(1995) 07 BOM CK 0075

Bombay High Court

Case No: Criminal Appeal No''s. 336 and 358 of 1991

Babulal Hiralal Sainy and another etc		APPELLANT
	Vs	
State of Maharashtra		RESPONDENT

Date of Decision: July 11, 1995

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 100, 165
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 2, 21, 41(1), 41(2), 42(1)

Citation: (1995) CriLJ 4105

Hon'ble Judges: R.M. Lodha, J; B.U. Wahane, J

Bench: Division Bench

Advocate: M.H. Rizwy and K.R. Padhye, Amicus Curiae, for the Appellant; H. Ahmed, A.G.P., for the Respondent

Judgement

R.M. Lodha, J.

These two criminal appeals, one by original accused No. 2 Babulal Hiralal Sainy (A2) and original accused No. 3 Mirajuddin Munnikhan Pathan (A3) and the other by original accused No. 1 Umesh (A1) are directed against the conviction and sentence awarded by the Additional Sessions Judge, Nagpur, in Sessions Case No. 545/1990, on 31-7-1991, to the accused/appellants for the offence punishable u/s 21 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short the N.D.P.S. Act). The appellants have been sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1,00,000/- each and in default to suffer R.I. for 6 month.

2. The principal contentions raised by Mr. Rizwy, the learned counsel for the appellants/accused A2 Babulal and A3 Mirajuddin in Criminal Appeal No. 336 of 1991, are (1) that the mandatory provisions contained in Sections 41 and 42 of N.D.P.S. Act have not been complied with inasmuch as the information received

about commission of offence was not reduced in writing and after reducing the said information in writing, the same was not sent to the Superior Officer, (2) that the mandatory provisions of Section 50 of N.D.P.S. Act were not complied with inasmuch as the accused/appellants were not informed of their right as to whether they wanted the search to be taken before the Executive Magistrate or the Gazetted Officer and (3) that the procedure as required under Sections 55 and 57 of the N.D.P.S. Act was not meticulously followed and as a result thereof serious prejudice was caused to the accused/appellants Mr. Rizwy, the learned counsel for the appellants/accused, in support of his submissions, strongly relied upon the decision of the Supreme Court in State of Punjab Vs. Balbir Singh, , Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, , Mohinder Kumar Vs. The State, Panaji, Goa, , and division bench judgment of this Court in Daniel Odemenam v. R. Ramesh (1995) 1 Mah LJ 857. The learned counsel appearing on behalf of the A1 Umesh adopted the submissions of Mr. Rizwy. Both the learned counsel submitted that in the absence of the compliance of mandatory provisions, particularly Sections 41, 42 and 50 of N.D.P.S. Act the conviction and sentence awarded by the Additional Sessions Judge, to the accused/appellants deserves to be quashed and set aside.

3. Opposing the submissions advanced by the learned counsel for the accused/appellants, on the other hand, Mr. Ahmed, Additional Public Prosecutor, appearing on behalf of the State, vehemently contended that the information received by the Police Officer was not about the commission of offence under the N.D.P.S. Act and was not as contemplated under the N.D.P.S. Act and, therefore, it was not required to be reduced in writing. Mr. Ahmed further urged that in fact the search was conducted by the empowered officer under Sections 100 and 165 of the Code of Criminal Procedure, 1973, because it was not pursuant to the information required under N.D.P.S. Act and therefore, no compliance of Sections 41 and 42 of the N.D.P.S. Act was required in the facts and circumstances of the present case. Mr. Ahmed would urge that since Section 41 and 42 of N.D.P.S. Act were not applicable in the facts and circumstances of the present case, obviously, Section 50 of the N.D.P.S. Act would not operate and non-compliance of the said provisions, even if we assume, would not help the accused/appellants and would not vitiate the trial. Mr. Ahmed took us through the provisions of the N.D.P.S. Act and submitted that possession of any narcotic drugs and psychotropic substance is by itself not an offence, and therefore, the information which was received to the effect that two persons from other State had come to Nagpur city along with large quantity of brown sugar and that they were in search of customers and were selling the brown sugar, was not an information as contemplated under Sections 41 and 42 of the N.D.P.S. Act since there was no information about the names of these two persons and also that these two persons were in possession of the brown sugar without any licence from the Competent Authority. The contention of Mr. Ahmed therefore, is that search conducted in the present case was search simpliciter under Sections 100 and 165 of Code of Criminal Procedure, 1973 and the said search was permissible by

virtue of Section 51 of N.D.P.S. Act being not inconsistent with the provisions of the said Act and therefore, question of non-compliance of Sections 41, 42 and 50 of N.D.P.S. Act did not arise. Mr. Ahmed also submitted that the burden was on the defence to lay foundation in cross-examination of the Police Officer as to whether the accused was informed as required u/s 50 of the N.D.P.S. Act or not and since there was no such cross-examination of P.W. 14, Shri Sunil Ramrao Paraskar, it is not open to the defence to urge in appeal before this Court that Section 50 of N.D.P.S. Act has not been complied with. Mr. Ahmed, in support of his submissions, strongly relied upon the Judgment of the Apex Court in Surajmal Kaniah Lal Soni v. State of Gujarat JT 4 (1994) (SC) 144.

