

Vijaysinh Chandubha Jadeja vs State Of Gujarat on 29 October, 2010

Equivalent citations: AIR 2011 SUPREME COURT 77, 2011 (1) SCC 609, 2010 AIR SCW 6843, 2010 AIR SCW 6800, AIR 2011 SC (CRIMINAL) 110, 2011 (1) ALL LJ 479, 2011 (2) AIR JHAR R 612, 2011 (1) CALCRILR 202, 2011 CALCRILR 1 202, (2011) 97 ALLINDCAS 236 (SC), (2011) 2 MH LJ (CRI) 1, 2011 (1) SCC(CRI) 497, (2011) 1 GUJ LR 795, 2010 (11) SCALE 509, 2010 ALL MR(CRI) 4023, 2011 (1) KER LJ 4 NOC, (2010) 3 UC 2041, (2010) 11 SCALE 509, (2010) 2 EFR 755, (2011) 1 GUJ LH 527, (2011) 1 CHANDCRIC 21, (2010) 4 KER LT 547, (2011) 1 MADLW(CRI) 64, (2010) 47 OCR 1015, (2011) 1 PAT LJR 100, (2011) 1 RAJ LW 813, (2010) 4 RECCRIR 911, (2010) 4 CURCRIR 269, (2011) 2 BOMCR(CRI) 713, (2010) 4 DLT(CRL) 327, (2011) 72 ALLCRIC 286, (2010) 9 SCALE 630, 2011 (1) ALD(CRL) 580, 2011 (73) ACC (SOC) 27 (DEL)

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Bench: Deepak Verma, R.M. Lodha, Mukundakam Sharma, B. Sudershan Reddy, D.K. Jain

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 943 OF 2005

VIJAYSINH CHANDUBHA JADEJA

--

APPELLANT (S)

VERSUS

STATE OF GUJARAT

--

RESPONDENT (S)

WITH

CRIMINAL APPEAL NO.974 OF 2003 &
CRIMINAL APPEAL NO.1809 OF 2009

JUDGMENT

D.K. JAIN, J.:

1. The short question arising for consideration in this batch of appeals is whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") casts a duty on the empowered officer to 'inform' the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a Gazetted Officer can be said to be due compliance with the mandate of the said Section?

2. When these appeals came up for consideration before a bench of three Judges, it was noticed that there was a divergence of opinion between the decisions of this Court in the case of Joseph Fernandez Vs. State of Goa¹, Prabha Shankar Dubey Vs. State of M.P.² on the one hand and Krishna Kanwar (Smt) alias Thakuraeen Vs. State of Rajasthan³ on the other, with regard to the dictum laid down by the Constitution Bench of this Court in State of Punjab Vs. Baldev Singh⁴, in particular regarding the question whether before conducting search, the concerned police officer is merely required to ask the suspect whether he would like to be produced before the Magistrate or a Gazetted Officer for the purpose of search or is the suspect required to be made aware of the existence of his right in that behalf under the law. It would be expedient to extract the relevant portion of the order:-

"When the matter came up before this Court, it was found that in some of the decisions rendered by this Court, a slightly different view was taken than what was expressed by the Constitution Bench with regard to interpretation of Section 50 of the NDPS Act. In the case Joseph Fernandez Vs. State of Goa, 2001 (1) SCC p.707, a Bench of three Hon'ble Judges held that even when the searching officer informed him that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate"; it was held that it was in substantial compliance with the requirement of Section 50 of the NDPS Act, and the Court observed that it did not agree with the contention that there was non-compliance of the mandatory provisions contained in Section 50 of the NDPS Act. In (2000) 1 SCC 707 (2004) 2 SCC 56 (2004) 2 SCC 608 (1999) 6 SCC 172 another decision of this Court in Prabha Shankar Dubey Vs. State of M.P. 2004(2) SCC p.56, the following information was conveyed to the accused: "By way of this notice, you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by a gazetted officer or by a Magistrate". This was held to be substantial compliance of Section 50 of the NDPS Act. In Krishan Kanwar (Smt.) Alias Thakuraeen Vs. State of Rajasthan, 2004(2) SCC p.608, the same question was considered and it was held that there is no specific form prescribed or initiated for conveying the information required to be given under Section 50 of the NDPS Act and it was held that "what is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the section itself.

