



Examining the search of persons under section 50 of the narcotic drugs and psychotropic substances act, 1985

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Abstract

This research paper aims to examine Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 in light of the recent judicial Pronouncements and changes of the applicability and execution of the provision.

Keywords: narcotic drugs, psychotropic substances, search, seizure, doctrine of substantial compliance

1. Introduction

The Narcotic Drugs and Psychotropic Substances Act, 1985 (Herein referred to as "NDPS ACT".) came into force on November 14, 1985, and has become the statute under which all cases relating to possession, consumption, and sale of 'Narcotic Drugs' and 'Psychotropic Substances' are prosecuted. The Act has evolved over the years, and has been amended thrice in 1988, 2001 and 2014 which has changed its scope and direction.

The Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act was passed in 1988 and was brought in to ensure full implementation and enforcement of the NDPS ACT. The NDPS ACT coming into force is the Single Convention on Narcotic Drugs which was an international treaty drafted in 1961. The Convention aimed at preventing the production and sale of specified narcotic substances. It was far broader in its scope than previous treaties because it covered newer drugs that did not exist when the previous treaties had been drafted. However, the Convention is not in itself applicable to any nation, but instead recommends nations to adopt similar measures as National Law triumphs International Laws.

2. Doctrine of substantial compliance.

The doctrine of substantial compliance enumerates that if a bona fide attempt is made to perform the essentials of the provision and even if it does not precisely meet the terms of the provision or statutory requirements, the performance will still be considered complete if the essential purpose or the objective is accomplished. However this is subject to claim of damages for shortfall.

A defendant when sued for non-performance cannot avoid paying damages by showing he substantially performed or came near to performing the requirements of the provision.

3. Analysis of Section 50 of NDPS ACT

The Hon'ble Supreme Court in Baldev Singh case ^[1] and its subsequent observations in Vijaysinh Chandubha Jadeja v State of Gujarat ^[2] the Hon'ble Apex court held that the requirements of Section 50 of the NDPS ACT are:

1. Informing the suspected persons of right under section 50 of NDPS act and;

2. Search in presence of gazette officers or magistrate if so desired by the suspect and held to be mandatory.

In cases where the translation of the words (in the language the accused understands) "Magistrate" or "Gazette officer" if not explained by the investigating officer to the accused does not lead to non-substantial compliance if other ingredients are satisfied and facts are set accordingly.

The Hon'ble Apex court in Dilip v. State of Madhya Pradesh³ & State of Rajasthan v. Parmanand ^[4]. The precedents held that non-compliance of Section 50 NDPS ACT was fatal, vitiating the entire prosecution. It was also held that consent or lack of consent of the accused was irrelevant regarding compliance of Section 50 of NDPS ACT. Thus the provisions of NDPS Act, Section 50 have been held to be mandatory complied with, if they are violated, it would vitiate the trial. Even the Hon'ble Rajasthan High Court in Sahi Ram Vs. State of Rajasthan ^[5] held that though there is no specific contemplation that the notice should be in writing, but in case, where there is no public Panch witness as in where it is conducted in private places, in that event, at least notice under Section 50 of the Act ought to be in writing in order to lend credibility to the prosecution case. Especially when there are only police present at the crime scene, a written notice gives credibility. Also an established law that while seizing the incriminating materials, if the accused was not given option by the investigation officer to be searched in presence of a Gazette Officer or a Magistrate, considering the violation of mandatory provision of section 50, conviction and sentence cannot be sustained.

In absence of documentary proof about delivery of notice, independent witness or corroborative evidence for alleged recovery of opium, it could not be said that provision of Section 42 or 50 of the NDPS ACT were complied with and accused was held entitled for acquittal in such circumstances as held by Rajasthan High Court in judgment cited as Bihari Lal Vs. State of Rajasthan ^[6].

When the prosecution evidence is not convincing that the accused was given offer of being searched before a Gazette Officer or a Magistrate, there can be no presumption under Section 114 of the Indian Evidence Act, 1872. If no evidence to the effect has given, the court must assume that a person to

¹ (1999) 6 SCC 172

² CRIMINAL APPEAL NO. 943 OF 2005

³ (2007) 1 SCC 450

⁴ AIR 2014 SC 1384

⁵ 1999 Cri.L.J.977 (Raj.)

⁶ 2002 Cri.L.J.1716 (Raj.)

be searched was not informed the protection provided by law to him and must find that the possession of contraband article under NDPS Act, was not established. Mandatory statutory provisions under Section 50 requires total compliance, even partial compliance is not compliance and there can be no presumption under Section 114 of the Indian Evidence Act of its due compliance.

