

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 Rs.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[1] and judgment of the Bombay High Court in Dharamveer Lekhrum Sharma and Another v. The State of Maharashtra and Ors.[2]. 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.

8. In State of Punjab v. Balbir Singh[3], this Court held that Section 50 of the NDPS Act is mandatory and non-compliance thereof would vitiate trial. In State of Himachal Pradesh v. Pirthi Chand[4], this Court held that breach of Section 50 does not affect the trial. There were divergent views on this aspect and, therefore, a reference was made to the Constitution Bench. Out of the three questions of law, which the Constitution Bench dealt with in State of Punjab v. Baldev Singh[5], the question which is relevant for the present case is whether it is the mandatory requirement of Section 50 of the NDPS Act that when an officer duly authorized under Section 42 of the NDPS Act is about to search a person, he must inform him of his right under sub-section (1) thereof of being taken to the nearest gazetted officer or nearest Magistrate. The conclusions drawn by the Constitution Bench, which are relevant for this case could be quoted.

"(1) That when an empowered officer or a duly authorised officer

acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act."

9. In this case, the conviction is solely based on recovery of opium from the bag of respondent No.1 - Parmanand. No opium was found on his person. In *Kalema Tumba v. State of Maharashtra*[6], this Court held that if a person is carrying a bag or some other article with him and narcotic drug is recovered from it, it cannot be said that it was found from his person and, therefore, it is not necessary to make an offer for search in the presence of a gazetted officer or a Magistrate in compliance of Section 50 of the NDPS Act. In *State of Himachal Pradesh v. Pawan Kumar*[7], three-Judge Bench of this Court held that a person would mean a human being with appropriate coverings and clothing and also footwear. A bag, briefcase or any such article or container etc. can under no circumstances be treated as a body of a human being. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the NDPS Act. The question is, therefore, whether Section 50 would be applicable to this case because opium was recovered only from the bag carried by respondent No.1 - Parmanand.

10. In *Dilip & Anr. v. State of Madhya Pradesh*[8], on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. This Court held that provisions of Section 50 might not have been required to be complied with so far as the search of the scooter is concerned, but keeping in view the fact that the person of the accused was also searched, it was obligatory on the part of the officers to comply with the said provisions, which was not done. This Court confirmed the acquittal of the accused.

11. In *Union of India v. Shah Alam*[9], heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following *Dilip*, it was held that since the provisions of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

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 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 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 authorized 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-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.

.....J.
(RANJANA PRAKASH DESAI)

.....J.
(MADAN B. LOKUR)

NEW DELHI;
FEBRUARY 28, 2014.

ITEM NO.1-A COURT NO.13 SECTION II
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS
CRIMINAL APPEAL NO(s). 78 OF 2005

STATE OF RAJASTHAN Appellant (s)

VERSUS

PARMANAND AND ANR. Respondent(s)

Date: 28/02/2014 This Appeal was called on for Judgment today.

For Appellant(s)

Mr. Imtiaz Ahmed, Adv.
Mrs. Naghma Imtiaz, Adv.
Ms. Amra Moosavi, Adv.
Mr. Milind Kumar, Adv.

For Respondent(s)

Ms. Nidhi, Adv.

Hon'ble Mrs. Justice Ranjana Prakash Desai pronounced the Judgment of the Bench comprising Her Ladyship and Hon'ble Mr. Justice Madan B. Lokur.

The Criminal Appeal is dismissed in terms of the signed Reportable Judgment.

| (Vishal Anand)
| Court Master

| | (Indu Pokhriyal)
| | Court Master

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(Signed Reportable Judgment is placed on the file)

[1] 1997(1) CRIMES 242
[2] 2001(1) CRIMES 586

- [3] (1994) 3 SCC 299
- [4] (1996) 2 SCC 37
- [5] (1999) 6 SCC 172
- [6] (1999) 8 SCC 257
- [7] (2005) 4 SCC 350
- [8] (2007) 1 SCC 450
- [9] (2009) 16 SCC 644
