

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

1. CRA-D-676-DB-2010

Harbhajan Singh alias Bhajan Singh

... Appellant

Versus

State of Punjab

... Respondent

2. CRA-D-737-DB-2010

Kuldeep Singh and others

... Appellants

Versus

The State of Punjab

... Respondent

3. CRA-S-2344-SB-2010

Harbhajan Singh alias Bhajan Singh

... Appellant

Versus

State of Punjab

... Respondent

**Reserved on : 19.12.2018
Date of decision : 08.02.2019**

***CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR.JUSTICE HARINDER SINGH SIDHU***

Present: Mr.P.P.S. Duggal, Advocate
for the appellant in CRA-D-676-DB-2010 &
CRA-S-2344-DB-2010.

Mr.Karamjit Singh Brar, Advocate
for the appellants in CRA-D-737-DB-2010.

Mr. Rajesh Bhardwaj,Sr.DAG, Punjab.

RAJIV SHARMA, J.

Since common questions of law and facts are involved in the aforesaid three appeals CRA-D-676-DB-2010, CRA-D-737-DB-2010 and CRA-S-2344-SB-2010, therefore these are taken up together and disposed of by a common judgment.

2. These three appeals are instituted against the judgment and order dated 27.05.2010 rendered by the learned Special Judge, Ferozepur in Sessions Trial No.101 of 2010 whereby the appellants Kuldeep Singh, Kashmir Singh alias Sheeru, Jagir Singh alias Jagira, and Jaswinder Singh alias Kala, who were charged with and tried for offences punishable under Section 15(c) and 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act') and appellant Harbhajan Singh alias Bhajan Singh, who was charged with and tried for offence punishable under Section 25 of the NDPS Act, were convicted and sentenced as under:-

Name of convict	Offence	Sentence	Fine	In default RI
Kuldeep Singh	15(c) read with Section 8 (c) of the NDPS Act	12 years	One lakh	Two years
Kashmir Singh alias Sheeru	15(c) read with Section 8 (c) of the NDPS Act	12 years	One lakh	Two years
Jagir Singh alias Jagira	15(c) read with Section 8 (c) of the NDPS Act	12 years	One lakh	Two years
Harbhajan Singh	25 NDPS Act	12 years	One lakh	Two years

One of the accused Jaswinder Singh alias Kala died during the pendency of trial.

3. The case of the prosecution in a nutshell is that on 04.01.2008, Sub Inspector Harpal Singh Incharge CIA Headquarters, Ferozepur along

with other police officials were on patrolling and checking of suspicious persons. When the police party reached near bus stand of village Machhi Bugra at Moga Ferozepur Road, SI Harpal Singh received a wireless message from Rajinder Singh DSP (D), Ferozepur at 11.30 A.M. that one truck bearing registration No.RJ 13 GA 0378 was coming from Faridkot side in which four persons were travelling. There was possibility of truck carrying heavy quantity of poppy husk. At about 1.00 P.M. the truck was seen coming from the side of Faridkot. It was stopped. The persons disclosed their identities. They were given option to get the truck searched in the presence of a gazetted officer or Magistrate. The accused replied that truck be searched in the presence of some gazetted officer. Thereafter DSP (D) Ferozepur Rajinder Singh reached at the spot. The truck was searched. It contained 165 bags of cement of Birla. Under the bags of cement, 30 more bags containing poppy husk were recovered. These were numbered 1 to 30. Two samples each containing 250 grams of poppy husk were separated from each of the bag. These were converted into parcels. The remaining poppy husk on weighment was found to be 39 kgs 500 grams in each bag. All the sample parcels and bulk parcels were separately sealed by the investigating officer. The case property was taken into possession. The investigating officer produced the accused and case property before SI Harinder Singh. He after verifying the facts of the case, put his seal 'HS' on the case property. He took the case property in his possession vide memo Ex.P5. On 05.01.2008, SI Harinder Singh produced the case property and accused before the learned Illaqa Magistrate. He moved applications Ex.P6 to Ex.P8. The Illaqa Magistrate passed the orders vide Ex.P9 to Ex.P11. On

10.01.2008 SI Harinder Singh completed Form 29 Ex.P12. The form along with samples and sample seal were handed over to Constable Kewal Singh for depositing the same in the office of Chemical Examiner. The Chemical Examiner's report is Ex.P13. The challan was put up after completing all the codal formalities. Police also put up supplementary challan against accused Harbhajan Singh alias Bhajan under Section 25 of the NDPS Act.

