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# DECODING MANDATE OF SECTION 50 OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

***Ms. Swati Soni***

*Assistant Professor, Faculty of Legal Sciences, Shoolini University, Solan*

## ABSTRACT

The medicinal use of charas, opium, dhatura is prevalent in the Indian Medicine System since the very beginning of the society and its use was in a controlled condition. Our saints had been using it for meditation purposes. Its extensive use affected the health of the society particularly the young children which led the State to think to regulate its use. When it affected the world at large, the various fora raised concern and international community called for stringent measures to be adopted for the safety of the society from its ill effects. As a result, thereof, the Parliament enacted the Narcotic Drugs and Psychotropic Substances Act, 1985. The stringent measures had some ill effects and Parliament provided graduated scale of punishment and later on in order to balance the personal liberty and the right to life, Parliament provided certain safeguards by way of amendment in the Act. Now safeguards provided for the safety of the persons charged with offences under the Act are contained in Section 41, 42, 50, 52A of the Act. The officers so empowered are to satisfy about the reasons for immediate search and seizures. The personal search is to be conducted in the presence of the Gazetted Officer or the Magistrate. The sample of the contraband material is to be drawn in the presence of the Magistrate to instil confidence in the process of sampling. Information necessitating immediate search needs to be recorded and forwarded to the superior officer which is a check on the arbitrary exercise of power by the authorised officer.

**KEY WORDS:** *Right to life, Personal Liberty, Personal Search, Sampling, Empowered Officers, Gazetted office.*

## 1. INTRODUCTION

The Narcotic Drugs and Psychotropic Substances Act, 1985[1] is a draconian law which provided mandatory provisions and severe punishment for drug offences. Punishment is provided based on quantity of drug recovered from the suspect. Quantity is divided into 3 categories such as small,

[1] Hereinafter the narcotic Drugs and Psychotropic Substances Act, 1985 shall be called as NDPS Act, 1985 for further reference

intermediate, and commercial quantity. Punishment up to 1 year has been prescribed for small quantity, up to 10 years for intermediate and maximum 20 years for commercial quantity. The specified quantities are notified by central government. Even death penalty is provided for subsequent offences dealing with certain drugs up to certain quantity. All offences are declared as cognizable and non bailable. Strict provision has been incorporated for getting bail in commercial quantity. Stringent conditions have been put upon getting bail in offences under Sections 19, 24, 27A and for offences involving commercial quantity. Conditions include giving the public prosecutor a chance to be heard. If he objects to the application and the court determines that there are good reasons to think he is innocent of the crime in question and that he is unlikely to commit another while out on bond, then bail may be granted. The concept of the reverse burden of proof serves as the foundation for some provisions. "Presumption of innocence," which states that a person is presumed innocent unless and until they are proven guilty, is a key concept in criminal law. Burden of proof is upon the prosecution to prove the guilt of the accused beyond reasonable doubt. But the principle of reverse burden of proof presumes the guilt of accused and he must adduce evidence regarding his innocence. Still prosecution must establish the foundational facts against the accused before burden of proving innocence shifts to accused.

As the life and liberty of accused is at stake and keeping in view the high chances of implication of innocent person in the case, some procedural safeguards have also been incorporated in Narcotic Drugs and Psychotropic Substances Act, 1985. Arrest, search and seizure are to be made according to the mandate given in various provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985. The safeguards are embedded in Sections 41,42,43,50, 52 and 52A.

## 2. EMPOWERED AND AUTHORISED OFFICERS FOR ARREST, SEARCH AND SEIZURE

Section 41 contemplates two categories of officers such as empowered and authorised officers. Empowered officers are Magistrates and gazetted officers of various departments empowered by State or Central Government by notification in the official gazette. These empowered officers can further authorise subordinate officers superior in rank to peons, constable or sepoy to carry out arrest, search and seizure.[2]

Two components make up Section 42. The recording of the information is covered in the first part, and the search itself is covered in the second. The first part is divided into two segments, the first

