

Dadan Singh Vs. State of U.P.

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Court : Allahabad

Decided On : Feb-10-1993

Reported in : 1993CriLJ1785

Judge : I.S. Mathur, J.

Acts : Narcotric Drugs and Pshychotropic Substances Act, 1985 - Sections 8, 12, 15, 18, 20, 21, 22, 37, 41 and 42 to 60; [Constitution of India](#) - Articles 14 and 21; Code of Criminal Procedure (CrPC) - Sections 439

Appeal No. : Criminal Misc. Bail Application No. 14479 of 1992

Appellant : Dadan Singh

Respondent : State of U.P.

Advocate for Def. : G.A.

Advocate for Pet/Ap. : V.S. Singh, Adv.

Disposition : Application allowed

Judgement :

I.S. Mathur, J.

1. In these bail applications, similar questions of law have been raised and these are accordingly being disposed of by this common order.

2. The submission made on behalf of the learned counsel, for the applicants are that Sections 42 and 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as N.D.P.S. Act) are mandatory and their violation must lead to the presumption of prejudice to the accused. It is further submitted by the learned counsel that if these provisions are violated, the prosecution and trial will itself be vitiated, and, as such, the accused will be entitled to bail. As a corollary to this proposition, it is submitted that, in considering the grant of bail for violation of these provisions, the alleged fact that large quantity of the narcotic drugs or psychotropic substances was recovered, will be quite irrelevant consideration.

3. On the other hand, learned Additional Government Advocate submitted that these provisions may not be considered to be mandatory and if there is reason to believe that accused is prima facie guilty of the offence or he is unable to show prima facie that he is not guilty of the offence with which he has been charged, mere violation of these provisions could not entitle him to be released on bail.

4. Relevant portions of Sections 42 and 50 read as follows:

42.(1) Any such officer... if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed... may, between sunrise and sunset:

(a) enter into and search any such building conveyance or place;

(b)to(c)...

(d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

(2) Where an officer takes down any information in writing under Sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior:

50(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).

(2) 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 any one excepting a female.

5. The nature and scope of these provisions was considered by me in an earlier decision of *Sewa Ram v. State*, 1992 Cri LJ 2929. On an analysis of these two provisions, they were held to be mandatory. It may be worthwhile to reproduce the following observations made in that judgment (at page 2931):

These provisions cast a statutory duty upon the police officers or the other authorities to reduce the information in writing and also gave an option to the accused to be searched before a Gazetted Officer or a Magistrate. These provisions are mandatory and violation thereof must, *prima facie*, be held to cause prejudice to the accused.

There is another aspect of the matter. If these provisions are not held mandatory and their violation is overlooked or permitted that would be against the mandate contained in Article 21 of the Constitution. The word 'law' in the expression, 'procedure prescribed by law', in Article 21 has been interpreted in *Maneka Gandhi's case* AIR 1978 SC 597 to mean that the procedure must be right, just and fair and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 could not be satisfied. If it is arbitrary, it would be violative of Article 14 of the Constitution also (See *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675 : (1978 Cri LJ 1741)). The principle of

reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14 it must be right, just and fair and not arbitrary, fanciful or oppressive, (Smt. Maneka Gandhi v. Union of India, AIR 1978 SC 597)

The intention of the Legislature obviously is that, when such stringent punishments are provided under the Act, there should be sound safeguards to ensure that innocent persons are not harassed or unnecessarily detained by any arbitrary or whimsical actions of the police or the other authorities.

It may be that during the trial, the prosecution may be able to show that, notwithstanding the non-compliance of this provision, there was no prejudice caused to the accused, but it may also be that the prosecution may fail in this attempt. Until the prosecution is able to show that no prejudice has been caused the accused must be found entitled to take benefit of this failure to comply with this provision, and be held entitled to bail on that account.

