(1993) 12 P&H CK 0009

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 298-DBA of 1991

The State of Punjab		APPELLANT
	Vs	
Kulwant Singh		RESPONDENT

Date of Decision: Dec. 17, 1993

Acts Referred:

- Constitution of India, 1950 - Article 21
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 41, 42, 50, 52, 55

Citation: (1994) 1 ILR (P&H) 342 : (1994) 106 PLR 535 : (1994) 1 RCR(Criminal) 303

Hon'ble Judges: N.K. Kapoor, J; Jai Singh Sekhon, J; G.S. Chahal, J

Bench: Full Bench

Advocate: G.K. Chatrath, A.G., S.S. Saron, DAG, Randhir Singh, AAG and J.C. Sethi,A.A.G, for the Appellant; S.C. Chhabra, J.C. Arora and G.S. Cheema, for the Respondent

Judgement

Jai Singh Sekhon, J.
While granting leave to appeal u/s 378(3) of the Code of Criminal Procedure (for short "the Code") against the orders of acquittal recorded by different trial Courts for offences under Sections 15, 18 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short (the Act") in Criminal Miscellaneous No. 6116-M-A of 1991, Criminal Miscellaneous No. 6205-M-A of 1991, Criminal Miscellaneous No. 6469-M-A of 1991 and Criminal Miscellaneous No. 6590-M-A of 1991, the Division Bench of this Court constituted by A.P. Chowdhri and N.K. Kapoor, JJ. noticed the conflict of the views of our High Court in Karam Singh v. The State 1987(2) C.L.R. 240 Hakam Singh Vs. Union Territory, Amrit Singh v. State of Haryana 1990(1) C.L.R. 437 and Kuldip Singh v. State of Haryana 1989 C.C. C 183 (H.C.) vis-a-vis the views of the Bombay High Court), Surajmal Kanaiyalal Soni Vs. The State of Gujarat, and Richhpal Singh v. The State 1989 D C 97 (D.B.- Delhi) qua the provisions of Chapter-V of the Act being mandatory in the sense that their non-compliance per se would vitiate the trial and prove fatal to the prosecutions case. The Divisions Bench also noticed the observations of the apex Court in State of

Maharashtra Vs. Natwarlal Damodardas Soni, that illegal search will not affect the validity of the seizure and further investigation by the Custom Authorities or the validity of the trial which followed on the complaint of the Collector of Customs in Dr Partap Singh and Another Vs. Director of Enforcement, Foreign Exchange Regulation Act and Others, , that the illegality in the method, manner or initiation of a search does not necessarily mean that anything seized during the search has to be returned and in Sunder Singh Vs. State of Uttar Pradesh, that the irregularity in the search and the recovery in non-compliance of the provisions of Section 103 of the Code would not affect the legality of the recovery proceedings. The Division Bench, after noticing the above referred decisions of the apex Court and the High Courts, formed a tentative view that non-compliance of the relevant provisions of Chapter-V of the Act would not per se vitiate the trial. However, considering this controversy to be of considerable importance and likely to affect the fate of a large number of cases. The following two questions were posed for decision of the larger Bench: -

(i) Whether all or particular provisions in Chapter V are mandatory in the sense that their non-compliance is per se fatal to the prosecution ? and

(ii) Whether the non compliance of the relevant provisions of Chapter V renders the recovery of the contraband commodity illegal?

Accordingly the Hon''ble Chief Justice constituted the Full Bench for deciding the above referred questions. Under these circumstances the matter has ultimately come before us.

2. Keeping in view the importance of the controversy involved notice was also issued to the Advocate General, Haryana although the State of Haryana did not figure as a party in all these matters.

3. As only legal controversy qua the provisions of Chapter V of the Act is involved, there is no justification in giving detailed facts of each case except making a short reference thereto. In Criminal Miscellaneous No. 6116-M-A of 1991 (State of Punjab v. Kulwant Singh), the trial Court acquitted the accused respondent on the charge for offence u/s 18 of the Act for the alleged possession of one kilogram of opium, ''mainly on the ground of non-compliance with the provisions of Sections 52 and 57 of the Act. In Criminal Miscellaneous No. 6590-M-A of 1991 (State of Punjab v. Angrej Singh), the trial Court had recorded the order of acquittal of the accused-respondent on the charge for offence u/s 18 of the Act for the possession of one kilogram of opium on the ground of non-compliance with the provisions of Sections 50, 52, 55 and 57 of the Act. In Criminal Miscellaneous No. 6469-M-A of 1991 (State of Punjab v. Smt. Nihal Kaur) the trial Court had recorded her acquittal on a charge for offence u/s 21 of the Act for the alleged possession of 1170 tablets containing disphenhydramine H.C.L. mainly on the ground of non-compliance with mandatory provisions of Section 50 of the Act. In Criminal Miscellaneous No. 6205-M-A of 1991 (State of Punjab v. Harcharan Singh and Anr.) the trial Court had recorded their acquittal on the charge for offence u/s 15 of the Act for the

alleged joint possession of 15 bags, each containing 35 kilograms of poppy husk, on the ground of non-compliance with provisions of Section 57 of the Act in not reporting the matter within 48 hours to the next higher officer about the seizure of the poppy husk, besides disbelieving the prosecution evidence on merits of the case.

4. We heard Mr. O.K. Chatrath, learned Advocate General, Punjab as well as Mr. J.C. Sethi, learned Additional Advocate General, Haryana and the learned counsel for the accused respondent in all these matters. There is considerable force in the contention of Mr. Chatrath that in order to ascertain the real intent of the Legislature in providing certain procedural safeguards in the provisions of Chapter V of the Act, the entire background of enacting this Legislation as well as other provisions of the Act should be taken into consideration. In Lachmi Narain and Others Vs. Union of India (UOI) and Others, , the apex Court in para 66 of the judgment, observed that the primary key to the problem whether a statutory provision is mandatory or directory, is the intention of the law-maker as expressed in the law itself. The reason behind the provision may be a further aid to the ascertainment of that intent. In that case the following observations, based upon the "Construction of Statutes" by Crawford (pp. 523-524) were made by the apex Court while interpreting the mandatory nature of the provisions of sub-section (2) of Section 6 of the Bengal Finance (Sales Tax) Act, 1941:-

" The primary key to the problem whether a statutory provision is mandatory or directory is the intention of the law-maker as expressed in the law itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of "must" instead of "shall" that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of pre-emptory language in a negative form is per se indicative of the intent that the provision is to be mandatory."

