



CRL.A.No.192 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.10.2022

CORAM:

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

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Rajasekar

... Petitioner

Vs.

State by
The Inspector of Police,
B-2, R.S.Puram Police Station,
Coimbatore.
(Crime No.853 of 2015)

... Respondent

Prayer: The Criminal Appeal filed under Section 374(2) of Cr.P.C. praying to call for the records relating to the judgment dated 09.03.2018 passed by the II Additional District and Sessions Judge and Presiding Officer, Special Court for E.C. Act Cases, Coimbatore, in C.C.No.8 of 2016 and set aside the same.

For Petitioner : Mr.G.S.Mahesh

For Respondent : Mr.A.Gopinath
Government Advocate (Crl. Side)

ORDER

This criminal appeal is directed as against the judgment passed in C.C.No.8 of 2016 on the file of the II Additional District and Sessions Judge



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and Presiding Officer, Special Court for E.C.Act Cases, Coimbatore, thereby convicting the appellant for the offence under Section 8(c) r/w 20 (b) (ii) (B) of NDPS Act, 1985.

2. The case of the prosecution is that on 05.12.2015 at about 09.30 a.m., the appellant was found in possession of Ganja weighing 1 Kg and 100 grams at backside of the Sri Gnanavinayakar Temple. Hence the respondent registered FIR in Crime No.853 of 2015 for the offence under Section 8(c) r/w 20 (b) (ii) (B) of NDPS Act, 1985, and remanded the appellant to judicial custody. After completion of investigation, the respondent filed final report and the same has been taken cognizance by the trial Court for the offence under Section 8(c) r/w 20 (b) (ii) (B) of NDPS Act, 1985.

3. In order to bring the charge to home, the prosecution had examined PWs1 to 7 and marked Exs.P1 to P10 as exhibits and also produced material objects M.O.1 and 2 and on the side of the appellant no one was examined and no document was marked.

4. On perusal of oral and documentary evidence, the trial Court found the appellant guilty for the offence under Section 8(c) r/w 20 (b) (ii) (B) of



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NDPS Act, 1985, and sentenced him to undergo three years rigorous imprisonment and imposed fine of Rs.10,000/- in default, to undergo six months rigorous imprisonment. Aggrieved by the same the appellant preferred this appeal.

5. The learned counsel for the appellant would submit that the search and seizure was not done before any other authorities or before any independent witnesses as contemplated under the NDPS Act. The prosecution failed to comply with the provisions under Section 50 of the NDPS Act, while making search on the appellant and the appellant was not informed about his right as contemplated under Section 50 of the NDPS Act, while making search on him.

6. In support of his contention, he relied upon the following judgments;-

1. 2011 CRI. L.J. 680 : (Vijaysinh Chandubha Jadeja Vs. State of Gujarat).
2. (2013) 2 SCC 67 : (2013) 1 SCC (Cri) 829 : 2013 SCC Online SC 42 (Ashok Kumar Sharma Vs. State of Rajasthan).
3. (2014) 2 SCC (Cri) 563 : (2014) 5 SCC 345 : (State of Rajasthan Vs. Parmanand & Another).
4. 2022 LileLaw (SC) 267 : (Sanjeev & Another Vs. State of Himachal Pradesh).



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7. Per contra, the learned Government Advocate (Crl. Side) submitted that the prosecution had proved its case beyond any doubt and duly complied with the provision under Section 50 of the NDPS Act. The search memo was duly served on the appellant and the same was marked as Ex.P2. The appellant was questioned that if you wish to search before the Judicial Magistrate or before a Gazetted Officer or by the person who registered FIR. For which he replied that the appellant presumed not to make a search before the Judicial Magistrate or before Executive Officer, instead he agreed to make a search by the Investigating Officer. He further submitted that though the mahazar witness turned hostile without supporting the case of the prosecution, it is not fatal to the case of the prosecution.

8. He further submitted that in fact, the appellant himself handed over the contrabands to the police person even before making search. Therefore, there is no question of violation of Section 50 of the NDPS Act, while making search on the appellant. In fact, Sections 50 (5) of the NDPS Act, is very clear that if it is not possible to take the person to be searched to the nearest Gazetted Officer or Judicial Magistrate. Without possibility of the person to be searched parting with possession of any narcotic drug or psychotropic



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substance, or controlled substance or article or document, he may instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 Cr.P.C. Therefore, the trial Court rightly found him guilty for the offence under Section 8(c) r/w 20 (b) (ii) (B) of NDPS Act, 1985, and the conviction does not require any interference by this Court.

9. In support of his contention, he relied upon the following judgments;-

1. (2020) 10 SCC 120 in the case of Mukesh Singh Vs. State (Narcotic Branch of Delhi).
2. (2020) 9 SCC 627 in the case of Rizwan Khan Vs. State of Chhattisgarh.
3. (2010) 9 SCC 608 in the case of Dharampal Singh Vs. State of Punjab.

