

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

791

CRA-S-519-SB-2006 (O&M)

Reserved on: 19.01.2023

Date of Decision: 20.01.2023

Krishan @ Sibhu

...Appellant

Versus

State of Haryana

... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Rajeshwar Singh, Advocate
for the appellant.

Ms. Sheenu Sura, DAG, Haryana.

N.S.SHEKHAWAT, J.

The present appeal has been directed against the judgment of conviction and order of sentence dated 28.02.2006 passed by the learned Judge, Special Court, Kaithal, whereby, the present appellant was convicted under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as '**the NDPS Act**') and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs. 5,000/- alongwith default stipulation.

The brief facts of the present case are that on 02.12.2004, ASI Om Parkash alongwith other police officials was present near Rice Mill, Dhand, for patrolling and crime prevention. In the meantime, Ram Swaroop son of Shri Malkha Singh resident of Dhand met them and the police officials were talking to him. In the meantime, one young boy was seen coming from the side of Dhand on foot and on seeing the police party, he turned back and started

walking briskly. He was apprehended with the help of police officials on suspicion. On being asked, he told his name to be Krishan Lal @ Sibu son of Puran Ram resident of village Jadola. The police suspected that he was carrying some narcotic substance and the notice was served on him under Section 50 of the NDPS Act. He was apprised of his right to get his search conducted either in the presence of Illaqa Magistrate or a gazetted officer. The accused signed the notice and it was thumb marked by Ram Swaroop and HC Satbir Singh. In reply to the notice under Section 50 of the NDPS Act, the accused opted to give his search before a gazetted officer and again it was signed by the accused and was also thumb marked/signed by the witnesses. On this, ASI Om Parkash produced the accused, witnesses Ram Swaroop and HC Satbir Singh in the office of the DSP, Headquarters, Kaithal, where Raj Kumar, the Deputy Superintendent of Police was present in his office. The accused and the witnesses produced before him. He also verified the facts from the accused and the witnesses. The DSP directed the ASI Om Parkash to conduct the personal search of the accused and the *charas* wrapped in *khakhi* polythene was recovered from the right pocket of the pant of the accused and the *charas* was in solid condition. Two samples of 50 grams each of *charas* were separated and residue on weightment was found to be 350 gms. All these were converted in separate parcels and were sealed with the seal of 'OP' of the Investigating Officer. Two seals each on each parcels and two seals each of 'RK' of DSP were also affixed. The specimen seal impressions were prepared and,

thereafter, seal was handed over to HC Satbir Singh. The DSP retained his seal 'RK' with him and the residue parcels, two sample parcels and specimen seal impressions were taken into police possession vide recovery memo Ex.PA duly signed by HC Satbir Singh, thumb marked by Ram Swaroop and attested by DSP Raj Kumar. DSP Raj Kumar attested both the sample parcels and residue parcels and specimen seal impression and, thereafter, *ruka*, was sent to the police station through Constable Rakesh Kumar for registration of the case and the formal FIR was recorded by ASI Devinder Kumar. After initial investigation, ASI Om Parkash alongwith accused, witnesses and the case property reached Police Station Dhand, where SI/SHO Zile Singh was found present. He produced the accused, witnesses, case property, sample parcel and specimen seal impressions before the SI/SHO and apprised him about the facts of the case. SI/SHO Zile Singh also verified the facts and had put his seal 'ZS' and affixed the same on the parcels and retained his seal with himself. On the directions of the SHO, the Investigating Officer deposited the case property with the MHC alongwith sample seal impressions and the sample parcels in intact position and the accused was lodged in the lockup. A report under Section 57 of the NDPS Act was also prepared and was presented to SI/SHO Zile Singh for further transmission to the higher officers. The samples were sent to F.S.L., Madhuban for its analysis and it was found to be containing *charas*.

After completion of the investigation, the challan was presented under Section 15 of the NDPS Act. The trial Court vide

order dated 02.12.2004 charge sheeted the appellant/accused under Section 15 of the NDPS Act, to which, he pleaded not guilty and claimed trial.

To prove the charge against the present appellant, the prosecution examined eight prosecution witnesses.

R.K. Vashist, DSP, was examined as PW1. After appellant/accused was apprehended, he was produced before the said witness, who was posted as DSP, Headquarter, Kaithal. He directed ASI Om Parkash to personally search the accused and on search by ASI Om Parkash, *charas*, was recovered from the pocket of right side of pant. The *charas* was wrapped in Khakhi polythene. The samples as well as residue parcels were converted into sample parcels and the seals were affixed. He supported the case of the prosecution in totality. SI Zile Singh was examined as PW2, who was posted as SI/SHO in Police Station Dhand. After the arrest, the accused, witnesses and the case property were produced before him and he had verified the facts of the case. He also forwarded the report under Section 57 of the NDPS Act Ex.PB to DSP and SP, Kaithal for information. He also affixed his seal 'ZS' on each of the parcels. The prosecution further examined HC Satbir Singh, who was part of the police team, which effected the search from the person of the accused. He was also a witness to the notice under Section 50 of the NDPS Act, where, the accused was apprised of his right of his search either in the presence of Illaqa Magistrate or a gazetted officer. Further, ASI Om Parkash, who was the key witness of the prosecution was

examined as PW4. He explained the entire search and seizure procedure and narrated the facts as mentioned in the FIR. The prosecution examined Constable Rampal as PW5, ASI Devender Kumar as PW6, Ved Parkash as PW7 and Constable Rakesh Kumar as PW8 and their testimonies are formal in nature.

After the examination of the prosecution witnesses, the entire incriminating material was put to the accused under Section 313 Cr.P.C., and he pleaded his false implication. He stated that he was innocent and was falsely involved and nothing was recovered from his possession. He was involved due to political revenge.