5. Again in Philips India Ltd. Vs. Labour Court, Madras and Others, in para 15 of the judgment of apex Court affirmed its earlier views in the following terms:-

"No cannon of statutory construction is more firmly established than that the statute must be read as a whole. This is a general rule of construction applicable to all statues alike which is spoken of as construction ex-visceribus actus. This rule of statutory construction is so firmly established that it is variously styled as "elementary rule" (See Attorney General v. H.R.H. Prince Larnfest Auguests (1957) 1 All E.R. 49 and as a settled rule (See Poppatlal Shah Vs. The State of Madras, . The only recognised exception to this well laid principle is that it cannot be called in aid to alter the meaning of what is of itself clear and explicit. Lord Coke laid down that :"it is the most natural and genuine exposition of a statute, to construe one part of a statute by another part of the same statute, for that best expresseth meaning of the makers (Quoted with approval in Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, .".

6. Consequently, in the light of above guidelines of the apex Court, a harmonious construction of the entire Act should be kept in view while ascertaining the real intent of the legislature qua the director or mandatory nature of the particular provisions of the Act except to the extent that it cannot be called in aid to alter the meanings of well expressed dictate of the legislature in the relevant provisions.

7. The preamble to the Act reveals that initially the Act was enacted to consolidate and amend the law relating to Narcotic Drugs and Psychotropic Substances and for matters connected therewith. Thereafter, the Act was amended by Amending Act II of 1989 w.e.f. May 29, 1989. The preamble of the Amended Act reads as under :-

"An Act 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 to provide for the forfeiture of property derived from or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith."

8. A bare glance through the preamble leaves no doubt that this Act was enacted in order to consolidate the existing law relating to narcotic drugs and psychotropic substances; to make stringent provisions for the control and regulation of operations of such drugs, to provide for the forfeiture of property derived therefrom and to implement the provisions of International Conventions on Narcotic Drugs and Psychotropic Substances. The definition of "illicit traffic" in relation to Narcotic Drugs and Psychotropic Substances figuring in clause (viii) (a) of Section 2 of the Act, further makes it clear that the legislature intended to control and strictly punish the illicit traffic in Narcotic Drugs and Psychotropic Substances as aiding such illicit traffic by financing directly or indirectly also falls within its admit. The definition reads as under:-

"2. (viii)(a) "illicit traffic, in relation to narcotic drugs and psychotropic substances means-

(i) Cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium poppy or any cannabis plant;

(iii) engaging in the production manufacture, possession sale, purchase, transportation, warehousing concealment, use or consumption import, inter-State, export inter-State, import into India, export from India or transhipment of narcotic drugs or psychotropic substances;

(iv) dealing in any activities in narcotic drugs or psychotropic substances other than those referred to in sub-clauses (i) to (iii) or

(v) handling or letting out any premises for the carrying on of any of the activities referred to in sub clauses (i) to (iv),

other than those permitted under this Act, or any rule or order made, or any condition of any license, term or authorisation issued, thereunder, and includes

(1) financing directly or indirectly any of the aforementioned activities.

(2) abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities, and

(3) harbouring persons engaged in any of the aforementioned activities."

9. The provisions of Section 4 of Chapter II of this Act makes it obligatory upon the Central Government to take measures for prevention and combating abuse of and illicit traffic in narocotic drugs etc. Section 5 empowers the Central Government to appoint a Narcotics Commissioner to exercise all powers and perform all functions relating to the superintendence of the cultivation of the opium poppy and production of opium as also to exercise and perform such other powers and functions as may be entrusted to him by the Central Government. Section 6 envisages" the formation of Narcotic Drugs and Psychotropic Substances Consultative Committee, while Section 7A envisages the constitution of National Fund for control of Drug Abuse. This fund shall include the amount which the Central Government may put in such fund after the appropriation made by Parliament by law. It is further provided that the Parliament by law may provide that the sale proceed of any property forfeited under Chapter V-A of the Act, any grant that may be made by any person or institution or any income from investment of the amounts credited to the fund the aforesaid provisions shall form part of such fund. Sub section (2) of Section 7 further provides that such fund shall be applied by the Central Government to meet the expenditure incurred in connection with the measures taken for combating illicit traffic in, or controlling abuse of narcotic drugs and psychotropic substances and for all or any of the purposes specified in sub section (1) of Section 71 of the Act. Section 71, in turn provides the establishment of as many centres as it deems fit for identification treatment etc, of addicts and for supply of narcotic drugs and psychotropic substances. Thus, the intention of the legislature to empower the Government to establish as many centres as it may deem fit for identification, treatment, education, after-care, rehabilitation, social re-integration of addicts and for supply of such drugs on medical necessity, clearly exhibits its anxiety to save the health of the nation from the evil effects of narcotic drugs and psychotropic substances. The provisions of Chapter III further provide for the prohibition, control and regulation of cultivation of the coca plant, opium poppy and the manufacture of the opium or its possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of such drugs. Section 12 of the Act figuring in Chapter III further prohibits the purchase of narcotic drugs or psychotropic substances for its supply outside India without previous authority of the Central Government.

