

(2006) 03 GUJ CK 0061
In the Gujarat High Court
Case No : Criminal Appeal No. 1280 of 1999

Ajitbhai Ismailbhai Pinjara	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 09-03-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 54
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 41, 42, 43, 44

Citation : (2006) 3 GLR 2074

Hon'ble Judges : Harsha N. Devani, J;C.K. Buch, J

Bench : Division Bench

Advocate : J.D. Ajmera, for the Appellant; K.P. Raval, Assistant Public Prosecutor for Opponent 1, for the Respondent

Final Decision : Allowed

Judgement

C.K. Buch, J.—This is an appeal against the judgment and order of conviction passed by Id. Special Judge, Surendranagar in Special Case No. 1/1998 on 17.09.1999 whereby the appellant-original accused has been held guilty of the offences punishable u/s 8(c) R/w Section 21 of The Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and has been sentenced to suffer R/I for 10 Years and to pay a fine of Rs. 1 Lakh (Rs. One lakh only), I/d to further undergo S/I for 2 Years.

2. We would like to narrate facts in brief so that the evidence led by the prosecution can be appreciated in the perspective of the evidence that has been led by the prosecution before the trial Court. That on 16.01.1998, Police Inspector Mr. HK Chauhan, Police Inspector of State Narcotic Cell, along with his other staff members, were proceeding towards Surendranagar in a vehicle namely jeep-car and when they stopped at a Tea-stall located somewhere near Gebansha Pir Dargah in between town Vadhawan and Surendranagar, Mr. Chauhan got one information regarding appellant accused and his name and

physical description was also given to Mr. Chauhan by the informant and he was also informed that appellant accused is likely to pass through Vadhawan for going to Surendranagar in the afternoon and that he would be carrying Charas a contraband substance under the scheme of the NDPS Act. On receipt of information, a report was prepared by P.I. Mr. Chauhan and the same was sent in an envelope to Ahmedabad Office by a special messenger i.e. with one Police Constable Mr. Desai and Mr. Desai was asked to deliver said information/envelope to the Supdt. Of Police of Narcotic cell. Mr. Chauhan, thereafter visited a STD Telephone Booth and talked on telephone with Supdt. Of Police at Ahmedabad and arranged for two panchas so that search can be arranged. Mr. Chauhan, along with staff members, placed themselves in a nearby area from where suspect was supposed to pass through. It is the case of the prosecution that meanwhile, a person whose description was given, came there and, therefore, he was intercepted and searched. Before carrying out formal search, he was asked by Mr. Chauhan that if he wishes to get himself searched in the presence of any gazetted officer or a Magistrate, then he may express his wish accordingly, but the appellant accused had refused the offer and permitted Mr. Chauhan to carry out the search. According to the prosecution, appellant accused had put on zabhbha and paizama and from one of the pockets of zabhbha, contraband substance namely Charas was found in a plastic/polythene bag. Some part of that bag was found cut-off and substance was smelled and it was found that the same was Charas. It is the say of the prosecution that the State Narcotic Cell headed by Mr. Chauhan was carrying with them a testing kit and it was found that the article found from the pocket of the zabhbha of the appellant accused is a Charas. So, the same was seized and after weighing it and completing formalities to take out samples etc., it was seized on the spot. Three samples were taken. During search, police also found cash amount of Rs. 2500/ from one another pocket of zabhbha put on by the appellant accused. That amount was also seized. This entire exercise of search and seizure was carried out in the presence of two panchas i.e. Panch Bhupatbhai and Panch Shankar Keshav and panchanama was prepared. Signature of the accused was also obtained as alleged by the prosecution on the seizure memo as well as document prepared by police with a view to discharge the obligations cast on searching officer u/s 50 of the N.D.P.S. Act. Signatures of both the panchas were also obtained on both these documents. This exercise was undertaken somewhere between 18.15 hours and 19.15 hours. Thereafter, the accused along with relevant documents and muddamal seized, was taken to Surendranagar Police Station and Mr. Chauhan lodged a formal complaint for the aforesaid offences committed by the appellant accused and he was handed over to Police Station Officer of Surendranagar Police Station along with muddamal seized. On completion of investigation, PSI Mr. Kureshi chargesheeted the accused. After appreciating oral as well as documentary evidence led by the prosecution during trial, Id. Special Judge accepted the case placed by the prosecution and held the appellant accused guilty of the offences punishable u/s 8(c), 21 of NDPS Act and sentenced him to suffer R/I for 10 Years and to pay a fine of Rs. 1 Lakh (Rs. 1 Lakh only), I/

d to further undergo S/I for 2 Years. Hence, present Criminal Appeal.

3. The appellant accused has assailed the legality and validity of the judgment and order of conviction and sentence on various grounds mentioned in the memo of appeal and has prayed that the impugned judgment should be quashed and set aside and appellant accused may be acquitted of the charges for which he is convicted and sentenced.

4. The prosecution has examined nine witnesses and has produced number of documents including Forensic Science Laboratory (FSL for short) Report. However, in the background of arguments advanced before us by Id. Counsel appearing for the parties, according to us, the oral evidence of following witnesses would be more relevant because Id. APP Mr. Raval appearing for the State has also concentrated his arguments on the oral version given by these witnesses:-

1. P.W.1 Bhupatbhai (Exh.11)
2. P.W.2 Shankarbhai (Exh.12)
3. P.W.3 Akbarbhai (Exh.13)
4. P.W.4 Hashmukhbhai (Exh.18)
5. P.W.5 Sukhdevsingh (Exh.28)
6. P.W.7 Balvantbhai Parmar (Exh.32)
7. P.W.8 Govindbhai, ASI, Surendranagar Police Station (Exh.33)

Ld. Counsel Mr. Ajmera appearing for the appellant accused as well as Id. APP Mr. Raval, both have also referred some of the documents namely panchanama Exh.20, writing executed for alleged compliance of Section 50 of the N.D.P.S. Act Exh.21, seizure memo Exh.23, FIR Exh.26 and telephone bill issued by STD Booth owner Exh.19. Of course, documents exh.30 & 31 i.e. FSL Reports etc. are also referred to before us.

08.03.2006

5(i) Ld. Counsel Mr. J.D. Ajmera appearing for the appellant accused has taken up various points while assailing the impugned judgment. It is submitted that the accused ought not to have been convicted by the trial Court when there is no compliance as required under Sections 42(1) and 42(2) of the N.D.P.S. Act and the prosecution has failed in leading any evidence- documentary evidence in support to prove the compliance of the aforesaid provisions and hence the appellant accused could not have been convicted as per the settled legal position. Non-compliance of the mandatory provisions of Section 42 of the N.D.P.S. Act would render the search and consequently the seizure of muddamal article Charas illegal. So, without entering into the merit of other endeavour made by

