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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH****CRA-S-2475-SB-2009 (O&M)****Date of Decision: 15.02.2025****DHARAM PAL****... Appellant****Versus****STATE OF PUNJAB****...Respondent****CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI**

Present: Ms. Promila Nain, Legal Aid Counsel with
Mr. Harveen Mehta, Advocate
for the appellant.

Mr. Harkanwar Jeet Singh, Asstt. A.G., Punjab.

**********JASJIT SINGH BEDI, J.**

The present appeal has been filed against the judgment of conviction and order of sentence dated 06.10.2009 passed by the Judge, Special Court, Barnala.

2. The FIR was registered on 21.11.2008, the judgment of conviction and order of sentence passed by the Judge, Special Court, Barnala is dated 06.10.2009, the appeal was filed on 14.10.2009 and the matter is being taken up for hearing now i.e. after a period of more than 16 years from the date of registration of the FIR.

3. The brief facts, as per the report u/s 173 Cr.P.C that on 21.11.2008, ASI Baljit Singh along with his police party, in connection with patrolling duty and checking of bad elements, was proceeding from main road Barnala, towards Mansa Dhaula. When the police party was a little short of

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the T-point Chhanna, at about 6.30 AM, on the right side under the shade of a Bohar tree near the water tap, one person was seen consuming something from his left hand with his right hand. On seeing the police party, he at once had kept that thing in the pocket and started drinking water. On suspicion, ASI Baljit Singh stopped the vehicle and with the help of his companions, apprehended the said person, who on enquiry, disclosed his name as 'Dharam Pal' and also disclosed his other particulars. ASI Baljit Singh, looked for a private person nearby, but none was available. HC Sabir Mohd. was despatched to bring some independent witness. Then ASI Baljit Singh disclosed his identity and also disclosed his present place of posting. He also stated to the accused that he suspecting him to be carrying some illegal substance and that he intends to conduct his search. He also apprised the accused of his right to get the search conducted in the presence of some Gazetted Officer or Magistrate, who could be called to the spot. However, the accused reposed confidence in ASI Baljit Singh and expressed his desire to get the search conducted from ASI Baljit Singh, whereupon a consent memo was separately recorded. Meanwhile, HC Sabir Mohd. also returned and disclosed about the non-availability of any independent witness.

4. Thereafter, ASI Baljit Singh, conducted the search of Dharam Pal, which led to the recovery of opium wrapped in a glazed paper from the pocket of the shirt, which the accused was wearing. ASI Baljit Singh separated two samples of 10 gm each from the opium so recovered and the residue opium weighed 130 gm. Parcels of the samples and the residue were



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prepared, which were sealed with the seal bearing impressions "BS". The sample seal was separately prepared. The seal after use was handed over to HC Ranjit Singh. All the three parcels and sample seal were taken into possession vide a separate recovery memo. Various other documents were prepared at the spot. On return to the police Station, the accused and the case property were produced before the SHO, who counter sealed the parcels and the sample seal with his seal bearing impressions "HS". The sample parcel was sent to the office of the Chemical Examiner and the latter vide his report, opined that the contents of the parcel were opium. On completion of the investigation, the accused was sent up to face trial for the commission of an offence under Section 18 of the NDPS, Act, 1985. Accordingly, charges were framed against the appellant under Section 18 of the NDPS Act, 1985. The accused pleaded not guilty and claimed trial.

5. The prosecution examined 05 prosecution witnesses besides adducing documentary evidence.

6. On closure of the prosecution evidence, all the incriminating circumstances appearing in the prosecution evidence were put to the accused in his statement u/s 313 Cr.P.C. The accused denied all the allegations, pleaded innocence and claimed false implication. However, he did not lead any evidence in defence.

7. ASI Baljit Singh who was the Investigating Officer was examined as PW-1. He deposed about the mode and manner of the interception of the accused during the course of patrolling duty. He deposed

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about having disclosed his identity to the accused and thereafter extending the option qua search before the Gazetted Officer or Magistrate to the accused. However when the accused reposed confidence in him, his consent memo Ex.PA was recorded. He deposed about conducting of a search of the accused which led to the recovery of the opium wrapped in a glazed paper. He deposed about separation of samples and preparation of parcels of the samples and the residue and also deposed about preparation of a sample seal, which were taken into possession vide recovery memo Ex.PB. He deposed about preparation of various documents at the spot, such as personal search memo Ex.PC, ruqa Ex.PD, on the basis whereof the formal FIR Ex.PD/1 was recorded, site plan Ex.PE, memo of arrest Ex.PF and intimation memo Ex.PG. He deposed that on return to the Police Station, he produced the accused together with the case property before SHO/Insp. Harpal Singh, who verified the fact of recovery and then counter sealed the parcels and the sample seal with his seal bearing impressions "HS". He also deposed about the preparation of the report under Section 57 of NDPS Act, 1985 which was Ex.PH and the endorsement of the DSP on the same Ex.PH/1. He deposed that on the day of recovery itself, he produced the accused and the case property before the Magistrate.