10. The perusal of provisions of Chapter IV relating to offences and penalties further shows that deterrent sentence has been provided for the commission of the offences

mentioned therein, which, in turn, implies that the legislature intended to save the health of the humanity from the evil effects of narcotic drugs and psychotropic substances. The provisions of Sections 15, 16, 17, 18, 19 and 20(b)(ii) provide punishment not less than ten years'' rigorous imprisonment, but which may extend to twenty years and also imposition of fine which shall not be less than one lac rupees, but which may extend to two lacs rupees for contravention in relation to poppy straw, coca plant, coca leaves, to prepare opium and embezzlement of the opium by a cultivator. Similar sentence is provided u/s 21 of the Act for contravention in relation to manufacture of drugs and their preparations. Section 22 provides similar sentence qua the contravention of conditions of licence in relation to psychotropic substances. Section 23 of the Act provides similar punishment for the illegal import into India, export from India or transhipment of narcotic drugs and Psychotropic substances in contravention of the provisions of this Act. Even external dealings in narcotic drugs and psychotropic substances in contravention of Section 12 of the Act visit the same sentence u/s 24 of the Act. The conduct of a person by knowingly allowing the use of any portion of his house, room, enclosure, space, place, animal or conveyance etc. for the commission of any other person of an offence under the provisions of Section 25 shall also visit the same quantum of sentence. The licencee of his servants are also punishable to deterrent sentence, if they violate any of the conditions of licence or rules u/s 26 of the Act. Section 27 of the Act further provides a deterrent sentence to persons for illegal possession of small quantity for personal consumption of any narcotic drug or psychotropic substance or consumption of such drug or substance. The abetment or entering into criminal conspiracy to commit any of these offences or attempts to commit offences has also been made punishable with similar deterrent sentence as the parent offences under Sections 28 and 29 of the Act. Section 30 of the Act even makes the preparation to do or omits to do anything which constitutes as offence punishable under any of the provisions of Section 15 to Section 25 (both inclusive) if from the circumstances of the case it may be reasonable inferred that the culprit was determined to carry out his intention to commit the offence but had been prevented by circumstances independent of his will. The offence of preparation has been made punishable with one-half of the minimum term, provided for the actual offence. In the history of criminal jurisprudence only attempt to commit an offence or abetment to commit an offence or entering into criminal conspiracy to commit an offence had been made punishable, but the preparation of the commission of the offences has been made punishable for the first time under the provisions of Section 30 of the Act which in turn implies that curbing and controlling the menace of consumption, smuggling in and transporting of narcotic drugs or psychotropic substances has been well kept in view by the legislature. Section 31 of the Act provides for enhanced sentence for every subsequent offence while Section 31A of the Act provides for extreme penalty of death to those persons who are subsequently convicted for the commission of offences u/s 15 to 25 or Section 27A of the Act for the possession of large quantities of narcotic drugs or psychotropic substances figuring in the table attached thereto, Section 33 of the Act makes the provisions of Probation of Offenders Act, 1958 and Section 36 of the Code of Criminal Procedure, 1973, Inapplicable to the convicts who had violated the provisions of

this Act, except such persons who are under eighteen years of age or who had been found guilty under Sections 26 and 27 of the Act. The suspension, remission or commutation of sentences awarded under this Act, accept u/s 27 has been barred u/s 32A of the Act.

11. The matter does not rest here as keeping in view the gravity of the offences pertaining to the contravention of the provisions of this Act in relation to narcotic drugs or psychotropic substances, the legislature has made these offences triable by Special Courts u/s 36 of the Act and till the formation of such Courts, triable by the Sessions Court. Vide Section 37, the offences in contravention of these provisions of the Act have been made cognizable and non bailable. While granting the bail, the Court has to satisfy that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. u/s 35 of the Act, culpable mental state of the accused has to be presumed by the Court but it shall be open to the accused to prove it otherwise. Comprehensive provisions in Chapter V-A providing forfeiture of property derived from or used in illicit traffic of such drugs and psychotropic substances exhibit traffic of such drugs and psychotropic substances exhibit the anxiety of legislature to save the humanity from harmful and lethal effects thereof.

12. Thus, keeping in view the above referred intent of the legislature providing for deterrent sentence for the commission of the offences figuring in Chapter IV of the Act, it transpires that the procedural safeguards embodied in Chapter V of the Act were provided with a view to prevent the misuse of the provisions of the Act by unscrupulous elements entrusted with the enforcement of the provisions and to preserve and safeguard the liberty and personal dignity of the persons suspected of the commission of the offences under this Act. Regarding the controversy whether such procedural safeguards are directory or mandatory in nature in the sense that then- violation per se would vitiate the trial or confer particular right upon the culprit/suspect, or that the accused has to establish that such like violations had resulted in miscarriage of justice or prejudice to him, Mr. G.K. Chatrath, the learned Advocate General, Punjab, contends on the strength of catina of authorities of the apex Court and High Courts (which shall be discussed at later stage) that the non-compliance of the safeguards provided under the procedural law during the investigation of the case would not ipso facto vitiate the trial unless such violation has resulted in miscarriage, or failure or justice or prejudice to the accused on the facts and circumstances of the particular case. He further maintained that the procedural safeguards contained in Chapter V of the Act are directory in nature and not mandatory.

13. Mr. J.C. Sethi, the learned Additional Advocate General, Haryana, also supported the above view of Mr. Chatrath besides maintaining that the provisions of Section 50 are directory and not mandatory in nature.

14. Mr. R.S. Cheema, Senior Advocate, as well as S.C. Chhabra, Mr. S.S. Virk, Mr. J.C. Arora, and Mr. G.S. Cheema, Advocates for the respondents, on the other hand,

maintained that the provisions of Sections 103 and 165 of the Old Code of Criminal Procedure, 1898 or provisions of Sections 100 and 165 of the Code of Criminal Procedure, 1973, cannot be equated with the mandatory provisions of special enactment especially when the legislature in its wisdom in unambiguous terms has provided the safeguards to be observed during the investigations of the case for offences under Chapter IV of the Act and the suspect has been given specific right u/s 50 of the Act to claim his personal search before the gazetted officer or before the nearest Magistrate in order to prove his innocence at that stage. Reliance in this regard has also been placed on different decisions of this Court, other High Courts as well as the apex Court, which shall also be discussed in the later part of the judgment.

