

REPORTABLE**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1233 OF 2006****STATE OF RAJASTHAN****... APPELLANT****VERSUS****JAG RAJ SINGH @ HANSA****... RESPONDENT****J U D G M E N T****ASHOK BHUSHAN, J.**

This appeal has been filed by the State of Rajasthan against the judgment of the High Court of Judicature of Rajasthan at Jodhpur in S.B. Criminal Appeal No.98 of 2001 dated 24.11.2003 acquitting the accused from the charges under Section 8/15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') after setting aside the judgment and conviction order of Special Judge, (NDPS Cases), Hanumangarh, Rajasthan dated 31.5.2000 by which judgment accused were sentenced to undergo 12 years rigorous imprisonment with fine of Rs. 1,20,000/- each. Accused were to go further rigorous

imprisonment of one year each in case of not depositing the fine. Accused Kishan Lal had filed Single Bench Criminal Appeal No. 397 of 2000 and accused Jagraj Singh alias Hansa had filed Single Bench Criminal Appeal No. 98 of 2001. Both the appeals having been allowed by the High Court of Rajasthan, this appeal being Criminal Appeal No. 1233 of 2006 has been filed by the State of Rajasthan against the acquittal of Jagraj Singh alias Hansa. The Criminal Appeal No. 1232 of 2006 has already been dismissed by this court.

2. The prosecution case in the nutshell is: Shishupal Singh, Station House Officer, Bhadra received a secret information on 9th August, 1998 at 8 P.M. that a blue jeep car No. HR 24-4057 would come and pass through Haryana via Sirsa. A memo was prepared regarding the above information which was also entered into Roznamacha and information was also conveyed to the Circle Officer, Nohar at 8:05 p.m. on the same day through a constable. Station House Officer along with certain other police personnel proceeded after taking two independent witnesses namely Hawa Singh and Karam Singh. At 10:15 p.m. Jeep HR 24-4057 was seen coming from Sahaba. It was stated that one driver and two other persons

were sitting who told their names as Jagraj Singh and Kishan Lal. Bags were lying in the jeep. Station House Officer gave notice to Jagraj and Krishan Lal and thereafter search was conducted. Nine bags containing opium powder were recovered from the jeep for which the accused were having no licence. Opium powder was weighed and two samples of 200 grams each were taken from each bag. Seizure memo was prepared on the spot. Both the persons were arrested. Material was sealed and after reaching the police station first information report being FIR No. 291/98 was registered. Samples were sent to Forensic Science Laboratory, Jaipur and on receiving a positive report, chargesheet was filed against both the accused under section 8/15 of the Act. The prosecution produced 12 witnesses including Station House Officer, Shishupal Singh as PD-11. Two independent witnesses PD-2 Hawa Singh and PD-3 Karam Singh were declared hostile. Prosecution also produced documents Exh. P1 to P40. Statements of accused were recorded under Section 313 of Cr. P.C. Sri Ram Meena the then Circle Officer, Nohar was examined as defence witness-1.

3. Before the learned Sessions Judge, accused contended that the mandatory provisions of Section 42(1) and 42 (2) as well as Section 50 of the NDPS Act have not been complied with; both the independent witnesses have not supported the status of recovery and that entire action had taken place at police station; the chain of event is not present so as to convict the accused. The test report is not admissible and readable. The contentions of accused were refuted by the learned Special Public Prosecutor. Learned Sessions Judge held that information received by Station House Officer was recorded as Exh. P-14 and the same was sent to Circle Officer, Nohar by Exhibit P-15. Hence, the Station House Officer has fully complied with the provisions of Sections 42(1) and 42(2). Sessions Judge further held that the vehicle was being used to transport passengers as has been clearly stated by PW-4 Veera Ram, hence, as per explanation to Section 43 of the NDPS Act, vehicle was covered within the ambit of public place. Therefore, there was no need of any warrant or authority to search. Learned Sessions Judge also found that Section 50 was complied since notices were issued to both the accused before search. Sessions Judge noted that although both the independent witnesses have turned hostile but the police

officers and officials have been examined on behalf of the prosecution with whom the fact of enmity has not been proved. Chain of event was complete. After coming to the aforesaid conclusion, learned Sessions Judge convicted both the accused.