Since no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. Whether the requirement of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or a straitjacket formula.

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Thus, in a way, it all depends on the oral evidence of the officer who conducts search, in case nothing is mentioned in the search mahazar or any other contemporaneous document prepared at the time of search. In view of the large number of cases coming up under the provisions of the NDPS Act the interpretation of Section 50 of the Act requires a little more clarification as its applicability is quite frequent in many cases. In appreciating the law laid down by the Constitution Bench in Baldev Singh's case (supra), we have noticed that conflicting decisions have been rendered by this court. We feel that the matter requires some clarification by a larger Bench. The matter be placed before the Hon'ble Chief Justice of India for taking further action in this regard."

That is how these appeals came to be placed before this Constitution Bench.

3. Since the cases have come up before us for a limited purpose of clarification as to the interpretation of Section 50 of the NDPS Act by the Constitution Bench in Baldev Singh's case (supra), we deem it unnecessary to state the background facts, giving rise to these appeals.

4. We have heard learned counsel for the appellant, State of Gujarat, State of West Bengal, Government of National Capital Territory of Delhi and learned Additional Solicitor General on behalf of Union of India.

5. Mr. P.H. Parekh, learned senior counsel appearing on behalf of appellant (Criminal Appeal No.943 of 2005), strenuously urged that a conjoint reading of Section 50(1) and 50(3) of the NDPS Act, in its common grammatical connotation, makes it abundantly clear that the procedural safeguards envisaged under Section 50 are to be employed effectively and honestly while informing, apprising and advising the suspect of his vested right to be searched only by a Gazetted Officer or a Magistrate. It was contended that the ambit of statutory protection granted by the Parliament under Section 50(1) of the NDPS Act having been explained unambiguously and clearly by the Constitution Bench in the case of Baldev Singh (supra), there is no scope for any other interpretation or clarification of Section 50 of the NDPS Act.

6. Learned counsel vehemently contended that in the light of the dictum laid down in Baldev Singh (supra), the decisions of this Court in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) wherein the concept of 'substantial compliance' has been erroneously read into Section 50 of the NDPS Act, do not lay down the correct proposition of law. It was argued that Section 50 being the only safeguard provided to the suspect under the NDPS Act, the legislature, while enacting it, gave it the character of a "due process" clause, thereby placing some minimum procedural limitations on the exercise of such extensive statutory power, by insisting on the strict observance of the procedure established under the said Section. According to the learned counsel, this safeguard is meant to

ensure that the powers under the NDPS Act are not abused and a person is not falsely implicated and subjected to grave consequences which are likely to follow under the said Act. Relying on the decision of this Court in *Beckodan Abdul Rahiman Vs. State of Kerala*⁵, learned counsel submitted that the harsh provisions of the NDPS Act cast a heavier duty upon the prosecution to strictly follow and comply with the safeguards.

(2002) 4 SCC 229

7. Learned counsel thus, argued that the theory of 'substantial compliance' cannot be applied to defeat, negate or neutralise important safeguards provided by the legislature. It was asserted that merely asking the suspect whether he would like to be produced before a Magistrate or a Gazetted Officer for the purpose of the search can never amount to due compliance with Section 50 of the NDPS Act.

8. Mr. Siddharth Luthra, learned senior counsel appearing on behalf of State of Gujarat, on the other hand, submitted that the rigours of Section 50 of the NDPS Act are neither applicable to the officers who have been empowered by a warrant under Section 41(1); nor to the gazetted/empowered officers who order search or arrest under Section 41(2). It was argued that Section 41(1) of the NDPS Act grants the Magistrate the power to issue warrants for arrest or search, whether by day or night, inter alia, in relation to a person whom the Magistrate has reason to believe has committed an offence under the NDPS Act. It was urged that a reading of Sections 41(1), 41(3), 42, 43 and 50 of the NDPS Act shows that an officer acting under a warrant by a Magistrate under Section 41(1) would not fall within the ambit of Section 50(1) of the NDPS Act. It was submitted that from the language of Section 41(2) of the NDPS Act, it is clear that the Central Government or the State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorise his subordinate on the terms stated in the Section. On the contrary, however, under Section 42(1) of the NDPS Act, there is no restriction on the Central Government or the State Government to empower only a gazetted officer and, therefore, additional checks and balances over officers acting under Section 42 have been provided in the proviso to Section 42(1) and in Section 42(2) of the NDPS Act. It was, thus, contended that the language of Section 42 of the NDPS Act makes it clear that the provision applies only to an officer empowered under Section 42(1) and not an empowered Gazetted Officer under Section 41(2) of the NDPS Act. In support of the submission that a distinction between a Gazetted Officer and an officer acting under Section 42 of the NDPS Act has to be maintained, learned counsel commended us to the decisions of this Court in *M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence*⁶ and *Union of India Vs. Satrohan*⁷. It was pleaded that the divergent view on the point expressed by this Court in *Ahmed Vs. State of Gujarat*⁸, does not lay down the correct proposition of law.

