A KARNAIL SINGH

v.

STATE OF HARYANA

(Criminal Appeal No. 36 of 2003)

JULY 29, 2009

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[K.G. BALAKRISHNAN, CJI, R.V. RAVEENDRAN, D.K. JAIN, P. SATHASIVAM AND J.M. PANCHAL, JJ.]

NARCOTIC DRUGS AND PSYCHOTROPIC
C *SUBSTANCES ACT, 1985:*

ss.42(1) and 42(2) – Power of entry, search and seizure and arrest without warrant or authorization – Requirement of taking down in writing by empowered officer the information
D *regarding commission of offence in respect of any narcotic drug or psychotropic substance, and sending a copy thereof to his immediate official superior – HELD: On receiving the information, it has to be recorded in the relevant register and a copy thereof to be sent forthwith to the immediate official*
E *superior, before proceeding to take action in terms of clauses (a) to (d) of s.42(1) – But, if information is received while officer is on move either on patrol duty or otherwise either by mobile phone or otherwise and information calls for immediate action and delay would frustrate the purpose, action can be taken*
F *as per clause (a) to (d) of s.42(1) and thereafter, as soon as it is possible, information be recorded in writing and sent forthwith to official superior – While total non-compliance of requirement of sub ss.(1) and (2) of s.42 is impermissible, delayed compliance with satisfactory explanation, which is a question of fact, would be acceptable compliance of s.42 –*
G *This position got strengthened with amendment to s.42 by Act 9 of 2001 – Code of Criminal Procedure, 1973 – ss. 96 to 103 and s. 165.*

The instant appeals were referred to the Constitution

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Bench in view of diverse opinions stated to have been expressed by two three Judge Benches of the Supreme Court in *Abdul Rashid*[1] and *Sajan Abraham*[2] regarding scope and applicability of s.42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 in the matter of conducting search, seizure and arrest without warrant or authorisation. In *Abdul Rashid,* the Court held that compliance of s.42 of the Act was mandatory and failure to take down the information in writing and to send forth with a report to the immediate superior official would cause prejudice to the accused; whereas in *Sajan Abraham* the Court held that s.42 was not mandatory and substantial compliance thereof was sufficient.

Answering the reference, the Court

HELD: 1.1. The Narcotic Drugs and Psychotropic Substances Act, 1985, keeping in view its objects, prescribes stringent punishment. Therefore, a balance must be struck between the need of the law and the enforcement of such law on the one hand and the protection of citizens from oppression and injustice on the other. The provisions contained in Chapter V of the Act, comprising s.42, intended for providing certain checks on exercise of powers of the authority concerned, and are capable of being misused through arbitrary or indiscriminate exercise unless strict compliance is required. The statute mandates that the prosecution must prove compliance with the said provisions. [Para 3] [478-G-H; 479-A-B]

1.2. Search and seizure are essential steps in the armoury of an investigator in the investigation of a criminal case. The Code of Criminal Procedure, 1973 in various provisions, particularly, ss. 96 to 103 and s.165,

1. *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat* 2000 (1) SCR 542.
2. *Sajan Abraham vs. State of Kerala* 2001 Suppl. (1) SCR 335.

A recognizes the necessity and usefulness of search and seizure during the investigation. Sub-s. (1) of s.41 of the Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of Second Class specially empowered by the State Government may B issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Sub-s. (2) of s. 41 refers to issue of authorization for similar purposes by officers of departments of Central Excise, Narcotics, Customs, C Revenue Intelligence, etc. [Para 7] [487-B-D]

1.3. Sub-s.(1) of s.42 of the Act lays down that the empowered officer, if has a prior information given by any person, should necessarily take it down in writing and where he has reason to believe from his personal D knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without warrant as specified in the sub-section and its E proviso. [Para 8] [487-E-F]

1.4. Sub-s. (2) of s.42 as it originally stood mandated that the empowered officer who took down information in writing or recorded the grounds of his belief under the F proviso to sub-s. (1), should send a copy of the same to his immediate official superior forthwith. But after the amendment in the year 2001, the period within which such report has to be sent has been specified to be 72 hours. Similarly, s.50 of the Act, which prescribes the conditions for search of a person and provides safeguard G or protection for search in the presence of a gazetted officer or a Magistrate has been amended by Act 9 of 2001 to meet the emergent situation. [Para 9 and 10] [488-A-B; 492-D]

