

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 798 of 2008

Braja Baral & Anr.

-Vs-

The State of West Bengal

<i>Amicus Curiae</i>	: Mr. Amartya Ghosh
For the State	: Mr. Narayan Prasad Agarwala Mr. Pratick Bose
Heard on	: 17.01.2023, 25.01.2023
Judgment on	: 18.04.2023

Ananya Bandyopadhyay, J. :-

1. The instant appeal is preferred against the Judgment and Order of conviction dated 20.11.2008 & 21.11.2008 passed by Learned Additional Sessions Judge-cum-Judge Special Court under N.D.P.S. Act, Cooch Behar in G.R. Case No. 136/2003 under Section 20(b)(ii)(B) of the N.D.P.S. Act, convicting the appellants and sentencing them to suffer rigorous imprisonment for five years and to pay a fine of Rs.50,000/- each, in default, to pay fine, suffer simple imprisonment for five months more.
2. The prosecution case precisely stated on 10.09.2003 at about 7:10 PM, the accused who jointly possessed Ganja of 2.1KG+2.1KG+1.9KG respectively at Balarampur, Chowpathi, Tufangunj, were apprehended by the police and on enquiry they

failed to produce any valid documents and a license violating the provision of Section 8 of the NDPS Act.

3. Consequently, G.R. Case No. 136/2003 was initiated on 16.09.2003 before Learned Sub-Divisional Judicial Magistrate, Tufangunj. After completion of investigation, initiated on the basis of First Information Report being 84/03 dated 10.09.2003. Charge-sheet was submitted against the three accused persons out of which accused Manik Dutta died on 2.08.2008.
4. The prosecution cited 10 witnesses and exhibited certain documents.
5. The Learned Advocate acting as the Amicus Curie submitted that PW-1 failed to issue requisition to the S.D.O and C.I directly. There was no seal or label on the alamats, which cast a grave doubt on the prosecution case as the seal or label denoted unique identification without which presumption must be drawn against the prosecution.
6. It was further submitted by the Learned Amicus Curie that –
 - i. There is nothing to show on record that Section 42(2) and Section 50 of N.D.P.S. Act have been complied with. Appellants were not given options to search with witnesses before their search of seizure of the goods.
 - ii. Out of ten witnesses six are police personnel, one Government Officer i.e. PW-7 and only three independent witnesses.
 - iii. The independent witnesses i.e. PW4, PW5 and PW6 stated in their evidence that they were called by the

police and they signed the papers at Police Station without knowing the contents of the paper.

- iv. The place of occurrence stated by the PW1, P.C. Tufangunj that the accused persons were standing near the bus stop but the PW-7, Sub-Divisional Officer, Tufangunj stated that the place of occurrence was Balarampur Chowpathi near market, which were not the same place.
- v. There was no requisition made by the PW1 to Sub-Divisional Officer, Tufangunj and C.O. Tufangunj. The seizure were not made in accordance with law. There are no mentioning which of the three bags were seized from whom.
- vi. There is no proof that PW-2 was present at the place of occurrence as a part of this duty. The PW-2 stated that they went to the place of occurrence by a police vehicle but the accused/appellants did not flee after seeing the police vehicles.
- vii. There was no evidence that PW-1 asked the accused /appellants to be searched in presence of a Gazetted Officer.
- viii. PW-3, a Constable of police could not produce any documents to prove his presence at the place of occurrence.
- ix. PW-4 one of the independent witness stated that police called him and he had to go and sign on the

request on the police without knowing the contents of the papers. He signed at the police station.