4. To assess the respective submissions made by the learned counsel, the prosecution story unfolded during the trial may be noted briefly. According to the prosecution case, on 21-6-1990, Shri Sunil Paraskar (P.W. 14), Assistant Commissioner of Police, Crime Branch Nagpur received an information that person from neighbouring State had arrived in Nagpur City with large quantity of brown sugar and they were in search of customers, Shri Sunil Paraskar, (P.W. 14) accordingly informed his Superior Officer, namely Deputy Commissioner of Police, Crime Branch, Nagpur and arranged for laying the raid and on 22-6-1990 at about 8.30 a.m. one Mr. Kadam, Additional Deputy Commissioner of Police, C.I.D. Intelligence was sent to Anukul Restaurant, Kamptee Road, Nagpur, with instruction to purchase brown sugar from accused/appellant A1 Umesh and it was decided if the brown sugar was found and the deal was struck, Mr. Kadam would proceed towards Kamptee. The raiding party led by Mr. Paraskar (P.W. 14) followed him to Anukul Restaurant, Shri Kadam arrived and parked his car in front of the Anukul Restaurant, went inside hotel, returned, from the hotel after 5-10 minutes and after boarding the car proceeded towards the Kamptee road. The car was driven by Mr. Kadam and the accused A1 Umesh sat on the rear seat of the car. Since the car proceeded towards Kamptee, it was indicative of the fact that the deal had struck and the person accompanying Mr. Kadam had contraband. The raiding party led by P.W. 14 Sunil Paraskar followed the car of Mr. Kadam, apprehended the car and asked A1 Umesh who was sitting on the rear seat to come out. Though A1 Umesh tried to flee away, his attempt was foiled and after disclosing identity, search was taken and the plastic bag having about half Kg. of brown sugar was found from his person. Panchanama Exh. 69 was drawn. The plastic bag seized from A1 Umesh was sealed and signatures of panchas, accused Umesh as well as P.W. 14 Sunil Ramrao Paraskar were put on the said seized plastic bag. Accused/Appellant A1 Umesh also informed the raiding party that accused/appellants A2 Babulal and A3 Mirajuddin, who were staying at Swagat Lodge Nagpur, were also having brown sugar with them and consequent to this information, the raiding party went to Swagat Lodge and with the assistance of P.W. 1 Harish, found that A2 Babulal and A3 Mirajuddin were putting in a room No. 36 of the said Lodge. P.W. 14 Shri Sunil Paraskar along with the raiding party, went to room No. 36 and A2 Babulal and A3 Mirajuddin were

found there. They were asked to search the members of the raiding party to which they declined and during search of the room, a suitcase was found and A2 Babulal was asked to open the suit-case and the polythene bag containing about 1/2 kg. brown sugar was found from the said suit-case. The said plastic bag was also sealed, and label bearing signatures of panchas, the appellants/accused A2 Babulal and A3 Mirajuddin and P.W. 14 Sunil Paraskar was put. The suit-case was also seized. Thereafter P.W. 14 Sunil Paraskar reported his superior officer Shri Mathur, D.C.P., C.I.D. about the raid and one more accused Shioraj was apprehended from his house. First Information report Exh. 127 was lodged at Police Station, Panchpaoli, by P.W. 14 on 22-6-1990 at about 10.30 a.m. The seized articles were deposited at the Police Station Panchpaoli through Police Constable Ramesh (P.W. 12). On 2-7-1990, the sealed articles were sent for chemical analysis and according to the Chemical Analyser''s report dated 18-7-1990 (Exh. 129), the sealed articles contained Heroin i.e. diacetylmorphine along with other opium alkaloids which were covered u/s 2(xvi)2 of N.D.P.S. Act. On conclusion of investigation, the accused/appellants namely A1 Umesh, A2 Babulal and A3 Mirajuddin along with another accused Shioraj were charged for the offence punishable u/s 21 of the N.D.P.S. Act The accused/appellants denied having committed any offence.

4-A. The prosecution during the course of trial, examined P.W. 1 Harish, P.W. 2 Shri Mustaq Ahmed, P.W. 3 Sanjay, P.W. 4. Bhimrao, P.W. 5. Dilip, P.W. 6. Haribhau, P.W. 7, Dnyaneshwar, P.W. 8. Suchit, P.W. 9 Ramkripal, P.W. 10 Ramapati, P.W. 11 Hansraj, P.W. 12 Ramesh, P.W. 13 Ram Kannake, P.W. 14 Sunil Paraskar, P.W. 15 Purushottam Kondalkar and also exhibited the number of documents including panchanama in respect of seizure of the property dated 22-6-1990 (Exh. 69 & 70), first information report (Exh. 127), Chemical Analyser''s report dated 18-7-1990 (Exh. 129) and copy of station diary sana dated 22-6-1990 (Exh. 138).

5. After recording the evidence and hearing the learned Public Prosecutor as well as the counsel for the accused persons, the Additional Sessions Judge, Nagpur, on 31-7-1991, held that the prosecution has been able to prove beyond reasonable doubt the offence u/s 21 of the N.D.P.S. Act against A1 Umesh, A2 Babulal and A3 Mirajuddin and convicted them for the offence punishable u/s 21 of the N.D.P.S. Act and sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1,00,000/- each and in default, of payment of fine to suffer R.I. for 6 months each. However, accused Shioraj Shubhkaran Thakur was acquitted.

