

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.11852 of 1984

Arising Out of PS.Case No. -0 Year- 0 Thana -null District- -

- =====
1. Rajan Kumar @ Rajan Lohani, son of Prema Nand, resident of Parnadi Manpur, Police Station Mofassil, District Gaya.
 2. Kishori Prasad, son of Rajo Ram, resident of Nawadah, Police Station and District - Nawadah. Petitioners.

Versus

The State of Bihar.

.... Opposite Party.

WITH

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Criminal Writ Jurisdiction Case No. 714 of 1992

Arising Out of PS.Case No. -null Year- null Thana -null District- SASARAM (ROHTAS)

- =====
1. Sheo Pujan Singh, son of Late Shikhan Singh, resident of village Jakhini, P.S. Nokha, District- Rohtas.
 2. Net Lal, son of Kapurchand Sah, resident of village Penar, P.S. Nokha, District Rohtas. Petitioners.

Versus

The State of Bihar.

.... Opposite Party.

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Appearance :

(In Cr.Misc. No. 11852 of 1984)

For the Petitioners : Mr. Arun Kumar, Advocate

For the Opposite Party : Mr. Anjani Kumar, A.A.G.-VI

Mr. Jharkhandi Upadhyay, A.P.P.

Mr. Deepak Kumar Jamuar, A.C. to A.A.G.-VI

(In Cr. WJC No. 714 of 1992)

For the Petitioner : Mr. N.K. Agrawal, Sr. Advocate

(*Amicus Curiae*)

For the Opposite Party: Mr. Anjani Kumar, A.A.G.-VI

Mr. Jharkhandi Upadhyay, A.P.P.

Mr. Deepak Kumar Jamuar, A.C. to A.A.G.-VI

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CORAM: HONOURABLE THE CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

And

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

C.A.V. JUDGMENT & ORDER

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 27-10-2016

The primal question involved in both these cases,



before the Full Bench, is whether the very entry, search and seizure conducted illegally and unauthorisedly, can form the basis for lodging an F.I.R. leading to prosecution and whether Court can quash the prosecution at the threshold on the ground of illegality in entry and consequential search and seizure, which form the basis for instituting the F.I.R. Equally in issue is the conflict of judgments between Division Bench in the case of *Madhusudan Prasad Vs. The State of Bihar and others*, being order dated 25.11.1981 in Cr.W.J.C. No.212 of 1981, and in the case of **Ramchandra Pansari Vs. The State of Bihar** since reported in **1988 PLJR 623** and **Sanjay Kumar Jaiswal Vs. The State of Bihar** since reported in **1990 PLJR 416**, which judgments are on the same issue and in conflict with the judgment in the case of **Madhusudan Prasad (supra)** holds that the prosecution cannot be quashed merely on the ground of initial illegality in any entry, search and seizure, whereas the other two cases hold to the contrary.

2. I may, now, refer to the facts of the two cases as before the Full Bench. In Cr. Misc. No.11852 of 1994 (*Rajan Kumar @ Rajan Lohani and another Vs. The State of Bihar*), an inspection was conducted on 28.07.1981 at 7 PM at the business premises of M/s Kisan Ghar, registered dealer in fertilizer, by the Supply Inspector, Gaya and, on basis of the said inspection Deo Rai, the Supply

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Inspector, Gaya lodged an F.I.R. on 29.07.1981 at about 7:30 PM with the Gaya Kotwali Police Station, giving rise to Gaya Kotwali P.S. Case No.161 of 1981, dated 29.07.1981, instituted under Section-7 of the Essential Commodities Act against Madhusudan Prasad, Kishori Prasad and the petitioner- Rajan Kumar @ Rajan Lohani, allegedly, the employee of M/s Kisan Ghar. The informant, the Supply Inspector, alleges that on inspection of the fertilizer business premises, it was found that the display board, displaying the stocks and prices of fertilizers, was found dated 26.06.1981, instead of 28.07.1981 and the books of accounts were not produced for inspection. Therefore, in view of Entry-34 in Schedule-1 of the display order, being “fertilizer” as inserted therein vide notification no. GSR 15 dated 08.05.1980 to the Bihar Essential Articles (Display of Stocks and Price) Order, 1977 (hereinafter in brevity ‘Display Order’), being an order issued by the State Government in exercise of powers delegated to it by the Central Government under the Essential Commodities Act, had been violated. Pursuant to the F.I.R. lodged, the Police, after investigation, submitted a charge-sheet on basis whereof by order dated 07.02.1984, the Chief Judicial Magistrate, Gaya was pleased to take cognizance of the offence punishable under Section-7 of the Essential Commodities Act and transferred the case for trial to S.D.J.M., Gaya, being G.R. No.1668 of 1981 (Tr. No.669

of 1984), where the matter is pending.

3. Here, it may be noted that the inclusion of Entry-34 “fertilizer” in the Display Order has already been held to be *ultra vires* by Division Bench of this Court in the case of Madhusudan Prasad Vs. The State of Bihar, being Cr.W.J.C. No.212 of 1981, disposed of on 25.11.1981 and this issue has attained finality. Display order, thus, has no application in relation to the present case.

4. The basic submission being that the informant, Supply Inspector had thus, no jurisdiction to conduct any inspection for compliance of the provisions of the Display Order in respect of fertilizers. The sale, purchase and storage for sale of fertilizer are controlled by the provisions of the Fertilizer (Control) Order, 1957 (hereinafter in short as ‘FCO’), an order issued by the Central Government under the powers conferred upon it by the Essential Commodities Act. FCO authorizes only an Inspector of fertilizer appointed under Clause-19 thereof, to enter, search and seize stocks of fertilizers for compliance of FCO in terms of Clause-20 thereof. Undisputedly, the Supply Inspector, Gaya, the informant, who entered the premises and conducted the search and seizure, which was the basis for lodging the F.I.R., was not an Inspector of fertilizer who alone had the jurisdiction to enter any premises and conduct search and seizure in accordance with the provisions of FCO. Thus, the very

entry for inspection, search and seizure, which was foundation of the F.I.R., being illegal, the prosecution based thereon, would be without jurisdiction, an abuse of process of Court.

5. This application having been filed under Section-482 Cr.P.C., this Court while admitting the case for final hearing, stayed further proceedings in the Court below. Subsequently, this case along with other cases have been referred to the Full Bench as noted above.

6. Cr.W.J.C. No.714 of 1992 (Sheo Pujan Singh & anr. Vs. The State of Bihar) again relates to an offence allegedly punishable under Section-7 of the Essential Commodities Act. It appears that on 28.09.1992 at about 10:45 AM Mangal Singh, the Additional Superintendent of Police, C.I.D. (Food), Sahabad, Dheri, District Rohtas entered the premises and conducted inspection in the premises of Bhagwatiji Rice Mill. It is alleged that on inspection, the Rice Mill was found closed and labourers were found present cleaning the machineries. On inspection, it was found that there was a Display Board in the Rice Mill premises dated 25.09.1992, displaying stocks of 140 quintals of rice and 35 quintals of khudi (broken rice), whereas, on physical verification, it was allegedly found that the stock of rice was 130 quintals and that of khudi was 32 quintals. It was thus alleged that there was violation of provisions of Bihar Trade Articles (Licences Unification) Order, 1984 (hereinafter in brevity 'Unification

Order'). On the basis of the aforesaid allegation on 28.09.1992 at 7 PM Nokha P.S. Case No.151 of 1992 was instituted for alleged violation punishable under Section-7 of the Essential Commodities Act.

7. The submission is that the Additional Superintendent of Police, C.I.D. (Food) was not authorized in terms of Clause-30 of the Unification Order to enter and conduct search and seizure and as such the very entry for search and seizure, being illegal, no F.I.R. could be registered based on such illegal entry or search and seizure and all further steps are illegal. The Additional Superintendent of Police, C.I.D. (Food) had no authority under Clause-30 of the Unification Order, is not in dispute. The writ petition having been filed, by order dated 05.01.1993, further proceedings, pursuant to the F.I.R., was stayed and the case is at that stage and, as noticed above, has referred to the Full Bench.

8. On behalf of the petitioners, primarily reliance has been placed on the judgment of the Apex Court in the case of **K.L. Subhayya Vs. State of Karnataka** since reported in **AIR 1979 Supreme Court 711**, which has been followed in the case of **Ramchandra Pansari (supra)** and **Sanjay Kumar Jaiswal (supra)**.

9. On the other hand, Mr. Anjani Kumar, learned Additional Advocate General-VI, submits that an entry, search and seizure

without authority by an officer not authorized could not vitiate the prosecution and the trial and supported the view taken by the Division Bench of this Court in the case of **Madhusudan Prasad (supra)**.

10. In substance on behalf of the petitioners, the submission would be that the Officers who entered the premises and conducted the search and seizure were not Officers authorized by law in these regards. Their very entry and consequential search and seizure were wholly without jurisdiction. The obligations and offences are created by special orders issued under Section 3 of the Essential Commodities Act (hereinafter in short referred to as E.C. Act), which itself provides and confers power only on specified Officers to enter, search and seize for securing compliance of the law. That being so, an Officer not authorized by the statute could not have entered the premises, searched and seized violating the fundamental and the only safeguard provided by the legislature and, thus, no prosecution could be based thereupon. Even if the trial were to take place on account of unauthorized entry, search and seizure, the trial would necessarily stand vitiated. If the trial is to stand vitiated, no useful purpose would be served by protracted litigation with the result being *fate accompali*. It would thus be an abuse of process of Court. In this Full Bench we have to examine the correctness of this submission, which has found favour in the two reported judgments referred to above.

11. In sum and substance, the submission on behalf of the State is that offences in relation to E.C. Act, by virtue of Section 10 A thereof, being cognizable, the police has power to investigate and the prosecution based thereon cannot stand vitiated.

12. In order to appreciate the submission, it is first necessary to look at the provisions as we are dealing with offences exclusively relatable to E.C. Act and not any offence under the Indian Penal Code.

13. First, I may refer to Section 4 of the Criminal Procedure Code (hereinafter in short as Cr. P.C.) and, in particular, sub-section (2) thereof, which is quoted hereunder:

4. Trial of offences under the Indian Penal Code and other laws.- (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

14. At the very outset, it may be noticed and reiterated that if it was an offence under any of the provisions of the Indian Penal Code, then all provisions of Cr.P.C. would apply, but sub-section (2) of Section 4 of the Cr.P.C. makes a departure to the extent that if any

special law provides any special procedure, it is that procedure that has to be followed and not the provisions of the Cr.P.C.

