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Judicial Activism and Controversies Under Sections of NDPS Act

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ABSTRACT

Liberty, equality and fraternity the essential part of principle of one's life is also monumental elements of social Democracy. Such liberty also includes economic democracy and both are inseparable. Section 42 of the Act enshrined in it power of the officer designated to search, seizure and arrest without warrant or any authorization if he/she has "reason to believe" from personal knowledge. The expression "reason to believe" in one glance seems to give wide power in the hands of the officer thereby leading to great legal controversy². The Section is not completely repellent from arbitrariness due to its express provision of providing wide power in the hands of police officer to conduct search, seizure and arrest. Now it has been a well established dictum that when offence under NDPS Act is a grave one. Procedural safeguards under Section 42 and Section 50 of the Act need to be strictly followed by the officers so designated under the respective Sections³. The non compliance of established procedural safeguards would leads to serious repercussions such as vitiating of trial and the accused may walk off scot-free.

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² Supra note 4.

³ Dilip and Another v. State of M.P., (2007) 1 SCC 450.

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Introduction

Liberty, equality and fraternity the essential part of principle of one's life is also monumental elements of social Democracy. Such liberty also includes economic democracy and both are inseparable. The widespread sell, trafficking; consumption of drugs, narcotics and illegal psychotropic substances not only corrupts such principles but also feeds every element of social democracy and economic democracy. To tackle with the problem Government of India passed Narcotics, Drugs and Psychotropic Substances Act, 1985. Under the Act Chapter 5⁴ comprehensively deals with the procedural safeguards which have to be followed by the designated officers while issuing warrant, conducting search and seizure, making an arrest, etc. Since the officers so designated under the Act has been given wide powers and duties but not arbitrary, the non compliance of certain statutory provision given under Chapter 5 of the Act will make such wide powers and duties arbitrary and unlawful. Section 42⁵ of the Act deals with the powers of the officer under clause (1) of the Section to entry, search, seize and arrest without warrant and authorization and procedural safeguards which the officer has to follow. Section 50⁶ of the Act deals with Condition under which search of persons shall be conducted which is nothing but the procedural safeguards that have to be followed by the officers while carrying "personal search". Through various landmark judgments and precedents, it has been well established that both the Sections have been drafted keeping in mind the "Personal Liberty" of the person being searched, which could be violated if the procedural safeguards under the Sections are not strictly complied with⁷.

Expression "reason to believe" enshrined under Section 42 has been matter of legal controversy and judicial activism in various landmark judgments⁸. Courts have coherently held that the expression should be strictly followed as a mandatory procedural safeguards or else it will lead

⁴ Narcotic Drugs and Psychotropic substance Act, 1985, No. 61, Act of Parliament, India , Chapter 5 (1985).

⁵ Narcotic Drugs and Psychotropic substance Act, 1985, No. 61, Act of Parliament, India, Section 42 (1985).

⁶ Narcotic Drugs and Psychotropic substance Act, 1985, No. 61, Act of Parliament, India, Section 50 (1985).

⁷ J. Starni, Conceptual issue relating to drug addiction in India: With special reference to Section 42 and Section 50 of the NDPS Act – A critique, 2013 PL July 64, At Page 68 (2013).

⁸Id.

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to illegal arrest and therefore miscarriage of justice⁹. The expression is inherently corroborated with “good faith” and “not mere pretence”, otherwise the whole search could be subjected to “benefit of doubt” and the whole trial could be vitiated. Similarly In *State of Punjab v. Baldev Singh*¹⁰, the difficulties in investigation and then prosecution of the accused under the Act, if procedural safeguards under Section 50 were not complied with strictly was ascertained by then Chief Justice of India and in the case it was held that non compliance of Section 42 and Section 50 of the Act being gross failure of the officer would ultimately lead to vitiating of trial and acquittal of Accused.

It is well settled principal under criminal justice system that Investigating officer should unequivocally collect evidence to be presented before the court so as to leave no loop holes. The action of the state must be “clear”, “right”, “just” and “fair” particularly in collection and admissibility of evidence which could be done only if proper search and seizure has been taken place¹¹. Both Section 42 and 50 are clear, unambiguous and well settled in these positions in such a way that they cannot be ignored or avoided¹².