- x. PW5 another independent witness, stated the only signed on the paper and he did not know the contents of the documents.
- xi. PW6 the last independent witness also stated that he signed at the police station and he did not know the contents thereof.
- xii. PW-7, Sub-Divisional Officer failed to produce any requisition paper through which he was called by the PW-1 or any other witness and he also stated that nobody came with him at the place of occurrence and he also could not say what was the weight of Ganja recovered from the accused persons though he claimed it was measured before him.
- xiii. PW-8 the Circle Inspector, failed to produce any requisition and he also admitted that there was no identification mark on the bags and he also failed to establish his presence by showing any documents.
- xiv. PW-9, Sub-Inspector of police failed to produce any document regarding his presence at the place of occurrence.
- xv. PW-10, the I.O. did not seize ganja and he also admitted that the G.D. Entry No. 581 was not mentioned in the complaint and that he was not present at the time of search and seizure and he also

admitted that in the envelope the weight of the sample was not mentioned.

7. Contradictions galore in the evidence of the prosecution witnesses being the police persons. The seizure witnesses denied having signed the seizure list. The ingredients constituting the offence to have been committed under Section 20(b)(ii)(B) of the N.D.P.S. Act could not be established and therefore the appeal shall be allowed.
8. The Learned Advocate for the State refuted the contention of the Learned Amicus Curie and submitted that the prosecution was successful in proving its case and the appeal shall be dismissed.
9. Assailing the evidence of the prosecution witnesses it appeared that PW-1/complainant in his deposition stated that no identifications were marked on the bags recovered from the accused persons. Labels on bags were not found due to repair or supposed repair work. Admittedly, similar bags were commonly available in the market. The source and destination of delivery were unknown.
10. PW2, a member of the raiding party, in his deposition differed from the Officer-in-Charge on nature of the bag. PW1 stated that it was plastic bag whereas PW2 stated it was jute bag. PW2 failed to find jute bag to be marked as exhibit. PW-2 did not sign on any document of seizure or labels.
11. PW3, another member of the raiding party, in his deposition stated that he failed to find jute bag to be marked as exhibit.
12. PW4, in his deposition stated that he owned a hardware shop near the place of occurrence. He further stated that he lived 2-3 kms

away from the place of occurrence and he arrived at the place of occurrence after being called by police. He handed over the weighing apparatus to police and signed on papers as per direction of police being unaware of the contents. He stated that he was not examined by the Investigating Officer.

13. PW5, in his deposition stated that he signed on papers as per direction of police being unaware of the contents.
14. PW6, in his deposition stated that he had a shop at the place of occurrence and he signed on papers as per direction of police being unaware of the contents. He further stated that police arrived at the place of occurrence around 17:30hrs.
15. PW7 stated in his deposition that on 10.09.2003 he was posted as S.D.O. at Tufangunj. He stated no information was received by way of written statement. He further stated that he could not recall the weights of Ganja recovered from accused persons. PW7 admitted that no photographs were taken of the samples collected.
16. PW-8 stated in his deposition that on 10.09.2003 he was posted as Circle Inspector at Tufangunj. PW-8 stated he received information over telephone from ASI. PW-8 further stated that search for accused persons were conducted at 8 PM. PW8 stated that the large bag was with Braja Baral, which differed from the evidence of PW1. PW-8 identified jute bag for the first time in Court. PW8 submitted that he reached the place of occurrence between 8 PM and 8.05 PM. PW-8 denied having signed on any samples or documents.

17. PW-9 in his deposition stated that on 10.09.2003 he was posted as S.I. at Tufangunj Police Station. PW-9 submitted that they reached the place of occurrence at about 7/7:10 PM. PW-9 further stated that weighing scale was not labelled and marked.
18. PW-10, Investigating Officer, stated in his deposition that on 10.09.2003 he was posted as S.I. at Tufangunj Police Station. Search and seizure were not made in the presence of PW-10. PW-10 only visited the place of occurrence on the morning after the arrests. PW-10 failed to name the accused persons. PW-10 only examined 1 out of 3 independent witnesses.
19. PW-1, Officer-in-Charge failed to note the G.D. Entry No. 581 dated 10.09.2003 in the written complaint which was lodged suo-moto by the PW-1. PW-1 did not “make any (gala) seal of the alamats. He could not state how many people gathered. He was unaware of the place of initiation and the destination of the accused persons.
20. PW-1 stated as follows:-

