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Notice under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 – Mandatory Compliance and its Importance: An Analysis

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ABSTRACT

The officers of the departments/organizations mentioned in section 41(2)/42(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as ‘the Act’) are the empowered officers to issue a Notice under the provisions of section 50 the Act and is, generally, the starting point of the search proceedings under the Act. This section under the Act has come under the legal scrutiny by the Hon’ble Supreme Court over a period of time. In terms of the judgments of the Hon’ble Supreme Court, the statutory rights vested upon the person has to be explained, albeit in the language known to him, and any failure on the part of the empowered authorised officer to do so would vitiate the trial and also would be a point of contention before the Courts for grant of bail. Hence, its importance.

1. The officers of the departments/organizations mentioned in section 41(2)/42(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as ‘the Act’) are the empowered officers to issue a Notice under the provisions of section 50 the Act and is, generally, the starting point of the search proceedings under the Act. This section under the Act has come under legal scrutiny by the Hon’ble Supreme Court over a period of time. Readers may wonder, at this stage, as to why so much importance is attached to the Notice under s50 of the Act in contradistinction to, say, a Notice issued under s102 of the Customs Act, 1962.

2. Before proceeding further, readers may like to remind themselves that the Act provides for a minimum punishment of 10 years with fine in respect of commercial quantity and up to 10 years for intermediate quantity with fine and this has been notified vide S.O. 1055(E) dated 19th October, 2001. Small quantity attracts a sentence of one year with fine with effect from 1st May, 2014 vide S.O. 1183(E) dated 30th April, 2014; previously 6 months of the illicit trafficked substance recovered and seized from the search of a person or his baggage/article,

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etc.

2.1 To illustrate, 0.002 grams and 0.1 gram of LSD, also known as dot, zen, pane, tab, boomer, blot, stamp, etc., have been notified as small quantity and commercial quantity, respectively, *vide* Notification S.O. 1055 (E) dated 19th October, 2001 as amended *vide* Notification No. S.O. 2942 (E) dated 18th November, 2009. The cases booked by various empowered organizations reveal that in many of the cases, contraband has been recovered from search of a person. It would not be out of context to highlight here that higher the punishment, higher would be the scrutiny of evidences by the Ld. Trial Court. It is for this reason that a great deal of importance is attached to this initial document prepared by the empowered officer authorised to issue the Notice.

3. The primary object of the Act being to operationalize the measures to control and regulate the narcotic, psychotropic and controlled substances, which have licit uses in the medical field to cure various illnesses the mankind suffers and simultaneously to proceed against the unscrupulous persons putting these very substances to illicit uses. Hence, to strike a balance between the licit and illicit uses, it is always desired that no innocent person suffers and hence the compliance of s50 of the Act has to be mandatorily followed and implemented, failing which the trial itself gets vitiated and the person accused of an offence under the Act gets the benefit of non-compliance by the empowered officers authorised to issue a Notice.

4. The basic requirement of s50 of the Act is that the empowered authorised officer should have ‘reasons to believe’ before he undertakes search of a person. The phrase ‘reasons to believe’ has not been defined under the Act. But we find that it has defined under section 26 of Indian Penal Code, 1860 as under:

“26. “Reason to believe”.—A person is said to have “reason to believe” a thing, if he has sufficient cause to believe that thing but not otherwise.”

4.1 It follows from the above that the empowered authorised officer about to search a person under the Act, should have evidences of sterling quality to believe, which would have been orally or otherwise received or gathered/collected and worked upon for its authenticity, reliability and admissibility, that the said person has secreted the contraband on his person, which if recovered, would result in the person being proceeded under the Act. The cases include ‘swallow’ cases. The reasons to believe, envisaged under s50 of the Act, is on a higher pedestal *vis a vis* ‘reason to suspect’ when a conveyance is to be searched under s49 of the Act. Meaning thereby a search of a person requires a higher degree of accurate, quality and sterling evidences against a mere suspicion for search of a conveyance under the Act.

5. It is exactly for this reason that this article focuses on the nitty gritty and nuances involved in the issuance of a Notice under s50 of the Act. The situation regarding applicability or otherwise of s50 of the Act can be broadly compartmentalized into the following:

(i) Where the recovery is made from the search of a person and the recovery is effected from the clothes, purse (especially LSD) found on the clothes and belt and accessories or footwear worn by the person.

(ii) Where a person does not carry anything on his person but has effective and conscious control over the articles, bags, boxes, carboys, parcels, luggage, baggage, etc. in which he has secreted or concealed the offending substance and the recovery is effected from articles being carried by the person.

(iii) Where a person does not carry anything on his person and does not have effective and conscious control over the articles, bags, boxes, carboys, parcels, luggage, baggage, etc. in which contraband has been secreted or concealed.

(iv) Where main accused and co-accused form part of a group travel and one of them being the wife of the main accused is not involved (and gets acquitted) as she does not have any knowledge or is not party to the dealings in narcotics but the main accused and co-accused are involved (and get convicted being involved).

(v) Where a person does not carry anything on his person and is a co-passenger in a private vehicle wherein, he knows the driver of the vehicle and from the Call Detail Records, it can be proved that he has knowledge about the fact that contraband has been concealed in the vehicle.

(vi) Where a person does not carry anything on his person and is a passenger in a hired vehicle, say Uber/Ola or takes a lift, and has not kept any luggage in the dickey/boot of the said vehicle and does not have effective and conscious control over the secreted contraband and has no knowledge about the fact that contraband has been concealed in the vehicle, including the dickey/boot of the vehicle.

(vii) Where a person does not carry anything on his person and is an employee with the Indian Railways engaged in the distribution of bed rolls and linen and has not concealed or secreted any contraband in the bed rolls and linen and also does not have effective and conscious control over the secreted contraband and has no knowledge about the fact that contraband has been concealed in the bed roll or linen.

(viii) Where a person does not carry anything on his person and is an employee with the Indian Railways engaged in the distribution of bed rolls and linen and has concealed or secreted any contraband in the bed rolls and linen and also does have effective and conscious control over the secreted contraband and has no knowledge about the fact that contraband has been concealed in the bed roll or linen.

(ix) Where a person does not carry anything on his person and is an employee with the State Transport Corporation or Private Transport Corporation and has not concealed or secreted any contraband in the dickey/boot of the bus and does not have an effective and conscious control over the secreted contraband and has knowledge about the fact that contraband has been concealed in the dickey/boot.

(x) Where a person does not carry anything on his person and is an employee with the State Transport Corporation or Private Transport Corporation and has concealed or secreted any contraband in the dickey/boot of the bus and has an effective and conscious control over the secreted contraband and has knowledge about the fact that contraband has been concealed in the dickey/boot.

(xi) Where a person does not carry anything on his person and is an employee/director of the company operating the cruise ship for luxury vacation and has not concealed or secreted any contraband in the cruise ship and does not have an effective and conscious control over the secreted contraband and has no knowledge about the fact that contraband has been concealed in the cruise ship.

