Supreme Court of India State Of Punjab vs Baldev Singh on 21 July, 1999 Author: Dr.A.S.Anand Bench: A.S.Anand Cji, S.B.Majmudar, Sujata V.Manohar, K.Venkataswami, V.N.Khare CASE NO.: Appeal (crl.) 396 of 1990

PETITIONER: STATE OF PUNJAB

RESPONDENT: BALDEV SINGH

DATE OF JUDGMENT: 21/07/1999

BENCH: A.S.ANAND CJI & S.B.MAJMUDAR & SUJATA V.MANOHAR & K.VENKATASWAMI & V.N.KHARE

JUDGMENT: JUDGMENT DELIVERED BY: DR.A.S.ANAND, CJI DR. A.S.ANAND, CJI : On 15.7.1997 when this batch of appeals/special leave petitions was placed before a two-Judge Bench, it was noticed that there was divergence of opinion between different Benches of this Court with regard to the ambit and scope of Section 50 of Narcotic Drugs and - Psychotropic Substances Act, 1985 (hereinafter NDPS Act) and in particular with regard to the admissibility of the evidence collected by an investigating officer during search and seizure conducted in violation of the provisions of Section 50 of NDPS Act. In the cases of State of Punjab v. Balbir Singh, 1994 (3) SCC 299, Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, 1994 (6) SCC 569, Saiyad Mohd. Saiyad Umar Saiyad and others v. State of Gujarat, 1995 (3) SCC 610 and a number of other cases, it was laid down that failure to observe the safeguards, while conducting search and seizure, as provided by Section 50 would render the conviction and sentence of an accused illegal. In Ali Mustaffas case (supra), the judgment in Pooran Mal v. The Director of Inspection (Investigation), New Delhi & Ors., 1974 (1) SCC 345, was also considered and it was opined that the judgment in Pooran Mals case could not be interpreted to have laid down that a contraband seized as a result of illegal search or seizure could by itself be treated as evidence of possession of the contraband to fasten liability, arising out of unlawful possession of the contraband, on the person from whom the alleged contraband had been seized during an illegal search conducted in violation of the provisions of Section 50 of NDPS Act. However, in State of Himachal Pradesh v. Pirthi Chand and Anr., 1996 (2) SCC 37, and State of Punjab v. Labh Singh, 1996 (5) SCC 520, relying upon a judgment of this Court in Pooran Mals case (supra), a discordant note was stuck and it was held that evidence collected in a search conducted in violation of Section 50 of NDPS Act did not become inadmissible in evidence under the Evidence Act The two-Judge Bench, therefore, on 15.7.1997, by the following order, referred the batch of cases to a larger bench : One of the questions that has been raised in these appeals/special leave petitions is whether compliance with Section 50 of the Narcotics Drugs and Psychotropic Substances Act, 1985 is mandatory and, if so, what is the effect of the breach thereof. This question has had been engaging the attention of this Court and answered in a number of cases. In State of Punjab v. Balbir Singh (1994 (3) SCC 299), a two-Judge Bench of this Court held that the

above section is mandatory and it is obligatory on the part of the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate. It was further held that non-compliance with the above section would affect the prosecution case and vitiate the trial. This Judgment was affirmed by a three-Judge Bench in Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat (1995 (3) SCC 610). In Ali Mustaffa Abdul Rahman Moosa v. State of Kerala (1994 (6) SCC 569) a submission was made on behalf of the State of Kerala to reconsider the judgment in Balbir Singhs case (supra) keeping in view the judgment of this Court in Puran Mal v. Director of Inspection (1974 (1) SCC 345). It was contended that even if the search and seizure of the contraband was held to be illegal and contrary to the provisions of Section 50, it would not affect the conviction because the seized articles could be used as evidence of unlawful possession of the contraband. In repelling the contention, the Court observed : The judgment in Pooran Mal case only lays down that the evidence collected as a result of illegal search or seizure, could be used as evidence in proceedings against the party under the Income Tax Act. The 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 NDPS 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 NDPS Act. In view of the law laid down in Balbir Singh case we hold that there has been violation of the provisions of Section 50 of the NDPS Act and consequently the conviction of the appellant cannot be sustained. (Emphasis supplied) It, however, appears that while dealing with Section 50 in State of Himachal Pradesh v. Pirthi Chand and Anr. (1996 (2) SCC 37), another two-Judge Bench of this Court referred to and relied upon the judgment in Pooran Mals case (supra) and held that the evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act. The Court further observed that even if search was found to be in violation of law, what weight should be given to the evidence collected was a question to be gone into during trial. With the above observations, the Bench recorded a finding that the Sessions Judge was not justified in discharging the accused after filing of the charge sheet holding that mandatory requirements of Section 50 had not been complied with. It, however, appears that the Courts attention was not drawn to Ali Mustaffa (supra). The view expressed in Pirthi Chand (supra) was reiterated in State of Punjab v. Labh Singh (1996 (5) SCC 520) wherein this Court considered the case of Balbir Singh (supra), besides other cases and held as follows :- In State of H.P. v. Pirthi Chand, this Court further elaborately considered the effect of the violation of Section 50 and held that any evidence recorded and recovered in violation of the search and the contraband seized in violation of the mandatory requirement does not ipso facto invalidate the trial. From the

