Supreme Court of India State Of Punjab vs Balbir Singh on 1 March, 1994 Equivalent citations: 1994 AIR 1872, 1994 SCC (3) 299 Author: K J Reddy Bench: Reddy, K. Jayachandra (J) PETITIONER: STATE OF PUNJAB

Vs.

RESPONDENT: BALBIR SINGH

DATE OF JUDGMENT01/03/1994

BENCH: REDDY, K. JAYACHANDRA (J) BENCH: REDDY, K. JAYACHANDRA (J) PANDIAN, S.R. (J)

CITATION: 1994 AIR 1872 1994 SCC (3) 299 JT 1994 (2) 108 1994 SCALE (1)793

ACT:

HEADNOTE:

JUDGMENT: The Judgment of the Court was delivered by K. JAYACHANDRA REDDY, J.- In almost all the above cases the State of Punjab is the petitioner. The common question that arises for consideration is whether any arrest and search of a person or search of a place without conforming to the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short), becomes illegal and consequently vitiates the conviction. The trial court in these cases acquitted the accused on the ground that the arrest, search and seizure were in violation of some of the relevant and mandatory provisions of the NDPS Act. The High Court declined to grant leave to appeal against the said order of acquittal. Questioning the same the State of Punjab has filed these special leave petitions and appeals. In a few cases, the convicted accused also have questioned their convictions on the ground that arrest and trial were illegal. Since a common question arises in all these matters, they are being disposed of by a common judgment. 2. The principal contention of Mr Suri, learned counsel appearing for the State of Punjab is that in all these cases, the police officers effected arrest, search and seizure on reasonable suspicion that a cognizable offence has been committed and not on any prior information that any offence punishable under NDPS Act has been committed and therefore the question of complying with some of the provisions of the NDPS Act in this regard at the time of the said arrest, search and seizure would not arise-and as long as such arrest, search and seizure are substantially in accordance with the provisions of Code of Criminal Procedure, such arrest, search and seizure cannot be declared as illegal. The further submission is that even if such arrest, search and seizure are not in strict conformity with the provisions of Code of Criminal Procedure, at that stage, the same may at the most be irregular and the courts have to consider the prosecution case and appreciate the relevant evidence from that background and should only see whether any prejudice is caused to the accused but cannot throw out the whole prosecution case as such. Several learned counsel appearing for the respondents-accused on the other hand contended that since deterrent punishments are prescribed under the NDPS Act,

the Legislature has taken care to incorporate several provisions in Chapter V of the NDPS Act governing the arrest, search and seizure to afford safeguards so that innocent persons are not harassed and these provisions are mandatory in nature and non-compliance of the same vitiates the trial. 3. To appreciate the questions involved, it may not be necessary to extract the said provisions in the NDPS Act extensively. Suffice if we give a gist of the said provisions since we are mainly concerned with the compliance of the provisions of Code of Criminal Procedure in respect of arrest, search and seizure subject to the limitations under NDPS Act. 4. The NDPS Act was enacted in the year 1985 with a view to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith. Sections 1 to 3 in Chapter I deal with definitions and connected matters. The provisions in Chapter 11 deal with the powers of the Central Government to take measures for preventing and combating abuse of and illicit traffic in narcotic drugs and to appoint authorities and officers to exercise the powers under the Act. The provisions in Chapter III deal with prohibition, control and regulation of cultivation of coca plant, opium poppy etc. and to regulate the possession, transport, purchase and consumption and poppy straw etc. Chapter IV deals with various offences and penalties for contravention in relation to opium poppy, coca plant, narcotic drugs and psychotropic substances and prescribes deterrent sentences. The provisions of Chapter V deal with the procedure regarding the entry, arrest, search and seizure. Chapter V-A deals with forfeiture of property derived from or used in illicit traffic of such drugs and substances. The provisions of Chapter VI deal with miscellaneous matters. We are mainly concerned with Sections 41, 42, 43, 44, 49, 50, 51, 52 and 57. Under Section 41 certain classes of Magistrates are competent to issue warrants for the arrest of any person whom they have reason to believe to have committed any offence punishable under Chapter IV or for search of any building, conveyance or place in which they have reason to believe that any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed, is kept or concealed. Section 42 empowers certain officers to enter, search, seize and arrest without warrant or authorisation. Such officer should be 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 an officer of similar superior rank 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. Such officer, if he has reason to believe from personal knowledge or information taken down in writing, that any offence punishable under Chapter IV has been committed, he may enter into and search in the manner prescribed thereunder between sunrise and sunset. He can detain and search any person if he thinks proper and if he has reason to believe such person to have committed an offence punishable