the prosecution, the appellant accused deserves acquittal and in not doing so, the Id. Trial Judge has grossly erred. It is also argued that there is no adequate evidence as to compliance of Section 50 of the N.D.P.S. Act and that has resulted into serious prejudice. Therefore also, the conviction is bad. According to Id. Counsel Mr. Ajmera, the case of the prosecution rests on the oral evidence led by police witnesses and no independent witness has been examined nor investigating agency has taken care to name any independent witness in the chargesheet submitted against the accused. When the say of the prosecution is that the accused was intercepted and searched and contraband article Charas was seized from him in a public place and that too on a four-track road where there are offices, departments of government are located in the nearby area, independent witness could have been procured and placed before the Court and in absence of such independent evidence, the accused ought not to have been held guilty of the offences as held by Id. Trial Judge. Raiding Officer Mr. Chauhan when had admitted that he is supposed to select the panch of a repute, he has not cared to select panchas from the locality where the raid was carried out. All these aspects go against the prosecution and weaken the strength of the case placed by the prosecution. One mode of argument of Id. Counsel Mr. Ajmera is that panchas selected by Mr. Chauhan are also residents of the area and they have not supported the case of the prosecution and they have been declared hostile. So, panchanama drawn by Mr. Chauhan in presence of panchas can not be said to be a document satisfactorily and legally proved and, therefore, it can not be read as substantive piece of evidence. Mr. Chauhan himself has not proved entire panchanama drawn by him and there are certain infirmities emerging from the evidence led by Mr. Chauhan qua the evidence collected while drawing of panchanama exh.20. Thus, his evidence in this regard is not adequate and sufficient to prove panchanama.

(ii) Non-compliance of the provisions of Section 57 of the N.D.P.S. Act also goes to the root of the trustworthiness of the case placed by the prosecution and it appears that the prosecution has tried to suppress very important and material aspects of entire exercise that was allegedly undertaken on 16.01.1998.

(iii) At two crucial places, Mr. Chauhan has not cared to refer and record time of preparation of writing i.e. writing made and allegedly signed by the accused and panchas with a view to show that scheme of Section 50 of the N.D.P.S. Act has been complied with. Though, seizure memo of a contraband article Charas is prepared, those two documents, according to Id. Counsel Mr. Ajmera, are crucial and important documents and this infirmity ought not to have been ignored by the Id. Trial Judge. It was possible for prosecution to examine the owner of STD Telephone Booth from where Mr. Chauhan had telephonic talk with his superior officer viz. Superintendent of Police, Narcotic Cell at Ahmedabad. It appears that no formal statement of telephone booth owner was recorded. Even, Mr. Chauhan has not proved that the telephone number reflected in the bill issued by the STD Booth Owner is the number of his superior officer i.e. Superintendent of Police, Narcotic Cell. Exh.19 is the bill which indicates that Rs. 74/ has been paid and it

also shows duration of time of telephonic talk between Mr. Chauhan and his superior officer which appears to be a detailed discussion. When Mr. Chauhan has already sent a written report through Police Constable Mr. Desai in a sealed envelope to his superior officer, there was no reason to continue the talk for such a long period of about 30 to 31 minutes. Impliedly, Mr. Ajmera has tried to argue that this bill is obtained only with a view to show that some exercise was done by Mr. Chauhan qua the information received by him against the appellant accused and he has intimated his immediate superior officer about the information received. The distance between the telephone booth and place of search is not coming out on record from the evidence led by the prosecution and this aspect should be seen in the background of one undisputed fact that the copy of the report allegedly sent by Mr. Chauhan to his superior officer with Police Constable Mr. Desai, is not available on record, nor Police Constable Mr. Desai has been examined. Anticipating the arguments from Id. APP Mr. Raval, it is argued by Id. Counsel Mr. Ajmera that Police Inspector Mr. Chauhan though is a gazetted officer, can not be said to be an officer who has carried out search and seizure in exercise of the powers conferred on him by the Notification issued by the State of Gujarat bearing No. GHL-14 and CS 1082-10577 (1)-M dated June 15, 1987 issued u/s 41 of the N.D.P.S. Act. The prosecution can not be permitted to change its stand especially when Mr. Chauhan has acted as an officer conducting the search and seizure as per the scheme of Sections 41 & 42 of the N.D.P.S. Act. According to Id. Counsel Mr. Ajmera, Mr. Chauhan has not carried out any search and seizure in the capacity of a gazetted officer empowered by the State u/s 41 of the N.D.P.S. Act and before this Court, for the first time, if such arguments are advanced, then this Court should hold that the prosecution is not entitled to change its stand and such an attempt is likely to cause serious prejudice to the defence side. One of the arguments advanced before us by Mr. Ajmera is that there is no element of either transparency or fairness in conducting the exercise of search and seizure as well as in the investigation carried out by Mr. Kureshi, Investigating Officer after lodging of FIR. The police witnesses examined namely Mr. Chauhan and Mr. BN Parmar have tried to keep curtain on certain aspects and non-production of log-book of the vehicle used by the team headed by PI Mr. Chauhan, creates a serious doubt about the genuineness of the search and seizure carried out at the relevant date and time.

(iv) In support of his submissions, Id. Counsel Mr. Ajmera has placed reliance on certain decisions of the Apex Court including the decision of the Apex Court in the case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, According to Id. Counsel Mr. Ajmera, in the case of Abdul Rashid (supra), the Apex Court has observed and held that in view of Section 42 of the N.D.P.S. Act, 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 place, it is imperative that the officer should take it down in writing and he should 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 the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused. In this very decision, the Apex Court has further observed that the arguments advanced by Id. Counsel appearing for the respondent State of Gujarat that the action was taken by him was not u/s 42 of the Act, but was u/s 43 of the Act and, therefore, the officer was not under an obligation to take down the information, should not be accepted. It is held by the Apex Court that we are unable to appreciate the argument because, in this case, P.W.2 admitted that he proceeded on getting prior information from a Constable and information was precisely one falling within the purview of Section 42(1) of the Act. Hence, P.W.2 can not wriggle out of the conditions stipulated in the said sub-section. We, therefore, unhesitatingly hold that there was non-compliance with Section 42 of the Act.

(v) According to Id. Counsel Mr. Ajmera, same analogy should be applied in the present case and it should be held that the State should not be permitted to place the argument that the exercise carried out by Mr. Chauhan was in the capacity of an officer empowered u/s 41 of the N.D.P.S. Act and, therefore, there was no need to take down information in writing nor Mr. Chauhan was under an obligation to inform his immediate official superior about the prior information received by him or about the contemplated action. In response to the query raised by us, Id. Counsel Mr. Ajmera has fairly accepted that this decision has been distinguished by the Apex Court in a subsequent decision in the case of *G. Srinivas Goud v. State of A.P.* (2005)8 SCC 183(AP), but the ratio laid down by the Apex Court in the case of *Abdul Rashid* (supra), has not been overruled. For short, according to Id. Counsel Mr. Ajmera, two mandatory provisions have not been complied with i.e. Sections 42 & 50 of the N.D.P.S. Act and, therefore, the Id. Trial Judge ought not to have held that the offence against the accused has been established. Though, the provisions of Section 57 of the N.D.P.S. Act have been held to be directory in nature by the Apex Court, but total non-compliance with the provisions of Section 57 if results into some prejudice to the defence side or to the accused, then advantage should be given to the accused considering the sensitivity of the crime and punishment prescribed for such crime. The entire scheme from Section 41 to 57 of the N.D.P.S. Act has been carved out to add transparency in investigation and to avoid false implication in a serious offence of a person who might not be actually responsible for indulging into the activities of storing, selling or trafficking in narcotic drug and contraband substances.