4. Both the Criminal Appeals filed by Kishan Lal and Jagraj Singh were decided by a common judgment of the High Court dated 24.11.2003. The High Court while allowing the appeal gave following reasons and findings:

(i) The secret information which was recorded as Exh. P-14 and in Exh. P-21 Roznamacha it was not mentioned that “two persons will come from Jhunjhnu who are carrying powder of opium”, whereas Exh.P-15, the information sent to the Circle Officer, Nohar which was also received by Circle Officer, Nohar the above fact was mentioned which was missing in the Exh. P-14 and P-21. In view of the above, Section 42(2) was not complied with.

(ii) The proviso to sub-section (1) of Section 42 provides that if such officer has reasons to believe, he may carry the search after recording the grounds of belief whereas no ground of belief as contemplated by the proviso was recorded in the present case and search took place after sun set which violates the provisions of Section 42(2) proviso.

(iii) The jeep which was the personal jeep of Viraram could not be treated as public transport vehicle. No evidence was brought on the record that there was any permit for public transport vehicle. The brother in law of Viraram i.e. Kartararam do not support the case that the vehicle was a public transport vehicle. Section 43 of the Act was not applicable; hence, the view of the court below that compliance of Section 42 was not necessary, is incorrect.

(iv) Further, the secret information from informer was received and recorded and search was conducted thereafter. The present was not a case of conducting the search at public place suddenly.

(v) The sealing of the material sample was not proper nor the sample of seal was deposited in the stock house. The seal vide which material has been sealed has not been kept safe anywhere, it remained in the possession of the officer who conducted the search.

(vi) The independent witnesses have not supported the case of prosecution at all.

5. The State of Rajasthan feeling aggrieved against the judgment of the High Court has come up in this appeal. Learned counsel for the appellant has contended that there was compliance of provisions of Section 42(1) and (2) of Section 42 and moreover, the vehicle being used to carry passengers as has come in the statement of the owner of the

vehicle Vira Ram PW-4 and the search being at public place, by virtue of Section 43 there was no necessity of compliance of Section 42. It is further contended that minor discrepancy in Exh. P-14 and that of Exh. P-15 was inadvertent mistake due to which it cannot be said that provisions of Section 42(1) was not complied with. It is contended that Station House Officer and other police personnel accompanying the team have been examined and they have proved the recovery and chain of events. The High Court has committed error in acquitting the accused whereas there was sufficient ground and material to support the conviction order recorded by the Special Judge.

6. The learned counsel appearing for the accused have supported the judgment of the High Court and submits that compliance of provisions of Section 42(1) and 42(2) have been held to be mandatory by this Court and due to non compliance of the said provisions, the conviction has rightly been set aside by the High Court. It is submitted that Section 43 of the Act is not attracted since the search was conducted after recording information from informer and Station House Officer himself in his statement had stated the facts for proving compliance of Section 42, hence, it cannot be said that compliance of Section

42 was not required more so the jeep was personal jeep of Vira Ram and High Court has rightly held that there was no material to prove that jeep was a public transport vehicle. No permit from transport authority to ply the vehicle as a public transport vehicle had been filed or even pleaded.

7. We have considered the submissions of learned counsel for the parties and have perused the record.

8. Whether the High Court committed error in acquitting the accused is the issue which needs to be considered in this appeal. Whether there were sufficient material to support the findings of the High Court regarding non-compliance of Section 42(1) and Section 42 (2) and whether Section 43 was applicable in the present case are the other issues which need to be answered. Whether recovery as claimed by the prosecution is supported from the evidence on record and material and samples were properly sealed are other related issues.

9. The NDPS Act was enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. This Court had occasion

to consider the provisions of NDPS Act in large number of cases. This Court has noted that the object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. This Court in **State Of Punjab vs Balbir Singh, 1994 (3) SCC 299**, in paragraph 15 has made the following observations:

“15. The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.”