15. In order to resolve this controversy, it would be appropriate to dilate upon on various safeguards provided in Chapter V of the Act, The provisions of Sections 41 and 42 of the Act relate to power of issuing warrant and authorisation to arrest any person or search any premises, building of cetera on the basis of personal knowledge or information taken down in writing about such person having committed any offence under Chapter IV of the Act or having concealed some document or other Article which may furnish evidence for such offences. The provisions of Sections 41 and 42 of the Act read as under:-

"Section 41. Power to issue warrant and authorisation - (1) A metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, 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, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Clause IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police of any other department of a State Government as is empowered in this by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drugs or psychotropic substance in respect of which any offence punishable under Chapter-IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting u/s 42.

Section 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 or of the Border Security Force 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 of believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence 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 material 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 Chapter IV relating to such drug or substances 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 Chapter IV relating to such drug or substances:-

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 to his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

16. A bare glance through the provisions of Section 41(1) of the Act leaves no doubt that warrant for arrest of a person or search warrants of any building, conveyance or place etc. during day or night can be issued by a Metropolitan Magistrate or a Magistrate of

First Class or any Magistrate of the Second Class especially empowered by the State Government, such warrant of arrest or search warrant can be issued only if such Magistrate has reason to believe that such person has committed any offence under Chapter IV of the Act or has reason to believe that any narcotic or psychotropic substance in respect of which such offence has been committed or any documents or articles, which may furnish evidence of the commission of any offences is kept or concealed therein. Thus, the legislature in its wisdom had only empowered the Magistrates having First Class powers only or Second Class Magistrate, especially empowered by the State Government to issue such warrants in view of the serious and sensitive nature of the offences, Sub-Section (2) of Section 41 provides that any officer of the gazetted rank of the departments of the Central Government mentioned therein, who has been authorised by the Central Government while officers of the gazetted rank of the departments of the State Government so authorised by the concerned State Government,can also arrest by day or night any person if such officer has reason to believe from personal knowledge or information given by any person and taken down in writing that such person has committed the offence punishable under Chapter IV of the Act or any narcotic or psychotropic substance or any document or article which may furnish evidence or committing such offence is kept or concealed. It is further provided by the legislature that a gazetted officer so authorised by the concerned government can also depute his subordinate but superior in rank to a peon, sepoy or constable to arrest such person or search any building or conveyance etc. Under Sub Section (3) the officers to whom the warrant under sub section (1) has been addressed or the officer authorised under sub-section (2) or the officer who is further authorised to effect arrest or search any person, have been given same powers as to an officer acting u/s 42 of the Act. Thus, the legislature in its wisdom has provided the above safeguards to the person suspected of the commission of the offences under Chapter IV of the Act. The legislature in its wisdom has restricted the powers of arresting a suspected person or search of the building etc. only on the basis of the warrants issued by the above referred Magistrates or by such officers of the gazetted rank of the Central Government or State Government, who had been duly authorised to arrest or search persons by the concerned Government which, in turn, implies that the police officer or whom such powers have not been conferred by the concerned government or who has not been assigned to execute the warrant of arrest or search, cannot arrest such person or search any building etc. The other safeguard provided in sub section (2) of this section is that an authorised gazetted officer can arrest such person or search any building etc. under the circumstances mentioned therein if he has reason to believe from personal knowledge or information given by any person of taken down in writing. In other words, it can be well said that the Legislature in its wisdom had even provided that the officers of the gazetted rank duly authorised by the Central Government or the State Government, as the case may be has first to satisfy themselves on the basis of personal knowledge and form an opinion to believe the involvement of any person in the commission of the offences under Chapter IV of the Act or the concealment of any narcotic drug, or psychotropic substance or document or article which may furnish evidence for the commission of such offences before arresting such person or searching

any building, premises etc. or authorising any officer subordinate to him of the rank mentioned therein to do so. In the case of information supplied by any other person like the secret informer he has to take such information in writing. In other words, it can be well said that the officers of the gazetted rank duly authorised under sub-section (2) of this section has to exhibit his reasons to believe in writing regarding the involvement of any suspect for the commission of the above referred offences or concealment of any contraband or commission of any such offence in some place, building etc. Consequently, by no stretch of imagination it can be said that the provisions of Section 41 of the Act are directory in nature and not mandatory.

17. A perusal of Section 42 of the Act reveals that power of entry, search, seizure and arrest without warrant or authorisation to arrest the suspect or search the premises during day time only on the basis of personal knowledge or on the basis of any information taken down in writing, such officer has been empowered to enter and search any building, conveyance and place and in case of any resistance break open the door and remove obstacle to such entry and seize such drug or substance and all material used in manufacture thereof and any other article which may furnish evidence etc. for the commission of such offence. He has also been given powers to detain and search and if he thinks proper may arrest any person whom he has reason to believe to have committed any offence under Chapter IV of the Act. The proviso to sub-section (1) of this Section further enables such officer to effect, enter any building etc. during the night if he is of the opinion that the search, warrant etc. cannot be obtained without affording the opportunity for concealment or facility for the escape of the offender, but he has to record the grounds of his belief, Sub-Section (2) further makes it obligatory for such officer to send a copy of the information taken down in writing under sub-section (1) or records of the ground of his belief under the proviso thereto to his immediate superior officer. The word "shall forthwith" figuring in sub-section (2) in connection with sending a copy of the information taken down in writing or the grounds of his belief under the proviso to sub-section (1) clearly depicts the intent of the Legislature to make these provisions mandatory as otherwise the word "forthwith" would not have figured with "shall".

