

# State Of Himachal Pradesh vs Suresh Kumar on 13 November, 2024

**Author: Vivek Singh Thakur**

**Bench: Vivek Singh Thakur**

Neutral Citation No. ( 2024:HHC:11231 ) IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA Cr. Appeal No. 4149 of 2013 Reserved on: 05.11.2024 Date of Decision: 13.11.2024 State of Himachal Pradesh ...Appellant.

Versus

Suresh Kumar

Coram

Hon'ble Mr Justice Vivek Singh Thakur, Judge. Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?1 Yes For the Appellant : Mr. S.D. Vasudeva, Deputy Advocate General.

For the Respondent : Mr. Virender Thakur, Advocate. Rakesh Kainthla, Judge The present appeal is directed against the judgment dated 06.12.2012 passed by learned Special Judge, Kullu (learned Trial Court) vide which the respondent (accused before learned Trial Court) was acquitted of the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (in short 'NDPS Act'). (Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience). Whether reporters of Local Papers may be allowed to see the judgment? Yes.

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2. Briefly stated, the facts giving rise to the present appeal are that the police presented a challan against the accused before the learned Trial Court for the commission of an offence punishable under Section 20 of the ND&PS Act. It was asserted that ASI Dheeraj (PW8), ASI Jai Lal, ASI Mukesh, HC Gopal Chand (PW6), and Constable Rajnish Kumar were present at Ramshila near Bhootnath Temple, Kullu on 22.10.2010 at about 4:30 am for patrolling. The accused came from Bhuntar towards Ramshila Bridge. He returned after seeing the police party and tried to run away. The police became suspicious that the accused might be in possession of some illicit article. The police apprehended the accused. He revealed his name as Suresh Kumar S/o Amar Chand on inquiry. The place was lonely and deserted. No house was located in the vicinity. There was no

movement of any pedestrian or vehicle. ASI Dheeraj asked Constable Rajnish to bring an independent witness. Constable Rajnish returned after 20 minutes and revealed that he could not find any independent witness. Hence, ASI Dheeraj associated Constable Rajnish and HC Gopal Chand as witnesses. ASI Dheeraj informed the accused that he had a legal right to be searched before a Magistrate or a Gazetted Officer. The accused consented to be searched by the police constable. Memo (Ext. PW-6/B) was Neutral Citation No. ( 2024:HHC:11231 ) prepared. ASI Dheeraj gave his personal search to the accused. No contraband was found in the possession of ASI Dheeraj. Search Memo (Ext. PW-6/A) was prepared. ASI Dheeraj conducted a personal search of the accused and found one blue handbag (Ext. P2) kept by the accused beneath the belt near his navel. The police checked the handbag and found a transparent polythene packet (Ext. P3) containing black sticks (Ext. P4). ASI Dheeraj checked the sticks and found them to be charas. The weight of the charas was found to be 400 grams. The charas was re-packed in the same manner in which it was recovered. It was put in a cloth parcel (Ext. P1) and the parcel was sealed with six seal impressions of seal 'E'. NCB-1 Form (Ext. PW-1/C) was filled in triplicate. The sample seal (Ext. PW-6/C) was taken on a separate piece of cloth. The seal impression was put on the NCB-1 Form and the seal was handed over to HC Gopal after use. The parcel was seized vide memo (Ext. PW-8/A). ASI Dheeraj prepared rukka (Ext. PW-5/A) and handed it over to HC Gopal Chand with the directions to carry it to the police station. HC Gopal Chand handed over the rukka to SI Om Chand (PW-5). FIR (Ext. PW-5/B) was registered based on the rukka. ASI Dheeraj conducted the investigation. He prepared the site plan (Ext. PW-8/B) and recorded the statements of the witnesses as per their Neutral Citation No. ( 2024:HHC:11231 ) version. He arrested the accused vide memo (Ext. PW-8/C). He produced the case property, NCB-1 Form and the accused before SI Om Chand (PW5). SI Om Chand (PW5) re-sealed the parcel with three impressions of seal 'R'. He obtained the seal impression (Ext. PW-5/D) on a separate piece of cloth. He filled in the relevant column of the NCB-1 Form and obtained the seal impression on the Form. He handed over the case property to HC Ram Kishan (PW1) who deposited it in Malkhana after making an entry in the Malkhana register at Sl. No. 155 (Ext. PW-1/A). HC Ram Kishan (PW1) handed over the parcel to Constable Inder Dev (PW4) on 21.10.2010 with the direction to carry it to SFSL, Junga along with the sample seal, NCB-1 Form, recovery memo and docket vide R.C. No. 229/2010 (Ext. PW-1/B). Constable Inder Dev (PW4) deposited all the articles at SFSL, Junga and handed over the receipt to HC Ram Kishan (PW1) on his return. A special report (Ext. PW-3/A) was prepared and handed over to Additional Superintendent of Police Sandeep Dhawan on 20.10.2010. Additional Superintendent of Police made the endorsement on the special report and handed it over to his Reader HC Harbans Kumar (PW3) on 20.10.2010 at 5:45 PM. HC Harbans Kumar (PW3) made an entry in his register (Ext. PW-3/B) and retained the special report on record. The result of the Neutral Citation No. ( 2024:HHC:11231 ) analysis (Ext. PW-8/D) was issued in which it was shown that the exhibit was an extract of cannabis and a sample of charas. The statements of the remaining witnesses were recorded as per their version and after the completion of the investigation, the challan was prepared and presented before the learned Trial Court.