4. The prosecution examined a number of witnesses. Statements of accused were recorded under Section 313 Cr.P.C. They denied the case of prosecution. The appellants examined DW-1 Ajaib Singh and DW-2 Ghola Singh in their defence. The appellants were convicted and sentenced, as noticed hereinabove. Hence the appeal Nos.CRA-D-676-DB-2010 and CRA-D-737-DB-2010. The truck in question was ordered to be confiscated to the State. The appeal bearing No.CRA-S-2344-SB-2010 has been filed for setting aside the order of confiscation of truck in question.

5. Learned counsel appearing on behalf of the appellants have vehemently argued that the prosecution has failed to prove the case against the appellants.

6. Learned counsel appearing on behalf of the State has supported the prosecution case.

7. We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

8. PW-1 Constable Kewal Singh had tendered his evidence by filing his affidavit Ex.P1. According to the averments contained in the affidavit, on 04.01.2008 he was posted as Constable on general duty at Police Station Ghall Khurd at Ferozepur. On 10.01.2008 SHO Harinder Singh had handed over to him along with other parcels, 30 parcels of case

property with the seals HS, RS, and HS specimen, containing powder of poppy husk weighing 250 grams each duly sealed to be deposited into the office of Chemical Examiner, Amritsar.

9. PW-2 Harinder Singh testified that on 04.01.2008 he was posted as SHO at Police Station Ghall Khurd. He received ruqa Ex.P2 from SI Harpal Singh. He recorded FIR Ex.P3. He sent the special reports to higher officers including the Illaqa Magistrate. SI Harpal Singh produced before him the accused along with case property comprising 60 sample parcels of poppy husk weighing 250 grams each, 30 bulk parcels of poppy husk weighing 39 kgs 500 grams each. These were sealed with seal impression HS/RS along with sample chit Ex.P4. He verified the facts. He took the case property in possession vide memo Ex.P5. He recorded the statement of I.O. On 05.01.2008 he produced the case property, sample seal chit and accused along with applications Ex.P6 to P8 before the Illaqa Magistrate. The Illaqa Magistrate passed the orders Ex.P9 to P11. On 10.01.2008 he completed form No.29 Ex.P12 by pasting sample seal impression chit on it. He took 30 sample parcels of this case and handed over the same to Constable Kewal Singh. He directed him to get the docket forwarded from the office of SSP, Ferozepur and to deposit the samples with the office of Chemical Examiner, Amritsar. On receipt of report of the Chemical Examiner, the challan was put up. In his cross-examination, he admitted that sample seal chit Ex.P4 was pasted on separate piece of plain paper. This chit only bore his signatures and other writing on this slip including the words attestation above, his signatures and his designations are in the hand writing of SI Harpal Singh. The slip was pasted on docket

form Ex.P12. It was also admitted that the case property was ordered to be deposited in judicial malkhana. This case property was still lying in police station. It was brought to the Court from police station. Volunteered there was no space in judicial malkhana. He did not get the Court order modified regarding the deposit of case property in the police malkhana. There was no report of the Incharge of Judicial Malkhana that there was no space in judicial malkhana. He also admitted that there was no case diary regarding taking of the case property to judicial malkhana and being brought back. He did not record any case diary on 10.01.2018 regarding dispatch of samples to the laboratory. He admitted that whenever any case property is taken out from the malkhana for any official purpose and then re-deposited, entries of both these activities are always made in register No.19 under the signatures of SHO or officer who took the case property or who deposited it in malkhana on its return.

10. PW-3 SI Harpal Singh deposed that on 04.01.2008 he was posted as Incharge CIA Staff, Headquarters Ferozepur. He was on patrolling duty along with other police officials. They were informed about the movement of truck carrying poppy husk. They laid *naka*. The truck was stopped at 1.00 P.M. The accused were taken out from the truck. They disclosed their identities. An effort was made to join independent witness but none met them. The truck was searched in the presence of the DSP. 30 bags containing poppy husk were found in the truck. These bags were marked 1 to 30. Two samples each of 250 grams were drawn from each bag and converted into parcels. The remaining poppy husk on weighment was found to be 39 kgs 500 grams in each bag. He affixed his seal on all the

