
(1998) 08 GUJ CK 0050
In the Gujarat High Court

Nurmohmed Musabhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 29-08-1998

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 12, 20(b) (ii), 22, 23, 24

Citation : (1999) 2 GLR 1551

Hon'ble Judges : J.N. Bhatt, J;Arunkumar Kantilal Trivedi, J

Bench : Division Bench

Judgement

J.N. Bhatt, J.—This appeal raises important questions of law which pertains to applicability, interpretation and exposition of provisions of Sections 41, 42, 43, 50 and 51 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("N.D.P.S. Act").

2. The main question which requires our examination and adjudication in light of provisions of N.D.P.S. Act is "whether mandatory requirement of provisions of Section 50, required to be observed by the empowered or authorised officer u/s 50 for search of person will be attracted, even in case of gazetted officer ? In other words, benefit of mandatory provisions of Section 50, whereby, a person to be searched, is entitled to be searched, in presence of a gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate, can be claimed by him even when the empowered or authorised officer is a gazetted officer ? So, non-compliance of mandatory provisions of Section 50 for search of person under the provisions of Sections 41, 42 or 43 when the officer himself is a gazetted officer; would it be obligatory on the part of such gazetted officer to inform the person so searched, what will be legal implication in case of failure to inform the person to be searched that he is to be searched in presence of a gazetted officer or a Magistrate ?

3. In order to appreciate the merits of the aforesaid question involved in this appeal under the N.D.P.S. Act, it would be expedient to have a glance at the

relevant and important skeleton of projection of the facts giving rise to this appeal. In this appeal, the raiding party was headed by police inspector who is admittedly enjoying the status of a gazetted officer.

4. It is in this context that it would be appropriate to have a glance at the factual scenario emerging from the appeal. In this appeal, the appellant who is the original accused has assailed the judgment and order recorded by the learned City Sessions Judge, Mr. F. R. Makwana, on 16-9-1991, whereby, the appellant came to be held guilty for the offences punishable u/s 20(b)(ii) of the N.D.P.S. Act, who, is hereinafter, referred to as "the accused". Thus, the accused came to be convicted and sentenced to suffer R. I. for ten years and fine of Rs. 1,00,000/-, in default, to suffer R.I. for one year. Original accused No. 2 was not, found, guilty and came to be acquitted and there is no acquittal appeal against him.

The complainant PW 6, P. I. Jadeja, who was serving in Madhavpura Police Station, Asarva, Ahmedabad, at the relevant time, received information from some person that one autorickshaw was to come from Dariapur, Charvad, unauthorisedly, containing CHARAS therein. He, at that time, was on combing-night duty, near Prem Darwaja Police Chowky, along with, other police officers, thus, on 23-10-1990, P. I. Mr. Jadeja, upon receipt of information, called two panch witnesses one Ashokbhai and Ghanshyambhai Champaneri who were given to understand the brief idea of the information received by him and they were ready to work as Panchas.

5. On that day, like that on 23-10-1990, at about 12.30 p.m., one autorickshaw bearing No. 2984 came from Dariapur, Charvad, in which two passengers were sitting. It was stopped the police. On being asked, the passengers gave their names. One of them Nurmohmed Musabhai is the appellant and the other one was child offender Yasin Noor Mohmed. The driver of the rickshaw Hamimuddin Huseinuddin was accused No. 2 before the trial Court. Upon search by P. I. Jadeja, with the help of members of the raiding party, the accused was found having rexin bag bearing mark of "S. T." and there was one covered handkerchief and two plastics bags were found from him which were opened. These bags contained black coloured substance and on verification, and smelling, the substance was suspected to be CHARAS by the police and the panch witnesses. Nothing was found from the rickshaw driver, accused No. 2 who came to be acquitted and against whom there is no acquittal appeal.

6. The CHARAS was weighed in scales brought by the police from Himatlal Khimraj and it was found that in one bag, it was 440 gms., and in another bag, it was 110 gms. Thus, the total find of the illegal material CHARAS was 550 gms. from possession of accused No. 1 After observing necessary procedures, the contraband substance was seized by the police and samples were sent to Forensic Science Laboratory for opinion.