The provisions of a statute have to be interpreted inter alia with reference to the intention of the Legislature. It may also be assumed that the Legislature would always intend to ensure just and fair action. Most of the population in India is not literate and, in any case, there are very few who understand their legal rights and duties or the provisions of law, much less the provision of such special law as N.D.P.S. Act. It would not be just and proper to hold that the accused in these cases must necessarily be deemed to know his rights given under Section 50 of the Act. In quite a number of cases the accused are rickshaw pullers and poor and illiterate section of the society. It is too much to expect that they will know their legal rights contained in Chapter IV of the Act. Justice demands that the authorities who have special knowledge of the Act must inform the accused of their right under Section 50 of the Act and their failure to do so much lead to the inference that the mandatory provision has not been complied with.

It may also be noted that the observations made in this order are not intended to foreclose the case of prosecution and they can still establish their case against the

accused. At the stage of bail, the material considerations are not necessarily the same as may be at the time of the trial. Different tests may have to be applied at the stage of bail for two important reasons; firstly at that stage, the accused has no opportunity to cross-examine the witnesses or to establish prejudice which he can hope to establish at the stage of trial, secondly the mandatory provisions would be attracted right from the inception of the investigation, subject, of course, to their detailed consideration at the stage of trial. As already noted, the prosecution may also be able to establish during the trial that, notwithstanding the non-compliance of the mandatory provisions, no prejudice has, in fact, been caused to the accused and that the evidence indicates that he is guilty of the offences.

It is true that the provisions of the N.D.P.S. Act are in the nature of social legislation and it is in the interest of the community that the real culprits must be apprehended and severely punished but at the same time care has to be taken that innocent persons are not unnecessarily harassed and for that purpose the mandatory safeguards are complied with. The social need lends special responsibility on the investigating and prosecuting authorities as also on the public prosecutors. The public prosecutor has a vital role to play in the whole process of reaching satisfaction by the Court in regard to the culpability of the accused.

6. It will appear from the decision in Sewa Ram's case that the following legal propositions were formulated or reiterated :

(i) The provisions of Sections 42 and 50 of N.D.P.S. Act are mandatory and violation of these provisions must be held to cause prejudice to the accused;

(ii) Unless the prosecution is able to show that, in fact, no prejudice has been caused, the accused must be held entitled to bail on account of the violation of these mandatory provisions.

(iii) So far as compliance of Section 50 of the Act is concerned, the Police Officer or the other authorities are bound to inform the accused of his right to have himself searched before a Magistrate or any other officer mentioned in the section.

(iv) The prosecution may show at the stage of the trial or even earlier that no prejudice has been caused to the accused or the recovery cannot be said to be doubtful.

7. The question as to whether the provisions of Sections 42 and 50 are mandatory, has been considered by this Court in a number of other decisions also and they have been held to be mandatory. In *Dashrath Lal v. State of U.P.* 1992 JIC 739, decided on 18-8-92, K. C. Bhargava, J. referred to the decision in *Sewa Ram's* case and other cases and has held :

In the case where mandatory provisions of law have not been followed, the person has a right to be bailed out. Where the mandatory provisions are complied with then only the provisions of Section 37 of the Act will come into play. Therefore bail can be allowed in such cases where there is violation of the mandatory provisions of the Act.

8. The learned Judge has also held that it is for the police officer to inform the accused of his right of being searched before a Magistrate or a Gazetted Officer and it cannot be a defence that the accused did not ask for it. The learned Judge referred to the decisions in *Suraj Mal Kanhaiya Mal Soni v. State of Gujarat* (Guj. High Court) 1991 (1) EFR 58, *Rekha Parmeshwari v. Assistant Collector Customs*, 1992 Cri LJ 901 (Mad. High Court) and *Wilfred Joseph Dawood Lema v. State of Maharashtra*, 1992 (2) EFR 547 (Bom), wherein it has been laid down that the police officer was not bound to inform the accused about his right of being searched in the presence of the designated gazetted officer or a Magistrate, but, disagreed with the proposition of law laid down therein.

9. In *Bhanu Pratap v. State of U.P.* 1992 LLJ 244, *Smt. Babi v. State of U.P.* 1992 UP Cri. Rulings 108, *Anand Goswamy v. State of U.P.* 1992 (2) EFR 486, this Court has held that the accused will be entitled to bail where there is a violation of Section 50 of the Act.