(xii) Where a person does not carry anything on his person and is an employee/director of the company operating the cruise ship for luxury vacation and has concealed or secreted any contraband in the cruise ship and does have an effective and conscious control over the secreted contraband and has knowledge about the fact that contraband has been concealed in the cruise ship.

5.1 The categorization, as above, assumes significance as the applicability or otherwise becomes the core issue in bail matters and of course during the course of trial. At the outset, it should be understood by the esteemed readers that compliance of s50 of the Act has been held to be mandatory in catena of cases (see para *infra* for details) and non-compliance thereof vitiates the trial.

6. Having understood the background, it is important to understand the jurisprudence developed around s50 of the Act. A catena of cases on the issue have been decided by different benches of various strengths by the Hon'ble Supreme Court and despite the decisions, the issue

has not attained stability as is evident from the latest decision rendered on 9th March, 2022 by the Larger Bench of the Hon'ble Supreme Court in Sanjeev & Anr vs. State of Himachal Pradesh² wherein it was held as under:

“10. We have checked the original record to satisfy ourselves. Exhibits PW8/B, PW8/C, PW8/D and PW8/E, which are arrest memos, do not reflect that any option or choice was given to the accused before their personal search was undertaken. It is true that the personal search did not result in recovery of any contraband material but the non-compliance of requirement of affording an option, was one of the reasons which weighed with the Trial Court in disbelieving the case of the prosecution.”

Emphasis applied

6.1 Hence, the analysis of various decisions of the Hon'ble Supreme Court assumes significance.

7. The Constitution Bench judgment rendered by the Hon'ble Supreme Court in the case of Baldev Singh vs. State of Punjab³ required the empowered officer to explain the statutory right vested in the person and that he has an option to get himself searched before the nearest Magistrate or the Gazetted Officer of the empowered department/organization i.e., NCB, Customs, DRI, Police, etc. This option has to be exercised by the person to be searched and the option so exercised should be reduced into writing. It may be noted at this stage that a Notice under s50 of the Act can be oral. But an Oral Notice has its own complications in proving that it was issued to the person.

7.1 Moving further, the word “taken” in s50 of the Act came in for interpretation in the case of U.O.I. & Anr vs. Sanjeev V. Deshpande⁴ wherein it was held that the person to be searched cannot be produced before the raiding team having a Gazetted Officer. Meaning thereby, the person has to be ‘taken’ to any other Gazetted Officer (of the same or any other empowered department) to maintain the integrity, credit worthiness and independence of the action to be taken.

8. It is required to be noted that it is important that situations in which the empowered departments book cases assume significance and hence it is felt that the decisions of the Hon'ble Courts have to be understood in the context of the situation, facts and circumstances of the case.

² Sanjeev & Anr vs. State of Himachal Pradesh - 2022 SCC OnLine SC 288 : 2022 LiveLaw(SC) 267

³ Baldev Singh vs. State of Punjab - 1999(6) SCC 172 : 1999 (7) TMI 630 - SUPREME COURT

⁴ U.O.I. & Anr vs. Sanjeev V. Deshpande - 2014 (13) SCC 1

While implementing the provisions of the Act by empowered departments like Customs, DRI, NCB, Police, etc. at International Airports where the international passengers are intercepted, it is always advisable to associate an interpreter to explain the reasons for the interception and the proceedings to the passenger under the Act. This is the basic requirement that is to be met lest the international passenger take a U-turn to contest that his statutory rights were not properly explained to him and consequently he could not exercise the option properly. The problem would be equally applicable to Indian citizens travelling abroad or arriving from abroad. The bulk of the Indian citizens going abroad would fall under the category of employment, falling in the category of manual labour or semi-skilled labour category.

8.1 Two cases booked by the Customs at IGI Airport, New Delhi, in this regard, require prominent mention at this stage. The Hon'ble Court of Additional Sessions Judge - Special Judge (NDPS), Dwarka Courts, New Delhi in Sessions Case No. 472-2017 decided on 2nd December, 2019⁵, observed as under:

“25. I have perused the Notices U/s 50 NDPS Act.

“The word mentioned is "Legal Right". However, the accused has given his reply in the form of noting on Notice itself which is in Hindi. Accused signed all the documents prepared at spot in Hindi. In the voluntary statement of accused U/s 67 of NDPS Act Ex. PW-1/L itself, the qualification of accused has been recorded as 5th pass out and it is mentioned that he can read and write Hindi only. So it is observed that accused was not much conversant with proceedings recorded in English and he was not comfortable with English. So, this defence is available to the accused.”

8.1.1 Similarly in the Sessions Case No. 441-2017 decided on 14th January, 2020⁶ the Hon'ble Court of Additional Sessions Judge-Special Judge (NDPS), Dwarka Courts, New Delhi observed as under:

“28. I have perused the Notices U/s 50 NDPS Act.

The word mentioned is "Legal Right". However, the accused has given his reply in the form of noting on Notice itself which is in Hindi. Accused signed on all the documents prepared at spot in Hindi only. It is nowhere alleged that accused was comfortable with English. So, this defence is available to the accused.”

8.2 At this stage it will be useful to refer to a very important and latest decision arising out

⁵ Department of Customs, through Air Customs Officer, IGI Airport, New Delhi vs. Mohd. Danish

⁶ Department of Customs, through Air Customs Officer, IGI Airport, New Delhi vs. Mohd. Naseem

of the Hon'ble Bombay High Court in the case of Gangam Sudhir Kumar Reddy vs. State of Maharashtra⁷ wherein the applicant sought regular bail in Crime No. 46 of 2019 registered by Anti-Narcotics Cell, Ghatkopar Unit, Mumbai for the offence punishable under section 8(c) read sections 20(C) and 29 of the Act. It was the case of the prosecution that commercial quantity of the contraband was recovered from the vehicle, owned by the wife of the applicant in which the applicant along with co-accused was travelling. A defence was raised to the effect that the applicant, a businessman having business of Tours and Travels, knew only Telugu language, being a permanent resident of Hyderabad and accordingly there was no effective communication of his right to know about statutory safeguards.

8.3 The Hon'ble High Court while rejecting the bail application preferred by the applicant observed as under:

”Once the applicant has claimed that he is conducting Tours and Travels business, the basic requirement of a person carrying out such business is acquaintance of the language and communication skills. The applicant was communicated about his right in Hindi which is National language. Applicant was apprehended from Mumbai. The fact that applicant was carrying out business of Tours and Travel, prompts this Court to believe at this stage that he must be aware about the topography and signals of the local language. As such, it can be presumed at this stage that the applicant was aware about Hindi language in which he was communicated about his right under Section 50 of the Act. Fact remains that in bail application of the applicant, his limited knowledge about Telugu language cannot be appreciated at this stage, as the said defence can be looked into at the stage of trial.”

