

(2015) 11 AHC CK 0004
In the Allahabad High Court
Case No : Criminal Revision No. 3876 of 2015

Mahesh Chandra Gupta

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 16-11-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100, 165, 227
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 22, 41, 41(1), 41(2)

Citation : (2016) 1 ADJ 411 : (2016) 92 ALLCC 658

Hon'ble Judges : Pankaj Naqvi, J.

Bench : Single Bench

Advocate : Chandrakesh Mishra and Daya Shankar Mishra, for the Appellant

Judgement

Pankaj Naqvi, J.—Heard Sri D.S. Mishra, learned counsel for the revisionist and Sri Vimlendu Tripathi, the learned A.G.A.

2. This criminal revision is preferred against the order dated 1.10.2015 passed by the Addl. Sessions Judge, Jalaun at Orai in SST No. 9/15 (State vs. Dr. Mahesh Chandra Gupta and another) rejecting a discharge for offences under Section 21 /22 NDPS Act.

3. An FIR as Case Crime No. 3928 of 2014 under Sections 21 /22 NDPS Act came to be registered at P.S. Kotwali, Orai on 12.11.2012 on the basis of a recovery memo alleging that a tip off was received that a courier agency is going to deliver a packet containing heroin at a particular address. Acting on the aforesaid information, the police concerned reached the designated place and at the pointing of the informer arrested two individuals, i.e. the revisionist and one Danish Ali son of Majid Ali with a packet at around 8:45 P.M. On a query as to the content of the packet, revisionist informed that it is "heroin", which is sold as medicine by his son Sunil Kumar Gupta. Upon being informed that as this is an offence under the NDPS Act he has a right to be searched either in the presence of a Gazetted Officer or a Magistrate, to which he replied that as he happens to

be an MBBS doctor, he has no objection, if search is conducted by a gazetted police officer. An information to this effect was sent through RT set to the C.O. Orai, who arrived at 9:15, interrogated the accused and the contraband was handed over to him. The seized contraband weighed around 2 Kg, which as per Scientific Assistant Field Unit, prima facie, appeared to be "heroin", thereafter a 50 gm sample was taken and sent for chemical analysis. After investigation, a charge sheet was laid against the applicant under Section 21 /22 of the NDPS Act, case committed to Sessions. An application u/s. 227 Cr.P.C. claiming discharge was filed for want of non-compliance of Sections 41 /42 and 50 of the NDPS Act, which came to be rejected under the order impugned on the ground that a plea of discharge based on defence evidence, cannot be made a subject matter of discharge.

4. The learned counsel for the revisionist submitted that despite a specific plea in the discharge that in the absence of non-compliance of Sections 41 /42 and 50 of the Act, the proceedings are liable to be quashed, the court below did not advert on the said issue. He further submits that such non-compliance vitiates entire pending proceedings and the revisionist cannot be permitted to face such a trial. He placed heavy reliance on a judgment of the Apex Court in the case of Roy V.D. Vs. State of Kerala, , which according to him squarely applies both on facts and law. He also relied on few other judgments, such as Jitendra and Another Vs. State of M.P., , Union of India (UOI) Vs. Shah Alam and Another, ; C. Ali Vs. State of Kerala, .

5. Sri Tripathi, the learned A.G.A., strongly opposed the submission and contended that the case of Roy V.D. is no longer a good law in view of Constitution Bench Judgments in the case of State of Punjab Vs. Baldev Singh, etc. etc., ; Karnail Singh Vs. State of Haryana, and Vijaysinh Chandubha Jadeja Vs. State of Gujarat, .

6. The seminal issue, which falls for consideration is whether for non-compliance of Sections 41 /42 /50 of the NDPS Act, the pending trial is liable to be quashed.

7. To answer the above issue, the Court would have to go back in time to examine the true import of the various judgments cited by learned counsel for the parties. At the outset, it be stated that all judgments cited by learned counsel for the revisionist except Roy V.D. are those, where the matter reached the Apex Court after conviction/acquittal and the Apex Court was called upon to examine the effect of non-compliance of Sections 41 /42 and 50 of the NDPS Act and the Apex Court held that in case Section 50 has not been complied with and 41 /42 not even substantially complied, it would result in a judgment of conviction being set aside. Learned A.G.A. in all fairness does not dispute the said position of law. Thus there is no necessity to examine the said judgments in extenso, as Sri Mishra, too does not dispute the same.

8. The sheet anchor of Sri Mishra's submission is a decision of the Apex Court in the case of Roy V.D. (supra). It would be apposite to first consider, State of

Punjab Vs. Balbir Singh, , which is referred in Roy V.D. (supra). The introductory paragraph of Balbir Singh (supra) manifests that the issue involved in the said case was whether any arrest or search of a person or of a place without conforming to the provisions of the NDPS Act becomes illegal and consequently, vitiates "conviction" (emphasis supplied). The Apex Court answered the issue raised in paragraph-25 of the judgment, which is extracted hereunder:-

"The questions considered above arise frequently before the trial courts therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc., when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal.

Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by any one other than such officers, the same would be illegal.

(2B) Under Section 41(2) only the empowered officer can give the authorization to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction.

(2C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to

Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165 Cr.P.C. including the requirement to record-reasons, such failure would only amount to an irregularity.