PW2-HC Ranjit Singh, who was accompanying the Investigating Officer on the day of recovery also deposed about the mode and manner of the apprehension of the accused and recovery of opium from his possession. He further deposed about the separation of the samples and preparation of the

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parcels of the samples and the residue. He deposed about preparation of various documents relating to the recovery in the present case which were signed by him as an attesting witness. His statement was in verbatim with the statement of the Investigating Officer.

PW3-HC Gurtej and PW4-HC Sukhdev Singh tendered into evidence their affidavits Ex.PJ and Ex.PK with regard to the safe custody of the case property in the Malkhana and safe conveyance of the sample parcel to the office of the Chemical Examiner.

PW5-Insp Harpal Singh deposed about the production of the accused along with parcels, sample seal and the witnesses before him on return to the Police Station, by ASI Baljit Singh. He verified the fact of recovery and counter-sealing of the parcels as well as sample seal with his seal bearing impression "HS" and thereafter getting deposited the case property with MHC Gurtej Singh.

Report of the Chemical Examiner is Ex.PI.

8. Based on the evidence led, the accused/appellant came to be convicted and sentenced by the Court of Judge, Special Court, Barnala vide judgment and order of sentence dated 06.10.2009 as under:-

Offence under Section	Sentence RI/SI	Fine	RI/SI in default of payment of fine
18 NDPS Act, 1985	RI for 06 months	Rs.250/-	RI for 15 days

9. It is the aforementioned judgment, which is under challenge, in the present appeal.



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10. The learned Legal Aid Counsel for the appellant contends that no independent witness was examined which creates a doubt in the prosecution case. There is a violation of Section 50 of the NDPS Act inasmuch as though an option was given to the appellant that he could be searched in the presence of a Gazetted Officer or Magistrate, his consent was recorded to the effect that he was ready and willing to get himself search in the presence of the Investigating Officer, ASI Baljit Singh who carried out the search and seizure. Reliance is placed on the judgments in the cases of **Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2011(1) SCC 609**, **State of Rajasthan Vs. Parmanand & another, 2014(2) RCR (Criminal) 40** and **Arif Khan @ Agha Khan Vs. State of Uttarakhand, 2018(2) RCR (Criminal) 931**. She, thus contends the impugned judgment was liable to be set aside.

11. On the other hand, the learned State counsel contends that mere absence of independent witnesses would not falsify the case of the prosecution as there was no reason for the official witnesses to depose falsely against the appellant. Further, it was the accused himself who had reposed faith in the Investigating Officer regarding his search being conducted and therefore, it could not be said to be a case where the provisions of Section 50 of the NDPS Act had been violated.

12. I have heard the learned counsel for the parties.

13. Before proceeding further in the matter, it would be apposite to refer to the provisions of Section 50 of the NDPS Act, 1985 and the same reads as under:-



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.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazette Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic 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 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

14. The various judgments relied upon by the appellant are as under:-

In **Vijaysinh Chandubha Jadeja** (supra), it was held as under:-

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*“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*



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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.”

(emphasis supplied)

In **State of Rajasthan** (supra), it was held as under:-

“2. The case of the prosecution was that on 13/10/1997 during Kota Camp at Iklera, P.N. Meena, Sub-Inspector, Office of the Narcotics Commissioner, Kota received information at 1900 hours in the evening that the respondents were to handover about 10 Kg opium on 14/10/1997 in the morning between 4.00 a.m. to 6.00 a.m. at Nangdi-Tiraha, Iklera, Chhipabaraud Road to a smuggler. This information was entered by SI Meena in the diary and he forwarded it to the Investigating Officer J.S. Negi, Superintendent. J.S. Negi sent this information through Constable B.L. Meena to Assistant Narcotic Commissioner, Kota. Thereafter, raiding party was formed. The raiding party was headed by Superintendent J.S. Negi. The raiding party reached Nangdi-Tiraha by a Government vehicle. Independent witnesses Ramgopal and Gopal Singh were called by SI Qureshi. Their consent was obtained. At about 4.25 a.m., the respondents came from the village Rajpura. On seeing the raiding party, they tried