8.4 As already stated herein above, the person who is to be checked should be communicated in the language known to him. However, on a close reading of the observations of the Hon'ble High Court, Hindi has been held to be the National Language. In fact, in terms of Article 343 of the Constitution of India, Hindi written in Devanagari script has been given the status of the official language of the Union of India. The matter was carried forward by way of filing of SLP before the Hon'ble Supreme Court.⁸

8.5 Vide Order dated 04.03.2022, the Division of the Hon'ble Supreme Court held as under:

⁷ Criminal Bail Application No.2054 of 2021 decided on 22.11.2021 by the Hon'ble Bombay High Court

⁸ Order dated 04.03.2022 in SLP (Crl.) No. 1527/2022 (Diary No.- 1679 – 2022)

“We are not inclined to interfere with the impugned order. Hence, the special leave petition is dismissed.

However, we take notice of the grievance raised by the petitioner that the trial has not proceeded. Arguments on charge are yet to be addressed. The trial court shall proceed expeditiously.”

8.6 The importance of the communicating in a language known to the accused person can also be gauged from the facts recorded in Paras 2 and 3 of the case in Union of India through Narcotics Control Bureau, Lucknow vs. Md. Nawaz Khan⁹

“2 The complaint was filed on 16 September 2019 through the Intelligence Officer at the Lucknow Zonal Unit of the Narcotics Control Bureau. The allegation is that the NCB, Zonal Unit received information at 1400 hours that three persons namely Md. Arif Khan, Rafiuddin and Md. Nawaz Khan (the respondent), who are residents of Manipur were proceeding with heroin/morphine in a Maruti Ritz vehicle bearing registration No. UK 06 AA 25823 from Dimapur in Nagaland to Rampur in Uttar Pradesh and that the vehicle would be passing through Banarasi Das College, Lucknow. The information was reduced into writing and was produced before the Zonal Director, NCB Lucknow. A team of NCB officers was formed and it was directed to liaise with the team of the Uttar Pradesh Special Task Force, Lucknow.However, a search of the car revealed two polythene packets hidden under the place where the wiper is connected to the front bonnet of the car. The first packet weighed 1.740 kg, while the second packet weighed 1.750 kg. Samples were taken and upon testing with the drug detection kit, the samples tested positive for heroin.

3 Since the occupants of the car were not well- versed with Hindi or English, an official belonging to the Shasastra Seema Bal was summoned at the spot for the purpose of translation as he hailed from Manipur and was conversant with the Manipuri language. The statements of the three accused persons were recorded in English and were translated in Manipuri by the official from the SSB and the accused were placed under arrest.”

⁹ Union of India through Narcotics Control Bureau, Lucknow vs. Md. Nawaz Khan - 2021 SCC OnLine SC 782

Emphasis applied

8.7 In Customs vs. Jaurah and Another¹⁰, the respondent was served a Notice under s50 of the Act, which read as under:

“The examination of your baggage and your personal search is to be conducted. If you so desire, the same could be conducted before a Magistrate or a Gazetted Officer of Customs.”

8.7.1 Relying on the decision of the Hon’ble Vijaysinh Chandubha Jadeja vs. State of Gujarat¹¹, the Hon’ble High Court of Delhi held as under:

*“20. In view of dictum laid down by the Hon’ble Supreme Court in the above judgment, it is apparent that the notices served upon the Respondents were **not in conformity with the provisions of Section 50 of the NDPS Act** and were merely an enquiry by the empowered officer to the Respondents. By these notices the respondents were not informed of their legal rights to be searched before the Magistrate or Gazetted officer. Further it is noteworthy that PW13 Sh. Khalid A. Noori in his cross examination admitted that he did not know the meaning of words “Gazetted officer” and “Magistrate” in Persian. Since both the respondents were not conversant with English, the meaning of these two words was not conveyed to them in vernacular language by PW13. Looked from any angle the very purpose of notice under section 50 was defeated what to speak of compliance.”*

Emphasis applied

8.8 The importance of the language used in communication as well as the wordings used in the Notice is such that it forms the starting point of the arguments before the Trial Court or Appellate Court.

9. Sub-sections (5) and (6) to section 50 of the Act were inserted *vide* section 22 of Act 9 of 2001 with effect from 2nd October, 2001. Under sub-section (5), an exception has been carved out when the empowered officer, duly authorised under s42 has “reason to believe” that the person to be searched would part with the possession of the narcotic drug or psychotropic substance or controlled substance or article or document, the authorised empowered officer can proceed to search the person. The authorised officer who proceeds to effect search of a person

¹⁰ Customs vs. Jaurah and Another8 - 2018-TIOL-79-HC-DEL-NDPS

¹¹ Vijaysinh Chandubha Jadeja - 2011-TIOL-51-SC-NDPS-CB

under sub-section (5) of s50 has to transmit the reason for such belief within 72 hours to his immediate superior.

9.1 Another vital issue arises when female suspects are to be searched. Do the provisions of s50 of the Act categorically state as to whether a female suspect is required to be searched by a female or an ‘empowered/authorised’ female officer? This issue becomes quite relevant in the context of the fact that the empowered departments, especially the Police, face shortage of empowered female officers in the force leading to search of a female suspect by any female officer of the department, who is neither empowered nor authorised to conduct the search of a female suspect. The aforesaid issue came up before the Hon’ble High Court of Delhi in Bail Application No. 2270/2021 decided on 28.09.2021¹². The Hon’ble High Court, answering the question in the affirmative, held as under:

“21. In the present case, the secret information stated to be received was with respect to a female. A perusal of the material placed on record would show that it has not been stated as to why no effort was made to secure presence of a female police officer. In view of the above enunciation of law, this Court is of the prima facie view that the search conducted by W/Ct Rekha does not appear to be in strict compliance with the mandate of Section 50(4) of the NDPS Act. For that reason, search conducted by W/Ct Rekha, even in the presence of the ACP/SHO, appears to suffer from the vice discussed above.”

Emphasis applied

9.2 Esteemed readers may note the fact that s42 of the Act categorically states that “Any such Officer, being an officer superior in rank to a peon, sepoy or constable” is empowered to take action provided he has been authorised to take action under s42 of the Act. It naturally follows that while a male suspect is invariably checked by an empowered and authorised officer superior in rank to a sepoy or constable, the search of a female suspect by any female officer (say a woman constable as in the case quoted above), goes against the letter and spirit of the Act and such a discrimination cannot be sustain in view of the explicit provisions of the Act.

9.3 Another very interesting facet came up before the Madurai Bench of the Hon’ble Madras High Court in a case¹³ which was with reference to ‘immediate superior officer’,

¹² Mamta vs. State of Delhi -2021 SCC OnLine Del 4570

¹³ CrI. A.(MD)Nos.143, 174, 219 of 2018 & 309 of 2020 and CrI.MP(MD)Nos.891, 6311 and 5114 of 2020 decided on 24.09.2021 by the Madurai Bench of the Hon’ble Madras High Court.

though in the context of s57 of the Act. It was the contention of the appellants therein that that PW8 (the Superintendent of NCB to whom the report of arrest and seizure was made) was camping at Madurai and PW1 sent the information to PW8. Hence, an argument was put forth on the side of the appellants to the effect that PW8 is not superior officer (on the date of the incident) of PW1 and PW7 (who was on leave on the date of incident) is the immediate superior officer of PW1. This contention was rejected. Meaning thereby that for the purpose of the proper and effective compliance of sub-sections (5) and (6) of s50 of the Act, it is immediate superior officer on the date of the search and not the regular immediate officer, if he happens to be on leave, etc.

