

SUPREME COURT OF INDIA

Suresh

Vs.

State of M.P.

Crl.A.No.300 of 2009

(P.Sathasivam and Ranjan Gogoi JJ.)

22.11.2012

JUDGMENT

P. SATHASIVAM,J.

1. This appeal is directed against the final judgment and order dated 23.08.2007 passed by the High Court of Madhya Pradesh, Bench at Gwalior in Criminal Appeal Nos. 738 and 772 of 2000 whereby the High Court dismissed the appeals filed by the appellants herein and confirmed the order of conviction and sentence dated 04.10.2000 passed by the Special Judge, Narcotic Drugs Psychotropic Substances Act, Guna (M.P.) in Special Case No. 7 of 1998 by which they were convicted under Section 8 read with Section 18 of the Narcotic Drugs Psychotropic Substances Act, 1985 (hereinafter referred to as “the NDPS Act”) and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.1,00,000/- with default stipulation.

2. Brief facts:

- (a) On 30.07.1998, at about 1.30 p.m., Som Singh Raghuvanshi, SHO, Police Station Kumbhraj, along with the police party went from the police station to search for the accused in connection with Crime No. 151 of 1998 registered under Sections 302 and 201 of IPC. In the process of searching, when they came to Khatkya Tiraha, they saw that one Maruti Car was coming from the side of Beenaganj. When they tried to stop that car, the driver tried to run away but they stopped the car and found three persons sitting in it. On being

asked about their names, they informed their names as Pramod, Suresh and Dinesh @ Pappu.

(b) Under suspicious circumstances, Panchas Shri Lal and Rup Singh were called from the 'Tiraha' and consent of all those persons was sought for their personal search and they gave their consent. After conducting the search, Panchnama was prepared. During search, they found that each of the appellants was having polythene bag in their possession which contained white colour substance and on its physical test, it was found "opium". The SDO (P), Radhagarh was informed about the incident. On weighing, all the three bags were contained 825 gms, 820 gms and 800 gms of "Opium". Samples of 25 gms were taken separately from each of the packets and the contents were sealed. Thereafter, the vehicle was also searched and inside the front mudguard, six packets of polythene bag containing 'opium' were also recovered weighing 810 gms, 820 gms, 690 gms, 820 gms, 800 gms and 615 gms respectively. Sample of 25 gms. from each of them were also taken and sealed. Thus, a total of 7 kg. Opium valued at Rs.1,03,575/- was seized from the appellants and they were arrested.

(c) Thereafter, along with the appellants and seized articles, the police party came to Kumbhraj Police Station and FIR being Crime Case No. 165/1998 was registered against them under Section 8 read with Section 18 of the NDPS Act. After investigation, the police filed charge sheet against the accused persons and the Special Judge, NDPS Act, Guna framed charges under Section 8 read with Section 18 of the Act. After trial, the Special Judge, by order dated 04.10.2000, convicted all the three accused persons and sentenced them to undergo RI for ten years along with fine of Rs.1,00,000/- each, in default of payment of fine, each would suffer two years' additional RI.

(d) Against the said order of conviction and sentence, Suresh and Pramod preferred appeal being Criminal Appeal No. 738 of 2000 and Dinesh preferred Criminal Appeal No. 772 of 2000 before the High Court. By common impugned judgment dated 23.08.2007, the High Court dismissed both the appeals.

(e) Aggrieved by the said judgment, the appellants have filed this appeal by way of special leave.

3. Heard Dr. J.N. Dubey, learned senior counsel for the appellants and Mr. C.D. Singh, learned counsel for the respondent-State.

4. The only point urged before us is about the non-compliance of Section 50 of the NDPS Act. According to Dr. J.N. Dubey, learned senior counsel for the appellant, considering the mandates provided under Section 50 of the NDPS Act as interpreted by two Constitution Benches of this Court, viz., *State of Punjab vs. Baldev Singh*, (1999) 6 SCC 172 and *Vijaysinh Chandubha Jadeja vs. State of Gujarat* (2011) 1 SCC 609, the prosecuting authorities failed to apprise the right of the suspect provided under Section 50 of the NDPS Act, hence on this ground the conviction is to be set aside. On the other hand, Mr. C.D. Singh, learned counsel for the State by pointing out the Panchnama regarding consent for personal search submitted that the conditions prescribed in Section 50 as explained in *Baldev Singh's* case (*supra*) have been fully complied with and prayed for dismissal of the appeal.