15. E.C. Act, 1955 was enacted in the interest of general public, for control of production, supply and distribution of and trade and commerce in certain commodities by the Parliament. It is a skeleton legislation, inasmuch as, it by itself does not provide for duties and obligations nor provides for offences. It merely authorizes the Central Government under Section 3 of the E.C. Act to issue statutory orders for the purposes of the said Act as enumerated in the said section or delegate its powers to the State Government under Section 5 of the E.C. Act, subject to such conditions and restrictions as it may prescribe. Section 3 (2) (j) of the E.C. Act reads as follows:

3. Power to control production, supply, distribution, etc. of essential commodities.

(1).....

(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide,-

(a)...

(b)....

.....

(j) for any incidental and supplementary matters including in particular, the **entry, search or examination** of premises, aircraft, vessels, vehicles or other conveyances and animals, and **the seizure by a person authorized to make such entry, search or examination-**

(i) of any articles **in respect of which such person** has reason to believe that a contravention of the order has been, is being, or is about to be, committed and

any packages, coverings or receptacles in which such articles are found;

*(ii) of any aircraft, vessel, vehicle or other conveyance or animal used in carrying such articles, if **such person** has reason to believe that such aircraft, vessel, vehicle or other conveyance or animal is liable to be forfeited under the provisions of this Act;*

*(iii) of any books of accounts and documents which in the opinion of **such person**, may be useful for or relevant to, any proceedings under this Act and the person from whose custody such books of accounts or documents are seized shall be entitled to make copies thereof or to take extracts therefrom in the presence of an officer having the custody of such books of accounts or documents.*

(emphasis supplied)

16. From the aforesaid provision, it would be seen that whenever any obligation is created by issuance of an order specific persons have to be authorized as Enforcement Officer for the purposes of entry, search, examination or seizure. Section 6 of the E.C. Act read as follows:

6. Effect of order inconsistent with other enactments.- Any order made under section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

6 A. Confiscation of foodgrains, edible oilseeds and edible oils. – (1) Where any essential commodity is seized **in pursuance of an order made under section 3 in relation thereto**, a report of such seizure shall, without unreasonable delay, be made

to the Collector of the district or the presidency town in which such essential commodity is seized and whether or not a prosecution is instituted for the contravention of such order, the Collector may, if he thinks it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied that there has been a contravention of the order may order confiscation of –

- (a) the essential commodities so seized;*
- (b) any package, covering or receptacle in which such essential commodity is found;*
- and*
- (c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity:*

.....

.....

17. Section 6 of the E.C. Act in clear terms gives an overriding effect to the orders made under the Act over provisions of any other law to the extent of inconsistency. At this stage, I may just refer to Section 6 A quoted above, dealing with confiscation. It, *inter alia*, provides that where any essential commodities is seized, in pursuance of an order made under Section 3 of the E.C. Act, in relation thereto, a report has to be sent to the Collector, who, after hearing the parties, order confiscation, if violation is found. Pertinent to note, that seizure has to be in pursuance of an order made under Section 3 of the E.C. Act. Meaning thereby, clearly predicating that seizure had to be by a person authorized under the order and none

else. I am quoting this only to show the efforts made by the legislature to restrict the power to be exercised in respect of the E.C. Act to only specified persons. This has an object. It is to protect the rights of the traders, businessman and industrialists from an unauthorized and indiscriminate intrusion into their affairs by all and sundry.

18. Now, I may refer to Section 7 of the E.C. Act dealing with penalties, in so far as it is relevant, is quoted hereunder:

7. Penalties. – (1) *If any person contravenes any order made under section 3-*

(a) he shall be punishable-

(i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of other order, with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine:

(b) any property in respect of which the order has been contravened shall be forfeited to the Government,

(c) any package, covering or receptacle in which the property is found and any animal, vehicle, vessel or other conveyance used in carrying the property shall, if the Court so orders, be forfeited to the Government.

19. From the aforesaid provisions, it would be seen that there

are different punishments for different types of contravention. For example, if the contravention relates to an order made with reference to Section 3 (2) (h), which is for collection of information or statistics or Section 3 (2) (i) for maintenance of books of accounts and production for inspection thereof, the punishment would not exceed one year. It would normally, thus, be non-cognizable in terms of the Cr.P.C. but in other cases the punishment may extend to seven years which makes those offences cognizable. The consequences and the provisions of Cr.P.C. are different in both the cases. If the offences are non-cognizable then there would be no F.I.R. and only a complaint by an aggrieved person would lie to the Court. The Court's power to take cognizance is also restricted inasmuch as the Court cannot exercise powers under Section 190 (1) (c) of the Cr. P. C. and the only power it would have which is referable to Section 190 (1) (a) of the Cr. P. C. I may add, as has been held by the Full Bench in the case of **Kuli Singh and others Vs. The State of Bihar and others** since reported in **AIR 1978 Patna 298** and in particular in paragraph 11 thereof, that powers of Magistrate under Section 190 (1) (c) is not available in cases of E.C. Act, being special statute, which decision is not questioned. Now, I may refer to Section 10 A of the E.C. Act, which is quoted hereunder:

10A. Offences to be cognizable and non-bailable. – Notwithstanding anything

contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be cognizable and non-bailable.

20. The reason for this is clear. If we refer back to Section 7 of the E.C. Act, as quoted above, some of the offences would normally not be cognizable and nor non-bailable, punishment being less than three years, therefore, the legislature specifically provided that contrary to the provisions of the Cr.P.C. all offences punishable under the Act shall be cognizable and non-bailable, a clear departure from the Cr.P.C.

21. Then, I may refer to Section 11 of the E.C. Act, which empowers Court to take cognizance and restricts it to be based upon only a report in writing of a fact constituting offence made by a person, who is a public servant. This has to be read with Section 10 A of the E.C. Act from which it would be clear that the power of the Court, even though it is cognizable offence, to take cognizance is restricted and power under Section 190 (1) (c) of the Cr. P. C. cannot be exercised as has been held in the case of Full Bench of this Court in **Kuli Singh' s case (supra)**.

22. Now, I may refer to two other provisions, which may be necessary for the purposes of interpretation and applicability of the provisions of the E.C. Act, they are Section 10 C and Section 14,

which are quoted hereunder:

10C. Presumption of culpable mental state.-

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in the prosecution.

(2) For the purposes of this section, a fact is said to be proved only when court believes it to exist beyond reasonable doubt and not merely when its existence is established by preponderance of probability.

14. Burden of proof in certain cases. – *Where a person is prosecuted for contravening any order made under section 3 which prohibits him from doing any act, or being in possession of a thing without lawful authority or without a permit, licence or other document, the burden of proving that he has such authority, permit, licence or other document shall be on him.*

23. These two sections would show that departing from the general jurisprudence in relation to criminal law, the presumption of guilt and the burden of proof is shifted to an accused which makes the provisions quite harsh and stringent as against the accused.

24. A close reading of the aforesaid provisions would, in my view, show that the intention of the legislature was to restrict the rights of any persons including the police to enter, search, examine and seize books of accounts, stocks etc. for ensuring compliance to



orders issued under the E.C. Act. This is the only safeguard as against arbitrary intrusion into affairs of a person, especially when we see this in conjunction with Section 10 C of the E.C. Act (presumption of guilt) and Section 14 of the E.C. Act (shift of onus of proof). The legislature never intended to confer power on general police in exercise of the authority conferred upon them under the Cr.P.C. or to any person to institute prosecution and investigate the same, except upon a report of a person authorized to enter, search, examine or seize. Section 3 (2) (j) of the E.C. Act clearly stipulates the person on whom such a power could be conferred and, now, if we look to the provisions of the orders, which are alleged to have been violated, it would clearly appear that the police in general are not conferred with such powers, which they would ordinarily have if the offences are merely cognizable.

25. The provision of FCO, relevant are as under:

19. Appointment of Inspectors.- The State Government may by notification in the Official Gazette, appoint such number of persons as it thinks necessary to be Inspectors of fertilizers for the purpose of this Order and may in any such notification define the local area within which such Inspector shall exercise his jurisdiction.

26. Then Clause 20 of the Fertilizer Control Order thereafter provides for power of inspector as an Enforcement Officer which

includes power to enter and inspect premises, seize any stocks or books of accounts etc. Clause 20 (1) A makes applicable only Section 102 and Section 103 of the Cr.P.C. in relation to powers exercised under Clause 20 (1) (d) of the E.C. Act by the Inspector.

27. Thus seen, the Fertilizer Control Order no where authorizes any Police Officer to take any action whatsoever, much less the Supply Inspector, who is not a notified Inspector. It may also be noticed that Inspector of Fertilizer are special class of person separately notified and, undisputedly, Supply Inspector are not so notified. These provisions are relevant for the first case of Rajan Kumar alias Rajan Lohani, where the allegations would be for violation of Fertilizer Control Order, 1957, the provision in relation to “fertilizer” in the Bihar Essential Articles (Display of Prices and Stock) Order, 1977 already having been declared *ultra vires* by this Court, as noted earlier.

28. Now, we may refer to Clause 30 of the Bihar Trade Articles (Licences Unification) order, 1984 (hereinafter in short as Unification Order), which is relevant for the second case, Sheo Pujan Singh. Clause 30 empowers entry, search and seizure etc. and Clause 30 (1) designates officers authorized for the said purpose, to which I will refer in great detail.

30. Powers of entry, search and seizure etc.

– (1) *The Licensing Authority Food*



Commissioner and Secretary, Food, Supply and Commerce Department, Collector, Additional Collector, Additional District Magistrate (Supply), District Development Officer, Deputy Director, Food and Civil Supplies, District Supply Officer, Assistant District Supply Officer, Deputy Inspector General of Police, Food-cum-Additional Secretary, Food, Supply and Commerce Department, Superintendent of Police (Food), Secretary to Food Commissioner, Food, Supply and Commerce Department, Magistrate Incharge, Flying Squad, Food, Supply and Commerce Department and Executive Magistrate, Block Development Officer, P.V.P., Circle Officer, Project Executive Officer, Assistant Project Executive Officer, Special Officer Incharge, Rationing, Patna, Jamshedpur, Dhanbad and Ranchi, Deputy Rationing Officer, Marketing Officer, Assistant Marketing Officer, Supply Inspector and any police officer not below the rank of Sub-Inspector or any other person empowered by the Government....