“We asked about the 3 accused persons carrying bags. Naturally, we detained the accused persons. We interrogated them. The accused persons admitted that they were carrying ganja. They disclosed their names, Manik Dutta, Brojo Baral and Sudhakar Goswami. Manik Dutta disclosed his address as Dutta Para and the other two accused persons disclosed that they are hailing from Orissa. We informed the Duty Officer, A.S. I. Ranjit Kumar Sarkar regarding the incident. We requested S.D.O. and C. I. Sadar to come to the spot. S.D.O. and C. I. Sadar arrived at the P.O. at 20.05 hours. S.D.O. Sushanta Dutta and C. I. Ranjit Mukherjee arrived on the spot. In presence of the Circle Inspector and the S.D.O.

we searched and seized the bags, when we found ganja was kept inside the bags. Manik Dutta was possessing ganja in silver grey coloured bag. He wrapped the ganja inside the plastic covered bag. Brojo Baral was carrying ganja in a green and red-coloured bag. He wrapped the ganja in red coloured plastic bag. Sudhakar Goswami was carrying a black-coloured office bag containing 2 packets of ganja wrapped in Old News Papers.

These are the alamats (identified) Mat Exhibit- I collectively along with the office bag (2 packets). These are the labels prepared by me also marked Mat Exhibit-I.

These labels bear the signature of the accused, witnesses and the gazetted officers and S.D.O. Tufanganj, marked Mat Exhibit-1/1 and 1/2. The labels are de-touched from the, alamats for repairing and kept with exhibit lists. Sudhakar was carrying these materials. Manik Dutta was carrying this larger bag which was steel grey coloured with stripes. The rodents have written away some parts of the bag. This bag wrapped by red polythene was recovered from Brojo Baral, alamat (identified) marked Exhibit-ii & iii respectively. We asked Atul Basak to bring his weighment instrument. This is the said weighing Instrument marked Mat Exhibit-4 collectively.

Weighment was done in presence of the S.D.O., the gazetted officers and the witnesses, Manik Dutta's packet weighed 2kg & 100grms. Brojo Baral's packet weighed 2kg & 100grms and Sudhakar Goswamy's packet of ganja weighed 1kg & 900grms respectively. I seized the ganja mentioned above under a proper seizure list. This is the said seizure list marked exhibit-1.

The accused persons, the independent witnesses and S.D.O. signed on Exhibit-1, (Seizure List).

I took sample of 50gms divided by 2 packets 25gms from each wrapped ganja.

I prepared 8 labels to the packets, each label was signed by the witnesses, S.D.O. and the accused persons. I prepared it marked as exhibit-2 series (2 to 2/7). It was prepared by same mechanical process This is the seizure list of the sample, marked Exhibit-3, which was prepared by me (entirely). It was signed by the S.D.O., witnesses and the accused persons. The labels were pasted at the bags of ganja recovered from the accused persons. Some of the labels are eaten by the rodents. I arrested the accused persons and brought the alamat and the accused persons to the P.S. Thereafter, I lodged the Suo moto complaint. This is the said complaint, written by me, marked as exhibit-4(entirely). The seizure list bear the G.D. entry number of our leaving the P.S. I recorded the case and I entrusted the investigation of the case to S.I. Anudhar Paul.

This is the formal F.I.R. filled in by me, marked as exhibit-5. I find 2 accused persons (namely identified) Brojo Baral and Sudhakar Goswamy. Had Manik Dutta been present I could have identified him. At the side of the formal F.I.R, there is endorsement of entrustment to investigate into the case.”