parcels bearing impression 'HS'. Sample seal impression chit was prepared separately vide Ex.P4. He filled up form Ex.P12. On return to the police station, he handed over the case property and accused to SI Harinder Singh. He affixed impression of his seal on Ex.P4. In his cross-examination, he admitted that he had seen the case property outside the Court. The seals on some of the bags were in broken condition. He admitted that the place of recovery was at a distance of about 35 kms. from Ferozepur. They remained at the spot for about 9 hours. There was no independent person in the party of DSP. At Talwandi Bhai, gazetted officers of other departments of Punjab Government were also posted and there was also Executive Magistrate posted at Talwandi Bhai. None of them was called to witness the recovery. He also admitted that sample slip Ex.P4 was prepared on a separate piece of paper and impressions of his seal, and that of DSP and SHO were not directly put on CFSL form Ex.P12 at the spot. CFSL form bears his signatures but there was no date under the signatures on it. He prepared three copies of CFSL form like Ex.P12. He could not tell where the other two copies of CFSL form were used by the SHO. Sample seal slips were prepared on three chits. On the other two CFSL forms, impressions of their seals were not directly put. There was no record on judicial file indicating that three copies of CFSL form and three sample seal chits were prepared at the spot.

11. PW-4 DSP Rajinder Singh deposed the manner in which the truck was searched and contraband was recovered.

12. PW-5 SI Gurpiar Singh deposed that on 04.01.2008 he was posted at CIA Headquarter Ferozepur. On that day, he along with SI Harpal

Singh and other police officials were going on two canters. They started checking process. At about 1.00 P.M., a truck bearing No.RJ13 GA-0378 was intercepted. Search was made and samples were drawn. Sample seal Ex.P4 was prepared and seal was handed over to him after its use. DSP Rajinder Singh also put one impression of his seal bearing impression RS on each parcel and also put one impression on sample seal chit. He retained his seal with him. Then the entire case property along with truck was taken into possession vide memo Ex.P23. CFSL form Ex.P12 was filled up at the spot. He admitted in his cross-examination that sample seal Ex.P4 was prepared on separate piece of paper and the impression of the seal of IO, DSP and SHO were not directly put on docket/CFSL from Ex.P12.

13. The appellants have examined DW-1 Ajaib Singh and DW-2 Ghola Singh. According to DW-1 Ajaib Singh, police came to their village and took away appellant Kuldeep Singh with the assurance that he would be released later on. Appellant Kuldeep Singh has tendered in his evidence copy of order dated 01.12.2009 Ex.D3, copy of order dated 16.02.2010 Ex.D4 and copy of order dated 16.02.2010 Ex.D5.

14. PW-2 Harinder Singh has categorically admitted in his cross-examination that sample seal Ex.P4 was prepared on separate piece of plain paper and thereafter pasted on Ex.P12. PW-3 SI Harpal Singh also admitted that sample seal Ex.P4 was prepared on a separate piece of paper and impressions of his seal, and that of DSP and SHO were not directly put on CFSL form Ex.P12 at the spot. CFSL form EX.P12 bore his signatures but there is not date under his signatures. He also deposed that he prepared three copies of CFSL form like Ex.P12. He could not tell where the other two

copies of Form 29 were used by SHO. Sample seal slips were also prepared on three chits. On the other two CFSL forms, impressions of their seals were not directly put. There was no record on judicial file indicating that three copies of CFSL form and three sample seal slips were prepared at the spot. It is a serious omission on the part of the police. They had not explained why separate chits were prepared. The seal impression should have been on the form itself. As noticed hereinabove, PW-3 SI Harpal Singh admitted that sample seal Ex.P4 was prepared on a separate piece of paper and impressions of his seal, and that of DSP and SHO were not directly put on CFSL form Ex.P12 on the spot. He also admitted that he had prepared three copies of CFSL form. There is no evidence on record that he prepared three copies of CFSL form and three sample seal slips were prepared at the spot. Thus the possibility of the same being affixed later on cannot be ruled out. Form No. 29 is required to be filled up on the spot after taking due precautions. All the columns should be filled up and seals of impressions should be on form itself and the pasting of the same later on is deprecated.

15. Entry in the Malkhana register to the effect that who had taken the property to the Court and brought it back, is necessary as per Punjab Police Rules, 1934. Para 22.70 of the Punjab Police Rules, 1934, reads as under:

“22.70. Register No. XIX- This register shall be maintained in Form 22.70.