7. As per the report of the Forensic Science Laboratory, the black coloured

substance was CHARAS which was collected and seized by the police inspector Jadeja in presence of the panch witnesses and the police officers had proved the panchnama, Exh. 15. A complaint, therefore, came to be lodged which is produced, at Exh. 28, against all the three accused persons. Offence came to be registered against the accused persons for illegally acquiring and possessing CHARAS on the strength of the complaint of P.S.I. Jadeja and accused persons were arrested by the police of Madhavpura Police Station. Investigation started and upon conclusion of the investigation, charge sheet followed in the Court of the learned Chief J.M.F.C, Ahmedabad, only against accused Nos. 1 and 2 for the offence punishable under Sections 12, 22, 23, 24 and 29 of the N.D.P.S. Act; whereas, the child offender was sent to the Juvenile Court. The learned Chief J.M.F.C, Ahmedabad, having no jurisdiction to conduct the cases under the N.D.P.S. Act, committed the case against accused No. 1 and 2 to the City Sessions Court, at Ahmedabad, for trial u/s 209 of the Code.

8. The City Sessions Court framed the charge, at Exh. 3, in Sessions Case No. 54 of 1991, in which the accused persons desired to be tried. In support of the charge, the prosecution relied on oral as well as, documentary evidence and upon examination and evaluation of the evidence of prosecution, the trial Court acquitted accused No. 2 giving him benefit of doubt and convicted accused No. 1 for the offence punishable u/s 20(b)(ii) of the N.D.P.S. Act, and sentenced him to suffer R. I. for ten years and to pay fine of Rs. 1,00,000/- and in default, R. I. for one year by his judgment and order dated 16-9-1991 which is questioned before us in Criminal Appeal No. 760 of 1991 by invoking provisions of Section 374 of the Code.

9. Since question of law is raised and involved in the appeal, pertaining to applicability, exposition and interpretation of provisions of Sections 41, 42, 43, 50 and 51 of the N.D.P.S. Act, we have exhaustively heard the learned Advocates appearing for the appellants-original accused persons and learned Addl. P.P. We have also heard learned Advocate Mr. A. D. Shah as an intervener. We have, dispassionately, examined the entire record and the relevant case law relied on by both the parties threadbare. Therefore, we would like to first deal with common question of law at the outset in light of the facts of this appeal. In the present case, the head of the raiding party the complainant and police officer who searched the accused persons was a police Inspector who is admittedly a gazetted officer in view of the notification, dated 15-6-1985, published in Gujarat Government gazette, Extraordinary, Part IV-B, on 15-6-1987 by, the State of Gujarat in exercise of powers conferred by Sub-section (2) of Section 41 of the N.D.P.S. Act; whereas, the notification under Sub-section (1) of Section 42 came to be issued on the same date by the State of Gujarat.

10. It has been, seriously, contended before us that in Criminal Appeal No. 760 of 1991, the police officer who searched the accused persons was a police inspector and though a gazetted officer under the aforesaid notification, is obliged to comply with provisions of Section 50, in that, it was contended that

the conditions under which search of accused person shall be conducted u/s 50 are mandatory in nature and must be observed by any officer including police officer of gazetted rank. It was, therefore, contended that police inspector Mr. Jadeja though a gazetted officer failed to observe the provisions of Section 50 in not informing the accused persons about their right to be searched in presence of a gazetted officer of any department mentioned in Section 42 or the nearest magistrate. Thus, it was vehemently urged before us that the police officer of any rank, may be even a gazetted officer, must comply with the provisions of Section 50(1) and non-observance of such mandatory provisions will be vitiation of fair trial resulting into acquittal of the accused. In support of this contention, learned Advocate Mr. Shah as intervener along with Mr. A. H. Mehta, learned Advocate for the appellant-accused, has placed reliance on the provisions of Sections 41, 42, 43 read with Sections 50 and 51 of the N.D.P.S. Act and the case-law to which reference will be made by us hereinafter.

Relevant Proposition of Law:

11. Firstly, it will be necessary and appropriate to refer to the provisions of Section 50 of the N.D.P.S. Act at this stage. They read as under:

50. (1) When any officer duly authorised u/s 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in Sub-section (1).

(3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

Before the relevant provisions of N.D.P.S. Act are examined and discussed, it would be advisable first to understand the scheme and the underlying purport and design of the N.D.P.S. Act.

12. In fact, there is a chequered history of the legislation, right from 19th century, to the present date. The legislature intended various laws but the main object could not be accomplished and one after the other legislations came to be enacted. The problem of drug trafficking and the drug addict is phenomenon. It is international menace and unfortunately, systematic and organized offence drug trafficking is operational through a very wide network.