9. It was then contended by Mr. Luthra that a reading of sub-sections (1) and (3) of Section 50 of the NDPS Act makes it clear that the right granted to a suspect is not the right to be searched before the nearest (2003) 8 SCC 449 (2008) 8 SCC 313 (2000) 7 SCC 477 Gazetted Officer or nearest Magistrate, but the right to be taken before the nearest Gazetted Officer or nearest Magistrate, whereupon such officer or Magistrate is duly empowered under Section 50(3), to either discharge the suspect from detention or direct that a search be made. In support of the proposition, reliance is

placed on a decision of this Court in *State of Rajasthan Vs. Ram Chandra*⁹.

10. Learned counsel also submitted that the decisions of this Court in *State of Punjab Vs. Balbir Singh*¹⁰, *Saiyad Mohd. Saiyad Umar Saiyad & Ors. Vs. State of Gujarat*¹¹, *Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala*¹² and affirmed in *Baldev Singh (supra)* have all read the phrase 'for making the search' into Section 50(1) of the NDPS Act, which has led to safeguards and protections to an accused person, as envisaged under Section 50 of the NDPS Act to be read down, making the said provision virtually ineffective and, therefore, the decision of this Court in *Baldev Singh (supra)* needs reconsideration.

11. Adopting the same line of arguments, Mr. P.P. Malhotra, the learned Additional Solicitor General, appearing on behalf of the Government of NCT of Delhi maintained that it is clear from language of Sections 41(2), 42 and 43 of the NDPS Act that the legislature has dealt with (2005) 5 SCC 151 (1994) 3 SCC 299 (1995) 3 SCC 610 (1994) 6 SCC 569 gazetted officers differently, reposing higher degree of trust in them and, therefore, if a search of a person is conducted by a gazetted officer, he would not be required to comply with the rigours of Section 50(1) of the Act. It was argued that the view expressed by this Court in *Ahmed (supra)*, is incorrect and, therefore, deserves to be reversed.

12. The NDPS Act was enacted in the year 1985, with a view to consolidate and amend the law relating to narcotic drugs, incorporating stringent provisions for control and regulation of operations relating to narcotic drugs and psychotropic substances. The object of the said legislation has been explained time and again by this Court in a plethora of cases and, therefore, we feel that it is not necessary to delve upon this aspect all over again, except to re-emphasise that in order to prevent abuse of the provisions of the NDPS Act, which confer wide powers on the empowered officers, the safeguards provided by the Legislature have to be observed strictly. Moreover, having regard to the terms of reference to the larger Bench, extracted above, it is equally unnecessary to extract extensively all the provisions of the NDPS Act to which reference was made by learned counsel appearing for the States, and a brief reference to these provisions would suffice.

13. Under Section 41 of the NDPS Act, certain classes of Magistrates are competent to issue warrants for the arrest of any person whom such Magistrates have reason to believe to have committed any offence punishable under the NDPS Act, or for the search of any building, conveyance or place in which such Magistrate has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the said Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA is kept or concealed. Under Section 42 of the NDPS Act, the empowered officer can enter, search, seize and arrest even without warrant or authorisation, if he has reason to believe from his personal knowledge or information taken down in writing, that an offence under Chapter IV of the said Act has been committed. Under proviso to sub-section (1), if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the

grounds of his belief and send the same to his immediate official superior in terms of sub-section (2) of the Section.