(a) require, the owner, occupier, or any other person Incharge of any place, premises, vehicle or vessel in which he has reason to believe that any contravention of the provisions of this Order has been or is being or is about to be made to produce any books of accounts or documents showing transaction relating to such contravention;

(b) enter, inspect or break open and search any place or premises, vehicle or vessel in which he has reason to believe that any contravention of the provisions of this Order has been, is being or is about to be made;

(c) seize any books of accounts and documents placed before him, which in his opinion may be useful or relevant to

in connection with the contravention made and shall be entitled to make copies thereof or to take extracts therefrom;

(d) search, seize and remove stocks of trade articles along with the packages, coverings or receptacles in which such stock is found, if he has reasons to believe that any provision of this Order has been or is being or is about to be contravened in respect of such stock or any part thereof and may also search, seize and remove the animals, vessels or other conveyance used in carrying the said trade articles, in contravention of the provisions of this Order and thereafter take or authorize the taking of all measures necessary for securing the production of stocks of trade article and the animals, vehicles, vessels or other conveyances so seized before the Court and for their safe custody pending such production;

(e) for the purpose of such inspection etc. ask any person all necessary questions.

29. It may be mentioned here that Clause 30 (2), inter alia, provides that provisions of Section 100 of Cr.P.C. so far as may apply to search and seizure under this clause. A reference to Clause 30 would show that the legislature have enumerated various officers including the Superintendent of Police (Food) as also any Police Officer not below the rank of Sub-Inspector but not the A.S.P. (C.I.D.) Food.

30. Thus, if we see the provisions of Clause 19 of the



Fertilizer Control Order and Clause 30 of the Unification Order, it would be seen that they have specified the persons, who have the authority to enter, search and seize. References to certain police officials are also there but notwithstanding the offences under E.C. Act, being cognizable, not all Police Officers or officials have been authorized to take any action. In respect of fertilizer no Police Officer is authorized. In relation to Unification Order, there are specific mention of various officers including the Superintendent of Police (Food) and officer not below the rank of Sub-Inspector. It is well settled principle that express mention of something implies exclusion of other others – *expression unius est exclusion alterius*. The intention, thus, is to restrict the persons to conduct search, seize and enquire into the offences by restricting the general power under the Cr.P.C.

31. In my view, this being the statutory scheme, the very entry by a person, who is not authorized by a statute, would be a rank illegality and contrary to and in conflict with the provisions of the statutory order. The search and seizure by them, not being authorized, would also be without jurisdiction. As noticed above, these are valuable and virtually the only safeguard that is available to a person, especially when we read the provisions of Section 10 C (presumption of guilt) and Section 14 (burden of proof) of the E.C. Act. In my



view, the intention of the legislature has been that it is only upon a legally authorized inspection that further proceedings can take place, otherwise the whole scheme would collapse. The whole intention of the legislature to protect the privacy of a businessman would be lost. All and sundry could enter the premises start exercising power of search and seizure and then go and lodge an F.I.R., pursuant to such illegal entry, search and seizure and once F.I.R. is lodged the police would then have power to investigate the same unrestricted. If this be correct, then the very specification of persons and confirmation of authority on them alone would become meaningless because, in any case, ultimately, a person could be prosecuted without restriction. This, in my view, leads to only one conclusion that for a valid prosecution, a valid authorized entry is prerequisite. If there is violation of this statutory safeguards, the trial would necessarily vitiate. If the trial would stand vitiated, then what is the purpose for permitting the trial at all? There being a fundamental defect in the prosecution. It must be nipped at the bud as has been held by the Apex Court in the case of **Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others** since reported in **AIR 1976 Supreme Court 1947**.

32. At this juncture, I may refer to a judgment in the case of **K.L. Subhayya Vs. State of Karnataka** since reported in **AIR**

1979 Supreme Court 711 wherein the question arose in relation to Mysore Excise Act and, Section 53 and 54 of the Mysore Excise Act thereof, with regard to recording of reasons before proceeding to search vehicle. This is what their Lordships held in paragraphs 3 and 4 of the reports, which is reproduced herein below:

“3. In the instant case, it is admitted that the inspector who searched the car of the appellant had not made any record of any ground on the basis of which he had a reasonable belief that an offence under the Act, was being committed before proceeding to search the car and thus the provisions of S. 54 were not at all complied with.

4. This, therefore, renders the entire search without jurisdiction and as a logical corollary vitiates the conviction. We feel that both Ss. 53 and 54 contain valuable safeguards for the liberty of the citizen in order to protect them from ill-founded or frivolous prosecution or harassment. We are satisfied that there has been a direct non-compliance of the provisions of S. 54 which renders the search completely without jurisdiction. In this view of the matter, the appeal is allowed, the conviction and sentence passed on the appellant is set aside and he is acquitted of the charges framed against him.”

33. At the cost of repetition, I may point out that in both the cases in hand, admittedly, the officer, who entered the premises and conducted the search and seizure, which search and seizure was the foundation of the F.I.R., were not authorized to enter, search or seize

under the respective statutory orders. This position has not been disputed by the State.

34. Now, I may refer to the case of **State of Punjab Vs. Balbir Singh** since reported in **(1994) 3 Supreme Court Cases 299**.

The said case dealt with, *inter alia*, the implications of non-compliance of Sections 41 and 42 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as the NDPS Act), where their Lordships held that if there is any irregularity in carrying out search in accordance with Sections 100 and 165 of the Cr.P.C., which is applicable to cases in NDPS Act by virtue of Section 51 thereof, those are mere irregularities, but when we come to Sections 41 and 42 of the NDPS Act, the position is different. Section 41 of the NDPS Act, as it then stood, provided certain classes of Magistrates, who were competent to issue warrants of arrest of any person whom they have reason to believe committed any offence under the NDPS Act or for search of any building, conveyance or place for such an act. Section 42 of the NDPS Act empowers only certain officers to enter, search, seize and arrest without warrants or authorization. The Court was, *inter alia*, called upon to decide what would be the effect if Sections 41 and 42 of the Act were not complied with. In other words, the person who entered, searched and seized was not so authorized nor was he in possession of warrant

issued by any empowered Magistrate. The conclusions of the Court on various issues including the aforesaid is recorded in paragraph 25 of the reports and the relevant are quoted hereunder:

25. The questions 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 authorization 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.

(emphasis supplied)

35. From the aforesaid, it would be seen that the Court made a distinction where a person in normal course was investigating an offence under Cr.P.C. not related to NDPS Act and there is chance of recovery of narcotics, then the search or seizure of the narcotics would not be vitiated because, he initially did not lack the jurisdiction but when it came to Sections 41 and 42 of the NDPS Act, the position was different. If the search and seizure were to be made under the Act, at the very inception under the NDPS Act, then compliance of Sections 41 and 42 of the NDPS Act were mandatory and non-compliance thereof would be illegal and vitiate the conviction *ipso facto*. This part of the decision still holds the field.

36. I may then refer to another judgment in the case of **Roy**



V.D. Vs. State of Kerala since reported in **(2000) 8 Supreme Court Cases 590**. It may be noted here that in this case the Apex Court noted with approval of the judgment in the case of **Balbir Singh (supra)** as also the Constitution Bench judgment in the case of **State of Punjab Vs. Baldev Singh** since reported in **(1999) 6 Supreme Court Cases 172**. Their Lordships held that the Constitution Bench judgment in the case of **Baldev Singh (supra)** were dealing with non-compliance of Section 50 of the NDPS Act, which dealt with information to the accused to be searched before a Gazetted Officer, whereas in **Balbir Singh's case (supra)** dealt with non-compliance of Sections 41 and 42 of the NDPS Act. Their Lordships held that the High Court should have quashed the proceedings under Section 482 of the Cr.P.C. I may quote what was said in the under-noted paragraphs of the judgment:

4. Mr. K. Sukumaran, the learned Senior Counsel appearing for the appellant contended that on the basis of recovery of illicit material on search and seizure made by an Excise Inspector, not authorized under Section 41(2) or 42(1) of the NDPS Act, no charge could have been laid against the appellant so the High Court ought to have quashed the impugned proceedings.

5. Mr. Mukul Rohtagi, the learned Additional Solicitor General appearing for the respondent State, argued that the appellant could as well raise this plea at his trial before the Sessions Court and when the High Court declined to quash the proceedings it would

not be appropriate for this Court to quash the proceedings.

6. On these contentions, the question that arises for consideration is whether the impugned proceedings in Sessions Case No. 78 of 1993 are liable to be quashed under Section 482 of the Criminal Procedure Code.

7. The life and liberty of an individual is so sacrosanct that it cannot be allowed to be interfered with except under the authority of law. It is a principle which has been recognized and applied in all civilized countries. In our Constitution Article 21 guarantees protection of life and personal liberty not only to citizens of India but also to aliens.

8. The ground on which the proceedings are sought to be quashed is that search, seizure and the alleged recovery of "ganja" are all in violation of Section 42(1) being by an Excise Inspector who was not empowered under Section 41(2) of the said Act.

16. Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) of the NDPS Act or make a complaint under clause (d) of sub-section (1) of Section 36-A of the NDPS Act. It follows that any collection of materials, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorized officer under Section 41(2) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and use of such a material by the prosecution vitiates the trial.

17. To the same effect is the view expressed by this Court in State of Punjab v. Balbir

Singh. In paras 13 Jayachandra Reddy, J. speaking for the Court observed thus: (SCC p. 313)

“13. Therefore, if an arrest or search contemplated under Section 41 and 42 is made under a warrant issued by any other Magistrate or is made by any officer not empowered or authorized, it would per se be illegal and would affect the prosecution case and consequently vitiate the trial.”

18. It is well settled that the power under Section 482 CrPC has to be exercised by the High Court, inter alia, to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused. In our opinion, exercise of power under Section 482 CrPC to quash proceedings in a case like the one on hand, would indeed secure the ends of justice.

20. It may be noticed that that conclusion was reached by the Constitution Bench in the context of non-compliance with Section 50 of the NDPS Act. While emphasising that it is imperative on the officer who is making search of a person to inform him of his right under sub-section (1) of Section 50 of the NDPS Act, it was held that the recovery of the illicit article in violation of Section 50 of the NDPS Act would render the recovery of the illicit article suspect and use of such material would vitiate the conviction and sentence of



an accused. It is manifest that the recovery of an illicit article in that case was by a competent officer but was in violation of Section 50 of the NDPS Act. In the instant case, however, the search and recovery were by an officer who was not empowered so to do. Further in Balbir Singh case this Court took the view that arrest and search in violation of Sections 41 and 42 of the NDPS Act being per se illegal would vitiate the trial. Therefore, the said conclusion cannot be called in aid to support the order under challenge. If the proceedings in the instant case are not quashed, the illegality will be perpetuated resulting in grave hardship to the appellant by making him to undergo the ordeal of trial which is vitiated by the illegality and which cannot result in conviction and sentence. It is, in our view, a fit case to exercise power under Section 482 CrPC to quash the impugned proceedings.