6(i) Id. APP Mr. Raval appearing for the State, while resisting the arguments placed by Id. Counsel Mr. Ajmera for the appellant accused, has submitted that PI Mr. Chauhan was gazetted officer at the relevant point of time and was empowered by the State under notification issued u/s 41 of the N.D.P.S. Act and, therefore, he himself was authorized to carry out search and seizure as per the scheme of the said section. He was not a delegated authority by an officer

empowered u/s 41 of the N.D.P.S.Act and so he was not supposed to record his own satisfaction or reasonable belief in writing before carrying out any search or seizure or information received by him either from any Batmidar, informant, department or from subordinate. So, status of Mr. Chauhan should be considered by the Court and, therefore, if the Id. Trial Court has discussed the nature of evidence led by the prosecution keeping in view the scheme of Sections 41 & 42 of the N.D.P.S.Act, that would not make the judgment bad or vulnerable. So, non-production of the copy of the report sent to Superintendent of Police, Narcotic Cell, Ahmedabad in a sealed envelope through Police Constable Mr. Desai, would not affect the case of the prosecution adversely in any manner. Merely because some act has been done by Mr. Chauhan as if he is acting as an officer authorized to carry out search and seizure or arrest without warrant, would not change the status of Mr. Chauhan or his legal entitlement to carry out the search on information on his satisfaction and, therefore, the arguments advanced by Id. Counsel Mr. Ajmera would not help the accused. According to Id. APP Mr. Raval, judgment of the Apex Court in the case of Abdul Rashid (supra) has been distinguished substantially by the Apex Court in its decision in the case of G. Srinivas Goud (supra) and, therefore, the observations made by the Apex Court in the subsequent decision, on the contrary, would help the respondent State in the background of the facts of the present case. He has also placed reliance on the decision of the Apex Court in the case of T. Thomson Vs. State of Kerala and Another, and has drawn our attention to Head Note-B and relevant para of the said decision and argued that there is no scope for the appellant accused to say that Section 42(1) of the N.D.P.S.Act has been violated. The description of the accused was very well with the raiding party and especially with PI Mr. Chauhan and, therefore, when the accused was seen on a public road, he was intercepted and after due compliance with Section 50 of the N.D.P.S.Act viz. in other words discharging the obligations as an officer, contemplated search of suspect and had carried out search of the accused and contraband substance namely Charas weighing 200 grams was recovered. The fact of recovery of Rs. 2500/- from one another pocket of the Zabhabha put on by the appellant accused and one polythene bag from where sticks of contraband Charas were found, is sufficient to indicate that the accused was indulging in illegal possession, sale and trafficking of such contraband substance. According to Id. APP Mr. Raval, absence of reference of time in two documents i.e. Exh.21 & 23 would not make the exercise bad or doubtful because Mr. Chauhan has received information when entire team was somewhere near Gebansha Pir Dargah at about 6.00 to 6.15 P.M. and after completing the entire exercise of search and seizure, sealing of samples etc., formal complaint i.e. FIR u/s 54 of CrPC has been lodged in the present case at about 20.30 hours with Surendranagar Police Station. So, the raiding party officers have not kept the muddamal recovered from the appellant accused for more than even two hours. So, the absence of recording of timing in above-said two documents should not be viewed seriously.

(ii) The back-bone of the arguments of Id. APP Mr. Raval is that when sample was

sent for analysis and testing by FSL, it was in a sealed condition and both the seals were intact and there is a reference of this fact in the forwarding letter as well as report received from the FSL and when there is adequate evidence that contraband article recovered by Mr. Chauhan-head of the team, was Charas, then trial Court was supposed to consider the oral as well as documentary evidence led by the prosecution as to the recovery of the said muddamal Charas from the conscious possession of the accused and in that background, Id. Trial Judge has rightly appreciated the evidence. Mr. Chauhan being a responsible gazetted officer empowered u/s 41 of the N.D.P.S. Act, was authorized to search the accused. Of course, he has searched on the basis of the information received by him and this search was carried out in the presence of of panchas. Hostility of panchas would not make the panchanama bad or illegal. The fact of drawing of panchanama and material contents of the panchanama has been proved by Mr. Chauhan himself and some part of the panchanama has been proved by other member of the raiding team namely Mr. BN Parmar. So, Mr. Chauhan is corroborated by Mr. BN Parmar qua the drawing of panchanama and compliance with the provisions of Section 50 of the N.D.P.S. Act. Mr. Chauhan has proved the document exh.21 signed by the accused as well as two panchas. So, Id. trial Judge has rightly held that there is no violation of any mandatory provisions of Section 50 of the N.D.P.S. Act.

(iii) So far as the arguments advanced by Id. Counsel Mr. Ajmera about non-compliance with Section 55 of the N.D.P.S. Act are concerned, Id. APP Mr. Raval has submitted that the scheme of Sections 55 & 57 of the N.D.P.S. Act are not mandatory and it has come on record during the cross-examination of Mr. Chauhan that such report u/s 57 was sent to his immediate official superior on completion of entire exercise of search and seizure and filing of the complaint at Surendranagar. Non-production of report u/s 55 or non-availability of the copy of the information sent to the Superintendent of Police, Narcotic Cell with Constable Mr. Desai, does not make the case placed by the prosecution doubtful. On the contrary, this Court while confirming the judgment and order of conviction and sentence, should observe that Mr. Chauhan had acted in a most transparent manner and though there was no need for him to reduce the information in writing, he has done that exercise also and had informed his superior about the information received and action contemplated, otherwise he ought not to have attempted to inform his superior twice; once by sending Police Constable Mr. Desai with written report in a sealed envelope and another by making telephone call to his superior. Of course, Mr. Chauhan has not mentioned that telephone number reflected in a telephone bill issued by STD Booth owner is of his immediate official superior, but when this aspect was not specifically assailed by the defence side, there was no need for the prosecution to explain this contingency. In the same way, non-production of the log-book of the motor vehicle used also would not make the journey of Mr. Chauhan and team from Ahmedabad to Surendranagar and their departure from Surendranagar to other destination, bad and would not make presence of Mr. Chauhan and his team at

Surendranagar doubtful. It is true that it emerges indirectly from the evidence led by the prosecution that Mr. Chauhan and his team had left for Ahmedabad from Surendranagar and after completing work that they had carried out at Surendranagar, no other work of carrying out search and seizure was undertaken by them on that very day i.e. on 16.01.1998 because in the cross-examination, Mr. Chauhan has categorically said that on that day i.e. on 16.01.2006, they have not carried out any other search or raid regarding contraband drug or substance under N.D.P.S.Act, but this should not be viewed with any doubt or absence of fairness should not be inferred. Some conflict or contradiction in the evidence led by Mr. Chauhan and Mr. Parmar pointed out by Id. Counsel Mr. Ajmera does not go to the root of the case placed by the prosecution. The prosecution is supposed to prove its case substantially and the evidence should be of sound and cogent nature and the Id. Trial Judge in the present case has correctly evaluated the evidence and has linked the accused with the crime.