9.4 Moving to the cases decided, primarily by the Hon'ble Supreme Court assume importance as they are binding on all the subordinate judiciary by virtue of Article 141 of the Constitution of India. One of the earliest cases *viz.* State of Punjab vs. Jasbir Singh & Others¹⁴ pertains to upholding the Order of acquittal on account of non-compliance of s50 of the Act recorded by the Trial Court wherein the Division Bench of the Hon'ble Supreme Court held as under:

*“2. Having considered the evidence we find it difficult to set aside the order of acquittal recorded by the Additional Sessions Judge. Though the offence involved is of a considerable magnitude of 70 bags containing 34 kgs of poppy husk, each without any permit/licence, **this Court is constrained to confirm the acquittal for the reasons that the mandatory requirements of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 has not been complied with. Protection given by Section 50 is a valuable right to the offender and compliance thereof intended to be mandatory.**”*

Emphasis applied

9.5 Needless to mention, the aforesaid decision was rendered prior to the Constitution Bench judgment in the case of Baldev Singh (*supra*): In Baldev Singh's case (*supra*) it was held that the right to be searched before a Gazetted Officer of any empowered department/Magistrate is a valuable right granted to a person who is to be searched and that such search, when done in the presence of a Gazetted Officer or the nearest Magistrate, imparts much more authenticity, credibility and creditworthiness to the search and seizure proceedings.

¹⁴ State of Punjab vs. Jasbir Singh & Others - (1996) 1 SCC 288

9.6 In *Joseph Fernandez vs. State of Goa*¹⁵ & *Prabha Shankar Dubey vs. State of M.P.*¹⁶, the concept of 'substantial compliance' was read into s50 of the Act and this was not in tune with the judgment rendered in *Baldev Singh (supra)*. The Constitution Bench of the Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja (supra)*, on the concept of 'substantial compliance', later on, held as under:

"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)."

9.7 However, in *Vijaysinh Chandubha Jadeja (supra)*, it was held that the provisions of s50 of the Act are mandatory and require strict compliance and the failure to comply with s50 of the Act would vitiate trial. We also further find that in *Kalema Tumba vs. State of Maharashtra*¹⁷, the appellant Kalema Tumba arrived at Bombay (now Mumbai) by a foreign airline and, on the basis of specific information, was intercepted and his baggage was found to contain a brownish powder which on testing was found to be heroin. It was held that the decision in *Jasbir Singh (supra)* stood overruled by placing reliance on the judgment in *Baldev Singh (supra)*. Another important judgment which requires mention is the case of *Namdi Francis Nwazor vs. Union of India*¹⁸ wherein the Larger Bench of the Hon'ble Supreme Court delinked the checked-in baggage with the issuance of a Notice under s50 of the Act and held that the provisions of s50 of the Act were not applicable/attracted. In this case, the appellant, a Nigerian was proceeding to Lagos and was intercepted by the officers of NCB and on checking his two hand baggage, nothing incriminating was found. But from the checked-in baggage, 152 out of 153 cartons contained ampoules and one carton contained brown colour substance, weighing 180 grams, packed with black adhesive, which on testing was found to be heroin. It is interesting to note that the decision in *Namdi Francis Nwazor (supra)* was held *per incuriam* subsequently in *Liyaqat Ali vs. Union of India*¹⁹. It is equally important to register here that *Namdi Francis Nwazor (supra)* was referred to in *Yasihey Yobin vs. Department of Customs*²⁰, wherein the Hon'ble Court laid down the "*test of inextricable connection between the bag and*

¹⁵ *Joseph Fernandez vs. State of Goa* - (2000) 1 SCC 707

¹⁶ *Prabha Shankar Dubey vs. State of M.P.* (2004) 2 SCC 56

¹⁷ *Kalema Tumba vs. State of Maharashtra* - (1999) 8 SCC 257

¹⁸ *Namdi Francis Nwazor vs. Union of India* - (1998) 8 SCC 534.

¹⁹ *Liyaqat Ali vs. Union of India* - (2008) 17 SCC

²⁰ *Yasihey Yobin v. Department of Customs* - (2014) 13 SCC 344

the person of accused” while again referring to the observations made in Namdi Francis Nawazor (*supra*). It was further held in this case that the word “any person” means a human being or a living person. The see-saw decisions on the applicability or otherwise is required to be noted at this stage and as is being discussed hereinafter.

9.7.1 In the meantime, in Gurbax Singh vs. State of Haryana²¹, the recovery was effected from a bag being carried (by Gurbax Singh) and it was held that in the facts and circumstances, s50 was not applicable, for which reliance was made to Baldev Singh (*supra*). In para 7, it was held as under:

“Further, after considering various decisions the Court held (in para 57) 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.”*

9.8 Moving forward, the cases of Dilip vs. State of M.P.²², State of Rajasthan vs. Parmanand²³ and Arif Khan vs. State of Uttarakhand²⁴ require a specific mention. It was held that the search, pursuant to which narcotics are recovered from an accused or from the person of an accused or from the baggage carried by an accused, where the accused is also searched along with his baggage, s50 of the Act mandates that the search be necessarily carried out in the presence of a Magistrate or a Gazetted Officer, even where the accused declines the offer to get himself searched in the presence of a Magistrate or a Gazetted Officer.

9.9 In a situation where simultaneous search of the person and the bags in his possession are done, the application of the judgments rendered by the Hon’ble Supreme Court in Dilip (*supra*) and Parmanand (*supra*) would apply and compliance therewith would be mandatory. Arif Khan (*supra*) marked a radical change, in the jurisprudence relating to s50 of the Act. The Hon’ble Supreme Court in Arif Khan (*supra*), after noticing Vijaysinh Chandubha Jadeja (*supra*) as well as the law laid down therein, went on to hold that nevertheless even where the person declined the offer under s50 of the Act, the raiding team was, mandatorily required to have the search of the person conducted in the presence of a Gazetted Officer or Magistrate

9.10 The judgment of Larger Bench of the Hon’ble Supreme Court in Sk. Raju @ Abdul

²¹ Gurbax Singh vs. State of Haryana - (2001) 3 SCC 28

²² Dilip vs. State of M.P. - 2006 (11) TMI 557 - Supreme Court

²³ State of Rajasthan vs. Parmanand - 2014 (3) TMI 54 - Supreme Court

²⁴ Arif Khan vs. State of Uttarakhand AIR 2018 SC 2123

Haque @ Jagga vs. State of West Bengal²⁵ followed the judgment in Dilip (*supra*). The view taken in Dilip (*supra*) was disapproved in State of Punjab vs. Baljinder Singh²⁶ and another. In Than Kunwar vs. State of Haryana²⁷, it was held that the judgment in the case of Baljinder drew inspiration from the Constitution Bench decision in Baldev Singh (*supra*).