H 1.5. The Constitution Bench in *Baldev Singh**

considered the compliance of s. 50 of the Act. While doing so, the Bench also considered the provisions of ss.41 and 42 of the Act. It is to be noted that Baldev Singh's case has dealt with s.50 of the Act and the effect of non-compliance of the same. It was held that the same provisions of s. 50 containing certain protection and safeguards implicitly make it imperative and obligatory and cast a duty on the investigating officer to ensure that search and seizure of the person concerned is conducted in the manner prescribed by s.50. Through the 2001 amendment the strict procedural requirement as mandated by *Baldev Singh's* case was made directory, as relaxation and fixing of the reasonable time to send the record to superior official as well as exercise of s. 100 of CrPC was included by the legislature. 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 to balance an urgent situation. As a consequence the mandate given in *Baldev Singh's* case is diluted. [Para 14] [490-F; 492-C-D; 493-G-H; 494-B]

State of Punjab vs. Baldev Singh (1999) 6 SCC 172, referred to.

2.1. A careful examination of the facts in *Abdul Rashid* and *Sajan Abraham* shows that the decisions revolved on the facts and do not really lay down different propositions of law. In *Abdul Rashid,* there was total non-compliance with the provision of s 42. The police officer neither took down the information as required u/s 42(1) nor did he inform his immediate official superior, as required by s.42(2). The ratio in *Abdul Rashid* is that the non-recording of vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused-appellant. On the other hand, in *Sajan Abraham*, the facts were different. In that case, it was very difficult, if not impossible, for the Sub-Inspector of police

A to record in writing the information and send a copy thereof forthwith to his official superior, as the information was given to him while he was on patrol duty and was moving in a jeep, and unless he acted on the information immediately, the accused would have B escaped. The Sub-Inspector of Police therefore acted, without recording the information into writing but, however, sent a copy of the FIR along with other records regarding arrest of the accused immediately to his superior officer. It is in these circumstances that the Court C held that the omission to record in writing the information received was not a violation of s.42. [Para 4 and 11] [481-F; 489-B-G]

Abdul Rashid Ibrahim Mansuri vs. State of Gujarat 2000 (1) SCR 542 =(2000) 2 SCC 513; *Sajan Abraham vs. State* D *of Kerala* 2001 (1) Suppl. SCR 335 = (2001) 6 SCC 692; *State of Punjab vs Balbir Singh* 1994 (3) SCC 299; *Koluttumottil Razak vs. State of Kerala* 2004 (4) SCC 465, referred to.

E 2.2. Under s.42(2) as it stood prior to amendment, such empowered officer who takes down any information in writing or records the grounds under proviso to s. 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-F compliance of this provision the same would adversely affect the prosecution case and to that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of s.42 of G the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. *Abdul Rashid* has been decided H

on 01.02.2000 but thereafter s.42 has been amended with effect from 02.10.2001 and the time of sending the report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused. [Para 15] [494-C-G]

2.3. With the advent of cellular phones and wireless, technology has taken part in the system of police administration and investigation. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. Therefore, in such change of circumstances, if the statutory provisions under ss.41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the promptitude of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/ offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers. [Para 16] [495-A-E]

2.4. Therefore, the law on the requirements of ss. 42(1) and 42(2) and the effect of the decision in *Abdul Rashid* and *Sajan Abraham* can be summed up as: (a) The officer on receiving the information (of the nature referred to in Sub-section (1) of s. 42) from any person has to record it in writing in the Register concerned and forthwith send a copy to his immediate official superior,

A before proceeding to take action in terms of clauses (a) to (d) of s.42(1); (b) But if the information is received when the officer is not in the police station, and is on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for B immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of s. 42(1) and C thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior; (c) Thus, the compliance with the requirements of ss.42 (1) and 42(2) in regard to writing down the information received and sending a copy D thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and E seizure. The question is one of urgency and expediency; (d) While total non-compliance of requirements of sub-ss. (1) and (2) of s.42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of s.42. Whether there is adequate F or substantial compliance with s.42 or not is a question of fact to be decided in each case. This position got strengthened with the amendment to s.42 by Act 9 of 2001. [Para 17] [495-F-H; 496-A-H; 497-A-C]

G Case Law Reference:

2000 (1) SCR 542	referred	para 1
2001 (1) Suppl. SCR 335	referred	para 1

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(1999) 6 SCC 172	**referred**	**para 4**
1994 (3) SCC 299	**referred**	**para 10**
2004 (4) SCC 465	**referred**	**para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 36 of 2003.