5. Since the only question pertains to compliance of Section 50 of the NDPS Act, it is useful to refer the same:

“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 subsection (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.”

After noticing divergence of opinion between different Benches of this Court with regard to the ambit and scope of Section 50 of the NDPS Act and, in particular with regard to the admissibility of the evidence collected by an investigating officer during search and seizure conducted in violation of the provisions of Section 50, the issue was referred to the Constitution Bench. These provisions have been interpreted by the Constitution Bench in Baldev Singh’s case (supra). After considering the mandate of the law as provided under Section 50 of the NDPS Act and various earlier decisions, the Constitution Bench has concluded as under:

“57. On the basis of the reasoning and discussion above, the following conclusions arise:

(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.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) 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.

(6) 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.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

(9) xxx xxxx

(10) xxx xxxx”

6. After the decision in Baldev Singh’s case (supra), a Bench of three Judges of this Court in Joseph Fernandez vs. State of Goa, (2000) 1 SCC 707, has also considered the requirement of Section 50 of the NDPS Act and in para 2, observed as under:

“Even then the searching officer informed him that “if you wish you may be searched in the presence of a gazetted officer or a Magistrate”. This according to us is in ‘substantial compliance’ with the requirement of Section 50. We do not agree with the contention that there was non-compliance with the mandatory provision contained in Section 50 of the Act.”

By saying so, after finding no reason to interfere with the conviction and sentence passed on the appellant therein, dismissed his appeal.

7. In *Prabha Shankar Dubey vs. State of M.P.*, (2004) 2 SCC 56, a two Judge Bench of this Court again considered the object of Section 50 of the NDPS Act. The Bench also extracted the conclusion arrived at in *Baldev Singh's* case (supra). After advertent to those conclusions and relying on the expression “substantial compliance” as stated in *Joseph Fernandez's* case (supra) rejected the plea that there was non-compliance with the requirement of Section 50 of the NDPS Act and consequently dismissed the appeal.

8. After the decision in *Joseph Fernandez's* case and *Prabha Shankar Dubey's* case, on the one hand and *Krishna Kanwar (Smt.) @ Thakuraeen vs. State of Rajasthan*, (2004) 2 SCC 608 on the other, again the interpretation relating to Section 50 was considered by the Constitution Bench in *Vijaysinh Chandubha Jadeja's* case (supra). The question that was posed before this Constitution Bench was whether Section 50 of the NDPS Act casts a duty on the empowered officer to “inform” the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance within the mandate of the Section 50? Before going into the ultimate conclusion arrived at by the Constitution Bench, the following details mentioned in paragraph 2 are also relevant which are as under:

“2. When these appeals came up for consideration before a Bench of three Judges, it was noticed that there was a divergence of opinion between the decisions of this Court in *Joseph Fernandez v. State of Goa*, *Prabha Shankar Dubey v. State of M.P.* on the one hand and *Krishna Kanwar v. State of Rajasthan* on the other, with regard to the dictum laid down by the Constitution Bench of this Court in *State of Punjab v. Baldev Singh*, in particular regarding the question whether before search, the police officer concerned is merely required to ask the suspect whether he would like to be produced before the Magistrate or a gazetted officer for the purpose of search or is the suspect required to be made aware of the existence of his right in that behalf under the law.”

In order to set the controversy raised, the Constitution Bench, at the foremost, recapitulated the decision arrived at by the Constitution Bench in *Baldev Singh's* case (supra). After considering all the earlier decisions, the latter Constitution Bench arrived at the following conclusions:

“24. Although the Constitution Bench in Baldev Singh case did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to “inform” the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to “inform” the suspect about the existence of his said right would cause prejudice to him, 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 the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

[Emphasis supplied]

28. We shall now deal with the two decisions, referred to in the referral order, wherein “substantial compliance” with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In Prabha Shankar Dubey a two Judge Bench of this Court culled out the ratio of Baldev Singh case on the issue before us, as follows: (Prabha Shankar Dubey case, SCC p. 64, para 11)

“11. ... What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word ‘right’ at relevant places in the decision of Baldev Singh case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the ‘suspect’ at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.” However, while gauging whether or not the stated requirements of

Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and Joseph Fernandez the Court chose to follow the views echoed in the latter case, wherein it was held that the searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words: (Prabha Shankar Dubey case, SCC p. 64, para 12)

"12. The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case⁴. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations."