9.11. It is very important to note that mere informing the person to be searched of his legal rights would not constitute compliance of the provisions of s50 of the Act. In Sunil vs. State of Haryana²⁸ decided by the Hon'ble Punjab and Haryana High Court, while enlarging the petitioner on bail, for which reliance was placed upon the judgments in the case of (i) Vijay Chandubha Jadeja vs. State of Gujarat (*supra*) (ii) Nirmal Singh Pehlwan @ Nimma vs. Inspector Customs, Custom House, Punjab²⁹ (iii) State of Delhi vs. Ram Avtar³⁰ and (iv) Labeebul Mubarack vs. State of Kerala³¹, it was held that merely informing the petitioner that he had rights under the Act, without specifying what rights the petitioner had under the Act, would not constitute compliance with the mandatory requirement under s50(1) of the Act.

9.12 Following the judgment of Than Kunwar (*supra*), the compliance of s50 of the Act would come into force only when there is search of a person and not otherwise. Search of the vehicle does not attract the provisions of s50 of the Act, as has been held by the Division Bench of the Hon'ble Supreme Court in the case of Kallu Khan vs. State of Rajasthan³², for which the reliance was placed on the judgment of the Division Bench of the Hon'ble Supreme Court in Surinder Kumar vs. State of Punjab³³, wherein it was held as under:

*15. Simultaneously, the arguments advanced by the appellant regarding non-compliance of Section 50 of NDPS Act is bereft of any merit because no recovery of contraband from the person of the accused has been made to which compliance of the provision of Section 50 NDPS Act has to follow mandatorily. In the present case, in the search of motor cycle at public place, the seizure of contraband was made, as revealed. Therefore, compliance of Section 50 does not attract in the present case. It is settled in the case of Vijaysinh (*supra*) that in the case of personal search only, the provisions of Section 50 of the Act is*

²⁵ Sk. Raju @ Abdul Haque @ Jagga vs. The State of West Bengal - 2018 (9) TMI 845 - SUPREME COURT

²⁶ State of Punjab vs. Baljinder Singh : (2019) 10 SCC 473 : 2019 SCC OnLine SC 1408

²⁷ Than Kunwar vs. State of Haryana (2020) 5 SCC 260 : 2020 SCC OnLine SC 256

²⁸ Sunil vs. State of Haryana in CRM-M No.28067 of 2021 decided on 02.11.2021

²⁹ Nirmal Singh Pehlwan @ Nimma vs. Inspector Customs, Custom House, Punjab (SC) -2011 (3) RCR (CrL) 831

³⁰ State of Delhi vs. Ram Avtar - 2011 (4) RCR (CrL) 191

³¹ Labeebul Mubarack vs. State of Kerala - 2018 (3) KLT 363

³² Kallu Khan vs. State of Rajasthan - 2021 SCC OnLine SC 1223

³³ Surinder Kumar vs. State of Punjab 28 - (2020) 2 SCC 563

required to be complied with but not in the case of vehicle as in the present case, following the judgments of Surinder Kumar (supra) and Baljinder Singh (supra). Considering the facts of this Court, the argument of non-compliance of Section 50 of NDPS Act advanced by the counsel is hereby repelled.

Emphasis applied

9.12 In Dayalu Kashyap vs. State of Chhattisgarh³⁴, the Division Bench of the Hon'ble Supreme Court observed that the only point which really arose for consideration in this case was the effect of provisions of s50 of the Act on the recovery of 'Ganja' from a green polythene bag on a wooden Kanwad. The Hon'ble Supreme Court, after hearing the rival submissions, held as under:

".....the recovery was in a polythene bag which was being carried on a Kanwad. The recovery was not in person. Learned counsel seeks to expand the scope of the observations made by seeking to contend that if the personal search is vitiated by violation of Section 50 of the NDPS Act, the recovery made otherwise also would stand vitiated and thus, cannot be relied upon. We cannot give such an extended view as is sought to be contended by learned counsel for the appellant."

9.13 In one of the latest decisions rendered on 9th March 2022 by the Larger Bench of the Hon'ble Supreme Court in the case of Sanjeev & Anr vs. State of Himachal Pradesh¹, the Hon'ble Supreme Court, while overturning the judgment of the Hon'ble Himachal Pradesh High Court, restored the acquittal recorded by the Ld. Trial Court by holding that non-compliance of s50 of the Act vitiated the proceedings despite the fact that there was no recovery from the search of the person.

10. Now coming to the different scenarios, as compartmentalized above, the same are answered *ad seriatim*

(i) Compliance of s50 is mandatory and non-compliance of s50 of the Act would vitiate the trial proceedings.

The non-compliance of s50 of the Act may also result in the grant of bail. In Bail Application No. 980 of 2021 in the case of Paramjitsingh Sardar Sarvansingh vs. State of Maharashtra³⁵, the Aurangabad Bench of the Hon'ble Bombay High Court enlarged the

³⁴ Dayalu Kashyap vs. State of Chhattisgarh 2022 SCC OnLine SC 334 : 2022 LiveLaw (SC) 100

³⁵ Bail Application No. 980 of 2021 decided on 23.09.2021 in the case of Paramjitsingh Sardar Sarvansingh vs.

petitioner on bail on account of non-issue of a Notice under s50 of the Act for the personal search conducted on the petitioner and three others, which resulted in recovery and seizure of 'a plastic carry-bag containing cocaine weighing 16 gm' The Hon'ble Bench, while enlarging the petitioner on bail, held as under:

“7. In the case at hand, FIR denotes that personal search of the applicant was taken. It appears that no notice under Section 50 of the NDPS Act has been issued calling upon the applicant to exercise the option under Section 50 of the NDPS Act. Therefore, non-compliance of mandatory provisions of Section 50 makes the applicant entitled to be released on bail. Because of noncompliance of provisions under Section 50 of the NDPS Act, it is clear that there is no possibility of conviction of the applicant. In terms of Section 37(b)(ii) of the NDPS Act, what the prosecution has to prove is that the evidence collected by the prosecution shows the possibility of conviction of the accused and that there is possibility of the accused committing similar offence again. In case in hand, there is nothing on record to show that the applicant has criminal antecedents. Therefore, there is no possibility of applicant committing the similar offence again. Moreover, there is no progress in the trial. Due to continuous absence of the informant, trial has not proceeded further. In such circumstances, applicant cannot be detained for an indefinite period. The applicant has, therefore, made out a case for bail.”

Emphasis applied

(ii) For effecting recovery of the contraband in which the person has effective and conscious control over the articles, bags, boxes, carboys, parcels, luggage, baggage, etc., as the case may be, in which he has secreted or concealed the contraband, there is no requirement of issuance of a Notice under s50 of the Act. This is in tune with the latest rulings, *inter alia*, in the cases of State of Punjab vs. Baljinder Singh and another(*supra*); Than Kunwar vs. State of Haryana(*supra*) and Dayalu Kashyap vs. State of Chhattisgarh (*supra*).

