hon'ble Apex Court has held that the requirement of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section

⁴ (1999) 6 SCC 172

⁵ (2011)1 SCC 609.

50 must be strictly complied with. It is imperative on the part of police officer to apprise the person intended to be searched of his right under Section 50 of the NDPS Act to be searched only before a Gazetted Officer or a Magistrate. It is further held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is further held that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate.

13 I have also gone through the intimation given to the application at the time of raid which is filed on record, which is at page No. 47, which reads as under:-

“To,
Sholadoye Samuel Joy,
R/o. Capstone Society,
Godrej Hair Dies near,
Flat No. 601, Undri, Pune
Home Town Nigeria.

You hereby intimated that we have a suspicion that you have a Narcotic drug in your possession. Therefore we want to take your personal search according to Sec.50(1) of NDPS act. You have a right to give your personal search in presence of a Gazetted Officer or a Magistrate. If you so require we may take you to the nearest Gazetted Officer or a Magistrate.

Before me

Witness

sd/-

1) sd/-

(Avinash Shinde)

2) sd/-

ASI, ANC Crime Branch

Pune City.

No sir, I don't want to be searched in the presence of Gazetted Officer or a Magistrate.

Before me

sd/-

sd/-

(Avinash Shinde)

1) sd/-

ASI, ANC Crime Branch

2) sd/-

Pune City.”

14 A simple reading of the same would show that the applicant was not apprised of his right under Section 50 of the NDPS Act to be searched “*only*” before a Gazetted Officer or a Magistrate as mandated by Hon’ble Apex Court in **Vijaysinh Chandubha Jadeja’s** case (**Supra**).

15 In view of above, I do not agree with the contention of learned APP that there was due compliance of Sections 42 and 50 of the NDPS Act, inasmuch as search and recovery made from the

applicant of the alleged contraband (cocaine) does not satisfy the mandatory requirement of provision as held by the Hon'ble Apex Court in **Vijaysinh Chandubha Jadeja**.

16 In view of above, I hold that the applicant has made out a case for bail. Hence, I pass the following order.

ORDER

- (i) Applicant- Sholadoye Samuel Joy shall be released on bail in C.R. No. 625 of 2019 registered with Kondwa Police Station, Pune on his executing P. R. bond in the sum of Rs.50,000/- with one or two sureties in like amount.
- (ii) As a condition of this order, the applicant shall not tamper with the prosecution evidence.
- (iii) The applicant shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case, so as to dissuade him from disclosing such facts to the court or to the Police Officer.
- (iv) The applicant should cooperate the trial Court for expeditious disposal of the Special Case pending against them.

- (v) The applicant should not repeat similar crime in future. If it is found that the applicant is repeating commission of similar offence in future, the prosecution is at liberty to get the bail of the applicant cancelled.
- (vi) The applicant should surrender his passport to the Police Station Kondwa, Pune, and he shall not leave India without prior permission of the trial Court.
- (vii) Bail before the trial Court.
- (viii) Parties to act on copy of this order duly authenticated by the Sheristedar of this Court.
- (ix) It is made clear that the observations made herein are prima facie and the trial Court shall decide the case on its own merit, in accordance with law, uninfluenced by the observations made in this order.
- (x) The application is allowed in the aforesaid terms and stands disposed off accordingly.

(V. G. BISHT, J.)

REKHA
PRAKASH
PATIL

Digitally signed by
REKHA PRAKASH
PATIL
Date: 2022.01.20
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Rekha Patil

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