10. The same proposition of law has been laid down in a large number of decisions, referred to by the learned counsel for the accused, by the Andhra Pradesh, Himachal Pradesh, Guwahati, Delhi, Madhya Pradesh, Madras,

Rajasthan and Punjab High Courts. It is unnecessary to refer to all such decisions. Some such decisions only may be noted. In *Ahmad Nasir v. State of Andhra Pradesh* 1991 (1) EFR 475, the Andhra Pradesh High Court has set aside the conviction of the appellant under Section 22 of the N.D.P.S. Act for selling brown sugar on the ground that provisions contained in Section 50 of the Act were not complied with and the accused was not informed of his right of being searched in the presence of a Magistrate or a designated gazetted officer.

11. In *Jayapalan v. State* 1991 (1) EFR 467, the Delhi High Court allowed the appeal against the conviction of the appellant under Section 22 of the N.D.P.S. Act for being in possession of 900 gms of Charas on the ground of violation of the provisions contained in Sections 42 and 50 of the N.D.P.S. Act. The Delhi High Court has held that these provisions are mandatory and that the violation thereof will be a vital discrepancy which will vitiate the conviction.

12. In *Zainul Abidin alias Mahamcha v. State of Manipur*, 1991 (2) EFR 464 decided by a Division Bench of the Guahati High Court, the appellants were convicted for being in possession of various quantities of heroin. They were convicted by the trial court. However, the High Court set aside the conviction inter alia, on the ground that the provisions of Sections 42 and 50 of the N.D.P.S. Act have been violated. The Court held that these provisions are mandatory and the accused will get benefit, if there is a violation to comply with these provisions. In regard to Section 50 of the Act, the Court held that it is incumbent for the police officer to inform the accused of his right of being searched before a Magistrate or a Gazetted Officer.

13. In *Bedil v. State of Madhya Pradesh* 1991 (2) EFR 461, the Madhya Pradesh High Court allowed the appeal and set aside the conviction of the appellant on the ground of violation of the provisions contained in Sections 42, 50 and 57 of the Act, with the observation that there is no evidence on that point and no explanation for their non-observance. In *Mohd. Nabi v. State of U.P.* 1991 (1) EFR 211, *Mohan Lal v. State of Madhya Pradesh* 1991 (1) EFR 524 and *Onkar v. State of Madhya Pradesh* 1991 (1) EFR 535, also the same view has been taken by the Madhya Pradesh High Court and it has been held that violation of the provisions of Section

50 of the Act vitiates the trial.

14. In Shiv Kumar alias Kumar alias Sugnu v. State 1990 (2) EFR 646, Madras High Court allowed the appeal and set aside the conviction of the appellant for being in possession of 40 grams of heroin inter alia, for the violation of the provisions contained in Section 50 of the Act. The Court has held that it is the mandatory duty of the police officer to inform the accused that he has a right to be taken before the nearest gazetted officer for being searched. The Court observed that these sections referred to the right of a person about to be searched in law, there is an inbuilt duty on the concerned officer to inform to such a person of his right to be taken to the nearest gazetted officer. The Court observed as follows:

Therefore, in view of the mandatory provisions having been ignored altogether, though the investigating agency was aware of the agency dealing with the offence under this Act it has resulted in material prejudice of the appellant and grave miscarriage of justice is the consequence.

15. The learned A.G.A. has, however, relied upon two decisions of this Court in Yogeshwar Kumar alias Tillu v. State of U.P. Civil Misc. Writ Petition No. 36265 of 1992 decided on 17-11-1992 and Raj Bahadur v. State of U.P. 1991 (1) EFR 253 and some decisions of Gujarat and Bombay High Courts in support of his submission that the provisions of Sections 42 and 50 of the Act are not mandatory. I have carefully gone through these decisions but I find it difficult to accept the submission of the learned A.G.A.