(iii) If the investigation on the spot reveals that the person did not carry anything on his person and does not have effective and conscious control over the articles, bags, boxes, carboys, parcels, luggage, baggage, etc. in which contraband has been secreted or concealed, *prima facie*, he cannot be proceeded under the Act. However, should the empowered officer gather evidence(s) subsequently, he can be proceeded under the Act. If the empowered

authorised officer intends to issue a Notice under s50 of the Act, for personal search, there shall be mandatory compliance of the provisions of s50 of the Act.

(iv) The issue is covered in the Order³⁶ dated 23.03.2022 wherein the facts of the case are that the case of the complainant is that all the original three accused were intercepted by the complainant near Naroda Patiya Bus Stop when they disembarked from Bus no. RJ01PA2003 coming from Himmatnagar and had committed offences punishable under sections 8 (c), 20(b) and 29 of the Act inasmuch as when accused No.3 was searched, Charas weighing 7.79 kilograms was found from the bag held by him. Further, the accused No.3-Imtekhab Rafikbhai Rangrej was in possession of bag and refused to provide its key and therefore lock of the bag was forced open and the aforesaid quantum of Charas was found therein. Various other articles such as phone and ID Card were found from the possession of all the three accused. The Ld. Trial Court acquitted the original accused No.2, the respondent no.2 in this appeal and convicted the accused no.1 Shaikh Mohammed Rafik and accused no.3 Imtekhab Rafikbhai Rangrej. The original accused No.2-the respondent no.2 in this appeal is the wife of accused no.1. On an appeal by the UOI-NCB, the Division Bench of the Hon'ble High Court held as under:

“7..... On scrutiny of evidence, the learned trial Judge found that respondent No.2 was merely a companion of her husband- accused No.1-Shaikh Mohammed Rafik and she was not an accomplice in the crime. The submissions of learned Advocate Mr.Pandya that all the three accused were travelling together and not strangers to one other in their tour from Ahmedabad to Jammu and back and therefore the culpability presumption of Section 35 of NDPS Act comes into play and burden shifts upon respondent No.2 to prove that she was not aware or had any knowledge to the fact that the bag contains the contraband Charas. No doubt, the moment the person had intention or knowledge of the fact, he or she is said to have culpable intention. In a case on hand, accused No.3-Imtekhab was holding the bag with key. As deposed by PW 2, he did not part with the key and therefore the Officer broke open the lock and thus respondent No.2 being companion of her husband and except for her presence as her husband's companion right from the receipt of information, her conscious possession as understood under the law does not surface even reasonable doubt. No any call details prior to and

³⁶ Hon'ble Gujarat High Court 's Order dated 23.03.2022 in R/Criminal Misc. Application No. 1478 of 2022 with R/Criminal Appeal No. 125 of 2022 in the case of UOI through Amit Kumar, Intelligence Officer or his successor in office vs. State of Gujarat.

after the incident is placed on record between accused No.3-Imtekhhab and respondent No.2.

8. Thus, the learned trial Judge on appraisal of entire evidence and so also here no doubt of a reasonable degree can be entertained ***that she had real knowledge of the nature of the substance locked in the bag and key in possession of accused No.3.***”

Emphasis applied

Based on the above, it can be stated that the prosecution is required to bring adequate evidences on record to drive home the point that, apart from being a companion (of her husband, as in this case), she was in conscious possession and was aware of the fact of concealment of the contraband in the bag.

(v) A. The person can be proceeded against under the provisions of the Act. The Hon’ble Supreme Court’s judgment in the case of Union of India vs. Md. Nawaz Khan⁸ is squarely applicable. In this case, it was submitted by the counsel for the respondent that “*the contraband in the present case was found concealed in the vehicle in which the respondent was travelling. Thus, it cannot be stated that it was the respondent who was in conscious possession of the contraband. Learned counsel submitted that the respondent is neither the driver nor the owner of the vehicle and in this backdrop, the order of the High Court enlarging him on bail cannot be faulted.*” The Hon’ble Supreme Court after hearing the rival submissions observed as under:

“22 ‘What amounts to “conscious possession” was also considered in *Dharampal Singh v. State of Punjab (2010) 9 SCC 608*, where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In *Mohan Lal v. State of Rajasthan (2015) 6 SCC 222*, this Court also observed that the term “possession” could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

“30 The following circumstances are crucial to assessing whether the High Court has correctly evaluated the application for bail, having regard to the provisions of Section 37:

The respondent was travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused; The complaint notes that the CDR analysis of the mobile number used by the respondent indicates that the respondent was in regular touch with the other accused persons who were known to him; The quantity of contraband found in the vehicle is of a commercial quantity; and The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused.”

While reversing the order granting bail to the respondent, the Hon’ble Supreme Court held as under:

“32 The High Court has clearly overlooked crucial requirements and glossed over the circumstances which were material to the issue as to whether a case for the grant of bail was established. In failing to do so, the order of the High Court becomes unsustainable. Moreover, it has emerged, during the course of the hearing that after the respondent was enlarged on bail he has consistently remained away from the criminal trial resulting in the issuance of a non-bailable warrant against him. The High Court ought to have given due weight to the seriousness and gravity of the crime which it has failed to do.”

The fine distinction between two persons travelling in a private car and two persons travelling in a public transport bus needs to be appreciated by the readers at this stage and hence the applicability of “standard of conscious possession” would be different in both the cases.

B. A useful reference can also be made to another decision, rendered by the Hon’ble Allahabad High Court.

In *Shridam Adhikari & Ors vs. UOI through Directorate of Revenue Intelligence*³⁷ the Hon’ble Allahabad High Court while rejecting the bail applicants of the accused-applicants, noted that the raiding team had recovered 650.740 kilograms of ganja from the mini truck, which is a commercial quantity and in the said vehicle, all the accused applicants were travelling. The accused applicants were apprehended by the raiding team on the spot and were having conscious and constructive possession over the recovered Ganja and there is specific

³⁷ Bail No.8654 of 2021, Bail No. 8637 of 2019, Bail No. 8627 of 2019 & Bail No. 8638 of 2019, all decided on 22.09.2021 by the Hon’ble Allahabad High Court

statutory presumption in relation to contraband that comes within the ambit of the Act. The Hon'ble High Court held that in view of s54 of the Act, presumption shall be drawn against the accused unless and until the contrary is proved and the expression "*unless and until the contrary is proved*" clearly imposed the burden of proving that possession of prohibited substance is legal on the accused himself. The Hon'ble High Court relied upon the judgments passed by the Hon'ble Supreme Court in the case of (i) UOI vs. Rattan Mallik @ Habul 2009 (1) SCC (Crl) 831, (ii) UOI vs. Ram Samujh 1999 (9) SCC 429, (iii) UOI vs. Shiv Shankar Kesari (2007) 7 SCC 798, (iv) State of Kerala vs. Rajesh AIR 2020 Supreme Court 721, (v) UOI vs. Prateek Shukla AIR 2021 SC 1509, (vi) Megh Singh vs. State of Punjab 2003 CRI. L.J. 4329 and (vii) Dehal Singh vs. State of Himachal Pradesh 2011 (72) ACC 661 to reject the bail.