3. The learned Trial Court charged the accused with the commission of an offence punishable under Section 20 of the ND&PS Act to which the accused pleaded not guilty and claimed to be tried.

4. The prosecution examined eight witnesses to prove its case. HC Ram Kishan (PW1) was posted as MHC with whom the case property was deposited. Constable Narender Pal (PW2) proved the entry in the daily diary. HC Harbans Kumar (PW3) was working as a Reader to the Additional Superintendent of Police to whom the special report was handed over. Constable Inder Dev (PW4) carried the case property to SFSL, Junga. SI Om Chand (PW5) was working as SHO who signed the FIR and resealed the case property. HC Gopal Chand (PW6) is a witness to the recovery. SI Tej Ram (PW7) prepared the challan. ASI Dheeraj Kumar (PW8) conducted the investigation and effected the recovery.

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5. The accused in his statement recorded under Section 313 of Cr. P.C. denied the prosecution case in its entirety. He stated that he was innocent and the witnesses deposed against him falsely. He did not lead any defence evidence.

6. Learned Trial Court held that the accused was given the option to be searched before a Magistrate or the Gazetted Officer but he chose to be searched by the police. This was sufficient compliance with the requirement of Section 50 of the ND&PS Act. The independent witnesses could not have been associated as the recovery was effected at 4:30 AM. The report of the analysis was not proper and it was not proved that the accused was found in possession of charas. Hence, the accused was acquitted.

7. Being aggrieved from the judgment passed by the learned Trial Court, the State has filed the present appeal asserting that the learned Trial Court erred in acquitting the accused. It was rightly held that the recovery and seizure of contraband from the possession of the accused was proved. It was wrongly held that the report of the analysis was not sufficient to prove that the substance recovered from the possession of the accused was charas. The report of SFSL, Junga clearly showed that the sample was of charas which contained 29.03% W/W resin in it. Therefore, it was prayed Neutral Citation No. ( 2024:HHC:11231 ) that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

8. We have heard Mr. S.D. Vasudeva learned Deputy Advocate General for the appellant/State and Mr Virender Thakur, Advocate for the respondent/accused.

9. Mr. S.D. Vasudeva, learned Deputy Advocate General for the appellant/State submitted that the learned Trial Court erred in acquitting the accused on the ground that the contraband was not proved to be charas. The judgment of this Court relied upon by the learned Trial Court has been overruled by the Hon'ble Supreme Court in Hira Singh versus Union of India 2020 SCC online SC 382. Therefore, he prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

10. Mr. Virender Thakur, learned counsel for the respondent/accused supported the judgment passed by the learned Trial Court. He submitted that the police officials had not complied with the requirement of Section 100 of Cr.P.C. as no independent witnesses were associated. There is

non-compliance with Section 50 of the ND&PS Act, which is fatal to the prosecution case. Therefore, he prayed that the present appeal be dismissed.

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11. We have given considerable thought to the submissions made at the bar and have gone through the records carefully.

12. The present appeal has been filed against a judgment of acquittal. It was laid down by the Hon'ble Supreme Court in Mallappa v. State of Karnataka, (2024) 3 SCC 544: 2024 SCC OnLine SC 130 that while deciding an appeal against acquittal, the High Court should see whether the evidence was properly appreciated on record or not; second whether the finding of the Court is illegal or affected by the error of law or fact and thirdly; whether the view taken by the Trial Court was a possible view, which could have been taken based on the material on record. The Court will not lightly interfere with the judgment of acquittal. It was observed:

"25. We may first discuss the position of law regarding the scope of intervention in a criminal appeal. For, that is the foundation of this challenge. It is the cardinal principle of criminal jurisprudence that there is a presumption of innocence in favour of the accused unless proven guilty. The presumption continues at all stages of the trial and finally culminates into a fact when the case ends in acquittal. The presumption of innocence gets concretised when the case ends in acquittal. It is so because once the trial court, on appreciation of the evidence on record, finds that the accused was not guilty, the presumption gets strengthened and a higher threshold is expected to rebut the same in appeal.

26. No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to reappraise or re-visit the evidence on record.

Neutral Citation No. ( 2024:HHC:11231 ) However, the power of the High Court to reappraise the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost question to be asked is whether the trial court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the trial court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the trial court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.

27. It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The "two-views theory" has been judicially recognised by the courts and it comes into play when the appreciation of evidence results in two equally plausible views. However, the controversy is to be resolved in favour of the

accused. For, the very existence of an equally plausible view in favour of the innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. Therefore, when two views are possible, following the one in favour of the innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the trial court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eye of the law.