18. Section 43 of the Act further gives powers to those officers if any of the departments mentioned in Section 2 of the Act to seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV of the Act has been committed. He has been further given powers to seize any animal or conveyance or article liable to confiscation under this Act, or any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under IVth Chapter. Clause (b) to sub-section (1) further gives such powers to such officer to detain or search any person against whom he has reason to believe to have committed an offence punishable under Chapter IV and if any contraband narcotic drugs and psychotropic substances are found in his unlawful possession, he can even arrest him and any other person b his company. Section 44 provides the application of the provisions of Sections 41, 42 and 43 of offences

punishable under Chapter IV and relating to coca plant, the opium poppy or cannabis plant, Section 45 of the Act provides a procedure for serving an order on the owner or person In possession of the goods, not to remove, part with or otherwise deal with the goods except with the previous permission of such officer duly authorised u/s 42 of the Act if seizure of such goods liable to confiscation is not practicable. Section 46 of the Act simply casts a duty on the land-holder to give immediate information of illegal cultivation of opium poppy, cannabis plant or coca plant and makes him liable for punishment in case of such default, Section 47 of the Act makes it obligatory on every officer of the Government and every panch, Sarpanch and other village officer to give immediate information to any officer of the police or of any of the departments mentioned in Section 42 the moment he comes to know about the cultivation of opium poppy, cannabis plant or coca plant and makes them liable to punishment in case they fail-to do so. Section 48 of the Act gives power of attachment of crop illegally cultivated. Section 49 of the Act further gives power to any officer authorised u/s 42 of the Act to stop and search any animal or conveyance, if he has reason to suspect that it is being used or about to be used for the transport of any narcotic drug on psychotropic substance. It further gives powers to such officer to shoot at any such animal or conveyance if he fails to stop by all lawful means. Thus, the provisions of Sections 43 to 49 are simply enabling provisions and do not contain any safeguards of mandatory nature.

19. Section 51 of the Act simply makes the provisions of the Code of Criminal Procedure, applicable to warrants issued and arrests, searches and seizures under this Act, if these are not inconsistent with the provisions of this Act. So, there is no need to extract or reproduce the provisions of Sections 43 to 49 and Section 51 as these do not contain any mandatory procedural safeguards. It may be clarified that Section 50 of the Act shall be discussed later as it confers a right upon the suspected person to claim personal search in the presence of a Magistrate or a gazetted officer mentioned therein.

20. The provisions of Section 52 of the Act also provides some safeguards and right as under:-

"52. Disposal of persons arrested and articles seized:-

(1) Any officer arresting a person u/s 41, Section 42, Section 43 of Section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under Sub-Section (1) of Section 41, shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to

(a) the officer-in-charge of the nearest Police Station, or

(b) the officer empowered u/s 53.

(4) The authority or officer to whom any person or article is forwarded under sub-Section (2) or sub-Section (3), shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article "

21. A bare perusal of the provisions of sub-section (1) of Section 52 of the Act leaves no doubt that it makes it obligatory upon the officer arresting an offender under Sections 41, 42, 43 or 44 of the Act to inform him the grounds for such arrest as soon as may be. The provisions are analogous to the provisions of Article 22(1) of the Constitution as therein the detenu is also required to be informed the grounds of his detention. Sub-Section (2) of this Section further makes it obligatory that if such person has been arrested or any article has been seized under warrant issued under sub-section (1) of Section 41 of the Act, then such person or article shall be produced before the concerned Magistrate who has issued the warrant without unnecessary delay while sub-section (3) makes it obligatory on the part of the officers to forward such person or article to the officer incharge of the nearest Police Station or to the officer empowered u/s 53 of the Act if such person or article has been seized without any warrant under sub-section (2) of Sections 41, 42, 43 or 44 of the Act. Sub-Section (4) of this Section further makes it obligatory on the part of the authority or officer to whom any person or article has been forwarded under sub-section (2) or sub-section (3) to take measures for the disposal according to law of such person or such article. Thus, the provisions of this section also provide a safeguard to the accused regarding informing him grounds for arrest as soon as possible besides producing him or the article before the Magistrate, who has issued the warrant or in other cases before the officer-in-charge of the Police Station or any officer, who has been conferred powers u/s 53 of the Act. The language used by the legislature clearly shows that these requirements are mandatory in nature qua the officer, who has arrested the suspect, or seized any contraband article as well as for the officer-in-charge of the Police Station.

22. Section 52A of the Act imbibes a rule of evidence. It was inserted by the Amending Act No. 2 of 1989 w.e.f. May 29, 1989. It provides for disposal of the seized narcotic drugs and psychotropic substances even before the commencement of the trial keeping in view its hazardous nature and vulnerability to theft, substitution, constraints or proper storage space or any other relevant considerations. Sub-Section (2) of this Section further provides the making of an inventory before disposing of such goods in the presence of Magistrate or taking of photographs of such drugs or substances which are required to be certified from the Magistrate and allowing to draw representative samples of such drugs or substances in the presence of Magistrate. Sub-section (4) further provides that every Court trying an offence under this Act shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn" as primary evidence in respect of such offence, notwithstanding anything contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973. Thus, in a way it can be well said that in order to avoid the pilferage or theft of narcotic drugs or psychotropic

substances or keeping in view their hazardous nature, wide powers have been given to the Central Government to specify by notification to be published in the gazette for disposal of such drugs or substances even before the conclusion of the relevant inquiry or trial.

23. Section 53A further makes the statements made and signed by a person before any officer empowered u/s 53 for the investigation of offences during the course of any inquiry or proceedings relevant for the purpose of proving the truth of the facts contained therein when such person is dead and cannot be found or has become incapable of giving evidence or is kept out of the way by the adverse party or whose presence cannot be obtained without any amount of delay or expense under the circumstances of the case. It further gives discretion to the Court to treat such statement as substantive evidence if the person who made the statement is examined as a witness in the case before the Court and if considers under the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Sub-section (2) of this Section further makes such statements relevant in any proceedings under the Act or Rules or orders made thereunder.

24. Section 54 of the Act also imbibes a rule of evidence regarding presuming a person to have committed and offence under Chapter IV in respect of any narcotic drug or psychotropic substance, any opium-poppy, cannabis plant or coca plant growing on any land under his cultivation, any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance; any material, undergoing any process towards the manufacture of a narcotic drug or psychotropic substance, if such person fails to account for its possession satisfactorily. Thus, Sections 54A and 54 also do not contain any safeguard in favour of the accused during the trial for offences under Chapter IV of the Act.