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to run away but they were stopped. Enquiry was made with both the respondents in the presence of the independent witnesses by SI Qureshi. The respondents gave their names. Respondent No. 1 Parmanand had one white colour gunny bag of manure in his left hand. SI Qureshi told the respondents that he had to take their search. They were told about the provisions of section 50 of the NDPS Act. They were told that under section 50(1) of the NDPS Act, they had a right to get themselves searched in the presence of any nearest Magistrate or any gazetted officer or in the presence of Superintendent J.S. Negi of the raiding party. One written notice to that effect was given to them. On this notice, appellant Surajmal gave consent in writing in Hindi for himself and for appellant Parmanand and stated that they are ready to get themselves searched by SI Qureshi in the presence of Superintendent J.S. Negi. He also put his thumb impression. Thereafter, bag of respondent No. 1 Parmanand was searched by SI Qureshi. Inside the bag in a polythene bag some black material was found. The respondents told him that it was opium and they had brought it from the village. The weight of the opium was 9 Kg. 600 gms. Necessary procedure of drawing samples and sealing was followed. The respondents were arrested. After completion of the investigation, respondent No. 1 Parmanand was charged for offence under Section 8 read with section 18 of the NDPS Act and respondent No. 2 Surajmal was charged for offence under Section 8 read with Section 18 and for offence under Section 8 read with section 29 of the NDPS Act. The prosecution examined 11 witnesses. The important witnesses are PW-5 J.S. Negi, the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi. The respondents pleaded not guilty to the charge. They contended that the police witnesses had conspired and framed them. The case is false.



3. *Learned Special Judge convicted respondent No. 1 Parmanand under Section 8 read with section 18 of the NDPS Act and respondent No. 2 Surajmal under Section 8 read with section 28 of the NDPS Act. They were sentenced for 10 years rigorous imprisonment each and a fine of L 10 lakhs each. In default of payment of fine, they were sentenced to undergo rigorous imprisonment for two years.*

4. *Aggrieved by the said judgment and order, the respondents preferred an appeal to the Rajasthan High Court. By the impugned order, the Rajasthan High Court acquitted the respondents. Hence, this appeal by the State.*

5. *Mr. Imtiaz Ahmed, learned counsel for the State of Rajasthan submitted that the High Court was wrong in coming to the conclusion that there was no compliance with section 50 of the NDPS Act. Counsel submitted that PW-10 SI Qureshi has clearly stated that the respondents were communicated their right under section 50(1) of the NDPS Act. A written notice was also given to them and only after they consented to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent, that the search of their person and search of bag of respondent No. 1 Parmanand was conducted. Counsel submitted that the High Court was also wrong in disbelieving independent pancha witnesses. Counsel urged that the impugned order is perverse and deserves to be set aside.*

6. *Ms. Nidhi, learned counsel for the respondents, on the other hand, submitted that admittedly notice under section 50 of the NDPS Act was a joint notice. The respondents were entitled to individual notice. The search is, therefore, vitiated. In this connection, counsel relied on judgment of the Punjab and Haryana High Court in Paramjit Singh and Anr. v. State of Punjab, 1997(1) RCR (Criminal) 293 : 1997(1) CRIMES 242 and judgment of the Bombay High Court in Dharamveer Lekhram*



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Sharma and Another v. The State of Maharashtra and Ors., 2001(2) RCR (Criminal) 788: 2001(1) CRIMES 586. Counsel submitted that search was a farce. The High Court has, therefore, rightly acquitted the respondents.

7. The question is whether section 50 of the NDPS Act was complied with or not. Before we go to the legalities, it is necessary to see what exactly the important police witnesses have stated about compliance of section 50 of the NDPS Act. The gist of the evidence of the police witnesses PW-5 J.S. Negi, the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi is that the respondents were informed that they have a right to be searched in the presence of a gazetted officer or a nearest Magistrate or before J.S. Negi, the Superintendent, who was present there. They were given a written notice. On that notice, respondent No. 2 gave his consent in Hindi in his handwriting that he and respondent No. 1 Parmanand are agreeable to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent. He signed on the notice in Hindi and put his thumb impression. Respondent No. 1 Parmanand did not sign. There is nothing to show that respondent No. 1 Parmanand had given independent consent. Search was conducted. PW-10 SI Qureshi did not find anything on the person of the respondents. Later on, he searched the bag which was in the left hand of respondent No. 1 - Parmanand. In the bag, he found black colour material which was tested by chemical kit. It was found to be opium.

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

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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.

13. It is now necessary to examine whether in this case, section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No. 2 - Surajmal is stated to have signed for himself and for respondent No. 1 - Parmanand. Respondent No. 1 Parmanand did not sign.

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



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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 authorised 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 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

15. 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 the raiding party. PW-



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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. We have, therefore, no hesitation in concluding that breach of section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed.

Appeal dismissed.”

(Emphasis supplied)

In Arif Khan @ Agha Khan (supra), it was held as under:-

“7. Thereafter, the accused was asked by the police personnel of raiding party as to whether he is in possession of contraband "Charas". The accused admitted that he is in possession of "Charas". On apprehending the accused, he was informed by the police personnel that he has a legal right to be searched in the presence of a Gazetted Officer or a Magistrate to which the accused replied that he has a faith on the raiding police party and consented to be searched by them.