It is manifest from the afore-extracted paragraph that Joseph Fernandez does not notice the ratio of Baldev Singh and in Prabha Shankar Dubey, Joseph Fernandez is followed ignoring the dictum laid down in Baldev Singh case.

29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS 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 insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires 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.

30. As observed in Presidential Poll, In re: (SCC p. 49, para 13)

“13. ... 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.’ ”

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.”

9. From the above, it is clear that the Constitution Bench has not approved the concept of “substantial compliance” as propounded in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra). Keeping the above principles, as laid down in Vijaysinh Chandubha Jadeja’s case (supra) which considered all the earlier decisions including the decision in Baldev Singh, in mind, let us consider whether the mandates of Section 50 as interpreted have been fully complied with or not?

10. Since the main question roving only to “right to inform” about his choice, it is relevant to refer the Panchnama regarding consent for personal search which is as under:

“Panchnama regarding consent for personal search

P.S. Kumbhraj, District Guna

Crime Case No. 0/98

Section 8/18 of N.D.P.S. Act

Place : A.B. Road, Khatakya Tiraha

Dated: 30.7.98 at 09.30 O’ Clock

Names of witnesses:

1. Sri Lal s/o Sri Narain by caste Dhobi aged 26 years 2/o Tapra Colony, Kumbhraj.
2. Bhup Singh s/o Ramnarain by caste Meena aged 25 years, r/o Kanakherhi P.S. Kumbhraj.

In the presence of aforementioned 'panchas', I, the P.S. In-charge, asked the driver of Maruti Car No. D.N.C./7211 namely, Pramod Kumar s/o Raghuvir Singh by caste Gadariya, aged 20 years, r/o Chitbhawan, P.S. Ekdil, District Etawah, Suresh, s/o Rambabu Khatik, aged 18 years, r/o Village Chitbhawan, sitting with him in the case and Dinesh @ Pappu s/o Jagannath by caste Dube, aged 25 years, r/o Tikri presently at village Ballapur, P.S. Ajitmal, District Etawah, sitting on the rear seat, regarding their personal search asking them as to whether they would offer their personal search to me or to Gazetted Officer – S.D.O.P. Sahib. At this, all the three suspects gave their consent for their personal search by me, the P.S. In-charge, and they also agreed for search of the car by me. Panchnama regarding consent for search has been prepared in the presence of the 'Panchas'. [Emphasis supplied]

Sd/- Signature of suspects Sri Lal Sd/- Suresh

Sd/- Pramod Kumar

T.I. of Bhup Singh Sd/- Dinesh Kumar @ Pappu

Seen Sd/- (Illegible) 30.7.98"

11. The above Panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of their legal right provided under Section 50 of the NDPS Act to refuse/to allow the police party to take their search and opt for being searched before the Gazetted officer or by the Magistrate. In other words, a reading of the Panchnama makes it clear that the appellants were not apprised about their right to be searched before a gazetted officer or a Magistrate but consent was sought for their personal search. Merely asking them as to whether they would offer their personal search to him, i.e., the police officer or to gazetted officer may not satisfy the protection afforded under

Section 50 of the NDPS Act as interpreted in Baldev Singh's case. Further a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh's case, this Court has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but "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. In Vijaysinh Chandubha Jadeja's case (supra), recently the Constitution Bench has explained the mandate provided under sub-section (1) of Section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that 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. The concept of substantial compliance as noted in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) were not acceptable by the Constitution Bench in Vijaysinh Chandubha Jadeja, accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law.

12. We reiterate that sub-section (1) of Section 50 makes it imperative for the empowered officer to "inform" the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate, failure to do so vitiate the conviction and sentence of an accused where the conviction has been recorded only on the basis of possession of the contraband. We also reiterate that the said provision is mandatory and requires strict compliance.

13. Though a portion of the contraband (opium) was recovered from the vehicle for which Section 50 is not applicable, if we exclude the quantity recovered from the vehicle, the remaining would not come within the mischief of 'commercial quantity' for imposition of such conviction and sentence. Taking note of length of period in prison and continuing as on date and in view of non-compliance of sub-section (1) of Section 50 in respect of recovery of contraband from the appellants, we set aside the conviction and sentence imposed on them by the trial Court and confirmed by the High Court.

14. As a result, the appeal is allowed and the appellants are ordered to be released forthwith, if they are not required in any other case.