With the exception of articles already included in register No. XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted in the appropriate column. The register may be destroyed three years after the date

of the last entry.”

The register is to be maintained in Form 22.70. It reads as under.

“FORM NO. 22.70.

Police Station _____

_____ District

Register No. XIX.-Store-Room Register (Part-I)

Column 1.- Serial No.

2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.

3. Date of deposit and name of depositor.

4. Description of property.

5. Reference to report asking for order regarding disposal of property.

6. How disposed of and date.

7. Signature of recipient (including person by whom dispatched).

8. Remarks.

(To be prepared on a quarter sheet of native paper).”

16. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is re-deposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is re-deposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case.

17. Sub-rule (2) of Rule 22.18 of Punjab Police Rules, reads as under:

“(2) All case property and unclaimed property, other

than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.

Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.

The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so.”

18. Rule 27.18 of Punjab Police Rules, reads as under:

“27.18. Safe custody of property.-

(1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency’s store-room, which register shall be maintained in Form 27.18(1).

Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to

which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.

(2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less than of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and

registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable.”

19. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is prescribed in Rule 27.18 that weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further provided in this Rule that every day, when the courts close, an officer of the prosecuting branch

of rank not less than that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

20. In Punjab Police Rules, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana / Store Room is to be recorded and also at the time when it is re-deposited.

21. In the instant case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in Register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

22. The case property was handed over to PW-2 SI Harinder Singh vide Ex.P5. He moved application Ex.P8 before the Illaqa Magistrate. The Illaqa Magistrate passed the order vide Ex.P11 on 05.01.2008. The order reads as under:-

“Heard. The case property be deposited in Judicial Malkhana. Intimation be sent to the Ld.CJM, Ferozepur.”

However the fact of the matter is that despite the specific order dated 05.01.2008, the case property was not kept in judicial malkhana. PW-2 SI Harinder Singh admitted in his cross-examination that case property though was ordered to be deposited in judicial malkhana, this case property was still lying in police station and was brought to the Court from police station itself. He volunteered said that there was no space in the judicial malkhana. However he also admitted that he did not get the Court order modified regarding deposit of case property. There was no report of Incharge of judicial malkhana that there was no space in the judicial malkhana. He admitted in his cross-examination that there was no case diary regarding taking of the case property to judicial malkhana and its return. He did not record any case diary on 10.01.2008 regarding dispatch of samples to the lab. He admitted that whenever any case property is taken out from the malkhana for any official purpose and then redeposited, entries of both these activities are always made in register No.10 under the signatures of SHO or other officers. PW-3 SI Harpal Singh admitted that he had seen the case property outside the Court lying in canter. The seals on some of the bags were broken. It was serious lapse on the part of the police. Once it was ordered to deposit the case property in the judicial malkhana, it should have

been deposited in the judicial malkhana alone. In case there was no space in judicial malkhana, the police should have moved an application for modification of the order dated 05.01.2008. There is no report from the Incharge of judicial malkhana that there is no space/room to keep the property in judicial malkhana. There is no corresponding entry when the case property was taken out from the malkhana and redeposited in the malkhana. There is detailed procedure under the Punjab Police Rules prescribing the manner in which the case property is to be deposited and taken out from malkhana. Since there is no entry in the malkhana, there is doubt whether the case property remained intact or not more particularly when the seal of certain bags were found broken. The contraband was seized on 04.01.2008 but it was sent for chemical examination only on 10.01.2008. PW-2 SI Harinder Singh also admitted that he did not record any case diary on 10.01.2008 regarding dispatch of sample to the laboratory. It is the duty of the police to ensure that case property always remains intact from the date of seizure till its production in the Court. The police had not joined any independent witness though the truck was apprehended at 1.00 P.M. PW-5 SI Gurpiar Singh deposed that seal was handed over to him but he returned the same to SI Harpal Singh after 2/3 days.

23. As far as appellant Harbhajan Singh is concerned, it was for the prosecution to prove that the owner of the vehicle had consciously permitted the vehicle to be used for commission of offence under the NDPS Act. No evidence in the present case has been led by the prosecution that the owner had knowledge that his truck was used for improper purposes. The prosecution has not discharged its onus to establish that Harbhajan Singh

knowingly allowed to use his truck to ferry contraband. There is also violation of mandatory provisions of Section 42 of the NDPS Act. Section 42 of the NDPS Act requires recording of reasons of belief and for taking down of information received in writing and the same is to be sent to the superior officers. There is no evidence that information was reduced into writing and superior officer was informed.