8. The raiding police party accordingly obtained his consent in writing to be searched by the raiding police party. The raiding police party then searched the accused which resulted in seizure of "Charas" weighing around 2.5 K.G. in quantity from his body.



14. Learned counsel contended that the prosecution has failed to ensure mandatory compliance of Section 50 of the NDPS Act inasmuch as the alleged recovery/search of the contraband (Charas) made by the raiding police party from the appellant's body was not done in accordance with the procedure prescribed under Section 50 of the NDPS Act which according to learned counsel is mandatory as held by this Court in the case of *Vijaysinh Chandubha Jadeja v. State of Gujarat*, 2010(4) RCR (Criminal) 911 : 2011(1) SCC 609.

15. Learned counsel urged that the search/recovery of the alleged contraband from the appellant ought to have been made only in the presence of either a Magistrate or a Gazetted Officer only.

16. It was urged that since admittedly the prosecution did not make the search/recovery from the appellant in the presence of a Magistrate or a Gazetted Officer and, therefore, the alleged recovery of the contraband "Charas" from the appellant is rendered illegal being in contravention of requirements of Section 50 of the NDPS Act thereby entitling the appellant for an acquittal from the charges.

18. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside of the impugned judgment acquit the appellant from the charges in question.

19. The short question which arises for consideration in the appeal is whether the search/recovery made by the police officials from the appellant (accused) of the alleged contraband (charas) can be held to be in accordance with the procedure prescribed under Section 50 of the NDPS Act.

20. In other words, the question that arises for consideration in this appeal is whether the prosecution was able to prove that the



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procedure prescribed under Section 50 of the NDPS Act was followed by the Police Officials in letter and spirit while making the search and recovery of the contraband "Charas" from the appellant (accused).

25. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband "Charas" does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of Vijaysinh Chandubha Jadeja (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the



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presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but none of them deposed that the search/recovery was made in presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal."

(emphasis supplied)

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15. A perusal of the law as laid down by the Hon'ble Supreme Court in the aforesaid judgments is that the provisions of Section 50 of the NDPS Act are mandatory and require strict compliance and failure to comply with the provisions 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. Further, in order to impart authenticity and transparency, at the first instance, it should be the endeavour of a police party to produce the suspect before the nearest Magistrate who enjoys more confidence of the common man compared to any other officer. Further, where an offer is given to an accused that he could be searched in the presence of a Gazetted Officer, Magistrate or by a member of the Police party who is not Gazetted Officer and the police party itself is not accompanied by a Gazetted Officer but the accused expresses his willingness to be searched by the raiding party reposing faith on the raiding police party and consents to be searched by them, even then, the offer would be violative of Section 50 of the NDPS Act inasmuch as it is a legal imperative that the search is carried out in the presence of a Gazetted Officer or Magistrate only and the question of giving a third option of a search being conducted by a member of the police party does not arise. Still further, where only two options are given in the compliance of Section 50 of the NDPS Act but the accused voluntarily expresses his willingness to be searched by a member of the raiding party none of whom are Gazetted Officers and the search is carried out by such unauthorised officer, this search



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and seizure, if any would be in violation of Section 50 of the Act and the judgments of the Hon'ble Supreme Court (supra).

16. Coming back to the facts of the instant case, apparently, the search could have been conducted only before a Gazetted Officer or a Magistrate. The question of a third option being given or recording of concession of the accused that he was ready for a search to be conducted by the police party which did not comprise of a Gazetted Officer or Magistrate does not arise. If such a concession of an accused was recorded and amounted to due compliance of Section 50 of the NDPS Act, then an accused in custody and under duress would easily succumb to police pressure and consent for a search to be conducted by the police party arresting him. This, most essential and vital safeguard would be rendered nugatory.

17. Therefore, this Court has no hesitation to hold that there must be strict compliance of Section 50 of the NDPS Act and the search of a person must be conducted in the presence of a Gazetted Officer or Magistrate only even if while exercising his option, the accused states that he wishes to be searched by a member of the police party none of whom are Gazetted Officers.

18. In view of the aforementioned discussion, quite apparently, there is a violation of Section 50 of the NDPS Act inasmuch as the accused/appellant consented to be searched by ASI Baljit Singh (PW1) who was not a Gazetted Officer, the search was conducted by PW1 and the alleged recovery of 150 gm of opium effected pursuant to the said illegal search.



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19. Therefore, the impugned judgment dated 06.10.2009 passed by the Judge, Special Court, Barnala is set aside and the appellant is acquitted of the charges framed against him.

(JASJIT SINGH BEDI)
JUDGE

15.02.2025

JITESH

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