28. In *Selvaraj v. State of Karnataka* [*Selvaraj v. State of Karnataka*, (2015) 10 SCC 230: (2016) 1 SCC (Cri) 19]: (SCC pp. 236-37, para 13) "13. Considering the reasons given by the trial court and on an appraisal of the evidence, in our considered view, the view taken by the trial court was a possible one. Thus, the High Court should not have interfered with the judgment of acquittal. This Court in *Jagan M. Seshadri v. State of T.N.* [*Jagan M. Seshadri v. State of T.N.*, (2002) 9 SCC 639:

2003 SCC (L&S) 1494] has laid down that as the Neutral Citation No. (2024:HHC:11231) appreciation of evidence made by the trial court while recording the acquittal is a reasonable view, it is not permissible to interfere in appeal. The duty of the High Court while reversing the acquittal has been dealt with by this Court, thus : (SCC p. 643, para 9) '9. ... We are constrained to observe that the High Court was dealing with an appeal against acquittal. It was required to deal with various grounds on which acquittal had been based and to dispel those grounds. It has not done so. Salutary principles while dealing with appeal against acquittal have been overlooked by the High Court. If the appreciation of evidence by the trial court did not suffer from any flaw, as indeed none has been pointed out in the impugned judgment, the order of acquittal could not have been set aside. The view taken by the learned trial court was a reasonable view and even if by any stretch of imagination, it could be said that another view was possible, that was not a ground sound enough to set aside an order of acquittal.'"

29. In *Sanjeev v. State of H.P.* [*Sanjeev v. State of H.P.*, (2022) 6 SCC 294: (2022) 2 SCC (Cri) 522], the Hon'ble Supreme Court analysed the relevant decisions and summarised the approach of the appellate court while deciding an appeal from the order of acquittal. It observed thus: (SCC p. 297, para 7) "7. It is well settled that:

7.1. While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with, in case the appellate court is of the view that the acquittal rendered by the trial court deserves to be upturned (see *Vijay Mohan Singh v. State of Karnataka* [*Vijay Mohan Singh v. State of Karnataka*, (2019) 5 SCC 436 :

(2019) 2 SCC (Cri) 586] and *Anwar Ali v. State of H.P.* [*Anwar Ali v. State of H.P.*, (2020) 10 SCC 166 : (2021) 1 SCC (Cri) 395] ).

Neutral Citation No. ( 2024:HHC:11231 ) 7.2. With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced (see *Atley v. State of U.P.* [*Atley v. State of U.P.*, 1955 SCC OnLine SC 51: AIR 1955 SC 807]). 7.3. If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal (see *Sambasivan v. State of Kerala* [*Sambasivan v. State of Kerala*, (1998) 5 SCC 412: 1998 SCC (Cri) 1320])."

13. The present appeal has to be decided as per the parameters laid down by the Hon'ble Supreme Court.

14. It was specifically stated by HC Gopal Chand (PW6) and ASI Dheeraj Kumar (PW8) that the police party was on patrolling duty when the accused was seen coming from the opposite side. He returned after seeing the police and the police apprehended him based on the suspicion that he might be having some contraband. Therefore, it is apparent that it is a case of chance recovery and the police did not have any prior information regarding the transportation of charas. While dealing with a similar case of a chance recovery, it was laid down by the Hon'ble Supreme Court in *Kashmira Singh Versus State of Punjab* 1999 (1) SCC 130 that the police party is under no obligation to join independent witnesses while going on patrolling duty and the association of any person after effecting the recovery would be meaningless. It was observed:

Neutral Citation No. ( 2024:HHC:11231 ) "3. Learned counsel for the appellant has taken us through the evidence recorded by the prosecution as also the judgment under appeal. Except for the comment that the prosecution is supported by two police officials and not by any independent witness, no other comment against the prosecution is otherwise offered. This comment is not of any value since the police party was on patrolling duty and they were not required to take along independent witnesses to support recovery if and when made. It has come in the evidence of ASI Jangir Singh that after the recovery had been effected, some people had passed by. Even so, obtaining their counter-signatures on the documents already prepared would not have lent any further credence to the prosecution version."

15. In similar circumstances, it was laid down by this court in *Chet Ram Vs State Criminal Appeal no. 151/2006* decided on 25.7.2018 that when the accused was apprehended after he tried to flee on seeing the police, there was no necessity to associate any person from the nearby village. It was observed:-

"(A)appellant was intercepted and search of his bag was conducted on suspicion, when he turned back and tried to flee, on seeing the police. Police officials did not have any prior information nor did they have any reason to believe that he was carrying any contraband. They overpowered him when he tried to run away and suspected that he might be carrying some contraband in his bag. Therefore, the bag was searched and charas was recovered. After the recovery of Charas, there was hardly any need to associate any person from the nearby village, because there remained nothing to be witnessed.