under Chapter IV. Under the proviso, such officer may also enter and search a building or conveyance at any time between sunset and sunrise also provided he has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for concealment of the evidence or facility for the escape of an offender. But before doing so, he must record the grounds of his belief and send the same to his immediate official superior. Section 43 empowers such officer as mentioned in Section 42 to seize in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe that an offence punishable under Chapter IV has been committed and shall also confiscate any animal or conveyance along with such substance. Such officer can also detain and search any person whom he has reason to believe to have committed such offence and can arrest him and any other person in his company. Section 44 merely lays down that provisions of Sections 41 to 43 shall also apply in relation to offences regarding coca plant, opium poppy or cannabis plant. Under Section 49, any such officer authorised under Section 42, if he has reason to suspect that any animal or conveyance is, or is about to be, used for the transport of any narcotic drug or psychotropic substance, can rummage and search the conveyance or part thereof, examine and search any goods in the conveyance or on the animal and he can stop the animal or conveyance by using all lawful means and where such means fail, the animal or the conveyance may be fired upon. Then comes Section 50. Since sufficient emphasis has been laid on this section, we shall extract the same in full. It reads as under : "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." This provision obviously is introduced to avoid any harm to the innocent persons and to avoid raising of allegation of planting or fabrication by the prosecuting authorities. It lays down that if the person to be searched so requires, the officer who is about to search him under the provisions of Sections 41 to 43, shall take such person without any unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. One of the questions raised is that what meaning is to be given to the words "if the person to be searched so requires". Do they cast a duty upon the officer about to make the search to intimate such person that if he so requires he would be taken before the nearest Gazetted Officer or the nearest Magistrate for the purpose of making search in their presence or it is for such person to make such a request on his own without being informed by the officer? We shall consider this question at a later stage. Section 51 is also important for

our purpose. It reads as under: "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 (2 of 1974) shall apply, insofar as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act." This is a general provision under which the provisions of Code of Criminal Procedure, ('CrPC' for short) are made applicable to warrants, searches, arrests and seizures under the Act. Section 52 lays down that any officer arresting a person under Sections 41 to 44 shall inform the arrested person all the grounds for such arrest and the person arrested and the articles seized should be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued or to the officer-in-charge of the nearest police station, as the case may be and such Magistrate or the officer to whom the articles seized or the person arrested are forwarded may take such measures necessary for disposal of the person and the articles. This section thus provides some of the safeguards within the parameters of Article 22(1) of the Constitution of India. In addition to this, Section 57 further requires that whenever any person makes arrest or seizure under the Act, he shall within forty-eight hours after such arrest or seizure make a report of the particulars of arrest or seizure to his immediate official superior. This section provides for one of the valuable safeguards and tries to check any belated fabrication of evidence after arrest or seizure. Section 57 reads as under : "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 official superior." These are some of the provisions which are relevant and out of them Sections 41, 42, 50, 51, 52 and 57 are important for appreciating the questions raised before us. 5. In most of the cases before us, the police officers did not proceed to act under the provisions of the NDPS Act after having necessary information or after having reasons to believe as contemplated under Section 42. The search, seizure or arrest carried out by them were obviously under the provisions of the CrPC. The provisions of arrest, warrant, search and seizure are incorporated in Sections 41 to 60, 70 to 81, 93 to 105 and 165 CrPC. It may also be noticed at this stage that NDPS Act is not a complete code incorporating all the provisions relating to search, seizure or arrest etc. The said Act after incorporating the broad principles regarding search, seizure or arrest etc. in Sections 41, 42, 43 and 49 has laid down in Section 51 that the provisions of CrPC 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 that Act. Therefore the provisions of Sections 100 and 165 CrPC which are not inconsistent with the provisions of the NDPS Act are applicable for effecting search, seizure or arrest under the NDPS Act also. The words "insofar as they are not inconsistent with the provisions of this Act" in Section 51 of the NDPS Act are significant. It may also be noted that Section 4 of the CrPC, 1973 provides that all the offences under any other law shall be investigated and inquired as mentioned therein. Section 4 of the CrPC, 1973 reads thus : "4. Trial of offences under the Indian Penal Code and other laws.(1) All of-