10. To the similar effect are the observations of this Court in **Saiyad Mohd. Saiyad Umar Saiyed & others vs. The**

State Of Gujarat, (1995) 3 SCC 610. Following was stated in paragraph 6 of the said judgment:

“6. It is to be noted that under the NDPS Act punishment for contravention of its provisions can extend to rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and also to fine which shall not be less than Rupees one lakh but which may extend to Rupees two lakhs, and the court is empowered to impose a fine exceeding Rupees two lakhs for reasons to be recorded in its judgment. Section 54 of the NDPS Act shifts the onus of proving his innocence upon the accused; it states that in trials under the NDPS Act it may be presumed, unless and until the contrary is Proved, that an accused has committed an offence under it in respect of the articles covered by it "for the possession of which he fails to account satisfactorily". Having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the legislature has enacted the safeguard contained in Section 50. To obviate any doubt as to the possession by the accused of illicit articles under the NDPS Act, the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate.”

11. In the present case, Section 42 is relevant which is extracted as below:

“ 42. Power of entry, search, seizure and arrest without warrant or authorisation.-(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government

including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

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

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act; and

(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 this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

12. The High Court has come to the conclusion that there is breach of mandatory provisions of Section 42(1) and Section 42(2) and further Section 43 which was relied by the Special Judge for holding that there was no necessity to comply Section 42 is not applicable. We thus proceed to first examine the question as to whether there is breach of provisions of Section 42(1) and Section 42(2). The breach of Section 42 has been found in two parts. The first part is that there is difference between the secret information recorded in Exh. P-14 and Exh. P-21 and the information sent to Circle Officer, Nohar by Exh. P-15. It is useful to refer to the findings of the High Court in the above context, which is quoted below:

“ From the above examination, it is not found that Exh. P-14 the information which is stated to be

received from the informer under Section 42(2) of Act or Exh. P-21, the information given by the informer which is stated to be recorded in the Rozanamacha, copy whereof has been sent to C.O. Nohar, who was the then Senior Officer, Rather, Exh. P-15, the letter which was sent, it is not the copy of Exh. P-14, but it is the separate memo prepared of their own. From the above examination, it is not found in the present case that section 42 (2) of Act, 1985 is complied with.”

13. What Section 42(2) requires is that where an officer takes down an information in writing under sub-Section (1) he shall sent a copy thereof to his immediate officer senior . The communication Exh. P-15 which was sent to Circle Officer, Nohar was not as per the information recorded in Exh. P 14 and Exh. P 24. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

14. Another aspect of non-compliance of Section 42(1) proviso, which has been found by the High Court needs to be adverted. Section 42 (1) indicates that any authorised officer can carry out search between sun rise and sun set without warrant or authorisation. The scheme indicates that in event the search has to be made between sun set and sun rise, the warrant would be necessary unless officer has reasons to believe that a search warrant or authorisation cannot be

obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded. In the present case, there is no case that any ground for belief as contemplated by proviso to sub-section (1) of Section 42 or Sub-section (2) of Section 42 was ever recorded by Station House Officer who proceeded to carry on search. Station House Officer has appeared as PD-11 and in his statement also he has not come with any case that as required by the proviso to Sub-section (1), he recorded his grounds of belief anywhere. The High Court after considering the entire evidence has made following observations :

“Shishupal Singh PD-11 by whom search has been conducted, on reaching at the place of occurrence by him no reasons to believe have been recorded before conducting the search of jeep bearing HR 24 4057 under Section 42(1), nor any reasons in regard to not obtaining the search warrant have been recorded. He has also not stated any such facts in his statements that he has conducted any proceedings in regard to compliance of proviso of Section 42(1). Since reasons to believe have not been recorded, therefore, under Section 42(2) it is not found on record that copy thereof has been sent to the senior officials. Shishupal Singh could be the best witness in this regard, who has not stated any fact in his statement regarding compliance of proviso to Section 42(1) and Section 42(2), sending of copy of reasons to believe recorded by him to his senior officials.”