It is by now well settled that non-association of independent witnesses or non-supporting of the prosecution version, by independent witnesses where they are associated, by itself is not a ground to acquit an accused. It is also well-settled that the testimony of official witnesses, including police officials, Neutral Citation No. ( 2024:HHC:11231 ) carries the same evidentiary value as the testimony of any other person. The only difference is that Courts have to be more circumspect while appreciating the evidence of official witnesses to rule out the possibility of false implication of the accused, especially when such a plea is specifically raised by the defence. Therefore, while scrutinizing the evidence of official witnesses, in a case where independent witnesses are not associated, contradictions and inconsistencies in the testimony of such witnesses are required to be taken into account and given due weightage, unless satisfactorily explained. Of course, it is only the material contradictions and not the trivial ones, which assume significance." (Emphasis supplied)

16. It was laid down by the Hon'ble Supreme Court of India in Raveen Kumar v. State of H.P., (2021) 12 SCC 557 that non- association of the independent witnesses will not be fatal to the prosecution case. However, the Court will have to scrutinize the statements of prosecution witnesses carefully. It was observed:

"19. It would be gainsaid that the lack of independent witnesses is not fatal to the prosecution case. [Kalpnath Rai vs. State, (1998) AIR SC 201] However, such omissions cast an added duty on Courts to adopt a greater degree of care while scrutinising the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."

17. This position was reiterated in Rizwan Khan Versus State of Chhattisgarh (2020) 9 SCC 627, wherein, it was observed:

"8.2 Having gone through the entire evidence on record and the findings recorded by the courts below, we are of the opinion that in the present case, the prosecution has been successful in proving the case against the accused by examining the witnesses PW3, PW4, PW5, PW7 and PW8. It is true that all the aforesaid witnesses are police officials and Neutral Citation No. ( 2024:HHC:11231 ) two independent witnesses who were panchnama witnesses had turned hostile. However, all the aforesaid police witnesses are found to be reliable and trustworthy. All of them have been thoroughly cross-examined by the defence. There is no allegation of any enmity between the police witnesses and the accused. No such defence has been taken in the statement under Section 313, Cr.P.C. There is no law that the evidence of police officials unless supported by independent evidence, is to be discarded and/or unworthy of acceptance.

It is settled law that the testimony of the official witnesses cannot be rejected on the grounds of non-corroboration by an independent witness. As observed and held by this Court in a catena of decisions, examination of independent witnesses is not an indispensable requirement and such non- examination is not necessarily fatal to the prosecution case, [see Pardeep Kumar (supra)].

In the recent decision in the case of Surinder Kumar vs. State of Punjab, (2020) 2 SCC 563, while considering a somewhat similar submission of non-examination of independent witnesses, while dealing with the offence under the NDPS Act, in paragraphs 15 and 16, this Court observed and held as under:

"15. The judgment in Jarnail Singh vs. State of Punjab (2011) 3 SCC 521, relied on by the counsel for the respondent-State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because the prosecution did not examine any independent witness, would not necessarily lead to a conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.

16. In State (NCT of Delhi) vs. Sunil, (2011) 1 SCC 652, it was held as under (SCC p. 655) "It is an archaic notion that actions of the police officer should be approached with initial distrust. It is time now to start placing at least initial trust in the actions Neutral Citation No. ( 2024:HHC:11231 ) and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law, the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature."

Applying the law laid down by this Court on the evidence of police officials/police witnesses to the facts of the case in hand, referred to hereinabove, we are of the opinion as the police witnesses are found to be reliable and trustworthy, no error has been committed by both the courts below in convicting the accused relying upon the deposition of the police officials."

18. Similar is the judgment of this Court in Balwinder Singh &Anr. Vs State of H.P., 2020 Criminal L.J. 1684, wherein it was held: -

"3. (iii) Learned defence counsel, contended that in the instant case, no independent witness was associated by the Investigating Officer, therefore, the prosecution case cannot be said to have been proved by it in accordance with provisions of the Act. Learned defence counsel, in support of his contention, relied upon titled Krishan Chand versus State of H.P., 2017 4 CriCC 531 3(iii)(d). It is by now well settled that prosecution case cannot be disbelieved only because the independent witnesses were not associated."

19. This position was reiterated in Kallu Khan Vs State of Rajasthan, AIR 2022 SC 50, wherein it was held: -

"16. The issue raised regarding conviction solely relying upon the testimony of police witnesses, without procuring any independent witness, recorded by the two courts, has also been dealt with by this Court in the case of Surinder Kumar (supra) holding that merely because independent witnesses were not examined, the conclusion could



not be Neutral Citation No. ( 2024:HHC:11231 ) drawn that accused was falsely implicated. Therefore, the said issue is also well-settled and in particular, looking to the facts of the present case, when the conduct of the accused was found suspicious and a chance recovery from the vehicle used by him is made from a public place and proved beyond a reasonable doubt, the appellant cannot avail any benefit on this issue. In our view, the concurrent findings of the courts do not call for interference."