fences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained. (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences." Therefore under this section the provisions of the CrPC are applicable where an offence under the Indian Penal Code or under any other law is being inquired into, tried and otherwise dealt with. From the words "otherwise dealt with" it does not necessarily mean something which is not included in the investigation, inquiry or trial and the word "otherwise" points to the fact that the expression "dealt with" is all comprehensive and that investigation, inquiry and trial are some of the aspects dealing with the offence. Consequently the provisions of the CrPC shall be applicable insofar as they are not inconsistent with the NDPS Act to all warrants, searches, seizures or arrests made under the Act. But when a police officer carrying on the investigation including search, seizure or arrest empowered under the provisions of the CrPC comes across a person being in possession of the narcotic drugs or psychotropic substances then two aspects will arise. If he happens to be one of those empowered officers under the NDPS Act also then he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is 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. But at this stage the question of resorting to Section 50 and informing the accused person that if he so wants, he would be taken to a Gazetted Officer and taking to Gazetted Officer thus would not arise because by then search would have been over. As laid down in Section 50 the steps contemplated thereunder namely informing and taking him to the Gazetted Officer should be done before the search. When the search is already over in the usual course of investigation under the provisions of CrPC then the question of complying with Section 50 would not arise. 6. At this juncture we may also dispose of one of the contentions that failure to comply with the provisions of CrPC in respect of search and seizure even up to that stage would also vitiate the trial. This aspect has been considered in a number of cases and it has been held that the violation of the provisions particularly that of Sections 100, 102, 103 or 165 CRPC strictly per se does not vitiate the prosecution case. If there is such violation, what the courts have to see is whether any prejudice was caused to the accused and in appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and from that point of view evaluate the evidence on record. Under Section 100 CrPC the officer conducting search under a warrant should call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and Witness the search. Section 165 CRPC lays down that whenever an officer-in-charge of a police station or a police officer making

an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in- charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer after recording in writing the grounds of his belief and specifying in such writing, may proceed to search or to cause search to be made. Section 165(4) lays down that the provisions of this Code as to search warrants and the general provisions as to searches contained in Section 100 shall, so far as may be, apply to a search made under Section 165 also. The scope of these two sections have been examined in a number of cases. In State of Punjab v. Wassan Singh, this Court has clearly held that irregularity in a search cannot vitiate the seizure of the articles. In Sunder Singh v. State of U.P.2 it is held that irregularity cannot vitiate the trial unless the accused has been prejudiced by the defect and it is also held that if reliable local witnesses are not available the search would not be vitiated. In State of Maharashtra v. P. K. Pathak3 it is held that 1 (1981) 2 SCC 1: 1981 SCC (Cri) 292 2 AIR 1956 SC 411: 1956 Cri L.J 801 3 (1980) 2 SCC 259: 1980 SCC (Cri) 428: AIR 1980 SC 1224 absence of any independent witness from the locality to witness the search does not affect the trial and the conviction of the accused under the Customs Act. In Radha Kishan v. State of Up.4 it is held that irregularity in a search would, however, cast a duty upon the court to scrutinise the evidence regarding the search very carefully. In Matajog Dobey v. H.C. Bhari5 it is held that when the salutory provisions have not been complied with, it may, however, affect the weight of the evidence in support of the search or may furnish a reason for disbelieving the evidence produced by the prosecution unless the prosecution properly explains such circumstance which made it impossible for it to comply with these provisions. In State of Maharashtra v. Natwarlal Damodardas Soni6 after referring to the above- mentioned decisions, this Court observed as under: (SCC p. 673, para 9) "Taking the first contention first, it may be observed that the police had powers under the Code of Criminal Procedure to search and seize this gold if they had reason to believe that a cognizable offence had been committed in respect thereof. Assuming arguendo, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which followed on the complaint of the Assistant Collector of Customs." 7. It therefore emerges that non-compliance of these provisions i.e. Sections 100 and 165 CrPC would amount to an irregularity and the effect of the same on the main case depends upon the facts and circumstances of each case. of course, in such a situation, the court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of search in the light of the fact that these provisions have not been compiled with and further consider whether the weight of evidence is in any manner affected because of the non-compliance. It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the courts look for inde-