24. Their Lordships of the Hon'ble Supreme Court in ***State of Punjab vs. Balbir Singh, (1993) 3 Supreme Court Cases 299*** have held as under:-

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

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is

mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.”

25. The Division Bench of Bombay High Court in ***Lamin Bojang vs. State of Maharashtra, 1997 Crl.L.J.513*** have held that information which is to be sent is information prior to the raid. FIR lodged after the raid and though countersigned by superior official would not be compliance of requirement of Section 42(2). The Division Bench have held as under:-

“12. Mr. Nalawade next urged that the requirements contained in [Section 42\(2\)](#) have been satisfied inasmuch as there is evidence to indicate that FIR was countersigned by the immediate superior official, PI Chaugule. We regret that we have to reject this submission also. A careful reading of [Sections 42\(1\)](#) and [42\(2\)](#) would show that the information which is to be sent under [Section 42\(2\)](#) is the information, prior to the raid or that information in pursuance of which, a raid is to be carried out. The FIR admittedly was lodged after the raid had been conducted and the recovery panchnama had been prepared. We cannot persuade ourselves to accept that countersigning of the FIR by PI Chaugule PW 6 would satisfy the requirements enjoined by [Section 42\(1\)](#) r/w. [Section 42\(2\)](#) of NDPS Act. We accordingly, repel this submission of Mr. Nalawade also.”

26. Their Lordships of the Hon'ble Supreme Court in ***Sukhdev Singh vs. State of Haryana, (2013) 2 Supreme Court Cases 212*** have underlined the objects and purpose of ensuring strict compliance of Section 42. Their Lordships have held that Section 42 is mandatory which ought to be construed and complied with strictly. The compliance of furnishing

information to the superior officer should be forthwith or within a very short time thereafter and preferably prior to recovery. Their Lordships have held as under:-

“15. Section 42 can be divided into two different parts: first is the power of entry, search seizure and arrest without warrant or authorisation as contemplated under sub-section (1) of the said section; second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Subsection (2) of Section 42 had been a matter of judicial interpretation as well as of legislative concern in the past. Sub-section (2) was amended by the Parliament vide Act 9 of 2001 with effect from 2nd October, 2001. After amendment of this sub-section, the words ‘forthwith’ stood amended by the words ‘within seventy two hours’. In other words, whatever ambiguity or leverage was provided for under the unamended provision, was clarified and resultantly, absolute certainty was brought in by binding the officer concerned to send the intimation to the superior officers within seventy two hours from the time of receipt of information. The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the amended sub-section (2) of Section 42. This, in our opinion, provides a greater certainty to the time in which the action should be taken as well as renders the safeguards provided to an accused more meaningful. In the present case, the information was received by the empowered officer on 4th February, 1994 when the unamended provision was in force. The law as it existed at the time of commission of the offence would be the law which will govern the rights and obligations of the

parties under the NDPS Act.

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18. No law can be interpreted so as to frustrate the very basic rule of law. It is a settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity. The amendments to criminal law would not intend that there should be undue delay in disposal of criminal trials or there should be retrial just because the law has changed. Such an approach would be contrary to the doctrine of finality as well as avoidance of delay in conclusion of criminal trial.

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21. In the present case, the occurrence was of 4th February, 1994. The Trial of the accused concluded by judgment of conviction dated 4th July, 1998. Thus, it will be the unamended Section 42(2) of the NDPS Act that would govern the present case. The provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer. That obviously means without any delay. But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the said information to his superior officers but could do it later and preferably prior to recovery. Compliance of Section 42 is mandatory and there cannot be an escape from its strict compliance.

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28. Before we part with this file, we consider it the

duty of the Court to direct the Directors General of Police concerned of all the States to issue appropriate instructions directing the investigating officers to duly comply with the provisions of Section 42 of NDPS Act at the appropriate stage to avoid such acquittals. Compliance to the provisions of Section 42 being mandatory, it is the incumbent duty of every investigating officer to comply with the same in true substance and spirit in consonance with the law stated by this Court in the case of Karnail Singh.”