37. Thus, in my view, the aforesaid judgments clearly indicate that if a person who is not authorized to enter, search, inspect or seize by the statute, which creates the obligation and the offences, then the very inception of the prosecution is based upon a fundamental illegality, which is not curable irregularity and the High Court would, thus, have the power to interfere at the very inception itself.

38. In view of the aforesaid, it cannot be said that the decision of this Court in **Ramchandra Pansari (supra)** or **Sanjay Kumar Jaiswal (supra)** requires reconsideration. To the contrary,

the judgment in the case of **Madhusudan Prasad (supra)** would not be laying down the correct law.

39. In fairness to the State, I may first notice the case of the Apex Court in the case of **H.N. Rishubud and another Vs. State of Delhi** since reported in **AIR 1955 Supreme Court 196**. That was a case under Prevention of Corruption Act where the investigation was conducted by an unauthorized Police Officer. The case dealt with investigation and not the initial entry, search and seizure, which was the foundation in the case at hand. The Apex Court held that irregularity in course of investigation would not vitiate the trial. Similarly reliance has been placed on behalf of the State on the case of State of **M.P. Vs. Ramesh C. Sharma** since reported in **(2005) 12 Supreme Court Cases 628** which case is clearly distinguishable, inasmuch as the aforesaid case again dealt with irregularity in course of investigation. The Apex Court, *inter alia*, relying on **H.N. Rishubud (supra)** and other decisions held that an irregularity in course of investigation would not vitiate the trial.

40. In fairness to learned counsel for the State, another argument must be noted. He submits that by virtue of Section 10 A of the E.C. Act, offences punishable under the E.C. Act are cognizable and, as such, any Police Officer can investigate the offence and F.I.R. can be registered upon entry, search and seizure by any person. To



me, there is a distinction when the Act itself provide that only such officers who are authorized can enter, search and seize, which is the foundation for the prosecution, then the general power in terms of Section 4 (2) of the Cr.P.C. would stand excluded. Moreover, what is contended herein and what has been noticed by the Supreme Court in the case of **Balbair Singh (Supra)** and **Roy V.D. (supra)** is with regard to illegality, at the very inception, for holding the prosecution to be invalid. I may refer in this connection that these decision are, not notwithstanding, similar provision of Section 37 (1) (a) of the NDPS Act which also provides that every offence punishable under this Act shall be cognizable. In spite of this, it was held that the initial entry, search and seizure had to be authorized under the NDPS Act otherwise the prosecution has to fail.

41. Thus, in my view, the decisions of this Court in the case of **Ramchandra Pansari (supra)** or **Sanjay Kumar Jaiswal (supra)** requires no consideration as they lay down the correct law, the decisions to the contrary are not laying down the correct law. Reference is answered accordingly. Prosecutions in both the cases under reference to Full Bench have to be quashed accordingly.

(Navaniti Prasad Singh, J.)

Per Hon'ble Mr. Justice Chakradhari Sharan Singh :-

42. I have had the privilege of going through the judgment written by my esteemed brother, Navaniti Prasad Singh, J. Despite the profound regard, which I have for His Lordship's erudition and scholarship, I have not been able to persuade myself to agree with the views recorded in the judgment and, therefore, I am recording my own views, on the question involved, in order to answer the reference.

43. The moot question, which has arisen in the present reference made to the Full Bench is as to whether a criminal prosecution launched on the basis of illegal entry, search and seizure should essentially be quashed at the very threshold in exercise of power under Articles 226/227 of the Constitution of India or under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "**Cr.P.C.**"). Noticing the conflict of judgments by a Division Bench of this Court, in the case of **Madhusudan Prasad v. State of Bihar**, rendered on 25.11.1981, in **Cr.W.J.C. No. 212 of 1981**, and in the case of **Ram Chandra Pansari v. The State of Bihar**, reported in **1988 PLJR 623**, and the decision rendered by a learned single Judge of this Court, in the case of **Sanjay Kumar Jaiswal v. State of Bihar**, reported in **1990 PLJR 416**, a learned single Judge of this Court has referred the matter to a Larger Bench by an order, dated 08.03.1991, passed in Criminal Misc. No. 6735

of 1986, for an authoritative pronouncement on the question involved and for setting the controversy at rest.

44. Before I proceed to take note of the issues involved in the present reference, I must point out a significant development in this regard. In a recent decision, a Division Bench of this Court, in the case of **Jagdish Sah and Others v. The State of Bihar and Another**, reported in **2014 (1) PLJR 243**, has held the judgment rendered in the case of **Ram Chandra Pansari** (supra), *per incurium*, having not taken notice of the amendment made in the Essential Commodities Act, 1955 (hereinafter referred to as the "**E.C. Act**"), whereby the offence, under of the E.C. Act, came to be declared cognizable. The Division Bench, in the case of **Jagdish Sah** (supra), was answering a reference made by a learned single Judge to the following effect:-

"i. Whether after the amendment of the Essential Commodities Act, 1955, making offence cognizable though the Police has not been notified as an Inspector under the different Control Orders, has jurisdiction to make the search and seizure of the premises or the moving vehicles or carts carrying essential commodity in violation of the Act will make the search and seizure illegal in consequence, will lead the whole prosecution illegal or irregular

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and the prosecution would vitiate depending on prejudice caused to the accused concerned?

ii. Whether the seizure of loaded vehicle intercepted by Police at a deserted place in dark night, will make such search illegal, would vitiate the whole prosecution?"

45. The Division Bench answered the reference in paragraph 18 of the decision, in case of **Jagdish Sah** (supra), by concluding as under:-

"18. Having noticed the facts, heard the arguments and dealt with the case law relied upon by the counsel for the parties, it is evident that the petitioners in the four petitions have challenged the order taking cognizance or refusing to discharge them of the offence under Section 7 of the Act on the ground that launching of the prosecution against the petitioners was preceded by illegal search, seizure. In support of such contention heavy reliance has been placed by the counsel for the petitioners on the Division Bench judgment of this Court in the case of Ram Chandra Pansari (supra), perusal whereof indicates that Division Bench in the case of Ram Chandra Pansari has placed heavy reliance on the

judgment of the Supreme Court in the case of K.L. Subhayya (supra) and held that in case of illegal search and seizure prosecution under Section 7 of the Act is fit to be quashed. While quashing the prosecution of Ram Chandra Pansari Division Bench of this Court did not notice the Amendment made in the Act by Act 36 of 1987 making the offence under the Act cognizable. The Division Bench also could not notice sub-section (2) of Section 4 of the Cr.P.C. which empowered the police to investigate, enquire into, try or otherwise deal with cognizable offence committed under any law including the Act with reference to the provisions contained in Sections 41 to 60, 70 to 81, 93 to 105 and 165 Cr.P.C. The Division Bench in the case of Ram Chandra Pansari also did not notice the earlier Supreme Court judgment in the case of Wassan Singh (supra) holding that irregularity in search cannot vitiate the seizure of the articles. Division Bench also did not notice the case of Radha Kishan (supra) holding that irregularity in search would cast a duty upon the court to scrutinize the evidence regarding search very carefully. Division Bench also did not consider the law laid down by the

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Supreme Court in the case of Shyam Lal Sharma (supra) that even if the search is illegal subsequent steps in the investigation shall not be vitiated on account of illegality in search and seizure. It also did not consider the dictum of the Supreme Court laid down in the case of State of Kerala Vs. Alasserry Mohammed etc. (supra) where the Supreme Court observed that failure on the part of the Inspector to comply strictly with the statutory provisions would not vitiate the trial and conviction of the respondents. Finally the Division Bench in the case of Ram Chandra Pansari (supra) also did not consider the case of State of Maharashtra Vs. Natwarlal Damodardas Soni (supra) referred to in the reference order in which Supreme Court observed that police has powers under the Code of Criminal Procedure to search and seize the commodity if they had reason to believe that a cognizable offence has been committed in respect of the commodity. It is, therefore, evident that Division Bench in the case of Ram Chandra Pansari (supra) could not notice the amending Act 36 of 1987 whereunder offence under the Act is made cognizable as also the Supreme Court judgments

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noted above in the case of Wassan Singh, Radha Kishan, Shyamlal Sharma, State of Kerala Vs. Alasserry Mohammed etc. and State of Maharashtra Vs. Natwarlal Damodardas Soni (supra) whereunder it has been observed that illegality in search and seizure may not vitiate the prosecution, trial and conviction unless prejudice is shown to have been caused to the offender. It is, thus, not difficult to conclude that the Division Bench judgment of this Court in the case of Ram Chandra Pansari (supra) has been rendered without the benefit of having noticed the amending Act 36 of 1987, the judgment of the Supreme Court in the case of Wassan Singh, Radha Kishan, Shyam Lal Sharma, State of Kerala Vs. Alasserry Mohammed etc. and State of Maharashtra Vs. Natwarlal Damodardas Soni (supra) is per in curium and not a binding precedent. In view of the provisions of Amending Act 36 of 1987 (sic,1967) offence under the Act having been made cognizable police officers though not notified as Inspector under the different control orders issued under the Act have the jurisdiction to investigate the offence committed under the Act with respect to the

essential commodity. Search and seizure being part of investigation police officers have also jurisdiction to conduct search, seizure of the premises, vehicle in which the essential commodity is stored or is being transported."

46. Before I proceed to consider, in this background, the three Division Bench decisions of this Court in case of **Madhusudan Prasad** (supra), **Ram Chandra Pansari** (supra) and **Jagdish Sah** (supra), I must indicate here itself that offence, under Section 7 of the E.C. Act, has been made cognizable by Essential Commodities (Second Amendment) Act, 1967 (Indian Parliament Act No. 36 of 1967), and not Act No 1987, as mentioned in case of **Jagdish Sah** (supra), which is apparently result of a typographical/printing error.

