

(1996) 07 CAL CK 0040**Calcutta High Court****Case No:** None

In Re: Dipak Jain

APPELLANT

Vs

RESPONDENT

Date of Decision: July 25, 1996**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 439
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 21, 37, 41, 41(2)

Citation: (1998) 1 ILR (Cal) 427**Hon'ble Judges:** Nure Alam Chowdhury, J; D.P. Sircar-I, J**Bench:** Division Bench**Advocate:** Soumen Ghosh and Shyam Sundar Manna, for the Appellant; A.R. Saha, for the Respondent**Judgement**

1. The Petitioner Dipak Jain has filed this-petition u/s 439 Code of Criminal Procedure, 1973 praying for bail. The matter has already been heard on July 26, 1996.
2. The Petitioner's case is that he has been taken to custody in connection with Chanchal P.S. Case No. 46 of 1996 dated June 26, 1996 u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as N.D.P.S. Act, along with five others, on the allegation that on June 26, 1996 the Petitioner was caught red handed while he was taking delivery of brown sugar from the other two persons taken to custody in connection with that case, and that, two packets of brown sugar each weighing 500 gms. were recovered from them at that time. It has been alleged in the First Information Report of Chanchal P.S. Case No. 46 of 1996 dated June 26, 1996 that O.C., Chanchal P.S. got an information on that date at about 12.05 hour in the term that Swapan Mondal and Akhtar Sk., two smugglers dealing in brown sugar were arriving at Chanchal bus stand by private car No. W.N.L. 3359 and that they

would give delivery of huge quantity of brown sugar to Abdus Samad and the Petitioner, Dipak Jain. The information was recorded in the G.D. of P.S. under G.D. Entry No. 1203 dated June 26, 1996 and some S.I. of Police accompanied the O.C. (Anil Kumar Roy) de facto complainant, and went to Chanchal bus stand under supervision of Circle Inspector Sri P.C. Das. They took with them two private persons to bear witness of expected recovery of brown sugar from the persons named by the source of information. At about 15.10 hour they saw the private Car No. W.N.L. 3359 coming to Chanchal bus stand from Malda side. No sooner had that private Car stopped at Chanchal bus stand, two persons hurriedly entered into the private car and the Petitioner was one of those latter two persons. The police party under the direct supervision of circle Inspector, Chanchal, Sri P.C. Das, intercepted the private car and found that Swapan Mondal and Akhtar SK. were giving delivery of two polythene packets containing brown sugar to Abdus Samad and the Petitioner, Dipak Jain. On seeing police, the accused, Swapan Mondal and Abdus Samad tried to conceal those packets under their garments, but on challenge by police they produced those two packets to the de facto complainant in presence of other members of police party and the private persons who accompanied the police party to bear witness. Those persons could not produce any valid paper or cash memo for possessing or carrying brown sugar. The de facto complainant got weighed the brown sugar recovered from the possession of Swapan and Akhtar, seized the same maintaining required formalities in that respect and also arrested the persons from whom the packets were recovered as well as the persons to whom they were about to deliver the contraband and started this case against all those persons including the Petitioner.

3. The learned advocate for the Petitioner submits that the contraband was recovered, not from possession of the Petitioner but from possession of other persons, that is those who came by the car and as such the Petitioner is being prosecuted illegally. The main spearhead of his argument is that the search and seizure was done in desperate violation of Section 50 of the N.D.P.S. Act and as such the Petitioner is entitled to be discharged. In support of his contention as above the learned advocate relied on the rulings [K.L. Subbayya Vs. State of Karnataka](#), and [Mohinder Kumar Vs. The State, Panaji, Goa](#). He submits that in all those rulings, the Hon'ble Supreme Court has been pleased to hold in exclusive terms that search and seizure in violation of Section 50 of the Act is unlawful and that the person accused of possession of the contraband is entitled to be discharged or acquitted as the case may be. The learned advocate, Mr. Saha, for the State cites and relies on the ruling [State of Himachal Pradesh Vs. Shri Pirthi Chand and another](#),

4. We have considered the arguments of the learned advocate of both the parties carefully. In Section 50 of the Act it has been provided that:

Section 50. Conditions under which search of person shall be conducted - (1) When any Officer duly authorised u/s 42 is about to search any person under the

provisions of Section 41, Section 42 or 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any department mentioned in Section 42 or to the nearest Magistrate.

