

Reserved on: 20.02.2023
Pronouncement on: 22.05.2023

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N.S.Shekhawat J.

1. This judgment shall dispose off three criminal appeals i.e CRA-S-879-SB-2009 (O&M) titled as "*Karnail Singh Vs. State of Haryana*", CRA-S-886-SB-2009 (O&M) titled as "*Balwinder Singh Vs. State of Haryana*" and CRA-S-1211-SB-2009 titled as “ *Bala Singh Vs. State of Haryana*, as the same arise out of the common impugned judgment of conviction and order of sentenced dated 24.03.2009, passed by the Court of Additional Sessions Judge, Fatehabad, whereby the appellants in these appeals were convicted and sentenced as under:-

Appellant Karnail in CRA-S-879-SB-2009(O&M)

Under Section 15 of the NDPSAct	Rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000,-/. In default of payment of fine, he shall further undergo simple imprisonment for a period of one year.
Under Section 120-B of IPC	Rigorous imprisonment for three years and to pay a fine of Rs.2000,-/. In default of payment of fine, he shall further undergo simple imprisonment for a period of two months.

Appellant Balwinder Singh in CRA-S-886-SB-2009(O&M)

Under Section 15 of the NDPSAct	Rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000,-/. In default of payment of fine, he shall further undergo simple imprisonment for a period of one year.
Under Section 409 of IPC	Rigorous imprisonment for five years and to pay a fine of Rs.2000,-/. In default of payment of fine, he shall further undergo simple imprisonment for a period of two months.
Under Section 420 of IPC	Rigorous imprisonment for three years

	and to pay a fine of Rs.2000,-/. In default of payment of fine, he shall further undergo simple imprisonment for a period of two months.
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Appellant Bala Singh in CRA-S-1211-SB-2009

Under Section 15 of the NDPS Act	Rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000,-/. In default of payment of fine, he shall further undergo simple imprisonment for a period of one year.
Under Section 420 of IPC	Rigorous imprisonment for three years and to pay a fine of Rs.2000,-/. In default of payment of fine, he shall further undergo simple imprisonment for a period of two months.

2. Shorn of unnecessary details, the prosecution story as it emanates from the report under Section-173 Cr.PC is that on 25.03.2007, Samunder Singh, DSP (Headquarters), Fatehabad along with HC Ramesh Chander and Constable Hans Raj was present in a Government zypsi driven by C. Satish Kumar at new Bus Stand, Fatehabad in connection with routine crime checking and patrolling duty, he received a secret information to the effect that Satbir Singh, Sub Inspector, Incharge, Police Post Gurunanakpura, Police Station City, Fatehabad, Balwinder Singh ASI, Dalip Singh EHC, Amar Singh Constable and Bala Singh EHC, all employees of Police Post Gurunanakpura, Fatehabad and Karnail Singh son of Bhupender Singh, all appellants were mixing rice husk in 20 bags of poppy husk, which were recovered in a case FIR No.144 dated 23.03.2007, under Sections 15/25 of the NDPS, Act, Police Station City, Fatehabad. As per the said secret information, a big room (*Kotha*) of the tubewell was constructed within the

premises of Police Post Gurunanakpura and after breaking open the seals, the poppy husk was being taken out from the said bags and sold in the market on payment of valuable sale consideration. Even the case property was made up by mixing rice straw in lieu of poppy husk and if a raid was conducted, they could be apprehended at the spot. Samunder Singh, DSP sent a message to Ajit Singh Inspector/SHO Police Station, City, Fatehabad and asked him to reach at the spot. After sometime, Ajit Singh Inspector/SHO along with ASI Madan Lal and ASI Chhattarpal Singh came to him in Government vehicle driven by Constable Satish Kumar. Samunder Singh DSP, shared the secret information with Ajit Singh Inspector/SHO and the team of abovesaid police officials reached at Police Post Gurunanakpura, where SI Satbir Singh, ASI Balwinder Singh, EHC Dalip Singh and Constable Amar Singh were sitting in the courtyard of the police post, who managed to run away from the spot after noticing the raiding party. However, EHC Bala Singh and one Sikh gentleman, who disclosed his name as Karnail Singh son of Bhupender Singh, resident of Dhani Khanpur were apprehended, who were mixing rice husk in the poppy straw in the room at the tubewell within the premises of Police Post, Gurunanakpura, after breaking open the seals of the bag containing poppy husk. All these bags constituted the case property of a case bearing FIR No.144 dated 23.03.2007. The raiding party checked the bags containing poppy husk, which were lying in the room and found that FIR No.144 was mentioned on nine bags of poppy husk, which were duly sealed with the seal impressions of “BS”, “HK” and “AS”. However, opening of 11 bags of poppy husk were lying open and poppy husk mixed with rice straw