16. So far as the Division Bench decision of this Court in the case of Yogeshwar Kumar is concerned, the question involved in that case was not the one which is being considered in the present case. The Division Bench itself formulated the question involved in the following terms:--

The important question involved in the present writ petition is as to whether for the alleged breach of Sections 42 and 50 of the Act, which fall under Chapter V dealing with the procedure regarding entry, search, seizure and arrest by various authorities of the suspected offenders will render search and recovery of the contraband goods illegal and investigation consequent thereof and follow up

actions should be quashed at this stage.

17. It is obvious that the question as to whether the provisions of Sections 42 and 50 of the Act are mandatory, and violation thereof well raise presumption of prejudice to the accused, was not directly involved in nor decided by the Division Bench. The Division Bench, in fact, noted the decision of this Court in Sewa Ram's case 1992 (2) EFR 39 but did not| overrule that decision. The Division Bench referred to the decisions of the Supreme Court in Pooran Mal v. Director of Inspection (Investigation) of Income Tax, AIR 1974 SC 348 : (1974 Tax LR 340) State of Maharashtra v. Natwarlal Damodardas Soni, AIR 1980 SC 593 : (1980 Cri LJ 429), Dr. Pratap Singh v. Director of Enforcement Foreign Exchange Regulations Act, AIR 1985 SC 989 : (1986 Cri LJ 824) and held that:

It cannot be accepted that as the search was illegal and in contravention of the provisions of Sections 42 and 50 of the Act, the first information report and the investigation in consequence thereof and the trial of the petitioner should be quashed.

18. In Rai Bahadur's case 1991 (1) EFR 253, no doubt, a single learned Judge of this Court has expressed the view that 'the alleged lapse in compliance of Section 50 of the Act cannot be a sufficient ground for enlarging the applicant on bail.' This decision was not brought to the notice at the time of hearing in Sewa Ram's case 1992 Cri LJ 2929 and Dashrath Lal's case 1992 JIC 739. Moreover, in the decision no reasons have been given for the view taken, and, at best, it only may be interpreted to mean that the violation of Section 50 will not entitle one to bail. In any case, Sewa Ram's case and Dashrath Lal's case are later decisions and, with great respect, I am unable to subscribe to the view taken in Raj Bahadur's case, if it was intended to lay down that violation of Section 50 N.D.P.S. Act could not be a valid consideration for granting bail.

19. The other decisions relied upon by the learned A.G.A. are --

(i) State of Gujarat v. Abdul Rashid Ibrahim Mansuri, 1991 (1) EFR 21 (Gujarat).

(ii) Suraj Mal Kanahiya Lal Soni v. State of Gujarat, 1991 (1) EFR 58 (DB).

- (iii) Abdul Hamid Khan Pathan v. State of Gujarat, 1987 EFR 709
- (iv) Abdul Sattar v. State, 1989 EFR 283
- (v) Fauji Ram v. State of Haryana 1986 EFR 597 : 1988 Cri LJ 297.
- (vi) Sham Ram Chandran Sonawane v. State of Maharashtra, 1991 (3) Crimes 775.
- (vii) Satish Kumar v. State, 1989 (2) Crimes 109 : 1989 Cri LJ 1559.
- (viii) Pooran Mal v. Director of Inspections, AIR 1974 SC 348.
- (ix) State of Maharashtra v. Nehru Lal Damodar Das.
- (x) Dr. Pratap Singh v. Director of Enforcement, AIR 1985 SC 939.