5. In the ruling relied upon by the learned Advocate for the Petitioner the question of search as provided u/s 50 of the Act as quoted above was considered and that ruling has been followed in the ruling reported in *Mahindra Khamka v. State of Punjab Supra*. In the said ruling the Hon"ble Supreme Court has held that the provision of Section 50 is mandatory and that the Officer acting u/s 41(2) or 42 should comply with the provision of Section 50 before any search of the person is made and such person should be informed that if he so requires he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. This ruling was followed in the ruling reported in *Mahindra Khamka v. State of Punjab Supra*. The learned Advocate for the State argues that in the Section 50 it has been provided that the accused person should be taken to the Gazetted Officer or Magistrate only if such person so requires. He argues that in this case the accused person did not ask for such benefit and as such there was no necessity for producing him before the Gazetted Officer or a Magistrate in compliance with the provision of Section 50. He argues for that C.I., present at the time of search was himself a Gazetted Officer and as such there was no requirement of bringing any other Gazetted Officer at the time of search and seizure. This point has been dealt with clearly in the said rulings of the Hon"ble Supreme Court. It has been held that it is obligatory on the part of the authorised officer to inform the person to be searched that he is entitled to be searched in presence of a Gazetted Officer or a Magistrate and failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate would amount to noncompliance of Section 50 which was mandatory and thus would affect the prosecution case and vitiate the trial. In the ruling reported in the Hon"ble Supreme Court held that "the words if the person to be searched so desires are important". One of the submissions before the Hon"ble Supreme Court was that whether the person who was about to be searched should by himself make a request or whether it was obligatory on the part of the empowered Officer to inform the person that if he so required he could be produced before a Gazetted Officer or a Magistrate and thereafter the search should be conducted. The Hon"ble Supreme Court has held that in the context in which this right had been conferred, it must naturally be presumed that it was imperative on the part of the Officer to inform the person to be searched of his right. The Hon"ble Supreme Court held that it was a valuable right given to the person to be searched in presence of the Gazetted Officer if he so required, and to afford such opportunity to the person to be searched he must be made aware of his right that search could be done only in presence of a Gazetted Officer or a Magistrate. The Hon"ble Supreme Court further held that the language was clear and the provision implicitly made it obligatory on the authorised Officer to inform the person to be searched of his right. In this circumstances, there is no

longer any dispute that if the officer concerned failed to inform the person searched of the right to be searched in presence of the Gazetted Officer or a Magistrate, and also fails to take him to the Gazetted Officer or the Magistrate that would amount to non-compliance of Section 50 which is mandatory and would affect the prosecution case and vitiate the trial.

6. The learned Advocate for the State relies on the ruling State of Himachal Pradesh v. Sri Priths Chand Supra. In that ruling the Hon"ble Supreme Court took into consideration all the rulings cited above as relied upon by the learned Advocate for the Petitioner, including the ruling reported in. In that case under consideration as State of Himachal Pradesh v. Sri Priths Chand Supra the Hon"ble Supreme Court held that discharge of the accused by Magistrate or Sessions Judge on the ground of non-compliance of Section 50 or other provision was not proper. In the case considered under that ruling the learned Sessions Judge before whom the case was under trial by his order dated July 6, 1987 discharged the Respondent from the offence u/s 20 and the High Court confirmed that order. The circumstance in that ruling is more akin to the case pending before us, as the present one is at the stage even before submission of the charge-sheet while the cases relied upon by the learned Advocate for the Petitioner as cited above were after the completion of the trial. In this ruling State of Himachal Pradesh v. Sri Priths Chand Supra as relied upon by the learned Advocate for the State the Hon"ble Supreme Court unequivocally held that "Though the search may be illegal but the evidence collected, that is Panchnama etc., nonetheless would be admissible at the trial. At the stage of filing charge-sheet it cannot be said that there is no evidence and the Magistrate or the Sessions Judge would be committing illegality to discharge the accused on the ground that Section 50 or other provisions have not been complied with. At the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law. Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into. Under these circumstances, the learned Sessions Judge was not justified in discharging the accused, after filing of the charge-sheet holding that mandatory requirements of Section 50 had not been complied with."