13. Adverse implications, in terms of social interest, and the ramifications and also enormous health hazards affecting and involving future generation of the

nation like teenagers are large scale indolence alarming various philosophers, thinkers and legislators. It is in this context that N.D.P.S., in its comprehensive form taking guidance and advice from the past deficiency and defective drug trafficking controlling regulations and enactments, the Parliament in its wisdom passed the N.D.P.S Act with the main object to make stringent provisions for control and regulation of operations relating to Narcotic drugs and psychotropic substances and to eliminate socio-health hazards. At the same time, in a democratic-social welfare country persons liberty, quality of law and proper maintenance of rule of law, undoubtedly, assume higher and wider significance. Therefore, in order to avoid any act of malfeasance, misuse, mal-administration or abuse of provisions of this Act, by persons incharge of implementation and concerned officers, important and salient safeguards are provided which in the context have to be observed strictly. Therefore, provisions of Sections 41 to 57 are designedly incorporated in Chapter IV of the Act. It was, therefore, contended before us on behalf of the appellant-original accused persons that there is violation of provisions of Section 50 and also Sections 41, 42 and 43. N.D.P.S. Act as its preamble shows came to be enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substance and for matters connected therewith. In this background, in Chapter IV, provision is made for procedure for investigation and offences under the Act. Section 41 prescribes power to issue warrant and authorization. Section 42 prescribes power of entry, search, seizure and arrest without warrant or authorization. Section 42 provides for power of seizure and arrest in public places, Sections 44 to 49 are, also, important incidental provisions relating to seizure, search and confiscation of psychotropic substances.

14. We are, vitally, concerned with the provisions of Section 50, as it imposes statutory safeguards for effective and valid search of persons to be conducted by officers. Therefore, the conditions under which search of persons shall be conducted prescribed in that section by the Parliament in the Act are very relevant important and relied on by the parties. We have already reproduced the said provisions in the earlier part of this judgment.

15. It could, therefore, be very well visualised on a plain reading of provisions that Section 50 with its sub-sections is very important and provides that when any officer duly authorised under the Act is in charge of search of any person and going to search any person, in view of Sections 41, 42 or 43, he is obliged to inform the accused that if he so requires to be searched in presence of a gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate, such officer is bound to follow the procedure prescribed in Sub-section (1) of Section 50 which is a mandatory condition. Provision of Section 50 is, apparently, and, obviously, introduced to avoid any harm to an innocent person and to avoid raising of allegations of planting or fabrication by the prosecuting agency of authority. It, clearly, provides that if the person to be searched so requires, the officer who is about to search him under the provisions

of Sections 41 to 43, shall take such person without any unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The provision, on the face of its, casts a mandatory duty. The provision is, therefore, mandatory and it has been very well settled by now.

16. The contention of the State is that though provision of Section 50 is mandatory, is applicable only to the category of officers as provided in Sub-section (1) of Section 42 and it does apply to the empowered officers or authorised persons in view of provisions of Section 41. In this appeal, admittedly, provisions of Section 50 were not observed as according to the State, the investigating officer who searched the person was a gazetted officer and therefore said provisions did not apply. Therefore, it would, also, be necessary to refer to the relevant provisions of Sections 41 and 42 of the Act, at this juncture Section 41 reads as under:

(1) A metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of central excise, narcotic, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any 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 whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under Sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under Sub-section (2) shall have all the powers of an officer acting u/s 42.

It could very well be seen that only the Magistrate so empowered can issue warrant for arrest and search when he has reason to believe that an offence under Chapter IV has been committed, as mentioned therein. u/s 41(2), only, a gazetted officer or other officers mentioned and empowered thereunder can give authorisation to the subordinate to arrest and search if such person has reason to believe about commission of an offence and after reducing the information into writing.

17. u/s 42, only officers mentioned, therein, and so empowered can make arrest and search as provided if they have reason to believe from personal knowledge or information. It would, therefore, be necessary to examine provisions of Section 42. It reads as under:

42. (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset:

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and
- (d) detain and search and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance;

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

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

It is very evident and obvious in both the provisions that important requirements are required to be satisfied;

(I) Magistrate or officers mentioned, therein, firstly be empowered and they must have reason to believe that offence under Chapter IV has been committed or that such arrest or search was necessary by other persons mentioned therein. So far as the first requirement is concerned, it can be seen that as the legislature intended only certain class of Magistrates and high ranking officers and empowered persons only can act to effect arrest or search. Obviously, this is a vital statutory safeguard enshrined therein with regard to deterrent sentences contemplated and with a view to seeing that innocent persons are not harassed. It, therefore, becomes very clear that if arrest or search contemplated under the provisions of the Act has to be performed, the same should be done only by competent and empowered Magistrates or officers mentioned therein.

