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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA-48-DBA-2004**Date of decision : 24.03.2025****STATE OF PUNJAB****... Appellant****Versus****DHARMINDER SINGH ETC.****...Respondents****CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL****HON'BLE MR. JUSTICE JASJIT SINGH BEDI**

Present: Mr. Siddharth Attri, AAG, Punjab
for the appellant.

Mr. Harsh Kinra, Advocate with
Ms. Apoorva Kinra, Advocate
for respondent Nos.1 and 2.

Mr. Keshav Pratap Singh, Advocate
for respondent No.3-Macky.

JASJIT SINGH BEDI, J.

The present appeal has been filed against the judgment of acquittal dated 23.07.2003 passed by the Judge Special Court, Nawanshahr.

2. The FIR was registered on 03.12.2000, the judgment of acquittal passed by the Judge Special Court, Nawanshahr is dated 23.07.2003, the appeal was filed on 24.09.2003 and the matter is being taken up for hearing now after a period of more than 25 years of the registration of the FIR.

3. The story of the prosecution was that on the intervening night of 2/3.12.2000, Parveen Kumar S.I alongwith A.S.I. Narinder Singh, ASI Kalwant Singh, H.C. Gurbax Lal, SPO Raj Kumar, PHG Santokh singh, PHG

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Sucha Ram, PHG Gurnam Singh and PHG Avtar Singh under the supervision of Shri Balbir Singh DSP, was holding a Naka for special checking at Bus Stop, Ballachaur. Secret information was received that Dharminder Singh alias Manga son of Malkiat Singh, resident of village Bhagauran and Macky son of Telu Ram, resident of Kallar Colony, Nawanshahr were dealing in the sale of a large quantity of smack and poppy husk and that they would be coming on a Truck bearing No.PB-32-A-3944 from Garhshankar side to Nawanshahr. In the said truck, underneath the bags of groundnuts were bags of poppy husk and if the said truck was checked, heavy quantity of poppy husk could be recovered. Jatinder Pal Singh son of Chanan Singh, resident of Garhshankar Road, Nawanshahr, was joined as a public witness. At about 04.30 A.M. on 03.12.2000, one truck came from the side of Garhshankar, which was signaled to stop in the light of the torch. The driver of the truck and the person sitting by his side, were apprehended and the driver on enquiry disclosed his name as Dharminder alias Manga and other person, who had been sitting by on the conductor side, disclosed his name as Macky. Balbir Singh DSP, Nawanshahr, disclosed his identity to them and told them that there was a suspicion of the them carrying bags of poppy husk in the said truck and asked if they wanted the search of the truck to be conducted by him or from some Magistrate. Both the accused stated that DSP Balbir Singh could conduct the search of their truck and the consent memos of accused Dharminder Singh Ex.PA and that of Macky Ex.PB were recorded which were thumb marked by the accused and attested by ASI Narinder Singh PW3,

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SI Parveen Kumar PW5 and Jatinder Pal Singh. Under the supervision of DSP Balbir Singh PW8, the search of the truck No.PB-32A-3944 was conducted, which revealed the presence of 30 bags of poppy husk hidden behind the bags of groundnuts. After arranging a floor scale, sample weighing 250 grams from each of the said 30 bags was separated and the 30 bags with their contents after having taken samples were found to be 34 Kgs. 750 grams each. The accused failed to produce any permit or licence for carrying the poppy husk. The samples and the bulk of the poppy husk contained in 30 bags were sealed by DSP Balbir Singh PW8 with his seal 'BS' and separate seal impressions were prepared. Thereafter, the seal was handed over to ASI Narinder Singh PW3. The samples, bags containing poppy husk and sample seal and the truck bearing No.PB-32A-3944 were taken in possession vide recovery memo Ex.PC which was attested by Balbir Singh DSP, Jatinder Pal Singh and ASI Narinder Singh. From the search of the cabin of the said truck, registration certificate of the truck showing the ownership of accused Bahadur Singh son of Darshan Singh, resident of village Malpur Arkan, District Nawanshahr and Bilty from Mangal Chand Rameshwar Dass Jaipur, favouring A.S. Industry Area, Kapurthala dated 29.11.2000 in respect of the bags of groundnuts were recovered and the said bags of groundnuts on counting were found to be 160 in number each weighing 55 Kgs. The said articles were taken into possession vide recovery memo Ex.PD which was attested by A.S.I. Narinder Singh PW3 and Jatinder Pal Singh. Personal search of accused Dharminder Singh was conducted