Introduction to NDPS Act, 1985

The word “Narcotic was derived from Greek word *Narkotikos*, which means a state of lethargy, sluggishness or sleep¹³. However, Narcotic drugs are any drugs or other substances which induce alter state of mind and have high potential abuse¹⁴. A drug has a deteriorating effect on mind and health of person. In India the problem of alcohol abuse and drug addiction are not only deteriorating health of individual, its trafficking, sale and abuse has become menace for the social and economic fabric of India. The drugs; heroin and hashis from India are trafficked to the

⁹*State of Punjab v. Balbir Singh*, (1994) 3 SCC 299 : *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*, (1994) 6 SCC 569 : *Karnail Singh v. State of Punjab*, AIR 1954 SC 204.

¹⁰*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172

¹¹J.K Mathur, *Critical analysis of Section 41, 42 and 50 of the narcotic drugs and psychotropic substances in the light of relevant judgments: procedural safeguards*, (1997) 6 SCC J-12, At Page 13 (1997) : *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172.

¹²*Id.*

¹³Br Sharma, *Forensic Science in Criminal Investigation and trials* 953(Universal Lexis Nexis 5th ed. 2020).

¹⁴*id.* At 954

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west through subcontinent¹⁵, which itself grossly violating the Human Rights in India since the traffickers generally involve vulnerable people specially Children in their Cartels in order to export, import, sell narcotic drugs. To tackle this issued Government of India has enacted NDPS Act, 1985 with a view to encompass, consolidate and amend all the laws relating to narcotic drugs and other non commercial psychotropic substances. The Act specifically provides legal frame work for the control, stop and prohibit production, sale and purchase of narcotic drugs through the territory of India. The NDPS Act has provided wide power in the hands of authorized officer and since the power corrupts and exclusive power corrupts absolutely the Act also provide mandatory procedural safeguards which has to be complied by the authorized officer while conducting their duties under NDPS Act. The Act has very stringent bail provisions, maximum sentence levied as per the Act is ten years.

Need and Scope of the Act

In order to tackle the menace of the drug abuse the world community has joined hand and subscribed to conventions and conclaves under UN¹⁶. United Nations Single Convention on Narcotic Drugs, 1961, UN Convention of Psychotropic Substances, 1971 and UN protocol, 1971 were subscribed for international cooperation in order to investigate, chase, control, prevent drug trafficking and arrest as well as punish the traffickers. India being party to all these conventions has enacted NDPS Act, 1985¹⁷. Our forefathers have contemplated the menace which could be caused due to drug trafficking, ergo have enacted the Article 47 in the Constitution of India¹⁸ which enjoins the State to endeavor to bring about prohibition of the intoxicating alcohols and drugs, except for the medicinal purpose. The responsibility of the Central as well as State Government to fulfill the Constitutional obligation, being signatories of various UN Conventions to tackle drug abuse and growing menace of the Drug trafficking and abuse in India led the Government to enact comprehensive legislation i.e., NDPS Act, 1985. The Act provides for

¹⁵Supra note 4.

¹⁶S.V. Joga Rao, Drug Addiction : Penal Policy, Journal of the Indian Law Institute, Vol. 32. 1992, At page 2-3.

¹⁷Id.

¹⁸INDIA CONST. art. 47.

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definition of various narcotic drugs in Schedules I and II, power of the officer designated to investigate, search, seize the drugs and arrest the offender, it also provides for stringent punishment and long term prison along with heavy fines for offenders¹⁹.

Legal controversies in Section 42 and Section 50 of the Act

Section 42 of the Act enshrined in it power of the officer designated to search, seizure and arrest without warrant or any authorization if he/she has “reason to believe” from personal knowledge. The expression “reason to believe” in one glance seems to give wide power in the hands of the officer thereby leading to great legal controversy²⁰. The Section is not completely repellent from arbitrariness due to its express provision of providing wide power in the hands of police officer to conduct search, seizure and arrest. The Section has been strictly subjective to judicial interpretation by the courts in which it was held that the Section does not provide purely subjective satisfaction on the part of the officer to conduct search, seizure and arrest according to his/her whims and fancies deliberately omitting the main purpose or intention of this Section²¹. The expression “reason to believe” has to be strictly interpreted with “good intention” and “good faith” and not on mere pretence²². Similarly Section 50 of the Act provides for procedural safeguards or conditions under which the officer designated under Section 42 can conduct personal search. Not complying strictly with the procedure of Section 40 will not only corrupt the purpose of Investigation but could also vitiate the trial.