was lying scattered on the floor. The sealed nine bags of poppy husk were weighed and each bag was containing poppy husk and weighed to be 39 Kgs 800 grams. However, 11 bags, whose mouths were found open, were found containing 40 Kgs of poppy husk in each bag.

3. Thereafter, the two samples of 100 grams each were separated from the each of the open bag, while two samples of 100 grams each were also taken out from the poppy husk mixed with rice straw, which was lying scattered on the floor. Thereafter, the case property was converted into sealed parcels, which were duly sealed with the seal impressions “SS” and “AS”. Seals after use, were kept by Samunder Singh, DSP and Ajit Singh Inspector/SHO. As per the case of the prosecution, Karnail Singh, Bala Singh, EHC and ASI, Balwinder Singh along with other three co-accused namely, SI Satbir Singh, EHC Dalip Singh and Constable Amar Singh were jointly mixing the rice husk in the poppy husk pertaining to a case FIR No.144 dated 23.03.2007, under Section 15 of the NDPS Act and had kept in their conscious possession 1022 Kgs 400 grams of poppy husk without any lawful authority. Ultimately, a ruqa was sent and on the basis of that, a FIR Ex. P1 was registered against the accused for keeping in their conscious possession 1022 Kgs 400 grams of poppy husk without any lawful authority under a deep rooted conspiracy and were jointly indulging in mixing the rice husk in the poppy husk, which was the case property of a case FIR No.144 dated 23.03.2007, under Section 15 of the NDPS Act. During the course of investigation, the accused Constable Amar Singh, SI Satbir Singh, EHC Dalip Singh and ASI Balwinder Singh were arrested on different dates.

Ultimately, the final report under Section 173 Cr. PC was produced before the Court of learned CJM, Fatehabad, who committed the case to the Court of learned Sessions Judge, Fatehabad.

4. Vide the order and charge-sheet dated 19.02.2008, the learned Additional Sessions Judge, Fatehabad ordered the framing of charge under Section 13 of the Prevention of Corruption Act against all the accused except accused Karnail Singh. Apart from that, all the six accused were charged for commission of an offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the “NDPS Act”). Balwinder Singh appellant was also charged under Section 409 IPC as he was entrusted with 20 bags of poppy husk containing 39.8 kgs each along with 40 samples of poppy husk weighing 100 grams each, in his capacity as a public servant and he committed the criminal breach of trust of that property. Apart from that, all the accused except Karnail Singh were also charge-sheeted under Section 420 IPC. Still further, Karnail Singh was also charged additionally under Section 120B of IPC.

5. To bring home the guilt of the accused/appellants, the prosecution examined 18 witnesses. The prosecution examined PW-1, EHC Krishan Kumar, who was posted in Police Station City, Fatehabad on 06.04.2007. He had deposited all the sample parcels and the sample seal with the FSL on 06.04.2007. The prosecution further examined PW-2 Constable Jagdish Kumar, who had delivered the special report to the learned Illaqua Magistrate. The Statement of PW-3 HC Om Parkash and PW-4 HC Ramesh Chander were formal in nature. The prosecution further examined PW-5 HC

