

(2002) 05 GUJ CK 0013
In the Gujarat High Court
Case No : Criminal Appeal No. 314 of 1999

Mahesh Laxmanbhai Patel APPELLANT
Vs
State of Gujarat RESPONDENT

Date of Decision : 10-05-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100, 102(3), 157, 165, 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 42, 52, 57, 8

Citation : (2002) 4 GLR 3127

Hon'ble Judges : R.R. Tripathi, J;K.R. Vyas, J

Bench : Division Bench

Advocate : Rajesh M. Agrawal, for Mehul Sharad Shah, for the Appellant; K.T. Dave, APP, for the Respondent

Final Decision : Dismissed

Judgement

Ravi R. Tripathi, J.—This appeal is filed u/s 374(2) of the Code of Criminal Procedure, 1973 against the judgement and order dated 8th March, 1999 passed by the learned Additional City Sessions Judge, Court No. 15, Ahmedabad in Sessions Case No. 208 of 1998, by which the appellant is convicted under Sections 8(C) and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) and punished with R.I. for 10 years and a fine of Rs. 1 lac (Rupees One lac Only), in default to undergo R.I. for six months.

2. The name of Mr. Mehul S. Shah was notified as the learned Advocate for the appellant, Mr. Shah produced a letter dated 16th March, 2002 addressed to the appellant, seeking his instructions as to whether he has to conduct the matter or the appellant wants to engage another advocate. Mr. Shah has also produced a xerox copy of a post card dated 25th March, 2002 addressed to him by the appellant. Mr. Shah submitted that as indicated in that post card, he has already handed over the papers to Mr. R.M. Agrawal, who may be permitted to address the Court. Both the letters are taken on record and Mr. Agrawal is permitted to

make his submissions on behalf of the appellant.

3. The facts giving rise to the present criminal appeal are as under :

3.1 On 27th May, 1998, at 10.15 a.m., Police Inspector (Narcotic Cell), Ahmedabad, received information from his informant that a person named Mahesh Patel wearing black T-shirt with linings and black pant, aged about 35 years, is selling packets of brown sugar near the gate of Municipal Garden. The officer, after verification of the information given by the informant, recorded it in the register kept in the office at 10.30 a.m. Thereafter, he arranged for panchas and essential articles required for carrying out raid. A report about the information noted down in the register was made to the Superintendent of Police of Narcotic Cell. The members of the raiding party and the panchas were informed about the information received and a preliminary panchnama was drawn between 10.45 a.m. to 11.00 a.m. The raiding party and police officers proceeded in a Government Jeep from the office of the Narcotic cell and passing through Chamunda Bridge, Sukhramnagar Cross Roads, New Cotton Mill, reached Khokhara Circle, near Rokadiya Hanuman. The Government vehicle was stopped there and the raiding party with the Police Sub Inspector (PSI) and other police personnel arranged themselves for a watch at the gate of the Municipal Garden. During this watch, at about 11.45 a.m., from the direction of Rukmani Darwaja Hospital, a person answering the description given in the information was seen coming. He was stopped by the PSI, Gaekwad, and other members of the raiding party including Police Inspector (PI) and the panchas also reached on the spot. In the presence of the panchas, the accused was enquired of his name. In response to which, he disclosed his name to be Maheshbhai Laxmanbhai Patel, residing at 127/996, Gujarat Housing Board, Khokhara, Ahmedabad. The appellant, original accused (hereinafter referred to as the appellant), was informed in the presence of panchas that two Police Inspectors are the Gazetted Officers and that other persons are the members of the raiding party and panchas. He was also informed that the police party has information that he possesses brown sugar packets and, therefore, he is to be searched. He was also asked that if he would like the search to be carried out in the presence of any Gazetted Officer or a Magistrate, then the same may be arranged. He was also asked as to whether he would like to search the panchas and the members of the raiding party. The appellant, in the presence of the panchas, replied that he does not want his search to be carried out in the presence of any Gazetted Officer or a Magistrate and that he does not want to search the panchas or the members of the raiding party either. The appellant was given this information in writing and as a token thereof, in the presence of the panchas, he signed the office copy.

3.2 On searching the appellant in the presence of the panchas, from the right pocket of the pant of the appellant, a red colour handkerchief with checks" design was found. In that handkerchief, nine packets of butter paper and nine packets of paper with lining were found. On opening one of the packets, brown colour powder was found, which was tested with the help of Kit Box by PSI, Shri

Gaekwad, and the same was found to be brown sugar. From the left pocket of the pant of the appellant, Rs.2400=00 were found consisting of one note of Rs.500=00, six notes of Rs.100=00, twenty notes of Rs.50=00 and thirty notes of Rs.10=00.

3.3 The powder contained in all the packets was taken in a plastic bag. It was sealed with the help of heat and the same was then kept in a white paper packet, which was tied with a thread by placing a slip containing the signatures of the panchas and the Police Officers and a seal bearing inscription of "PI NDPS GS CID Crime Ahmedabad" was applied. The empty butter papers, lining papers and brown colour gum tape, which was applied at the end of the packets, were wrapped in a white paper. The same was tied with the help of thread and following the same procedure, as aforesaid, it was sealed. The substance, on weighing that packet, was found to be 6 Grams.

3.4 After having found 'brown sugar' from the appellant, a seizure memo was prepared, in the presence of the panchas and was served by obtaining signature of the appellant on the office copy of the same.

3.5 The police party thereafter took the appellant to his residence to search as to whether any more narcotic substance is kept in his house. On searching the house in the presence of the panchas, nothing objectionable was found. The panchnama was completed and at 1.30 p.m., the appellant was arrested for the offence punishable under Sections 8 to 21 of the NDPS Act. The appellant was served with the arrest memo after obtaining his signature on the office copy.

3.6 Thereafter, a detailed complaint for the offence under Sections 8(C) and 21 of the NDPS Act was filed. After which, the accused, seized muddamal along with the panchnama were handed over to the Police Station Officer (PSO) of Amraiwadi Police Station for registering the offence along with a forwarding letter.