From the Judgment & Order dated 12.7.2002 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 305-SB of 1998.

WITH

Criminal Appeal No. 606 of 2004.

A.P.S. Deol, Harikesh Singh, Devinder Vir Singh (for A.P. Mohanty), Satbir Pillania, Anil Karnawal, Dr. Sushil Balwada for the Appellants.

Rajeev Gaur 'Naseem', Rajesh Ranjan and T.V. George for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. In the case of *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat,* (2000) 2 SCC 513, a three-Judge Bench of this Court held that compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of *Sajan Abraham vs. State of Kerala,* (2001) 6 SCC 692, which was also decided by a three-Judge Bench, it was held that Section 42 was not mandatory and substantial compliance was sufficient. In view of the conflicting opinions regarding the scope and applicability of Section 42 of the Act in the matter of conducting search,

A seizure and arrest without warrant or authorization, these appeals were placed before the Constitution Bench to resolve the issue.

2. The statement of objects and reasons of the NDPS Act
B makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well organized gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with
C regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India
D has also acceded, consolidating and amending the then existing laws relating to narcotic drugs, strengthening the existing control over drug abuse, considerably enhancing the penalties particularly for trafficking offences, making provisions for exercising effective control over psychotropic substances and
E making provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has become a party.

3. Let us consider the Scheme of the NDPS Act and its
F relevant provisions. The 1985 Act came into force on 14.11.1985. Certain provisions were subsequently amended in 1989 and in 2001. Chapter IV deals with offences and penalties whereas Chapter V deals with procedure. Section 41 relates to power to issue warrant and authorization. Section 42 with
G which we are concerned relates to power of entry, search, seizure and arrest without warrant or authorization. Section 43 relates to power of seizure and arrest in public place. Section 50 refers to conditions under which search of persons shall be conducted. The NDPS Act prescribes stringent punishment. Hence a balance must be struck between the need of the law
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and the enforcement of such law on the one hand and the protection of citizens from oppression and injustice on the other. This would mean that a balance must be struck in. The provisions contained in Chapter V, intended for providing certain checks on exercise of powers of the authority concerned, are capable of being misused through arbitrary or indiscriminate exercise unless strict compliance is required. The statute mandates that the prosecution must prove compliance with the said provisions.

4. The facts in *Abdul Rashid Ibrahim Mansuri* (supra) were as follows:

> PW 2, Inspector of Police at Dariapur Police Station, got information on 12-1-1988 that one Iqbal Syed Husen was trying to transport charas up to Shahpur in an autorickshaw. At about 4.00 p.m. they sighted the autorickshaw which was then driven by the appellant. They stopped and checked it and found four gunny bags placed inside the vehicle. The police took the vehicle to the police station and when the gunny bags were opened ten packets of charas were found concealed therein. The value of the said contraband was estimated to be Rs. 5.29 lakhs. When appellant/ accused was questioned by the trial court under Section 313 of the Code of Criminal Procedure he did not dispute the fact that he rode the autorickshaw and that the same was intercepted by the police party and the gunny bags kept in the vehicle were taken out and examined by them at the police station. His defence was that those four gunny bags were brought in a truck at Chokha Bazar by two persons who unloaded them into his vehicle and directed him to transport the same to the destination mentioned by them. He carried out the assignment without knowing what were the contents of the load in the gunny bags.

The Trial Court acquitted the accused. But, State of Gujarat preferred an appeal before the High Court. The Division Bench of the High Court set aside the order of acquittal and convicted