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which revealed the presence of currency notes of Rs.152/- which were taken in possession vide search memo Ex.PE. The same was thumb marked by Dharminster singh accused and attested by Narinder Singh ASI. Personal search of accused Macky revealed currency notes of Rs.162/- and one mobile phone make Panasonic, which were taken in possession vide personal search memo Ex.PF, which was thumb marked by the accused Macky and attested by ASI Narinder Singh. The arrest memo in respect of accused Dharminster Singh Ex.PG was prepared and arrest memo Ex.PH was prepared in respect of accused Macky. The Investigating Officer sent ruqa Ex.PM to the Police Station, on the basis of which formal F.I.R. No.269 under Section 15 of the Act was registered at Police Station City, Nawanshahr by MHC Surjit singh. The Investigating Officer prepared rough site plan Ex.PO depicting the place of recovery. Intimation was sent to SHO Baldev Singh of Police Station, City, Nawanshahr, who reached the spot and after interrogating the accused and verifying the case property and the samples, fixed his seal 'BS' on 30 bags of poppy husk and samples containing poppy husk and also prepared sample seal impression and retained his seal with him. The Investigating Officer deposited the case property and samples with M.H.C. Surjit Singh. The samples were sent to the Forensic Science Laboratory, Chandigarh and report Ex.PQ of the FSL, was received that contents of all the 30 samples, after analysis were found to be of poppy husk.

4. Meanwhile during the course of investigation accused Dharminster and Macky made disclosure statements on 08.12.2000 that the

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owner of the truck bearing No.PB-32A-3944 i.e. accused Bahadur Singh son of Darshan Singh resident of village Malpur Arkan, agreed to pay an amount of Rs.60,000/- to them for transportation of the bags of poppy husk. On the basis of the said disclosure statement, accused Bahadur Singh was arrested on 08.12.2000 and the offence under Section 25 of the Act was added. The statements of the witnesses were recorded and after completion of investigation, challan against the accused was presented in the Court.

5. In order to prove the charge against the accused, the prosecution examined PW3-ASI Narinder Singh recovery witness, PW5-Inspector Parveen Kumar I.O. and PW8-DSP Balbir Singh. They supported the case of the prosecution and deposed the manner in which the search of the truck driven by accused Dharminder Singh and in which accused Macky was sitting on the conductor seat, was conducted which revealed that 30 bags of poppy husk each weighing 35 Kgs. were being carried in the said truck bearing registration No.PB-32A-3944, owned by accused Bahadur Singh by concealing the said bags of poppy husk behind the bags of groundnuts. After following the procedure under the Narcotic Drugs and Psychotropic Substances Act, the truck and the other articles had been taken into possession.

6. PW7-Inspector Baldev Singh deposed that after verifying the case property and interrogating the accused, he affixed his seal on the case property and the samples. PW4-Dilbagh Singh Clerk from the office of D.T.O. Nawanshahr proved the registration certificate Ex.PL of truck bearing



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No.PB-32A-3944 to be in the name of Bahadur Singh as per record of the office of District Transport Officer, Nawanshahr.

7. PW1-Constable Resham Lal deposited that on 03.01.2001, he was handed over 30 samples by MHC Sukhjit Singh and the same were deposited by him in the office of Forensic Science Laboratory, Chandigarh on the same day and the receipt was handed over by him to the MHC. PW6-MHC Sukhjit Singh deposited that the case property and the samples remained intact and were not tampered with by him or anyone else. Similar was the statement of PW1-Resham Lal constable regarding intactness of the samples.

8. PW2-SI Harbhajan Dass who partly investigated the case, also deposited regarding part investigation of the case conducted by him.

9. PW-Jatinder Pal Singh was given up having been won over by the accused.

10. On the closure of the evidence of the prosecution, the statements of the accused were recorded under Section 313 of the Cr.P.C. and the incriminating circumstances appearing against them in evidence were put to them. Accused Dharminder Singh denied the case of the prosecution and pleaded that he had no knowledge regarding the presence of poppy husk in the truck, as the truck had been loaded by the owner of the groundnuts and that he had been falsely implicated in this case.

Accused Macky also denied the case of the prosecution and stated that the Police had enmity with him and one Jassa who was son of

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maternal uncle of the accused and that the present case had been planted on him.