3.7 The PSO of Amraiwadi Police Station, on receipt of the complaint and the accompanying papers, along with the muddamal and the accused, registered the offence, being Prohibition Crime Register No. 5246 of 1997, and issued receipt for muddamal, in terms of the description of the same in the panchnama. The investigation was handed over to PI, Shri B.D. Jhala. The muddamal, 'brown sugar' which was received in sealed condition, was handed over to him. Cash Rs.2,400=00 and the packet consisting of 18 papers were handed over to the Crime Writer, Shri Sursingh Raysingh. The FIR was registered in the station diary. Shri B.D. Jhala, PI, sent the muddamal brown sugar to the FSL on 28.5.1998, that is, on the next day, with a forwarding note, with the Police Sub Inspector (PSI), Shri V.K. Rathod, who handed over the same in sealed condition to the FSL, Narcotic Cell. A receipt was issued by the FSL, which was handed over to PI, Shri B.D. Jhala. The analysis report indicated that the substance analysed contained opium, alkaloids like morphine, codeine, thebaine, narcotin, papaverine and also acetylene codeine, 6 monoacetylmorphine and diacetylmorphine (heroin). On receipt of the report and on completion of the

investigation, the appellant was chargesheeted for the offence punishable under Sections 8(C) and 21 of the NDPS Act in the City Sessions Court, Ahmedabad.

4. The learned Additional City Sessions Judge framed charge at Exh.1 against the appellant for the offences punishable under Sections 8 and 21 of the NDPS Act. The charge was read over and explained to the appellant, who pleaded 'not guilty' to the same and claimed to be tried. Therefore, the prosecution, to prove its case against the appellant, had examined, (1) PW1, Exh.6, R.K. Bhatt; (2) PW2, Exh.18, PSI, H.M. Gaekwad; (3) PW3, Exh.19, K.I. Solanki, PSO of Amraiwadi Police Station; (4) PW4, Exh.23, M.B. Parmar, Panch; (5) PW5, Exh. 24, B.B. Thakore, Panch; (6) PW6, Exh. 25, V.K. Rathod, PSI of Amraiwadi Police Station; (7) PW7, Exh. 27, B.D. Jhala, PI of Amraiwadi Police Station. The prosecution had also adduced documentary evidence, that is, information received and recorded in writing at Exh.7, report to the Superintendent of Police, State Narcotic Cell, CID Crime, Ahmedabad, at Exh.8, intimation given to the appellant about the search as to whether he would like to have search to be carried out in the presence of any Gazetted Officer or a Magistrate at Exh.9, panchnama at Exh.11, arrest memo at Exh.12, complaint at Exh. 13, forwarding letter to PSO - Amraiwadi Police Station to register the offence at Exh.14, Ravanagi Nondh (muddamal forwarded to FSL) at Exh. 15, receipt issued by FSL for having received muddamal at Exh. 26, and FSL Report at Exh. 30. After recording of the evidence of the prosecution witnesses was over, the learned Sessions Judge explained to the appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his statement as required by Section 313 of the Code of Criminal Procedure, 1973. The appellant, in his statement, denied the case of the prosecution, but did not lead any evidence in support of his defence that, 'the case of the prosecution was false'. However, the appellant submitted a written statement, as contemplated by Section 233(2) of the Code of Criminal Procedure, 1973, and contended that 'he is falsely implicated in the case on account of his quarrel with one Vinodbhai Dantani, Police Constable', and that 'he was lifted from his residence' and, therefore, he should be acquitted.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the appellant was found in possession of 6 grams of brown sugar and that he had committed offences punishable under Sections 8(C) and 21 of the NDPS Act. It was also held by the learned Judge that it was proved by the prosecution that mandatory provisions of the NDPS Act were complied with and the appellant could not satisfy the Court that, breach of any of the mandatory provisions of the NDPS Act was committed by the prosecution. After holding that the appellant had committed offences punishable under Sections 8(C) and 21 of the NDPS Act, the learned Advocate for the appellant was heard regarding sentence, as required by Sub-Section (2) of Section 235 of the Code of Criminal Procedure. After hearing the learned Advocate for the appellant, the learned Judge passed an order of punishment dated 8th March, 1999 referred to herein above against which the

present appeal is filed.

6. Mr. R.M. Agrawal, learned Advocate appearing for the appellant, submitted that there is violation of Section 57 of the NDPS Act and as Section 57 is held to be mandatory by the Honourable Supreme Court in the matter of Mohinder Kumar vs. State of Panaji, reported in AIR 1995 SC 815, there being a breach of mandatory provision, the conviction recorded and the punishment imposed are required to be quashed and set aside by this Court and the appellant is required to be acquitted. He submitted that in the alternative, even if Section 57 of the NDPS Act is not held to be mandatory, the police officer should not commit breach of the same, as the legislature has not enacted the same for committing breach of.

7. The learned Advocate for the appellant next submitted that Section 52(A)(4) is not complied with in the present case, inasmuch as the prosecution has withheld the primary evidence and produced only the secondary evidence, which according to him is not admissible in law and, therefore, the case of the prosecution must fail. He submitted that Section 51 of the NDPS Act provides that provisions of Criminal Procedure Code, 1973 shall apply to all warrants issued and arrests, searches and seizures made under this Act. As Section 102(3) of the Code of Criminal Procedure is not complied with, in view of the Division Bench's judgement of this Court in the case of Ahmed Mohmad Hakim Vs. State of Gujarat, , the appeal is required to be allowed. According to him, there is total non-compliance of the provisions contained in Section 102(3) of the Code of Criminal Procedure. He emphatically submitted that as even substantial compliance of the said provision is not made, the case of the prosecution must fail on that ground alone and the conviction recorded should be quashed.

8. The learned Advocate for the appellant submitted that Section 55 of the Act, whereby the police is to take charge of articles seized and delivered, is also not complied with in this case, which has caused serious prejudice to the appellant-original accused and, therefore, the benefit of that must flow in favour of the accused. He also submitted that while recording the statement of the accused u/s 313 of the Code of Criminal Procedure, the Court has not strictly complied with the provisions of the same in true spirit, inasmuch as no question about the documents pertaining to the compliance of Section 102(3) of the Code of Criminal Procedure were put to the accused.

The learned Advocate for the appellant also submitted that the complainant was the member of the raiding party and he had carried out the investigation. He submitted that thus, the investigation was vitiated and it was not a fair investigation and it is the accused, who must get the benefit of the same.