(iv) In response to the query raised by the Court, Id. PP Mr. Raval has tried to state that language used by Mr. Chauhan while replying one question put to him during the course of cross-examination should not be interpreted in the manner suggested by Id. Counsel Mr. Ajmera for the appellant because Mr. Chauhan has answered the question in a correct manner and it is said by him that when accused was searched and contraband article was seized from him, he was under detention. So, vernacular word Aatak should not be equated with word arrest because it is the say of the prosecution that after discharging the obligations cast on the officer carrying out search and seizure etc., the accused was arrested. So, when formal arrest panchanama has been drawn after issuance of the seizure memo, it should not be accepted that when muddamal Charas was taken out from the pocket of the Zabhbha put on by the accused by Mr. Chauhan, the appellant was already arrested and rest of the exercise is nothing but a paper work done by the team headed by Mr. Chauhan. So, according to Mr. Raval, judgment under challenge is not required to be interfered with. It is argued that the offence being a serious offence and the same is against the society and public at large, the Court should not even disturb the findings recorded by the Id. Trial Judge qua the sentence awarded and amount of fine imposed on the appellant accused. Id. APP Mr. Raval, therefore, prayed that the appeal preferred by the appellant accused requires to be dismissed on all counts.

7. To appreciate rival contentions placed before us, we would like to discuss the set of oral evidence. P.W.4 Mr. HK Chauhan, PI, Narcotic Cell, State of Gujarat, at the relevant date, was a gazetted officer. Notification has been placed before us for perusal by Id. APP Mr. Raval which is dated 15.06.1987 and he being the officer of the rank of Police Inspector, falls within the category of the officers referred to in the notification. It is not necessary to reproduce the contents of the notification, but it will be difficult for us to accept the arguments advanced by Id. Counsel Mr. Ajmera for the appellant that at the relevant point of date and time, Mr. Chauhan should be considered to be an officer acting as an officer empowered u/s 42 of the N.D.P.S.Act. Close distinction has been made between

two categories of the officers while carving out the scheme of Sections 41 & 42 of the N.D.P.S. Act keeping in mind the observations of the Apex Court in number of decisions. Mr. SP Tyagi, Author of The Narcotic Drugs & Psychotropic Substances Act, 1985, 2005 Edition, in the commentary to Section 41, has summarized the Scheme as under:-

Section 41 consists of three sub-sections. Section 41(1) empowers a Magistrate to issue a warrant for the arrest of any person suspected of having committed any offence under Chapter IV or for the search of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or any document or other article is kept or concealed. Section 41(2) empowers certain Gazetted Officers of Central Excise, narcotic, customs, revenue, intelligence etc. of the Central Government or the Border security Force, or any such officer of the revenue, excise, police, during control or other departments of the State Governments empowered by the general or special orders in this behalf to issue an authorization for the arrest of any person believed to have committed an offence or for the search of any building, conveyance or place whether by day or by night in which the offending drug or substance or article is kept or concealed. (Raj Kumar Karwal Vs. Union of India and others,

It has been further stated thus:-

...Sub-section (2) of Section 41 authorises Gazetted Officers of various departments of the Central Government specified in that section empowered by general or special order by the Central Government, or such officer of the revenue, drug control, excise, police, or any other department of a State Government as is empowered in that behalf by general or special order of the State Government to search a building, conveyance, or place by himself or authorize an officer subordinate to him, but superior in rank to a peon, Sepoy or a constable, to arrest such a person or search a building, conveyance or place. If the information is given by any other person, then such empowered officer should take it down in writing and then take further action for arrest or search a building, conveyance or place by himself or authorize a subordinate officer, but above the rank of Peon, Sepoy or Constable, to arrest or search a building, conveyance or place. Section 41 makes provisions empowering such officers and also relating to the authority of the empowered officer to authorize his subordinate to take action or himself take action of arrest or search. By Notification No. GHL 14 and CS 1082-10577 (1)-M dated June 15, 1987, the Government of Gujarat, in exercise of its power under Sub-section (2) of Section 41, N.D.P.S. Act, empowered for the purpose of Sub-section (2) of Section 41, all officers of the Police Department of and above the rank of Inspector of Police posted in any part of the State of Gujarat and other officers of the Prohibition, Excise Department, Drugs, Cosmetic Department, etc. The officers of the rank of Inspector of Police and above, therefore, can exercise the powers under Sub-section (2) of Section 41, N.D.P.S. Act. u/s 41, arrest and search can be made

either under warrant issued by the Magistrate or by the authorized officer or under orders of such authorized officer. Without being empowered under Sub-section (2) of Section 41, N.D.P.S. Act, the Officer can not arrest or search without warrant or authorize arrest and search.... (Shyamlal Kanaiyalal Soni v. State of Gujarat 1990(2) 32 GLR 923).

It is further stated thus;

Mandate of Section 42 NDPS Act would not apply to the officers coming u/s 41(2) of the Act.

Sections 41 and 42 have to be read together as u/s 41 Magistrate and Gazetted Officer of the departments mentioned in these two sections can issue warrant of arrest and authorization to subordinate officer respectively enabling them to arrest a person or conduct a search in a building, conveyance or place. Section 42 gives power of entry search and seizure or arrest without warrant or authorization u/s 41. From these sections, it would appear that the intentions of the legislature is to involve officers of more departments in order to make the Act effective. But these officers can act only if they are authorized to do so by the Central Government or the State Government, as the case may be, and in absence of such an authority, they will have no power to arrest, search etc. and if they try to do so their action can be resisted....

...Sub-section (2) of Section 41 any authorized Gazetted Officer of the departments mentioned in the said sub-section may also authorize any officer subordinate to him but superior in rank to peon, Sepoy or constable to arrest a person or conduct a search in building, conveyance or place whether by day or night. This authorization by the Gazetted Officer similarly is also mandatory as otherwise, the subordinate officer will be acting without powers. Section 42 is not confined to Gazetted Officer of the department, but to other officers not being a sepoy, peon or constable who are duly authorized by the Central Government or the State Government to enter into any building etc. for the purpose of conducting search and seizure. This can be done from personal knowledge regarding any narcotic drugs or psychotropic substances or information given by any person and taking down in writing. (Md. Jainulabdin alias Nahamacha and etc. Vs. State of Manipur and etc.,

8. It is true that Mr. Chauhan has started exercise to carry out search of a suspect appellant as if he is exercising powers of entry, search, seizure and arrest without warrant or authorization, but it is not the case that he was instructed by his superior to visit Surendranagar and to carry out a particular exercise in the capacity of a delegated officer by the officer covered or empowered u/s 41 of the N.D.P.S. Act. It is the case of the prosecution from the beginning that a team of Narcotic Cell of State of Gujarat had been to Surendranagar and was moving towards Surendranagar from Ahmedabad and when they were somewhere near Gebansha Pir Dargah and made a halt for taking tea etc., they had received secret information against the appellant

accused. Though the informant might not be aware about the status of PI Mr. Chauhan, but undisputedly, he was an officer empowered u/s 41 of the N.D.P.S. Act when he received information from the informant. The entire team came into action thereafter and before doing actual exercise of carrying out search and seizure, Mr. Chauhan sent information received by him to his immediate official superior -Superintendent of Police, Narcotic Cell, Ahmedabad, in writing in a sealed envelope. The exercise which was not required to be done, if it is carried out by Mr. Chauhan, would not change the status of Mr. Chauhan or would not make him an officer falling under the category of the officers referred to in Section 42 of the N.D.P.S. Act. Non-production of the report prepared by Mr. Chauhan and sent to his superior officer with Constable Mr. Desai, whether would have any bearing on the merit of the case, is a different question altogether, but it is not possible for us to say that the arguments placed by Id. APP Mr. Raval that Mr. Chauhan being a gazetted officer empowered u/s 41 of the N.D.P.S. Act, there was no need for him to undergo the formalities prescribed u/s 42 of the N.D.P.S. Act, can not be said to be an exercise of wriggling out from the contingency that has taken shape during the investigation and then in turn while leading evidence before the trial Court. We would like to quote some part of the decision in the case of G. Srinivas Goud (supra). It has been observed in paras 8 to 10 as under:-