25. Section 55 of the Act makes it obligatory upon an officer-in-charge of the Police Station to take charge of and keep in safe custody, pending the orders of the Magistrate, all articles sized under this Act within the local area of that Police Station and which may be delivered to him. It further makes it obligatory on the officer-in-charge of the Police Station to allow any officer who may be accompanying such articles to the Police Station or who may be deputed for this purpose to affix his seal on such articles or to take samples of and from them and all such samples so taken shall also be sealed with the seal of the officer-in-charge of the police Station. Thus, this Section provides a safeguard of mandatory nature for the accused qua the affixing of seal in order to rule out the possibility of tampering with the sample.

26. Section 56 of the Act simply makes it obligatory on all officers of the several departments mentioned in Section 42 of the Act to assist each other in carrying out the provisions of this Act on the request or notice of other officers. Thus, this provision is also irrelevant for the controversy in hand.

27. Section 57 of the Act makes it obligatory upon the person arresting any suspect or seizing any property under this Act to make a report of such seizure to his immediate superior officer within 48 hours.

28. The remaining provisions of this Chapter except Section 50 provides no procedural safeguards to the offender during the investigation of the case under this Act. Thus, there is no necessity to refer the same.

29. The only other provision conferring a specific right upon the suspected person in Section 50 of the Act to claim his personal search before the nearest gazetted officer of any of the departments mentioned in Section 42 or before the nearest Magistrate. Sub-section (2) of this Section further provides the detaining of such person till he is produced before the gazetted officer or the Magistrate. Sub-section (3) of this Section further provides a right to the accused to prove his innocence before the gazetted officer or a Magistrate as discretion has been given to such officer or Magistrate to discharge the person without conducting his search if he sees no reasonable ground for doing so. Thus, the mandatory safeguards imbibed under the provisions of Sections 41, 42, 52, 55 and 57 of the Act, referred to above are of different nature than the one figuring in Section 50 of the Act. Consequently, the procedural safeguards contained in the above- referred Sections except Section 50 of the Act had to be considered separately than the one in Section 50 of the Act.

30. The law is well settled on the point that the violation of the statutory procedure by itself is not sufficient to vitiate the trial, unless it has resulted in miscarriage of justice or prejudice to the accused. The apex Court in H.N. Rishbud and Inder Singh Vs. The State of Delhi, , while considering the provisions of Section 5-A of the Prevention of Corruption Act, 1947 (as amended by the Act No. 59 of 1952) providing for the investigation of the case by an officer not below the rank of Deputy Superintendent of Police without the specific order of the Magistrate being mandatory or directory, at page 203 held that these provisions are mandatory and not directory and that the investigation conducted in violation thereof bears the state of illegality. It was further held that such defect or illegality during the investigation of the case, howsoever serious, has direct bearing on the competency of the Court take cognizance of the offence and would not vitiate the trial, unless it has resulted in miscarriage of justice or prejudice to the accused.

31. In Sunder Singh v. State of Uttar Pradesh AIR 1955 S.C. 411 the apex Court in para nine of the judgment, regarding the non-compliance of the provisions of Section 103 of the Old Code of Criminal-Procedure, observed as under:-

"In respect of search of the room occupied by the appellant and the recovery of the blood-stained shirt and blood-stained pants aforesaid it was necessary to have at least two search witnesses as required by Section 103. Assuming that the two richshaw-wallahs who actually witnessed the search as found by the Court below were not respectable inhabitants of locality, that circumstances would not invalidate the search.

It would only affect the weight of the evidence in support of the search and the recovery. Hence at the highest the irregularity in the search and the recovery in so far as the terms of Section 103 had not been fully complied with would not affect the legality of the proceedings. It only affected the weight of evidence which is a matter for Courts of fact and this Court would not ordinarily go behind the findings of fact concurrently arrived at by the Courts below."

33. Again, the apex Court in Radhakishan Vs. State of U.P., , in para 5 of the judgments, regarding the illegality of search under the provisions of Sections 103 and 165 of the Old Code of Criminal Procedure observed as under:-

"xx xx xx xx xx

It may be that where the provisions of Sections 103 and 165, Old Code of Criminal Procedure are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be included to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues."

34. In Munna Lal Vs. State of Uttar Pradesh, the apex Court followed the ratio of its earlier view in H.N. Rishbud"s case (supra) and observed that illegality during the investigation in- not following the provisions of Section 5-A of the Prevention of Corruption Act, 1947, the trial cannot be vitiated unless a miscarriage of justice has been caused on account of illegal investigation.

35. The above-referred view was reiterated by the five Judges Bench of the apex Court in M.C. Sulkunte Vs. State of Mysore, . In that case, the violation of Section 5-A of the Prevention of Corruption Act was involved, as the Magistrate had granted permission to the Inspector of Police to lay the trap but after elaborate discussion, it was held that the invalidity of the investigation shall not vitiate the trial unless it has resulted in miscarriage of justice.

36. The apex Court again in Khandu Sonu Dhobi and Another Vs. State of Maharashtra, reiterated its earlier view taken in H.N. Rishbud"s case (supra).

37. In the State of Maharashtra Vs. Natwarlal Damodardas Soni, , in Para 10 of the judgment, it was held that assuming arquendo, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which followed on the complaint of the Assistant Collector of Customs. Reliance in that case was also placed on the earlier decisions of the Supreme Court in Shyam Lal Sharma, etc. Vs. State of Madhya Pradesh, and in Dakhini Prasad Srivastava Vs. State of Uttar Pradesh, . In the said case, gold was seized by the police and the subsequent; investigation was conducted by the Customs Authorities under the Customs Act, 1962. The learned counsel for the accused had raised the objection qua the competency of the police officer to seize the gold.

38. In Durand Didier v. Chief Secretary, Union Territory of Goa (1990) S.C.C. 95 the apex Court again held that non-joining of independent witnesses of the locality as required u/s 100(4) of the Code of Criminal Procedure, 1973, but joining two other witnesses of the same area as mere irregularity and not illegality, and shall not affect the legality of the proceedings. The earlier view of the Supreme Court in Sunder Singhs"s case (supra) and Tej Bahadur v. State of U.P. was followed.