[2] Intelligence Officer, DRI v. Arshad Saleem, 2004 Cr.L.J 4496 (Karnataka)

of which deals with the recording of information obtained and the second of which is concerned with the officer's belief based on his personal knowledge. According to Section 42(2), any information documented in accordance with Section 42(1) must be sent to the person recording the information's superior officer. The officer's authority regarding entry, search, seizure, and arrest without a warrant or authorization is covered under Section 42 (1)'s second part. The proviso to subsection (1) requiring the recording of the grounds for the designated officer's belief that he has the authority to conduct the search must be followed when the designated officer exercises a power under Section 42(1)'s second half.[3]

While the second limb of Section 42 is an emergency provision that must be used in particular specific circumstances, Section 41 is a general rule that must be followed in regular circumstances. When the Gazetted officer personally conducts the raid or search, Section 41(2) does not require a written authorization. When the gazetted official wants his subordinate to perform the search, this authorization is necessary.[4]

With additional procedural requirements, Section 42's authority may be exercised during the hours between sunset and sunrise. The requirement that the officer has reason to believe that a search warrant or authorization cannot be obtained without providing a chance for the concealment of evidence or a facility for an offender's escape must be satisfied , before it can be used, and the officer must document his reasons and send a copy of them within 72 hours to his immediate superior official. The objective is to make sure that the authorised officer, upon obtaining such information, should put it in writing and note the justifications for his convictions while conducting a search and making an arrest. Only searches and seizures conducted in buildings, conveyances, or enclosed spaces are covered by Sections 41 and 42.[5]

## 3. MANDATE OF SECTION 50

In Article 21 of the Indian Constitution, justice and fairness are implied. A fair trial is also a human right. Every decision made by the authorities under the NDPS legislation must take into account both the accused's right to a fair trial and the terms of the legislation. The Latin maxims "salus populi suprema lex" (the safety of the people is the supreme law) and "salus republicae suprema lex" (the safety of the state is the supreme Law) coexist and are fundamental to the idea that an

[3] State of Orissa v. Laxman Jena, 2009 (16) SCC 332
[4] T. Thomason v. State of Kerala, 2002 (9) SCC 618
[5] Thulaseedharan v. State of Kerala, 2002 Cr.L.J 2522 (Ker)

individual's welfare must give way to the welfare of the community. But the state must behave in a righteous, just, and fair manner.[6]

Section 50 has a role in preventing the fabrication and placement of false evidence against the innocent individual. It mandates that only a Magistrate or a Gazetted Officer may conduct a physical search of a person, with the unalienable right of the accused to select between the two. Section 50 reads:

"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 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.*

*(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."*

The provision of the NDPS Act, 1985 with the most complexity is section 50. To resolve the conflict in the instances relevant to the precise understanding of this clause, the Hon. SC established two constitution benches. Previously, it was the opinion of the Honourable Courts that the empowered officer under Section 42 of the Act had to inform the suspect about his right to be

[6] Miranda v. Arizona, (1996) 384 US 436

searched in front of a gazetted officer or magistrate before conducting a personal search, and even if the accused did not choose to exercise that right, it would still constitute compliance with Section 50 of the Act. But with the decision of Arif Khan v State of Uttarakhand[7], entire law has changed. After referring the rulings of both constitution benches, the Supreme Court ruled that only gazetted officers or magistrates may conduct a personal search of a suspect. There is no question of offering the suspect a choice because it is necessary for the empowered officer to immediately contact a gazetted officer or magistrate in order to perform a personal search.[8]

The phrase "if such person so requires" must be used, and the officer must also inquire about whether the person wants to be escorted to the nearest Magistrate or Gazetted officer. However, the abovementioned words would not go into effect and such provision cannot be deemed to be followed with unless the person to be searched is notified of his right granted under Section 50.[9]

Constitution bench of Supreme Court has discussed the interpretation of entire Section 50 in State of Punjab v. Baldev Singh[10] and held:

- "It is essential that an empowered official or a legally authorised officer acting on prior information tell the concerned person of his right under Section 50 (1) to be taken to the Gazetted officer or nearest Magistrate before conducting the search. However, such details might not always be recorded in writing.
- An accused individual would be prejudiced if the he is not informed of his right.
- Where the conviction has been recorded solely on the basis of the possession of the illicit article, recovered during a personal search, non-compliance with Section 50's provision may not vitiate the trial but would make the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused.
- The treatment cannot be worse than the condition being treated. If the court is perceived to be supporting unlawful behaviour committed by the investigative agency during such operations, respect for the law may be undermined, and the administration of justice may unintentionally be compromised. This could cast doubt on the legitimacy of the judicial process. That is not acceptable. An accused has a right to a fair trial.