9. Mr. Agrawal, on resuming his arguments, reiterated all the aforesaid contentions. He next submitted that there is breach of Section 42 of the NDPS Act in the present case as the information was not taken in writing. Sub-Section (2) of Section 42 provides that, "an officer who takes down the information in

writing, under sub.section-1, shall sent a copy thereof to his immediate official superior." He submitted that in the present case, it is not on record that a copy of the information received was sent to the superior official. The learned Advocate concluded his arguments by saying that in view of the fact that both the panchas have turned hostile, there is no independent evidence supporting the case of the prosecution and, therefore, the case of the prosecution must fail. According to him, the evidence of the police officers in the present case is not that of "sterling quality", which is a must. He submitted that in absence of necessary corroboration, the contents of the panchnama should have been held as 'not proved' and once that is done, the seizure panchnama goes, then, nothing remains against the accused and he must be set at liberty forthwith.

10. Mr. K.T. Dave, learned Additional Public Prosecutor, appearing for the State, while replying to the contentions raised by the learned Advocate for the appellant, submitted that he supports the judgement and order of the learned Additional Sessions Judge in toto. He submitted that the learned Judge has taken all pains to consider all these contentions at the time of trial and has given convincing reasons for not accepting any of them. Mr.Dave also submitted that the learned Advocate for the appellant has tried to mislead this Court by not pointing out that he himself has appeared in Criminal Appeal No.12 of 2002 wherein all these contentions were taken, but were not accepted by a Division Bench of this Court consisting of Mr. Justice J.M. Panchal and Mr. Justice J.R. Vora, in their judgement dated 5th/6th February, 2002. Mr. Dave submitted that more particularly, first two contentions namely, Section 57 of the NDPS Act is held to be mandatory by the Honourable Supreme Court in the case of Mohinder Kumar (supra) was put forward for consideration of the Division Bench and the Division Bench in its elaborative judgement have turned down the same for the reasons set out in the judgement. He submitted that so far as Section 52 is concerned, it was also argued, but, the same is also turned down.

Mr. Dave, learned APP, submitted that even the argument that Section 50 can be said to have been complied with only when the officer concerned states to the accused that "he has a right" of being searched in the presence of a Gazetted Officer or a Magistrate, was advanced, but the same was negated by the Division Bench relying upon various decisions of the Honourable Apex Court.

11. We are at pains to record that Mr. Agrawal, a Senior Advocate, owes a duty to the Court to point out a judgement, more particularly, when Mr. Agrawal himself had appeared and argued the matter before another Division Bench, more so, when it was another Public Prosecutor, who had opposed him. It is not in good taste to argue a matter by urging the same points afresh before this Court without mentioning that he has already argued those points earlier before another Division Bench and they are concluded against him. We would have appreciated the submissions of Mr. Agrawal if they were to the effect that in view of the later decisions of the Honourable Apex Court, he wants this Court to take a different view of the matter than that of the earlier Division Bench, but then, Mr.

Agrawal did not do that. He argued the matter without even mentioning the aforesaid facts. It is painful that a Senior Advocate has not discharged his duties towards the Court and has not put any serious efforts to see that ends of justice is served. An advocate has to advance a cause of his clients, but at the same time, it is his pious duty and obligation towards the Court as well as towards the other side, to point out the decisions which may not be favourable to his case. Here, in this case, the learned Advocate, who appeared before the earlier Bench, advanced all these points at length, which are concluded against him by a judgement, made an attempt to suppress that judgement and argued the matter afresh and urged all those points afresh with a hope that he may obtain a judgement in his favour. Despite these facts, as what is at stake before us is the interest of the appellant and not of the Advocate, we have considered all the submissions of Mr. Agrawal, learned Advocate for the appellant, in detail. We could have turned down all his submissions on all these points, merely by saying that 'all these points are concluded by a Division Bench's judgement and we do not find any ground to take a different view than the one taken by the earlier Division Bench', but judicial propriety and discipline demands and, therefore, we discuss all the contentions of Mr. Agrawal in detail.

12. In support of his first submission that Section 57 of the NDPS Act is mandatory, the learned Advocate relied upon a judgement of the Honourable Apex Court in the matter of Mohinder Kumar Vs. The State, Panaji, Goa, . Mr. Agrawal, learned Advocate for the appellant, submitted that the Honourable Apex Court has held in paragraph 3 of that judgement that provisions of Section 52 and 57 of the Act are mandatory in character.

12.1 It will be appropriate to reproduce the relevant part of paragraph 3 of the said judgement. It reads as under :

"In Balbir Singh's case, it has been further stated that the provisions of Sections 52 and 57 of the Act, which deal with the steps to be taken by the officer after making arrest or seizure are mandatory in character. In that view of the matter, the learned counsel for the State was not able to show for want of material on record, that the mandatory requirements pointed out above had been adhered to. The accused is, therefore, entitled to be acquitted."

In earlier part of paragraph-3, the Honourable Apex Court has dealt with Section 42(1) and the proviso and also Section 42(2) and Section 50 of the Act. So far as these provisions are concerned, by a series of judgements, the Honourable Apex Court has held them to be mandatory, but so far as Sections 52 and 57 are concerned, the judgement says that "as held in Balbir Singh's case, the provisions of Sections 52 and 57 of the Act are mandatory in character". Therefore, we asked the learned Advocate to point out the relevant portion of the judgement of the Honourable Apex Court in the case of State of Punjab Vs. Balbir Singh, . The learned Advocate submitted that in paragraph 26 of the said judgement, the Supreme Court has set out its conclusions. Conclusion no.6 reads as under:

"The provisions of Sections 52 and 57, which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 and 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of the evidence regarding arrest or seizure as well as on merits of the case."

12.2 We have perused the judgement of the Honourable Apex Court at length and found that paragraph 25 of the said judgement deals with Sections 52 and 57 of the NDPS Act. Paragraph 25 reads as under :

"25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance of recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) u/s 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act-etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) u/s 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) u/s 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such

offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) u/s 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Section 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer u/s 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57, which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 and 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of the evidence regarding arrest or seizure as well as on merits of the case."