58. The question for our consideration is: whether it is necessary for officers of the gazetted rank to comply with Sub-section (2) of Section 42 i.e. send the information taken down in writing by the officers to immediate official superior within seventy-two hours. According to the learned counsel for the appellants, Section 42(2) is mandatory and covers all officers including officers of gazetted rank. It does not make any distinction between a gazetted and a non-gazetted officer and, therefore, all empowered officers must comply with Sub-section (2) of Section 42.

9. It will be seen from Section 41(2) that it refers to only officers of gazetted rank and it is such officers who can authorize their subordinates, not below the rank of peon, sepoy or constable, to carry out arrest, search or seizure. The function of arrest, search and seizure carried out u/s 42(1) is by officers who do not have warrants or authorization in their hands before proceeding to take action. This is as per the heading of the section which reads : Power of entry, search, seizure and arrest without warrant or authorization. u/s 41 it is the specified Magistrate who issue warrants of arrest and it is officers of gazetted rank, who give authorization in favour of their juniors. Provisions of Sub-section (2) of Section 42 are meant to cover cases falling u/s 42(1). Therefore, in our view, the requirement u/s 42(2) need not be extended to cases of arrest, search and seizure by officers of gazetted rank. The officer of gazetted rank while authorizing junior officers u/s 41(2) knows what he is requiring them to do and, therefore, there is no need for reporting. For this reason Section 41 does not contain any such requirement. The need for reporting u/s 42(2) arises because the officer proceeds without authorization in terms of Section 41(1) or 41(2). The

requirement of informing the immediate official superior u/s 42(2), in our view, has to be confined to cases where the action is taken by officers below the rank of gazetted officers without authorization.

10. It will be anomalous to say that officers of gazetted rank who are conferred with power to authorize junior officers to carry out arrest, search and seizure, are required to report to their superior officers when they carry out arrest, search or seizure on their own. As already seen the rationale for this provision of informing superiors appears to be that when the arrest, search and seizure is without authorization by gazetted rank officers, the officers taking action must keep their superiors informed. The superior officers must know about the action taken by their subordinates. However, the position of gazetted rank officers, in view of their rank and seniority and power to authorize subordinates to proceed to action, is totally different. They are the source of power of authorization. The gazetted rank officers enjoy special position and privileges under the Act. They need not be equated to officers taking action without authorization or warrants. The requirement of sending information to superior officers under Sub-section (2) of Section 42 can not be insisted upon in their case. There is no bar in the statute to functions of arrest, search and seizure being carried out by the officers of the gazetted rank themselves. When they act on their own, they do not have to report to their seniors on such things.

9. In the case of Abdul Rashid (supra), the officer who has carried out the search, as appeared from the facts reflected in the said decision, was also a Police Inspector, but the question before the Apex Court cropped up was whether the State can change the entire stand that no formalities either u/s 41 or u/s 42 of the N.D.P.S. Act was required to be carried out because it was a search of a person in a public place. So, if the decision in the case of Abdul Rashid (supra) even if not distinguished, then also it would not have helped Id. Counsel Mr. Ajmera for the appellant because in para-15 of the said decision, the Apex Court has mentioned specifically that the Police Inspector who carried out the search of the appellant Abdul Rashid, was not a gazetted officer. So, he might not be a gazetted officer at the relevant point of time. However, in the present case, Mr. Chauhan was placed in a State Narcotic Cell and CID Crime Branch and is working for combating of sale, storage and trafficking of narcotic drugs and psychotropic substances and was a Police Inspector. The State of Gujarat has empowered a particular class of officers u/s 41 and notification issued thereunder includes Police Inspector. So, we are not inclined to accept the say of Id. Counsel Mr. Ajmera that non-production of a report with the copy of the gist of information taken down in writing by Mr. Chauhan and non-examination of Police Constable Mr. Desai with whom report was sent by Mr. Chauhan to Superintendent of Police at Ahmedabad, should be equated with violation of Section 42(2) of the N.D.P.S. Act and that solely on this ground, advantage should be given to the accused. Suppression of any document though available with the prosecution or any relevant material evidence if is not placed before the Court, then the effect of it can be appreciated by the Court while evaluating the

entire set of evidence available on record, but it would not be legal or proper for the Court in the present set of facts to say that the conviction should be turned down merely because a written report sent by Mr. Chauhan through Constable Mr. Desai to Superintendent of Police allegedly prepared by him before carrying out search of the accused and seizure of the contraband article Charas, is not produced, the conviction recorded by the Id. Trial Judge is bad as the same is in breach of the provisions of Section 42(1) & 42(2) of the N.D.P.S.Act.

10(i) Inadequacy of evidence placed before us by Id. Counsel Mr. Ajmera so far as the scheme of Section 50 of the N.D.P.S.Act is concerned, we are of the view that the prosecution has led satisfactory evidence by examining police officers Mr. Chauhan and Mr. BN Parmar. Merely because these two witnesses are police personnel and they are interested in the result of the case, their evidence should not be discarded. When the Court is supposed to appreciate the evidence of police personnels and that too of the status having interest in the result of the case, the Court should remain doubly conscious and oral evidence of such witnesses should be scanned closely or the Court should try to seek some corroboration. One police officer can corroborate another or police witness can get corroboration from the documents produced and proved. In the present case, the oral say of Mr. Chauhan as well as Mr. BN Parmar as regards the compliance with Section 50 of the N.D.P.S.Act gets corroboration from the panchanama Exh.20. Of course, both the panchas have not supported the case of the prosecution, but this very panchanama has been proved by Mr. Chauhan who is the officer who has drawn the panchanama. So, one part of the panchanama clearly corroborates the oral version of Mr. Chauhan as well as Mr. BN Parmar that before search of the person suspect namely the appellant accused, he was asked a positive question whether he wants to get himself searched in the presence of any gazetted officer or Magistrate and it is in evidence that answer of the suspect was in the negative and, therefore only, he was searched. Of course, the crucial question raised before us by Id. Counsel Mr. Ajmera is that for the sake of arguments even if it is accepted that some exercise of informing the accused was done by Mr. Chauhan and his team, then at what point of time this exercise was carried out and whether such exercise carried out by Mr. Chauhan is genuine exercise or merely a paper work done only with a view to get rid of the obligation required to be discharged as per the scheme of Section 50 of the N.D.P.S.Act. It is true that the say of the prosecution is that this exercise was carried out before carrying out the formal search of the accused, but in view of the answer given by Mr. Chauhan in the cross-examination that when panchanama was drawn and copy of seizure memo regarding contraband article Charas was prepared, the accused was already arrested. Of course, Id. APP Mr. Raval has attempted to explain that word Aatak in vernacular Gujarati uttered by Mr. Chauhan in the cross-examination, should be equated with detention and not with arrest. However, said explanation is not found acceptable especially when none of these two material documents bear time. It appears that only with a view to avoid conflict in timing, none of these two documents bear time. In the