A the accused of the offences charged. The convicted accused filed SLP before this Court and contended that there was non-compliance of Section 42 of the Act which was enough to vitiate the search as a whole. After referring Section 42 of the Act and the evidence of police officer as PW 2, the Court held that (1) B he should have taken down the information in writing; and (2) he should have sent forthwith a copy thereof to his immediate official superior. After finding that PW 2 - police officer admitted that he proceeded to the spot only on getting the information that somebody was trying to transport a narcotic substance and C noting that PW 2 admitted that he proceeded on getting prior information from a Constable and the information was precisely one falling within the purview of Section 42(1) of the Act, the Court decided that PW 2 cannot wriggle out of the conditions stipulated in the said sub-section and unhesitatingly found that D there was non-compliance of Section 42 of the Act. The State contended before the Bench that such non-compliance with Section 42 of the Act cannot be visited with greater consequences than what has been held by the Constitution Bench regarding non-compliance with the conditions prescribed in Section 50 of the Act. After referring to the dictum E laid down in *State of Punjab vs. Baldev Singh,* (1999) 6 SCC 172, this Court held that the views expressed with reference to Section 50 of the Act would apply with reference to Section 42 also and consequently held as follows:

F "If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed G place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though H the trial may not vitiate on that score alone. Nonetheless

the resultant position would be one of causing prejudice to the accused" A

It was also contended by the learned counsel for the State of Gujarat that as the accused did not dispute the factum of recovery of the "charas" from the vehicle it does not matter that the information was not recorded at the first instance by the police officer. The Court did not approve such contention because it held that non-recording of information has in fact deprived the accused as well as the Court of the material to ascertain what was the precise information which PW 2 got before proceeding to stop the vehicle. It further held that value of such an information, which was the earliest in point of time, for ascertaining the extent of the involvement of the accused in the offence, was of a high degree. It further held that it is not enough that PW 2 was able to recollect from memory, when he was examined in court after the lapse of a long time, as to what information he got before he proceeded to the scene. Even otherwise, it held that the information which PW 2 recollected itself tends to exculpate the appellant rather than inculpate him. Finally the court held that non-recording of the vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused. On analyzing this as well as the other materials, this court ultimately allowed the appeal filed by the accused/appellant and set aside the conviction and sentence passed on him by the High Court and restored the order of acquittal passed in his favour by the trial court. The ratio in *Abdul Rashid* (supra) is that the non-recording of vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused-appellant. The police officer examined as a crucial witness, PW2, in that case admitted that he proceeded to the spot only on getting information that somebody was trying to transport a narcotic substance, but failed to take down the information in writing. Nor did he apprise his superior officer of any such information either then or later, much less send a copy of the information to the superior officer. Thus, it was a B C D E F G H

A case of absolute non-compliance with the requirements of Section 42(1) and (2).

5. The facts in *Sajan Abraham v. State of Kerala* (Supra), were completely different. The appellant/accused - *Sajan Abraham* was put on trial for an offence punishable under B Section 21 of the Act. As per the prosecution case, on 10.10.1993 at about 7.45 p.m. the appellant was in possession of a manufactured drug by the name of "Tidigesic" and three syringes for injecting the same near Blue Tronics Junction at Palluruthy. The Head Constable, PW 3 and two other C Constables of the Special Squad got information at about 7.00 p.m. on the said date that a person was selling injectable narcotic drugs near Blue Tronics Junction at Palluruthy. They informed this to PW 5 - Sub-Inspector of Police, Palluruthy Cusba Police Station, who was coming in a jeep along with his D police party. Thereafter PW 5 along with his police party including PW 3 and other members of the Special Squad went to the scene of occurrence found the accused standing on the road with a packet in his hand. He was identified by PW 3 and apprehended by PW 5. On search, the packet possessed by E the appellant revealed that it contained 5 strips of 5 ampoules each of Tidigesic and three injection syringes and a purse containing currency note of Rs. 10. At the spot, one ampoule was taken as a sample for chemical analysis and the said contraband articles were seized as per Ext. P-1 and seizure F mahazar was prepared at the spot. The appellant was also arrested. The charge-sheet was submitted, the appellant pleaded not guilty.

The trial court found discrepancies in the evidence of the G prosecution witnesses and thus disbelieved the prosecution story, hence acquitted the appellant. The High Court, on reappraisal of the evidence, came to the conclusion that the Trial Court was not justified in acquitting the appellant. It held that the prosecution has established with positive evidence beyond reasonable doubt that the appellant has committed an offence H

punishable under Section 21 of the Act, hence convicted and sentenced the appellant before this court. Learned counsel for the appellant submitted before this Court with vehemence that the prosecution has violated the mandatory provisions under Section 42, Section 50 and Section 57 of Act and hence conviction and sentence is liable to be set aside. The conclusion of this Court with regard to Section 42 is as under:

> "With regard to Section 42, the submission is that PW 5 has not recorded the information given by PW 3 with respect to the appellant's involvement before proceeding to arrest him in his case. This constitutes violation of Section 42 of the Act. It is true under Section 42(1), the officer concerned, when he has reason to believe from his personal knowledge or information received from any person, is obliged to take it down in writing if such information constitutes an offence punishable under Chapter IV of the Act and send it forthwith to his immediate superior. Such an officer is empowered to search any building, conveyance and in case of any resistance, break up any door or remove any obstacle for such entry, seizure of such drug or substance and to arrest such person whom he has reason to believe to have committed any offence punishable under the said Chapter. Thereafter such officer has to send a copy of this information forthwith to his immediate superior. Submission is that PW 5 after receiving the said information had not communicated it to his immediate superior which constitutes violation of Section 42. In construing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory. This is in order to balance

A the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The court however while construing such provisions strictly
B should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in trapping an
C accused, which may lead the accused to escape, then the prosecution case should not be thrown out."

"In the present case, PW 3 - Head Constable, got information with reference to the appellant only at about 7 p.m. that the person is selling injectable narcotic drugs
D near Blue Tronics Junction, Palluruthy. When he proceeded for Palluruthy Police Station to give this information to his immediate superior, SI of Police, PW 5, he found PW 5 along with his police party, who were on patrol duty coming, hence the said information was
E communicated there by PW 3 to PW 5. Thereafter, PW 5 along with his police party and PW 3 immediately proceeded towards the place where the appellant was standing. Had they not done so immediately, the opportunity of seizure and arrest of the appellant would
F have been lost. How PW 5 could have recorded the information given by PW 3 and communicated to his superior while he was on motion, on patrol duty, in the jeep before proceeding to apprehend him is not understandable. Had they not acted immediately, the
G appellant would have escaped. On these facts, this Court found that no inference could be drawn that there has been violation of Section 42 of Act."

It is clear from *Sajan Abraham* (supra) that to enforce the law under the NDPS Act stringently against the persons involved
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in illicit drug trafficking and drug abuse, the legislature has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted to be mandatory. It is further clear that this is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The court however while construing such provisions strictly should not interpret them literally so as to render their compliance impossible. It concluded that if in a case, the strict following of a mandate results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out. It is also clear that when substantial compliance has been made it would not vitiate the prosecution case.

6. In the light of the above decisions and the principles enunciated therein, it would be appropriate to refer to Section 42 of the NDPS Act which is relevant for the present purpose as it stood before its amendment by Act 9 of 2001. It reads as under:-

> *"42. Power of entry, search, seizure and arrest without warrant or authorisation.*—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other

A article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,—

B (a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

C (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has D reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have E committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without F 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.

G (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

H Sub-section (2) as replaced by Act 9 of 2001 is extracted

below:

"(2) Where an officer takes down any information in writing under sub-Section (1) or records grounds for his belief under the proviso thereto, he shall within seventy two hours send a copy thereof to his immediate official superior."

7. It is well established that search and seizure are essential steps in the armoury of an investigator in the investigation of a criminal case. The Code of Criminal Procedure in various provisions, particularly, Sections 96 to 103 and Section 165 recognizes the necessity and usefulness of search and seizure during the investigation. Sub-section(1) of Section 41 of the Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of Second Class specially empowered by the State Government may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Sub-Section (2) of Section 41 refers to issue of authorization for similar purposes by officers of departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc.

8. Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his reasons of belief. The proviso to sub-section (1) of Section 42 lays down that if the empowered officer has reason to believe that a search warrant or authorization 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.

A 9. Sub-section (2) of Section 42 as it originally stood mandated that the empowered officer who have taken down information in writing or records the grounds of his belief under the proviso to sub-section (1), should send a copy of the same to his immediate official superior forthwith. But after the B amendment in the year 2001, the period within which such report has to be sent was specified to be 72 hours. Section 43 deals with the power of seizure and arrest of the suspect in a public place.

C 10. We may note that *Abdul Rashid* followed *State of Punjab vs. Balbir Singh* – 1994 (3) SCC 299. We extract below the passage that was followed :

> (2-C) Under Section 42(1), the empowered officer if has a prior information given by any person, that should D necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest E or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1), if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his F belief.
>
> To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.
>
> G (3) Under Section 42(1), such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same H affects the prosecution case. To that extent it is mandatory.

