

CASE NO.:  
Appeal (crl.) 312 of 2002

PETITIONER:  
Bharatbhai Bhagwanjibhai

RESPONDENT:  
State of Gujarat

DATE OF JUDGMENT: 29/10/2002

BENCH:  
Umesh C. Banerjee & B.N. Agrawal.

JUDGMENT:  
J U D G M E N T

BANERJEE, J

The Statement of Objects and Reasons of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act") categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safe-guards provided under the Statute so as to be in tune therewith.

At this juncture, however, it would be convenient to advert to the contextual facts briefly : The factual score records that on 23rd January, 2000, Inspector Mr. Katara along with two Head Constables and four Constables was on patrolling duty and whilst on duty at the bus stand at Chowk in Upleta at about 3.00 p.m. it was noticed that the accused on seeing the police started running. This undue movement however aroused the curiosity and as such accused was intercepted and upon having the presence of two Panchas was searched which however led to the disclosure of small size plastic bag containing Charas of about 12 gms. in weight. The inspector lodged a complaint at about 1630 hours and necessary entries were made in the records. The substance found in the plastic bag was forwarded to the Forensic Science Laboratory for opinion and all necessary formalities thereafter were complied with culminating into the filing of the charge-sheet. The learned Sessions Judge framed the charge against the accused who pleaded 'not guilty' and as a matter of fact in his statement under Section 313 Cr.P. Code, the appellant has stated that the evidence stands created, as he was not aware of any such incident as noticed above. The learned Sessions Judge, however, on the basis of available records convicted the accused person and sentenced as noticed earlier. The High Court, however, confirmed the conviction as well as sentenced the accused to suffer rigorous imprisonment for 10 years and a fine of Rs.1.00 lakh with a default clause as well.

The principal contention raised that since the deterrent punishments are prescribed under the NDPS Act, the legislature has taken care to incorporate several provisions in Chapter V of the

Act and as interpreted by this Court, the provisions are mandatory in nature and non-compliance therewith would completely vitiate the trial. It is on this score it has been contended in support of the appeal that by reason of the factum of ascertainment of the wishes and desires of the accused as regards the search and seizure and that being a mandatory requirement and there being admitted non-compliance therewith, question of either maintaining the guilt of the accused person by the Additional Sessions Judge or confirmation thereof by the High Court would not arise. In this context Section 50 has been very strongly emphasised, which we feel it convenient to set out along with Sections 51 and 57 on which the appellant also laid strong emphasis. The said provisions read as below :

"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 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 Gazetted 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."

"51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures - The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, insofar as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."

"57. Report of arrest and seizure  
Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior."

Turning attention to the requirement of Section 50, it is now well settled that the same is mandatory in nature and thus there exists an obligation to comply with the provisions and non-compliance thereof would entail an order of acquittal in a proceeding under the NDPS Act. This Court consistently and without even sounding a contra note followed the same and as such we need not dilate thereon any further.

Incidentally, Section 51 of the Act is an enabling provision under which the provisions of Code of Criminal Procedure have been made applicable to warrants, searches, arrests and seizures under the Act provided further the same be not inconsistent with the provisions of the special statute being the Act of 1985. It is in this context that Section 4 of the Code of Criminal Procedure, 1973 ought to be noticed which provides for trial of offences under the Indian Penal Code and other laws since sub-section (2) thereof expressly records that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation and other incidentals noticed above.

On a reading of the aforesaid provisions thus, it appears that Section 51 of the Narcotics Act permits introduction of Section 4 of the Criminal Procedure Code even in the matter of investigation, searches, seizures, etc.