[7] Arif Khan v State of Uttarakhand , AIR 2018 SC 2123
[8] Gurinder Singh Dhot, Practical Approach to Narcotic Drugs and Psychotropic Substances Act, 1985, 126, (1st edn 2020)
[9] Chotteylal v. State of Rajasthan, 1990 (1) Crimes 246 (247)
[10] State of Punjab v. Baldev Singh, 1999(6) SCC 172

- The Court must decide based on the evidence presented at trial whether or not the precautions outlined in Section 50 have been properly observed. Findings on that matter, in either case, would be significant for noting a conviction or acquittal ruling.
- Despite being found during an illegal search, any other material found during that search, excluding the contraband, may be used by the prosecution in future proceedings against the accused.
- Because any search that violates Section 50 is illegal, the prosecution is not allowed to assert a presumption under Section 54. Only when the prosecution has proven that the accused was discovered in possession of the contraband during a search carried out in line with Section 50's requirements may a presumption under Section 54 be raised.
- Section 50 does not involve any self-incrimination. It is merely a procedure necessary to safeguard an accused person's rights, who must be informed of their ability to have their person searched before any of the designated authorities.
- It appears that the objective is to prevent the accused from subsequently claiming that the items were planted on him or that they were never recovered from him."

Only the suspect's personal search is covered by Section 50. Under no circumstances may a bag, briefcase, or other item be treated as the body of a person. They are given unique names and can be recognised as such. They cannot, under any circumstances, be regarded as a component of the human body. A person's capacity will determine how many objects of various shapes, sizes, and weights he can carry. However, it takes more work or energy to carry them or move alongside them. As a result, it is impossible to include all of these items under the definition of "person" under Section 50 of the Act.[11]

The term "person" must be understood broadly and commonly, not as a naked or nude human body, but rather as how a typical human being would behave in a civilised society. As a result, "the body of a human being as presented to public view usually with its appropriate covering and clothing" appears to be the most acceptable definition of "person." Shoes are included in the proper attire since they are typically thought of as a necessary item to wear when leaving the house. Once worn, they typically would not separate from the body until a deliberate effort was made in that direction.[12]

[11] State of Rajasthan v. Babu Ram, AIR 2007 SC 2018
[12] State of Himachal Pradesh v. Pawan Kumar, AIR 2005 SC 2265

The Supreme Court considered the general maxim "ignorantia juris non excusat" in the case of Ashok Kumar Sharma v. State of Rajasthan and whether the accused might raise the defence that he was not aware of the process outlined in Section 50 in such a circumstance. Since everyone is presumed to know the law, ignorance is typically not a valid defence under criminal law. While it is undeniably true that many people lack a basic understanding of the law, it is also true that everyone should be assumed to know the law. However, it must be unreasonable to assume knowledge in certain circumstances. For example, we cannot assume that a rural villager who is completely illiterate and a homeless guy will be familiar with all of the laws enacted in this country, let alone the NDPS Act, 1985. This truth is also known to the legislature, thus it's conceivable that's why, in its wisdom, it required the authorised official to tell the suspect of his right under section 50.[13]

The evidence gathered because of the search and seizure will not be considered inadmissible if there was any procedural illegality in its execution, and the court will look at all the relevant facts to determine if the accused was seriously prejudiced. It could be argued that the evidence is not likely to be admissible in evidence if the search and seizure were carried out improperly, in violation of the law and procedure, and there was any chance that the evidence was tampered with or extrapolated while being gathered.[14]