same way, it is also not clear that at what exact point of time, Mr. Chauhan had received information with details as to description of the accused. It appears that the first part of the panchanama was over by 18.05 hours. However, the place of preparation of the first part of the panchanama and the place where search was carried out, are different and there is a reasonable distance between aforesaid two places. When it is the case of the prosecution that at 16.30 hours they were able to locate and intercept the accused when he was in the area nearby M.P. Shah College and he was about to reach one temple of Vasukidada, then written intimation allegedly given to the accused must have been prepared some time after 16.30 hours and prior to 19.50 hours. It is clear from the second part of the panchanama that drawing of the panchanama had commenced at 18.05 hours and that exercise lasted for about one hour and there is no reference of handing over writing allegedly prepared in compliance with Section 50 of the N.D.P.S. Act. It is true that there is a reference of the writing executed and signatures of the panchas as well as accused obtained on the said writing, but narration in the panchanama clearly reveals that the same is in descriptive manner. So, at the time of obtaining signatures and handing over original writing Exh.21 to the accused, Mr. Chauhan could have mentioned the time. Same is the situation qua the seizure memo. It also does not bear exact time of seizure of contraband article Charas from the person of the appellant accused. It is in evidence that contraband article was taken out from the pocket of the Zabhbha put on by the appellant accused by Mr. Chauhan himself. It does not emerge from the evidence available on record that the conduct of the accused at relevant point of time was abnormal. If drawing of second part of panchanama had commenced at 18.05 hours and was completed at 19.15 hours, then it can reasonably be inferred that while drawing panchanama, sun must have set because it was 16th January. So, all the formalities of recovery of contraband article, seizure of it and separation of samples as stated by Mr. Chauhan in his deposition, whether could have been done without the formal detention and arrest of the accused, is also a question. So, evidence of two police personnel and that too members of a raiding party, if appreciated, it is clear that recovery of contraband article appears to have been made immediately after interception of the suspect- appellant accused and rest of the formalities appears to be a paper work. Absence of examination of any independent witness is found relevant.

(ii) Accused was intercepted in a district Head Quarter like Surendranagar and at a place having colleges, a temple and some government offices in nearby area where the accused was intercepted. Some independent witnesses could have been cited and examined by the prosecution to add to the strength of the version of these two police personnel namely Mr. Chauhan and Mr. BN Parmar. If the person was taken in custody immediately after interception, then the procedure followed of preparation of written intimation to the accused in presence of panchas etc. in compliance with Section 50 of the N.D.P.S. Act would become irrelevant. Substantive compliance should be made and evidence of such compliance to the satisfaction of the Court should be led. In the present case, it

is on record that team has started from Ahmedabad on 16.01.1998 and it is not the say of the prosecution that they had started with a specific information with reference to the present appellant accused; may be general in nature. No other activity was done by the team on that day. So, the team probably had started only for one work i.e. search and seizure to be carried out qua the present petitioner, is the impression created. In this fact situation, non-production of the copy of the information received by Mr. Chauhan and report sent by Mr. Chauhan to his superior i.e. Superintendent of Police, Narcotic Cell with Police Constable Mr. Desai, more particularly when other papers were submitted along with original documents like panchanama Exh.20, seizure memo Exh.23 and crucial document Exh.21 etc., there was no reason for not supplying the copy of the information reduced in writing to Investigating Officer, Surendranagar Police Station immediately or at any time thereafter. It is true that Mr. Chauhan was not under an obligation to reduce the information in writing, but when he had opted to do so, then absence of production of that document gives rise to a big shadow of doubt and it can be argued that as the information that was reduced in writing was materially different than mentioned in the panchanama, as to the look, name and age of the accused, it has been suppressed.

(iii) Examination of Mr. Desai to corroborate the version of Mr. Chauhan and Mr. Parmar on this aspect, would have created confidence in the mind of this Court and in the say of the prosecution. So, in the present case, recovery and seizure of contraband article Charas from the conscious possession of the present appellant is found stained with serious procedural irregularity. In NDPS cases, this Court as well as Apex Court in number of cases, has distinguished violation of procedural formalities in two categories viz. serious violation and violation which can not be termed as serious infirmity or irregularity which can be ignored. Totality of facts available in the present case takes us to one inference that the nature of irregularities committed in the present case are serious in nature and fatal to the prosecution case and such violation should not be ignored considering the severity of punishment prescribed. There is no trustworthy and adequate evidence to show that substantial compliance with Section 50 of the N.D.P.S. Act has been made in the present case and contraband article has been recovered and seized as per the need of the situation. Non-support from panchas becomes significant when evidence of police officials or say of the members of the raiding party needs satisfactory corroboration. In such a situation, independent witness can support the case of the prosecution. However, here in the present case, both these elements i.e. supporting evidence by panch witnesses or by any independent witness, is absent. Part of the panchanama that has not been proved, can not be read as substantive piece of evidence and suggestions made to the hostile witnesses namely panch witnesses during the cross-examination by Id. PP, would not become a legal and admissible evidence, in absence of corroborative evidence. Narration of conversation that has taken place between PI Mr. Chauhan and panchas or between PI Mr. Chauhan and suspect intercepted, would be merely a statement and the same can not be read as substantive piece

of evidence as a part of panchanama. This narration is simply a background of actual procedure done by the chief of raiding party.