20. A similar view was taken in *Kehar Singh v. State of H.P.*, 2024 SCC OnLine HP 2825 wherein it was observed:

"16. As regards non-association of the independent witnesses, it is now well settled that non-association of the independent witnesses or non-supporting of the prosecution version by independent witnesses itself is not a ground for acquittal of Appellants/accused. It is also well settled that the testimonies of the official witnesses, including police officials carry the same evidentiary value as the testimony of any other person. The only difference is that the Court has to be most circumspect while appreciating the evidence of the official witnesses to rule out the possibility of false implication of the accused, especially when such a plea is specifically raised by the defence. Therefore, while scrutinising the evidence of the official witnesses, in cases where independent witnesses are not associated, contradictions and inconsistencies in the testimonies of such witnesses are required to be taken into account and given due weightage, unless satisfactorily explained. However, the contradiction must be material and not trivial one, that alone would assume significance.

17. Evidently, this is a case of chance recovery, therefore, the police party was under no obligation to join independent witnesses while going on patrolling duty and the association of any person after effecting the recovery would be meaningless.

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19. A similar reiteration of law can be found in the judgment rendered by the learned Single Judge of this Court in *Avtar @ Neutral Citation No. ( 2024:HHC:11231 ) Tarri v. State of H.P.*, (2022) Supreme HP 345, wherein it was observed as under: --

"24. As regards the second leg of the argument raised by learned counsel for the appellant, it cannot be said to be of much relevance in the given facts of the case. The fact situation was that the police party had laid the 'nakka' and immediately thereafter had spotted the appellant at some distance, who got perplexed and started walking back. The conduct of the appellant was sufficient to raise suspicion in the minds of police officials. At that stage, had the appellant not been apprehended immediately, police could have lost the opportunity to recover the contraband. Looking from another angle, the relevance of independent witnesses could be there, when such witnesses were immediately available or had already been associated at

the place of 'nakka'. These, however, are not mandatory conditions and will always depend on the fact situation of each and every case. The reason is that once the person is apprehended and is with police, a subsequent association of independent witnesses, may not be of much help. In such events, the manipulation, if any, cannot be ruled out."

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22. A similar reiteration of law can be found in a very recent judgment of the Coordinate Bench of this Court in Cr. A. No. 202 of 2020, titled Dillo Begum v. State of H.P., decided on 27.03.2024."

21. Thus, in view of the binding precedents of this Court and Hon'ble Supreme Court, the non-association of independent witnesses is not fatal and the prosecution case cannot be discarded due to the non-association of independent witnesses.

22. It was specifically mentioned in the rukka (Ext. PW- 5/A), seizure memo (Ext. PW-8/A), FIR (Ext. PW-5/B), special report Neutral Citation No. ( 2024:HHC:11231 ) (Ext. PW-3/A) and the charge sheet that the recovery was effected from the handbag kept beneath the belt near the navel. It was laid down by the Hon'ble Supreme Court in State of H.P Versus Pawan Kumar (2005) 4 SCC 350, that the word person includes the body of a human being as presented to public view usually with its appropriate coverings and clothing. It was observed:-

"10. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or bodies of individuals as factually in these types of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not the naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word "person" appears to be - "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilised society appropriate coverings and clothing are considered absolutely essential and no sane human being comes into the gaze of others without appropriate coverings and clothing. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothing or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothing, are not Neutral Citation No. ( 2024:HHC:11231 ) to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothing and also footwear.

23. In the present case the recovery was effected from beneath the belt which is part of the clothing and near the navel which is the part of the body; thus, the recovery was effected from the person of the accused.

24. Section 50 of the ND&PS Act deals with the search of the person. 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 42 or Section 43, he shall, if such person as 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 except 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 Neutral Citation No. ( 2024:HHC:11231 ) 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."

25. Thus, the police were to search the accused as per Section 50 of the NDPS Act and had to inform the accused of his right to be searched before the Magistrate or Gazetted Officer.

26. ASI Dheeraj Kumar (PW8) informed the accused that he had a right to be searched before the Magistrate or the Gazetted Officer. He prepared the Memo (Ext. PW-6/B) in which the accused consented to be searched by the police. ASI Dheeraj Kumar (PW8) and HC Gopal Chand (PW6) have not stated how the accused could have opted to be searched by the police when he was told of his right to be searched before the Magistrate or the Gazetted Officer. Any reasonable person provided with an option to be searched before a Magistrate or a Gazetted Officer will choose either and cannot choose an option to be searched by the police unless such an option was given to him. The fact that the accused opted to be searched by the police can only lead to an inference that an option to be searched before the police was also given to him and that is why the accused had opted to be searched before the police. In the absence of any Neutral Citation No. ( 2024:HHC:11231 ) explanation from the official witnesses, this is the only inference, which can be drawn in the circumstances of the case. It was laid down by the Hon'ble Supreme Court in State of Rajasthan Vs. Parmanand & another (2014) 5 SCC 345, that Section 50 only provides an option to be searched

before a Magistrate or a Gazetted Officer and it does not provide for a third option to be searched before the police. It was observed:

"19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate, before the nearest gazetted officer or before PW- 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such an option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

27. The law regarding the third option given to the accused Neutral Citation No. ( 2024:HHC:11231 ) was exhaustively considered by this Court in Pradeep Singh alias Rocky vs. State of Himachal Pradesh, 2020(1) Him. L.R. 133 and it was held that giving the third option to the accused is fatal. It was observed:

"3(iii)(c). Under the provisions of Section 50 of the Act, the accused has to be informed about his legal rights regarding search before a Magistrate or Gazetted Officer. 3(iii)(d). In the instant case, the consent memo (Ext.PW- 1/A), obtained from the accused, shows that in addition to the two statutory options of search before the Magistrate or the Gazetted Officer", a 3 rd option was also given to the accused for getting himself searched before any other police officer. It is in such circumstance that the accused gave his search to the police party. Giving 3 rd option to the accused was clearly contrary to the mandatory provisions of Section 50 of the Act. In the case titled State of Rajasthan versus Parmanand and Another, (2014) 5 SCC 345, it has been held by the Hon'ble Apex Court that such a 3 rd option could not be given when there was no provision under Section 50(1) of the Act. Relevant para of the said judgment is reproduced as under: -

"19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like

to be searched before PW- 5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and Neutral Citation No. ( 2024:HHC:11231 ) that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such an option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

Relying upon the above judgment, in titled SK. Raju alias Abdul Haque alias Jagga versus State of West Bengal, (2018) 9 SCC 708 Hon'ble Apex Court further observed thus: -

"18. In Parmanand, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two-judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two-judge Bench of this Court in Dilip v State of M.P.] It was held thus: (Parmanand, SCC p.351, para

15).

"15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have an application.

19. Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer or before the Superintendent, who was also a Neutral Citation No. ( 2024:HHC:11231 ) part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being searched before the Superintendent, who was not an independent officer."

Effect of giving the 3rd option:

3(iii)(e). The effect of illegality committed during the course of the search of the accused has been considered by the Hon'ble Apex Court in titled State of H.P. versus Pawan Kumar, (2005) 4 SCC 350 wherein, after considering various judgements on the question, it was observed thus: -

"26. The Constitution Bench decision in Pooran Mal v. The Director of Inspection, (1974) 1 SCC 345 was considered in State of Punjab v. Baldev Singh and having regard to the scheme of the Act and especially the provisions of Section 50 thereof, it was held that it was not possible to hold that the judgment in the said case can be said to have laid down that the "recovered illicit article" can be used as "proof of unlawful possession" of the contraband seized from the suspect as a result of illegal search and seizure. Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used, a very strict view of Section 50 of the Act was taken and it was held 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 sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word "person"

occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him."

Neutral Citation No. ( 2024:HHC:11231 ) In a case titled State of H.P. versus Rakesh 2018 LHLJ 214 (HP), this Court observed as under: -

"18. .... Now, in view of the above, this Court has to examine whether the provisions of Section 50 of the NDPS Act are applicable to the present case and if applicable, then whether those have been breached or not. Admittedly, as per the version of PW-3, HC Chaman Lal, he has conducted the personal search of both the accused persons and also prepared search memos, Ex. PW-3/P and Ex. PW-3/Q. If only the bag of the accused persons would have been searched, then Section 50 of the NDPS Act has no application, but as the personal search of the accused persons was also conducted, certainly Section 50 of the NDPS Act is applicable. In fact, Section 50 of the NDPS Act has a purpose and communication of the said right, which is ingrained in Section 50, to the person who is about to be searched is not an empty formality. Offences under the NDPS Act carry severe punishment, so the mandatory procedure, as laid down under the Act, has to be followed meticulously. Section 50 of the Act is just a safeguard available to an accused against the possibility of false involvement. Thus, communication of this right to the accused has to be clear, unambiguous and to the individual concerned. The purpose of this Section is to make aware the accused of his right and the whole purpose behind creating this right is effaced if the accused is not able to exercise the

same for want of knowledge about its existence. This right cannot be ignored, as the same is of utmost importance to the accused. In the present case, certainly, the provisions of Section 50 of the NDPS Act have not been complied with, therefore, the judgment (supra) is fully applicable to the facts of the present case.

19. In State of Himachal Pradesh vs. Desh Raj & another, 2016 Supp HimLR 3088 (DB), this Court has relied upon the law laid down in Parmanand's case (supra). Relevant paras of the judgment of this Court are extracted hereunder:

Neutral Citation No. ( 2024:HHC:11231 ) "18. Their Lordships of the Hon'ble Supreme Court in State of Rajasthan v. Parmanand, (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for the third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. ...."

Again, in the present set of facts and circumstances, the judgment (supra) is fully applicable to the present case, as the right provided under Section 50 of the NDPS Act in no way can be diluted and its compliance is mandatory in nature."