But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case." A

Abdul Rashid was followed in *Koluttumottil Razak vs. State of Kerala* – 2004 (4) SCC 465, which was also a case of total non-compliance with section 42, as the Sub-Inspector of Police neither reduced the information received into writing nor informed the official superior about it. B

11. A careful examination of the facts in *Abdul Rashid* and *Sajan Abraham* shows that the decisions revolved on the facts and do not really lay down different prepositions of law. In *Abdul Rashid*, there was total non-compliance with the provision of section 42. The police officer neither took down the information as required under section 42(1) nor informed his immediate official superior, as required by Section 42(2). It is in that context this Court expressed the view that it was imperative that the police officer should take down the information and forthwith send a copy thereof to his immediate superior officer and the action of the police officer on the basis of the unrecorded information would become suspect though the trial may not be vitiated on that score alone. On the other hand, in *Sajan Abraham*, the facts were different. In that case, it was very difficult, if not impossible for the Sub-Inspector of police to record in writing the information given by PW-3 and send a copy thereof forthwith to his official superior, as the information was given to him when he was on patrol duty while he was moving in a jeep and unless he acted on the information immediately, the accused would have escaped. The Sub-Inspector of Police therefore acted, without recording the information into writing, but however, sent a copy of the FIR along with other records regarding arrest of the accused immediately to his superior officer. It is in these circumstances that this Court held that the omission to record in writing the information received was not a violation of Section 42. C D E F G

12. The material difference between the provisions of H

A Sections 42 and 43 is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 B of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.

C 13. Section 50 prescribes the conditions under which search of a person shall be conducted. Sub-section (1) provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest gazetted officer or the D Magistrate for the purpose. Under sub-section (2) it is laid down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such gazetted officer or the Magistrate. Sub-section (3) lays down that when the person to be searched is E brought before such a gazetted officer or the Magistrate and such gazetted officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise, he shall direct that the search be made.

F 14. The Constitution Bench in *Baldev Singh* (supra) considered the compliance of Section 50 of the Act. While doing so, the Bench also considered the provisions of Sections 41 and 42 of the Act. It observed as follows:

G "**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 H 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.

9. Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without a warrant between sunrise and sunset, and he may do so without recording his reasons of belief.

10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior. Section 43

A deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard B to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in C possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

It is to be noted that *Baldev Singh's* case (supra) has dealt with Section 50 of the Act and the effect of non-compliance of the D same. It was held that the same provisions of Section 50 containing certain protection and safeguards implicitly make it imperative and obligatory and cast a duty on the investigating officer to ensure that search and seizure of the person concerned is conducted in a manner prescribed by Section 50. E The unamended Section 50 as existed during that period is as follows:

"Section 50 - Conditions under which search of persons shall be conducted

F (1) When any officer duly authorized 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 G 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 subsection (1).

H

(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."

The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. But this strict procedural requirement has been diluted by the insertion of subsection (5) and (6) to the Section by Act 9 of 2001, by which the following subsections were inserted accordingly:

"(5) When an officer duly authorized 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 section100 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."

Through this amendment the strict procedural requirement as mandated by *Baldev Singh's* case was avoided as relaxation and fixing of the reasonable time to send the record to superior official as well as exercise of Section 100 of CrPC was included by the legislature. The effect conferred upon the previously

A mandated strict compliance of Section 50 by Baldev Singh's 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. B 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 to balance an urgent situation. As a consequence the mandate given in *Baldev Singh's* case is diluted.

C 15. Under Section 42(2) as it stood prior to amendment such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the D same would adversely affect the prosecution case and to that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the E Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. *Abdul Rashid* (supra) has been decided on F 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question G of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

16. The advent of cellular phones and wireless services H

in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy makers about it. Now for the last two decades police investigation has gone through a sea-change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the Register/Records kept for those purposes in the police station or the respective offices of the authorized officials in the Act if the emergency of the situation so requires. As a result, if the statutory provisions under Section 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/ offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.

17. In conclusion, what is to be noticed is *Abdul Rashid* did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham* hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of

A section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information

to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.

18. We answer the reference in the manner aforesaid. Let the appeals be now placed for disposal before the appropriate Bench.

R.P. Reference answered.