pendent corroboration. This again depends on question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions. In Deepak Ghanshyam Naik v. State of Maharashtra7 a case arising under the NDPS Act, a Division Bench of the Bombay High Court considered the effect of non-compliance of Section 100(4) namely that two or more independent respectable inhabitants of the locality were not called to be present during the search and that on the other hand two Panchas of different locality were called to be present. The Division Bench considered the explanation that Parnaka was at a distance of half a kilometre from the place of occurrence 4 AIR 1963 SC 822: 1963 Supp (1) SCR 408: (1963) 2 LLJ 667 5 AIR 1956 SC 44: (1955) 2 SCR 925: 1956 Cri LJ 140 6 (1980) 4 SCC 669: 1981 SCC (Cri) 98: AIR 1980 SC 593 7 1989 Cri L.J 11 81: 1989 Mah L J 276 (Bom) and they called the Panch witnesses from that place and that they could not call somebody present on the road where the incident took place and held that there was no material to hold that Panch witnesses from Pamaka were in any way motivated to falsely implicate the accused. In Sunil Kumar v. State8 again a case arising under the NDPS Act, the Delhi High Court while considering the scope of Section 42 of the NDPS Act and Section 100(4) of CrPC observed that failure to associate independent persons in the search in a given situation would not affect the prosecution case in toto and the same cannot be thrown out or doubted on that ground alone. In this case it has also been observed that provisions of Sections 41 or 42 would not be attracted at this stage when the police had secret information that some persons would be reaching in a public place while in transit and the information was not about the specific presence of a contraband but was only about the likelihood of such articles being brought. It thus emerges that when the police, while acting under the provisions of CrPC as empowered therein and while exercising surveillance or investigating into other offences, had to carry out the arrests or searches they would be acting under the provisions of CrPC. At this stage if there is any non- compliance of the provisions of Section 100 or Section 165 CrPC that by itself cannot be a ground to reject the prosecution case outright. The effect of such non- compliance will have a bearing on the appreciation of evidence of the official witness and other material depending upon the facts and circumstances of each case. In carrying out such searches if they come across any substance covered by the NDPS Act the question of complying with the provisions of the said Act including Section 50 at that stage would not arise. When the contraband seized during such arrests or searches attracts the provisions of NDPS Act then from that stage the remaining relevant provisions of NDPS Act would be attracted and the further steps have to be taken in accordance with the provisions of the said Act. 8. But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has

reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Sub-section (2) of 8 1990 Cri LJ 414 (Del) Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior. 9. As already noted Chapter V contains the provisions from Section 41 onwards regarding the power to arrest, issue warrants and carrying out seizure etc. and the procedure to be followed. These provisions are attracted if any of the steps mentioned thereunder are to be taken when there is reason to believe that any person who is sought to be arrested and searched, has committed any offence punishable under Chapter IV of the Act. The Magistrate or officers especially empowered under the Act can proceed under Sections 41 and 42 on the prior information and/or having reason to believe thereupon that an offence under the Act has been committed. We may mention here that Section 43 which deals with the power of seizure and arrest in public places is slightly different from Section 42 in certain respects. Under this provision any empowered officer under Section 42 has the power to seize, detain, search or arrest in public place or in transit if he has reason to believe that an offence punishable under Chapter IV relating to such drug or substance has been committed and seize any document or other article which may furnish evidence of the commission of such offence and can seize any animal or conveyance or article liable to confiscation and can detain and search any person similarly. The empowered officer while acting under Section 43 need not record any reasons of his belief. This section also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to Section 42. 10. It is thus clear that by a combined reading of Sections 41, 42, 43 and 51 of the NDPS Act and Section 4 CrPC regarding arrest and search under Sections 41, 42 and 43, the provisions of CrPC namely Sections 100 and 165 would be applicable to such arrest and search. Consequently the principles laid down by various courts as discussed above regarding the irregularities and illegalities in respect of arrest and search would equally be applicable to the arrest and search under the NDPS Act also depending upon the facts and circumstances of each case. 11. But there are certain other embargoes envisaged under Sections 41 and 42 of the NDPS Act. Only a Magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been committed so on and so forth as mentioned therein. Under sub-section (2) only a Gazetted Officer or other officers mentioned and empowered therein can give an authorization to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence

and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirements. One is that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the Legislature intended that only certain Magistrates and certain officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or officers mentioned thereunder. 12. Nand Lal v. State of Rajasthan9 is a case where a police head constable and a station house officer were not empowered to carry out investigation and it was contended that the whole investigation was illegal and consequently the trial was vitiated. The Rajasthan High Court held that for launching the prosecution or for initiating the proceedings under the Act, .the authority doing so must have a clear and unambiguous power. In Bhajan Singh v. State of Haryana10 it was observed that only officers empowered under the Act can take steps regarding entry, search, seizure and arrest and that the relevant provisions of the Act are mandatory. In Umrao v. State of Rajasthan' I it was held that the search made by a police constable without jurisdiction and investigation made by an officer not empowered, vitiate the trial. In Shanti Lal v. State of Rajasthan12 it was similarly held that search and arrest made by SHO who was not authorised under the Act, were illegal. 13. Therefore, if an arrest or search contemplated under Sections 41 and 42 is made under a warrant issued by any other Magistrate or is made by any officer not empowered or authorised, it would per se be illegal and would affect the prosecution case and consequently vitiate the trial. 14. The other requirement is that the Magistrate or the officer empowered while acting under Section 41 or Section 42 should have "reason to believe" that such an offence under Chapter IV has been committed and, therefore, an arrest or search was. necessary as contemplated under these provisions. Section 26 IPC gives the meaning of this term as under: "26. 'Reason to believe'.- A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise." In Partap Singh (Dr) v. Director of Enforcement, Foreign Exchange Regulation Act13 it was observed as under (SCC pp. 78 and 77, paras 10 and 9) "The expression 'reason to believe' is not synonymous with subjective satisfaction of the officer. The belief must be held in good 9 (1987) 3 Crimes 629 (Raj) 10 (1988) 1 Crimes 444 (P&H) 11 (1988)2RLW25:(1988)IRLR796 12 (1989) 1 Crimes 276 (Raj) 13 (1985) 3 SCC 72: 1985 SCC (Cri) 312: 1985 SCC (Tax) 352: AIR 1985 SC 989 faith; it cannot be merely a pretence.... When an officer of the Enforcement Department proposes to act under Section 37 (of the Foreign Exchange Regulation Act for ordering search,) undoubtedly, he must have reason

to believe that the documents useful for investigation or proceeding under the Act are secreted. The material on which the belief is grounded may be secret, may be obtained through Intelligence or occasionally may be conveyed orally by informants. It is not obligatory upon the officer to disclose this material on the mere allegation that there was no material before him on which his reason to believe can be grounded." Whether there was such reason to believe and whether the officer empowered acted in a bona fide manner, depends upon the facts and circumstances of the case and will have a bearing in appreciation of the evidence. However, if such information is given by any person, the same should be taken in writing as provided both under Sections 41(2) and 42(1). But under the proviso to Section 42(1) if such empowered officer has reason to believe that search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of offender, he may enter and search at any time between sunset and sunrise after recording the grounds of his belief. However, if such arrest, search or seizure are to be made by the empowered officer between sunrise and sunset, there is no such mandatory provision for recording of the reasons to believe. 15. In K.L. Subhayya v. State of Karnataka 14 this Court considering the scope of Section 54 in the Mysore Excise Act whereunder the officer was required to "record the grounds of his belief' and the failure to do so was held to be rendering the entire search without jurisdiction and thus vitiated the conviction. Commenting on the failure to do so, it was observed as under: (SCC p. 117, para 4)"This, therefore, renders the entire search without jurisdiction and as a logical corollary, vitiates the conviction. We feel that both Sections 53 and 54 contain valuable safeguards for the liberty of the citizen in order to protect them from ill-founded or frivolous prosecution or harassment." The very fact that sub-section (2) of Section 42 requires that where a.7. 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, itself is a strong indication of the mandate that the officer should record his reasons for his belief as required under the proviso and also that the information received should be reduced to writing so that it can be verified whether there were sufficient reasons for belief. In Presidential Election 1974 15, Re, this Court observed as under: (SCC p. 49, para 13) "In determining the question whether a provision is mandatory or directory, the subject-matter, the importance of the provision, the 14 (1979) 2 SCC 115: 1979 SCC (Cri) 367: AIR 1979 SC 711 15 (1974) 2 SCC 33: AIR 1974 SC 1682 relation of that provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get at the real intention of the Legislature by carefully attending the whole scope of the provision to be construed. 'The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." *In Govind Lal Chaggan Lal Patel v. Agriculture Produce Market Committee16 it was observed thus : (SCC pp. 487-488, para 13) "Thus, the governing factor is the meaning and intent of the Legislature, which should be gathered not merely from the words used by the Legislature but*