It becomes therefore clear that if the arrest or search contemplated under the provisions of Sections 41 and 42 is made under a warrant issued by any other Magistrate or is made by an officer not empowered or authorised, it would be per-se illegal and would affect the prosecution case and the trial shall be vitiated. Again, the second requirement is that the magistrate or officer empowered while acting u/s 41 or 42 should have reason to believe that such offence under Chapter IV of the Act has been committed and therefore arrest or search was necessary, as contemplated under these provisions.

18. Provisions of Sections 41 and 42 are also mandatory. These provisions make it obligatory such of the officers mentioned therein upon receiving information should reduce the same to writing and also record reasons or belief while carrying out arrest or seizure as provided under the proviso to Section 41(1). To that extent, they are held mandatory. As a necessary corollary, failure to comply with the mandatory provisions, the trial shall be vitiated.

19. In order to strike the balance between the needs of the said enforcement on one hand and protecting of citizens from delay, hardships, harassment or injustice at the hands of prosecuting agency and law enforcement machinery on the other hand, is a perennial problem of state craft. The pendulum over the years has swung to the right. Even as long as the opening of the twentieth century, it was rightly observed and declared that at the present time in this country there is more danger that criminals will escape justice than that they will be subject to tyranny. As the century has unfolded, the danger has increased. It is in this background that provision is made in Chapter IV throwing all the relevant factors into the scale and to see and provide that just balance is struck in between imperatives, innovations and checking enforcement authority.

20. Both the sides have placed reliance on the decision of Hon"ble Apex Court in

State of Punjab Vs. Balbir Singh, which is a celebrated decision of the Hon''ble Apex Court in relation to the provisions of Sections 41 to 59 enacted in Chapter V of the Act. This decision is followed in five Division Bench decisions of this Court. The Division Bench decisions of this Court following the decision of the Hon''ble Apex Court in Balbir Singh's case (supra) are also relied on. It would, therefore, be necessary at this juncture to refer to them. The interpretation and applicability of the ratio laid down in Balbir Singh's case (supra) is highlighted in the following decisions;

(1) D.B. Thakur v. State 1996 (2) GLH 94 : 1996 (1) GLR 214, decided on 13/14-1-1995.

(2) Himmat Pethabhai Vankar Vs. State of Gujarat, , decided on 12-2-1995.

(3) Anwar @ Anudo Alimamad Pathan Vs. State of Gujarat, , decided on 24-9-1996.

(4) Mukesh Natvarlal Modi Vs. H.S. Barot and Another, , decided on 26/30-9-1997.

(5) Mohmadkhan Rasulkhan Pathan Vs. State of Gujarat, , decided on 22-12-1997.

21. Learned Advocate Mr. Mehta in support of his contention relied on the decision of the Division Bench of this Court referred in Anwar Pathan's case (supra). He had read the entire judgment before us. It is true that in that case, admittedly, the investigating officer was a police inspector who is a gazetted officer in view of the notification issued by the Government of Gujarat. Relying on the decision in Balbir Singh's case (supra), the Division Bench (Coram : N. J. Pandya, as he then was and R. Balia, JJ.) in Anwar's case (supra) allowed the appeal of the accused while quashing the conviction order. Our attention is invited to para 2 of the said judgment in which it is stated that the complainant and the person who searched the person was in the cadre of Police inspector who is a gazetted officer. Therefore, it was submitted that the interpretation made by this Court in that decision and the ratio of Balbir Singh's case (supra) would include the officer who is also a gazetted officer. In short, the contention which was canvassed before us was that even in case of the complainant or investigating authority being a gazetted officer, Section 50 was, also, held to be attracted and the appeal was allowed. This submission, prima facie, may sound ingenious but not sustainable. We are of the clear opinion that the question whether a gazetted officer is also covered by provisions of Section 50 was not in focus. It was not raised to be considered and adjudicated upon. Therefore, it cannot be presumed that the person who was about to take search or suspect for an offence under Chapter IV of the Act, who happened to be in the cadre of police inspector and was a gazetted officer under the relevant notification of the State Government, was raised, argued and adjudicated upon. It becomes evident from the whole tenor of the judgment which we have read that such issue or question was not at all adjudicated and invited to be adjudicated upon.

22. As against that, in D. B. Thakur's case (supra), Mohmed Rasul Pathan's case (supra), Mukesh's case (supra) and Himatbhai Vankar's case (supra), this Court has clearly, and consistently held that provisions of Section 50 would not get attracted in a case where the concerned officer taking search of the accused is gazetted officer himself. Section 50 is attracted only in case of provisions of Section 42(1) of the Act. This proposition is very well expounded and explained in the aforesaid decisions of this Court.