above resume, it would thus appear that though a two-Judge Bench of this Court considered the earlier judgments of this Court, it held in the case of Pirthi Chand, [and affirmed in the case of Labh Singh (supra)], that breach of Section 50 does not affect the trial while in the case of Ali Mustaffa (supra), another Bench categorically laid down that breach of Section 50 makes the conviction illegal. In view of the divergent opinions so expressed, we deem it fit to refer these matters to a larger Bench. Let the records be placed before the Chief Justice for necessary orders. The batch of cases was thereafter listed before a three-Judge Bench. However, when the three-Judge Bench took up the matter, it was of the opinion that the judgment of a three-Judge Bench in Saiyad Mohd. Saiyad Umar Saiyad and ors. v. State of Gujarat, (supra), required reconsideration and, therefore, the cases were required to be considered still by a larger bench and on 19.11.1997, the three-Judge Bench made the following order : 1. In this bunch of appeals/special leave petitions the following questions of law (besides other questions of law and facts) fall for determination: (i) Is it the mandatory requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (Act for short) that when an officer, duly authorised under Section 42 of the Act, is about to search a person he must inform him of his right under sub- section (1) thereof of being taken to the nearest Gazetted Officer or nearest Magistrate for making the search? (ii) If any search is made without informing the person of his such right would the search be illegal even if he does not of his own exercise his right under Section 50(1)? And (iii) Whether a trial held in respect of any recovery of contraband articles pursuant to such a search would be void ab initio? 2. The above questions came up for consideration before a two-Judge Bench of this Court in State of Punjab v. Balbir Singh (1994) 3 SCC 299, and it answered them as under: (SCC p.322, para 25) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. (Emphasis supplied) 3. In Ali Mustaffa Abdul Rahman Moosa v. State of Kerala (1994) 6 SCC 569, a submission was made on behalf of the State of Kerala to reconsider the judgment in Balbir Singhs case (supra) in view of the judgment of the Constitution Bench of this Court in Pooran Mal v. The Director of Inspection (Investigation), New Delhi & others, (1974) 1 SCC 345 wherein it was observed that where the test of admissibility of evidence lay on relevancy (as in India and England), unless there was an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure was not liable to be shut out. Relying upon the above observation it was contended that even if the search and seizure of the contraband were held to be illegal

and contrary to the provisions of Section 50 it would not affect the conviction because the seized articles could be used as evidence of unlawful possession. In repelling this contention the two-Judge Bench of this Court observed as under: The judgment in Pooran Mals 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 the party under the Income Tax Act. The judgment cannot be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten that 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 NDPS 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 NDPS Act. In view of the law laid down in Balbir Singhs case (supra) we hold that there has been violation of the provisions of Section 50 of NDPS Act and consequently the conviction of the appellant cannot be sustained. 4. The judgment in Balbir Singhs case (supra) was affirmed by a three-Judge Bench in Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat, (1995) 3 SCC 610. 5. A discordant note was however struck by a two-Judge Bench of this Court in State of H.P. v. Pirthi Chand & another, (1996) 2 SCC 37, relying upon the judgment of this Court in Pooran Mals case (supra), when it held that the evidence collected in a search in violation of law did not become inadmissible in evidence under the Evidence Act. The Court further observed that even if the search was found to be in violation of law, what weight should be given to the evidence collected was a question to be gone into during trial. The same view was reiterated by a two-Judge Bench in State of Punjab v. Labh Singh, (1996) 5 SCC 520, with the observation that any evidence recorded and recovered in violation of the search and the contraband seized in violation of the mandatory requirement did not ipso facto invalidate the trial. (Emphasis supplied) 6. In our considered opinion the judgment of this Court in Saiyad Mohd. Saiyad Umar Saiyads case (supra) (which was delivered by a three-Judge Bench) requires re-consideration and the questions formulated above answered by a larger Bench, not only in view of the subsequent judgments of this Court (delivered by a two- Judge Bench) referred to above, but also in view of the Constitution Bench judgment in Pooran Mals case (supra). 7. Let these matters be, therefore, placed before the Honble Chief Justice for necessary orders. That is how this batch of Criminal Appeals/Special Leave Petitions has been placed before this Constitution Bench. Drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. There is no doubt that drug trafficking, trading and its use, which is a global phenomena and has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. It has the effect of producing a sick society and harmful culture. Anti-drug justice

is a criminal dimension of social justice. The United Nations Conventions Against Illicit Trafficking In Narcotic Drugs & Psychotropic Substances which was held in Vienna, Austria in 1988 was perhaps one of the first efforts, at an international level, to tackle the menace of drug trafficking throughout the comity of nations. The Government of India has ratified this convention. Prior to the passing of the NDPS Act, 1985 control over Narcotic drugs was being generally exercised through certain Central enactments though some of the States also had enacted certain statutes with a view to deal with illicit traffic in drugs. The Opium Act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy and manufacture of opium. Opium Act, 1878, supplemented Opium Act, 1875 and made possession, transportation, import, export, sale, etc. of opium also an offence. The Dangerous Drug Act, 1930, was enacted with a view to suppress traffic in contraband and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf etc. The Act prescribed maximum punishment of imprisonment for three years with or without fine, insofar as first offence is concerned and for the second or the subsequent offence the punishment could go upto four years RI. These Acts, however, failed to control illicit drug traffic and drug abuse on the other hand exhibited an upward trend. New drugs of addiction known as Psychotropic Substances also appeared on the scene posing serious problems. It was noticed that there was an absence of comprehensive law to enable effective control over psychotropic substances in the manner envisaged by the International Convention of Psychotropic Substances, 1971. The need for the enactment of some comprehensive legislation on Narcotics Drug and Psychotropic Substances was, therefore, felt. The Parliament with a view to meet a social challenge of great dimensions, enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalties particularly for trafficking and various other offences. The NDPS Act, 1985 provides stringent penalties for various offences. Enhanced penalties are prescribed for second and subsequent offences. The NDPS, Act 1985 was amended in 1988 w.e.f. 29th May, 1989. Minimum punishment of 10 years imprisonment which may extend upto 20 years and a minimum fine of Rs.1 lakh which may extend upto Rs.2 lakh have been provided for most of the offences under the NDPS Act, 1985. For second and subsequent offences, minimum punishment of imprisonment is 15 years which may extend to 30 years while minimum fine is Rs.1.5 lakh which may extend to Rs.3 lakhs. Section 31(a) of the Act, which was inserted by the Amendment Act of 1988, has even provided that for certain offences, after previous convictions, death penalty shall be imposed, without leaving any discretion in the Court to award imprisonment for life in appropriate cases. Another amendment of considerable importance introduced by the Amendment Act, 1988 was that all the offences under the Act were made triable by a special court. Section 36 of the Act provides for constitution of special courts manned by a person who is a Sessions Judge or an Additional Sessions Judge. Appeal from the orders of the special courts lie to the High Court. Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for