As regards the provisions of Section 57, we do not find any infraction thereof. As such no question can be raised as regards the intimation of arrest and seizure and a report to that effect. Turning attention to the contextual facts once again, admittedly, the search was not in accordance with the requirement of Section 50 and it is on this score that learned Advocate was rather vocal and emphatic as regards the factum of the learned Additional Sessions Judge being subjected to a very serious error and the High Court also by reason of its concurrence has been in a manifest error. The issue, however, is slightly different in the contextual facts. Section 50 categorically lays down that if the search is to be conducted by an officer duly authorised under Section 42 and the search is about to be conducted under the provisions of Sections 41, 42 or 43, the concerned officer does owe a duty to intimate the person to be searched that if the latter so requires, he would be taken to the nearest Gazetted Officer or to the nearest Magistrate for the purpose of having the search in their presence. But in the event of a situation otherwise, as in the contextual facts, viz., the accused person on seeing the patrolling police party started running, which created a suspicion in the mind of the concerned officer, who thereafter intercepted him and then in the presence of Panchas effected a search, question of compliance with the safeguards as prescribed under Section 50 of the Act would not arise. In *Balbir Singh (State of Punjab v. Balbir Singh)* 1994 (3) SCC 299 this Court in the similar vein answered the question in the negative in the manner following :

" It thus emerges that when the police, while acting under the provisions of Cr.P.C. as empowered therein and while exercising surveillance or investigating into other offences, had to carry out the arrests or searches they would be acting under the provisions of Cr.P.C. At this stage if there is any non-

compliance of the provisions of Section 100 or Section 165 Cr.P.C. that by itself cannot be a ground to reject the prosecution case outright. The effect of such non-compliance will have a bearing on the appreciation of evidence of the official witness and other material depending upon the facts and circumstances of each case. In carrying out such searches if they come across any substance covered by the NDPS Act the question of complying with the provisions of the said Act including Section 50 at that stage would not arise. When the contraband seized during such arrests or searches attracts the provisions of NDPS Act then from that stage the remaining relevant provisions of NDPS Act would be attracted and the further steps have to be taken in accordance with the provisions of the said Act."

Admittedly, on perusal of the evidence as is available on the records, it is clear that there was no prior information to the police officer that the accused is likely to come with a narcotic substance, neither the inspector had any reason to believe from his personal knowledge or information that the accused is likely to be in the area from where he was found with the contraband item. As a matter of fact, even at the time of effecting search, there was no knowing that an offence under Chapter IV of NDPS Act has been committed by the accused. The Inspector merely suspected the commission of an offence by reason of the fact that the accused started running on seeing the patrolling party. The evidence on this score is clear and categorical to the effect as discussed hereinbefore. Though the Panchas have given a slightly different version of the search and seizure, but that does not by itself take away the primary evidence as regards the search and subsequent discovery of Charas in the possession of the accused and the resultant seizure thereof. The contextual facts thus depict a situation not covered within the purview of Section 50. In this context, the observation of the Constitution Bench of this Court in *State of Punjab v. Baldev Singh* (1999 (6) SCC 172) also lends credence to the above statement of law. In paragraph 12 of the Report, this Court stated as below :

"12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted."

The learned Advocate in support of the appeal further contended that the decision of this Court in *Ahmed v. State of Gujarat* (2000 (7) SCC 477), upon reference to both *Balbir* and *Baldev* (supra) came to a conclusion of the applicability of Section 50 in all cases of NDPS. Unfortunately, however, the reliance on *Ahmed* (supra) is totally misplaced by reason of the fact that this Court in *Ahmed* was considering the issue of empowered officer or a duly authorised officer. This Court went on to record that to ensure fairness in the search itself and for compliance with Section 50 of the Act, no differentiation can be made whether the search is being made by the empowered officer, who obviously is an officer of a gazetted rank or the authorised officer, who may be a subordinate officer to whom the empowered officer authorises.

This Court went on to observe that a combined reading of the provisions of Sections 42 and 50 would make it crystal clear that wherever a search of a person is about to be made on the basis of personal knowledge or information received in that behalf, then if the person to be searched requires to be taken to a gazetted officer or the nearest Magistrate, the same must be complied with and failure to comply with the same would constitute an infraction of the requirements of the provisions of Section 50, which would ultimately vitiate the conviction and it is on this score this Court relied upon the plain and categorical language used by the legislature in Section 50. The decision in Ahmed (supra) does not lend any credence to the submissions in support of the appeal. The High Court in fact recorded a categorical satisfaction as regards the acceptance of evidence as credible and trustworthy and we also do not find any reason to record a different opinion in regard thereto. On the wake of the aforesaid, we are not inclined to interfere with the order of the High Court. As such this appeal fails and is dismissed.