Mr. Agrawal submitted that he is conscious of the fact that the Honourable Apex Court has not declared the provisions of Sections 52 and 57 of the Act to be

mandatory in the decision of Balbir Singh (supra), but then, in view of the later decision of the Honourable Supreme Court in the matter of Thandi Ram Vs. State of Haryana, wherein the Honourable Apex Court has allowed the appeal by observing that, "In view of the pronouncement of this Court in the aforesaid cases and in view of the finding, as recorded in the judgement of the High Court that the provisions of Sections 55 and 57 have not been complied with the conviction is bad in law", he is pressing this point.

12.3 We have perused the judgement of the Honourable Apex Court cited by Mr. Agrawal and found that, it was represented before the Honourable Apex Court that, "Learned counsel for the appellant contended that in view of the decision of this Court in the case of State of Punjab v. Balbir Singh as well as the three-Judge Bench decision in the case of Mohinder Kumar v. State, Panaji, Goa, the conclusion of the High Court is not sustainable in law and the conviction of the appellant cannot be sustained."

12.4 Having perused all these authorities, namely, judgements of the Honourable Apex Court in the case of Balbir Singh (supra), Mohinder Kumar (supra) and Thandiram (supra), we found that the Honourable Supreme Court has not pronounced that Sections 52 and 57 of the Act are mandatory in character. The circumstances in which the Honourable Supreme Court made the following observations in Mohinder Kumar's case (supra) that, "In Balbir Singh's case, it has been further stated that the provisions of Sections 52 and 57 of the Act, which deal with the steps to be taken by the officers after making the arrest or seizure are mandatory in character", can be culled out from the judgement. Similarly, in Thandiram's case (supra), the learned counsel contended that in view of the decisions of the Honourable Supreme Court in the case of State of Punjab vs. Balbir Singh (supra) as well as in the case of Mohinder Kumar v. State, Panaji, Goa (supra), the conclusions of the High Court is not sustainable in law.

13. The learned Advocate could not point out from the judgement in the case of Balbir Singh as to where the Honourable Supreme Court has laid down that Sections 52 and 57 are mandatory. Therefore, there is no question of accepting the submissions made by Mr. Agrawal. It will also be appropriate at this stage to note that this very contention, when raised before the earlier Division Bench in the case of Raghubhai Gandabhai Bharwad vs. State of Gujarat in Criminal Appeal No. 12 of 2002 decided by Mr. Justice J.M. Panchal and Mr. Justice J.R. Vora dated 5th and 6th February, 2002, the Court after considering the judgements of the Honourable Apex Court in the case of Balbir Singh (supra), Mohinder Kumar (supra) and in light of other judgements of the Honourable Apex Court, namely, in the matter of Gurubax Singh vs. State of Haryana reported in (2001) 3 SCC 28 and in the matter of Sajan Abraham Vs. State of Kerala, , held that, "the provisions of Sections 52 and 57 are not mandatory and if substantial compliance with it is made, it would not vitiate the prosecution case".

14. Despite this, Mr. Agrawal, learned Advocate, went on submitting that the

Honourable Supreme Court has laid down the `guidelines for the High Court to appreciate the decisions of the Apex Court", in its decision in the matter between Pandurang Kalu Patil & Anr. vs. State of Maharashtra, reported at 2002 SAR 167. He relied upon the following paragraphs from that judgement :

"1. A Division Bench of the High Court of Bombay has ventured to disagree with a ratio which has become locus classicus and well stood the long period of half a century. That ratio is the one laid down in the celebrated decision in Pulikuri Kottaya and Ors. vs. Emperor (AIR 1947 PC 67). In that exercise, the Division Bench of the Bombay High Court had unwittingly overlooked another legal guideline delineated by a Full Bench of the Bombay High Court itself in State of Bombay Vs. Chhaganlal Gangaram Lavar, wherein Chief Justice Chagla speaking for the Full Bench had said thus :-

"So long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decisions of the Privy Council are still binding upon us and when we say that the decisions of the Privy Council are binding upon us, what is binding is not merely the point actually decided but an opinion expressed by the Privy Council, which opinion is expressed after careful consideration of all the arguments and which is deliberately and advisedly given."

2. Quite possibly the attention of the learned judges of the "Division Bench of the High Court would not have been drawn to the observations made by Chagla, C.J. of the Full Bench of the Bombay High Court in the aforecited decision, for, otherwise we are sure that learned Judges of the Division Bench would not have erred into the matter of judicial discipline.

7. It is unfortunate that learned Judges of the Division Bench of the Bombay High Court, in the impugned judgement, have chosen to set a locus classicus at nought without reference to any of the catena of judicial pronouncements rendered by High Courts as well as the Apex Court pertaining to the ratio in that decision. Nonetheless the guidelines laid down by the Division Bench of the impugned judgement did call for any interference as they related to the manner of recording the evidence in the trial court. However, we feel that guideline number `F" (mentioned in the impugned judgement) seems to be unnecessary and would only cause additional workload for the trial courts."

15. He also relied upon a judgement of the Honourable Apex Court in the matter between Suganthi Sureshkumar vs. Jagdeesan reported at 2002 SAR 180, wherein the Honourable Supreme Court was pleased to observe in paragraph 9 as under :

"It is impermissible for the High Court to overrule the decision of the apex Court on the ground that Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It was pointed out by this Court in Anil Kumar Neotia and

Others Vs. Union of India (UOI) and Others, that the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court.

Both these authorities are not required to bring home a well settled and accepted proposition of law. In fact, in support of the proposition that, 'under Article 141 of the Constitution of India, the law declared by the Supreme Court is binding on all Courts within the territory of India', no authority is required, but still the question remains as to whether in not accepting the submissions of Mr. Agrawal to the effect that, 'Sections 52 and 57 are mandatory', are we showing any disregard to the aforesaid proposition. From the aforesaid discussed, it is clear that the Honourable Apex Court has not laid down in the case of Balbir Singh (supra) that Sections 52 and 57 are mandatory. Still to insist to accept that the Honourable Supreme Court has declared Sections 52 and 57 as mandatory, is stretching a point too far.