23. Having regard to the facts and circumstances of the present case and the relevant proposition of law we are of the opinion that the interpretation of the case of Balbir Singh (supra) made by this Court in the aforesaid decisions is quite justified and we are in full agreement with the said decisions. We may also make it clear that the decision in Balbir Singh's case (supra) is also followed by this Court in Anwar's case (supra) and since no point was ever raised, no submission was made, no contention was taken specifically that a gazetted officer is also included in the category of officers in which mandatory provisions of Section 50 must be followed. We find, as such, no divergence or difference in any one of the decisions of this Court relied on by the parties in the present case.

24. Apart from the decisions relied on, the underlying purport and design of the provisions of Section 50 is to safeguard the interest of the innocent persons and to see that malpractice, malfeasance, abuse or misuse of powers by such officers while dealing with N.D.P.S. cases is successfully, avoided. It is provided in Section 42(1) that certain conditions shall be observed by the officer who is about to make search of the suspect likely to have committed offence falling within Chapter IV of the Act. Obviously, it can, therefore, be concluded safely that a right is given to the accused of he being searched in presence of a gazetted officer or a Magistrate so that such apprehension can be eliminated. High rank officer of gazetted status owes an important duty and, therefore, such chances can be avoided. So, the underlying purport and design is that the gazetted officer in whose presence, upon exercise of option by the accused, it insulates the officer from the allegation of malpractice or misconduct or malfeasance or misuse or abuse of power that he committed will be reinforcing factor for interpreting that when a person who is about to search a suspect under Chapter-IV of the Act is himself a Gazetted Officer, it was not necessary for him to follow the procedure of Section 50 which is designed to provide safeguard to eliminate such vices in a case when a gazetted officer in charge is not only in the level or category of gazetted officer. Otherwise also, what would happen if we were to take a contrary view ? Assuming that a gazetted officer is undergoing such exercise provided in Chapter IV and in continuation of exercise of option by the accused it would happen that other accused will have to be taken, if he wishes so to be done, to any gazetted officer or in some case, to a gazetted officer who is below in the rank of officer in charge of such search, not only will undergo embarrassment but will lead to anomalous situation more so, in view of provisions of Section 50(3) which provides that if a gazetted officer or a Magistrate concerned before whom a person is brought for search finds no

reasonable ground for search, and directs officer intending to take search to discharge that person forthwith, though he is of the same category or in some case, may be of higher rank. For example, an officer of D.S.P. rank goes for search, who is an authorised persons, who is a gazetted officer and if he is obliged to follow provisions of Section 50 and if a person suspected of the offence under the Act opts for being searched before a gazetted officer and the gazetted officer, may be a gazetted officer, is a Police Inspector, what will be the situation if P. I. states that no search is necessary ? The officer in rank of Superintendent of Police will have to take the person before an officer viz., Police Inspector who is lower in rank of hierarchy, who will be forced to let go the accused, as the P. I. decides that the person should not be searched for the offence for reasonable grounds. Can it be conceived even for a moment that this was in the contemplation of the Parliament while making provisions of Section 50 ? The gist and genesis and design, object and intention of interpreting provisions of Section 50 is obvious and it was to see that deterrent punishments are provided and upon seizure or possession of narcotic items, the same may not be abused or misused and the officer below rank of gazetted officer will have to follow the procedure u/s 50 and upon option being exercised by the person concerned, will have to be searched in presence of such officer who ordinarily and obviously in the context of provisions of Section 50 would enjoy and vouchsafe against misuse of power for manipulation of. Therefore, the interpretation which was sought to be canvassed before us on behalf of the appellant accused that even in case of a gazetted officer, the procedure of person being searched in presence of gazetted officer upon option being exercised, must be followed, is totally meritless and the interpretation made by this Court in the aforesaid decisions is quite justified and we are in agreement with the said proposition of law.

25. It was contended before us that in view of Sub-section (3) of Section 41 and the ratio of Balbir Singh's case (supra), the officer not u/s 42(1) but the officer u/s 41(1) who are delegated powers by the empowered officer must also follow the provisions of Section 50. This contention is raised only academically as no such factual situation is obtainable in the present appeal and, therefore, whether in such contingency, provisions of Section 50 will be attracted or not would not be necessary to be examined and adjudicated upon in this appeal. Therefore, this contention being only academic, no *res gestae* or a question arising out of the facts, needs to be examined or adjudicated upon.

26. In light of the facts of the present case and the admitted fact that the searched was conducted by the Police Inspector who is admittedly a gazetted officer, non-observance of provisions of Section 50 would not vitiate the trial. Unfortunately, therefore, the appellant accused is not entitled to claim acquittal in the present appeal. With the result, the appeal must fail. Accordingly, it is dismissed.