grant of bail. However, despite the stringent provisions of the NDPS Act, 1985 as amended in 1988 drug business is booming; addicts are rapidly rising; crime with its role to narcotics is galloping and drug trafficking network is ever growing. While interpreting various provisions of the statute, the object of the legislation has to be kept in view but at the same time the interpretation has to be reasonable and fair. With a view to answer the questions framed by the referring Bench and resolve the divergence of opinion expressed by different benches particularly on the applicability of the law laid down in Pooran Mals case (supra) to the admissibility of evidence collected as a result of search conducted in violation of the provisions of Section 50 of the NDPS Act, to offences under the NDPS Act, it would be appropriate to first notice some of the relevant statutory provisions. For the purpose of this batch of cases we are primarily concerned with Chapter V in general and Sections 35, 41, 42, 43, 50, 51, 54 and 57 of the Act in particular. Section 35 lays down : 35. Presumption of culpable mental state. (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Explanation In this section culpable mental state includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. (2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability. Section 41 reads as follows:- 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 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. (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 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 of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from 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 drug, 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 under section 42. Section 42 provides:- 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 to 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) such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; 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 substance: 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 sun set and sun rise after recording the grounds of his belief. (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto he shall forthwith send a copy thereof to his immediate official superior. 43. Power of seizure and arrest in public places. Any officer of any of the departments mentioned in section 42 may (a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article 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 an offence punishable under Chapter IV relating to such drug or substance; (b) detain and search any person whom he has reason to believe to have committed an

offence punishable under Chapter IV, and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company. Explanation For the purposes of this section, the expression public place includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public. Section 50 of the N.D.P.S. Act reads as follows : 50. Conditions under which search of persons shall be conducted. (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to 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 (1). (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made. (4) No female shall be searched by anyone excepting a female. Section 51 provides : 51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures.– The provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act. Section 52 reads thus : Disposal of persons arrested and articles seized. (1) Any officer arresting a person under section 41, section 42, section 43 or 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 under section 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 dispatch, take such measures as may be necessary for the disposal according to law of such person or article. Section 54 provides : 54. Presumption from possession of illicit articles. In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect of (a) any narcotic drug or psychotropic substance; (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated; (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance; or (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance, or any residue left of the materials from which any narcotic drug or psychotropic substance has been manufactured. for the possession of which he fails to account satisfactorily. Section 57 reads as follows:- 57. Report of arrest and seizure.- Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight

hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate superior official. Section 132 (13) of the Income Tax Act, 1961 provides : 132. Search and seizure. xxx xxx xxx (13) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1) or sub-section (1A). Search and seizure are essential steps in the armoury of an investigator in the investigation of a criminal case. The Code of Criminal Procedure itself recognises the necessity and usefulness of search and seizure during the investigation as is evident from the provisions of Sections 96 to 103 and Section 165 of the Criminal Procedure Code. In M.P. Sharma and others v. Satish Chandra, District Magistrate, Delhi and others, [1954] S.C.R. 1077, the challenge to the power of issuing a search warrant under Section 96(1) Cr.P.C. as violative of the fundamental rights was repelled by the Constitution Bench on the ground that the power of search and seizure in any system of jurisprudence is an overriding power of the State for the protection of social security. It was also held that a search by itself is not a restriction on the right to hold and enjoy property, though a seizure may be a restriction on the right of possession and enjoyment of the seized property, but it is only temporary and for the limited purpose of an investigation. The Court opined : A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches. The Court also opined : A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is necessary and reasonable restriction cannot per se be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. We are unable to see how any question of violation of article 19(1) (f) is involved in this case in respect of the warrants in question which purport to be under the first alternative of Section 96(1) of the Criminal Procedure Code. Section 41 of the NDPS Act provides that 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 and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide sub-Section (2) the power has also been vested in Gazetted Officers of the Department of Central Excise, Narcotics, Customs, Revenue Intelligence or any other Department of the Central Government or of Border Security Force, empowered in that behalf by general or special order of the State Govt. to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter

IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband or document or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place. Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without a warrant between sunrise and sunset, and he may do so without recording his reasons of belief. The proviso to sub-section (1) lays down that if the empowered 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. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any Narcotic Drug or Psychotropic Substances in a public place where such possession appears to him to be unlawful. Section 50 of the Act prescribes the conditions under which search of a person shall be conducted. Sub-section (1) provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest Gazetted Officer or the Magistrate for the purpose. Under sub-section (2) it is laid down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such Gazetted Officer or the Magistrate. Sub-section (3) lays down that when the person to be searched is brought before such a Gazetted Officer or the Magistrate and such Gazetted Officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct that the search be made. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.

