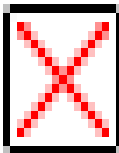


Personal Search u/s 50 of the NDPS Act, 1985

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power to search, seize and arrest is vested under Sections 42, 43 and 44 of the NDPS Act, 1985 only on officers of the rank superior in rank to a peon, sepoy or constable of the departments of Central Excise/CGST, narcotics, customs, revenue intelligence or other departments 1 of Central Government and revenue, drugs control, excise, police or any other department of a State Government. Only they can exercise powers conferred upon them, under the NDPS Act, 1985. Such officers are called 'empowered officers' and the departments concerned are called 'empowered departments'. Power to search includes personal search of a suspect person. In terms of Section 50(4) of the NDPS Act, 1985, it is explicit that no female shall be searched by anyone excepting a female.

The exercise of powers by a non-empowered department, say Income Tax, Forest, FSSAI, Transport, Shipping, Agriculture, Enforcement Directorate, etc. of the Central Government and similarly placed departments of the State Governments along with the officers of these departments/agencies is not sanctioned by the NDPS Act, 1985. Similarly, the non-empowered officers of the empowered departments also cannot exercise the power.

Different empowered officers of the Central Government and those of the State Governments exercise the powers under the provisions of the NDPS Act, 1985. Majority of the cases are booked by the Narcotics Control Bureau (Headquarters and Zonal units/regional units), Customs officers of different Customs Commissionerates, DRI (Headquarters and Zonal/regional units), on the one hand, and Police officers of different States on the other.

To re-iterate, the NDPS Act, 1985 confers power on empowered officers of the empowered departments of the Central Government and State Governments to search, seize and arrest under Section 42, 43 and 44 thereof. For the sake of this article, let us assume that an information received categorically suggests that a male is involved in the illicit trafficking. For the empowered officers of the Central Government and those of the State Governments, it would be necessary to record the information and submit it to the superior officer and acting on the directions of the said officer to constitute a team and take necessary steps to search, seize and arrest the male in the event of recovery of contraband. Personal search of the person, as mandated, can be carried out in accordance with the settled provisions of law and the binding judgments of the Hon'ble Supreme Court, the latest being *Than Kunwar Vs State of Haryana* reported as [2020-TIOL-78-SC-NDPS](#).

On the other hand, the search of a female can be taken by a female as mandated by Section 50(4) of the NDPS Act, 1985. While this sub-section does not talk about an empowered female officer, the fact still remains is that on a harmonious reading of provisions of Sections 42, 43 and 44, it is only the empowered officer who has been vested with power to carry out search, seizure and arrest. Generally, it is seen that it is the lady constable who carries out the personal search of a suspect female. While the NDPS Act, 1985 categorically vests the power on the empowered officer, who is bound to be superior in rank to a peon, constable and sepoy in these empowered departments, the exercise of the power to search a female by a non-empowered female of the empowered department would vitiate the proceedings and consequently the trial.

The judgment in the case of *Tofan Singh Vs State of Tamil Nadu* reported as [2020-TIOL-171-SC-NDPS-LB](#)

while taking note of the fact that different empowered officers (say a statement recorded by an empowered officer who is also a customs officer under Section 67 of the NDPS Act *vis a vis*

a statement recorded by an empowered police officer under Section 67 of the NDPS Act) of different empowered departments book cases under the NDPS Act, 1985 went on to hold (i) that 'the officers who are invested with powers under Section 53 of the NDPS Act are **"police officers"**

within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act and (ii)

that a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act." Meaning thereby, that for an offence under NDPS Act, 1985, two different interpretations are not applicable.

Post the judgment, plainly put, a statement under Section 67 of the NDPS Act, 1985 recorded by a Customs Officer empowered under the NDPS Act, 1985 is no different from a statement recorded by an empowered police officer and both stand on the same pedestal. This analogy equally applies to search of a female by a non-empowered female officer (say a constable) of an empowered department.

A self-inflicted goal would be scored in a situation (by way of an illustration) where a group of persons (male and female) are apprehended simultaneously. The males would be searched by a male empowered officer of the empowered department. If the female is searched by a non-empowered officer (say a constable) of the empowered department, then a plea can be raised by the accused before the Ld. Court that prejudice has been caused to the female accused of an offence. Furthermore, the search by an empowered officer for a male and by a non-empowered female (say a constable) for a female would be hit by Article 14 of the Constitution of India as the classification between the two types of personal searches by empowered officer and non-empowered officer has not been envisaged under the NDPS Act, 1985. It is always better to implement the provisions of the Act in the manner prescribed rather invite the wrath of Article 14 of the Constitution of India.

Section 51 of the NDPS Act, 1985 makes the provisions of the Cr. P.C., 1973 applicable to all warrants, arrests, searches and seizures under the NDPS Act, 1985 insofar as they are not inconsistent with the NDPS Act, 1985. However, provisions of Section 100 (7) of the Cr. P.C., 1973 are not consistent with those of the NDPS Act, 1985 and hence provisions of the NDPS Act, 1985 will prevail e.g. the Cr. P.C. does not prescribe issuance of a notice to the suspect person as envisaged under Section 50 of the NDPS Act, 1985 though the said notice can be oral too, as has been held by the Hon'ble Supreme Court in the case of Balbir Singh Vs State of Haryana reported as (1987) 1 SCC 533.

Should the suspect female to be checked by an empowered female officer opt for search before a Gazetted Officer, it is incumbent to produce the female before the **"nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate"**. Since, a lady Gazetted Officer of case booking department cannot be ensured at all times (on account of exigencies, leave, etc.), provisions of Section 56 of the NDPS Act, 1985 can be put into use by soliciting the services of the lady Gazetted Officers of empowered departments **viz.** Customs, Central Excise, DRI, CGST 2 etc., who have pan-India presence.

Hence, in the opinion of the author, while effecting personal search of a suspect female, it should always to be ensured that she is searched by a female officer of a rank equal to or above the rank of an officer empowered to search a male suspect so that the case does not suffer on technical grounds.

[The author retired as Additional Director, DRI, Mumbai Zonal Unit and the views expressed are strictly personal.]

1. (i) Notification S.R.O. 16(E) dated 5.12.2019 from file F. No. 5(4)/2017-D(N-II/OPS)/862 issued by Ministry of Defence empowering Indian Coast Guard; (ii) Railway Protection Force is an empowered department vide Notification No. S.O. 1582(E) dated 11.04.2019 issued by the Department of Revenue; (iii) NIA is the latest empowered department vide Notification No. S.O. 3213(E) dated 22.9.2020 issued by the Department of Revenue

2. Department of Revenue's Notification S.O. 3901(E) dated 30.10.2019 issued from F. No. N/11011/1/2019-NC-II empowers officers of and above the rank of Inspectors in the Central Board of Indirect Taxes and Customs to exercise the powers and perform the duties specified in section 42 within the area of their respective jurisdiction and also authorises the said officers to exercise the powers conferred upon them under section 67 of the Act. Since, CGST officers come under CBIC, they are empowered officers for section 42 and 67 of the NDPS Act.

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