39. In Dr Partap Singh and Another Vs. Director of Enforcement, Foreign Exchange Regulation Act and Others, , in para 12 of the judgment, the apex Court held that the provisions of Section 165(1) of the Code of Criminal Procedure, 1973, have to be generally followed to the searches u/s 37(1) of the Foreign Exchange Regulation Act, as sub-section (2) of this Section provides that the provisions of the Code relating to the searches shall, so far as may be applicable to search provided under sub-section(l), be followed. Thus, it was held that the requirements of Section 165(1) of the Criminal Procedure Code for recording grounds of the belief are not applicable to searches under the Foreign Exchange Regulation Act. The apex Court was considering the import of its earlier decision in The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc., to the effect that the obligation to record in writing the grounds of belief, as enjoined in Section 165(1) of the Code, if not complied with, would vitiate the issuing of search warrant and seizure of the articles.

40. Now examining the provisions of Chapter V of the Act in the light of the above-referred observations and law laid-down by the Supreme Court, it transpires that procedural safeguards provided under the provisions of Sections 41, 42, 52, 55 and 57 of the Act, referred to above, are mandatory in nature, but mere non-compliance, violation or breach thereof are not sufficient to violate the trial unless, on the circumstances of the particular case, it is found that the non-observance of the safeguards to such extent has resulted in prejudice to the accused or in failure of justice.

41. In order to understand the import of the provisions of Section 50 of the Act, it would be worthwhile to reproduce it in verbatim:-

"Section 50. Conditions under which search of persons shall be conducted.-(i) when any officer duly authorised u/s 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 with unnecessary delay to the 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(i).

(3) The Gazetted Officer on 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"

42. A bare glance through sub-section (1) of this section leaves no doubt that a right has been given to the person suspected of his involvement of offence under Chapter IV of the Act to claim personal search before the nearest Gazetted Officer or the nearest Magistrate. Although Section 50 figures in Chapter V relating to the procedure to be followed under the Act, yet it cannot be said to be purely procedural in nature as a right has been conferred upon the accused to claim personal search in the presence of the aforesaid gazetted officer or Magistrate.

43. The matter does not rest here as the provisions of Sub-Section (2) empower the concerned officer to detain such person until he is brought before a gazetted officer or the Magistrate. Thus, such officer cannot have an excuse that the nearest gazetted officer or the nearest Magistrate was available at a considerable distance and, thus he did not feel it necessary to get the search conducted before such gazetted officer or Magistrate or that he had to produce the accused before the magistrate within 24 hours of his arrest, as provided in Section 167(1) of the Code of Criminal Procedure. Section 51 of the Act gives overriding effect to the provisions of this Act over the provisions of the Code of Criminal Procedure. To inform it all, the legislature has given power under-sub-section (3) to the gazetted officer or the Magistrate to discharge such person forthwith it he sees no reasonable ground for search. Consequently, it can be well said that before the personal search of a person is conducted in the presence of the Magistrate or a gazetted officer, he has been afforded an opportunity to establish his innocence. Sub-Section (4) of this section further provides that no female shall be searched by any one excepting a female. The provisions of sub- sections (1), (2) and (3) of Section 50 were enacted by the legislature in its wisdom only qua the personal search of a person-and that regarding the search of houses, buildings etc. obviously to preserve the human dignity. There is logic behind enacting the special provisions regarding the personal search, because a person can carry only a small quantity of contraband narcotic drug or psychotropic substance. Thus, in order to rule out the possibility of planting small quantity of such drugs at the instance of unscrupulous officers of the enforcing agency and to eliminate the chances of exploitation, the above-referred substantive right has been conferred upon the suspected person. A conjunct reading of the provisions of Section 50 of the Act leaves no doubt that the legislature did intend to confer a distinct right upon the suspect to claim personal search before a Magistrate or Gazetted Officer and prove his innocence in recognition of the right to human dignity and free from exploitation flowing from Article 21 of the Constitution.

44. Similar provisions figure in Section 102(1) of the Customs Act, 1962 as well as Section 19A of the foreign Exchange Regulation Act, 1973. In Natwarlal"s case (supra) before the Supreme Court, although the locality of the seizure of Gold under the Customs Act, 1962 by the police officer was involved, but the violation of the provisions of Section 102 of the customs Act was neither raised nor discussed.

45. In Durand Didier''s case (Supra), the accused had not claimed his search u/s 50 of the Act before a gazetted officer or a Magistrate, thus, before the Supreme Court, the effect of the non-compliance of the mandatory provisions of Section 50 of the Act was not involved.

46. Consequently, the non-compliance of the mandatory provisions of Section 50 of the Act during the investigation of the case, cannot be equated with an illegality resulting from non-compliance of the other safeguards embodied in Sections 41, 42, 53, 55 and 57 of the Act, because it is not purely procedural qua investigation, but a substantial right has been conferred on the suspected person to claim search before gazetted officer or before the nearest Magistrate and prove his innocence at that stage. If despite of such requisition by the suspect the concerned official does not get his personal search conducted, in the presence of the gazetted officer or a Magistrate, is still itself amount to prejudice to the accused and result in miscarriage of justice as it will amount to breach of one''s substantive right and tinkering with his personal dignity.

47. Consequently, the observations of the Apex Court qua other procedural illegalities being not by themselves sufficient to vitiate the trial unless it has resulted in failure or miscarriage of justice, are not attracted to the non-compliance of the provisions of Section 50 of the Act. It may, however, be clarified that although the non-compliance of the provisions of Section 50 of the Act would itself vitiate the trial, yet the person concerned shall not be entitled to claim the return of narcotic drugs and psychotropic substance, as in view of the provisions of this Act, nobody can possess or claim possession of such article.