6. The prosecution case is clear to the extent that an information was received by P.W. 14 Sunil Paraskar that some persons from other State had come to Nagpur City along with large quantity of brown sugar and that they were in search of customers for selling the said brown sugar. This fact is clearly borne out from the first information report dated 22-6-1990, (Exh. 127) registered at Police Station Panchpaoli, lodged by Shri Sunil Paraskar (P.W. 14). The station diary sana (Exh. 138) also reveals that some information was received regarding the brown sugar and the

Assistant Commissioner of Police, Crime Branch, remained present to lay raid and the person who was asked to act as bogus customer also remained present in his car. It is recorded in Exh. 138 that name of the informant in the circumstances, should not be leaked and name and address of the bogus customer was also not mentioned and no intimation was given to any Police Station in order to maintain secrecy. P.W. 14 Sunil Paraskar has also deposed before the Court that he received the information that persons from neighbouring State have come to Nagpur and were selling the brown sugar and accordingly he informed his superior Deputy Commissioner of Police, C.I.D., Nagpur and made preparation for laying the trap and conducting the raid and in that connection Shri Kadam, Additional Deputy Commissioner, C.I.D., Intelligence was required to act as a bogus purchaser, and it was decided that Shri Kadam should purchase the brown sugar from the persons who were suspected to have brown sugar. Firstly the question is whether this information which was received by P.W. 14 Sunil Paraskar, Assistant Commissioner of Police, Crime Branch, Nagpur, was an information of commission of offence under N.D.P.S. Act as contemplated under Sections 41 and 42 of the N.D.P.S. Act.

7. Before we advert to the said question as to whether the information received by Shri Sunil Paraskar (P.W. 14) was an information regarding commission of offence as contemplated under Chapter IV of the N.D.P.S. Act the judgment of the Apex Court in State of Punjab Vs. Balbir Singh, , may be seen. The Apex Court in Balbir Singh''s case has succinctly, explained the scope of Sections 41, 42, 50, 52 and 57 of N.D.P.S. Act as to what extent these provisions are mandatory and has set out the conclusion in para 26 of the said report which reads as follows :

"The questions considered above arise frequently before the trial Courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the N.D.P.S. Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the N.D.P.S. 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 (of recovery of any narcotic drug or psycotropic 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 N.D.P.S. 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 N.D.P.S. Act.

(2A) u/s 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 Ss. 41(2) and 42(1) can act under the provisions of the N.D.P.S. Act. If such arrest or search is made under the provisions of the N.D.P.S. Act by any one other than such officers, the same would be illegal.

(2B) u/s 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.

(2C) u/s 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) u/s 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.

(4A) 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 Cr.P.C. 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.

(4B) If an empowered officer or an authorised officer u/s 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165, Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C., 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 u/s 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 gazatted 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."

8. It is thus clear that if empowered officer makes a search or arrests a person pursuant to the information of commission of offence as contemplated under N.D.P.S. Act it is required to be reduced in writing and the said written information is further required to be sent to the Superior Officer.

9. Balbir Singh''s case has been followed and reiterated by the Apex Court in Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, , and the Supreme Court thus held : (at p. 245-46 of AIR)

"6. Learned counsel for the respondents on the other hand submitted that the question of giving option to the accused in compliance with Section 50 of the Act is subject to the condition that the accused "requires" that he be searched in the presence of a gazetted officer or a Magistrate but where the accused does not so ''require'' for whatever reason his conviction would not stand vitiated, in case the option was not given to him. A similar argument had been advanced in State of Punjab Vs. Balbir Singh, and the Bench repelled the same after a detailed discussion and observed (at pp. 1819-20 of AIR) : (at p. 3714 of Cri LJ) "The words" if the person to be searched so desires'' are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search should be conducted, in the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. To us, it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart

much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right.

7. We respectively agree with the above observations and reject the submission made on behalf of the respondents.

8. Learned counsel for the respondents then submitted that the judgment in State of Punjab Vs. Balbir Singh, requires reconsideration. We cannot agree. There are no compelling reasons advanced by the learned counsel for the respondents for the reconsideration of the judgment in Balbir Singh''s case (supra).

9. The last submission of the learned counsel for the respondents is that even if the search and seizure and seizure of the contraband are held to be illegal and contrary to the provisions of Section 50 of the N.D.P.S. Act it would still not affect the conviction because the seized articles could be used as "evidence" of unlawful possession of a contraband. Reliance for this submission is placed on the judgment of this Court in Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, . We are afraid the submission is misconceived and the reliance placed on the said judgment is misplaced. The judgment in Pooran Mal''s case (supra) only lays down that the evidence collected as a result of illegal search or seizure, could be used as evidence in proceedings against that party under the Income Tax Act. That judgment cannot be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten the liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner. "Unlawful possession" of the contraband is the sine qua non for conviction under the N.D.P.S. Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in the absence of proof of possession of the same, an accused cannot be held guilty under the N.D.P.S. Act,"

10. Again in Mohinder Kumar Vs. The State, Panaji, Goa, , the Supreme Court reiterated the legal position as laid down in State of Punjab Vs. Balbir Singh, and held thus : (at p. 2075 of Cri LJ).

"3. In the instant case, the facts show that he accidentally reached the house while on patrolling duty and had it not been for the conduct of the accused persons in trying to run into the house on seeing the police party he would perhaps not have had occasion to enter the house and effect search. But when the conduct of the accused persons raised a suspicion he went there and effected the search, seizure and arrest. It was, therefore, not on any prior information but he purely accidentally stumbled upon the offending articles and not being the empowered person, on

coming to know about the accused persons being in custody of the offending articles, he sent for the panchas and on their arrival drew up the panchanama. In the circumstances, from the stage he had reason to believe that the accused persons were in custody of narcotic drugs and sent for panchas, he was under an obligation to proceed further in the matter in accordance with the provisions of the Act. u/s 42(1) proviso, if the search is carried out between sun set and sunrise, he must record the grounds of his belief. Admittedly, he did not record the grounds of his belief at any stage of the investigation subsequent to his realising that the accused persons were in possession of charas. He also did not forward a copy of the ground to his superior officer, as required by Section 42(2) of the Act because he had not made any record under the proviso to Section 42(1). He also did not adhere to the provisions of Section 50 of the Act in that he did not inform the person to be searched that if he would like to be taken to a Gazetted Officer or a Magistrate, a requirement which has been held to be mandatory. In State of Punjab Vs. Balbir Singh, , it has been further stated that the provisions of Sections 52 and 57 of the Act, which deal with the steps to be taken by the officer after making arrest or seizure are mandatory in character. In that view of the matter, the learned counsel for the State was not able to show for want of material on record, that the mandatory requirements pointed out above had been adhered to. The accused is, therefore, entitled to be acquitted."