15. In this context, it is relevant to note that before the Special Judge also the breach of Section 42(1) and 42(2) was contended on behalf of the defence. In paragraph 12 of the judgment Special Judge noted the above arguments of defence. However, the arguments based on non-compliance of Section 42 (2) were brushed aside by observing that discrepancy in Exh. P-14 and Exh. P-15 is totally due to clerical mistake and there was compliance of Section 42(2). Special Judge coming to compliance of proviso to Section 42(1) held that vehicle searched was being used to transport passengers as has been clearly stated by its owner Veera Ram, hence, as per the explanation to Section 43 of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court has reversed the above findings of the Special Judge. We thus, proceed to examine as to whether Section 43 was attracted in the present case which obviated the requirement of Section 42(1) proviso. Section 43 of the Act is as follows:

“43. Power of seizure and arrest in public place.-Any officer of any of the departments mentioned in section 42 may

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to

believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public"

16. Explanation to Section 43 defines expression "public place" which includes any public conveyance. The word "public conveyance" as used in the Act has to be understood as a conveyance which can be used by public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the

Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers. The High Court has looked into the evidence and come to the conclusion that there was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court has further held that even Kartara Ram who as per owner of the vehicle Veera Ram was using the vehicle, do not support that the jeep was used as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle. Following observations were made by the High Court:

“Kartara Ram is produced as PD-5, who has deposed the statement that Vira Ram is his brother-in-law (Saala), on whose name jeep bearing No.HR 24 4057 is lying registered. He had employed Inderjit singh as driver for that jeep. Person namely Krishan has never been employed as driver. This witness has been declared hostile and he has been examined too, who does not support the prosecution case. In this manner, Viraram is the owner of the jeep. According to him he had given the jeep to Kartara Ram, but Kartara Ram has not stated anywhere in is statement that this jeep was given to him and he used the same as Public Transport Vehicle. Since powder of opium was caught in this jeep and even

Notice Exh. P-6 was also served upon him by the police, he with a view to save himself, can also depose such statement that Kartara used to use the jeep as Public Transport Vehicle , whereas Kartara Ram PD-5 does not affirm this fact. Jeep was personal, it is clear on the record. In this manner, just on this ground that he has given the jeep to his brother-in-law and he used it to carry the passengers, the personal jeep could not be treated as public transport vehicle. However, the fact that jeep is used to carry the passengers has not been affirmed from the statements of Kartara Ram. There is no evidence on record on the basis of which it could be stated that jeep was public transport vehicle and they have the permit for it, rather it was the private vehicle and it is stated that Vira Ram himself is the owner of that vehicle”

17. There is nothing to impeach the aforesaid findings. We have also perused the statement of Vira Ram in which statement he has never even stated that he has any permit for running the vehicle as transport vehicle. He has stated that “..... I had given this jeep to Kartara Ram resident of who is my relative to run it for transporting passengers” Admittedly the jeep was intercepted and was seized by the police. In view of the above, the jeep cannot be said to be a public conveyance within the meaning of Explanation to Section 43. Hence, Section 43 was clearly not attracted and provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been

complied with, the High Court did not commit any error in setting aside the conviction.

18. There is one more aspect which needs to be noted. The present is a case where prosecution himself has come with case that secret information was received from informer which information was recorded in Exh. P-14 and Exh. P-21 Roznamacha and thereafter the Station House Officer with police party proceeded towards the scene. The present is not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer in his statement has also come up with the facts and case to prove compliance of Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 has to be complied with. This Court in ***Directorate Of Revenue & Another vs Mohammed Nisar Holia, (2008) 2 SCC 370***, had occasion to consider Sections 41,42 and 43 explanation. Following was stated in paragraph 14:

“14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public

place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefor must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance.....”

19. Thus the present is not a case where Section 43 can be said to have been attracted, hence, non-compliance of Section 42(1) proviso and Section 42(2) had seriously prejudiced the accused. This Court had occasion in large number of cases to consider the consequence of non-compliance of provisions of Section 42(1) and 42(2), whether the entire trial stand vitiated due to above non compliance or conviction can be set aside. In this context reference is made to the judgment of this Court in ***State of Punjab Vs. Balbir Singh (1994) 3 SCC 299***. In the above batch of cases, the High Court has acquitted accused on the ground that search was conducted without conforming to the provisions of the NDPS Act. Sections 41,42 43 and other relevant provisions

came for consideration before this Court, referring to the provisions of Chapter IV following was stated in paragraph 8:

“8. But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Sub-section (2) of 8 1990 Cri LJ 414 (Del) Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior.”