20. In the cases of Abdul Rashid Ibrahim Mansuri 1991 (1) EFR 21 and Suraj Mal Kanahiya Lal Soni 1991 (1) EFR 58 (DB) the Gujarat High Court has taken the view that Section 50 does not make it mandatory for the police officer to inform the accused that he could have his search made before the Magistrate or Police Officer and he will be bound to take him to the Magistrate or gazetted officer only if he asks for it and further that Section 42 of the Act also is not mandatory. It has also been laid down in these cases that unless prejudice is shown to have been caused, mere violation of these provisions will not vitiate the trial. The same view has been taken by the Bombay High Court in the cases of Abdul Sattar 1989 EFR 283, Sham Ram Chandran Sonawane 1991 (3) Crimes 775. With respects and for the reasons already stated, it is not possible to subscribe to the view that provisions contained in Sections 42 and 50 of the N.D.P.S. Act are not mandatory or that the Police Officer is not bound to inform the accused of his right to be searched before a Magistrate or a gazetted officer or that violation of these provisions will not raise a presumption of prejudice. However, the view taken in these cases that mere violation of the provisions contained in Sections 42 and 50 of the N.D.P.S. Act will not vitiate the trial in substantially the same as has been taken by me in Sewa Ram's case and endorse and reiterate that view.

21. Indeed, it is difficult to accept the sweeping submission made by the learned counsel for the accused that mere violation of Sections 42 and 50 of the Act would be fatal to the trial and the accused will be entitled to acquittal or to bail if the submission means that the prosecution could not show during the trial or at the stage of bail that, irrespective of the failure to comply with these provisions, no prejudice has, in fact, been caused. In this regard, it may be useful to refer to the decisions of the Hon'ble Supreme Court, referred to by learned State counsel. In *Pooran Lal v. Director of Inspection*, AIR 1974 SC 348 : (1974 Tax LR 340), the Supreme Court considered the question as to whether the evidence obtained as a result of illegal search could be a valid evidence and observed as follows:

It would be seen that in India, as in England where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure is not liable to be shut out.

22. The same view has been taken by the Supreme Court in *Pratap Singh v. Director of Enforcement*, AIR 1985 SC 989 : (1986 Cri LJ 824). The Supreme Court in this case relied upon its earlier decision given in *Pooranmal's case* and observed as follows (at page 829; of Cri LJ):

Illegality of the search does not vitiate the evidence collected during such illegal search. The only requirement is that the Court or the authority before which such material or evidence seized during the search, shown to be illegal is placed, has to be cautious and circumspect in dealing with such material. This is too well established to necessitate its substantiation by a precedent. However, one can profitably refer to *Radhakrishnan v. State of U.P.* (1963) Supp 1 SCR 408 at p. 411 : (AIR 1963 SC 822 at p. 824), wherein the Court held that assuming that the search was illegal the seizure of the articles is not vitiated. It may be that because of the illegality of the search, the Court may be inclined to examine carefully the evidence regarding seizure but no other consequence ensues.

23. If, as has been laid down by the Hon'ble Supreme Court, the evidence collected during illegal search, seizure of the articles is not vitiated and that is a valid and admissible evidence, there could be no question of trial itself being

vitiated merely on the ground of violations of Sections 42 and 50 of the N.D.P.S. Act. The only effect of non-compliance of these provisions for the purpose of the trial would be that the Court will be inclined to examine the evidence regarding seizure more carefully. This, in fact, supports the view expressed in Sewa Ram's case that the prosecution may show during the trial or even at the stage of bail that irrespective of violations of the mandatory provisions contained in Sections 42 to 60 of the N.D.P.S. Act, no prejudice was, in fact, caused. Accordingly, the submission of the learned counsel for the applicants that mere violation of Sections 42 and 50 of the N.D.P.S. Act will vitiate the trial must be rejected.

24. Before proceeding further, the other decisions, referred to by the learned State counsel may also be noticed. In Abdul Hamid Khan Pathan's case 1987 EFR 709 : (1989 Cri LJ 468 a Division Bench of the Gujarat High Court has observed that in offences under N.D.P.S. Act bail should not normally be granted. The Division Bench has observed as follows at page 719 of the report (at page 476; of Cri LJ) :--

Taking into consideration the seriousness of the offence, the punishment provided under the Act and starting of rampant use of the charas, ganja or such other drugs by the young, we consider that, in these types of cases normally accused should not be released on bail. It should not be forgotten that in murder cases the accused commits the murder of one or two persons while those persons who are dealing in charas or ganja or intoxicant drugs are causing the death of number of persons in the societies and/or ruining their lives. The law should not be made so much impotent that it does not serve the society and the anti-social elements should not be given licence to create havoc in society.