Accused Bahadur Singh also denied the case of the prosecution and stated that the truck in question had been loaded without his knowledge and that he had no concern with the poppy husk and that he was agriculturist by profession and on his failure to pay bribe money to the Police, he had been falsely implicated in this case.

11. Based on the evidence led, accused/respondent Nos.1 to 3 were acquitted by the Court of Judge Special Court, Nawanshahr vide judgment dated 23.07.2003 primarily on the grounds that the secret information received was neither reduced into writing and nor sent to a superior officer as envisaged under Section 42 of the NDPS Act.

12. It is the aforementioned judgment of acquittal which is under challenge in the present appeal.

13. The learned counsel for the appellant-State contends that the Trial Court has not considered Sections 41 & 42 of the NDPS Act in its proper perspective. As DSP Balbir Singh (PW8), a Gazetted Officer, was present at the spot where the Naka had been set up and the secret information had been received by him, there was no requirement of the compliance of Section 42(2) of the NDPS Act inasmuch as the secret information received and reduced into writing was not required to be sent to senior officers keeping in view Section 41(2) of the NDPS Act. He, however candidly admits that even as per Section 41(2) of the NDPS Act the secret information

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so received by a Gazetted Officer was not reduced into writing which was a legal requirement. He, however contends that the said lapse would not substantively affect the prosecution case and therefore, the appeal be allowed, the judgment of acquittal be set aside and the accused/respondent Nos.1 to 3 be convicted for the offences in question. Reliance is placed on the judgment in **M. Prabhulal Versus Assistant Director, Directorate of Revenue Intelligence, 2004(1) RCR (Criminal) 160.**

14. The learned counsels for the respondents (acquitted accused), on the other hand, contend that PW3-ASI Narinder Singh, PW5-Inspector Parveen Kumar and PW-8 (DSP Balbir Singh) categorically admitted that secret information was received by them. Neither was the same reduced into writing and nor was it sent to a superior officer as the truck was a private vehicle (truck). Since there was non-compliance of Section 42 of the NDPS Act the accused have rightly been acquitted of the charges framed against them. However, even if it was a case where the secret information was received by DSP Balbir Singh (PW8) a Gazetted Officer, he was required to record it in writing in terms of Section 41(2) of the NDPS Act. That not having been done was another reason for the rightful acquittal of the accused. They further contend that Jatinder Pal Singh was a stock eye-witness and was not examined in Court. Qua accused Bahadur Singh, it is contended that the only evidence against him was of the disclosure statement of the arrested accused Dharaminder Singh and Macky and therefore, he was rightly acquitted of the charges framed against him.

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15. As we wanted to holistically examine the ambit of Sections 41, 42 and 43 of the NDPS Act, we sought the assistance of Mr. P.S. Sekhon, Advocate who has very ably assisted us.

16. He does not dispute the proposition of law as enumerated in **M. Prabhulal** (supra) that in terms of Section 41(2) of the NDPS Act where the secret information is received by Gazetted Officer, he is to reduce the same into writing but he is not required to send it to a superior officer. He can proceed to the spot himself for search and seizure or authorise any officer subordinate to him. However, with respect to the applicability of Sections 42/43 of the NDPS Act to a private vehicle (conveyance) in transit in a public place, he contends that Section 42 of the NDPS Act would apply and therefore, the secret information received must be reduced into writing and send to the immediate superior officer within 72 hours. He has sought to justify his argument by stating that Section 42 of the NDPS Act refers to 'conveyance'. If it meant a parked vehicle in an enclosed place/building as mentioned in Section 42 of the NDPS Act, then there was no need to specifically mention the word 'conveyance' because compliance of Section 42 of the NDPS Act would be required in any case where the search of a building or enclosed place was to take place. He contends that Section 43 of the NDPS Act and its explanation further clarify this position. As per Section 43 of the NDPS Act seizure in any public place or in transit does not require the compliance of Section 42 of the NDPS Act. The explanation describes 'public place' to include 'public conveyance' and not mere 'conveyance'. If

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Section 43 of the NDPS Act was to apply to a private conveyance as well then the word ‘conveyance’ alone would have been used in the explanation to Section 43 of the NDPS Act. He therefore contends that where a private conveyance in a public place or in transit is sought to be searched and seized, Section 42 of the NDPS Act is to be complied with. Reliance is placed on the judgments in *State of Rajasthan Versus Jag Raj Singh @ Hansa, 2016(3) RCR (Criminal)* and *Boota Singh & others Versus State of Haryana, 2021(2) RCR (Criminal) 892.*

17. We have heard the learned counsel for the parties and gone through the record.

18. Sections 41, 42 and 43 of the NDPS Act have been subjected to multiple interpretations over a number of years both by the various High Courts and also by the Hon’ble Supreme Court. We wish to make an attempt in this regard as well.

