

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

**CRM-M No. 11162 of 2022
Date of Decision: 22.03.2022**

Prempal

..... Petitioner

Versus

State of Haryana

..... Respondent

CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR

Present: Mr. Rakesh Gupta, Advocate,
for the petitioner.

Mr. Tanuj Sharma, Assistant Advocate General, Haryana

(Through Video Conferencing)

SURESHWAR THAKUR, J. (ORAL)

1. The petitioner, by filing the present petition, cast under Section 439 Cr.P.C., seeks grant of regular bail in case FIR No. 461 of 23.11.2021, which was registered against him, at Police Station Sadar Ballabgarh, District Faridabad, constituting therein an offences under Section 22-C (Act No. 61) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. The recovery, as, became effected from the alleged conscious, and, exclusive possession of the bail applicant – petitioner, and, from the co-accused, who was with him, at the crime site, rather was from a bag, kept on the seat of the motor-cycle occupied at the relevant time by both the co-accused. The weight of the seizure is of a commercial quantity, and, thereupon the rigours cast under Section 37 of the NDPS Act, are applicable thereon, and, hence prima facie, the prayer made in the petition, that the petitioner be admitted to regular bail, cannot be accepted.

3. However, the learned counsel for the petitioner argues, that since a joint consent carried in Annexure P-1, was conveyed to both the co-

accused, thereupon, he argues that the asking for, by the Investigating Officer, of a joint consent of both the accused, in purported compliance being made to the mandate carried in Section 50 of the NDPS Act, is vitiated. Consequently, he argues that the entire proceedings relating to preparation and drawings of search / recovery memos concerned, at the crime site also become vitiated, and, the bail petitioner is entitled to be admitted to bail.

4. In making the afore submission, the learned counsel for the petitioner makes dependence upon a verdict, drawn on 28.02.2014, by the Hon'ble Apex Court, in Criminal Appeal No. 78 of 2005, titled as ***“State of Rajasthan Vs. Parmanand and another”***, especially to paragraphs-12 & 14 thereof, paras whereof are extracted hereinafter. However, the hereafter extracted paragraph(s), as carried in judgment (supra), though makes a striking conclusion, that the joint consent, as, become strived to be elicited from the accused concerned, is completely void, and, is vitiated, as it does not mete compliance to the mandate carried in Section 50 of the NDPS Act. However, in paragraph-12 of the verdict (supra), a pivotal inference is recorded, that in case the recovery is made not on any personal search, of the accused concerned, rather being made by the IO concerned, thereupon the mandate carried in Section 50 of the NDPS Act, would have no application, and, nor would the seizure, as, made in consequence thereof become either vitiated or void.

“12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium

was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

14. *In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The*

search of the bag of respondent No.1 Parnanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated. ”

5. Bearing in mind the above, and, also bearing in mind the factum, that the apposite recovery did not become effected, from each of the accused, upon, both keeping the seized contraband in their respective shirt pockets or in each of their trouser pockets or from their respectively worn over clothes, if any, and, nor when it is displayed in the FIR, that the seized contraband was hidden or tethered onto body(ies) of the accused concerned, whereas, thereupon only or when the afore incriminating circumstances emerged, there would be a complete statutory necessity cast, upon the Investigating Officer, to, serve upon each of the accused concerned, a separate consent memo prior to his conducting the personal search of each of the accused. However, since as afore stated, the seizure was not made upon the personal search of each of the accused, being made by the IO concerned, rather was made in a variant thereto manner, inasmuch as, it being made from a bag kept on the seat of the motorcycle, occupied at the relevant time, hence by both the accused. Therefore, in the wake of the afore manner of recovery being effectuated, rather the mandate carried in paragraph-12, of the judgment (supra) becomes aroused, and, its to be applied to the present factual circumstances.

6. There is no merit in the petition, and, the same is dismissed.

7. Liberty is reserved to the petitioner to re-access the appropriate Courts, in accordance with law.

8. Any observation made hereinabove is in respect of the disposal of the instant petition(s), and, shall not be taken to be any observation on the

merits of the case, and, nor the learned trial Judge concerned, shall be influenced from the afore order, as and when the learned trial Judge concerned, enters upon the trial, against the accused.

March 22, 2022
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(SURESHWAR THAKUR)
JUDGE

Whether Speaking/reasoned	Yes
Whether Reportable	Yes