Section 42 of the NDPS Act

Section 42 has been subjected to many judicial interpretations and it has been found out that Section does not carry any legal controversy but actually controversy can be created by the Officer on deliberately omitting the procedural aspect of this Section. On contemplating the Section it could be found out that Section clearly enshrined on its Subsection(1) that officer on

¹⁹Supra note 4.

²⁰Supra note 4.

²¹J.K Mathur, Illegal search and arrest – its effect on trial, (1997), (1997) 6 SCC (Jour) 12, At page 2(1997).

²²Id.

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receiving certain information given by any person has to duly note it in writing and can send the copy of it to his superior officer. Further in relation to the expression “reason to believe”²³ it has been concluded through judicial precedent that the officer should have “good faith” and “good intention” and not merely pretence while conducting search, seizure and arrest. Furthermore he/she should have reason to believe that warrant cannot be adopted without affording opportunity for the concealment of any evidence or facility for the escape of an offender²⁴.

Section 50 of the NDPS Act

Section 50 is clear and unambiguous in its language that while conducting personal search certain procedural safeguards has to be followed. In *State of Punjab v. Baldev Singh*²⁵ it was held that while conducting of search of contrabands in some other premises, the compliance as to Section 50 if the Act does not require but while conducting personal search strict compliance of Section of the Act is requires as a mandatory statutory provision. This clearly shows that Section 50 of the Act was drafted on keeping in mind the Rights of the Accused to be given fair and just trial and to protect the accused from illegal arrest²⁶. The proviso clearly enshrined that officer have to intimate right of the person being searched, that he/she has the right to be searched before the gazette officer or magistrate and in case if he does not opts it failure of not conducting the search before gazette officer and magistrate could be prejudice to the accused, it could be illegal arrest, the conviction could be vitiated since it has been held that non compliance of Section 50 the Act while conducting personal search could lead to illegal arrest and vitiating of trial²⁷.

Judicial activism on Section 42 and Section 50 of the Act

²³Supra note 8.

²⁴Id.

²⁵State of Punjab v. Baldev Singh, (1999) 6 SCC 172.

²⁶Supra note. 18.

²⁷Supra note 18.

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The language of Section 42 and Section 50 are clear and unambiguous and the law is so well settled that it is impossible to take different view. Both the Section actually contemplates that the action of the individual however by grave and horrendous, the State is duty bound to maintain the sanctity of criminal justice system. Ergo, the action of the State should be "clear", "just" and "fair"²⁸.

Section 42 of the NDPS Act

In *Karnail Singh v. State of Punjab*²⁹, the issue of scope and applicability of Section 42 of the Act was comprehensively discussed by the Court. The Court reiterated the well established dictum already discussed in the case of *State of Punjab v. Baldev Singh*³⁰, that insofar as the obligation of officer conducting search is concern under Section 50(1)³¹ i.e., to inform the right of the person to be searched in front of magistrate is gazetted officer, the flexibility as to procedural requirements in terms of the two newly inserted subsections can be restored only in emergent and urgent situations, and not as a normal routine or matter of course. Further the officers so designated has to duly comply with procedure of Section 42 as mandatory statutory provision so as to avoid acquittal of the accused, since non compliance of the Section could easily help the defense to raise reasonable doubt in the manner of search, seizure and arrest conducted and also the undue intention of the officer.

Section 50 of the NDPS Act

In So far as Subsection (6) of Section 50 is concerned it is obligatory on the authorized officer to send the copy of reasons recorded by him on his belief in terms of Subsection (5) to his superior officer and which could be used by the court while scrutiny³². Furthermore there is no specific procedure or format on which the information as to be given to the person being search in

²⁸Supra note 4.

²⁹*Karnail Singh v. State of Punjab*, AIR 1954 SC 204

³⁰*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172

³¹Supra note 8.