The empowered officer must inform the accused of his or her options. Even though there isn't an established format, the accused must be informed in a way that makes him aware that the decision is his and not the officer in question. The empowered officer must notify the person who is going to be searched of his right to have a search conducted by a gazetted officer or a magistrate. This is because the suspect has been granted this right under Section 50 (1) of the NDPS Act, 1985 as a safeguard. The main goals of this safeguard are to prevent the abuse of authority, prevent harm to innocent parties, and reduce the likelihood that law enforcement officials will plant or fabricate a false case. It is necessary and strictly adhered to. An effort should be made to present the suspect before the nearest magistrate, who commands greater public confidence than any other authority, in order to lend authenticity, openness, and creditworthiness to the entire proceeding. Not only would it give the search process more legitimacy, but it might also in fact make the prosecution firmer.[15]

[13] Ashok Kumar Sharma v State of Rajasthan, 2013 (2) SCC 67
[14] Khet Singh v. union of India, (2002) 4 SCC 380
[15] Sant Ram Alias Kordu v. State of MP, Criminal Appeal No. 603 of 1995, decided on 03-03-2011

If a chance recovery occurs, Section 50 requirements are not necessary. If a police officer makes an arrest while investigating an offence or a suspected offence as provided by the provisions of the Criminal Procedure Code without first conducting a search, section 50 of the NDPS Act, 1985 would not be attracted at that point, and the issue of complying with the requirements would not come up. The police officer who is not authorised shall inform the authorised officer if there is a potential that any contraband may be recovered during the search or arrest, and the authorised officer should then proceed in accordance with the NDPS Act's requirements. He should conduct the investigation in accordance with the other NDPS Act,1985 provisions from that point on if he also happens to be an empowered officer.[16]

Amendment Act 9 of 2001 had added subsections (5) and (6) in section 50. These provisions addressed sudden and urgent circumstances in which carrying out Section 50 (1)'s requirement would defeat the purpose of the search because the suspect might part with possession of the contraband. In these circumstances, a search can be carried out by an authorised officer in accordance with Section 100 of the Criminal Procedure Code. In these circumstances, it lessened the strictness of Section 50 (1) and gave additional protections in Subsection (6), which requires that reports be sent to the senior officials within 72 hours.[17]

In Karnail Singh v State of Haryana,[18] the Constitution Bench of Apex Court considered the object and effect of insertion of sub section (5) and (6) in section 50. The Court observed:

"Through this amendment the strict procedural requirement as mandated by Baldev Singh case was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 Criminal Procedure Code was included by legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by Baldev Singh case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation, Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted in order to balance an urgent situation."

[16] State of Punjab v. Balbir Singh, AIR 1994 SC 1872
[17] Baljinder Singh SRA, Paramjeet Kaur, Lectures on Narcotic Drugs and Psychotropic Substances Act, 1985: Practice and Procedure 388 (1st edn 2021)
[18] Karnail Singh v. State of Haryana, 2009 (5) RCR(crl.) 515

## 4. CONCLUSIONS AND SUGGESTIONS

The Legislature in its wisdom considered the earlier general provisions of criminal jurisprudence that evidence collected even illegally was admissible at the trial but it was aware and cognizant of the welfare and natural right of the accused who is in a weak position in a special drug law which enforces reverse burden and stringent punishment. The mandate of the Constitution of India contained in Article 21 requires that the life and liberty of a citizen/person can be taken away by a procedure which is just, fair, and reasonable. Thus, fouler the offence, stricter is proof. This necessitated the legislature to provide safeguards in the shape of Section 41, 42, 50 and 52A NDPS Act, 1985. Another principle laid down by the Supreme Court is that violation of mandatory provisions of the NDPS Act, 1985 while collecting evidence will make such evidence inadmissible at the trial and this is departure from the general rule of evidence. These safeguards to some extent ensure fair dealing to the accused at the trial.

Since there are use and abuse of the strict law, the liberty of the citizen must be ensured and strict compliance must be ensured for which there must be some agency independent of the executive control to independently assess and evaluate the entire process to advise the investigating agency whether the case is fit to be sent to the Court of Law. It is not every case howsoever weak which must be sent to the court for trial under the concept “let us have the judicial verdict” which doctrine is sheer wastage of time, money, and labour. Since court dockets are overburdened, it is need of the hour that substantive cases are sent to the court for trial. Laying weak cases results in unwarranted prosecution and trial ultimately ending in acquittals which may give rise to a demand for compensation for having detained a person without genuine trial/case.