

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE**

CRM (NDPS) 1260 of 2024

**Mahesh Prasad Jaiswal
Vs.
The State of West Bengal**

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Apurba Sinha Ray

For the Petitioner : Mr. Sabyasachi Banerjee, Adv.
Mr. Pawan Kumar Gupta, Adv.
Ms. Sofia Nesar, Adv.
Mr. Santanu Sett, Adv.

For the State. : Ms. Anasuya Sinha, APP
Ms. Madhumita Basak, Adv.

CAV On: : 23.09.2024

Judgment On : 01.10.2024

Apurba Sinha Ray, J. :-

1. In praying for bail of the petitioner the learned counsel has drawn the attention of this court to the order passed in CRM (NDPS) 876 of 2024 on 03.07.2024 wherein the concerned accused person

was granted bail by this Bench as the Gazetted Officer who witnessed the search and seizure and the arrest, directly supervised the process of search and seizure. The learned counsel claims parity. He has also submitted that requirements under Section 50 of NDPS Act, 1985 were not complied with. Furthermore, the contraband articles which were allegedly seized at the time of arrest of the accused were not actually sent to the forensic laboratory for test since the nature and particulars of the representative sample drawn from the contraband do not match with the seized contraband.

2. It is further contended that the Hon'ble Supreme Court has laid down the principles of law in this regard in the case of **State of Rajasthan Vs. Parmanand and Anr. (2014) 5 SCC 345**, but the same was not followed at the time of seizure.

3. Learned counsel for the State vehemently opposes the prayer for bail. According to her, the requirements laid down in Section 50 of the NDPS Act, 1985 have been duly complied with and further the representative samples were correctly drawn from the seized contraband articles. Whatever submission regarding alleged deficiency in the seizure list has been made by learned counsel of the petitioner relates to the first seizure of the contraband articles and they are not related to the second seizure. There are sufficient incriminating

materials against the present petitioner. Learned counsel for the State has also submitted that during hearing of the case being no. CRM (NDPS) 876 of 2024 due compliance under section 50 of NDPS Act, 1985 in connection with the said accused was not brought to the notice of the court and the order dated 03.07.2024 in connection with CRM (NDPS) 876 of 2024 was passed without taking into consideration that such requirements were complied with.

4. We have considered the rival submissions of the learned counsels of the parties. After perusal of the Case Diary we find that as per requirement of Section 50 of NDPS Act, 1985 the petitioner was served with a notice informing him that he had the right to be searched in presence of a Gazetted Officer or a Magistrate but the petitioner did not require that his person should be searched in presence of a Gazetted Officer or a Magistrate and he himself wrote his comment in Hindi language. Section 50(1) of the NDPS Act is as follows:-

“50. Conditions under which search of persons shall be conducted – (1) When any officer duly authorized 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.”

5. From the above, it transpires that if the petitioner requires that his person should be searched in presence of the nearest Gazetted Officer or the nearest Magistrate, in that event non-compliance of provision of Section 50 of the Act will come into play if such request of the petitioner is not respected. But, if the petitioner after knowing that he has the right to be searched in presence of a Gazetted Officer or Magistrate does not require to be searched in any of such officers’ presence and if such search is not done in presence of such officer accordingly, the same cannot be considered as violation of Section 50 of Act, 1985. Several reported decisions, such as **State of Rajasthan V. Ram Chandra (2005) 5 SCC 151 : 2005 SCC (Cri) 1010; see also Vijaysinh Chandubha Jadeja V. State of Gujarat (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497** may be referred to for understanding the issue. The said decisions postulate that Section 50 of the Act 1985 in reality provides for additional safeguards which are not specifically provided by the statute. The stress is on the adoption of a reasonable, fair and just procedure. There is no specific form prescribed or intended for conveying the information required to be given under Section 50. What is necessary is that the suspect should be aware of

the existence of his right to be searched in the presence of one of the officers mentioned in the section. Since no specific mode or manner is prescribed or intended the court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or straight jacket formula in that regard.

5.1. However, application of substantial compliance theory in respect of Section 50 of the Act, 1985 has been done away with in **Vijaysinh Chandubha Jadeja (supra)**.

“31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey 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 case. 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.”

5.2. In **Vijaysinh Chandubha Jadeja (supra)** the Apex Court has been pleased to quote the observations of the Hon'ble Court in connection with **State of Punjab Vs. Baldev Singh (1999) 6 SCC 172** at page no. 619 :-

“That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.”

6. In the **State of Rajasthan Vs. Parmanand and Anr. (supra)** the Hon'ble Apex Court has deprecated the system of joint communication of right available under Section 50(1) of the NDPS Act, 1985 since according to the Hon'ble Court it 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 carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. The communication of the right under Section 50 has to be clear unambiguous and individual.

7. In our case, individual notice was served upon the petitioner but he did not require that he should be searched in the presence of a Gazetted Officer or Magistrate and he wrote his unwillingness in Hindi. Therefore, prima facie, it appears that Section 50 of the Act, 1985 has been complied with.

8. All the above decisions deal with the questions relating to the duty of the concerned police personnel when the accused expresses his willingness to be searched in the presence of a Gazetted Officer or Magistrate. The said decisions do not ponder over the question what would be the duty of the police personnel when being informed of his

right, the accused to be searched in the presence of a Gazetted Officer or Magistrate. In this regard, reference may be made to the case law reported at **(2013) 2 SCC 67 (Ashok Kumar Sharma Vs. State of Rajasthan)** wherein, after holding that **Vijaysinh Chandubha Jadeja (supra)** lays down the correct law, it has been held:-

“We are of the view that there is an obligation on the part of the empowered officer to inform the accused or the suspect of the existence of such a right to be searched before a gazetted officer or a Magistrate, if so required by him. Only if the suspect does not choose to exercise the right in spite of apprising him of his right, the empowered officer could conduct the search on the body of the person.”

9. In this case, the agency, at least at this stage, has been able to show that individual notice upon the petitioner was served and he intimated in writing that he did not require to be searched in the presence of a Gazetted Officer or a Magistrate. If there is any deficiency in complying with the provisions of Section 50(1) of Act of 1985, the same shall be determined at the time of trial.

10. Moreover, the same reasoning will apply also in respect of the alleged inconsistency in the seized contraband articles or

representative sample of the contraband. As such question relates to factual aspects, the same shall also be determined at the time of trial. Further, be it mentioned here that at the time of passing the order dated 03.07.2024 in CRM (NDPS) 876 of 2024, neither the State counsel nor the learned advocate representing the concerned accused drew our attention to the question of compliance of requirement under Section 50 of the Act of 1985 and the same was passed without taking into consideration whether requirements under Section 50 of the Act 1985 were complied with or not.

11. From the materials on record, it transpires that Dysp. Subhasish Banik was not in the raiding party as alleged by the petitioner. The record shows that he arrived at the place of occurrence after the accused persons were detained, and the process of search and seizure was carried out in his presence. As the accused/petitioner refused to be searched in the presence of a Gazetted Officer or the nearest Magistrate, the search and seizure in the presence of Dysp. Subhashis Banik cannot, at this stage, be held to be violative of the provisions of Sections 43 and 50 of the NDPS Act, 1985.

12. In view of the above, commercial quantity of contraband items being involved, we are not inclined to allow the prayer for bail of the petitioner at this stage.

13. Accordingly, the bail petition stands rejected.

14. Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

I Agree.

(ARIJIT BANERJEE, J.)

(APURBA SINHA RAY, J.)