from a variety of other circumstances and considerations. In other words, the use of the word 'shall' or 'may' is not conclusive on the question whether the particular requirement of law is mandatory or directory. But the circumstance that the Legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. One of the fundamental rules of interpretation is that if the words of a statute are themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature." The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial. 16. One another important question that arises for consideration is whether failure to comply with the conditions laid down in Section 50 of the NDPS Act by the empowered or authorised officer while conducting the search, affects the prosecution case. The said provision (Section 50) lays down that any officer duly authorised under Section 42, who is about to search any person under the provisions of Sections 41, 42 and 43, shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate and if such requisition is made by the person to be See Brett v. Brett (1 826) 3 Addams 210, 216 16 (1975) 2 SCC 482: AIR 1976 SC 263 searched, the authorised officer concerned can detain him until he can produce him before such Gazetted Officer or the Magistrate. After such production, the Gazetted Officer or the Magistrate, if sees no reasonable ground for search, may discharge the person. But otherwise he shall direct that the search be made. To avoid humiliation to females, it is also provided that no female shall be searched by anyone except a female. The words "if the person to be searched so desires" are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search would be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. To us, it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the

proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right. 17.As discussed above, in considering whether a provision in a statute is mandatory and the effect of non-compliance of the same, the courts should keep in mind the real intention of the legislature keeping in view the whole scope of the Act and the particular provisions to be construed in the context. Keeping these principles in view, we shall proceed to consider the nature of some of these relevant provisions. 18. Under the Act wide powers are conferred on the officers and deterrent sentences are also provided for the offences under the Act. It is obvious that the legislature while keeping in view the menace of illicit drug trafficking deemed it fit to provide for corresponding safeguards to chock the misuse of power thus conferred so that any harm to innocent persons is avoided and to minimise the allegations of planting or fabricating by the prosecution, Section 50 is enacted. 19. The author Lewis Mayers in his book titled Shall We Amend the 5th Amendment p. 228 stated as under : "To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the year has swung to the right. Even as long ago as the opening of the twentieth century, Justice Holmes declared that 'at the present time in this country there is more danger that criminals will escape justice than that they will be subject to tyranny'. As the century has unfolded the danger has increased. Conspiracies to defeat the law have in recent decades become more widely and powerfully organized and have been able to use modern advances in communication and movement to make detection more difficult. Law breaking tends to increase. During the same period an increasing awareness of the potentialities of abuse of power by law- enforcement officials have resulted, in both the judicial and the legislative spheres, in a tendency to tighten restrictions on such officials, and to safeguard even more jealously the rights of the accused, the subject, and the witness. It is not too much to say that at mid-century we confront a real dilemma in law enforcement." 20. In Miranda v. Arizona17 the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus : "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." It was further observed thus : "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness

of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system that he is not in the presence of persons acting solely in his interest." When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable. Therefore it is to be, taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory. 21. Both under Sections 41 and 42, the officers empowered can enter and search the place and also arrest the person suspected to have committed the offence either on the basis of his own knowledge or on the basis of information reduced to writing. If an arrest is made and a person is to be 17 384 US 436: 16 L Ed 2d 694 (1966) searched, then as noted above Section 50 comes into operation and the search of the person has to be carried out in the manner provided thereunder. Some of the High Courts also have taken the same view. In Jang Singh v. State of Haryanal8 it was held that it is an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate and failure to do so warrants his acquittal. In State of H.P. v. Sudarshan Kumar alias Kala19 a Division Bench of the High Court held that the provisions of Section 50 sub-section (1) are mandatory and violation thereof per se would be fatal to the prosecution case. 22. We have also already noted that the searches under the NDPS Act by virtue of Section 51 have to be carried under the provisions of CrPC particularly Sections 100 and 165. The irregularities, if any, committed like independent witnesses not being associated or the witnesses not from the locality, while carrying out the searches etc. under Sections 100 and 165 CrPC would not, as discussed above, vitiate the trial. But a question may still arise that when an empowered officer acting under Sections 41 and 42 of the Act, carries out a search under Section 165 CrPC without recording the grounds of his belief as provided under Section 165, whether such failure also would vitiate the trial particularly in view of the fact that such a search is connected with offences under the NDPS Act. Neither Section 41(2) nor Section 42(1) mandates such empowered officer to record the grounds of his belief. It is only proviso to Section 42(1) read with Section 42(2) which makes it obligatory to record grounds for his belief. To that extent we have already held the provisions being mandatory. A fortiori, the empowered officer though is expected to record reasons of belief as required under Section 165, failure to do so cannot vitiate the trial particularly when Section 41 or 42 do not mandate to record reasons while making a search. Section 165 in the context has to be read along with Sections 41(2) and 42(1) whereunder he is not required to record his reasons. 23. The counsel for the respondents, however, contended that an examination of Section 165 CrPC, as it stands, would show that recording such grounds is obligatory and failure to do so will vitiate the trial. In our view, the general principles laid down regarding the irregularities