11. The Division Bench of this Court in Daniel v. R. Ramesh (1995) 1 Mah LJ 857, considered the judgment of the Apex Court in State of Punjab Vs. Balbir Singh, and it was held therein :

"5. In the instant case, there was a prior information received by P.W. 1 which was reduced into writing and forwarded to his superior officer Mr. Kakkar who arranged the trap. Neither in the evidence of P.W. 1 R. Ramesh and P.W. 3 Kakkar have been stated that the appellant-accused was asked for his option as required u/s 50(1) of the N.D.P.S. Act. We do not find any evidence even in the evidence of panch witness, P.W. 2. Therefore, it is clear that no opportunity was offered to the appellant in compliance of Section 50 of the Act. However, the learned Additional Public Prosecutor Mr. Agarwal appearing for customs submitted that the ratio laid down by the Supreme Court is limited to the extent that the search is restricted to person only i.e., physical search of the suspected person and not his baggage nor his belongings. The incriminating substance found in the hand bag of the appellant does not fall within the scope of search of persons u/s 50(1) of the Act and therefore, the ratio laid down by the Supreme Court is not applicable in the instant case. We did not go far to find out the answer to this. The Supreme Court itself has answered to this in its judgment rendered in the case of Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, , delivered on 28-9-1994. In para 2 of the said Judgment, it is observed that : (at p. 245 of AIR)

"According to the prosecution case, on 12-10-1988 at about 11.15 p.m., the appellant was found in possession of 780 gms of charas in the first class waiting room of the railway station at Quilon. P.W. 6, Ashok Kumar, Sub-Inspector of Police attached to the Quilon railway station on receipt of reliable information that a foreigner having charas in his possession was sitting at the Quilon railway station, went to the platform where P.W. 1 constable Nataraja Pillai was on patrol duty. Both P.W. 1 and P.W. 2 went to the first class waiting room. The appellant was found sitting there with a bag. On suspicion, he was questioned by P.W. 1 and P.W. 6. The appellant took out a small packet of charas from his bag and handed it over to P.W. 6. On further questioning and search. P.W. 6 recovered three big packets of charas from the bag which was in possession of the appellant. The seizure of the charas was effected in presence of the witness on the spot itself and the contraband was taken into possession after making the mahazar. The other valuable articles which were with the appellant were also taken into custody, after preparing the recovery memo. The contraband was weighed and in the presence of witnesses, a small portion from each of the four packets of contraband, was taken as sample for examination. The search and seizure lasted till about 5.00 a.m. on 13-10-1988. The seized articles were kept in safe custody of the police station and the appellant was produced before the Magistrate, after the registration of the case. After further investigation, the chargesheet was filed before the Chief Judicial Magistrate, Quilon who committed the case to the Sessions Court for trial".

12. At this stage the judgment of the Supreme Court in Surajmal Kaniah Lal Soni v. State of Gujarat JT (4) (1994) 144, may be advantageously referred in which it was held that whether Police Officer informed the accused as required u/s 50 of the Act, the said question was a question of fact and foundation regarding thereto has to be laid in the cross-examination of the Police Inspector as to whether he informed the accused as required u/s 50 of the Act. The Supreme Court, thus, held :

"4. In this appeal the main submission is that the Police Inspector did not reduce the information into writing and therefore the mandatory provision has been violated. It must be noted that according to the Police Inspector, only some vague information was passed on to him. No informant as such came and gave the information which as per the relevant Section was to be reduced into writing.

5. The learned counsel appearing for the appellant also submitted that there is no clinching evidence that the appellant was in possession of the opium. This is purely a question of fact. The evidence adduced by the prosecution is to the effect that the opium was found in the rexine bag and it has been accepted by both the Courts below and we see no grounds to come to different conclusion.

6. The only other important submission made was that there is no proof that Section 50 of the Act has been complied with. According to the learned counsel, the Police Officer who searched did not say that he informed the accused that he has got a right to be taken to a gazetted officer for conducting the search. This Court in State

of Punjab Vs. Balbir Singh, , has pointed out that whether there was compliance or not, would be a question of fact. No foundation has been laid in the cross-examination of the Police Inspector as to whether the Police Officer, informed the accused as required u/s 50 of the Act, the learned counsel also submitted that there was no compliance of Section 57 namely that there is no material to show that the Police Inspector has sent a report to the Higher authorities as required u/s 57 of the Act."