(vi) The issue in the question is covered by the decision of the Hon'ble Supreme Court in the case of Ashish Singh vs. State of Chhattisgarh³⁸. The case of the prosecution was that when an OLA cab being driven by the accused no. 1 was searched on 08.02.2020, ganja was recovered from the dickey/boot of the cab. The Petitioner (Accused No.2 in the case) was travelling in the said cab as a passenger. It is the case of the appellant that from the FIR, charge sheet and counter affidavit filed by the learned counsel for the State, no connection has been drawn between him (the Petitioner) and the co-accused, the vehicle from which the narcotic substances were recovered apart from the fact that the petitioner was a passenger in the said cab. Nothing was placed on record to even suggest that the petitioner was aware of the narcotic substances hidden in the dickey/boot of the cab. On the basis of the above, the Hon'ble Supreme Court *vide* Order dated 09.04.2021, in the facts and circumstances of the case, recorded that the conditions under s37 of the Act are fulfilled in the present case. Furthermore, the main accused has already been released on bail by the High Court, which has not been denied by the learned counsel for the State. The Hon'ble Supreme Court held that "*taking into consideration the above, and the fact that the petitioner is in custody for around 1 year and 2 months and has no criminal antecedents, we are inclined to enlarge him on bail. The petitioner is, therefore, directed to be released on bail, subject to such terms and conditions which the concerned Trial Court shall deem fit and appropriate to impose upon him.*" It flows from the above that the prosecution is expected to link the accused with the offence. Simply, sitting in a hired private car does not, *ipso facto*, translate the same into a case for the prosecution.

(vii, ix & xi) The issues in these questions are interlinked and intertwined having a

³⁸ Order dated 09.04.2021 in Petition for Special Leave to Appeal (Crl.) No.136/2021 in the case of Ashish Singh vs. State of Chhattisgarh

bearing on one another and hence they are answered under a single heading. To understand the issues in proper perspective, it is necessary to understand the decision by Hon'ble Gauhati High Court in the case of Biswanath Pratap Singh and Another³⁹. The facts of the case are that on 10.04.2018, checking conducted inside the train No.12435DN Rajdhani Express, while it was at Platform No.1 of Guwahati Railway station, led to the detection that the Bedroll staff of Coach No.4A and Coach No.B3 were carrying suspected Ganja in bags kept inside the bedroll cabin of the Coach. Immediately, the checking party deboarded the bedroll staff along with the three Bags containing Ganja from the coach and detained them with the bags at Platform No.1. On completion of the necessary formalities, a total five packets of suspected Ganja weighing 38 kgs wrapped in black polythene were recovered from the two black-coloured bags alleged to be of Ashok Bhagat, one of the appellants herein. One ID card allegedly kept in one of the bags was also recovered. A total of 27 Kilograms of suspected Ganja, wrapped in three black polythene bags, was recovered from a red-coloured bag allegedly belonging to the second appellant and also recovered one ID card and two numbers of mobile handset. Accordingly, Guwahati GRPS Case No. 85/2018 was registered under s20(C) and 29 of the Act. On completion of the investigation, chargesheet came to be filed and charges under section 20(b)(ii)(C) and under s29 of the Act were framed against the appellants and the same were read over and explained to them. Vide the judgment and order dated 12.09.2019 passed by the Ld. Sessions Judge, Kamrup (M), in NDPS Case No. 58/2018, both the appellants were found guilty of committing offences under Sections 20(b)(ii)(c) and 29 of the Act and were sentenced to undergo RI for 14 years and also to pay fine of Rs 2,00,000/- each, in default to undergo rigorous imprisonment for another 6(six) months each. The matter was carried forward by way of appeal and the issue was as to whether the appellants were right in contending that there was no conscious possession and that no presumption could be raised under s35 and s54 of the Act on the basis of evidence available on record? The Hon'ble High Court while answering the question observed that before that presumption could be raised, prosecution is obliged to establish based on the principle of preponderance of probability, that the appellants were in exclusive and conscious possession of the contraband in order to sustain the conviction for illegal possession of the contraband. The Hon'ble High Court, after analysing the provisions of s35 and s54 of the Act and the Hon'ble SC judgment rendered in the case of Noor Aga vs. State of Punjab - (2008) 16 SCC 417, noted that from a close scrutiny of the materials available on record, the following conclusion can be drawn:

'A. The prosecution has failed to prove that the two accused persons were

³⁹ Biswanath Pratap Singh and Another vs. State of Assam - 2021 SCC OnLine Gau 2336

bedroll employees on duty in the Rajdhani Express train in coaches 4A & B3 and that they were having control over the two bedroll almirahs wherefrom, the bags containing the contraband were recovered.

B. No material has been brought on record to prove that the bags belonged to the accused appellants. The prosecution has therefore, failed to prove the conscious possession of contraband of the accused beyond reasonable doubt.

C. The PW1, PW2 and PW3, have deposed that recovery is from inside the train. The informant PW4, who had allegedly seized the contrabands, has deposed that the recovery was from the Bags found with the accused in the Railway Platform. An overall analysis of the evidence on record shows that there is a reasonable doubt as to the actual place and circumstance of recovery of the contraband.

D. Clear proof as regard the link between the accused persons and the seized bags was required to be brought to show the conscious possession of the contraband by the accused persons, more so, since the contraband was apparently seized from a public place viz. railway platform, which was accessible by a large number of passengers.

E. For the above reasons, we are of the view that the prosecution has not been able to prove the foundational facts of the offence based on preponderance of probability and therefore, the presumption under Section 35/ 54 of the Act cannot also be drawn against the accused persons in the case. Rather, the involvement of accused/appellant is doubtful and hence, they are entitled to the benefit of doubt.’’

In view of the above, the Hon’ble High Court held that the impugned judgment dated 18.09.2019 passed by the learned Sessions Judge, Kamrup (Metro) in the NDPS Case No.58/2018 of 2018 was unsustainable in law and hence was set aside.

The prosecution should bring in evidences which categorically prove that the persons accused of an offence under the Act were in conscious and exclusive possession and control, whether implicit (constructive possession) or explicit, over the offending contraband. This equally applies to the officers posted in the Railways or Public Transport Corporation or Private buses or in the employment of a company conducting holiday/vacation/entertainment using cruise ship.