47. I need to notice, now, the conflicting views in case of **Madhusudan Prasad** (supra) and in case of **Ram Chandra Pansari** (supra). In the case of **Madhusudan Prasad** (supra) exactly the same question had arisen as to whether the prosecution under Section 7 of the EC Act deserved to be quashed since it was based on search/inspection conducted by a person, who was not an Inspector of fertilizers. Answering the said question, the Division Bench of this Court, in case of **Madhusudan Prasad** (supra), held in paragraph 8 as follows:-

"8. Mr. Rameshwar Prasad,

however, relied upon certain decisions to show that where the search is illegal no prosecution can be launched and the prosecution was bound to fail. He first relied upon the case of K.L. Subhayya Vrs. State of Karnatka (A.I.R. 1979 S.C. 711) where the search was made in violation of provision of section 54 of Mysore Excise Act. It was held that if the search was illegal as a logical corollary, conviction was vitiated. That case, however, is distinguishable inasmuch as under section 54 of the Mysore Excise Act, as has been pointed out by the Supreme Court, no search would have been made unless the provisions were complied with and non-compliance was held to be such as illegality as vitiated the conviction. In the instant case there is no such provision which specifically proves under the Fertilizer (Control) Order, 1957 that a search or inspection can not be made by any other person except an inspector of fertilizer. The next case relied upon by the learned counsel is the case of Suresh Prasad Vrs. State of Bihar and others (1981 Bihar Labour and Review Journal, page 1) where a Bench of this Court held that if a seizure was illegal then no confiscation on the basis of illegal

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seizure could be made under section 6A of the Act. That case is again distinguishable because section 6A authorises the competent authority to confiscate the goods seized in accordance with law which are not in violation of section 7 of the Act. In the case before us there is no such provision. We are therefore of the view that the investigation which is being conducted on the basis of the first information report, a copy of which is annexure 2, can not be quashed or set aside."

48. In a subsequent decision, in case of **Ram Chandra Pansari** (supra), the another Division Bench of this Court, answering the challenge to the prosecution on the same ground, held in paragraph 7 as follows:-

"7. In the case before us, the trial has not begun. The petitioner, therefore, is certainly entitled to raise the point regarding violation of the mandatory provisions of rule 12 of the Order. There is another aspect also. The case reported in A.I.R. 1955 S.C. 196 (supra) shows certain infirmities in course of investigation, as it was investigated by an officer below the Deputy Superintendent of Police without the order of a Magistrate of

first class. But in the case at hand, the violation of rule 12 of the Order was not in the process of investigation rather it was the basis for registering the case under section 7 of the Act. The illegal search and seizure, therefore, is the foundation of the present prosecution and this, in my opinion, cannot be treated as mere irregularity and can also not be cured and rectified by directing fresh search and seizure. The case reported in A.I.R. 1955 S.C. 196 (supra) does not help Mr. Jaiswal."

49. In the case of **Ram Chandra Pansari** (supra), the Division Bench held that since search and seizure made by Assistant Sub Inspector of Police was without jurisdiction, the same had to be ignored and once the search and seizure was ignored, the very foundation for instituting a proceeding under Section 7 of the E.C. Act, would vanish. In effect, this Court, in the case of **Ram Chandra Pansari** (supra), has proceeded on the premise that if search and seizure are illegal, the First Information Report on such basis and subsequent investigation and submission of charge sheet, all stand vitiated. Similar view was taken by a learned single Judge, in the case of **Sanjay Kumar Jaiswal** (supra). In the case of **Sanjay Kumar Jaiswal** (supra), search and seizure of fertilizer was made by District

Agriculture Officer and in the absence of any valid notification under the provisions of Fertilizer (Control) Order, 1985, he was held not to be authorized to conduct search and seizure and, accordingly, the prosecution, in the said case, was quashed.

50. It is noteworthy years before this Court's decision, in the case of **Ram Chandra Pansari** (supra), came to be pronounced; the Division Bench of this Court had negated the contention that entire investigation and criminal prosecution would stand vitiated because the Supply Inspector, who had conducted the search/seizure was not declared Inspector under the Control Order and, accordingly, the very foundation of lodging of the criminal case was bad, in the case of **Madhusudan Prasad** (supra). The said decision had come on 25.11.1981. The Division Bench, in the case of **Madhusudan Prasad** (supra), held that even if there was an illegality in the inspection; investigation of the case could not be quashed.

51. It is evident on perusal of the Division Bench decision, rendered in the case of **Ram Chandra Pansari** (supra), that it did not notice the earlier decision of a co-ordinate Bench, in the case of **Madhusudan Prasad** (supra), possibly because the said decision was not reported in any law journal.

52. Noticing the apparent conflict between the two Division Bench decisions, in the cases of **Ram Chandra Pansari** (supra) and **Madhusudan Prasad** (supra), keeping in mind the

importance of the issue involved, a learned single Judge, by an order, dated 08.03.1991, passed in Criminal Misc. No. 6735 of 1986, referred the matter to a Larger Bench for authoritative pronouncement in the following terms:-

"5. That apart, the points involved in the case are important questions of law. The offences punishable under the Essential Commodities Act have been made cognizable (Section 10A). According to Section 11 of the Act, the Court is precluded for taking cognizance of the offences under the Act except upon a report in writing constituting such offence made by a public servant. In a case proceeded on First Information Report, the report submitted by the Police under Section 173 (2) of the Code disclosing an offence along with accompanying documents is treated as report in writing by the public servant and cognizance is taken on the basis of the said report. In such a situation, question arises as to whether illegality in search and seizure conducted prior to the lodging of First Information Report will vitiate the prosecution even though the written report submitted by the police contains facts constituting offence under the Act. The other issue to be

determined is as to whether this Court will quash the prosecution at the threshold on the ground of illegality in search and seizure even though the allegations constitute a prima facie case.

6. As the decisions rendered by the two Division Benches of this Court are conflicting and important questions of law are involved in the case, in my view, there should be an authoritative pronouncement on the point involved in this case by a Larger Bench for clarity of precedent. Let this case be placed before the Hon'ble the Chief Justice for considering the desirability of placing the matter before a Larger Bench."

53. Since the same issue, in question, cropped up in the case of **Rajan Kumar @ Rajan Lohani and Others v. The State of Bihar, (Criminal Misc. No. 11852 of 1984)**, a learned single Judge of this Court directed the said case to be listed along with Criminal Misc. No. 6735 of 1986 (Sitaram Sah v. State of Bihar). Later, one Cr. W.J.C. 714 of 1992 was filed, under Article 226 of the Constitution of India, questioning the search and seizure conducted by the Additional Superintendent of Police, C.I.D. (Food), Sahabad, and a Division Bench of this Court, by order, dated 02.03.1993, directed the case to be listed

along with Criminal Misc. No. 11852 of 1984. On a request being made by learned Counsel for the petitioner appearing in Criminal Misc. No. 6735 of 1986, the said application was permitted to be withdrawn by order, dated 16.07.1991.

54. This is how these two applications, one filed under Section 482 of the Cr.P.C. (Cr. Misc. No. 11852 of 1984) and another filed under Articles 226 and 227 of the Constitution of India (Cr. W.J.C. No. 714 of 1992), have been listed and taken up together by the Full Bench for answering the reference.

55. The issue involved for answering the reference can be better appreciated if facts of the two cases are narrated in brief:

CRIMINAL MISCELLANEOUS NO. 11852 OF

1984 :-

(i) Sub-Inspector of Police, Gaya, conducted an inspection on the business premises of M/s Kishan Ghar, a registered dealer in fertilizer, in course of which he found certain discrepancies, including in the matter of displaying stocks and prices of the fertilizers on the display board. When the inspection was made on 28.07.1981, in the display board, price of fertilizer was mentioned as on 26.06.1981, instead of 28.07.1981. Allegedly, books of accounts were also not produced for inspection. This was found to be in violation of Bihar

Essential Articles (Display of Price and Stocks) Order, 1977 (hereinafter referred to as the Display Order). Fertilizer falls in Entry-34 in Schedule-I to the said Display Order. The Display Order has been issued in exercise of power under Section 3 of the E.C. Act.

(ii) Section 7 of the E.C. Act, makes contravention of any Order made under Section 3 of the Act as punishable. Section 7 (1) (a) of the Act prescribes two categories of punishment for contravention of any Order made under Section 3 of the Act. One is with reference to clause (h) of clause (i) of Sub-Section (2) of Section 3 of the Act. In this case, the offence is punishable for a term, which may extend to one year. For any other violation, as per Section 7 (1) (a) (ii) of the Act, the punishment of imprisonment for a term which may extend to seven years has been prescribed. Section 10A of the Act has made all the offences under the Act to be cognizable.

(iii) Accordingly, on the basis of inspection report of the Sub-Inspector of Police, communicated to the Officer-in-Charge of Gaya Kotwali Police Station, an F.I.R. being Gaya Kotwali Police Station Case No. 0161 of 1981 came to be instituted. The Police, upon completion of investigation, appear to have submitted charge sheet,

whereupon the learned Chief Judicial Magistrate, Gaya, has taken cognizance on 07.02.1984.

(iv) Mithilesh Prasad is said to be the owner of the said firm. The petitioner No. 1, Ranjan Kumar, had claimed that he was merely sitting at the shop of Mithilesh Prasad when the inspection was held and had no connection at all with the business, in question, except occasionally doing the work of M/s Kishan Ghar in relation to matters relating to sales tax, etc. The petitioner No. 2, Kishori Prasad had claimed that he was working merely as salesman and he was in no manner responsible of conduct of the business of the firm of said Mithilesh Prasad. As per the records, upon transfer of the case after taking cognizance by the learned Chief Judicial Magistrate, Gaya, the matter is pending for trial in the Court of learned Sub Divisional Judicial Magistrate, Gaya, being G.R. No. 1668 of 1981 (Trial No. 669 of 1984).

(v) It is the plea of the petitioners that the Sub-Inspector of Police, Gaya, who had entered into the premises and conducted search and seizure, was not an Inspector of Fertilizer under the Fertilizer (Control) Order, 1957, issued by the Central Government, under the powers conferred upon it under the provisions of the E.C.



Act. It is their case that only an Inspector of Fertilizer, appointed under Clause 19 of the Fertilizer (Control) Order, had the authority to enter into a premises, conduct search and seizure of stocks of fertilizer in terms of Clause 20. It is, accordingly, their case that the very inspection, search and seizure, made by the Sub-Inspector of Police being illegal, the First Information Report on such basis and subsequent investigation and order taking cognizance stand vitiated.

CRIMINAL WRIT JURISDICTION CASE NO. 714

OF 1992 :-

(i) On the basis of an inspection conducted by the Additional Superintendent of Police, C.I.D. (Food), in the premises of Bhagwati Ji Rice Mill, Jakhini, on 25.09.1992, certain discrepancies were detected in relation to displaying the stocks, which was materially different from the stock of rice available.