16. The facts of the present case are required to be appreciated. So far as Section 57 is concerned, it provides for report of arrest and seizure. Whenever any person makes any arrest or seizure under this Act, he shall within 48 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. It is required to be noted that the Section uses the word "any person". The reason behind that is that so far as arrest and seizure is concerned, the NDPS Act has given wide powers on all superior officers to the rank of the peon, sepoy or constable for entry, search, seizure and arrest. In fact, u/s 42, arrest even without warrant is permissible. But then, various safeguards are incorporated in various sections, which the Honourable Apex Court, by now in number of authorities, has laid down to be mandatory. In the present case, the arrest and seizure is made by a police officer. Section 157 requires an officer to make a report forthwith to a Magistrate, who is empowered to take cognisance. In compliance of Section 157 of the Code of Criminal Procedure, a report is made, then, by no stretch of imagination, it can be said that there was no compliance of Section 157 of the Code of Criminal Procedure. PW1, R.K. Bhatt, PI, Exh.6, has deposed that after seizure of muddamal, arrest of the accused and preparation of the FIR, he handed over the same with a forwarding letter to the PSO of Amraiwadi Police Station. The PSO of Amraiwadi Police Station is examined as PW3, Exh.19. He has stated that on receipt of the complaint, papers, muddamal and the accused along with the forwarding letter, Exh. 14, he handed over the investigation to PI, Shri B.D. Jhala. Shri B.D. Jhala, PI, is examined as PW7 at Exh.27. He has deposed that on 27th May, 1998, he received a letter informing the accused of his arrest, seizure memo, statement of accused and muddamal receipt. The accused was arrested on 27th May, 1998 at 1.30 p.m. The accused was presented before the Metropolitan Magistrate Court No.5 and remand was sought for. This Court is of the opinion that this is a stricter compliance than the 'report' provided for u/s 57 of the NDPS Act. u/s 57, the officer has 48 hours" time to make report to his immediate superior officer. In the present case, the officer in-charge of the

investigation has made report on the next date, therefore, it cannot be said that there was violation of Section 57. We are of the opinion that in any case, this will amount to substantial compliance of Section 57 of the NDPS Act.

17. So far as the next contention about the non-compliance of Section 50 is concerned, the officer concerned has deposed that in the presence of panchas, the appellant was enquired of his name. Thereafter, he was informed that there are two police officers of gazetted rank. He was also enquired in writing as to whether he wants to take search of the panchas and the members of the raiding party and that whether he wants his search to be carried out in the presence of a Gazetted Officer or a Magistrate. The said writing is produced at Exh.9, which bears an endorsement of the appellant in his own handwriting to the effect that, "For my search, I do not want to call any Gazetted Officer or Magistrate, nor I want to search any person. You can proceed with search." This Exh.9 is also signed by the PI and two panchas. Mr. Agrawal submitted that the police officer ought to have informed the accused that, "he has a right to have his search before a Gazetted Officer or a Magistrate". Mere offer that a Gazetted Officer or a Magistrate can be kept present, if so desired by the accused, before the search is carried out is not sufficient.

In this regard, the learned Advocate relied upon various authorities, namely, (i) State of Punjab Vs. Baldev Singh, etc. etc., K. Mohanan vs. State of Kerala reported at 2000 SCC 1228, to contend that if the accused is not informed that 'he is having a right to be searched in the presence of a Gazetted Officer or a Magistrate', there is no compliance of Section 50 and there being a breach of mandatory provision, the same must result into failure of the case of the prosecution.

18. Mr. Agrawal, learned Advocate, pointed out paragraph 55 (sub.para-3) of the decision of the Honourable Apex Court in the matter of State of Punjab vs. Baldev Singh etc. etc.(supra), which reads as under:

"(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;"

The learned Advocate also pointed out the observations made by the Honourable Apex Court in paragraph 18 wherein the Apex Court has considered its earlier judgement in the matter of Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat, and has quoted paragraph 8 of that judgement, which reads as under :

"We are unable to share the High Court's view that in cases under the NDPS Act it is the duty of the Court to raise a presumption, when the officer concerned has not deposed that he had followed the procedure mandated by Section 50, that he had in fact done so. When the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the Court is duty bound to conclude that the accused had not had the benefit of the protection that Section 50 affords; that therefore, his possession of articles which are illicit under the NDPS Act is not established; that the precondition for his having satisfactorily accounted for such possession has not been met; and to acquit the accused."

(Emphasis were supplied by the Apex Court while considering the aforesaid decision in the case of Baldev Singh).

19. The learned Advocate also placed reliance on a judgement of the Honourable Apex Court in the matter between K. Mohanan vs. State of Kerala, reported in 2000 SCC (Criminal) 1228. He pointed out the contents of paragraph 6 of the said judgement, which reads as under :

"If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of a gazetted officer or a Magistrate, it cannot be treated as communicating to him that he had a right under law to be searched so. What PW 1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would have been the answer given by the accused cannot be gauged by us at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with".

While taking into consideration the submissions of the learned Advocate, what is required to be kept in mind is the object of Section 50 of the NDPS Act. By number of decisions, the Honourable Apex Court has held that the provisions of Section 50 are mandatory in character and its compliance is must for an officer, who is duly authorised u/s 42 and who is about to search any person under the provisions of Sections 41, 42 or 43, such officer shall take the person concerned, if he so requires, without unnecessary delay, to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

20. The Honourable Supreme Court while considering the provisions of Section 50 in the matter of Joseph Fernandez Vs. State of Goa, , has observed as under :

"Learned counsel tried to highlight a point that Section 50 of the Narcotic Drugs and Psychotropic Substances Act has not strictly been complied with by PW 8, the officer who conducted the search. According to the learned counsel for the appellant, the searching officer should have told the person, who was subjected to search, that he had a right to be searched in the presence of the gazetted officer or a Magistrate. In this case PW 8 has deposed that she told the appellant that if he wished he could be searched in the presence of the gazetted officer or a Magistrate to which the appellant had not favourably reciprocated. According to

us, the said officer is a communication about the information that the appellant has a right to be searched so. It must be remembered that the searching officer had only Section 50 of the Act then in mind unaided by the interpretation placed on it by the Constitution Bench. Even then the searching officer informed him that, "if you wish you may be searched in the presence of a gazetted officer or a Magistrate". This according to us is in substantial compliance with the requirement of Section 50. We do not agree with the contention that there was non-compliance with the mandatory provisions contained in Section 50 of the Act."

It is required to be noted that the decision of the Honourable Apex Court in the matter of Joseph Fernandez (supra) is of a Larger Bench.