27. Their Lordships of the Hon'ble Supreme Court in ***Darshan Singh vs. State of Haryana, (2016) 14 Supreme Court Cases 358*** have held that Section 42(1) of the NDPS Act lays down that the empowered officer if he has a prior information given by any person, should necessarily take it down in writing, and where he has reason to believe from his personal knowledge, that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his reasons of belief. In the circumstances contemplated under Section 42 of the NDPS Act the mandate of the procedure contemplated under Section 42(1) and Section 42(2) will have to be followed separately, in the manner interpreted by the Supreme Court in Karnail Singh, (2009) 8 SCC 539. Their Lordships have held as under:-

“13. Having given our thoughtful consideration to the submission advanced at the hands of learned counsel for the respondent, we are of the view that the mandate contained in section 42(1) of the NDPS Act, requiring the recording in writing, the details pertaining to the receipt of secret information, as also, the communication

of the same to the superior officer are separate and distinct from the procedure stipulated under the provisions of the Criminal Procedure Code. Sub-section 1 of section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of Second Class specially empowered by the State Government may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Sub-section (2) of Section 41 refers to issue of authorisation for similar purposes by the officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc. Sub-section (1) of section 42 of the NDPS Act lays down, that the empowered officer, if he has a prior information given by any person, should necessarily take it down in writing, and where he has reason to believe from his personal knowledge, that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his reasons of belief. The two separate procedures noticed above are exclusive of one another. Compliance of one, would not infer the compliance of the other. In the circumstances contemplated under section 42 of the NDPS Act the mandate of the procedure contemplated therein will have to be followed separately, in the manner interpreted by this Court in Karnail Singh's case (supra) and the same will not be assumed, merely because the Station House Officer concerned had registered a first information report, which was also dispatched to the Superintendent of Police, in compliance with the provisions of the Criminal Procedure Code.”

28. Their Lordships of the Hon'ble Supreme Court in ***State of Rajasthan vs. Jagraj Singh alias Hansa, (2016) 11 Supreme Court Cases, 687*** have explained the true scope of Section 42 of the NDPS Act as under:-

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

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

“15.....The object of [NDPS Act](#) is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by

the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to [Section 42\(1\)](#). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.”

11. To the similar effect are the observations of this Court in [Saiyad Mohd. Saiyad Umar Saiyed & others vs. The State Of Gujarat](#). The following was stated in paragraph 6 of the said judgment:

“6. It is to be noted that under the [NDPS Act](#) punishment for contravention of its provisions can extend to rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and also to fine which shall not be less than Rupees one lakh but which may extend to Rupees two lakhs, and the court is empowered to impose a fine exceeding Rupees two lakhs for reasons to be recorded in its judgment. [Section 54](#) of the NDPS Act shifts the onus of proving his innocence upon the accused; it states that in trials under the [NDPS Act](#) it may be presumed, unless and until the contrary is Proved, that an accused has committed an offence under it in respect of the articles covered by it "for the possession of which he fails to account satisfactorily". Having regard to the grave consequences that may entail the possession of illicit articles under the [NDPS Act](#), namely, the shifting of the onus to the accused and the severe

punishment to which he becomes liable, the legislature has enacted the safeguard contained in [Section 50](#). To obviate any doubt as to the possession by the accused of illicit articles under the [NDPS Act](#), the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate.”

12. In the present case, [Section 42](#) is relevant which is extracted as below:

“ 42. Power of entry, search, seizure and arrest without warrant or authorisation.-(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired

property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

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

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

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

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

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

(2) Where an officer takes down any information in writing under subsection (1) or records grounds

for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

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

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

14. *What [Section 42\(2\)](#) requires is that where an officer takes down an information in writing under sub-Section (1) he shall sent a copy thereof to his immediate officer senior . The communication Exh. P-15 which was sent to Circle Officer, Nohar was not as per the information recorded in Exh. P 14 and Exh. P 24. Thus, no error was*

committed by the High Court in coming to the conclusion that there was breach of [Section 42\(2\)](#).