21. The evidence of PW-1, PW-2, PW-3, PW-7, PW-8, PW-9 and PW-10 was corroborative and reliable in substance.
22. The FSL report marked exhibit-11 was positive.
23. The following were marked as Exhibits:-

Ext.1	Seizure List
Ext.2 to 2/7	Lebel Carbon Copy & article seized
Ext.3	Sample Seizure list
Ext.4	Written F.I.R.
Ext.5	Formal F.I.R.
Ext.6	Extract copy of GDE no. 581 dt.10/09/03
Ext. 7	Rough sketch map

Ext. 1/1	Signature of PW-4 in seizure list
Ext. 2/1	Signature of PW-4 on label
Ext. 1/2	Signature of PW-5 in seizure list
Ext. 2/9	Signature of PW-5 on label
Ext. 1/3	Signature of PW-6 in seizure list
Ext. 3/4	Signature of the accused
Ext. 3/6	Signature of PW-7 in the seizure list
Ext. 9	Zimmanama
Ext. 10	Chalan of Sample
Ext. 11	Certificate analysis of FSL

24. Section 20(b)(ii)(B) of the NDPS Act states as follows –

“Punishment for contravention in relation to cannabis plant and cannabis.: - *Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder,-*

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable-

¹*[(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and*

(ii) where such contravention relates to sub-clause (b),-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to [one year], or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous

¹ Subs. by Act 9 of 2001, sec. 7, for sub-clauses (i) and (ii) (w.e.f. 2-10-2001)

imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;"

25. Section 42 of the NDPS Act states as follows:

"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 paramilitary 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 VA 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 VA 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 sub-section (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.”

26. Section 43 of the NDPS Act states as follows:

“²[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

² Subs. by Act 9 2001, sec. 19, for section 43 (w.e.f 2-10-2001)

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 VA 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.]”

27. In the case of **Sk Raju @ Abdul Haque @ Jagga Vs. State of West Bengal**, the Hon’ble Supreme Court observed as follows:

*“In the case of **Narayanaswamy Ravishankar v Assistant Director, Directorate of Revenue Intelligence**³, the Hon’ble Supreme Court, a three judge Bench of this Court considered whether the empowered officer was bound to comply with the mandatory provisions of Section 42 before recovering heroin from the suitcase of the appellant at the airport and subsequently arresting him. Answering the above question in the negative, the Court held:*

“In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure

³ (2002) 8 SCC 7

having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant.”

*In the case of **Krishna Kanwar (Smt) Alias Thakuraeen v State of Rajasthan**⁴, a two judge Bench of the Hon’ble Supreme Court considered whether a police officer who had prior information was required to comply with the provisions of Section 42 before seizing contraband and arresting the appellant who was travelling on a motorcycle on the highway. Answering the above question in the negative, the Court held:*

*“Section 42 comprises of two components. One relates to the basis of information i.e.: (i) from personal knowledge, and (ii) information given by person and taken down in writing. **The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application.** Sub- section (2) mandates, as was noted in Baldev Singh case that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in any building, conveyance or enclosed place. **Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place.**” [Emphasis supplied]*

7 *An empowered officer under Section 42(1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and*

arrest are conducted in a public place, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

8 The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase “public place” in the explanation to Section 43. Section 42 had no application.

9 The cases relied on by the learned counsel for the appellant will also not apply in the context of the facts before us. In **Mansuri**, an auto-rickshaw driver was intercepted by police personnel. Four gunny bags of charas were recovered from the auto-rickshaw. The police officer who had prior information about transportation of some narcotic substance, had neither taken down the information before carrying out the seizure and arrest, nor apprised his superior officer. He contended that the action taken by him was under Section 43 and not Section 42. Rejecting the argument of the State, this Court held that compliance with Section 42 was required as the auto-rickshaw was a private vehicle and not a public conveyance as contemplated under Section 43. Similarly, in **Jagraj**, contraband was recovered from a jeep which was intercepted by police personnel on a public road after receiving prior information. The police officer who had received the information, admitted to not taking it down in writing, contending that Section 43 would be applicable. Rejecting the argument of the State, this Court held that the jeep which was intercepted, was not a public conveyance within the meaning of Section 43 and compliance with Section 42(1) was therefore mandatory. In **Holia**, Mandrax tablets were recovered from the hotel room of the respondent. The information was not reduced to writing by the officer who

