A ALI MUSTAFFA ABDUL RAHMAN MOOSA

v.

STATE OF KERALA

SEPTEMBER 28, 1994

B [DR. A.S. ANAND AND FAIZANUDDIN, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 :

Section 50—Search and seizure—In the presence of a Gazetted Officer
C *or a Magistrate—Option to the accused—Held : Mandatory and non-compliance of the same would vitiate the conviction.*

The appellant was found in possession of 780 grams of charas. He was convicted under S.20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to 11 years rigorous imprisonment
D **and a fine of Rs. 1 lakh, by the Sessions Judge. On appeal the High Court reduced the sentence to 10 years R.I. but maintained the fine. Hence this appeal.**

The main contention on behalf of the appellant was that the provisions of S.50 of the Act being mandatory, the violation thereof vitiates
E **the conviction and sentence and so the same could not be sustained.**

The respondent argued that the question of giving option to the accused in compliance with S.50 of the Act, is subject to the condition that the accused required that he be searched in the presence of a gazetted officer or a magistrate but where the accused did not so require for
F **whatever reason, his conviction would not stand vitiated; and that even if the search and seizure was illegal, it would not still affect the conviction because the seized articles could be used as evidence of unlawful possession of a contraband.**

G **Allowing the appeal, this Court**

HELD : 1. On account of the non-compliance with the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 which provisions are mandatory, the conviction and sentence of the appellant cannot be sustained. Undoubtedly, before the search of the appellant
H **was made, he was not given any option as to whether he desired to be**

searched in the presence of a gazetted officer or a Magistrate as envisaged by Section 50. [54-H, 55-B] A

State of Punjab v. *Balbir Singh,* **[1994] 3 SCC, 299, relied on.**

2. "Unlawful possession" of the contraband is the *sine qua non* for conviction under the Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in the absence of proof of *possession* of the same, an accused cannot be held guilty under the Act. [56-H] B

Pooran Mal v. *Director of Inspection,* **[1974] 1 SCC, 345, distinguished.** C

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 348 of 1991.

From the Judgment and Order dated 10.4.90 of the Kerala High Court in Crl. A. No. 414 of 1989. D

R.N. Joshi and Harjinder Singh for the Appellant.

G. Vishwanatha Iyer and M.T. George for the Respondent.

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The Judgment of the Court was delivered by

DR. ANAND, J. The appellant, a Kuwaiti national, was convicted for an offence under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter 'the NDPS Act') and sentenced to suffer imprisonment for 11 years and a fine of Rs. 1 lac by the learned Sessions Judge, Quilon. His appeal against the conviction failed before the High Court of Kerala though the sentence of imprisonment was reduced to 10 years RI. The imposition of fine of Rs. 1 lac as also the imprisonment in default of the payment of fine as imposed by the Trial Court was, however, maintained. F G

According to the prosecution case, on 12.10.1988 at about 11.15 p.m., the appellant was found in possession of 780 gms. of charas in the first class waiting room of the railway station at Quilon. PW-6, Ashok Kumar, Sub-Inspector of Police attached to the Quilon railway station, on receipt of reliable information that a foreigner having charas in his possession was H

A sitting at the Quilon railway station, went to the platform where PW-1 Constable Nataraja Pillai was on patrol duty. Both PW-1 and PW-6 went to the first class waiting room. The appellant was found sitting there with a bag. On suspicion, he was questioned by PW-1 and PW- 6. The appellant took out a small packet of charas from his bag and handed it over to PW-6. On further questioning and search, PW-6 recovered three big packets of charas from the bag which was in possession of the appellant. The seizure of charas was effected in presence of the witnesses on the spot itself and the contraband was taken into possession after making the mahazar. The other valuable articles which were with the appellant were also taken into custody, after preparing the recovery memo. The contraband was weighed and in the presence of witnesses, a small portion from each of the four packets of contraband, was taken as sample for examination. The search and seizure lasted till about 5.00 a.m. on 13.10.1988. The appellant was arrested on the spot and produced at the police station adjacent to the railway station. The seized articles were kept in safe custody of the police station and the appellant was produced before the Magistrate, after the registration of the case. After further investigation, the charge-sheet was filed before the Chief Judicial Magistrate, Quilon who committed the case to the Sessions Court for trial.