15. Another aspect of non-compliance of [Section 42\(1\)](#) proviso, which has been found by the High Court needs to be adverted. [Section 42 \(1\)](#) indicates that any authorised officer can carry out search between sun rise and sun set without warrant or authorisation. The scheme indicates that in event the search has to be made between sun set and sun rise, the warrant would be necessary unless officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded. In the present case, there is no case that any ground for belief as contemplated by proviso to sub-section (1) of [Section 42](#) or Sub-section (2) of [Section 42](#) was ever recorded by Station House Officer who proceeded to carry on search. Station House Officer has appeared as PD-11 and in his statement also he has not come with any case that as required by the proviso to Sub-section (1), he recorded his grounds of belief anywhere. The High Court after considering the entire evidence has made following observations :

“Shishupal Singh PD-11 by whom search has been conducted, on reaching at the place of occurrence by him no reasons to believe have been recorded before conducting the search of jeep bearing HR 24 4057 under [Section 42\(1\)](#), nor any reasons in regard to not obtaining the search warrant have been recorded. He has also not stated any such facts in his statements that he has conducted any proceedings in regard to compliance of proviso of [Section 42\(1\)](#). Since reasons to believe have not been recorded, therefore, under [Section 42\(2\)](#) it is not found on

record that copy thereof has been sent to the senior officials. Shishupal Singh could be the best witness in this regard, who has not stated any fact in his statement regarding compliance of proviso to [Section 42\(1\)](#) and [Section 42\(2\)](#), sending of copy of reasons to believe recorded by him to his senior officials.”

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

17. [Section 43](#) of the Act is as follows:

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

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such

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

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

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

18. Explanation to [Section 43](#) defines expression "public place" which includes any public conveyance. The word "public conveyance" as used in the Act has to be understood as a conveyance which can be used by public in general. [The Motor Vehicles Act, 1939](#) and thereafter the [Motor Vehicles Act, 1988](#) were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the [Motor Vehicles Act, 1988](#), no vehicle can be used for transporting passengers.

19. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers. The High Court has looked

into the evidence and come to the conclusion that there was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court has further held that even Kartara Ram who as per owner of the vehicle Veera Ram was using the vehicle, do not support that the jeep was used as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle.

20. The following observations were made by the High Court:

“Kartara Ram is produced as PD-5, who has deposed the statement that Vira Ram is his brother-in-law (Saala), on whose name jeep bearing No.HR 24 4057 is lying registered. He had employed Inderjit singh as driver for that jeep. Person namely Krishan has never been employed as driver. This witness has been declared hostile and he has been examined too, who does not support the prosecution case. In this manner, Viraram is the owner of the jeep. According to him he had given the jeep to Kartara Ram, but Kartara Ram has not stated anywhere in his statement that this jeep was given to him and he used the same as Public Transport Vehicle. Since powder of opium was caught in this jeep and even Notice Exh. P-6 was also served upon him by the police, he with a view to save himself, can also depose such statement that Kartara used to use the jeep as Public Transport Vehicle, whereas Kartara Ram PD-5 does not affirm this fact. Jeep was personal, it is clear on the record. In this manner, just on this ground that he has given the jeep to his brother-in-law and he used it to carry the passengers, the personal jeep could not be treated as public transport vehicle. However, the

fact that jeep is used to carry the passengers has not been affirmed from the statements of Kartara Ram. There is no evidence on record on the basis of which it could be stated that jeep was public transport vehicle and they have the permit for it, rather it was the private vehicle and it is stated that Vira Ram himself is the owner of that vehicle”

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

22. There is one more aspect which needs to be noted. The present is a case where prosecution himself has come with case that secret information was received from informer which information was recorded in Exh. P-14 and Exh. P-21 Roznamacha and thereafter the Station House Officer with police party proceeded towards the scene. The present is not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer in his statement has also come up with the facts and case to prove compliance of [Section 42](#). When search is conducted after recording information under [Section 42\(1\)](#), the provisions of [Section 42](#) has to be complied with. This

Court in *Directorate Of Revenue & Another vs Mohammed Nisar Holia*, (2008) 2 SCC 370, had occasion to consider *Sections 41, 42 and 43* explanation. The following was stated in paragraph 14:

“14. *Section 43*, on plain reading of the Act, may not attract the rigours of *Section 42* thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of *Section 42*, need not be complied with, only because the place whereat search is to be made is a public place. If *Section 43* is to be treated as an exception to *Section 42*, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of *Section 165* of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefor must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance.”