In the present case also, it is on record that PW1, R.K. Bhatt, in his deposition, at Exh.6, has stated that when a person was approached by PSI, Gaekwad, who was answering the description given in his information, the deponent and the panchas reached to him. In the presence of the panchas, he (the accused) was enquired of his name. He replied by stating that his name is 'Maheshbhai Laxmanbhai Patel'; and, 'he is a resident of 127/996, Gujarat Housing Board, Khokhara". Thereafter, in the presence of the panchas, the police party introduced the Police Inspectors, who are Gazetted Officers along with other police personnel and panchas. He was also informed in the presence of the panchas that the raiding party has information that the accused is having packets of brown sugar and, therefore, he is required to be searched. He was also informed that if he wants to have his search carried out in the presence of any other Gazetted Officer or a Magistrate, the same can be arranged.

21. We have perused other evidence also which is on the record of the case, which supports the version of PW1, in view of that, we uphold the finding that there was compliance of Section 50 or in the alternative, there was substantial compliance of Section 50.

22. It is required to be noted that earlier, the same learned Advocate had advanced the same arguments before other Division Bench of this Court in the matter of Raghubhai Gandabhai Bharwad (supra). The Division Bench, after considering all the relevant authorities of the Honourable Supreme Court relied upon by the learned Advocate, namely, (1) State of Punjab Vs. Baldev Singh, 2 Kalayath Nassar vs. State of Kerala 2000 AIR SCW 271; (3) Babu vs. State of Kerala 1999 S.A.R. (Criminal) 780; (4) T.P. Razak @ Nagappan Razak vs. State of Kerala (1995) Supp. 4 SCC 456 ; and, (5) Bherulal Viraji Kumavat and Sodha Darbar Hamirsinh Vardhaji Vs. State of Gujarat, , and the authorities relied upon by the learned APP in this regard, namely, (1) Kalema Tumba Vs. State of Maharashtra and Another, , Sarjudas and Another Vs. State of Gujarat, , Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, , Birakishore Kar Vs. State of Orissa, , KANHAIYA LAL V. STATE OF M.P., (2000) 10 SCC 380 , negatived the contentions raised by the learned Advocate. In the present case also, the learned Advocate tried to put forward the same contention, but thereafter he did not

press and pursue the same.

The Division Bench has considered and followed a decision of the Honourable Apex Court in the matter of *Sajan Abraham Vs. State of Kerala*, wherein the Honourable Apex court is pleased to hold that while construing the provisions of the NDPS Act, one has to examine the facts of the case to come to the conclusion as to whether the prosecution has complied with the mandate of a provision which is mandatory, with a pragmatic approach. What is emphasised thereunder is that the law under the aforesaid Act being stringent towards the persons involved in the activity of illegal drug trafficking and drug abuse, the legislature has made certain provisions obligatory for the prosecution to comply with, which the Courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused, by casting an obligation on the prosecution for stricter compliance. The stringency is because of the type of crime involved under it, so that an accused does not escape from the clutches of the law. It is further held that the Court, while construing such provisions, should not interpret them so literally so as to render their compliance impossible and before drawing such an inference, it should be examined with a pragmatic approach.

23. The decision of the Honourable Apex Court in the matter of *Joseph Fernandez (supra)* was also considered and followed by the Division Bench. We also find ourselves in total agreement with the reasoning adopted by the Division Bench. We also follow the decision of the Honourable Apex Court in the matter of *Joseph Fernandez (supra)*. This Court, therefore, holds that when an accused is conveyed by the searching officer that, "if you wish, you may be searched in the presence of a Gazetted Officer or a Magistrate", there is sufficient compliance of the requirement of Section 50 of the NDPS Act.

24. We are also supported in our view by a Division Bench of this Court (Coram: B.C. Patel and A.L. Dave, JJ.), who, while deciding the matter of *Hanifbibi Abdul Majid vs. State of Gujarat*, Criminal Appeal No. 65 of 1996, on 16/06/2001, considered the decisions of the Honourable Apex Court in the matter of *Joseph Fernandez (supra)*, *P.P. Beeran Vs. State of Kerala*, and *K. Mohanan (supra)*, and followed the decision of the Honourable Apex Court in the matter of *Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd.*, . The Division Bench considered the following observations made by the Honourable Apex Court, in the said decision:

"It is neither desirable nor permissible to pick out a word or sentence from the judgement of this Court divorced from the context of the question under consideration and treat it to be the complete 'law' is declared by this Court. The judgement must be read as a whole and the observations from the judgement have to be considered in light of the questions which are before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this

Court and not to pick out words or sentences from the judgement, divorced from the context of the questions under consideration by this Court to support their reasoning."

25. The next contention raised by the learned Advocate for the appellant is regarding non-compliance of the provisions of Sub.Section 4 of Section 52A of the Act. He submitted that by not having done the inventory, by not taking the photographs of the narcotic drug or psychotropic substance and not drawing a list of samples under Sub.Section (2), which is to be certified by the magistrate, the prosecution has kept back the primary evidence. According to the learned Advocate, what is produced by the prosecution is "secondary evidence". The submission is not only devoid of any merit, but is absolutely misconceived. Mr. Agrawal, who is a Senior advocate, often appearing in the matters of NDPS, is not able to explain as to how the provisions of Sub. Section 4 of Section 52A of the Act are applicable to the facts of the present case.

On a plain reading of Section 52A, it is clear that it provides for, "disposal of seized narcotic drugs and psychotropic substances". Having regard to the hazardous nature of a narcotic drug or psychotropic substance, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant consideration, the Act has provided for disposal of the seized narcotic drugs or psychotropic substances.

In cases when the muddamal is so disposed, then under sub.section 4, it is provided that,

"Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub.section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

In the facts of the present case, what was found was 6 grams of brown sugar. As we have discussed above, from the evidence, it is clear that after the said substance was sealed in a proper manner, it was handed over to the PSO of Amraiwadi Police Station, who in turn handed over the said muddamal to PI, B.D. Jhala, who was entrusted investigation of the case and who in turn forwarded the same to the FSL next day. Therefore, there was no question of provisions of Sub.Section 4 of Section 52A, being applicable to the facts of the case on hand. Consequently, there is no question of withholding of primary evidence and producing secondary evidence. We are not able to appreciate the vehemence with which the learned Advocate is contending this point unmindful of the fact that the same has no application to the facts of the present case.