³²Supra note. 8

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pursuance of Section 50(1) of the Act, the only obligation is to inform the person about his right to be searched in front of the magistrate or gazette officer in order to escape from illegal arrest and unfair trial. Section 50 only comes in to play when there is personal search being conducted by the authorize officer. For conducting search in any premises of the Accused such as his house or a vehicle compliance of Section 50 is not needed³³. Also if the authorized officer without any prior information as contemplated under Section 42 of the Act makes search and arrest the person during normal course of investigation in to an offence other than offence under NDPS Act and on completion of such search contraband is found, the requirement of Section 50 of the Act is not required. Therefore it can be concluded that even in case of chance detention the authorized officer is duty bound to inform the person about his right under Section 50 of the Act.

Constitutionality of NDPS Act

Non compliance of Section 42 and 50 of the Act could leads to violation of Fundamental right since illegal arrest will not have any impact on legal proceedings and could lead to miscarriage of Justice. NDPS Act being penal legislation, all the statutory provisions have to be followed strictly otherwise it will lead to unjust trial³⁴. The arrest being made by the officer by omitting the statutory provision will lead to violation of Article 21³⁵ of the person. In *Man Bahadur v. State of H.P.*³⁶, the Supreme Court held that omission of Section 50(1) i.e., accused being made aware of his/her right to be search before gazette officer or magistrate will leads to unjust and unfair trial.. Justness and fairness being implicit part of Article 21 and also a fair trial is a human right as declared under Article 12 of the Universal Declaration of Human Rights³⁷. This scheme is also enshrined under Article 21 of the Constitution. Thus, every action of the authorities must

³³*State of Punjab v. Balbir Singh*, (1994) 3 SCC 299 : *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*, (1994) 6 SCC 569 : *Saiyad Umar Saiyad v. State of Gujarat*, (1995) 3 SCC 610.

³⁴Dr. Geeta Oberoi, Critical analysis of Section 41, 42 and 50 of the Narcotic drugs and Psychotropic substances in the light of relevant judgments: procedural safeguards, National Judicial Academy, 39-40(2015), [http://www.nja.nic.in/nja%20report%20on%20ndps%20act%20\(1\).pdf](http://www.nja.nic.in/nja%20report%20on%20ndps%20act%20(1).pdf).

³⁵INDIA CONST. art. 21.

³⁶*Man Bahadur v. State of H.P.*, AIR 2009 SC 369.

³⁷UDHR. 1948, art 12

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be construed having regard to the provision of the Act which would lead to fair trial of the accused.

Conclusion

Now it has been a well established dictum that when offence under NDPS Act is a grave one. Procedural safeguards under Section 42 and Section 50 of the Act need to be strictly followed by the officers so designated under the respective Sections³⁸. The non compliance of established procedural safeguards would leads to serious repercussions such as vitiating of trial and the accused may walk off scot-free. The Supreme Court has strictly concluded that as long as “personal search” by the officers are concerned, it is mandated by the virtue of law that Section 50 of the Act need to be complied with. The ratio given by the court in arriving at such condition was “Non compliance of Section 42 and Section 50 of the Act by the Officer designated during personal search will question the credibility of Official Witness, which would be considered on the facts and circumstances of each case. Furthermore if two views are possible, the benefit of doubt should be given to the accused³⁹”. Mere “personal knowledge” as provided under Section 42 of the Act and intention to comply with procedural safeguards of Section 50 but not strictly complying it is nothing but gross failure of the Officer designated which will ultimately leads to vitiating of trial and acquittal of the accused.

In *State of Punjab v. Balbir Singh*⁴⁰, the Hon’ble Supreme Court held that non compliance of Section 42 and Section 50 of the Act while arresting a person may leads to illegal arrest and vitiate the trial. Ergo the illegal arrest by the designated officer is violation of “personal liberty” of the person being arrested, which is guaranteed under Article 21 of the Constitution of India. Since “Arrests made in violation of any statutory provision is violation of Article 21 as Illegal

³⁸ *Dilip and Another v. State of M.P.*, (2007) 1 SCC 450.

³⁹ *Dilip and Another v. State of M.P.*, (2007) 1 SCC 450.

⁴⁰ *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299.

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arrests would not have any impact on the legal proceedings and could lead to miscarriage of Justice”⁴¹.



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⁴¹State of Punjab v. Balbir Singh, (1994) 3 SCC 299.

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