Indraj Singh, who proved on record certain official record. As per him, at about 11:15 AM on 23.03.2007, ASI Balwinder Singh, HC Indraj Singh, EHC Dalip Singh, EHC Bala Singh, EHC Kuldeep Singh and Constable Amar Singh had gone in a private vehicle for patrolling and checking crime in the area of City, Fatehabad and ASI Balwinder Singh along with other police officials reached in Police Station City, Fatehabad at 10:00 PM after completion of the investigation. As per him on 24.03.2007, ASI Balwinder Singh along with other police officials had taken away accused Ranjit Singh and Buta Singh for producing them in the Court. The statements of PW-6 ASI Rajveer Singh was formal in nature and even PW-7 Amit Kumar turned hostile. PW-8 SI Jagjeet Singh and PW-9 Devender Kumar were formal in nature. As per PW-10 HC Kuldeep Singh on 28.05.2007, DI Devender Kumar reached at the Police Post, Gurunanakpura and he gave phone numbers of ASI Balwinder Singh and SI Satbir Singh to him. PW-11 HC Suresh Kumar stated that ASI Balwinder Singh was the Investigating Officer of the case under the NDPS Act. PW-12 HC Ajaib Singh had exhibited Ex.P25. The prosecution further examined Inspector Ajit Singh (Retired) as PW-13, who was part of the raiding team. PW-14 DSP Samunder Singh also supported the case of the prosecution as narrated in the FIR. He not only conducted the raid, but also investigated the matter in the present case and after completion of investigation of the case, a report under Section 173 Cr.PC was prepared by Inspector Bali Singh. However, in his cross-examination he stated that he came to know about FIR No.144 only from the secret information. It was received at 11:00 PM. He did not reduce the secret

information in writing nor gave any further information of this secret information to any other senior officer. He voluntarily stated that the SP was on leave and he was working as SP. However, he had not taken any charge of SP nor there was any written order about his working as SP on that day. He did not sent anybody in the police station to record any DDR on the basis of this secret information. Ajit Singh had come from the police station and met him at 11:05 PM. He admitted that the marking of case FIR No.144 was not mentioned in the recovery memo as well as in the ruqa. The prosecution further examined Inspector Satbir Singh as PW-15, who arrested the accused Balwinder Singh from Ludhiana. PW-16 Subhash is the owner of Subhash Photo Studio, Fatehabad and had taken the photographs at the relevant time. PW-17 Inspector Bali Singh had prepared a report under Section 173 Cr.PC and presented the same before the Court. Similarly, PW-18 Harbir Singh stated that he had taken the car and was got stopped by the police officials to enquire about the documents, but he could not tell about the papers.

6. After closure of the evidence, the statements of all the accused were recorded and they pleaded their false implication. To prove the defence, the accused had examined 11 defence witnesses. DW-1 Hardev Singh, Record Keeper, Office of DGP, Haryana proved on record the enquiry report by DSP Dharam Singh as Ex.DW-1/B. DW-2 DSP Dharam Singh had appeared and he proved on record some enquiry conducted on the complaint moved by Constable Amar Singh. DW-3 Chand Ram Inspector was the Enquiry Officer in an enquiry, initiated on the complaint filed by Amar Singh. DW-4 Jaswant Singh is a shopkeeper of Invertor in Village Aherwan. On 24.03.2007, he was

with Karnail Singh and other persons, however, their jeep was stopped outside the police post on the road. He along with Karnail Singh and Rameshwar Garhwal had gone to Police Post Gurunanakpura to enquire about the application moved by Rameshwar Garhwal for the theft of his tubewell wires. However, Karnail Singh, appellant was arrested by the police illegally. Even DW-5 Dalip Singh, Lumberdar was also examined to prove the said fact. DW-6 HC Ashok Kumar brought the summoned record and as per the record, Samunder Singh DSP was posted as DSP (Headquarter), Fatehabad and was biased against ASI Balwinder Singh, appellant. ASI Balwinder Singh, who was posted as Incharge, Police Post Ratia at that time and Samunder Singh DSP was directed not to do so in future. DW-7 Constable Kulwant Singh had brought certain DDR report. Mangal Singh was examined as DW-8 and as per him, accused Amar Singh and Dalip Singh were present in a marriage party at his house on the occasion of marriage party of his son Jagga Singh on 25.03.2007. The defence examined DW-9 Narender Kumar, Photo Journalist, who had prepared the photographs from his digital camera. Mange Lal Bagri, News Reporter was examined as PW-10, who proved on record the newspaper report by him in Fatehabad Bhaskar on 26.03.2007 as Ex.DW/10A. DW-11 Rameshwar Garhwal was also examined by Karnail Singh to show that he had been falsely involved in the present case.