Six witnesses were examined by the prosecution and various articles as recovered from the possession of the appellant were exhibited as material objects. The contraband was found by the expert to be "charas". The appellant in his statement under Section 313 Cr.P.C. denied the seizure and disowned the bag from which the contraband had been recovered and seized and asserted that it was an abondoned bag and th..t the appellant had been un-necessarily linked up with the seizure of the contraband on misguided suspicion.

Though a number of submissions were made by learned counsel for the appellant, we need not detain ourselves to deal with all those submissions as in our opinion there is force in the main argument of the learned counsel for the appellant viz. that on account of the non-compliance with the provisions of Section 50 of the NDPS Act, which provisions have been held to be mandatory by this Court in *State of Punjab* v. *Balbir Singh,* [1994] 3 SCC, 299, the conviction and sentence of the appellant cannot be sustained.

From the testimony of PW-6, it is apparent that before reaching the first class waiting room at the railway station, he had received information that a foreigner was sitting with charas at the railway station. The appellant was thereafter spotted and subjected to search and from his possession allegedly 780 gms of charas was seized. Undoubtedly, before the search of the appellant was made, he was not given any option as to whether he desired to be searched in the presence of a gazetted officer or a Magistrate as envisaged by Section 50. In *State of Punjab* v. *Balbir Singh* (supra) it has been held that before the authorised or empowered officer conducts a search, he should give the accused an option to be searched either in the presence of a gazetted officer or a Magistrate. It was also held that Section 50 confers a valuable right on the person to be searched in the presence of a gazetted officer or a Magistrate *if he so requires and the failure to provide that option to the accused vitiates his conviction.* The Court expressly held the provisions of Section 50 to be mandatory, the non-compliance whereof would vitiate the conviction.

Learned counsel for the respondents on the other hand submitted that the question of giving option to the accused in compliance with Section 50 of the Act is subject to the condition that the accused "requires" that he be searched in the presence of a gazetted officer or a Magistrate but where the accused does not so 'require' for whatever reason his conviction would not stand vitiated, in case the option was not given to him. A similar argument had been advanced in *Balbir Singh's* case (supra) and the Bench repelled the same after a detailed discussion and observed :

> "The words "if the person to be searched so desires" are important. *One of the submissions is whether the person who is about to be searched sould by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search should be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate.* To us, it appears that this is a valuable right given to the person to be searched in

A the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. *To afford such an opportunity to the person to be searched, he must be aware of his right and* B *that can be done only by the authorised officer informing him.* The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right. (Emphasis Supplied)

C We respectfully agree with the above observations and reject the submission made on behalf of the respondents.

Learned counsel for the respoondents then submitted that the judgment in *Balbir Singh's* case (supra) requires reconsideration. We cannot agree. There are no compelling reasons advanced by the learned counsel D for the respondents for the reconsideration of the judgment in *Balbir Singh's* (supra).

The last submission of the learned counsel for the respondents is that even if the search and seizure of the contraband are held to be illegal and E contrary to the provisions of Section 50 of the NDPS Act, it would still not affect the conviction because the seized articles could be used as "evidence" of unlawful possession of a contraband. Reliance for this submission is placed on the judgment of this Court in *Pooran Mal* v. *Director of Inspection,* [1974] 1 SCC 345. We are afraid the submission is misconceived and F the reliance placed on the said judgment is misplaced. The judgment in *Pooran Mal's* case (supra) only lays down that the *evidence* collected as a result of illegal search or seizure, could be used as *evidence* in proceedings against that party under the Income-Tax Act. That judgment cannot be interpreted lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten the liability of *unlawful possession* of the G contraband on the person from whom the contraband had allegedly been seized in an illegal manner. "Unlawful possession" of the contraband is the *sine qua non* for conviction under the NDPS Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in the absence of proof of *possession* of H the same, an accused cannot be held guilty under the NDPS Act.

In view of the law laid down in *Balbir Singh's* case (supra), we hold A
that there has been violation of the provisions of Section 50 of NDPS Act and consequently the conviction of the appellant cannot be sustained. We, therefore, allow this appeal and set aside the conviction and sentence of the appellant. He is directed to be released forthwith unless required in any other case.

G.N. Appeal allowed.