11(i) The Courts have given weightage to the fairness and transparency in carrying out search and seizure operation and that too by authorized officer as also fairness in conducting the investigation, which is a prime consideration. So, to show that till PI Mr. Chauhan got information against the accused by name when they have incidentally stopped for tea break somewhere near Gebansha Pir Dargah during the course of their journey to Surendranagar, they were not aware at all that they have to carry out some operation in the nearby area and that it was not even within the knowledge or mental background. The Investigating Agency could have collected evidence of time of departure of the said team from Ahmedabad and any entry, if made, in the register of the office of PI Mr. Chauhan and copy of the log-book maintained of the vehicle in which raiding party was traveling and this evidence also could have been led before the trial Court. It appears from Exh.19- a telephone bill issued by STD Booth Owner that telephonic conversation has taken place for 32 Minutes & 18 Seconds and recipient was the person having telephone No. 09824023985. There is no formal evidence on record to show that in whose name aforesaid telephone number is allotted/subscribed. It appears to be a mobile telephone number, but in absence of any evidence, the Court shall have to rely upon the bare words of Mr. Chauhan wherein he has stated that he had talked to his immediate official superior " Superintendent of Police at Ahmedabad on that telephone number and he was appraised about the information received etc. It is rightly argued by Id. Counsel Mr. Ajmera that when the information reduced in writing was sent along with the report with special messenger i.e. with Constable Mr. Desai to Superintendent of Police, Narcotic Cell, Ahmedabad, why the officer (Mr. Chauhan) should talk with his superior for more than half an hour? At least, Mr. Chauhan could have said on oath that the telephone number shown in the telephone issued by STD Booth owner and tendered in evidence by him, is a mobile telephone number of his immediate official superior. Unless the witness states something in the nature of evidence, defence counsel is not supposed to seek clarification qua the ambiguity left out. Minor conflicts require to be ignored, but some conflict in evidence, may be minor, gets importance and becomes major and relevant in the background of other important and relevant aspects of the case. There is no clear evidence as to the distance between the tea-stall where the raiding party had stopped incidentally i.e. near Gebansha Pir Dargah and place where accused was intercepted. It is in evidence that there is no tea-stall in nearby area of Gebansha Pir Dargah. There is conflict in evidence as to the distance between the place where suspect accused was intercepted and Gebansha Pir Dargah where raiding party had made a halt for tea-break incidentally. There is no evidence as to the amount of traffic in the evening time in that area. It has come on record by way of a suggestion in the cross-examination of Mr. Chauhan that one telephone booth -STD PCO Booth is near Milan Cinema, but there is no evidence as to the distance between telephone booth and place where two

panchas were called. As per the evidence, exercise of dispatching information to superior official and making telephone call to the very officer was over prior to the time when panchas were called. The first part of panchanama was over by 18.05 hours as mentioned earlier and it is mentioned in the first part of panchanama that panchas were called near Gebansha Pir Dargah and at the spot where there are three roads. The place where Mr. Chauhan has received secret information is somewhere near Gebansha Pir Dargah, may be same place where panchas were called. It is not satisfactorily explained by two witnesses namely Mr. Chauhan and Mr. BN Parmar that what prompted them to go to the telephone booth and to return back to that very place where they received information.

(ii) It emerges from record that the place where the accused was intercepted, was towards Surendranagar from Vadhawan town and suspect was to come from Vadhawan town and was to proceed towards Surendranagar city. In this situation, whether raiding party personally was aware about the history of the appellant accused or not become relevant. It is the case of the prosecution that Mr. Chauhan and raiding party team was informed about involvement of present appellant accused in another case under N.D.P.S.Act. Of course, there is no formal evidence led by the prosecution in this regard, but at one place, during the course of cross-examination, Mr. Chauhan has stated on oath that he or his team was not aware about the history of the appellant accused. So, this minor conflict has become relevant and important in absence of copy of the information reduced in writing which is not produced. It is possible to argue that information was in reference to a person having some involvement in a case under N.D.P.S.Act vis-a-vis the description and other details. These aspects have not been taken care of by the Id. Trial Judge.

12. For the sake of arguments, even if it is accepted that there is an element of substantial compliance with the provisions of Section 50 of the N.D.P.S.Act, but that by itself would not add any strength to the case of the prosecution because one more infirmity is non-availability of the report on record prepared u/s 57 of the N.D.P.S.Act by Mr. Chauhan. It is true that compliance u/s 57 of the N.D.P.S.Act is directory and not mandatory, but when written information received is not available on record, though as per the rule of best evidence it should have been placed before the Court, and the fact that the evidence as to the compliance with Section 50 of the N.D.P.S. Act is hazy in nature, non-availability of the report allegedly prepared in compliance with Section 57 of the N.D.P.S.Act creates serious prejudice. It is true that documents and set of papers were submitted to Surendranagar Police in couple of minutes of completion of search and seizure exercise, but when it has come on record that report u/s 57 of the N.D.P.S.Act was prepared by Mr. Chauhan and it was sent to his superior, there was no reason for the prosecution to suppress that document. Undisputedly, Police Station Officer -P.W.8 ASI Mr. Vaghela was not immediate official superior of Mr. Chauhan, PI of Narcotic cell. Section 57 of N.D.P.S.Act casts duty on the person who makes arrest or seizure of a contraband article, substance or drug under the N.D.P.S.Act. It is provided in Section 57 of the

N.D.P.S.Act thus;-

57. Report for arrest and seizure:- Whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

13. In the present case, therefore, Mr. Chauhan was supposed to send the written report within 48 hours next after the seizure of contraband Charas to his immediate official superior wherein he was supposed to mention that seized articles have been handed over to Surendranagar Police Station and he has filed a formal complaint. Non-production of such report would add to infirmity. Merely because the provisions are held to be directory, it can not be ignored for giving go-bye. Mr. Chauhan has said that he prepared and sent it to his immediate superior, then with a view to show transparency, the same could have been produced before the Court. Non-preparation of such report is materially different from non-production of a prepared report in a proceedings of a case under the N.D.P.S.Act. Such non-production can reasonably be explained. However, the prosecution has failed in explaining as to why such report was not made part of the chargesheet or it was not produced even during the deposition of Mr. Chauhan- author of the said report.

14. It is true that in the present case, the accused was intercepted and searched in a public place, but in view of the ratio of the decision in the case of Abdul Rashid (supra), we would not allow the submission of the nature whereby it can be said that the search and seizure of the contraband substance was u/s 43 of the N.D.P.S.Act and, therefore, there was no need in the present case to reduce in writing the information received as contemplated u/s 42(1) & 42(2) of the N.D.P.S.Act and that there is compliance of Section 50 of the N.D.P.S.Act, because after the judgment in the case of G. Shrinivas Goud (supra), the relevant observations made in the case of Abdul Rashid (supra) still hold the field. The relevant observations made by the Apex Court in this regard in the case of G. Srinivas Goud (supra), are already reproduced earlier in this judgment.

15. The arguments advanced by Id. APP Mr. Raval based on the decision of the Apex Court in the case of State of Rajasthan Vs. Ram Chandra, , wherein the Apex Court has observed that the object of the Act being that the search is conducted in the presence of a superior officer, in order to lend transparency and authenticity to the search, are not found acceptable in the background of the facts of the present case.

09.03.2006

16. It is true that no specific form is prescribed. The question whether requirements are satisfied, is to be tested on facts of each case is the ratio in the case of State of Rajasthan v. Ramchandra (supra). We have also considered the