7. I have heard learned counsel for the appellants and learned State counsel.

8. Learned counsel for the appellants vehemently argued that in the instant case, the FIR in question was registered on the basis of a secret

information, but admittedly, neither the said secret information was reduced into writing nor the copies of the same or any report was submitted to the higher police officers in this regard. Thus, there was non-compliance of mandatory provisions of the “ NDPS Act” and it has caused serious prejudice to the appellants. Apart from that, the learned Trial Court failed to appreciate that the independent witnesses were not examined by the prosecution and the entire prosecution case was based on testimonies of only official, biased and interested witnesses. Still further, there was huge delay in sending the samples to the chemical examiner and the story of the prosecution was to be disbelieved. Learned counsel further submitted that even the chain of circumstances in the present was incomplete and they had been falsely involved in the present case. The said submissions have been opposed by the learned State counsel by contending that the accused were keeping in their conscious possession of 1022 Kg 400 grams of poppy husk. The case said property was deposited in a case FIR No.144 dated 23.03.2007, under Sections 15 of the NDPS Act by the police and the entire case property was unauthorised taken out from the Malkhana and the accused wanted to mix rice husk in the poppy husk and by taking out the poppy husk out of the bags, they wanted to sell it. Apart from that, the accused had also committed the offence under sections 409, 420 and 120-B of IPC and were liable to be convicted by this Court.

9. I have heard learned counsel for the parties and with their able assistance; I have gone through the Trial Court record carefully in the present case.

10. Learned counsel for the appellants vehemently contended that in the instant case, there was total non-compliance of the mandatory provisions of Section 42 of the NDPS Act, which is impermissible in law. The prosecution had examined its star witness PW-14 Samunder Singh, DSP who was heading the raiding team and also conducted the investigation in the present case. In his cross-examination, he admitted that the secret information of this case was received at about 11:00 PM. However, he did not reduce the secret information into writing nor give any further information in this regard to any other senior officer. He even did not send anyone to the police station to record any DDR on the basis of this secret information. Even otherwise, there is no evidence on record, which shows that the secret information was reduced into writing and was sent to higher police officers and thus, there was breach of mandatory provision of law and the appellants were liable to acquitted by this Court.

11. Learned State counsel vehemently opposed the said submissions by contending that in the present case, Samunder Singh, DSP, who himself was a higher officer, had conducted the entire proceedings and even the contraband was seized in his presence. Since, the higher police officers had already been informed, there was sufficient compliance of the provisions of Section 42 of the Act.

12. I have learned counsel for the parties, I am of the firm view that there is sufficient force in the submissions made by learned counsel for the appellants.

13. 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 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".

Still further, the Hon'ble Supreme Court as held in the matter of

State of Rajasthan Vs. Jag Raj Singh @Hansa; 2016 (3) RCR (Criminal),

539 as follows"-

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

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

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage section 50 of the NDPS Act would not be attracted and the question of complying

with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorised 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 Cr.P.C. 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 Cr.P.C. 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."

It was further held as follows:-

*"24. It is also relevant to note another Constitution Bench judgment of this Court in **Karnail Singh v. State of Haryana, 2009(5) RCR (Criminal) 515 : 2009(4) Recent Apex Judgments***

(R.A.J.) 638: 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 v. State of Gujarat**, 2000(1) RCR (Criminal) 611 (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 v. State of Kerala**, 2001(3) RCR (Criminal) 808: (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 organised gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of

investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over"

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

14. Keeping in view the aforesaid principles of law and the evidence led by the prosecution in the instant case, it is apparent from the testimony of PW-14 Samunder Singh, DSP, he had received a secret information and after getting the same, he called PW-13 Ajit Singh, Inspector at the spot. However, the secret information was never reduced into writing and consequently, there was no question of sending the same to the police station or higher police officers. Thus, there was a breach of mandatory provision of Section 42 of the Act and the learned Trial Court committed error, while convicting the appellants in the instant case.

15. Still further, the law is well settled that any breach of mandatory provisions of Section 42 of the Act has to be viewed seriously by the Court. The purpose of these provisions is to provide due protection to a suspect against false implication and to ensure that these provisions are strictly complied with to further the legislative mandate of a fair investigation in a case. The element of prejudice is of some significance, where the provisions of the Act are directory and are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevance. Absolute duty coupled with strict compliance would rule out the element of prejudice, where there is total non-compliance of the provision.