Further, given the facts of the case and in the absence of solid evidences linking the persons to conspiracy, financing, external dealing, allowing the premises to be used, etc. cannot be

proceeded under the Act. The accused persons are bound to move bail applications and are likely to be enlarged on bail. The following Orders passed by the Hon'ble Special Judge for N.D.P.S. Cases at Greater Mumbai support the answer:

- (a) ⁴⁰Order dated 30.10.2021 in N.D.P.S. Bail Application No. 2626/2021.
- (b) ⁴¹Order dated 30.10.2021 in N.D.P.S. Bail Application No. 2627/2021.
- (c) ⁴²Order dated 30.10.2021 N.D.P.S. Bail Application No. 2628/2021.
- (d) ⁴³Order dated 30.10.2021 N.D.P.S. Bail Application No. 2629/2021.

(viii, x & xii) If the evidences are forthcoming to this effect, the said person can be proceeded against under the Act.

11. Be that as it may, there have been plenty of cases where entire gang consisting of 5 - 6 persons indulging in illicit trafficking has been caught. It is to be remembered that each person has to be served a Notice individually and proceeded individually. The Act does not contemplate issuance of a joint Notice. A duty has been cast on the empowered authorised officer to explain statutory rights vested in the person about to be searched and has to further ensure that each person who has been issued a Notice exercises the option himself. In short, a person, say X, cannot exercise option on behalf of another person, say Y. Since the Act does not contemplate such an action, the exercise of such option by on behalf Y, as in the example, by X is bound to be agitated before the Hon'ble Court⁴⁴. The Act also does not contemplate a joint consent i.e. the joint consent being recorded on the Notice issued to an individual but bearing the signatures of all the persons who are to be searched on a particular day under the provisions of the Act is also not in tune with the provisions of the Act. The Hon'ble Bombay High Court in *Yogendra R. Virkar vs. State of Maharashtra*⁴⁵ held that joint communication or consent of the accused would frustrate s50 of the Act.

⁴⁰ Order dated 30.10.2021 in N.D.P.S. Bail Applications No. 2626/2021 in NCB/MZU/CR-94/2021 decided on 30.10.2021 in the case of Gopalji Anand vs. The Union of India, (Through the Intelligence Officer, Narcotics Control Bureau, Mumbai Zonal Unit, Mumbai).

⁴¹ Order dated 30.10.2021 in N.D.P.S. Bail Applications No. 2627/2021 in NCB/MZU/CR-94/2021 decided on 30.10.2021 in the case of Bhaskar Arora vs. The Union of India, (Through the Intelligence Officer, Narcotics Control Bureau, Mumbai Zonal Unit, Mumbai).

⁴² Order dated 30.10.2021 N.D.P.S. Bail Applications No. 2628/2021 in NCB/MZU/CR-94/2021 decided on 30.10.2021 in the case of Manav Singhal vs. The Union of India (Through the Intelligence Officer, Narcotics Control Bureau, Mumbai Zonal Unit, Mumbai)

⁴³ Order dated 30.10.2021 N.D.P.S. Bail Applications No. 2629/2021 in NCB/MZU/CR-94/2021 decided on 30.10.2021 in the case of Samir Sehgal vs. The Union of India (Through the Intelligence Officer, Narcotics Control Bureau, Mumbai Zonal Unit, Mumbai).

⁴⁴ Criminal Appeal (SJ) Nos. 758, 888 and 993 of 2018 decided on 04.03.21 by the Hon'ble Patna High Court in the case of (i) Noor Alam @ Jhunna vs. State of Bihar, (ii) Afroz Alam vs. State of Bihar, (iii) Sabhapati Ram vs. State of Bihar.

⁴⁵ *Yogendra R. Virkar vs. State of Maharashtra*⁴² -2018 SCC OnLine Bom 17842

11.1 The empowered authorised officer should also be very careful in the documentation. The search of a person takes place under different places i.e., international airports, domestic airports, cruise, railway station, Interstate Bus Terminal (both private and public transport) hotels, clubs, etc. The documentation, in these places of search, should clearly bring out the identity of the person and that should be clearly brought out in the presence of independent witnesses having impeccable integrity as the persons sought to be prosecuted under the Act can take recourse to alibi during the trial proceedings. To illustrate, in respect of passengers arriving into India or exiting out of India, the names should be got matched with Passenger Manifest (which would have the details of the checked-in baggage tags with unique numbers, if any; PNR; whether traveling independently or in group) & boarding pass (having sequence number) and baggage tags affixed on the boarding pass and the identity established in the first instance and tallied with the passport details before proceeding further. Also, the concerned Airlines should be directed to submit all the documents, including the manner of booking and purchase of ticket (i.e., through website, travel agent, etc. and the manner of making payment) in their possession to prove the identity of the person. Similar exercise, except for the passport details, should be conducted for domestic passengers, In respect of passengers using the Indian Railways, the identity should be confirmed with the ticket and that of the documents shown to the Ticket Travelling Examiner at the initial time of checking. The Commercial Officer of the Zonal Railway should also be approached to get the certified copy of the passenger list (which is not kept for more than 30 days on conclusion of the journey and hence the urgency). The manner of booking and purchase of ticket (i.e., through website, travel agent, etc. and the manner of making payment) should be obtained and matched with the identity of the person accused of the offence. It must also be ensured that the identity of the person is established properly and there is no impersonation. In respect of passengers using the Interstate Bus Terminus, the empowered authorised officer in case of passengers arriving by State owned bus, the identity should be confirmed with the ticket and that of the documents shown to the conductor at the initial time of checking. The passenger list available, if any, should also be procured from the State Transport Authority. In case of private bus, the identity of the person should be confirmed with the ticket and the conductor, specifically, should be asked to certify that the person was on board during the journey and was duly intercepted by the officers of the empowered department. In respect of the persons staying in hotels, the reception or Front Desk Executive should be requested to submit all the documents, including the entries made in the register and the signature captured, the mode of payment, etc. submitted by the hotel guest and it should be carefully scrutinized. Should the occasion arise, the photograph available with the

empowered authorised officer should be got tallied with the images captured on the CCTV. In respect of hotel guests, since privacy of the person is involved, all actions as above, should be done prior to initiation of search of the person as well as the room of the person and there should be due compliance of the mandatory provisions of the Act.

12. *Ergo*, keeping in view the developments recorded herein, it is always safe and better for the empowered authorised officer to start the proceedings with the issuance of a Notice under s50 of the Act explaining him the statutory rights conferred upon him by the Act and upon exercise of option, which has been reduced into writing on the Notice itself, the compliance of the person being 'taken' to the nearest Gazetted Officer of any of the empowered departments or the nearest Magistrate for complying with the provisions of the Act and the judicial decisions. A proper compliance, irrespective of the fact whether there is recovery or not, would only add weight to the case of the prosecution.

13. In conclusion, the sum and substance of the analysis is that in respect of the cases booked under the Act, the quantum of seizure has no impact or role to play. It is the meticulous implementation and compliances of the mandatory provisions of the Act which are vital for successful trial of the case and hence form backbone of the case. If the mandatory compliances including under s50 of the Act are done, the chances of failure before the Hon'ble Courts would certainly diminish and that is the need of the hour.