25. The anguish and concern shown in these observations has to be and is, indeed, fully appreciated and shared. There could hardly be two opinions in regard to the observation that those who deal in drugs commit graver offence than the offence of murder. These observations, indeed, echo the views expressed by the Supreme Court in respect of the economic offences generally in State of Gujarat v. Mohan Lal Jetamalji Perwal, 1987 Cr LJ 1061. The apex Court has observed:--

Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through State and the Public Prosecutor is entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions. The community or the State is not a person a nongrata whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed at the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community.

26. The views expressed by the Supreme Court and the Division Bench of the Gujarat High Court must, indeed, be kept in mind while considering the prayer for grant of bail. However, these observations cannot be interpreted to mean that merely because the accused has been charged for offence under the N.D.P.S. Act, he must be found guilty on his prayer for bail must be refused even if the mandatory provisions of the Act have been violated and the evidence or facts show that prejudice has been caused to the accused or evidence of recovery is found to be unreliable. While having concern for the society, the liberty of individual can not also be allowed to be lightly compromised, and, for this purpose, the intention of legislature must always be kept in mind, A perusal of the provisions of the N.D.P.S. Act will leave no doubt that, while the legislature wanted to curb the menace of drug addiction with a heavy hand by providing stringent punishments, it was nevertheless conscious of the constitutional requirement that liberty of individual must not be lightly curtailed and, in order to avoid or lessen the possibility of false implication, it provided sound procedural safeguards.

27. The learned AGA vehemently contended that, in view of Section 37 of the N.D.P.S. Act, provisions contained in Section 439, Cr. P.C. will not apply and the accused will not be entitled to bail unless the Court finds reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. Learned A.G.A. has also referred to Section 54 of the Act in support of his submission that there will be presumption that the accused is guilty of offence if he fails to give satisfactory explanation of his possession. The

propositions of law envisaged by the learned A.G.A. are quite correct but not so the inference that these considerations will arise even if the prosecution has violated the mandatory provision of the Act and has failed to show that, irrespective of such violation, no prejudice has been caused. As has been noted by this Court in the case of Dashrath Lal, 1992 (2) EFR 486, where the mandatory provisions are complied with, then only the provisions of Section 37 of the Act will come into play.' Likewise the presumption under Section 54 of the Act will arise only if 'possession' of the accused has been satisfactorily established.

28. The learned State counsel also referred to Fauji Ram v. The State of Haryana 1986 EFR 597 in support of his submission that, in the cases under N.D.P.S. Act, bail should not normally be granted. In this case the Punjab High Court has observed that in the cases under N.D.P.S. Act, the matter of bail cannot be treated casually and the offenders cannot be released on bail on small amount of bonds, Considering the nature of offences and the provisions of the N.D.P.S. Act, there could be no question of disagreement with this view and, subject to the observations made above, I respectfully agree with these observations.

29. In view of the facts and legal position noted above, I see no reason for taking any view contrary to the view taken by this Court in the cases of Sewa Ram 1992 (2) EFR 39 (1992 Cri LJ 2929) or Dashrath Lal 1992 (2) EFR 486 that provisions of Section 42 and 50 of the N.D. P.S. Act are mandatory and violation of these provisions will prima facie be deemed to have caused prejudice. The view taken by this Court in Sewa Ram's case that the prosecution may, however, show that, irrespective of such violation, no prejudice has, in fact, resulted, must also be reiterated.

30. The learned A.G.A., and learned counsels for the accused hazarded many a guess and ventured varied suggestion in regard to the question as to what facts or evidence could or could not show that the recovery was genuine and no prejudice has, in fact, resulted. Learned A.G. A. submitted that if the recovery is of large quantity, or there are reliable witnesses of recovery or these is a statement by the police to the effect that provisions have been complied with, it may be presumed that recovery is genuine, On the other hand, learned counsel for the accused

contended that the mere fact that large quantity was recovered is not sufficient to displace the presumption of prejudice and further that police makes false statements in the records retarding compliance of mandatory provisions and such statements must not be believed.