48. The observations of the Full Bench of Orissa High Court in Sanka Dass and Ors. v. State of Orissa, 1993 (2) R.C.R. 285 in paras 5 and 6 of the judgment, that the provisions of Sections 41, 42, 43, 45, 50 and 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985, are mandatory qua the officials who are required to do the prescribed acts in the prescribed manner, but the non-compliance thereof is no itself sufficient to vitiate the conviction unless it has resulted in prejudice to the accused or miscarriage of justice, are of no help to decide the controversy qua the provisions of Section 50 of the Act, as the Full Bench had not considered the import of sub-section 3 of Section 50 of the Act providing a substantive right to the accused for establishing his innocence at the earliest stage. The Full Bench had relied upon the judgments of the apex Court in Radhakishan Vs. State of U.P., and in Khandli Sonu''s case (Supra). As already discussed in Radha Krishan''s case (supra) the controversy related to the non-compliance of Sections 103 and 163 of the Old Criminal Procedure Code for search of the premises while in Khandu Sonu''s Case (supra) the controversy related to violation of the provisions of Section 5-A of the Prevention of Corruption Act, as the search was conducted by an officer not duly authorised. Consequently, the ratio of the decision of the Full Bench of Orissa High Court is of no help In concluding that non- compliance of the provisions of Section 50 of the Act would not itself vitiate the trial or conviction. However, the Full Bench of the Orissa High Court lends support to the view already taken by us that the provisions of Sections 41, 42,

52, 55 and 57 of the Act, though mandatory in nature, but their non-compliance by itself is not sufficient to vitiate the trial unless in the circumstances of the particular case, it has resulted in any prejudice to the accused or miscarriage of justice.

49. Although the question whether the concerned officer duly empowered under Sections 41 and 42 of the Act or the police officer conducting search of a person suspected of the possession of such psychotropic substances under the Act is bound to inform the suspect of his right to get himself searched in the presence of a gazetted officer or the nearest Magistrate was not referred to the full Bench for decision, yet, on the request of the learned counsel for the parties, we consider it desirable to settle this controversy. In this regard, it is noteworthy that every person is supposed to know the law of the land. The provisions of Section 50 do not provide at all that the suspect is required to be informed in this regard by the official concerned. Thus, there is no escape but to hold that the legislature in its wisdom had not deliberately made it obligatory on such officer to inform the accused of his right regarding search before a gazetted officer or nearest Magistrate. It cannot be said to be inadvertent omission as there are many instances where the legislature has specifically provided for such intimation. The provisions of Section 130(1) of the Army Act, 1950, can be safely referred to in this regard. Under that Section, the accused is required to be informed that he has a right to object to the composition of the Presiding Officer or the members of the Court Martial. Similarly, u/s 50(2) of the Code of Criminal Procedure, 1973, it is provided that if a police officer arrests a person for a bailable offence, without a warrant; then it is obligatory on him to inform such person that he is entitled to be released on bail on furnishing requisite sureties. The Full Bench of Orissa High Court in Banks Doss"s- case (supra) had also taken a similar view. The observations Amrit Singh v. State of Haryana 1990 (1) C.L.R. 437 as well as of the Division Bench of the Himachal Pradesh High Court in State of Himachal Pradesh v. Sudershan Kumar 1989 C.L.R. 240 that the officer or police official conducting the personal search of the suspect is bound to inform him of his right to get himself searched in the presence of the gazetted officer or the. nearest Magistrate are, therefore, not legally sound. However, in an actual practice, it would be desirable to record the statement of suspect whether he claims search before a Gazetted Officer or the Magistrate because in every such case of personal search, the accused would get having claimed such right while it would be almost diliask for the prosecution to prove that he had not done so.

50. In view of the above findings, with utmost respect to. the learned Judges of this Court, there is no escape but to hold that in Hakam Singh Vs. Union Territory, Kuldip Singh v. The State of Haryana 1989 C.C. C 183 (H.C.) Bhajan Singh v. State of Haryana 1988 (1) Crimes 444 Amrit Singh v. The State of Haryanar 1990 (1) C.L.R. 437 and State of Himachal Pradesh v. Sudershan Kumar 1989 (1) C.L.R. 240 the learned Judges had not laid-down the correct law qua non-compliance of the provisions contained in Chapter V of the Act other than the one u/s 50 of the Act having resulted in vitiating the trial and conviction. However, their conclusions qua the provisions of Section 50 of the Act are well

rounded.

51. The Panaji Bench (Goa) of the Bombay High Court in Abdul Satar v. State 1989 Cri.L.J. 430 had taken the view that non-compliance of the provisions of Sections 41 to 58 of the Act, although mandatory in nature, would not vitiate the trial unless it has resulted in prejudice to the accused, had not laid down the correct law qua the effect of the non-compliance of the provisions of Section 50 of the Act. Moreover, in that case, the accused-appellant had not asserted that he had exercised his right to be searched in the presence of the gazetted officer or Magistrate.

52. The Division Bench of Gujarat High Court in Surajmal Kanaiyala Soni v. The State of Gujarat 1991 Cri L.J. 1433 with utmost respect to the learned judges, had not taken the correct view qua the provisions of Section 50 of the Act as well as qua recording of information in writing under Sections 41 and 42 of the Act being not Mandatory.

53. The Division Bench of Delhi High Court in Richhpal Singh v. The State 1989 D C 97 : 1989 FAC 133 had also not laid down the correct law qua the effect of the non-compliance of the provisions of Section 50 of the Act, However, its findings qua the non-compliance of other provisions of the Act are well-founded.

54. For the foregoing reasons, there is no escape but to hold that the provisions of Sections 41, 42, 52, 55 and 57 of the Act are mandatory in the sence that the concerned officials are bound to comply with the same, but their non-compliance per se would not prove fatal to the case unless it has resulted in miscarriage of justice or prejudice to the accused on the facts of a particular case. However, the non-compliance of the provisions of Section 50 of the Act would so result in vitiating the trial and conviction and it would amount to taking away the most valuable and substantive right of the suspected person in establishing his innocence and rendering the recovery of narcotic drugs and psychotropic substances as illegal qua the possession of the accused. However, such contraband article shall be confiscated to the State as he cannot claim return of the same. The questions posed in the reference are answered accordingly. These four appeals now be placed before the appropriate Bench for their disposal on merits.