Vide Section 51, the provisions of the Code of Criminal Procedure, 1973, shall apply, insofar as they are not inconsistent with the provisions of the NDPS Act, to all warrants issued and arrests, searches and seizures made under the NDPS Act. Thus, the NDPS Act, 1985 after incorporating the broad principles regarding search, seizure and arrest etc. in Sections 41, 42, 43, 49 and 50 has laid down in Section 51 that the provisions of the Code of Criminal Procedure shall apply insofar as they are not inconsistent with the provisions of the NDPS Act. The expression insofar as they are not inconsistent with the provisions of this Act occurring in Section 51 of the NDPS Act is of significance. This expression implies that the provisions of the Code of Criminal Procedure relating to search, seizure or arrest apply to search, seizure and arrest under NDPS Act also except to the extent they are inconsistent with the provisions of the Act. Thus, while conducting search and seizure, in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the NDPS Act are also required to be followed. Section 50(4) of the NDPS Act lays down that no female shall be searched by anyone excepting a female. This provision is similar to the one contained in Section 52 of the Code of Criminal Procedure, 1898 and Section 51(2) of the Code of Criminal Procedure, 1973 relating to search of females. Section 51(2) of the Code of Criminal Procedure, 1973 lays down that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency. The empowered officer must, therefore, act in the manner provided by Section 50(4) of the NDPS Act read with Section 51(2) of the Code of Criminal Procedure, 1973 whenever it is found necessary to cause a female to be searched. The document prepared by the Investigating Officer at the spot must invariably disclose that the search was conducted in the aforesaid manner and the name of the female official who carried out the personal search of the concerned female should also be disclosed. The personal search memo of the female concerned should indicate compliance with the aforesaid provisions. Failure to do so may not only affect the credibility of the prosecution case but may also be found as violative of the basic right of a female to be treated with decency and proper dignity. The provisions of Sections 100 and 165 Cr.P.C. are not inconsistent with the provisions of the NDPS Act and are applicable for affecting search, seizure or arrest under the NDPS Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure, comes across a person being in possession of the narcotic drugs or the psychotropic substance, then he must follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided thereunder. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. In Balbir Singhs case after referring to a number of judgments, the Bench opined that failure to comply with the provisions of Cr.P.C. in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 per se does not vitiate the prosecution case. If there is such a violation, what the

courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view. What is the import of the expression if such person so requires he shall be taken to the nearest Gazetted Officer or Magistrate and his search shall be made before such Officer or Magistrate as occurring in Section 50. Does the expression not visualise that to enable the concerned person to require his search to be conducted before a Gazetted Officer or a Magistrate, the empowered officer is under an obligation to inform him that he has such a right ? Learned counsel appearing for the State of Punjab as also the learned counsel appearing for the State of Gujarat argued that it would not be proper to read into the provisions of Section 50, any legislative intent of prescribing a duty on the part of the empowered Officer to inform the suspect that if he so requires, the search would be conducted before a Gazetted Officer or a Magistrate, as the case may be. According to the learned counsel, the view expressed in State of Punjab v. Balbir Singh (supra), laying down that it is obligatory on the part of such an officer to so inform the person to be searched or if such person requires, failure to take him for search before the Gazetted Officer or the Magistrate, would amount to non- compliance with the provisions of Section 50 and would affect the prosecution case and vitiate the trial requires reconsideration. As a matter of fact, the order of the referring bench itself, centers around whether there is any requirement of Section 50, making, it obligatory for the empowered officer, who is about to search a person, to inform him of his right of being taken to the nearest Gazetted Officer or nearest Magistrate for making the search if he so requires. Learned counsel for the parties, however, agree that in case the obligation to inform the suspect of his right to be searched before a Gazetted Officer or a Magistrate is read as a duty cast on the empowered officer, then failure to give information regarding that right to the suspect would be a serious infirmity amounting to denial of a valuable right to an accused and would render his conviction for an offence under the NDPS Act bad and unsustainable. The question as to what is the effect of non-compliance with the provisions of Section 50 on the recovery of the contraband was answered in State of Punjab v. Balbir Singh (supra). The common question which arose for consideration in a batch of appeals filed by the State of Punjab was whether any arrest or search of a person or search of a place conducted without conforming to the provisions of the NDPS Act would be rendered illegal and consequently vitiate the conviction? The Trial Court in those cases had acquitted the accused on the ground that the arrest, search and seizure were conducted in violation of some of the relevant and mandatory provisions of the NDPS Act. The High Court declined to grant appeal against the order of acquittal. The State of Punjab thereupon filed appeals by special leave in this Court. In some other cases, where the accused had been convicted, they also filed appeals by special leave questioning their conviction and sentence on the ground that their trials were illegal because of non-compliance with the safeguards provided under Section 50 of the NDPS Act. A two-Judge Bench speaking through K. Jayachandra Reddy, J. considered several provisions of

the NDPS Act governing arrest, search and seizure and, in particular, the provisions of Sections 41, 42, 43, 44, 49, 50, 51, 52 and 57 of the NDPS Act as well as the provisions of the Code of Criminal Procedure relating to search and seizure effected during investigation of a criminal case. Dealing with Section 50, it was held that in the context in which the right had 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 he shall be searched before a Gazetted Officer or Magistrate and on such request being made by him, to be taken before the Gazetted Officer or Magistrate for further proceedings. The reasoning given in Balbir Singhs case was that to afford an opportunity to the person to be searched if he so requires to be searched before a Gazetted Officer or a Magistrate he must be made aware of that right and that could be done only by the empowered officer by informing him of the existence of that right. The Court went on to hold that failure to inform the person to be searched of that right and if he so requires, failure to take him to the Gazetted Officer or the Magistrate, would mean non-compliance with the provisions of Section 50 which in turn would affect the prosecution case and vitiate the Trial. The following conclusions were arrived at by the two-Judge Bench in State of Punjab v. Balbir Singh (supra) : 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 NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act. (2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal. (2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction. (2-C) Under Section 42(1) the empowered officer if