14. Section 50 of the NDPS Act prescribes the conditions under which personal search of a person is required to be conducted. Being the pivotal provision, the Section, (as amended by Act 9 of 2001 - inserting sub-sections (5) and (6) with effect from 2nd October 2001) is extracted 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.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

15. Sub-section (1) of the said Section 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. It is manifest that if the suspect expresses the desire to be taken to the gazetted officer or the Magistrate, the empowered officer is restrained from effecting the search of the person concerned. He can only detain the suspect for being produced before the gazetted officer or the Magistrate, as the case may be. Sub-section (3) lays down that when the person to be searched is brought before such 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 the search to be made. The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so.

16. At this juncture, we must state that the issue before us in terms of the referral order is not about the applicability of Section 50 of the NDPS Act per se but is confined to the scope and width of the expression "if the person to be searched so requires" as figuring in sub-section (1) of the said Section. Therefore, we deem it unnecessary to evaluate the submissions made by the learned counsel regarding the applicability of the rigours of Section 50 of the NDPS Act when a search of the suspect is conducted by an officer empowered under Section 41 of the said Act. We may, however, add that while considering the question of compliance with Section 50 of the NDPS Act, the Constitution Bench in Baldev Singh (supra) considered the provisions of Section 41 as well. It observed as under :-

"8. 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 Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, empowered in that behalf by a general or special order of the State Government 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."

17. In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh's case (supra). We are concerned with the following conclusions:-

"57. (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 person concerned 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 person concerned 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.

xxxxxxxxxxxxxxxxxxxxxx (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 the 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 short 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 person concerned 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."

18. Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, 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 the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

19. As noted above, sub-sections (5) and (6) were inserted in Section 50 by Act 9 of 2001. It is pertinent to note that although by the insertion of the said two sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the sub-sections, viz. when the authorised officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under sub-section (6). Under the said sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy two hours of the search. In our opinion, the insertion of these two sub-sections does not obliterate the mandate of sub-section (1) of Section 50 to inform the person, to be searched, of his right to be taken before a gazetted officer or a Magistrate. The object and the effect of insertion of sub-sections (5) and (6) were considered by a Constitution Bench of this Court, of which one of us (D.K. Jain, J.) was a member, in *Karnail Singh Vs. State of Haryana*¹³. Although in the said decision the Court did observe that by virtue of insertion of sub-sections (5) and (6), the mandate given in *Baldev Singh's* case (supra) is diluted but the Court also opined that it cannot be said that by the said insertion, the protection or safeguards given to the suspect have been taken away completely. The Court observed :-

"Through this amendment the strict procedural requirement as mandated by *Baldev Singh* case was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by *Baldev Singh* case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only (2009) 8 SCC 539 to balance an urgent situation. As a consequence the mandate given in *Baldev Singh* case is diluted."

20. It can, thus, be seen that apart from the fact that in *Karnail Singh* (supra), the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in *Baldev Singh's* case (supra) in so far as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

21. We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In *Prabha Shankar Dubey* (supra), a two Judge bench of this Court culled out the ratio of *Baldev Singh's* case (supra), on the issue before us, as follows:

"What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word "right" at relevant places in the decision of *Baldev Singh* case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the "suspect" at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it."

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and *Joseph Fernandez* (supra), the Court chose to follow the views echoed in the latter case, wherein it was held that searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words:

"The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in *Baldev Singh* case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations."

It is manifest from the afore-extracted paragraph that *Joseph Fernandez* (supra) does not notice the ratio of *Baldev Singh* (supra) and in *Prabha Shankar Dubey* (supra), *Joseph Fernandez* (supra) is followed ignoring the dictum laid down in *Baldev Singh's* case (supra).

22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in *Re Presidential Poll*¹⁴, it is the duty of the courts to get at

the real intention of the Legislature by carefully attending to 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." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of (1974) 2 SCC 33 the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

23. Accordingly, we answer the reference in the manner aforesaid. The appeals shall, now, be placed before the appropriate Bench for disposal.

.....J. (D.K. JAIN)J. (B. SUDERSHAN REDDY)
.....J. (DR. MUKUNDAKAM SHARMA)J. (R.M.
LODHA)J. (DEEPAK VERMA) NEW DELHI;

OCTOBER 29, 2010.