JUDGMENT

20. After referring large number of cases, this Court recorded conclusion in paragraph 25 which is to the following effect:

“25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate

officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. (3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the 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. It is obligatory on the part of such officer to inform the person to be searched. 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 non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

21. A three Judges Bench in **Saiyad Mohd. Saiyad Umar Saiyed & others vs. The State Of Gujarat (supra)** after elaborate consideration of provisions of the NDPS Act including section 50 had endorsed the judgment of this court in Balbir Singh's case (supra).

22. A Constitution Bench of this Court in **State of Punjab Vs. Baldev Singh, (1999) 6 SCC 172**, had occasion to consider the provisions of the NDPS Act and several earlier judgments of this Court. The Constitution Bench noticed that the earlier judgments in **Balbir Singh's** case has found approval by three Judges Bench in **Saiyad Mohd. Saiyad Umar Saiyed & others vs. The State Of Gujarat (supra)** and a discordant note was struck by two Judges Bench in **State of Himachal Pradesh Vs. Pirthi Chand and another, (1996) 2 SCC 37**. The Constitution Bench approved the view of this Court in **Balbir Singh's** case that there is an obligation on authorised officer under section 50 to inform the suspect that he has right to be informed in the presence of the Gazetted Officer. It was held by Constitution Bench that if search is conducted in violation of Section 50 it may not vitiate the trial but that would render the recovery of illicit articles

suspect and vitiates the conviction and sentence of the accused. What is said about non-compliance of Section 50 is also true with regard to non-compliance of Section 42 of the Act.

23. In **Beckodan Abdul Rahiman vs State Of Kerala, 2002 (4) SCC 229**, this Court had occasion to consider both Section 42 and Section 50. In the above case there was non-compliance of Section 42 (2) as well as Section 50. It was also noticed that a Constitution Bench in **State of Punjab Vs. Baldev Singh (supra)** has already laid down that provisions of Section 42 and 50 are mandatory and their non-compliance would render the investigation illegal. Following was held in paragraphs 5 and 6:

“5. In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW1). After recording the information, the witnesses is not shown to have complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a Gazetted Officer or Magistrate.

6. We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution

which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted....”

24. It is also relevant to note another Constitution Bench judgment of this Court in **Karnail Singh Vs. State of Haryana, 2009 (8) SCC 539**, where this Court had again occasion to consider the provisions of Sections 42 and 50. The Constitution Bench noted the divergence of opinion in two earlier cases which has resulted in placing the matter before the larger Bench. The question was noticed in paragraphs 1 and 2 of the judgment which are to the following effect:

“1) In the case of Abdul Rashid Ibrahim Mansuri vs. State of Gujarat, (2000) 2 SCC 513, a three-Judge Bench of this Court held that compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of Sajan Abraham vs. State of Kerala, (2001) 6 SCC 692, which was also decided by a three-Judge Bench, it was held that Section 42 was not mandatory and substantial compliance was sufficient.

2) In view of the conflicting opinions regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest without warrant or authorization, these appeals were placed before the Constitution Bench to resolve the issue.

3) The statement of objects and reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well organized gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over”

25. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance of requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance of Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in paragraph 5. The present is not a case where insofar as compliance of Section 42(1) proviso even an arguments based on substantial compliance is raised there is total non-compliance of Section 42(1) proviso. As observed above, Section 43 being not attracted search was to be conducted after complying the provisions of Section 42. We thus, conclude that the High Court has rightly held that non compliance of Section 42(1) and Section 42(2) were proved on

the record and the High Court has not committed any error in setting aside the conviction order.

26. In view of what has been stated above, it is not necessary for us to enter into the other reasons given by the High Court for setting aside the conviction order. The High Court has given the sufficient reasons and grounds for setting aside the conviction order in which we do not find any infirmity so as to interfere in this appeal.

27. In the result the appeal is dismissed.

.....J.
(ABHAY MANOHAR SAPRE)

.....J.
(ASHOK BHUSHAN)

NEW DELHI,
JUNE 29, 2016.

JUDGMENT