13. To what extent the provisions contained in Sections 41, 42 and 50 of N.D.P.S. Act are mandatory is now well settled and no more res integra in view of the judgment of the Apex Court in State of Punjab Vs. Balbir Singh, . If there is specific information about the commission of offence under Chapter IV of the N.D.P.S. Act it is required to be reduced in writing and the said information of such commission of crime which has been reduced in writing is further required to be sent to the superior officer. However, it does not mean that any or every vague and unspecific information in connection with N.D.P.S. Act and about likelihood of commission of offence under N.D.P.S. Act is required to be reduced in writing. A vague secretive information in connection with the N.D.P.S. Act cannot be equated with the information of commission of an offence under Chapter IV of N.D.P.S. Act as contemplated under N.D.P.S. Act. The information in the nature that some persons are dealing with the narcotic drug or psychotropic substance or that such persons are in search of customers for sale of narcotic drugs and psychotropic substance, by itself cannot be said to be a specific information of commission of offence under Chapter IV of N.D.P.S. Act and at best can be said to be an information in connection with the N.D.P.S. Act and there was likelihood of commission of offence and such vague information, cannot be said to be an information as is required and contemplated under the N.D.P.S. Act. Such information in connection with the N.D.P.S. Act may at best provide a basis for suspicion about the commission of crime but does not furnish a positive information that crime has been committed or that the said information was with regard to the commission of offence under Chapter V of the N.D.P.S. Act. Though Mr. Ahmed, Additional Public Prosecutor, has strenuously urged that in the instant case, since the information did not reveal that the brown sugar with the said persons was without licence and, therefore, not an offence, but we do not agree with the broad submission made by Mr. Ahmed to that extent that merely because no information was given that the persons possessing the brown sugar had no licence and therefore, not an offence under N.D.P.S. Act. Yet what is required under law before an information can be said to be an information u/s 41 and 42 of N.D.P.S. Act is that such information should be specific and not vague about the person and place of commission of offence under the N.D.P.S. Act. The prosecution case as is revealed from first information report (Exh. 127), station diary sana (Exh. 138) and the deposition of P.W. 14 Sunil Paraskar is that P.W. 14 Sunil Paraskar received information that some persons from neighbouring State have arrived at Nagpur city and were in search of customers for

sale of brown sugar. The said information had neither disclosed the names of the persons who had arrived in Nagpur nor even the description of such persons. It also did not disclose about the quantity of the brown sugar being possessed by them. The information as received in such circumstances, cannot be construed to mean an information of commission of offence as contemplated under Sections 41 and 42 of N.D.P.S. Act. It may further be seen that by this information only suspicion was created in the mind of P.W. 14 Sunil Paraskar in connection with N.D.P.S. Act and therefore to find out the truth and the correctness of the information, preparation of laying trap and conducting the raid was made. It was in this connection that Mr. Kadam, Additional Deputy Commissioner of Police, was arranged as bogus customer and he was asked to go to Anukul Restaurant and strike the deal of purchase of brown sugar and if the deal materialised, he was required to move towards Kamptee. This exercise also leads to an inference that there was no definite, specific and clear information about commission of offence under the N.D.P.S. Act and P.W. 14 Sunil Paraskar conducted the raid and proceeded with the search in the manner under Sections 100 and 165 of Code of Criminal Procedure, 1973. If a search and arrest is made under Sections 100 and 165 of the Code of Criminal Procedure, without prior information of commission of offence as contemplated under Sections 41 and 42 of N.D.P.S. Act compliance of Sections 41 and 42 of N.D.P.S. Act is not required to be made and such search and arrest under Sections 100 and 165 of Code of Criminal Procedure cannot be said to be bad being not inconsistent with the provisions of N.D.P.S. Act as is provided u/s 51 of the N.D.P.S. Act in State of Punjab Vs. Balbir Singh, , the Apex Court has made it clear that if a Police Officer without any prior information as contemplated under the provisions of N.D.P.S. Act makes a search or arrests a person, the provisions contained in Section 50 of N.D.P.S. Act would not be attracted and the question of complying thereunder would not arise. In para 9 of the said report the Apex Court has observed if a prior information lead to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the Officer empowered have to proceed and act under the provisions of Sections 41 and 42. That means that if, prior information does not lead to a reasonable belief that an offence has been committed, or that the information received does not disclose the commission of offence under Chapter IV of N.D.P.S. Act such information is not required to be reduced in writing, because that would be only vague information and on the basis of such information the empowered officer cannot be said to have formed the reasonable belief that an offence under Chapter IV of the N.D.P.S. Act has been committed. The provisions of Sections 41 and 42 of N.D.P.S. Act would not be operative and cannot be said to be attracted where the Police had secret, vague and unspecific information without there being specific information of commission of offence under N.D.P.S. Act but has only an information about the likelihood of commission of offence under N.D.P.S. Act. In Surajmal Kania Lal Soni Vs. State of Gujarat, the argument that Police Officer did not reduce the information into writing and, therefore, the mandatory provisions was violated, was repelled by the Apex

Court by observing that it must be noted that according to the Police Inspector, only some vague information was passed on to him and there was no information as per the relevant Section which was to be reduced into writing. We are, therefore, of the definite opinion that unless an information is received by the empowered Police Officer about the commission of offence under Chapter IV of the N.D.P.S. Act and the said information was specific about the specific crime, non-recording of such an information would not mean that mandatory provisions of Section 41 or 42 have been violated or infringed. The information about the specific commission of offence under Chapter IV of N.D.P.S. Act is only required to be reduced in writing, and such information, which is reduced in writing, is required further to be sent to the superior officer and not each and every vague information not relating to specific commission of offence under Chapter IV of the N.D.P.S. Act.

11th July, 1995.