16. Apart from that, in the present case Balwinder Singh and Bala Singh appellants have also been additionally convicted under Section 420 IPC. In fact, it was alleged that they had altered the case property i.e the poppy husk of other case and it was capable of being sold in the open market and had committed the offence under Section 420 IPC and thus, cheated the police department.

17. Section 415 defines “Cheating” and has been reproduced below for ready reference:-

415.Cheating - whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

18. From this, it is apparent that if a person, fraudulently or dishonestly induces the persons so deceived to deliver any property to any person, which he would not do or omit or if he so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind and reputation or property, then it can be said that he had cheated another person. Even to constitute the offence of cheating, intention to deceive should be in the existence at the time when inducement was offered. From the perusal of the evidence, in the present case, it is apparent that no offence under Section 420 IPC is made out as the appellants Bala Singh and Balwinder Singh had not induced any person from the police department to deliver the property to them. Apart from that, it was evident that the only allegation against the appellants was with regard to the removal of the case property from the *Malkhana* of the police station, which was punishable under a special statute i.e under Section 15 of the NDPS Act and the provisions of Section 420 IPC have been wrongly invoked in the present case. Learned counsel for the appellants further contended that Balwinder Singh has been wrongly convicted under Section 409 IPC. As per the allegations levelled by the prosecution, Balwinder Singh had taken out the poppy husk and rice husk was being added in the poppy husk by the said police officials. It is apparent that it is again the same charge under Section 15 of the “NDPS Act”. In fact, the alleged offence committed by the appellants were already covered under the provisions of NDPS Act, which was a special and a later statute and the provisions of the Indian Penal Code were invoked in the present case. The submissions made by learned counsel for the appellants have been vehemently opposed by the learned State counsel by

contending that apart from the provisions of the NDPS Act , the offences under Section 409 IPC were rightly invoked by the police. It has been held in the matter of “**Gagan Harsh Sharma and other Vs. The state of Maharashtra and other,2019 CriLJ1398:2019 (3) Crimes 618 as under:-**

“12. It is well known principle of law that a prior general Act may be effected by a subsequent particular or a special Act. In the principles of statutory interpretation by justice G.P. Singh 13th Edition 2012 the aforesaid principle is culled out in the following manner:

"A prior general Act may be effected by a subsequent particular or a Special Act, if the special matter of particular Act prior to its enforcement was being governed by the general provision of the earlier Act. In such a case the operation of the particular Act may have the effected of parallel rebelling the general Act or curtailing its operation or added conditions to its operation for the particular cases.

A general Act operation may be curtailed by a latter special Act even if the general Act contained a non obstante clause. The curtailment of the general Act will be more readily inferred with the latter special Act also containing an overriding non obstante provision”.

*“ 13. The well know principle of 'generalialia specialibus general non derogant' which is to be invoked in case of conflict between a specific provision and general provision and which gives the specific provision an overriding effect over the general provision has been described in Craies on statute law at page 206, Sixth Edition Rommaly, MR referred the rule as "The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense would override, particular enactment must be inactive and the general enactment must be taken to effect only the over parts of the statute to which it may properly apply. In case of **Belsund Sugar Co. Ltd. v. The State of Bihar, AIR 1999 Supreme Court 3125** the Hon'ble Apex Court was required to deal with one such special*

statute by Section 4 of the Bihar Finance Act (Act 5 of 1981), provision was made for levy of purchase tax on goods in general. Provision was also made for levy of purchase tax on sugarcane later by section 49 of the Bihar Sugarcane (Regulation of Supply and Purchase) Act (Act 37 of 1982) which was a special Act for the control of the activities of production, supply and regulation of sugarcane including the levy of purchase tax. In so far as the activity of levy of purchase tax on sugarcane was concerned both the Acts operated in the same field. As the Sugarcane Act was a special Act the rule that 'general provision should yield to special provision' was applied and it was held that purchase tax on sugarcane could be levied only under the sugarcane Act and not under the Finance Act. On the same principle it was also held in another case that dealings in sugarcane were exclusively regulated by the Sugarcane Act and its provisions excluded the operation of the Bihar Agricultural Produce Markets Act, 1980 which was a general Act for regulating sale and purchase of all types of agricultural produce”.

19. In the instant case, I find sufficient force in the arguments raised by learned counsel for the appellants, that the provisions of special and the later statute shall prevail over the general law. Thus, the appellants have been wrongly convicted under Section 409 IPC.