7. We have stated above that the stage at which the case under consideration before this Court lies, is more akin to the case over which the ruling State of Himachal Pradesh v. Sri Priths Chand Supra was passed, than the rulings relied upon by the learned Advocate for the Petitioner. Further this ruling appears to us to be the latest interpretation of law in this respect by the Hon"ble Supreme Court. In that ruling cited by the State it is clear that the Hon"ble Supreme Court took into consideration the rulings relied upon by the Petitioner, in the most of which the ruling as reported in A.I.R.1994 S.C.W. 1802 was followed. There it has been held that despite the interpretation of law as in A.I.R.1994 S.C.W. 1802 and in all other rulings relying thereon the accused cannot be discharged or acquitted at any stage before trial for non-compliance of Section 50 of N.D.P.S. Act and that despite such

failure the prosecution must be given chance to adduce evidence, which has the implication that before trial the accused cannot be discharged. After considering all those cases, the Hon'ble Supreme Court came to the finding that it would be an illegality on the part of the Trial Judge to discharge the accused person for non-compliance of Section 50 of the Act before the full-scale trial of the case. It will be, therefore, an illegality for this Court as well to allow the benefit of discharge or anything entailing on failure to comply Section 50 at this stage.

8. Under these circumstances, we cannot but follow the ruling State of Himachal Pradesh v. Sri Priths Chand Supra and hold that even if Section 50 of N.D.P.S. Act was not complied with it would be an illegality to discharge the accused Petitioner on that ground, and, that the trial must take a normal course and the accused person must face trial. Accordingly, we hold that the accused person cannot be discharged ipso facto at this stage as argued by the learned Advocate for the Petitioner, or that he is automatically entitled to bail. The case as we stated above, must take a normal course till the end of trial.

9. As this is a case under N.D.P.S. Act which involves the accused Petitioner of a serious offence, his case cannot be considered lightly. We must take into consideration the entire volume of facts and circumstances, as in other cases, on the question of bail prayer of the accused Petitioner. The case was registered not even a month ago. It is at an incipient stage. The allegation is grave. The accused, as per prosecutions definite case and materials on record, was caught red handed while he rushed eagerly into the car and was about to take delivery of the packets which according to State case contains brown sugar. The accused Petitioner cannot be entitled to bail at this stage on the face of strong opposition by the learned Public Prosecutor, and, in compliance of Section 37(b)(ii) of the N.D.P.S. Act.

10. In the ruling relied upon by the State it has been held that "It would be seen that the organised traffic in contraband generates deleterious effect on the national economy affecting the vitals of the economic life of the community. It is settled law that illegality committed in investigation does not render the evidence obtained during that investigation inadmissible. In spite of illegal search, property seized on the basis of said search, still would form basis for further investigation and prosecution against the accused. The manner in which the contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial."

11. Section 37(i)(b)(ii) of N.D.P.S. Act is an insurmountable block against bail in this case.

12. Accordingly, the prayer for bail cannot but be and is rejected. The question whether the presence of Clause had the connotation of compliance of Section 50 of N.D.P.S. Act in this case, is quite immaterial at this stage.