14. On the facts and in the circumstances of the case, the information received by P.W. 14 Sunil Paraskar to the effect that persons from neighbouring State had come to Nagpur with large quantity of brown sugar and were in search of customers cannot be said to be an information that any person has committed an offence punishable under Chapter IV or that narcotic drug and psychotropic substance in respect of which any offence punishable under Chapter IV has been committed and, therefore, such information was not required to be reduced in writing under Sections 41 and 42 of the N.D.P.S. Act because the said information was not the information as contemplated u/s 41 and 42 of N.D.P.S. Act. Assuming however, that the information received by P.W. 14 Sunil Paraskar was an information about the commission of offence under Chapter IV of N.D.P.S. Act, still on the basis of Exh. 138, station diary sana, it can be held that such information has been recorded. It is not disputed that the information was received on 21-6-1990 and on 22-6-1990 in station diary sana (Exh. 138) the said information is recorded. The information recorded in station diary sana dated 22-6-1990 (Exh. 138) reads :

"On the basis of the information received regarding Gard (brown sugar) I Assistant Commissioner of Police Crime-1, have remained present to lay a raid. Similarly, one person who is being sent to act as bogus customer, has also remained present by his car. Name of the informant should not be leaked and hence name and address of the bogus customer is not mentioned. Similarly, intimation is not given to any Police Station in order to maintain secrecy. An information has been received to the effect that some persons residing in other State have come to Nagpur city for selling intoxicant (Gard) brown sugar. And as per the instruction given by bogus customer, they are coming in one hotel for bargaining regarding Gard (brown sugar) ....."

This information was recorded, admittedly, before the trap was laid and raid was conducted on 22-6-1990. P.W. 14 Sunil Paraskar has also deposed that he had reported the said information to his superior officer Deputy Commissioner of Police Shri Mathur. In his deposition P.W. 14 Sunil Paraskar, Assistant Commissioner of

Police, testified that after raid, report to Deputy Commissioner of Police Shri Mathur was made in writing.

15. On the face of these facts, it cannot be said that there was total non-compliance of Sections 41 and 42 of N.D.P.S. Act even if, it be assumed that such information received by P.W. 14 Sunil Paraskar was an information as contemplated under Sections 41 and 42 of N.D.P.S. Act. So looking from either of the angles, it cannot be said that there was any breach of the provisions of Sections 41 and 42 of N.D.P.S. Act to the extent the said provisions are mandatory. In State of Punjab Vs. Balbir Singh, the Apex Court observed that" (paras 6, at p. 3708 of Cri LJ)

"The provisions of arrest, warrant, search and seizure are incorporated in Ss. 41 to 60, 70 to 81, 93 to 105 and 165, Cr.P.C. It may also be noticed at this stage that N.D.P.S. Act is not a complete code incorporating all the provisions relating to search, seizure or arrest etc. The said Act after incorporating the broad principles regarding search, seizure or arrest etc. in Sections 41 and 42, 43 and 49 has laid down in Section 51 that the provisions of Cr.P.C. shall apply in so far as they are not inconsistent with the provisions of the N.D.P.S. Act to all warrants issued and arrests, searches and seizures made under that Act. Therefore, the provisions of Sections 100 and 165, Cr.P.C. which are not inconsistent with the provisions of the N.D.P.S. Act are applicable for effecting search, seizure or arrest under the N.D.P.S. Act also."

It would be thus seen that firstly by the information which was received by P.W. 14 Sunil Paraskar that some persons from neighbouring State had arrived at Nagpur with large quantity of brown sugar and that they were in search of customer was not specific information relating to specific commission of an offence under Chapter IV of N.D.P.S. Act and, therefore, was not an information as contemplated u/s 41 or 42 of the N.D.P.S. Act and, therefore, non-compliance of the said provisions would not vitiate the trial and affect the prosecution case. Alternatively, even if it be assumed that the information received by P.W. 14 Shri Sunil Paraskar was an information as contemplated under Sections 41 and 42 of the N.D.P.S. Act the said information has been reduced to writing, which is revealed from station diary sana (Exh. 138) and the said information was recorded prior to the search and seizure and, therefore, it cannot be said that the said information has not been reduced to writing. That information is also reported by P.W. 14 Sunil Paraskar to his superior officer Deputy Commissioner of Police Shri Mathur, which is apparent from the deposition of P.W. 14 Sunil Paraskar. Therefore, there is no merit in the connection of the learned counsel for the appellants/accused that there was breach of mandatory provisions of Section 41 or 42 of the N.D.P.S. Act and we do not find any substance in the submission of Mr. Rizwy that there was total non-compliance of Sections 41 and 42 of the N.D.P.S. Act.

16. Mr. Rizwy, the learned counsel for the accused/appellants A2 Babulal and A3 Mirajuddin strenuously urged that there was also non-compliance of Section 50 of

the N.D.P.S. Act and breach of the mandatory provision has vitiated the trial. Mr. Rizwy contended that the accused/appellants were not informed whether they required search to be taken before Gazetted Officer or before the Magistrate and in the absence thereof, the valuable rights of the accused persons have been taken away.

17. At the out set, it may be observed that Section 50 of the N.D.P.S. Act would come into operation only if Sections 41 and 42 of the N.D.P.S. Act were applicable. If search was not pursuant to the information as contemplated under Sections 41 and 42 of the N.D.P.S. Act that the offence has been committed under Chapter IV of the N.D.P.S. Act, provisions of Section 50 of the N.D.P.S. Act, would not be attracted. In view of our finding that the information received by P.W. 14 Sunil Paraskar was not an information that an offence under Chapter IV of N.D.P.S. Act, has been committed and that being an information not contemplated under Sections 41 and 42 of the Act, the said Sections 41 and 42 were not applicable and consequently in view of that finding, Section 50 of the N.D.P.S. Act would not be attracted at all and the grievance of the accused/appellants that they were not informed about their right of having the search conducted before the Gazetted Officer or Executive Magistrate is devoid of any merit.