19. For the said purpose, it would be apposite to refer to the provisions of the Act which are reproduced hereinbelow:-

“41. Power to issue warrant and authorisation.—(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 this Act, 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 or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article

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which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed.

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the para-military forces or the armed forces 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 this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is 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 such 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 under section 42.



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42. Power of entry, search, seizure and arrest without warrant or authorisation.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces 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, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act 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 this Act or furnish evidence of holding any illegally acquired property which is liable

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*for seizure or freezing or forfeiture under Chapter VA of this Act;
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 this Act:

{Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further 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 within seventy-two hours send a copy thereof to his immediate official superior].

43. Power of seizure and arrest in public place.—Any officer of any of the departments mentioned in section 42 may—

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

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(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.—For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.]

20. Section 41(1) empowers a Magistrate to issue a warrant of arrest of any person whom he has reason to believe to have committed any offence punishable under the Narcotic Drugs And Psychotropic Substances Act or for search. Under Section 41(2) only a Gazetted Officer can be empowered by the Central Government or the State Government. Such empowered officer can either himself make an arrest or conduct a search or authorise an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a Peon, a Sepoy or a Constable. Sub-section (3) of Section 41 vests all the powers of an officer acting under Section 42 on three types of officers (i) to whom a warrant under sub-section (1) is addressed, (ii) the officer who authorised the arrest or search under sub-section (2) of Section 41, and (iii) the officer who is so authorised under sub-section (2) of Section 41. Therefore, an empowered Gazetted Officer has also all the powers of Section 42 including power of seizure. Section 42 provides for procedure and power of entry, search, seizure and arrest without warrant or authorisation. An empowered officer has the power of entry into and search of any

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building, conveyance or place, break open door, remove obstruction, seize contraband, detain, search and arrest any person between sunrise and sunset in terms provided in sub-section (1) of Section 42. In case of emergent situation, these powers can also be exercised even between sunset and sunrise without obtaining a search warrant or authorisation, in terms provided in the proviso to sub-section (1) of Section 42. Sub-section (2) of Section 42 is a mandatory provision. In terms of this provision a copy of information taken down in writing under sub-section (1) or ground recorded for the belief under the proviso thereto, is required to be sent by the officer to his immediate official superior. It is clear from Section 41(2) that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorise his Subordinate on the terms stated in the section. Under sub-section (1) of Section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer. But on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of Section 42. It is clear from the language of sub-section (2) of Section 42 that it applies to officer contemplated by sub-section (1) thereof and not to a Gazetted Officer contemplated by sub-section (2) of Section 41, when such Gazetted Officer himself makes an arrest or conducts search and seizure. Section 43 of the NDPS Act relates to power of seizure and arrest in public place. Any officer of any of the departments mentioned in Section 42 is empowered to seize

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contraband etc. and detain and search a person in any public place or in transit on existence of ingredient stated in Section 43. It can, thus, be seen that Sections 42 and 43 do not require an officer to be a Gazetted Officer whereas Section 41(2) requires an officer to be so. A Gazetted Officer has been differently dealt with and more trust has been reposed on him as can also be seen from Section 50 of the Narcotic Drugs and Psychotropic Substances Act which gives a right to a person about to be searched to ask for being searched in the presence of a Gazetted Officer.

21. In the context of Sections 41, 42 and 50 of the NDPS Act, the Hon'ble Supreme Court in the case of **State of Punjab Versus Balbir Singh, 1994(1) RCR (Criminal) 736** has held as under:-

“27. 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 Narcotic Drugs And Psychotropic Substances Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr P.C. and when such search is completed at that stage Section 50 of the Narcotic Drugs and Psychotropic Substances 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 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 Narcotic Drugs And Psychotropic

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Substances 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 Narcotic Drugs And Psychotropic Substances Act.

2A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offence.s 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 Narcotic Drugs And Psychotropic Substances Act. If such arrest or search is made under the provisions of the Narcotic Drugs And Psychotropic Substances Act by any one other than such officers, the same would be illegal.