(ii) With the allegation of violation of provisions of Bihar Trade Articles (Licenses Unification) Order, 1984 (hereinafter referred to as the "**Unification Order**"), Nokha Police Station Case No. 151 of 19912 was instituted for violation of the Unification Order, again punishable under Section 7 of the E.C. Act.

(iii) In this case also, it is being argued

that Additional Superintendent of Police, C.I.D. (Food), had no authority, under Clause 30 of the Unification Order and, therefore, First Information Report, registered on the basis of illegal entry, search and seizure, deserves to be quashed.

56. Both the cases in hand arise out of prosecution launched against the petitioners under the provisions of the E.C. Act, 1955. In both the cases, proceedings pending before the Courts below had been directed to be stayed by the separate interim orders passed in the said two cases.

57. As has been noticed, at the very outset, the only question which needs to be answered is as to whether on the basis that entry, search and seizure was made by a person not authorized will amount to vitiate the entire criminal prosecution, under the E.C. Act, founded on report of such inspection/search/seizure, right from its inception.

CASE OF THE PETITIONERS :-

58. It has been submitted on behalf of the petitioners that there being no dispute that inspection/search/seizure was made by Officers not authorized under the provisions of the E.C. Act, 1955 or the Orders issued thereunder, registration of the First Information Report based thereon and investigation conducted thereafter stand vitiated; any proceeding based on

illegally search/seizure/inspection, has no sanctity in the eyes of law/ and it would be an abuse of the process of the Court to allow investigation/enquiry/trial to continue.

59. Mr. Nawal Kishore Agrawal, learned Senior Counsel, on our request has appeared as *amicus curiae* and has extended valuable assistance to us. He has argued that the law laid down by Division Bench of this Court, in case of **Ram Chandra Pansari** (supra), is correct proposition of law and a proceeding instituted on the basis of an illegal search and/or seizure, made by a person not authorized to do so, shall stand vitiated. He has referred to the Supreme Court decision in case of **K.L. Subhaya Vs. State of Karnataka [AIR 1979 SC 711]**, relying on which the Division Bench of this Court delivered the judgment in case of **Ram Chandra Pansari** (supra). He has taken us to the Supreme Court decision in case of **State of Punjab Vs. Balbir Singh**, reported in **(1994) 3 SCC 299** and a subsequent Constitution Bench decision in case of **State of Punjab Vs. Baldev Singh**, reported in **(1999) 6 SCC 172**, wherein the Supreme Court had the occasion to consider whether strict compliance of Section 50 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as the "**NDPS Act**"), which lays down the procedure for search and/or seizure, is mandatory. Relying on the said decisions, it is his submission that search and/or seizure, made in



contravention of mandatory statutory provisions, shall render a criminal trial vitiated. He has argued that where the very foundation of a criminal case/registration of the First Information Report is based on inspection, search and/or seizure, made in contravention of the statutory requirements, the prosecution stands vitiated from its very inception. In such situation, he argues the prosecution, right from the beginning, will be *void ab initio* and this Court in exercise of powers under Section 482 Cr.P.C. or Articles 226/227 of the Constitution of India, should quash the entire proceeding from the very beginning, since otherwise it will be an abuse of the process of the Court. According to him, the Division Bench of this Court, in case of **Ram Chandra Pansari** (supra), has noticed this distinguishing feature between two situations, as noted above, and argued that the case of **Ram Chandra Pansari** (supra) enunciates correct proposition of law. He has, thus, submitted that the ratio in case of **Sanjay Kumar Jaiswal** (supra), laid down by a Single Judge of this Court, which is based on a Division Bench decision of this Court, in case of **Ram Chandra Pansari** (supra), also lays down the correct proposition.

60. Adverting to the Division Bench decision of this Court, in case of **Madhusudan Prasad** (supra), it has been submitted by Mr. Agrawal, learned Senior Counsel, that the said decision does not take into account the true import of the law

laid down by the Supreme Court in case of **K.L. Subhayya** (supra) and the distinction made with reference to Section 54 of the Mysore Excise Act, which was the subject matter in case of **K.L. Subhayya** (supra), is incorrect.

61. Learned Counsel, appearing on behalf of the petitioners, have adopted the arguments advanced by Mr. Agrawal, learned Senior Counsel.

CASE OF THE RESPONDENTS :-

62. Mr. Anjani Kumar, learned Additional Advocate General No.-II, appearing on behalf of the State of Bihar, has argued that the Division Bench decision of this Court, in case of **Ram Chandra Pansari** (supra), is *per incurium* inasmuch as it failed to notice the earlier Division Bench decision of this Court in case of **Madhusudan Prasad** (supra). According to him, the earlier Division Bench decision of this Court, in case of **Madhusudan Prasad** (supra), went unnoticed in which the Supreme Court decision, in case of **K.L. Subhayya** (supra), had been duly dealt with. He has next submitted that in any event, a criminal prosecution cannot be quashed, on the ground that inspection, search and/or seizure made by the officer, based on which the First Information Report came to be registered, was not authorized to make such inspection, search and/or seizure. It is his plea that even if it is held that the provisions, under the Control Order, requiring search to be made by authorized

officers only, to be mandatory, failure to comply with the provisions may render the recovery of the seized articles suspect, but in no event, on that ground investigation by the police itself can be said to be vitiated or on that basis subsequent proceedings or trial can be held to be illegal. According to him, the provision laying down the procedure, under the Control Orders, cannot be said to be mandatory.

63. Mr. Anjani Kumar, has also submitted that since the offence, under Section 7 of the E.C. Act, has been made cognizable, the police have wide and unquestioned powers to investigate, once commission of cognizable offence is brought to the notice of an Officer In-Charge of the concerned police station, under the scheme of the Cr.P.C.. He has submitted that the E.C. Act does not bar taking of cognizance of an offence, on the ground of illegality or irregularity in search and/or seizure. According to him, under Section 11 of the E.C. Act, the only limitation which has been put for taking of cognizance by the Court is that it should be based on a report, in writing, of the facts constituting such offence made by the person, who is a public servant, as defined in Section 21 of the Indian Penal Code or "*any person aggrieved or any recognized consumer association*". He, accordingly, submits that even if it is presumed that the inspection/search/seizure was not made by an authorized officer, that cannot be a ground for not taking



cognizance of the offence under Section 7 of the E.C. Act, on the basis of police report submitted after completion of investigation by the police. He has also submitted that unless the petitioners are in a position to demonstrate that inspection/search/seizure made by the concerned officer, becoming foundation of registration of the First Information Report, caused any serious prejudice amounting to miscarriage of justice; the First Information Report cannot be quashed in exercise of extra ordinary powers, vested in this Court, under Section 482 Cr.P.C. and under Articles 226/227 of the Constitution of India. He has placed reliance on Supreme Court decisions in case of **H.N. Rishbud & Anr. Vs. State of Delhi [AIR 1955 SC 196]**, **State of Maharashtra Vs. Natwarlal Damodardas Soni [AIR 1980 SC 593]**, **State of Punjab Vs. Wassan Singh & Ors.**, reported in **(1981) 2 SCC 1**, **Sunder Singh Vs. State of Uttar Pradesh [AIR 1956 SC 411]** and **Radha Kishan Vs. State of Uttar Pradesh [AIR 1963 SC 822]**, in support of his submission that an irregularity of the nature cannot vitiate the trial unless the accused is in a position to demonstrate that such irregularity or serious prejudice leading to miscarriage of justice.

DISCUSSION :-

64. Before I begin to discuss the rival submissions, made on behalf of the petitioners and the State of Bihar, for answering the reference, I may point out at the very outset that



no binding precedence has been shown to us, wherein it has been held that a criminal prosecution will be required to be quashed right from its inception, if an illegal or irregular search/seizure is the foundation for registration of a criminal case disclosing commission of a cognizable offence. All the Supreme Court decisions, which have been cited on behalf of the petitioners, as mentioned above, arise out of appeals after conviction of the accused persons. The effect of illegal search and/or seizure came to be elaborately discussed by the Supreme Court in later years in appeals arising out of conviction or acquittal when the provisions laying down the procedure for search and/or seizure, under the various sections of the NDPS Act, fell for consideration. In case of **State of Punjab Vs. Balbir Singh** (supra), the Supreme Court, while interpreting Section 50 of the NDPS Act, held that the provision was mandatory and non-compliance with the said provision would affect the prosecution case and vitiate the trial. Interpreting Section 50 of the NDPS Act, the Supreme Court, in case of **State of Punjab Vs. Balbir Singh** (supra), held that it was obligatory on the part of the officer concerned to inform the person to be searched, of his right to demand that the search be conducted in the presence of a gazetted officer or a Magistrate. The 2-Judge Bench decision of the Supreme Court, in case of **State of Punjab Vs. Balbir Singh** (supra), was subsequently affirmed

by a 3-Judge Bench of Supreme Court in case of **Saiyad Mohd. Saiyad Umar Saiyad & Ors. Vs. State of Gujarat**, reported in **(1995) 3 SCC 610**. However, in view of conflicting decisions in case of **State of H.P. Vs. Pirthi Chand & Anr.**, reported in **(1996) 2 SCC 37**, the matter was referred to a larger Bench of Supreme Court in case of **State of Punjab Vs. Baldev Singh** (supra). Upon threadbare analysis of statutory provisions, the Supreme Court, in case of **State of Punjab Vs. Baldev Singh** (supra), laid down the law in paragraph 57 as follows:-

"57. *On the basis of the reasoning and discussion above, the following conclusions arise:*

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under Sub-section (1) of [Section 50](#) of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior



information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of [Section 50](#) of the Act.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important

but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by [Section 50](#) at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in [Section 50](#) have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of [Section 50](#) and, particularly, the safeguards provided

therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in [Section 50](#) for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of [Section 50](#) are mandatory or directory, but, hold that failure to inform the person concerned of his right as emanating from sub-section (1) of [Section 50](#), may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during a search conducted in violation of the safeguards provided in [Section 50](#) of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under [Section 54](#) of the Act can only be raised after the prosecution has

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established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of [Section 50](#). An illegal search cannot entitle the prosecution to raise a presumption under [Section 54](#) of the Act.

(9) That the judgment in Pooran Mal case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of [Section 50](#) of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search.

(10) That the judgment in Ali Mustaffa case correctly interprets and distinguishes the judgment in Pooran Mal case and the broad observations made in Pirthi Chand case and Jasbir Singh case are not in tune with the correct exposition of law as laid down in Pooran Mal case."