The defence examined DW1 Ram Swaroop, independent witness. He stated that he did not know Krishan, accused, present in the Court. In his presence, the police did not recover anything from the accused and he was never joined in the investigation as an independent witness.

I have heard learned counsel for the parties and with their able assistance, I have perused the case file carefully.

Learned counsel for the appellant, while referring to the notice under Section 50 of the NDPS Act Ex.PC, submitted that the accused was not served with proper notice as per the mandatory requirement of law. In fact, an option was given to the present appellant to get his search conducted either in the presence of learned Illaqa Magistrate or some gazetted officer. It was further argued that even PW3 HC Satbir Singh also stated that a notice under Section 50 of the NDPS Act was served upon the accused and he was apprised

about his right that he could get his search conducted either before a Illaqa Magistrate or a gazetted officer. Apart from that, ASI Om Parkash also stated that the accused was apprised of his right to give his search before the Illaqa Magistrate or a gazetted officer. Learned State counsel has opposed the said submission and stated that the mandatory provisions of Section 50 of the NDPS Act had been complied with in the instant case.

It has been held by the Hon'ble Supreme Court of India in the matter of Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2011(1) SCC 609 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.*

It has been held by the Hon'ble Supreme Court in the matter of **State of Rajasthan Vs. Jag Raj Singh @ Hansa 2016(3)**

R.C.R.(Criminal) 539 and AIR 2016 SC 3041 as follows:-

22. A Constitution Bench of this Court in ***State of Punjab v. Baldev Singh, 1999(3) RCR (Criminal) 533 : (1999) 6 SCC 172***, had occasion to consider the provisions of the NDPS Act and several earlier judgments of this Court. The Constitution Bench noticed that the earlier judgments in ***Balbair Singh's*** case has found approval by three Judges Bench in ***Saiyad Mohd. Saiyad Umar Saiyed & others v. The State Of Gujarat (supra)*** and a discordant note was struck by two Judges Bench in ***State of Himachal Pradesh v. Pirthi Chand and another, 1996(2) RCR (Criminal) 759 : (1996) 2 SCC 37***. The Constitution Bench approved the view of this Court in ***Balbair Singh's*** case that there is an obligation on authorised officer under section 50 to inform the suspect that he has right to be informed in the presence of the Gazetted Officer. It was held by Constitution Bench that if search is conducted in violation of Section 50 it may not vitiate the trial but that would render the recovery of illicit articles suspect and vitiates the conviction and sentence of the accused. What is said about non-compliance of Section 50 is also true with regard to non-compliance of Section 42 of the Act.

23. In ***Beckodan Abdul Rahiman v. State Of Kerala, 2002(2) RCR (Criminal) 385 : 2002 (4) SCC 229***, this Court had occasion to consider both Section 42 and Section 50. In the above case there was non compliance of Section 42 (2) as well as Section 50. It was also noticed that a Constitution Bench in ***State of Punjab v. Baldev Singh (supra)*** has already laid down that

provisions of Section 42 and 50 are mandatory and their non-compliance would render the investigation illegal. Following was held in paragraphs 5 and 6:

"5.In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW1). After recording the information, the witnesses is not shown to have complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a Gazetted Officer or Magistrate.

6.We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted...."

I find sufficient force in the arguments raised by the learned counsel for the appellant. In the instant case, the notice under Section 50 of the NDPS Act was served upon the present appellant. However, he was given offer vide notice Ex.PC that he could get his search conducted either in the presence of learned Illaqa Magistrate or some gazetted police officer. Even PW3 HC Satbir Singh stated that a notice under Section 50 of the NDPS Act Ex.PC was served on the accused and he was apprised about his right to get his search conducted either before a Illaqa Magistrate or a gazetted officer. Similarly, PW4 ASI Om Parkash stated that a notice Ex.PC under Section 50 of the NDPS Act was served upon the accused and he was

apprised of his right to get his search conducted either before a Illaqa Magistrate or a gazetted officer. The prosecution evidence on record further suggests that the recovery was effected from the personal search of the accused and in that eventuality, the police officials were bound to strictly comply with the mandatory provisions of Section 50 of the NDPS Act. Thus, the breach of mandatory provisions of Section 50 of the NDPS Act would vitiate the recovery of the contraband from the present appellant.

Still further, as per the case of the prosecution, the police party was present on the road near Dhand and a private person Ram Swaroop son of Shri Malkha Singh met them and started talking to the police party. The said person was associated as an independent witness and had thumb marked recovery memo Ex.PA, notice under Section 50 of the NDPS Act Ex.PC, reply to the notice under Section 50 of the NDPS Act Ex.PD as well as the notice under Section 50 of the NDPS Act Ex.PE. However, he was not examined as a prosecution witness and rather he appeared as DW1. DW1 Ram Swaroop clearly deposed that he did not know the accused and police did not recover anything from the possession of the accused in his presence. He was never joined as an independent witness during the course of the investigation and the Investigating Officer had obtained his thumb impressions on some blank papers, when he visited the police station in connection with some personal work. Thus, it is apparent that the only independent witness was not examined by the prosecution and

while appearing as a defence witness, he had not supported case of the prosecution.

In view of the above discussion, I find that there was breach of mandatory provisions of Section 50 of the NDPS Act and the judgment of conviction is legally unsustainable. Consequently, the impugned judgment of conviction and order of sentence dated 28.02.2006 passed by the learned Judge, Special Court, Kaithal, are set-aside and the appellant is acquitted of the charge. He be set free, if not on bail and not required in other case.

All pending applications, if any, are disposed of, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

20.01.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking : Yes/No
Whether reportable : Yes/No