(4B) If an empowered officer or an authorized officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165 Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information, the empowered officer or authorized officer while acting under Section 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

9. A perusal of the aforesaid conclusions would unequivocally indicate that what the Apex Court held was that in the event of non-compliance of Sections 41 /42

and 50 of the NDPS Act having been established after appreciation of facts (emphasis mine), it is the trial that gets vitiated.

10. The Constitution Bench in Baldev Singh (supra) was called upon to answer the following issues:-

"(i) Is it the mandatory requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985. ("Act" for short) that when an officer, duly authorized under Section 42 of the 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 for making the search?

(ii) If any search is made without informing the person of his such right would the search be illegal even if he does not of his own exercise his right under Section 50(1) ? And

(iii) Whether a trial held in respect of any recovery of contraband articles pursuant to such a search would be void ab initio?

2. The above questions came up for consideration before a two-Judge Bench of this Court in State of Punjab Vs. Balbir Singh, , and it answered them as under : (p. 322. para 25) "On prior information the empowered officer or authorized officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial.

(Emphasis supplied)"

11. The Constitution Bench in Baldev Singh (supra), while dealing with the referred issues especially issue No. (iii) was conscious of the exposition of law in Balbir Singh (supra) and after evaluating the legal position, the conclusions in Baldev Singh (supra), in so far is relevant for the instant case are recorded in sub-para-3 and 5 of paragraph-55 in answer to issue No. (iii) as under:-

"(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.....

(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 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;"

12. An analysis of the aforesaid conclusions in sub-paras-3 and 5 would indicate that for non-compliance of Section 50 of the Act, recovery of the illicit article becomes a suspect, conviction and sentence becomes vitiated, if conviction is recorded solely on the basis of possession of an illicit article recovered from the person. But whether Section 50 has been complied with or not is an issue, which can be determined only on the basis of evidence at the stage of trial, for which prosecution will have to be given an opportunity to establish that Section 50 was complied with and that a criminal trial cannot be cut short for the said issue. To this extent, the Constitution Bench in Baldev Singh (supra) was clarifying the exposition of law in Balbir Singh (supra), which had held that in the event of non-compliance of Sections 41 /42 and 50 of N.D.P.S. Act, it is the trial that gets vitiated.

13. In a subsequent Constitution Bench judgment in the case of Karnail Singh (supra), the issue was as to whether Section 42 of the Act was mandatory or not. The Constitution Bench held in paragraphs - 33, 34 and 35 as under:-

"Abdul Rashid (supra) has been decided on 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

16. The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy makers about it. Now for the last two decades police investigation has gone through a sea-change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the Register/Records kept for those purposes in the police station or the respective offices of the

authorized officials in the Act if the emergency of the situation so requires. As a result, if the statutory provisions under Section 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will, disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.

17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of Clauses (a) to (d) of Section 42(1) .

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per Clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of Sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42 . To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42 . But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a

suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

14. Thus the Constitution Bench in *Karnail Singh* (supra) held that whether there is adequate or substantial compliance of Section 42 or not is a question of fact, to be decided in each case, i.e. such an issue can only be examined after a full fledged trial.

15. Yet again in a Constitution Bench judgment in *Vijaysinh Chandubha Jadeja* (supra), the Apex Court was called upon to examine as to whether Section 50 of the Act casts a duty on the empowered officer to "inform", the suspect of his right to be searched in the presence of the Gazetted Officer or the Magistrate, if he so desires or whether a mere inquiry 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 with the mandate of the said Section. The Apex Court answered the said issue in paragraphs-27, 29, 30 and 31, which are as under:-

"27. It can, thus, be seen that apart from the fact that in *Karnail Singh* (supra), the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorization, the said decision does not depart from the dictum laid down in *Baldev Singh*'s case (supra) in so far as the obligation of the empowered officer to inform the suspect of his right enshrined in Sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted Sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, Sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorized officer to send a copy of the reasons recorded by him for his belief in terms of Sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

28. We shall.....

29. In view of the foregoing discussion, we are of the firm opinion that the object with which 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 minimize 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 authorized officer under Sub-section (1) of Section 50 of the NDPS 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.

30. As observed In In Re: Presidential Poll,

"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 (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 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."

16. Thus the Apex Court held that provisions of Section 50 of the Act have to be complied with, concept of substantial compliance cannot be read into, but whether the same is complied with or not is an issue, which can only be considered after the evidence is led in the light of the aforesaid Constitution Bench judgments. Thus notwithstanding that the issue raised, considered and decided in Roy V.D. (supra) was answered in favour of the applicant, but as the judgments, on which Roy V.D. (supra) was based having undergone a substantial change in view of the subsequent aforesaid Constitutional Bench Judgment, this Court is of the view that in view of law of precedence, it would go by the judgments of the Constitution Benches, than that of Roy V.D. (supra).

17. Against the above backdrop, this Court is of the view that Roy V.D., which placed reliance on Balbir Singh and distinguishes Baldev Singh for quashing the pending trial underwent a sea-change with the exposition of law in Baldev Singh involving Section 50 , Karnail Singh involving Section 42 and Vijaysinh Chandubha Jadeja involving Section 50 of the NDPS Act to hold that provisions of Section 50 of the Act are mandatory and that Section 42 of the Act can be substantially complied with, but whether the same are complied or not is a question of fact involving appreciation of evidence. In other words, the issue of non-compliance of Sections 41 /42 /50 of the Act cannot be a subject matter either of discharge or for quashing of the pending proceedings.

18. No other plea is urged.

19. The revision lacks merit and is dismissed.