(Emphasis added)

65. It cannot be forgotten that the Supreme Court, in case of **State of Punjab Vs. Baldev Singh** (supra), was laying down the law, keeping in mind the stringent provisions

prescribing severe punishment for mere possession of illicit drugs and psychotropic substances and in that circumstance, the effect of personal search having not been carried out strictly in accordance with the prescribed procedure.

66. I notice from the Supreme Court decision, in case of **State of Punjab Vs. Baldev Singh** (supra), with particular reference to paragraph 57, which has been extracted hereinabove, that the Supreme Court held that failure to inform the person of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to the accused and in case of failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where conviction has been recorded only on the basis of possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

67. Apparently, the Court did not hold that the prosecution of such person shall itself stand vitiated for non-compliance of provisions of Section 50 of the NDPS Act. In subparagraph 5 of paragraph 57, in case of **State of Punjab Vs. Baldeo Singh** (supra), the Supreme Court went on to clarify that whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court

on the basis of the evidence led down at the trial and finding on that issue, one way or the other, would be relevant for recording of order of conviction or acquittal. The Supreme Court, in expressed terms, held that it would not be permissible to cut-short the criminal trial. The Supreme Court further refrained from expressing any opinion as to whether the provisions of Section 50 of the NDPS Act were mandatory or directory, but held that failure to comply with the provisions of Section 50 of the NDPS Act, *i.e.*, to inform the person concerned of his right to be searched before a gazetted officer or a Magistrate, may render recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

68. The question of effect of the search conducted on an accused in violation of Section 50 of the NDPS Act, again came to be considered in a subsequent decision of Supreme Court in case of **Vijaysinh Chandubha Jadeja Vs. State of Gujarat**, reported in **(2011) 1 SCC 609**, paragraph 29 of which reads thus:-

"29. *In view of the foregoing discussions, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of*

false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

69. It can easily be noticed from the said decision of Supreme Court, in case of **Vijaysinh Chandubha Jadeja** (supra), that failure to comply with the provisions may render recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of recovery of illicit article from the person of the accused during such search, the Supreme Court never held that failure to comply with the said provision

would unexceptionally render the conviction vitiated. The said decision, in case of **Vijaysinh Chandubha Jadeja** (supra), has been subsequently relied on by the Supreme Court in case of **Ram Swaroop Vs. State (Government of NCT of Delhi)**, reported in **(2013) 14 SCC 235**.

70. As has been noticed in foregoing paragraphs, it is the plea on behalf of the State that even if it is presumed that entry/inspection/search/seizure was not made by an Officer authorized under the E.C. Act, or Control Orders issued thereunder, once First Information Report has been registered and/or cognizance has been taken by a Court of competent jurisdiction, the criminal proceeding cannot be said to be vitiated. It is their case that since the offence punishable is cognizable in view of Section 10A of the E.C. Act, power to investigate and prosecution based thereon cannot be said to have been vitiated.

71. I will now come to the decision of Supreme Court, in case of **K.L. Subhayya** (supra), which is, in fact, seat anchor of the petitioners' case and which is the basis for the Division Bench decision of this Court in case of **Ram Chandra Pansari** (supra). The said decision, in case of **K.L. Subhayya** (supra), has been considered by the Division Bench of this Court in case of **Madhusudan Prasad** (supra), wherein the Division Bench distinguished the provisions as contained in Section 54 of the



Mysore Excise Act and the provisions under the Fertilizer (Control Order), 1957. This is also to be noticed that in the case of **Radha Kishan** (supra), the Supreme Court has held that a person has a right to resist, if the search was illegal and in that circumstance, the Court may be inclined to examine the seizure carefully. The said decision in case of **Radha Kishan** (supra) has been noticed in case of **Ram Chandra Pansari** (supra), but it has been distinguished on account of the fact that in case of Ramchandra Pansari (supra), illegal search and/or seizure was the foundation of the case and, therefore, the investigation on that basis cannot be said to be lawful. We also find that on the same ground, the Division Bench of this Court, in case of **Ram Chandra Pansari** (supra), distinguished the case of **H.N. Rishbud** (supra).

72. In my opinion, the decision in case of **K.L. Subhayya** (supra), which arose out of a case under the Karnataka Excise Act, 1965 (1966 Kar. Act 21), has been wrongly applied in case of **Ram Chandra Pansari** (supra) by the Division Bench for quashing of the very investigation of the case in exercise of power under Section 482 of the Cr.P.C. for more than one reasons. Firstly, the provisions under the Karnataka Act of 1965, are materially distinct from the provisions under the E.C. Act inasmuch as the offence under the Karnataka Act of 1965, was non-cognizable and it has been

made cognizable by Amending Act 14 of 2005. I have examined the provisions of the Karnataka Excise Act (Mysore Act 21 of 1966), Sections 33 to 39 of which are penal provisions. The punishments prescribed under those provisions, as they existed prior to the judgment, in case of **K.L. Subhayya** (supra), was delivered in 1979 were less than three years. Evidently, power of the police to investigate a cognizable case on the basis of written report of an officer, submitted consequent upon illegal search and/or seizure, was not an issue before the Supreme Court in case of **K.L. Subhayya** (supra). The statement of objects and reasons for introducing *Amendment*, through Amending Act 14 of 2005, by Karnataka Legislature reads thus:-

"Amending Act 14 of 2005.-

It is felt necessary to make the excise law more stringent in order to net more revenue. Check excise evasion of excise duties, by taking away the existing compounding powers and making the law more stringent by rendering the offences under the Act cognizable and non-cognizable.

Hence the bill."

73. Evidently thus, in case of **K.L. Subhayya** (supra) the investigation of a cognizable offence by the police was not in issue. Secondly, the effect of result of an illegal investigation, search and/or seizure had been elaborately dealt with in case of

Radha Kishan (supra). With due respect, I am of the opinion that larger Bench decision in case of **Radha Kishan** (supra) had higher presidential value than the decision in case of **K.L. Subhayya** (supra). Thirdly, in case of **K.L. Subhayya** (supra), the Supreme Court did not hold that the investigation and trial would stand vitiated because of the illegal search. **K.L. Subhayya** (supra) is a short judgment in four paragraphs, the last paragraph of which, i.e., paragraph 4, is the consideration part, which reads thus:-

"4. This, therefore, renders the entire search without jurisdiction and, as a logical corollary, vitiates the conviction. We feel that both Sections 53 and 54 contain valuable safeguards for the liberty of the citizen in order to protect them from ill-founded or frivolous prosecution or harassment. The point was taken before the High Court which appears to have brushed aside this legal lacuna without making any real attempt to analyse the effect of the provisions of Sections 53 and 54. The High Court observed that these two sections were wholly irrelevant. With due respect, we are unable to approve of such a cryptic approach to a legal question which is of far-reaching consequences. It was, however, suggested that the word "place" would

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not include the car, but the definition of the word "place" under the Act clearly includes vehicle which would include a car. Thus the ground on which the argument of the petitioner has been rejected by the High Court cannot be sustained by us. We are satisfied that there has been a direct non-compliance of the provisions of [Section 54](#) which renders the search completely without jurisdiction. In this view of the matter, the appeal is allowed, the conviction and sentence passed on the appellant is set aside and he is acquitted of the charges framed against him."

74. Evidently, in the case of **K.L. Subhayya** (supra), the 3-Judge Bench decision of Supreme Court, in case of **Radha Kishan** (supra), was not considered. Further in view of the subsequent decisions of Supreme Court, some of which have been noticed above, on the point, the decision in case of **K.L. Subhayya** (supra) cannot have any binding precedence. In my opinion, the decision rendered by the larger Bench of Supreme Court, in case of **Radha Kishan** (supra), deals elaborately with the provisions of Section 165 of the Cr.P.C. The said decision having not been noticed in case of **K.L. Subhayya** (supra), the same cannot be said to be a binding precedent on the point of consequence of case having been registered on the basis of

illegal inspection, search or seizure, disclosing a cognizable offence. In my opinion, defect in search and/or seizure of the nature alleged, made before registration of an F.I.R., cannot vitiate registration of the First Information Report itself in relation to an offence, which is cognizable.

75. Before I proceed further, I must notice the 3-Judge Special Bench decision, in case of **Kuli Singh Vs. State [AIR 1978 PATNA 298]**, wherein expressing majority view, Hon'ble Justice Uday Sinha, J. (as he then was), dealing with the obligations of a Magistrate under Section 190 of the Cr.P.C., held in paragraph 11, as follows :-

"11. x x x x x x x That he would be doing not in exercise of any inherent jurisdiction but in exercise of his obligation cast upon him in terms of Section 173 (4) and Section 190 (1) (b) of the Code. This must be so except in cases where a statute provides that a Court shall not take cognizance of an offence except on a report in writing of facts constituting an offence as provided under the Essential Commodities Act or the Defence of India Rules and similar statutes. x x x x x x x."

(Emphasis added)

76. The said observation, by no means, construed to mean that power of a Magistrate to take cognizance of an

offence, under Section 7 of the E.C. Act, is not available under Section 190 of the Cr.P.C.. Section 190 of the Cr.P.C. falls under Chapter-XIV of the Cr.P.C., which lays down "conditions requisite for initiation of proceedings". Undisputedly, cognizance of an offence by a Magistrate is one of the conditions, requisite for initiation of a proceeding under the Cr.P.C..

77. Section 4 (1) of the Cr.P.C. prescribes that all the offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions of the Cr.P.C.. Section 4 (2) of the Cr.P.C. refers to offences under any other law and lays down that all such offences shall be investigated, inquired into, tried or "*otherwise dealt with*", according to the same provisions, but subject to any enactment for the time being in force, regulating the manner or place of investigating, inquiring into, trying or "*otherwise dealing with*" such offences.

78. For the benefit of quick reference Section 4 of the Cr.P.C. is being reproduced hereinbelow:-

"4. Trial of offences under the Indian Penal Code and other laws.-(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.
(2) All offences under any other law shall be investigated, inquired

into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

79. I may refer now Section 7 of the E.C. Act, which puts a restriction on taking of cognizance and prescribes that no cognizance can be taken by a Court of an offence punishable under the provisions of E.C. Act except on a report in writing of the facts constituting such offence made by a person, who is a public servant, as defined under Section 21 of the Indian Penal Code or any other person aggrieved or any recognized consumer association, whether such person is a member of that association or not.