20. Apart from that, in the present case, Karnail Singh has been convicted under Section 120-B IPC. Criminal conspiracy has been defined under Section 120(A) of the Indian Penal Code, which is as under:-

“When two or more persons agree to to do, or cause to be done:-
(1) an illegal act, or
(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

21. Section 120-B prescribes the punishment for criminal conspiracy

which by itself is an independent offence, punishable separately from the main offence. The offence of criminal conspiracy can be established by direct evidence or by circumstantial evidence. Section 10 of the Evidence Act introduces the doctrine of agency and will be attracted only when the Court is satisfied that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence or an actionable ground that is to say there should be a prima facie evidence that the person was a party to the conspiracy before his act can be used as co-conspirators. Apparently, in the present case, there was no evidence by the prosecution, which could afford a reasonable ground for this court to believe that any two or more persons had conspired or were members of the conspiracy. Even the judgment passed by the learned Trial Court is silent in this regard and is non-speaking. As a consequence, findings recorded by the learned trial Court are liable to be reversed by this Court.

22. Apart from that, learned counsel appearing on behalf of the appellants vehemently argued that the defence evidence has to be treated at a par with the prosecution evidence and the testimonies of defence witnesses could not have been rejected only on the ground that they were appearing as witnesses on behalf of the accused in the present case. Apart from that, the learned Trial Court had completely overlooked their testimonies and the impugned judgment is liable to be set aside on this ground alone. These submissions have been vehemently opposed by the learned State counsel.

23. Having heard learned counsel for the parties, this Court finds sufficient force in the submissions made by learned counsel for the appellants.

In the present case, the accused examined DW-4, Jaswant Singh, who was a shopkeeper in Village Aherwan. On 24.03.2007, he came across Karnail Singh, appellant and Rameshwar Garhwal at Ratia Chugi. Karnail Singh, who was Numberdar of the Village, told him that he along with Rameshwar Garhwal was going to Police Post, Gurunanakpura to enquire about the application moved by Rameshwar Garhwal for theft of his tubewell wires. He also stopped his jeep outside the police post near the road and Karnail Singh and Rameshwar Garhwal went inside the police post. All of a sudden a zipsy came from the side of Fatehabad and forcibly stopped Karnail Singh inside Gurunanakpura Police Post. Karnail Singh had no concern whatsoever with the alleged mixing of poppy husk with rice poppyhusk and he was falsely involved at the instance of police officials of Fatehabad. His testimony has been supported by DW-5 Dalip Singh, Lamberdar. Apart from that, the defence also examined DW-6 HC Ashok Kumar, who produce the summoned file and Ex.DW-6/A that is copy of the order passed by the SSP, Fatehabad on 15.04.2006. As per the said order passed by SSP, just prior to the present case Samunder Singh, DSP, the head of raiding party was biased against ASI Balwinder Singh, appellant, who was Incharge of Police Post, Ratia at that time and Samunder Singh, DSP, PW-14 was directed not to repeat such acts in future. This clearly proves that Samunder Singh, DSP was already inimical towards Balwinder Singh appellant. Apart from that, the other accused had also led defence evidence to show reasons for their false implication, however, SI Satbir Singh, EHC Dalip Singh and Constable Amar Singh have already been acquitted by the learned Trial Court, consequently, it would not be referred to

the said defence. Thus, it is apparent that Samunder Singh, DSP who was heading the raiding team, was inimical towards ASI Balwinder Singh, who was Incharge of the Police Post, Ratia and the SSP had already passed strictures against Samunder Singh, DSP, which is evident from the evidence Ex.DW6/A.

24. In view of the above discussion, the present appeal succeeds. The impugned judgment of conviction and order of sentenced dated 24.03.2009, passed by the Court of Additional Sessions Judge, Fatehabad are set side and the appellants are ordered to be acquitted of the charges. The bail bond and the surety bond shall stand discharged and the accused shall be set at liberty, if in jail and is not required in any other case.

25. All pending applications, if any, are also disposed off, accordingly.

26. Case property, if any, be dealt with, and destroyed after the expiry of period of limitation for filing the appeal, in accordance with law.

The Trial Court record be sent back.

22.05.2023

hitesh

(N.S.SHEKHAWAT)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No