2B) Under Section 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.

2C) Under Section 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

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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) Under Section 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.

4A) 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 Criminal Procedure Code fails to strictly comply with the provisions of sections 100 and 165 Criminal Procedure Code, 1973 including the requirement to record reasons, such failure would only amount to an irregularity.

4B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Criminal Procedure Code namely sections 100 and 165 Criminal Procedure Code, 1973 and if there is no strict compliance with the provisions of Criminal Procedure Code then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

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



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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 to 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 evidence regarding arrest or seizure as well as on merits of the case.”

(Emphasis supplied)

22. In **Karnail Singh Versus State of Haryana, 2009(5) RCR (Criminal) 515**, the Hon’ble Supreme Court while discussing Section 42 of the NDPS Act held that while trial non-compliance was impermissible, delayed compliance was acceptable. The relevant paragraphs in this regard are as under:-

“17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of

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Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

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

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

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

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



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

(emphasis supplied)

23. In **M. Prabhulal** (supra), where the search and recovery was from a vehicle in transit and that too by the Gazetted Officer, the Hon'ble Supreme Court held that Section 41(2) of the NDPS Act would come into play and not Section 42 of the NDPS Act inasmuch as a Gazetted Officer had received the information. The relevant paragraphs of the judgment are as under:-

“8. Now, we come to the last and rather more serious objections raised on behalf of the appellants regarding the non-compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act vitiating the conviction which looks quite formidable but only at the first impression and not on its deeper examination. The contention of Mr. R. K. Jain is that the view of the High Court that when a Gazetted Officer himself conducts a search it is not necessary to comply with Section 42(2) of the Act, is clearly erroneous. Section 42(2) provides that where an officer takes down any information in writing under sub-section (1) or records grounds for

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his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. This was the statutory provision at the relevant time. By the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 which came into force on 2nd October, 2001, Section 42(2) was amended whereunder the information taken down in writing under subsection (1) or grounds of belief recorded under proviso thereto are required to be sent within seventy- two hours to officer's immediate official superior. The contention is that the officer who searched and seized the contraband did so on information received by him as per Ext. P.W.1 but the said information was not forwarded to his superior officer as contemplated in Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act, thus vitiating the entire prosecution. Further argues the counsel that the respondent after grant of bail to the appellants by the High Court taking into consideration the non-compliance of Section 42(2) has tried to fill in the lacuna with a view to show the compliance of this mandatory provision.

9. The officer who conducted the arrest, search and seizure was an empowered Gazetted Officer of the department. This fact is not in dispute. According to Mr. Vasudev, learned senior counsel for the respondent, Section 42(2) is not applicable when an empowered Gazetted Officer conducts the arrest, search and seizure. Counsel submits that there was no obligation on the officer to comply with the requirement of Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act. It was also contended, in the alternative, that Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act was complied with.

10. The High Court in the judgment impugned has held that, on facts found, Section 41 of the Narcotic Drugs and Psychotropic Substances Act alone was applicable and Section 42(2) was not attracted and, therefore, the judgments rendered under

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Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act relied upon by the appellants have no relevance.

11. The gist of intelligence reduced into writing and on basis whereof the officer started to act reads as under :

"One Prabhulal of Anna Nagar, Trichy, his brother Shivanarain of Trichy, Mohammed Shabir of Madhya Pradesh and Loganathan of Dindigul are engaged in dealing in narcotic drugs. Intelligence gathered indicates that Shivanarain and Loganathan are likely to proceed to Salem and stay in National Hotel, Salem and are likely to receive huge quantity of Heroin from Mohammed Shabir of Madhya Pradesh on 15-5-1993 who is accompanying the said consignment in a lorry from North India. Shivanarain and Loganathan are likely to travel in a car bearing Registration No. TNB 9346 to meet the lorry carrying the contraband Heroin at the outskirts of Salem, if this car is followed from National Hotel, Salem we may be able to seize the contraband."

14. Section 41(1) which empowers a Magistrate to issue warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under the Narcotic Drugs And Psychotropic Substances Act or for search, has not much relevance for the purpose of considering the contention. Under Section 41(2) only a Gazetted Officer can be empowered by the Central Government or the State Government. Such empowered officer can either himself make an arrest or conduct a search or authorise an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a Peon, a Sepoy or a Constable. Sub-section (3) of Section 41 vests all the powers of an officer acting under Section 42 on three types of officers (i) to whom a warrant under sub-section (1) is addressed, (ii) the officer who authorised the arrest or search under sub-section (2) of Section 41, and (iii) the officer who is so authorised under sub-section (2) of Section 41.