has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. (3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case. (4-A) If a police officer, even if he happens to be an empowered officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity. (4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial. The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case. (5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact. (Emphasis ours) (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. A three-Judge Bench in Saiyad Mohd. Saiyad Umar Saiyad and others v. State of Gujarat (supra), upheld the view taken in Balbir Singhs case (supra) on the point of duty of the empowered officer to inform the suspect

about his right to be searched before a Gazetted Officer or a Magistrate. It considered the provisions of Section 50 and opined : 8. We are unable to share the High Courts view that in cases under the NDPS Act it is the duty of the court to raise a presumption, when the officer concerned has not deposed that he had followed the procedure mandated by Section 50, that he had in fact done so. When the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the court is duty- bound to conclude that the accused had not had the benefit of the protection that Section 50 affords; that, therefore, his possession of articles which are illicit under the NDPS Act is not established; that the precondition for his having satisfactorily accounted for such possession has not been met; and to acquit the accused." (Emphasis ours) In State of Himachal Pradesh v. Shri Pirthi Chand & Anr., (supra), the Bench agreed with the view in Balbir Singhs case regarding the duty to inform the suspect of his right as emanating from Section 50 of the NDPS Act. The Court opined : Compliance of the safeguards in Section 50 is mandatory obliging the officer concerned to inform the person to be searched of his right to demand that search could be conducted in the presence of a Gazetted Officer or a Magistrate. The possession of illicit articles has to be satisfactorily established before the court. The officer who conducts search must state in his evidence that he had informed the accused of his right to demand, while he is searched, in the presence of a Gazetted Officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that effect is given, the court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit articles was not established. The presumption under Article 114 Illustration (e) of the Evidence Act, that the official duty was properly performed, therefore, does not apply... In State of Punjab v. Labh Singh, (supra) again it was reiterated that the accused has been provided with a protection of being informed of his right to be searched in presence of a Gazetted Officer or a Magistrate and failure to give an opportunity to the concerned person to avail of the protection would render the prosecution case unsustainable. In State of Punjab v. Jasbir Singh & others, (1996) 1 SCC 288, it was opined : Having considered the evidence we find it difficult to set aside the order of acquittal recorded by the Additional Sessions Judge. Though the offence involved is of a considerable magnitude of 70 bags containing 34 kgs. Of poppy husk, each without any permit/licence, this Court is constrained to confirm the acquittal for the reasons that the mandatory requirements of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 has not been complied with. Protection given by Section 50 is a valuable right to the offender and compliance thereof intended to be mandatory. In case the police officers had prior knowledge that illegal transport of the contraband is in movement and persons are in unlawful possession and intends to intercept it, conduct search and consequentially to seize the contraband, they are required to inform the offender that he has the right that the search will be conducted in the presence of a gazetted officer or a Magistrate. Thereafter on their agreeing to be searched by the police officers, the search and seizure of the contraband from their unlawful possession

would become legal and valid. However, the evidence collected in breach of mandatory requirement does not become inadmissible. It is settled law that evidence collected during investigation in violation of the statutory provisions does not become inadmissible and the trial on the basis thereof does not get vitiated. Each case is to be considered on its own backdrop. (Emphasis added) In Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, (supra), two-Judge Bench of this Court, (to which one of us (CJI) was a party) it had been found that the appellant had not been given any choice as to whether he desired to be searched in the presence of a Gazetted Officer or a Magistrate as envisaged under Section 50 of the NDPS Act. The argument raised in that case to the effect that Section 50 of the Act could not be said to have been violated because the appellant did not require to have himself searched before a Gazetted Officer or a Magistrate was rejected following the law laid down in Balbir Singhs case (supra). The Court opined that to enable the concerned person to require that his search be carried out in the presence of a Gazetted Officer or a Magistrate makes, it is obligatory on the part of the empowered officer to inform the concerned person that he has a right to require his search to be conducted in the presence of a Gazetted Officer or a Magistrate. Mohinder Kumar v. State, Panaji, Goa, (1998) 8 SCC 655, a three-Judge Bench (to which one of us, Sujata V. Manohar, J. was a party) once again considered the requirements of Sections 42 and 50 of the Act. In that case the police officer accidentally reached the house while on patrol 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 any occasion to enter the house and effect search. But when the conduct of the accused persons raised a suspicion, he went into the house and effected the search, seized the illicit material and caused the arrest. The Court opined that in the facts and circumstances of the case, when the Investigating Officer accidentally stumbled upon the offending articles and himself not being the empowered officer, then on coming to know that the accused persons were in possession of illicit articles, then from that stage onwards he was under an obligation to proceed further in the matter only in accordance with the provisions of the Act. On facts it was found that the Investigating Officer 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 and since he had made no record, he did not forward a copy of the grounds to his superior officer nor did he comply with the provisions of Section 50 of the Act, inasmuch as he did not inform the person to be searched that if he required, his search could be conducted before a Gazetted Officer or a Magistrate, the Bench held that for failure to comply with the provisions of Sections 42 and 50, the accused was entitled to an order of acquittal and consequently the appeal was allowed and the order of conviction and sentence against the accused was set aside. It would, thus, be seen that none of the decisions of the Supreme Court after Balbir Singhs case have departed from that opinion. At least none has been brought to our notice. There is, thus, unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting

the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a Gazetted Officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the concerned person requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a Gazetted Officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad. To be searched before a Gazetted Officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the concerned person having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the concerned person of the existence of his right to have his search conducted before a Gazetted Officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the concerned person orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the concerned person of his right of being searched in the presence of the Magistrate or a Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with. The safeguard or protection to be searched in presence of a Gazetted Officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of Illicit Drugs and Narcotic Substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in presence of a Gazetted Officer or a Magistrate is a necessary sequence for enabling the concerned person to exercise that right under Section 50 because after Maneka Gandhi v. Union of India, (1978) 1 SCC 248, it is no longer

permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not reasonable, fair and just and when a statute itself provides for a just procedure, it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a Gazetted Officer or a Magistrate, would be violative of the reasonable, fair and just procedure and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be fair, just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in presence of a Gazetted Officer or a Magistrate, if he so requires, would place any premium on ignorance of law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a reasonable, fair and just procedure. Requirement to inform has been read in by this Court in other circumstances also, where the statute did not explicitly provide for such a requirement. While considering the scope of Article 22(5) of the Constitution of India and various other provisions of COFEPOSA Act and the NDPS Act as amended in 1988, a Constitution Bench of this Court in Kamelesh Kumar Ishwardas Patel vs. Union of India & Ors., (1995) 4 SCC 51, concluded : Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation. (Emphasis ours) This Court cannot over-look the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a right "that if he requires" to be searched in the presence of a Gazetted Officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve dual purpose to protect a person against false accusation and frivolous charges as also to lend creditibility to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more

acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. In D.K. Basu v. State of West Bengal, (1997) 1 SCC 416, it was opined : We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worst than the disease itself. (Emphasis ours) In D.K. Basus case (supra), the Court also noticed the response of the Supreme Court of the United States of America to such an argument in Miranda v. Arizona, 384 US 436 : 16 L Ed 2d 694 (1966), wherein that Court had said : The Latin maxim salus populi suprema lex (the safety of the people is the supreme law) and salus republicae suprema lex (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be right, just and fair (Emphasis supplied) There is indeed, a need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. However, the question whether the provisions of Section 50 are mandatory or directory and if mandatory to what extent and the consequences of non-compliance with it does not strictly

speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the Investigating Officer (empowered officer) to ensure that search of the concerned person (suspect) is conducted in the manner prescribed by Section 50, by intimating to the concerned person about the existence of his right, that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, would cause prejudice to an accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a Gazetted Officer or a Magistrate, if he so requires, is sacrosanct and indefeasible it cannot be disregarded by the prosecution except at its own peril. The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50, and particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial. The next question which arises for our consideration is whether evidence collected in a search conducted in violation of Section 50, is admissible in evidence? This question arises in the context of the judgment of the Constitution Bench in Pooran Mals case (supra). A submission was made in Ali Mustaffa Abdul Rahman Moosas case (supra) before the Bench on behalf of the State of Kerala to reconsider the judgment in Balbir Singhs case in view of the judgment of this Court in Pooran Mal v. The Director of Inspection (Investigation), New Delhi and others. It was urged in Ali Mustaffa's case that even if search and seizure of the contraband was held to be illegal having been conducted in violation of the provisions of Section 50, it could not affect the conviction because the recovered articles could still be used as "admissible evidence" under the Evidence Act to establish unlawful possession of the contraband on the concerned person from whom it was recovered during that search. This Court repelled that contention and held that the judgment in Pooran Mals case (supra) could not be read to have laid down that a contraband seized as a result of an illegal search or seizure could still be used as admissible evidence of unlawful possession of the contraband on the person

from whom the contraband had allegedly been seized in an illegal manner. The Bench in Ali Mustaffas case (supra) observed : The last submission of the learned counsel for the respondents is that even if the search and seizure of the contraband are held to be illegal and contrary to the provisions of Section 50 of the NDPS 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 v. Director of Inspection. We are afraid the submission is misconceived and the reliance placed on the said judgment is misplaced. The judgment in Pooran Mal case only lays down that the evidence collected as a result of illegal search or seizure, could be used as evidence in proceedings against the party under the Income Tax Act. The judgment cannot be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten that 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 NDPS 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 NDPS Act. However, a later two-Judge Bench in Pirthi Chands case (supra) relying upon Pooran Mals case (supra), observed : The evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act. The consequence would be that evidence discovered would be to prove unlawful possession of the contraband under the Act. It is founded in Panchnama to seize the contraband from the possession of the suspect/accused. Though the search may be illegal but the evidence collected, i.e., Panchnama etc., nonetheless would be admissible at the trial. At the stage of filing charge-sheet it cannot be said that there is no evidence and the Magistrate or the Sessions Judge would be committing illegality to discharge the accused on the ground that Section 50 or other provisions have not been complied with. At the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law. Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into (Emphasis supplied) This view was reiterated in Jasbir Singhs case also. It appears that the earlier judgment in Ali Mustaffas case was not brought to the notice of their Lordships in both the above cases. Let us, therefore, first examine the fact situation and the law as laid down in Pooran Mals case and the question of its applicability to cases arising out of offences under the NDPS Act, based only on proof of unlawful possession of an illicit drug or a psychotropic substance on the person of an accused, where the illicit article only was seized during the search conducted in breach of the provisions of Section 50. In Pooran Mals case, the relief claimed by the main appellant in his case was in respect of action taken under Section 132 of the Income Tax Act, 1961 by way of search and seizure of certain premises on the ground that the authorisation for the search as also the search and seizure of the materials were illegal. In