23. Thus the present is not a case where *Section 43* can be said to have been attracted, hence, non-compliance of *Section 42(1)* proviso and *Section 42(2)* had seriously prejudiced the accused. This Court had occasion in large number of cases to consider the consequence of non-compliance of provisions of *Section 42(1)* and *42 (2)*, whether the entire trial stand vitiated due to above non compliance or conviction can be set aside. In this context reference is made to the judgment of this Court

in State of Punjab Vs. Balbir Singh (1994) 3 SCC 299. In the above batch of cases, the High Court has acquitted accused on the ground that search was conducted without conforming to the provisions of the [NDPS Act. Sections 41,42 43](#) and other relevant provisions came for consideration before this Court, referring to the provisions of Chapter IV following was stated in paragraph 8:

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

forthwith send a copy thereof to his immediate official superior.”

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

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

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

(2-A) Under [Section 41\(1\)](#) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the

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

(2-B) Under [Section 41\(2\)](#) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

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

to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

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

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

(4-B) If an empowered officer or an authorised officer under [Section 41\(2\)](#) of the Act carries out a search, he would be doing so under the provisions of [CrPC](#) namely [Sections 100](#) and [165 CrPC](#) and if there is no strict compliance with the provisions of

CrPC then such search would not per se be illegal and would not vitiate the trial.

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

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

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

appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

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

26. A Constitution Bench of this Court in *State of Punjab Vs. Baldev Singh*, had occasion to consider the provisions of the *NDPS Act* and several earlier judgments of this Court. The Constitution Bench noticed that the earlier judgments in *Balbir Singh's case* has found approval by three Judges Bench in *Saiyad Mohd. Saiyad Umar Saiyed & others vs. The State Of Gujarat* (supra) and a discordant note was struck by two Judges Bench in *State of Himachal Pradesh Vs. Pirthi Chand* and another. The Constitution Bench approved the view of this Court in *Balbir Singh's case* that there is an obligation on authorised officer under *section 50* to inform the suspect that he has right to be informed in the presence of the Gazetted Officer. It was held by Constitution Bench that if search is conducted in violation of *Section 50* it may not vitiate the trial but that would render the recovery of illicit articles suspect and vitiates the conviction and sentence of the accused. What is said about non- compliance of *Section 50* is also true with regard to non-compliance of *Section 42* of the Act.

27. In *Beckodan Abdul Rahiman vs State Of Kerala*, this Court had occasion to consider both *Section 42* and *Section 50*. In the above case there was non compliance of *Section 42* (2) as well as *Section 50*. It was also noticed that a Constitution Bench in *State of Punjab Vs. Baldev Singh* (supra) has already laid down that provisions of *Section 42* and *50* are mandatory and their

non-compliance would render the investigation illegal. Following was held in paragraphs 5 and 6:

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

6. We are of the firm opinion that the provisions of sub-section (2) of [Section 42](#) and the mandate of [Section 50](#) were not complied with by the prosecution which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted.”

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

“1) In the case of [Abdul Rashid Ibrahim Mansuri vs. State of Gujarat](#), (2000) 2 SCC 513, a three-Judge Bench of this Court held that compliance of [Section 42](#) of the Narcotic Drugs and [Psychotropic Substances Act](#), 1985 (hereinafter referred to as "[NDPS Act](#)") is mandatory and failure to take down the information in writing

and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of [Sajan Abraham vs. State of Kerala](#), (2001) 6 SCC 692, which was also decided by a three-Judge Bench, it was held that [Section 42](#) was not mandatory and substantial compliance was sufficient.

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

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

29. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance of requirement of [Sections 42](#) and [50](#) is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance of [Section 42](#). The Constitution Bench noted the effect of the aforesaid two decisions in paragraph 5. The present is not a case where insofar as compliance of [Section 42 \(1\)](#) proviso even an arguments based on substantial

compliance is raised there is total non- compliance of [Section 42\(1\)](#) proviso. As observed above, [Section 43](#) being not attracted search was to be conducted after complying the provisions of [Section 42](#). We thus, conclude that the High Court has rightly held that non compliance of [Section 42\(1\)](#) and [Section 42\(2\)](#) were proved on the record and the High Court has not committed any error in setting aside the conviction order.

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

29. In view of the aforesaid observations, the appeals are allowed and the judgment and order dated 27.05.2010 are set aside. Appellants are acquitted. Appellant Harbhajan Singh alias Bhajan Singh is on bail. His bail bonds and surety bonds are discharged. Remaining accused are in custody. They be released forthwith. The truck in question is also ordered to be released to its registered owner.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

February 08, 2019.
Davinder Kumar

Whether speaking / reasoned

Yes/No

Whether reportable

Yes/No