Therefore, the combined effect of the law laid down by the Hon'ble Apex Court, as applied to the facts of the case in hand, is that non-compliance to the mandatory provisions of Section 50 of the Act has vitiated the proceedings related to search and recovery. Point is, therefore, answered in favour of appellant."

28. This position was reiterated in Dayalu Kashyap v. State of Chhattisgarh, (2022) 12 SCC 398: 2022 SCC OnLine SC 334 wherein it was observed at page 400:

4. The learned counsel submits that the option given to the appellant to take a third choice other than what is prescribed as the two choices under sub-section (1) of Section 50 of the Act is something which goes contrary to the mandate of the law and in a way affects the protection provided by the said section to the accused. To support his contention, he has relied upon the judgment of State of Rajasthan v. Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345 : (2014) 2 SCC (Cri) 563], more specifically, SCC para 19. The judgment in turn, relied upon a Constitution Bench judgment of this Court in State of Punjab v. Baldev Singh [State of Punjab v.

Baldev Singh, (1999) 6 SCC 172: 1999 SCC (Cri) 1080] to Neutral Citation No. ( 2024:HHC:11231 ) conclude that if a search is made by an empowered officer on prior information without informing the person of his right that he has to be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to take his search accordingly would render the recovery of the illicit article suspicious and vitiate the conviction and sentence of the accused where the conviction has been recorded only on the basis of possession of illicit articles recovered from his person. The third

option stated to be given to the accused to get himself searched from the Officer concerned not being part of the statute, the same could not have been offered to the appellant and thus, the recovery from him is vitiated.

29. A similar view was taken in *Ranjan Kumar Chadha v. State of H.P.*, 2023 SCC OnLine SC 1262: AIR 2023 SC 5164 wherein it was observed:

27. We have no hesitation in recording a finding that Section 50 of the NDPS Act was not complied with as the appellant could not have been offered the third option of search to be conducted before the ASI. Section 50 of the NDPS Act only talks about a Gazetted Officer or Magistrate. What is the legal effect if an accused of the offence under the NDPS Act is being told, whether he would like to be searched before a police officer or a Gazetted Officer or Magistrate?

28. This Court in *State of Rajasthan v. Parmanand*, (2014) 5 SCC 345, held that it is improper for a police officer to tell the accused that a third alternative is also available i.e. the search before any independent police officer. This Court also took the view that a joint communication of the right available under Section 50 of the NDPS Act to the accused would frustrate the very purport of Section 50.....

29. Thus, from the oral evidence on the record as discussed above it is evident that Section 50 of the NDPS Act stood violated for giving a third option of being searched before a police officer."

30. It was further held in *Ranjan Kumar Chadha* (supra) that Neutral Citation No. ( 2024:HHC:11231 ) the investigating officer should give an option to the accused to be searched before the magistrate or the gazetted officer, the accused can decline to avail of such option and the Investigating Officer can carry out the search himself. It was observed:

"62. Section 50 of the NDPS Act only goes so far as to prescribe an obligation to the police officer to inform the suspect of his right to have his search conducted either in the presence of a Gazetted Officer or Magistrate. Whether or not the search should be conducted in the presence of a Gazetted Officer or Magistrate ultimately depends on the exercise of such right as provided under Section 50. In the event the suspect declines this right, there is no further obligation to have his search conducted in the presence of a Gazetted Officer or Magistrate, and in such a situation the empowered police officer can proceed to conduct the search of the person himself. To read Section 50 otherwise would render the very purpose of informing the suspect of his right a redundant exercise. We are of the view that the decision of this Court in *Arif Khan* (supra) cannot be said to be an authority for the proposition that notwithstanding the person proposed to be searched has, after being duly apprised of his right to be searched before a Gazetted Officer or Magistrate, but has expressly waived this right in clear and unequivocal terms; it is still mandatory that his search



be conducted only before a Gazetted Officer or Magistrate.

63. A plain reading of the extracted paragraphs of Arif Khan (supra) referred to above would indicate that this Court while following the ratio of the decision of the Constitution Bench in Vijaysinh Chandubha Jadeja (supra) held that the same has settled the position of law in this behalf to the effect that, whilst it is imperative on the part of the empowered officer to apprise the person of his right to be searched only before a Gazetted Officer or Magistrate; and this requires strict compliance; this Court simultaneously proceeded to reiterate that in Vijaysinh Chandubha Jadeja (supra) "it is ruled that the suspect person may or may not Neutral Citation No. ( 2024:HHC:11231 ) choose to exercise the right provided to him under Section 50 of the NDPS Act".