that case articles consisting of account books and documents besides some cash, jewelry and other valuables were seized by the Income Tax Authorities purporting to act under the authorisation of a search and seizure issued under Section 132 of the Income Tax Act. The Constitution Bench dealt both with the challenge on constitutional and non-constitutional grounds to the search and seizure. The Court opined that the power of search and seizure in any system of jurisprudence is an overriding power of the State for the protection of social security and that power is necessarily regulated by law. The Court then noticed the safeguards provided in Section 132 of the Act and observed : We are, therefore, to see what are the inbuilt safeguards in Section 132 of the Income-tax Act. In the first place, it must be noted that the power to order search and seizure is vested in the highest officers of the department. Secondly the exercise of this power can only follow a reasonable belief entertained by such officer that any of the three conditions mentioned in Section 132(1)(a), (b) and (c) exists. In this connection it may be further pointed out that under sub-rule (2) of Rule 112, the Director of Inspection or the Commissioner, as the case may be, has to record his reasons before the authorisation is issued to the officers mentioned in sub-section (1). Thirdly, the authorisation for the search cannot be in favour of any officer below the rank of an Income-tax Officer. Fourthly, the authorisation is for specific purposes enumerated in (i) to (v) in sub-section (1) all of which are strictly limited to the object of the search. Fifthly when money, bullion, etc. is seized the Income- tax Officer is to make a summary enquiry with a view to determine how much of what is seized will be retained by him to cover the estimated tax liability and how much will have to be returned forthwith. The object of the enquiry under sub-section (5) is to reduce the inconvenience to the assessee as much as possible so that within a reasonable time what is estimated due to the Government may be retained and what should be returned to the assessee may be immediately returned to him. Even with regard to the books of account and documents, seized, their return is guaranteed after a reasonable time. In the meantime the person from whose custody they are seized is permitted to make copies and take extracts. Sixthly, where money, bullion, etc. is seized, it can also be immediately returned to the person concerned after he makes appropriate provision for the payment of the estimated tax dues under sub-section (5) and lastly, and this is most important, the provisions of the Criminal Procedure Code relating to search and seizure apply, as far as they may be, to all searches and seizures under Section 132. Rule 112 provides for the actual search and seizure being made after observing normal decencies of behaviour. The person in charge of the premises searched is immediately given a copy of the list of articles seized. One copy is forwarded to the authorising officer. Provision for the safe custody of the articles after seizure is also made in Rule 112. In our opinion, the safeguards are adequate to render the provisions of search and seizure as less onerous and restrictive as is possible under the circumstances. The provisions, therefore, relating to search and seizure in Section 132 and Rule 112 cannot be regarded as violative of Article 19(f) and (g). (Emphasis supplied) Dealing with the effect of search and seizure conducted in breach of the provisions of Section 132 of the Income

Tax Act, the Court opined : In that view, even assuming, as was done by the High Court, that the search and seizure were in contravention of the provisions of Section 132 of the Income-tax Act, still the material seized was liable to be used subject to law before the Income-tax authorities against the person from whose custody it was seized and, therefore, no Writ of Prohibition in restraint of such use could be granted. It must be, therefore, held that the High Court was right in dismissing the two writ petitions. The appeals must also fail and are dismissed with costs. Now, if the Evidence Act, 1872 which is a law consolidating, defining and amending the law of evidence, no provision of which is challenged as violating the Constitution permits relevancy as the only test of admissibility of evidence (See Section 5 of the Act) and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence It, therefore, follows that neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search. (Emphasis supplied) On facts, the Court in Pooran Mals case, however, found : On the whole, therefore, we are not inclined to hold that the search and seizure in this writ petition was vitiated by any illegality. Similarly, in the other writ petitions dealt with in Pooran Mals case, the Court opined : .The search and seizure, therefore, impugned in this illega l. writ petition cannot be regarded as (Emphasis supplied) The Judgement in Pooran Mals case (supra) has to be considered in the context in which it was rendered. It is well-settled proposition of law that a decision is an authority for what it decides and not that everything said therein constitutes a precedent. The courts are obliged to employ an intelligent technique in the use of precedents bearing it in mind that a decision of the court takes its colour from the questions involved in the case in which it was rendered. In C.I.T. v. Sun Engineering Works (P) Ltd., (1992) 4 SCC 363, this Court rightly pointed out : It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete law declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. (Emphasis supplied) The judgment in Pooran Mals case (supra), therefore, cannot be understood to have laid down that an illicit article seized during the search of person, on prior information, conducted in violation of the provisions of Section 50 of the Act can be used as evidence of unlawful possession of the illicit article on the person from whom that contraband had been seized during an illegal search. Apart from the position that in Pooran Mals case, on facts, it was