31. It is difficult to lay down precisely as to what facts or circumstances will be sufficient for holding the recovery to be genuine or displacing the prima facie presumption of prejudice. That will depend on the facts of each case. Neither the mere fact that alleged recovery is of large quantity may, in a given case, be sufficient to hold the recovery to be genuine nor this factor may be completely ignored. That may be one of the factors to be considered along with others in excluding the (possibility of false implantation).

32. It may, however, be observed in this connection that, if the police officer has noted facts in the recovery memo or other relevant police papers which may indicate that compliance of the provisions has been made, contrary inference may not be readily drawn merely on the basis of possibilities or probabilities, as suggested by the learned counsel for the accused. There cannot be a presumption that, if police officer has an opportunity, he will make false or fabricated report (Sunder v. State 1957 Cr. LJ 1378, Pattipati Venkatiah v. State of A.P. 1985 SCC (Cri) 464. Nor there is any law that testimony of police witness must necessarily be rejected merely because he is a police witness (Lallan v. State of U.P. 1988 Lucknow Criminal Reports 244). Having regard to the provisions of Section 37 of the N.D.P.S. Act and the legal position noted above, if a statement is made in the recovery memo regarding compliance of any provision or provisions of the N.D.P.S. Act or by way of explanation for non-compliance, that statement or explanation may have to be prima facie taken into consideration at the stage of bail and accepted unless the accused is able to show that the statement contained in recovery memo or any other police paper is incorrect.

33. To sum up, therefore, the legal position may be stated and reiterated thus --

(a) The provisions of Section 42 and 50 of the N.D.P.S. Act are mandatory and violation of any of these provisions will raise a presumption of prejudice;

(b) The prosecution may show with reference to the appropriate evidence at the stage of bail and in the trial that compliance of these provisions was, in fact, made.

(c) The prosecution could also place before the Court reliable evidence to show that irrespective of the violation of these provisions, recovery was made from the accused and no prejudice has, in fact, been caused.

(d) In regard to Section 50 of the N.D.P.S. Act, the police officer is bound to inform the accused that he could have his search made before a Magistrate or any other gazetted officer, referred to in the Section .

(e) Where provisions of Section 42 or 50 of the N.D.P.S. Act have been violated and it is not shown that no prejudice was, in fact, caused, mere alleged recovery of large quantity may not be considered to be sufficient to deny bail.

For reasons stated above, all the criminal miscellaneous bail applications must be allowed without prejudice to the right of the prosecution to prove the relevant facts and circumstances at the time of the trial.

In the case of Dadan Singh Crime No. 122 of 1992 Under Section 8/20 N.D.P.S. Act, P. S. Holagarh, Distt. Allahabad, three kilogram Ganja is alleged to have been recovered. It is alleged in the affidavit that the applicant was arrested from his house and not from the place alleged by the prosecution on 27-8-1992. According to the averments made in para 3 of the affidavit, the deponent is alleged to be eye witness of this arrest. It is also stated that provisions of Section 50 of the N.D.P.S. Act have not been complied with. No material has been placed by the prosecution to controvert these facts.

In Shyam Behari's case (Crime No. 52 of 1992, under Section 8/21 N.D.P.S. Act, P. S. Bhamaura, Distt. Bareilly). 10 grams smack is alleged to have been recovered. It is stated in the affidavit that the applicant was arrested in connection with a dacoity case and has been falsely implicated for being in possession of smack. It is stated that provisions of Section 50 have not been complied with. According to the averments made in para 4 of the affidavit, the applicant had himself informed the deponent that no offer as is required under Section 50 of

N.D.P.S. Act was made to him. No counter affidavit of the arresting officer has been filed and there is no other material at present on record to prima facie controvert the averments made in the application.