26. The next contention raised by the learned Advocate for the appellant is regarding non-compliance of the provisions of Section 102(3) of the Code of Criminal Procedure, that too, does not find favour with this Court. It is true that

Section 51 of the NDPS Act provides that provisions of the Code of Criminal Procedure shall apply to warrants, arrests, searches and seizures, but then it is equally important to note that these provisions are to apply "in so far as they are not inconsistent with the provisions of this Act." Section 102 of the Code of Criminal Procedure provides for power of police officer to seize certain property. Sub. Section 3 provides as under :

"Every police officer acting under sub.section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same."

In the present case, it is deposed by PW1 that on seizure of the contraband brown sugar, the same was sealed. Thereafter, the same was handed over in sealed condition to the PSO of Amraiwadi Police Station along with other papers, forwarding letter, panchnama, complaint and the accused. The PSO, PW3, Exh.19, has deposed that on receipt of the same, he registered an offence, made necessary entries in the muddamal register, etc. and handed over the muddamal to the investigating officer, who in turn sent it to FSL next day. Not only that it is also pointed out by the learned APP, Mr. K.T. Dave, that immediately a report was made to the Metropolitan Magistrate, Court No.7, Ahmedabad, on next day, along with the production report which contained all details, that is, name of the police station - `Amraiwadi Police Station", C.R.No.5246 of 1996, under Sections 8(C) and 21 of the NDPS Act, and the name and address of the accused, `Maheshbhai Laxmanbhai Patel", resident of Block No. 127/996, Gujarat Housing Board, Khokhara, Ahmedabad, arrested on 27th May, 1998 at 1.30 p.m. He was produced before the learned Magistrate for keeping in custody. The learned APP also pointed out, " an application for remand" submitted by the police authorities on the same day for the reasons set out therein, namely, "the accused had purchased the contraband brown sugar for Rs.1300 from one person named Firoz, who is stated to be a resident of Chorwad. As the accused does not have the full name and address of Firoz and only knows him by face, remand is sought so as to find out Firoz in order to enable the police authority to reach to the root of the menace of drug".

27. Mr. Agrawal, learned Advocate for the appellant, without taking trouble to have a glance at those papers which he could have if he so desired, submitted that there is violation of the provisions of Section 102(3) of the Code of Criminal Procedure. Mr. Agrawal relied upon a judgement of this Court in the matter of Shivabhai Gajmalbhai vs. State of Gujarat, reported in 1996 (2) GLR 264.

28. We have perused the same and we are of the opinion that the same has no application to the facts of the present case. In the present case, as discussed hereinabove, a report was already made to the learned Metropolitan Magistrate and the accused was produced before the learned Metropolitan Magistrate on

28/5/1998, that is, within 24 hours from the arrest of the accused. The contention of the learned Advocate is rejected as having found no merits.

At this juncture, the learned Advocate contended that the production report which is referred to is neither proved nor exhibited in this case. Not only that, the accused was not confronted with the same while recording his statement u/s 313 of the Code of Criminal Procedure. Before proceeding further with the hearing of the matter, we enquired from Mr. Agrawal as to whether he would like the accused to be confronted with this material, then we may undertake the necessary exercise before this Court. The learned Advocate did not opt for the same and submitted that, his submissions may be noted, for whatever worth. In view of 'non-opting' for an opportunity offered by the Court, we rejected the contention of the learned Advocate.

29. The next contention of Mr. Agrawal, the learned Advocate, was that there is no compliance of Section 55 of the NDPS Act.

It is a curious submission made by Mr. Agrawal. We are conscious while using the expression, "curious". Section 55 provides for police to take charge of articles seized and delivered. Mr. Agrawal submitted that once the searching/raiding officer sends the muddamal to the PSO, the PSO should remain in exclusive possession of the same and he should not hand over the same to any other officer. We are unable to agree with the submission made by Mr. Agrawal inasmuch as Section 50 only provides that, "an officer in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer, who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer in-charge of the police station."

In the present case, there is sufficient evidence on record to show that the searching/raiding officer after sealing the muddamal had handed over the same to the PSO of Amraiwadi Police Station, who, after making necessary entries regarding the offence, handed over the same to the Investigating Officer, PI, Shri B.D. Jhala, who, in turn, forwarded the same to the FSL on the next day. The object underlying in the Section is that muddamal must be taken in-charge by a responsible officer like PSO and the same should be kept in safe custody so as to avoid any tampering, which may, otherwise, cause serious prejudice to the accused. In the present case, we have taken care to verify from the papers of the FSL as to whether the muddamal which reached the FSL was in sealed condition. In Exh.30, it is mentioned that FSL received one sealed white paper parcel, tied with thread, having a seal with inscription, 'PI NDPS CID CRIME GS A"BAD". It is further mentioned that, 'the seal was intact' and was also 'tallying with the sample of the seal sent along with it'. It is also required to be noted that the said document from the FSL also mentions that below the seal,

there was a paper slip containing the name, signature and date as under :

"Dt. : 27/5/1998

Panch : (1) Parmar Mansukhbhai Bachubhai

(2) Bhikhaji Bachubhai Thakore

and, signature of PI, State Narcotic Cell, Gujarat State, Ahmedabad."

In view of the evidence on record, we have no doubt in our mind that muddamal had reached the FSL without being tampered. Merely for the sake of contending, to contend that the provisions of Section 55 are not complied with, is nothing but an attempt on the part of the Senior Advocate, Mr. Agrawal, to tire out this Court by arguing even irrelevant points. But then, as a Court of law, we have to examine each contention raised by the learned Advocate keeping in mind that no injustice be done to the client represented by him. We reject this contention of the learned Advocate having found no merit in the same.

30. The next contention of the learned Advocate for the appellant is that the complainant was a member of the raiding party and had also taken part in the investigation for some time, this has vitiated the investigation. Mr. Agrawal, though submitted that, there are plethora of judgements to the effect that when the complainant himself takes part in the investigation, the investigation is to be held to be bias or unfair, has cited none. There cannot be any dispute so far as the proposition of law is concerned. There is substance in the submission that 'the Honourable Supreme Court has held in number of authorities that it is always desirable that a complainant himself may not be the investigating officer'.