In case *Rasihidi Ally Chigale versus State of Maharashtra* ^[7] there was recovery of contraband. The raiding party consisted of two Gazetted Officers. The accused was informed of his right to be searched before a Gazetted Officer or a Magistrate. The accused opted to be searched before Gazetted Officer. The search was conducted by the Gazetted Officer of the raiding party.

The Hon'ble High Court of Bombay has held that the Section 50 of the Act was not complied with in its true spirit as Section 50 of the Act does not mean that such Gazetted Officer should be one of those officers who are also members of the raiding party. This act of the investigating officer has caused prejudice to the accused as the Gazetted Officer of the raiding party was interested in the conviction of the accused to get the reward and in such circumstances, the conviction of the accused was set aside.

In judgment *Shakil Ahmed @ Pappu versus State* ^[8], there was recovery of cannabis on receipt of prior information. Accused were informed that if they required, Gazetted Officer or Magistrate could be arranged for taking their search. But it was not communicated that the accused had a right to be searched before a Gazetted Officer or Magistrate. It was held violation of Section 50 of the Act and the conviction was set aside.

Thus Section 50 has been introduced with the obvious intent to avoid any harm to any innocent and to avoid raising of allegations of planting or fabrication by the prosecution authority, the officer who is about to search under Sections 41 and 42 of the Act shall take such person without any unnecessary delay to the nearest Gazetted Officer of any of the department mentioned in Section 42 or to the nearest Magistrate.

4. Appraisal of rights

The appraisal of the rights to the accused should be done individually by the investigating officers or the concerned officer on duty. Joint appraisal amounts to noncompliance of the provision as each accused has to be individually offered if he wants to be taken to a 'Magistrate' or a 'Gazette officer' by the investigating officer or the officer on duty. Also whether there is non-compliance of mandatory provision of Section 42 & 57 of the Act by Investigating Officer as held by the Hon'ble Apex court that the Compliance of Section 57 of the Act is not mandatory and it is directory. The Three Judges Bench of Supreme Court in case of *Sajan Abraham v. State of Kerala* ^[9] has held that Section 57 of the Act is not mandatory, therefore if substantial compliance of it is made, it would not vitiate prosecution case.

The accused person may or may not choose to exercise the right provided to him under Section 50 by intimating the investigating officer or the officer on duty that he waives his right and such must be recorded. The investigation officer or officer on duty is concerned, an obligation is cast upon him under Section 50 of NDPS ACT to apprise the suspect of his

right to be searched before a Gazette Officer or a Magistrate. The appraisal should be done individually to the accused and not jointly. A non-compliance with the mandatory procedure prescribed under Section 50 of the NDPS ACT, accused can be acquitted on the abovementioned ground.

The search to be carried out is specified under section 100 of the Code of Criminal Procedure, 1973. After a search is conducted the investigating officer or officer on duty shall record the reasons for such belief which necessitated the search and within seventy- two hours send a copy thereof to his immediate official superior about the same.

5. Search & Seizure

Section 42 of the NDPS Act would be attracted when the search is conducted in a closed space/Private place since the members of public are not present except the panchas and the officers who priory introduced themselves to the accused. If the search is carried out in a public place section 42 will not apply. The officer conducting search and seizure must inform the accused of his right being searched in presence of the Gazetted Officer or a Magistrate and failure to give option to the accused by officer conducting search is clear violation of the Section 50 of the Act and trial is vitiated as a result thereof. Partial offer of being searched in presence of Gazetted Office was held to be non-compliance of provisions of Section 50 of the Act.

6. Conclusion

Thus the Section 50 of the Narcotic Drug and Psychotropic Substance, 1985 makes it mandatory for the officer conducting search and seizure to inform accused of his right to be searched in presence of 'Gazetted Officer' or 'Magistrate'. Compliance of Section 50 is mandatory and noncompliance can only be afforded by the prosecution at his own peril.

7. References

1. Section 42 of the the Narcotic Drugs and Psychotropic Substances Act, 1985.
2. Section 50 of the the Narcotic Drugs and Psychotropic Substances Act, 1985.
3. Section 57 of the the Narcotic Drugs and Psychotropic Substances Act, 1985.
4. Section 114 of the Indian Evidence Act, 187
5. Judicial Pronouncements as cited.

⁷ 32003 (4) RCR (Criminal) 197 (Bom.)

⁸ 2002 (3) RCR (Criminal) 145 (Delhi)

⁹ 2001 Cri LJ 4002