10. Heard, the learned counsel for the appellant and the learned Government Advocate (Crl. Side) for the respondent and perused the materials available on record.

11. According to the case of the prosecution, on receipt of the secret information, PW1 and his team went to the scene of crime, where the appellant was found in possession of Ganja. Therefore, he was served with search memo and informed about his wishes to conduct search before the Judicial Magistrate



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or before the Gazetted Officer. On receipt of the said information, the appellant informed that he agreed to conduct search by PW1. Thereafter, PW1 with two independent witnesses conducted the search on the appellant and found him in possession of said contraband namely 1.100 Kgs of Ganja. After taking two samples, each contain 50 grams, for chemical analysis, the remaining contraband were sealed and produced before the Court.

12. The learned counsel for the appellant raised grounds mainly on that the respondent failed to follow the procedure contemplated under Section 50 of the NDPS Act. Therefore, the point for consideration is that where PW1, the officer who had conducted the search on the appellant had failed to comply with the procedure laid down under Section 50 of the NDPS Act. It is mandatory on the part of the authorized officer to make the accused aware of his existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance. The suspect may or may not choose to exercise the right provided to him under the said provision, but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act, to apprise the person of his right to be searched before a Gazetted Officer or a Magistrate.



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WEB COPY 13. The search memo was marked as Ex.P2 which was in the form of question and answer, and it is extracted hereunder;-

"கேள்வி:

உம்மீது கஞ்சா என்னும் போதைப் பொருள் விற்பனை செய்ய வைத்திருப்பதாக தகவல் உள்ளது. உம்மீது சோதனையிட வேண்டும் அதற்கு முன் நீர் விரும்பினால் அருகில் உள்ள நீதித்துறை நடுவர் முன்போ அல்லது அரசிதழ் பதிவு பெற்ற அதிகாரி முன்போ அழைத்து சென்று சோதனையிடவா அல்லது நானே சோதனை இடலாமா?

பதில்:

என்னை நீதித்துறை நடுவர் முன்போ அல்லது அரசிதழ் பதிவு பெற்ற அதிகாரி முன்போ சென்று சோதனையிட வேண்டாம் உதவி ஆய்வாளர் ஆகிய தாங்களே சோதனையிட எனக்கு சம்மதம்."

14. The appellant was informed about the secret information that he came for selling Ganja therefore, he was subjected for search, for which he can be searched before any Magistrate or Gazetted Officer or by PW1. The search need not to be conducted before the Judicial Magistrate or Gazetted Officer and he agreed to conduct search by PW1. Thus, it is clear that PW1 questioned the appellant that he had only informed the appellant that he can be searched before any Magistrate or Gazetted Officer, if he so wishes. The fact that the



appellant has a right under Section 50 of the NDPS Act, to be searched before the Gazetted Officer or a Magistrate was not known to him.

15. The learned counsel for the appellant relied upon the judgment reported in **(2014) 2 SCC (Cri) 563 : (2014) 5 SCC 345** in the case of State of **Rajasthan Vs. Parmanand and Another.**

The relevant portion of the above said judgment is extracted hereunder;-

" 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of



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the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

16. In the case on hand, admittedly, PW1 had given three options to the appellant that the search to be conducted by PW1 if he so wishes. The third option does not provide under Section 50(1) of the NDPS Act, therefore, such option would frustrate the provision under Section 50(1) of the NDPS Act. Therefore, failure to inform the appellant about the existence of his right would cause prejudice to him.

17. The learned counsel for the appellant also relied upon the judgment reported in **2022 LiveLaw (SC) 267** in the case of **Sanjeev & Another Vs. State of Himachal Pradesh**, wherein, the Hon'ble Supreme Court held that the



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personal search did not result in recovery of any contraband material but the non-compliance of requirement of affording an option, was one of the reasons which weighed with the trial Court in disbelieving the case of the prosecution. On the sole ground, the conviction has been imposed on the appellant which cannot be sustained and it is liable to be set aside.

18. The learned Government Advocate (Crl. Side) appearing for the respondent vehemently contended that as per Section 55 of the NDPS Act, PW1 proceeded to search the appellant as provided under Section 100 Cr.P.C. It is not at all applicable to the case on hand since Section 51 is clear and mandate that the appellant should be informed about his right, while making search on him.

19. Admittedly, in the case on hand, such right was not informed to the appellant herein and the judgment cited by the learned Government Advocate is not helpful in the case on hand.

20. In view of the aforesaid observation, the judgment dated 09.03.2018 passed by the II Additional District and Sessions Judge and Presiding Officer, Special Court for E.C. Act Cases, Coimbatore, in C.C.No.8 of 2016 is hereby



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set aside.

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21. Accordingly, the Criminal Appeal stands allowed.

28.10.2022

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Index : Yes / No

Speaking / Non Speaking order

To

1. The II Additional District Judge,
Coimbatore.
2. The Presiding Officer,
Special Court for E.C.Act Cases, Coimbatore.



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G.K.ILANTHIRAIYAN, J.
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