found that the search and seizure conducted in the cases under consideration in that case were not vitiated by any illegality, the import of that judgment, in the present context, can only be to the effect that material seized during search and seizure, conducted in contravention of the provisions of Section 132 of the Income Tax Act cannot be restrained from being used, subject to law, before the Income Tax Authorities in other legal proceedings against the persons, from whose custody that material was seized by issuance of a writ of prohibition. It was not the seized material, in Pooran Mals case, which by itself could attract any penal action against the assessee. What is implicit from the judgment in Pooran Mals case is that the seized material could be used in other legal proceedings against an assessee, before the Income Tax authorities under the Income Tax Act, dealing with escaped income. It is, therefore, not possible to hold that the judgment in Pooran Mals case can be said to have laid down that the recovered illicit article can be used as proof of unlawful possession of the contraband seized from the suspect as a result of illegal search and seizure. If Pooran Mals judgment is read in the manner in which it has been construed in The State of Himachal Pradesh v. Pirthi Chand and Anr. (though that issue did not strictly speaking arise for consideration in that case), then there would remain no distinction between recovery of illicit drugs etc. seized during a search conducted "after" following the provisions of Section 50 of the NDPS Act and a seizure made during a search conducted "in breach of" the provision of Section 50 of the NDPS Act. Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on the record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded. In R. vs. Collins : 1987 (1) SCR 265 the Supreme Court of Canada speaking through Lamer, J. (as His Lordship, Chief Justice of the Supreme Court of Canada then was) opined that the use of evidence collected in violation of the Charter rights of an accused would render a trial unfair and the evidence inadmissible. In the words of the Supreme Court of Canada: The situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial. (Emphasis ours) The opinion in Collins case has been relied upon by the majority of the Supreme Court of Canada in R. v. Stillman, [1997] 1 R.C.S. 607 also. The question of

admissibility of evidence, which may be relevant to the question in issue, has thus to be decided in the context and the manner in which the evidence was collected and is sought to be used. In view of the provisions of Chapter IV of NDPS Act, mere unlawful possession of a contraband amounts to an offence and is punishable with rigorous imprisonment for terms which shall not be less than 10 years but can extend to 20 years or 30 years in addition to a fine which shall not be less than one lakh of rupees but which may extend to two lakhs or three lakhs of rupees. On a charge of possession of a dangerous drug or a psychotropic substance, if it is established that the accused had the contraband in his possession without authority, he is liable to be punished. "Unlawful possession" of the contraband is the sine qua non for recording conviction under the NDPS Act and the most important ingredient of an offence under the NDPS Act. Explaining the concept of possession, in Bocking v. Roberts, (1973) 3 All E.R. 962, Lord Widgery, C.J. observed : In my judgment it is quite clear that when dealing with a charge of possession of a dangerous drug without authority, the ordinary maxim of de minimis is not to be applied, in other words if it is clearly established that the accused had a dangerous drug in his possession without authority, it is no answer to him to say : oh, but the quantity of the drug which I possessed was so small that the law should take no account of it. The doctrine of de minimis as such in my judgment does not apply but, on the other hand, since the accused is possessing a dangerous drug, it is quite clear that the prosecution have to prove that there was some drug in the possession of the accused to justify the charge (Emphasis ours) In R. v. Young, (1984) 2 All E.R. 164, it was held that if an accused being in possession of the prohibited substance on seeing the police party swallows the same to avoid detection, he can be convicted for possession of the prohibited substance and not for consumption thereof. Similarly, in Louis Beaver v. Her Majesty The Queen, [1957] S.C.R. 531, the Supreme Court of Canada while dealing with a case relating to an offence of possession of forbidden narcotic substance held that the element of knowledge formed a part of the ingredient of possession, where mere possession of the forbidden substance amounts to an offence. A Constitution Bench of this Court in Sanjay Dutt v. The State through C.B.I., Bombay (II), (1994) 5 SCC 410, while dealing with Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), which reads : Section 5 Possession of certain unauthorised arms, etc., in specified areas. Where any person is in possession of any arms and ammunition specified in Columns 2 and 3 of Category I or Category III (a) of Schedule I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. spelt out the ingredients of the offence created by Section 5 of TADA and opined : The position which emerges is this. For constituting the offence made punishable under Section 5 of the TADA Act, the prosecution has to prove the aforesaid three ingredients. Once the prosecution has proved unauthorised conscious possession of any of

the specified arms and ammunition etc. in a notified area by the accused, the conviction would follow on the strength of the presumption unless the accused proves the non-existence of a fact essential to constitute any of the ingredients of the offence. Undoubtedly, the accused can set up a defence of non-existence of a fact which is an ingredient of the offence to be proved by the prosecution. (Emphasis ours) The Constitution Bench in Sanjay Dutt's case, thus clearly held that once the prosecution has proved unauthorised conscious possession of any of the specified arms and ammunition etc. in a notified area by the accused, the offence is complete and the conviction must follow on the strength of the statutory presumption, unless the accused proves the non-existence of a fact essential to constitute any of the ingredient of that offence. Indeed, the presumption, even though statutory in nature, was held to be rebuttable. Thus, even if, it be assumed for the sake of argument that all the material seized during an illegal search, may be admissible as relevant evidence in other proceedings, the illicit drug or psychotropic substance seized in an illegal search cannot by itself be used as proof of unlawful conscious possession of the contraband by the accused. An illegal search cannot also entitle the prosecution to raise a presumption under Section 54 of the Act because presumption, is an inference of fact drawn from the facts which are known as proved. A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. We, therefore, hold that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case. Thus, considered we are of the opinion that the judgment in Ali Mustaffas case correctly interprets and distinguishes the judgment in Pooran Mals case and the broad observations made in Pirthi Chands case and Jasbir Singhs case are not in tune with the correct exposition of law, as laid down in Pooran Mal's case. On the basis of the reasoning and discussion above, the following conclusions arise : (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing; (2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused; (3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to

conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act; (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by Section 50 at the trial, would render the trial unfair. (5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- sho rt a criminal trial; (6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law; (7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search; (8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act (9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person,

on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search; (10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case. The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part. We, accordingly, answer the reference in the manner aforesaid. Let the Criminal Appeals and Special Leave Petitions be now placed for disposal before an appropriate Bench.