⁴ (2004) 2 SCC 608; Rajendra v. State of M.P., (2004) 1 SCC 432

had first received the information. The State claimed that compliance with Section 42 was not required as the hotel was a public place. Rejecting the submission of the State, this Court held that while a hotel is a public place, a hotel room inside it is not a public place. This Court held thus:

*“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 ... **It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing informing the same to the superior officer and obtain his permission as also recording the reasons therefore coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy.** Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or housekeeping of the room, the guest is entitled to maintain his privacy.” [Emphasis supplied]*

There is hence no substance in the first submission.

10 Section 50 of the Act deals with conditions under which search of persons shall be conducted. It states:

“50. Conditions under which search of persons shall be conducted.— (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate. (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1). (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made. (4) No female shall be searched by anyone excepting a female. (5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974). (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

According to Section 50(1), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a magistrate. In

Vijaysinh Chandubha Jadeja v State of Gujarat (“Vijaysinh”)⁵,
a Constitution Bench of this Court interpreted Section 50 thus:

“The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so ... In view of the foregoing discussion, we are of the firm opinion that the object with which 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 in so far 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 a 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 ... We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of Sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh’s case (supra).”

*The principle which emerges from **Vijaysinh** is that the concept of “substantial compliance” with the requirement of Section 50 is neither in accordance with the law laid down in **Baldev Singh**, nor can it be construed from its language. [Reference may also be made to the decision of a two judge Bench of this Court in **Venkateswarlu**]. Therefore, strict compliance with Section 50(1) by the empowered officer is mandatory. Section 50, however, applies only in the case of a search of a person. In **Baldev Singh**, the Court held “on its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises, etc.” In **State of Himachal Pradesh v Pawan Kumar (“Pawan Kumar”)⁶**, a three judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on his shoulder or head, etc., would not attract Section 50. It was held thus:*

“In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within

⁵ (2011) 1 SCC 609

⁶ (2005) 4 SCC 350

the ambit of the word “person” occurring in Section 50 of the Act ...After the decision in Baldev Singh, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him.”

*In **Parmanand**, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two judge Bench of this Court in **Dilip v State of Madhya Pradesh**⁷. It was held thus:*

“Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application.”

*Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer **or before the Superintendent**, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being search before the Superintendent, who was not an independent officer. It was held thus:*

“We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, who was part of the raiding party. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of

⁷ (2007) 1 SCC 450

the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated."

The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW-2 and PW-4."

28. In the instant case the seizure was conducted at a public place and thereafter the accused persons were arrested, therefore strict compliance under Section 42 of the Act was not necessary.
29. PW-7, the Additional District Magistrate deposed that the accused persons did not oppose search and seizure of ganja being carried by them in bags.
30. PW-8, C.I sadar Cooch Behar deposed when option was given to the accused persons they stated that they had no objection if their bags were searched.
31. The compliance under Section 50 of the NDPS Act was not necessary since the search of persons was not conducted but the bags containing the ganja were searched.
32. Minor faults on the part of the prosecution and the absence of label or seal on the alampats over a considerable period of time do not affect the prosecution case where substantive, corroborative reliable evidence, justify the prosecution case, being independent and unbiased.
33. In view of the above discussions it is concluded that the prosecution was able to establish its case and accordingly the appeal is dismissed.
34. CRA 798 of 2008 is disposed of accordingly.
35. In view of the above discussions, the appeal is allowed.

36. I record my appreciation for the able assistance rendered by Mr. Mr. Amartya Ghosh, Learned Advocate, as *Amicus Curiae* in disposing of the appeal.
37. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
38. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)