18. Besides that the search in the present case was made by Shri Sunil Paraskar (P.W. 14) who himself was Assistant Commissioner of Police and indisputably a Gazetted Officer. The argument advanced by Mr. Rizwy, the learned counsel for the appellants/accused is that, even if, the search was conducted by Gazetted Officer, still the accused had right to be informed by the said officer that if he wanted the search to be made before the Gazetted Officer or before the Executive Magistrate, such arrangement could be made. In support of his argument, Mr. Rizwy, the learned counsel for the appellants/accused, relied upon the single Bench Judgment of this Court in Lawarance D''souza Vs. State of Maharashtra and another, .

19. With utmost respect, we observe, that the said judgment does not lay down the proposition that even where the search is made by the Gazetted Officer, still the accused is required to be informed that if he wanted the search to be made before the Gazetted Officer or the Executive Magistrate, it could be arranged and failure to comply thereof, would vitiate the trial. In Lawrence D''Souza''s case (cited supra), the learned Single Judge decided the bail application and in the facts and circumstances of that case, the learned Single Judge prima facie took the view that search was conducted ignoring the law and, therefore, the petitioner in that case viz., Lawrence D''Souza was entitled for grant of bail. Though, in para 7 of the said report, it is referred that the counsel for the petitioner in that case argued that even if the member of the raiding party was Gazetted Officer or the Superior Officer of the Department, he could not perform the dual tasks of being a party to the search and it was duty of the Officer intending to search a person to inform that person that he has a right to be taken to a Gazetted Officer or a Magistrate if he so required, but

the said argument has not been specifically dealt with by the learned Single Judge while passing the order and it has not been held in so many words in that case that even if the raid was conducted by a Gazetted Officer or a Superior Officer of the Department, still the person to be searched was required to be informed that he has a right to be taken to a Gazetted Officer or a Magistrate. Though provisions of Section 50 are mandatory and have to be complied with but in the case, where the search is made by the empowered Gazetted Officer, the compliance of provisions of Section 50 of N.D.P.S. Act would be deemed to have been made. Obviously the scheme of Section 50 is that possibility of any plantation or foul play with the suspected person should be ruled out, and in that scheme of things, Section 50, mandates that the empowered officer conducting the raid before searching the suspect should inform him that he has a right to be searched before a Gazetted Officer or a Magistrate and if be so required, he may be taken there. Where the search is conducted by the Gazetted Officer himself, the responsibility attached to that officer rules out such plantation or foul play and in that event it must be assumed that there was compliance of Section 50 of the N.D.P.S. Act even when the suspected person is not asked whether he wanted the search to be made before the Gazetted Officer or the Executive Magistrate because the search has been made by the officer who himself is the Gazetted Officer.

20. Even otherwise the argument advanced by Mr. Rizwy, the learned counsel for the accused, appellants, relating to Section 50 of the N.D.P.S. Act cannot be said to have much substance, because admittedly no foundation was laid by the defence in cross-examination of P.W. 14 Sunil Paraskar that he did not inform the accused as required u/s 50 of the N.D.P.S. Act. It is no more a debatable question that whether these was compliance of Section 50 of the N.D.P.S. Act or not is always a question of fact and, therefore, depends on facts and circumstance of each case. Relying upon the decision of State of Punjab Vs. Balbir Singh, , the Apex Court in Surajmal Kania Lal Soni Vs. State of Gujarat, , reiterating the said legal position held that whether there was compliance of Section 50 or not would be a question of fact and further held that the foundation is required to be laid about non-compliance of Section 50 by the accused.

21. Mr. Rizwy, the learned counsel for the appellants/accused, frankly conceded that no foundation has been laid by the defence about non-compliance of Section 50 of N.D.P.S. Act but Mr. Rizwy would strenuously urge that the burden was on the prosecution to show that there was compliance of Section 50 and in the absence of any evidence by the prosecution about compliance of Section 50, adverse inference should be drawn against the prosecution and it should be held that there was non-compliance of Section 50 of N.D.P.S. Act. In view of the judgment of the Apex Court in Surajmal Kania Lal Soni''s case, (cited supra) and referred to hereinabove, we do not find any merit in this contention of the learned counsel for the accused/appellants and hold that since no foundation has been laid by defence by cross-examining the Police Officer, Assistant Commissioner of Police Shri Sunil

Paraskar (P.W. 14) or otherwise, it is not open to urge now before us that there was non-compliance of Section 50 of the N.D.P.S. Act.

22. Mr. Rizwy, also contended that there was non-compliance of Sections 55 and 57 of the N.D.P.S. Act and as a result thereof serious prejudice has been caused to the accused/appellants. In this connection, Shri Rizwy, referred to deposition of P.W. 15 Purushottam and he also submitted that the articles which were seized by P.W. 14 Shri Sunil Paraskar on 22-6-1990 were retained by him for 2 days and it was only that on 24-6-1990, the said articles were deposited at Police Station, Panchpaoli. Mr. Rizwy would also urge that though the seizure was made on 22-6-1990, and the seized articles were deposited with the Police Station on 24-6-1990, the said articles were sent for chemical analysis on 2-7-1990.