80. Apparently, by virtue of Section 4 (2) of the Cr.P.C., an offence, under Section 7 of the E.C. Act, is to be investigated, inquired into, tried or "*otherwise dealt with*" in accordance with the provisions of the Cr.P.C., but subject to the provisions of E.C. Act. Section 11 of the E.C. Act deals with cognizance of offences under the Act and reads thus:-

"11. Cognizance of offences.- No Court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such

offence made by a person who is a public servant as defined in section 21 of the Indian Penal Code (45 of 1860) [or any person aggrieved or any recognised consumer association, whether such person is a member of that association or not]."

81. Ostensibly, therefore, power of a Magistrate to take cognizance, under Section 190 of the Cr.P.C., is subject to Section 11 of the E.C. Act, as quoted above. I should now come to Section 190 of the Cr.P.C., which reads thus:-

"190. Cognizance of offences by Magistrates. -(1) *Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-*

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the

second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.”

82. A conjoint reading of the provision under Section 190 of the Cr.P.C., Section 11 of the E.C. Act and Section 4 of the Cr.P.C. together, leaves no scope of doubt that a Magistrate can take cognizance of an offence, under Section 7 of the E.C. Act, upon receiving a complaint of facts made by “any person aggrieved or any recognized consumer association, whether such person is a member of that association or not”, in exercise of its jurisdiction under Section 190 (1) (a) or 190 (1) (c) of the Cr.P.C.. Needless to say that such complaint of facts should be in writing, in compliance of Section 11 of the E.C. Act. Further, since the offence is cognizable, the police have a duty to register a case, investigate it in accordance with the provisions of the Cr.P.C., on completion whereof submit a police report. Thereupon, the Magistrate may take cognizance of the offence punishable under Section 7 of the E.C. Act, exercising jurisdiction under Section 190 (1) (b) of the Cr.P.C.. Section 190 (1) (c) of the Cr.P.C. is a residuary provision under which the Magistrate may take cognizance of the offence “upon information received from any person other than a police officer” or “upon his own knowledge that such offence has been committed”. In case of offence under the provisions of E.C. Act,



by virtue of Section 11 of the E.C. Act, power to take cognizance under Section 190 (1) (c) of the Cr.P.C. is subject to condition that such person is himself "aggrieved" within the meaning of Section 11 of the E.C. Act or "any recognized consumer association, whether such person is a member of that association or not". It is true that the Magistrate cannot take cognizance of the offence, punishable under Section 7 of the E.C. Act, upon "his own knowledge" as occurring under Section 190 (1) (c) of the Cr.P.C., as Section 11 of the E.C. Act prohibits taking of cognizance except on "a report in writing of the facts constituting such offence".

83. This discussion can be summarized by holding that following conditions must exist for taking of a cognizance by a Magistrate for an offence to be punishable under the provisions of the E.C. Act:-

- (i) It must be on a report in writing of facts constituting such offence; and
- (ii) Such report in writing must be made either by:-
 - (a.) a person, who is a public servant, as defined in Section 21 of the Indian Penal Code;
 - (b.) any person aggrieved; and
 - (c.) any recognized consumer association,

whether such person is a member of that association or not.

84. Since the offence is cognizable, on the basis of the police report, submitted after completion of investigation by the officer-in-charge of the concerned police station, the Magistrate may take cognizance, exercising jurisdiction under Section 190 (b) of the Cr.P.C.. On the basis of a report in writing of facts constituting offence, made by a public servant, cognizance may be taken invoking jurisdiction under Section 190(1)(a) or Section 190 (1) (c) of the Cr.P.C..

85. Cognizance of an offence is taken under Section 190 of the Cr. P.C., in either of the three situations mentioned in Section 190(1)(a), 190(1)(b) and 190(1)(c) of the Cr.P.C. In case of offence, under the E.C. Act, cognizance can be taken by the Court only upon a report, in writing, of facts constituting such offence, made by a person, who is a public servant, as defined in Section 21 of the Indian Penal Code. By way of *Amendment* introduced *w.e.f.* 01.05.1987, persons aggrieved or any recognized consumer association can also make a report, in writing, on the basis of which the Court can take cognizance. What has been mentioned in the case of **Kuli Singh** (supra), as has been quoted above, is mere reiteration of provisions contained in Section 11 of the E.C. Act. There is no gainsaying

that a police officer is public servant on whose report, submitted under Section 173 of the Cr.P.C., a Magistrate can take cognizance of an offence punishable under the E.C. Act.

86. In the case in hand, the First Information Reports have been registered with the police in respect of commission of cognizable offence, punishable under Section 7 of the E.C. Act. Power of the police to investigate a cognizable offence is wide and unfettered, except in exceptional cases. The police may enquire into the correctness and truthfulness of inspection, search and/or seizure made by an officer, on whose report, the First Information Report came to be registered. Merely, on the ground that the First Information Report has been registered on the basis of report submitted by an officer not authorized under the Control Orders, the Investigating Officer does not become bound by such report as he is free to examine and investigate into the correctness or otherwise of the allegations made in the report. Therefore, even if there had been any defect on the ground that officer, who made the inspection, search and/or seizure, was not authorized to do so, the investigation based on that, cannot be said to be illegal. I am also of the opinion that since the offence, under Section 7 of the E.C. Act, is cognizable; the police may upon information initiate investigation on the basis of any information received with regard to commission of an offence under Section 7 of the E.C. Act.

87. Situated thus, I find it difficult to agree with the submissions advanced on behalf of the petitioners that the First Information Report needs to be quashed, on the ground that inspection/search/seizure, which is the foundation of registration of First Information Report, was not carried out by an officer authorized to do so.

88. Further, whether any defect in investigation can create a bar, in taking cognizance of the offence or holding trial, is the next step, which I intend to consider.

89. In my opinion, the Court's jurisdiction, under Section 482 of the Cr.P.C. or under Articles 226/227 of Constitution of India, to interfere with the investigation of a cognizable offence is very limited. The Supreme Court in case of **State of Bihar Vs. J.A.C. Saldhana**, reported in **(1980) 1 SCC 554**, made very significant observation in the very opening paragraph while considering the Court's jurisdiction to interfere with the investigation of an offence registered at a police station, which reads thus:-

"Reverence and anxiety to the same degree, if not more, to shoot at sight even a remote intrusion into the field preserved for judiciary must inform the judicial approach whenever assistance of the judicial machinery is sought for an unwarranted encroachment into the field of activity reserved for the other branch of

Government, more so, when extraordinary power conferred on the High Court to issue prerogative writ in aid of justice is invoked to thwart a possible detection of a suspected offence. How dangerous it is to rush in where one should be wary to tread is amply demonstrated by the facts revealed in these two appeals."

90. The Supreme Court noted with approval the Privy Council decision in case of **King Emperor Vs. Khwaja Nazir Ahmad, [AIR 1944 PC 18]**, wherein the Privy Council had made following observations of immense importance:-

"In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police and complementary, not overlapping, and the combination to be obtained by leaving each to exercise its own function, always, of course, subject to

the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it, and not until then."

91. The said decision of Supreme Court, in case of **J.A.C. Saldhana** (supra), has been consistently followed in a subsequent decision and the said proposition holds the field.

Conclusion:-

92. Having noticed the factual background and rival submissions advanced on behalf of the parties, as noted above, and various judicial pronouncements of the Supreme Court, to sum up my discussion, I answer the reference in following terms:-

(i) The judgment rendered by the Supreme Court, in case of **K.L. Subhayya** (supra), does not lay down a law that registration of an F.I.R disclosing commission of cognizable offence, on the basis of illegal inspection/search/seizure, will render the entire investigation, enquiry or trial, illegal from its very inception, requiring the High Court to exercise its extraordinary jurisdiction, under Section 482 of the Cr.P.C. or Articles 226/227 of the Constitution of India, by quashing the very F.I.R.

(ii) The Supreme Court, in case of **K.L. Subhayya** (supra), was dealing with a case arising out of a non-cognizable offence at the stage of appeal, after conviction. The Supreme Court in that case had no occasion to deal with the question of such illegality or irregularity in inspection/search/seizure made in a cognizable case, being investigated by the police.

(iii) A search being made by an officer, not authorized in this behalf, can be resisted by a person, whose premises are sought to be searched and because of illegality of that nature, the Court may be inclined to examine carefully, the evidence regarding seizure. Beyond these two consequences, no further consequence would ensue and seizure of the articles shall not be vitiated, as has been held by the Supreme Court in case of **Radha Kishan** (supra).

(iv) An illegal search may render the recovery of illicit articles suspect, but it will certainly not vitiate the trial. Further, the accused will have to make out a case that such illegal search by a person, not authorized, caused serious prejudice having consequence of miscarriage of justice.

(v) Seizure of loaded vehicle, inspected by a police, at a deserted place in dark night, will not make such search illegal and will not vitiate the entire prosecution, in view of what has been held above.

(vi) The Division Bench decision in case of **Ram**



Chandra Pansari (supra), to the effect that an F.I.R. registered on the basis of illegal seizure made, in violation of Rule 12 of the Bihar Motor Spirit and High Speed Diesel Oil Dealers Licensing Order, 1996, an Order, issued under Section 3 of the E.C. Act, shall stand vitiated on that ground and no investigation can legally ensue or trial held on such basis and, thereby, requiring the High Court to quash the prosecution, invoking jurisdiction under Section 482 of the Cr.P.C., with due regard, doesn't lay down the correct law. The decision in case of **K.L. Subhayya** (supra), has been incorrectly applied by Division Bench in case of **Ram Chandra Pansari** (supra). In case of **K.L. Subhayya** (supra), the offences were non-cognizable, under Karnataka Excise Act, 1965, whereas the offences under Section 7 of the E.C. Act is cognizable. The Division Bench decision in case of **Madhusudan Prasad** (supra) lays down the correct law, wherein it has been held that on the plea of illegality of search and/or seizure, having been made by an unauthorized officer leading to registration of an F.I.R, the said First Information Report cannot be quashed or set aside at very threshold, exercising power under Section 482 of the Cr.P.C.

93. Having answered the reference as above, I do not find any merit in these applications, which are, accordingly, dismissed. The interim orders stand vacated.

94. Before I part with, I must record my deep

appreciation for the assistance extended by Mr. N.K. Agarwal, learned Senior Counsel, who appeared, as *amicus curiae*, on our request, and Mr. Anjani Kumar, learned Additional Advocate General No. II, appearing on behalf of the State of Bihar.

(Chakradhari Sharan Singh, J.)

I agree with the views of
Hon'ble Mr. Justice C.S. Singh
I.A. Ansari, C.J.:

(I.A. Ansari, C.J.)

Trivedi/Praveen/-

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