ratio of another decision of the Apex Court placed before us in the case of Prabhashankar Dubey v. State of M.P. AIR 2004 SC 486 wherein the Apex Court has said that reasonable, fair and just procedure requires to be adopted. The Supreme Court, on facts, found that service of notice to the accused and evidence led in the cited decision was sufficient compliance of the requirement of Section 50 of the N.D.P.S.Act. However, we have also to consider some observations made by the Apex Court in the case of Prabhashankar Dubey (supra) that a line or word in judgment can not be read in isolation to impute a different meaning to observations made by the Court. So, when Id. APP Mr. Raval has argued that in the present case when Mr. Chauhan had handed over the written intimation to the accused and simultaneously signed by two panchas, can be said to be sufficient compliance within the meaning of Section 50 of the N.D.P.S.Act, but in view of above discussion, according to us, this exercise is not found trustworthy and nature of evidence available on record is not found adequate. In most of the decisions brought to our notice by Id. APP Mr. Raval, it has transpired that the Court on facts have recorded satisfaction that sufficient compliance of Section 50 of the N.D.P.S.Act has been made and in all cases the court also found that substantive compliance of Section 57 of the N.D.P.S.Act has also been made. On the other hand, in the case before us, there is no compliance of Section 57 of the N.D.P.S.Act. WE have also gone through the ratio of the decision of the Apex Court in the case of Joseph Fernandez Vs. State of Goa, . In this decision, the suspect was informed that whether he wishes to be searched in presence of a gazetted officer or Magistrate and thereafter exercise of search was carried out and the Apex Court observed that this can be said to be satisfactory and sufficient compliance of requirements of Section 50 of the N.D.P.S.Act. This very decision has been referred by the Apex Court in the case of Prabhashankar Dubey (supra), but it is now settled that there can not be any generalization or straight-jacket formula to prove the requirement of Section 50 of the N.D.P.S.Act. So, each case shall have to be decided on facts placed before the Court and nature of evidence led by the prosecution. So, in the background of the facts of the present case, we are inclined to say that the ratio of the decision in the case of Narayanaswamy Ravishankar Vs. Asstt. Director, Directorate of Revenue Intelligence, cited by Id. APP Mr. Raval, would not help the prosecution. In the cited decision, the authority of Revenue Intelligence were on International Airport, Chennai. The accused was intercepted and then searched. Nothing was recovered from the person of the accused, but the officer on duty found 5940 gms. of heroin concealed in the bottom of a suitcase which he was carrying. The Supreme Court found that Section 57 has been substantially complied with and as such contraband substance heroin was found from the suitcase and not from the physical search of the person accused, there was no need to comply with the scheme of Section 50 of the Act, is one of the findings of the Apex Court. That the accused was detained and recovery was made at 3.00 a.m. and formal arrest was made at 2.00 p.m. So, it is clear from the evidence that the accused was not arrested and he was simply intercepted and detained and searched in the early hours at about 3.00 a.m. In such a fact situation, whether there is any sufficient

compliance of the procedure required to be followed u/s 42 is appreciated by the Apex Court. So, the decision in the case of Narayan Swami (supra) does not carry the case of the prosecution any further because according to us, Mr. Chauhan being gazetted officer was authorized to carry out the search and seizure procedure being empowered officer. However, as discussed earlier, non-production of the information received by him and reduced in writing adversely affects the transparency and fairness and the same goes to the root of the genuineness of the search and seizure effected.

17. In the case of Babubhai Odhavji Patel, Vs. State of Gujarat, , the Apex court has observed that general information is not required to be reduced in writing, but specific information must be reduced in writing. In the present case, Mr. Chauhan has received a specific information and, therefore only, it appears that he was tempted to put it in writing though he was not required to do so he being gazetted officer, and has sent his report along with information received by him by a special messenger namely Police Constable Mr. Desai to his immediate official superior at Ahmedabad. Therefore, the fact of non-availability of the report and copy of the information can be considered as relevant aspect while appreciating the evidence ultimately led by the prosecution.

18. In the same way, decision cited by Id. APP Mr. Raval in the case of T. Thomson Vs. State of Kerala and Another, according to us, would not help the prosecution because the facts of the cited decision are materially different than the facts of the present case. In the case of T. Thomson (supra), Brown Sugar weighing 506 grms. was seized after search. The person who carried out the search was gazetted officer himself. The Supreme Court has observed in the cited decision that there was no need to have written authorization to carry out search. However, the case of the prosecution has been accepted because the Apex Court found that other statutory requirements have been complied with and the case of the prosecution was mainly based on voluntary statement recorded by the competent officer u/s 57 of the N.D.P.S.Act. In the same way, the decision in the case of Sajan Abraham Vs. State of Kerala, , also would not help Id. APP Mr. Raval. In this cited decision, it was argued that there is non compliance of Section 42 of the N.D.P.S. Act, but the prosecution has successfully brought evidence on record that on receipt of information as to the illegal sale of contraband substance, team has rushed to the spot immediately and some delay if caused in trapping the accused, might have led to his escape. So, the officer carrying out search with the team has rushed to the spot immediately apprehending escape of the accused and, therefore, the Apex Court has observed that the scheme of Section 42 of the N.D.P.S.Act whether has been complied or not, should be appreciated pragmatically. It appears that the Apex Court accepted the arguments placed by the prosecuting state because there was substantive compliance of Section 57 of the N.D.P.S.Act. Here in the present case, as observed earlier, there is no evidence as to compliance of requirements of Section 57 of the N.D.P.S.Act. It is true that the ratio of the decision in the case of State of Orissa Vs. S. Mohanty and Others, would apply to the facts of

the present case and, therefore only, it is observed by us that Mr. Chauhan was not under an obligation to reduce the information received by him in writing and to intimate the same to his immediate official superior as contemplated u/s 42 of the N.D.P.S.Act. In the decision in the case of S. Mohanty (supra), Deputy Supdt. Of Excise " a gazetted officer himself has undertaken the operation of search and seizure.

19. The decision of the Apex Court in the case of State of Rajasthan v. Gurmail Singh AIR 2005 SC 1578 (1st Supplement), would not help the appellant much wherein the Apex Court has upheld the order of acquittal recorded by the High Court and the Supreme Court was satisfied that there was convincing evidence as to sealing process adopted by the seizing officer and non-production of Malkhana register affected adversely to the merits of the case. Here, the prosecution has led satisfactory evidence that the recovered of muddamal Charas was handed over to Surendranagar Police Station and the sample was sent to FSL was having two sets of seals; one of raiding officer and another of Surendranagar Police Station and they were intact.

20. We are inclined to reverse the conviction recorded by the Id. Trial Judge observing that there is a reasonable dark shadow of doubt as to the search and seizure exercise carried out by the raiding party headed by Mr. Chauhan and non-compliance of Section 57 of the N.D.P.S.Act and doubtful compliance of Section 50 of the N.D.P.S.Act which vitiates the conviction. Though Mr. Chauhan was authorized to search the accused as an officer empowered u/s 41 of the N.D.P.S.Act, failure on his part to tender very relevant document-report to the Investigating Officer and in turn before the Court prepared by him on receipt of the information as well as non-production of information reduced in writing, thickens the doubt created in the mind of the Court. The prosecution has failed to clear said doubt by adducing cogent, convincing and reliable evidence. Hence, the impugned judgment and order of conviction and sentence vitiates on the count alone.

21. For the reasons aforesaid, present Criminal Appeal is hereby allowed. The impugned judgment and order of conviction and sentence dated 17.09.1999 passed by Id. Special Judge, Surendranagar in Special Case No. 1/1998 convicting the appellant accused Ajitbhai Ismailbhai Pinjara for the offences punishable u/s 8(c) R/w Section 21 of the NDPS Act and sentencing him to suffer R/I for 10 Years and to pay a fine of Rs. 1 Lakh (Rs. One Lakh only) I/d to further undergo S/I for 2 Years, is hereby quashed and set aside by giving benefit of doubt to the appellant accused. Fine if paid, be refunded to the appellant accused. The appellant accused, if in custody, is ordered to be set at liberty forthwith if not required to be detained in any other case. Bail bonds, if any, stand discharged.