In the present case, the searching/raiding officer was PW1, PI, Shri R.K. Bhatt, who handed over the muddamal along with all papers and the accused to the PSO at Amraiwadi Police Station and the investigation was entrusted to the PI, Mr. B.D. Jhala, who is examined as PW7 at Exh. 27. The learned Advocate is not able to elaborate as to what does he mean by, 'raiding officer having taken part for some time in the investigation'. The investigation started only after the same was entrusted to PI, Mr. B.D. Jhala by the PSO of Amraiwadi Police Station. Before that what was done was the search, seizure and arrest under the relevant provisions of the Act, therefore, there was no question of taking part in the investigation by the seizing/raiding officer. Drawing of the panchnama and sealing of the muddamal recovered from the accused are part of the seizure itself. Mr. Agrawal is not able to point out as to what part the seizing/raiding officer has taken in the investigation of this matter. In this view of the matter, we are of the opinion that this contention has no substance, hence rejected.

31. On resuming the arguments overnight, Mr. Agrawal, learned Advocate for the appellant, started arguing that there is breach of Section 42 of the NDPS Act because the information received was not reduced in writing and as it was not reduced in writing, a copy of the same could not have been sent to the superior officer. We are at loss to accept and understand this contention of Mr. Agrawal in

view of the elaborate evidence on the record of the case. We are also not able to appreciate the real purpose of advancing of these arguments when there is no evidence on the record. The seizing officer has deposed in so many words that on 27th May, 1998, when he was present at the office of the Narcotic Cell, he received an information from his informant at 10.15 a.m., who informed that one Mahesh Patel wearing black T-Shirt with a white lining and black pant, aged about 35 years, is selling brown sugar packets outside the gate of Municipal Garden. The officer got the information verified and thereafter, recorded the same in the information register maintained in the office. The original was brought before the learned Judge conducting the trial wherein the said information was recorded at Entry No.1, a xerox of which is produced at Exh.7 in this case. If this is not to be said to have taken down in writing, then, this Court is at loss to think of any other better mode to comply with the provisions requiring the same.

Immediately, the police officer took steps to call panchas, gathered instruments to be taken in raid and made a report of the information recorded in the register to the Superintendent of Police of Narcotic Cell, a copy of which is produced at Exh.8. It is stated therein that "Today, when I was present in the office of the Narcotic Cell, my informant gave me information that one person named Maheshbhai Patel, who has put on black and white lining T-shirt and a black pant, aged about 35 years, is selling brown sugar packets outside the Gate of Municipal Garden on footpath. This information is recorded in the information register. Panchas are called. Taking instruments required in the raid, we are preparing to start for raid. This is for your information."

In our opinion, there is no breach of mandatory provisions of Section 42 of the Act.

32. Mr. Agrawal then contended that in view of the fact that both the panchas have turned hostile in the present case, it cannot be said that there is an independent witness supporting the prosecution case and in view of that, the evidence of the police officer should be of sterling quality so that it can be accepted. He submitted that as the panchas have not supported the contents of the panchnama, the same stands unproved. Mr. Agrawal relied upon a judgement of the Division Bench of this Court in the matter of Mohammad Jahangir Khan Pathan vs. State of Gujarat reported at 1994 (3) Crimes 543, wherein one of us, Mr. Justice K.R. Vyas, was a party to that judgement. We have perused the judgement. The relevant observations are as under :

"That merely because the panchas do not support the prosecution case, that by itself is hardly a ground to disbelieve the evidence of the police witness, if they are otherwise found dependable. In fact, there cannot be two opinions in this aspect. But at the same time, in order to record the order of conviction and sentence on the basis of the evidence of Police Officers only, their evidence should be of the sterling quality, clear enough and beyond any measure of doubt to connect the accused with the crime alleged against him. In such case, under

the Narcotic Act, in order to connect the accused with the crime alleged against him, the prosecution is required to prove beyond any measure of doubt the identity of the muddamal sample, that is to say the sample seized from the accused at the time of his search by the Police Officer and which ultimately came to be identified, analysed and found to be Narcotic drug by the Public Analysis is one and the same only and none other ..."

In the present case, we have examined the evidence on record. We have carefully considered the manner described by the seizing officer about the seizure of muddamal and its sealing. We have also considered the evidence of the other police officers in whose custody the muddamal has then passed through before reaching the FSL. We have also examined the evidence on record. From the documentary evidence of the FSL, it is proved beyond doubt that the muddamal seized from the accused had reached FSL without any tampering and the same was analysed to be a narcotic drug and, therefore, the said decision has no application to the facts of the present case.

33. Last but not the least, the learned Advocate for the appellant contended that the accused was not confronted with the FSL report while recording his statement u/s 313 of the Code of Criminal Procedure.

We have perused the statement recorded u/s 313 and found that at no point of time, the appellant had ever claimed that he had not understood the contents of the report. We have also perused the FSL report, which is in Gujarati. It is clear that the same was supplied with other papers while submitting the chargesheet in the case. In his further statement also the appellant had not claimed that the contents of the report, which was in Gujarati, were not understood by him. In this case, after recording of further statement was over, the appellant had filed a written statement under the provisions of Section 233(2) of the Code of Criminal Procedure. In the said written statement also, he has never claimed that he has not understood the contents of the FSL report. What we find is that this is nothing, but an afterthought and more, a brainchild of the learned Advocate for the appellant.

34. Mr. Agrawal, learned Advocate for the appellant, also contended that as required under the pronouncement of the Honourable Apex Court, one of the relative of the accused ought to have been informed and the same is not done by the prosecution in the present case.

We have examined the record and it is very much on the record that brother, Mohanbhai Laxmanbhai Patel, was intimated by the Police Inspector about the arrest of the accused. Mr. Agrawal then contended that a copy of the same is not given to him. We have to record with pains that there cannot be an end to the contentions, if one wants to raise all "frivolous contentions". If requirement under the law is that a relative of an accused is to be informed, another requirement cannot be created out of that, that after informing the relative of the accused, a copy of the same is to be served to the accused. If such contention is

accepted, then, there cannot be an end to such demands which will further go on cropping up. Therefore, we reject this contention advanced by the learned Advocate, Mr.Agrawal.

35. For the foregoing reasons, the appeal fails and the same is dismissed. The conviction of the appellant recorded under Sections 8(C) and 21 of the NDPS Act, as well as punishment imposed for the commission of the said offence is maintained. Muddamal to be disposed of in accordance with law.