23. We have considered the aforesaid submission of Mr. Rizwy in the light of the evidence which has come on record. The legal position as set out by the Apex Court regarding the provisions of Sections 52 and 57 of the N.D.P.S. Act is that the said provisions by itself are not mandatory and 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 further such failure may have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case. It is well established on record that the articles which were seized from A1 Umesh, as well as from A2 Babulal and A3 Mirajuddin were respectively sealed at the spot of seizure and a label bearing signatures of panchas, the raiding officer P.W. 14 Sunil Paraskar as well as the accused persons were obtained. Without going into the merits or demerits of the case whether the signatures of the accused persons should have been taken or not, the fact remains that the sealed articles were received with seals intact by the chemical analyser when they were sent to him. The seals on both the seized articles B1 and B2 were found intact by the Chemical Analyser and that is duly reflected from the Chemical Analyser''s report and in this back ground, it cannot be said that any prejudice has been caused to the accused/appellants if at all there was any irregularity. Section 52 of the N.D.P.S. Act provides, inter alia, that the seized articles shall be forwarded without unnecessary delay to the officer-in-charge of the nearest police station or the officer empowered u/s 53. The articles were seized on 22-6-1990 and admittedly the seized articles were deposited with Police Station on 24-6-1990. P.W. 14 Sunil Paraskar has explained the reason of delay that since he was busy in investigation, he could not send the seized articles immediately to the nearest police station. P.W. 12 Ramesh a constable in Crime Branch has deposed on 24-6-1990, he carried two sealed packets and suitcase to Panchpaoli Police Station and these articles were given to him by P.W. 14 Sunil Paraskar, Assistant Commissioner of Police. Exh. 123 was the duty pass and he deposited the property with the officer of the Police Station Panchpaoli and P.W. 9 Mishra gave him an acknowledgment Exh. 109. Thus it cannot be said that there was any non-compliance of Section 52 resulting in any prejudice to the case of accused/appellants. As regards non-compliance of Sections 55 and 57 of the N.D.P.S.

Act though minor irregularities have been pointed out by the trial Court but considering the said irregularities in the light of the entire evidence led by the prosecution, it cannot be said that the finding of the trial Court that no prejudice has been caused to the appellants/accused cannot be said to be infirm warranting interference by this Court. We are satisfied that the minor irregularities about the compliance of Sections 55 and 57 of the N.D.P.S. Act, in the facts and circumstances of the present case, have not caused any prejudice to the case of the appellants/accused and, therefore, the finding recorded by the trial Court on this aspect of the matter needs no interference.

24. Mr. Rizwy, the learned counsel for the appellants/accused also relied upon the decision of the Apex Court in Valsala Vs. State of Kerala, , and submitted that since there was delay in sending the seized articles to the Court, the prosecution is liable to be set aside. Mr. Rizwy submitted that though the articles were seized on 22-6-1990, the said seized articles were sent to the Court only on 12-10-1990 and, therefore, the delay was fatal as regards the prosecution case. It may be observed that the contraband was seized on 22-6-1990 and they were deposited with the Police Station Panchpaoli on 24-6-1990. The seized articles in sealed condition were sent for chemical analyser''s report on 2-7-1990 and the said articles were found in sealed condition by the Chemical Analyser as is revealed from Chemical Analyser''s report that seals on the seized articles were found intact. The Chemical Analyser''s report is dated 18-7-1990 and it is described therein that two sealed plastic bags seals intact were found. In the present case thus there is definite evidence to show that articles were sealed and kept in proper custody in Police Station and the seals on the said articles were found intact by the Chemical Analyser. In the facts and circumstances of the present case, therefore, the judgment of the Apex Court in Valsala''s case (cited supra), has no application because in the case before the Supreme Court there was no evidence that the article was sealed and kept in proper custody and the circumstances of sending the very article seized to chemical examiner were found to be doubtful. In this view of the matter, the judgment of the Apex Court in Valsala''s case (cited supra) does not help the argument of the learned counsel for the appellants/accused.

25. At this stage Mr. Rizwy, the learned counsel for the appellants/accused also urged that the presence of appellants/accused in room No. 36 at Hotel Swagat is not fully established and that the prosecution has also not established the conscious possession of the contraband recovered from the suitcase.

26. This argument of the learned counsel for the appellants/accused has no merit on facts of the case and needs to be brushed aside in view of the evidence which has come on record and the findings recorded by the trial Court. It is well established on record that A2 Babulal and A3 Mirajuddin were in possession of room No. 36 of Hotel Swagat where raid was conducted and search was made. It is also established on record that room No. 36 was taken by accused/appellant No. 2 Babulal by

making entry in hotel register. After the information was given by A1 Umesh that A2 Babulal and A3 Mirajuddin were in possession of contraband and staying in room No. 36 of the hotel Swagat, when the raiding party arrived at the hotel, P.W. 1 Harish, an official of the hotel, took the raiding party to room No. 36 and A2 Babulal opened the door. A3 Mirajuddin was found sitting in the room. The suitcase was lying in the room and the room was in possession of A2 Babulal and A3 Mirajuddin only and no other person and the suitcase was also opened by the A2 Babulal when he was asked to do so by P.W. 14 Sunil Paraskar. In this background it cannot be said that the suitcase was not in conscious possession of A2 Babulal and A3 Mirajuddin. Finding recorded by the trial Court about complicity of accused A2 Babulal and A3 Mirajuddin is justified and is proved beyond reasonable doubt and needs no interference.

27. In view of our foregoing discussion, the conviction and sentence awarded by the Additional Sessions Judge, Nagpur, on 31-7-1991, in Sessions Case No. 545/1990 to aforesaid accused/appellants namely A1 Umesh Murlidhar Ramteke, A2 Babulal Hiralal Sainy and A3 Mirajuddin Munni Khan Pathan is maintained. Both the appeals are liable to be dismissed and dismissed accordingly.

28. Appeal dismissed.