In the case of Mohan (Crime No. 56/92, Under Section 8/20 N.D.P.S. Act, P. S. Senwahi, Distt. Deoria) 4 Kgs ganja is alleged to have been recovered by the Inspector of Police, while on patrol duty. The applicant was apprehended with Ganja. It is stated in the affidavit filed with the application that provisions of Section 50 of N.D.P.S. Act have not been complied with. It is further alleged that the General Diary does not disclose any departure of the concerned police officer from police station or his return. It is also stated in para 6 of the affidavit that the applicant was arrested on 10-3-92, in mid day from Anand Chitra Mandir of Sewrahi and a marpit had taken place due to some confusion in connection with a lady while according to the recovery memo, this recovery and arrest has been made on 11-3-1992. No material has been placed to controvert these allegations.

In Mukhlal's case (Crime No. 141/92, Under Section 8/12 N.D.P.S. Act, P. S. Kaptanganj, Distt. Deoria), 2 kg ganja is alleged to have been recovered. It is stated in the accompanying affidavit that the provision of the N.D.P.S. Act, including Sections 42 to 54 have not been complied with. According to the recovery memo, the applicant was arrested and recovery was made on 3-6-92, but, it is stated in para 7 of the affidavit that the applicant was, in fact, arrested from Railway station Kaptanganj on 30-5-1992 and was kept in police station for three days. Further, the recovery memo states that copy of the recovery memo was given to the accused but he tore it off. It is not understandable as to how this averments could have been made in the body of the recovery memo. The copy of the recovery memo could have been given to the accused only after it was signed whereafter only the applicant could have torn and, as such, there could be no question of this averment finding place in the body of the recovery memo. This averment also makes the recovery prima facie doubtful.

In the case of Shabbir (Crime No. 186 of 1992, Under Section 8/20, N.D.P.S. Act, P. S. Pachauna, Distt. Deoria) 5 kg. ganja is alleged to have been recovered. It is stated in the affidavit that the provisions of Section 50 have not been complied

with. There is neither any averment to the contrary in the recovery memo nor this fact has been denied by any counter affidavit. Further it is mentioned in the body of the order that the applicant was given copy of the recovery memo but he tore it off. As observed above, this averment could not have been validly made in the recovery memo.

In the case of Adesh (Crime No. 421 of 1992 Under Section 15/18, N.D.P.S. Act, P.S. Chandpur, Distt. Bijnor) 4 kg. paupyrastrow is alleged to have been recovered from the bags lying on the chabutara and the applicant is alleged to have been in possession of these bags. It is stated that provisions of Sections 42 and 50 have not been complied with. It is also stated in the affidavit that the alleged recovery has been made from an open space and the applicant is not the owner of this chabutara nor these bags were in his possession. No material has been placed by the prosecution to controvert these averments.

In the case of Ram Kumar, alias Ramu (Crime No. 99/92, Under Section 8/22 N.D.P.S. Act, P. S. Holagarh, Distt. Allahabad) 1.750 kg. ganja is alleged to have been recovered. It is stated that provisions of Sections 42 and 50 N.D.P.S. Act have not been complied with. So far as Section 42 is concerned that provision may not be applicable in this case but there is no counter affidavit to deny the averments that provisions of Section 50 have not been complied with.

In the Prabhu Dayal's case (Crime No. 84/ 92, Under Section 20/22 N.D.P.S. Act, P. S. Dheharuma, Distt. Sidharthnagar) 1300 grams charas is alleged to have been recovered. It is stated in the affidavit that provisions of Section 50 have not been complied with. It is also stated that the applicant was arrested two days earlier from his house and further that there is no public witness. No counter affidavit has been filed and no other material has been placed before the court to controvert these averments at this stage.

In view of the above, all these bail applications are allowed and it is directed that the applicants shall be released on bail on their furnishing a personal bond in the sum of Rs. 20,000/- and two sureties each in the like amount to the satisfaction of Chief Judicial Magistrate concerned and subject to the further condition that the applicant shall not leave the jurisdiction of the court without prior permission and

on leaving the jurisdiction, they will keep the police station and the court concerned informed about their whereabouts.

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