committed in such searches, equally apply even to cases where the grounds of belief as required under Section 165 are not recorded. In Bai Radha v. State of Gujarat2O while considering the scope of Section 15 of the Suppression of Immoral Traffic Act, whereunder the authorised officer had to record the grounds of his belief, on the effect of failure to do so, this Court observed thus : (SCC p. 46) "The principles which have been settled with regard to the effect of an irregular search made in exercise of the powers under Section 165 of 18 (1988) 1 Crimes 446 (P&H) 19 (1989) 3 Crimes 608 (HP) 20 (1969) 1 SCC 43: (1969) 2 SCR 799 the Code of Criminal Procedure would be fully applicable even to a case under the Act, where the search has not been made in strict compliance with its provisions. It is significant that there is no provision in the Act according to which any search carried out in contravention of Section 15 would render the trial illegal. In the absence of such a provision we must apply the law which has been laid down with regard to searches made under the provision of the Criminal Procedure Code." While concluding on the legal effect with regard to an irregular search under Section 165 of the Code, it was observed thus : (SCC p. 47) "In conclusion it may be observed that the investigating agencies cannot and ought not to show complete disregard of such provisions as are contained in sub-sections (1) and (2) of Section 15 of the Act. The Legislature in its wisdom provided special safeguards owing to the nature of the premises which have to be searched involving inroads on the privacy of citizens and handling of deligate situations in respect of females. But the entire proceedings and the trial do not become illegal and vitiated owing to the non- observance of or non-compliance with the direction contained in the aforesaid provisions. The court, however, has to be very careful and circumspect in weighing the evidence where there has been such a failure on the part of the investigating agency but unless and until some prejudice is shown to have been caused to the accused person or persons the conviction and the sentence cannot be set aside." The observations made in the above case have been relied upon by this Court in Shyam Lal Sharma v. State of M.p.21 No doubt in K.L. Subhayya case 14 failure to record the grounds of belief as required under Section 54 of the Mysore Excise Act amounted to an illegality vitiating the trial. But there it must be noted that Section 54 itself gives a mandate that such grounds of belief should be recorded. But under the NDPS Act, Sections 41 and 42(1) do not give any such mandate. It is only proviso to Section 42(1) which makes the recording of grounds obligatory. In R.S. Seth Gopikisan Agarwal v. R.N. Sen, Assistant Collector of Customs and Central Excise 22 a question arose whether the custom officer while acting under Section 105 of the Customs Act and making a search as provided under Section 165(1) should record reasons. This argument was based upon Section 105(2) which lays down that the provisions of the CrPC relating to search so far as may be applied to search under this section. Considering this submission it was held thus : " The argument is that the expression 'so far as may be' in Section 105(2) of the Act attracts Section 165(1) of the Code of Criminal Procedure and under that section, as the police officer has to record in writing the grounds of his belief the Assistant Collector of Customs shall also in authorizing the search record his reasons for doing so. But, in our view, Section 105 of the

Act and Section 165(1‘) of the Code of Criminal 21 (1972) 1 SCC 764: 1972 SCC (Cri) 470: AIR 1972 SC 886 22 AIR 1967 SC 1298: (1967) 2 SCR 340: 1967 Cri LJ 1194 Procedure are intended to meet totally different situations. While under Section 105 of the Act the Assistant Collector of Customs either makes the search personally or authorizes any officer of Customs to do so, if he has reason to believe the facts mentioned therein, under Section 165(1) of the Code of Criminal Procedure the recording of the reasons for believing the facts is only to enable him to make a search urgently in a case where search warrants in the ordinary course cannot be obtained. It is, therefore, not possible to invoke that condition and apply it to a situation arising under Section 105 of the Act." It therefore emerges that the empowered officer while effecting the search or arrest without warrant as provided under Sections 41 and 42(1) has to carry out search in accordance with Section 165 CrPC, but if he fails to record reasons, such a failure will not amount to an illegality vitiating the trial. The effect of such a failure has to be kept in view in appreciating the evidence as held in Bai Radha case20. 24. Sections 52 and 57 come into operation after the arrest and seizure under the Act. Somewhat similar provisions are also there in the CrPC. If there. is any violation of these provisions, then the Court has to examine the effect of the same. In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non- compliance or failure to strictly comply by itself will not vitiate the prosecution. 25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows : (1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions

of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act. (2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly 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. (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. 26. We will now proceed to consider the question whether any interference is called for in these matters in view of above conclusions. In most of the cases filed by the State of Punjab, arrest or search was carried out by police officers who were not empowered and in such a situation, as held above, compliance of Section 50 did not arise. But the cases have been thrown out on the ground that Section 50 has not been complied with in all these cases. All the SLPs listed above except SLP (Crl.) No. 2437 of 1992 are filed by the State of Punjab questioning the order of acquittal passed by the trial court. The offences are said to have taken place a long time back and after hearing both sides on notice stage, we do not think that it is expedient to order retrial in all these cases at this distance of time particularly in view of the fact that most of the incriminating evidence would have disappeared. So in this view of the matter, SLPs filed by the State of Punjab are dismissed. 27. All the other criminal miscellaneous petitions are also filed by the State of Punjab for condonation of delay in filing the SLPS, against acquittal on the same grounds. In all these cases, there is considerable delay and we do not think these are fit cases for condonation of delay. They are accordingly dismissed. Criminal Appeal No. 212 of 1993 28. This appeal pursuant to the leave granted, is filed by the State of Punjab against the order of acquittal on the same grounds. In view of the above conclusions reached, this appeal is also dismissed. Criminal Appeal Nos. 334 of 1990, 348 of 1991 and SLP (Crl.) No. 2437 of 1992 29. These two appeals and one SLP are filed by the accused who are convicted under the NDPS Act. These matters have to be decided on merits after hearing the parties in the light of the above conclusions. Therefore they are delinked and they may be posted in due course for regular hearing. ADDL. SPECIAL LAND ACQUISITION OFFICER V. YAMANAPPA BASALINGAPPA CHALWADI ORDER These appeals by special leave arise from the Judgment of the High Court of Karnataka dated August 10, 1981 in Misc. Appeal Nos. 1406-1428 of 1981. The High Court following its earlier Judgment in Special Land Acquisition officer, Hassan v. Mallesha M.S.' applying a multiplier of 15 years for the average annual income for Rs 720 per acre upheld the fixation + From the Judgment and Order dated August 10, 1981 of the Karnataka High Court in M.F.A. Nos. 1406 to 1428 of 1981 1 (1975) 2 Mys LJ 74 of the market value at Rs'800 per acre. Thus these appeals

by special leave. Notification under Section 4(1), dated March 13, 1980 was published in the State Gazette on July 24, 1980 acquiring 100 acres of land for Upper Krishna Project. The District Judge found from the evidence that the lands are madikattu lands and two dry crops of groundnuts in the first season, Jowar or cotton in the second rabi season were being raised in those lands. He determined the market value of the crop at Rs 720 after deducting the expenses incurred thereof. Though it is doubtful whether two crops could be raised in dry lands, under appeal we proceed on the footing that the evidence adduced would show that in the lands under acquisition two crops were raised and that annual yield was at Rs 720 per acre. But the crucial question is what is the suitable multiplier which would be applicable to the agricultural crops. This question is squarely covered by a Judgment of this Court in Special Land Acquisition Officer, Davangere v. P. Veerabhadarappa2. While disposing of batch of the appeals this Court held that ten years' multiplier would be the proper method in determining the total market value by following the method of capitalisation as just and reasonable principle. We find that this principle is quite consistent with the valuation of the land allowed by multiplying the value of the annual yield, in the absence of any other acceptable evidence. Following the ratio we hold that ten years' multiplier is the proper method of valuing the lands by capitalisation method. The appeals are accordingly allowed in part and the respondents are entitled to the solatium at 15% and interest at the rate of 5% from the date of taking possession till date of deposit. The appellant is entitled to recover the balance amount from the respondents. No costs. 2 (1984) 2 SCC 120 + From the Judgment and Order dated April 29, 1981 of the Madras High Court in C.A. No. 178 of 1977