64. There is no requirement to conduct the search of the person, suspected to be in possession of a narcotic drug or a psychotropic substance, only in the presence of a Gazetted Officer or Magistrate, if the person proposed to be searched, after being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate categorically waives such right by electing to be searched by the empowered officer. The words "if such person so requires", as used in Section 50(1) of the NDPS Act would be rendered otiose, if the person proposed to be searched would still be required to be searched only before a Gazetted Officer or Magistrate, despite having expressly waived "such requisition", as mentioned in the opening sentence of sub-Section (2) of Section 50 of the NDPS Act. In other words, the person to be searched is mandatorily required to be taken by the empowered officer, for the conduct of the proposed search before a Gazetted Officer or Magistrate, only "if he so requires", upon being informed of the existence of his right to be searched before a Gazetted Officer or Magistrate and not if he waives his right to be so searched voluntarily, and chooses not to exercise the right provided to him under Section 50 of the NDPS Act.

65. However, we propose to put an end to all speculations and debate on this issue of the suspect being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate. We are of the view that even in cases wherein the suspect waives such right by electing to be searched by the empowered officer, such waiver on the part of the suspect should be reduced into writing by the empowered officer. To put it in other words, even if the suspect says that he would not like to be searched before a Gazetted Officer or Magistrate and he would be fine if his search is undertaken by the empowered officer, the matter should not rest with just an oral statement of the suspect. The suspect should be asked to give it in writing duly signed by him in presence of Neutral Citation No. ( 2024:HHC:11231 ) the empowered officer as well as the other officials of the squad that "I was apprised of my right to be searched before a Gazetted Officer or Magistrate in accordance with Section 50 of the NDPS Act, however, I declare on my own free will and volition that I would not like to exercise my right of being searched before a Gazetted Officer or Magistrate and I may be searched by the empowered officer." This would lend more credence to the compliance of Section 50 of the NDPS Act. In other words, it would impart authenticity, transparency and creditworthiness to the entire proceedings. We clarify that this compliance shall henceforth apply prospectively.

66. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarised as follows:--

(i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search conducted in the presence of a Gazetted Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

(ii) Where the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate and he may be searched by the empowered officer.

(iii) Before conducting a search, it must be communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate.

(iv) While informing the right, only two options of either being searched in the presence of a Gazetted Officer or Magistrate must be given, who also must be Neutral Citation No. ( 2024:HHC:11231 ) independent and in no way connected to the raiding party.

(v) In case of multiple persons to be searched, each of them has to be individually communicated of their rights, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section 50.

(vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate but an endeavour should be made to take him before the nearest Magistrate.

(vii) Section 50 is applicable only in case of search of person of the suspect under the provisions of the NDPS Act, and would have no application where a search was conducted under any other statute in respect of any offence.

(viii) Where during a search under any statute other than the NDPS Act, a contraband under the NDPS Act also happens to be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although in such a situation Section 50 may not be required to be complied for the reason that search had already been conducted.

(ix) The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.

(x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50 would be inadmissible and cannot be relied upon in the trial by the prosecution, however, it will not vitiate the trial in respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings.

31. In the present case, the memo (Ex. PW-6/B) contains a writing of the accused to the effect that he wanted to be searched by Neutral Citation No. ( 2024:HHC:11231 ) the police and he had no pressure to be searched before the police. This writing does not mention that the accused after having been apprised of the right to be searched before the Magistrate or Gazetted Officer had elected to waive the right. Hence, the submission that the police had not complied with the provisions of Section 50 of the NDPS Act has to be accepted as correct.

32. It was laid down by the Hon'ble Supreme Court in Vijaysinh Chandubha Jadeja vs. State of Gujarat (2011) 1 SCC 609, that violation of Section 50 of NDPS Act is fatal and the police cannot rely upon the recovery effected in violation of Section 50 of NDPS Act. It was observed:-

"29. .... We have no hesitation to hold that in so far as the obligation of the authorized officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of illicit articles suspect and vitiate the conviction if the same is recorded only on the basis of recovery of an illicit article from the person of the accused during such search."

33. This position was reiterated in Arif Khan @ Agha Khan versus State of Uttarakhand AIR 2018 SC 2123, wherein it was observed:-

"28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search Neutral Citation No. ( 2024:HHC:11231 ) and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a

Magistrate or a Gazetted Officer.

29. Though the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party none of them deposed that the search/recovery was made in the presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal."

34. Once, it is held that the prosecution cannot rely upon the recovery of the charas, the subsequent steps like depositing the case property with malkhana moharrir and sending it to FSL will become meaningless, as the charas analysed cannot be connected to the accused. Therefore, no advantage can be derived by the prosecution Neutral Citation No. ( 2024:HHC:11231 ) from the evidence led to this effect.

35. Therefore, the accused could not have been convicted of the commission of an offence punishable under Section 20 of the ND&PS Act based upon the recovery effected in violation of the provisions of Section 50 of the ND&PS Act and no interference is required with the judgment passed by learned Trial Court.

36. Consequently, the present appeal fails and the same is dismissed.

37. A copy of this judgment along with the records of the learned Trial Court be sent back forthwith. Pending miscellaneous application(s), if any, also stand(s) disposed of.

(Vivek Singh Thakur) Judge (Rakesh Kainthla) Judge 13th November, 2024 (Nikita)