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Therefore, an empowered Gazetted Officer has also all the powers of Section 42 including power of seizure. Section 42 provides for procedure and power of entry, search, seizure and arrest without warrant or authorisation. An empowered officer has the power of entry into and search of any building, conveyance or place, break open door, remove obstruction, seize contraband, detain, search and arrest any person between sunrise and sunset in terms provided in sub-section (1) of Section 42. In case of emergent situation, these powers can also be exercised even between sunset and sunrise without obtaining a search warrant or authorisation, in terms provided in the proviso to sub-section (1) of Section 42. Sub-section (2) of Section 42 is a mandatory provision. In terms of this provision a copy of information taken down in writing under sub-section (1) or ground recorded for the belief under proviso thereto, is required to be sent by the officer to his immediate official superior. It is clear from Section 41(2) that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorise his Subordinate on the terms stated in the section. Under sub-section (1) of Section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer. But on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of Section 42. It is clear from the language of sub-section (2) of Section 42 that it applies to officer contemplated by sub-section (1) thereof and not to a Gazetted Officer contemplated by sub-section (2) of Section 41, when such Gazetted Officer himself makes an arrest or conducts search and seizure. It would be useful to also notice Section 43 which relates to power of seizure and arrest in public place. Any officer of any of the departments mentioned in Section 42 is empowered to seize contraband etc. and detain and search a person in any public place or in transit on existence of



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ingredient stated in Section 43. It can, thus, be seen that Sections 42 and 43 do not require an officer to be a Gazetted Officer whereas Section 41(2) requires an officer to be so. A Gazetted Officer has been differently dealt with and more trust has been reposed on him can also be seen from Section 50 of the Narcotic Drugs and Psychotropic Substances Act which gives a right to a person about to be searched to ask for being searched in presence of a Gazetted Officer. The High Court is thus, right in coming to the conclusion that since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decisions in State of Punjab v. Balbir Singh, 1994(1) RCR (Criminal) 736 (SC); (1994) 3 SCC 299; Beckodan Abdul Rahiman v. State of Kerala, 2002(2) RCR (Criminal) 385 (SC); (2002) 4 SCC 229 on the aspects under consideration are neither relevant nor applicable.

15. In view of our conclusion that Section 42(2) is not applicable when search, seizure etc. is conducted by a Gazetted Officer under Section 41(2) and (3), the further contention of Mr. Jain that an attempt was made by the respondent to fill up lacuna to show compliance of Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act as a result of observations made in the order granting bail to the appellants as noticed hereinbefore becomes inconsequential and, therefore, it is not necessary to examine it.

(Emphasis supplied)

24. In **Rajender Singh Versus State of Haryana, 2011(3) RCR (Criminal) 856**, where the recovery was from a private property, the Hon'ble Supreme Court held that as the secret information received was not recorded in writing nor sent to a superior officer, the accused could not be convicted.



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The same principle was followed in **Darshan Singh Versus State of Haryana, 2016(1) RCR (Criminal) 333 and 2016 Court Judgments (SC) 54.**

In **Jagat Singh Versus State of Uttarakhand, 2016(3) RCR (Criminal) 531** and **SK Raju @ Abdul Haque @ Jagga Versus State of West Bengal, 2018 AIR (Supreme Court) 4255** where the recovery was from the accused walking on the road, the Hon'ble Supreme Court held that as the recovery of the contraband was from a public place the case in hand fell under Section 43 of the NDPS Act and therefore, there was no requirement of following the procedure as envisaged under Section 42 of the NDPS Act.

In **Directorate of Revenue @ Anr. Versus Mohammad Nisar Holia, 2008(1) RCR (Criminal) 241**, the Hon'ble Supreme Court held that while a hotel was a public place, a private room therein was a private space and therefore Section 42 of the NDPS Act would apply to the search and seizure from a private room.

25. So far as the search and seizure from a private property or a public place is concerned, the law as has been enumerated above is well settled. However, as regards search and seizure from a private/public conveyance in transit is concerned, various judgments of the Hon'ble Supreme Court and of different High Courts appear to be in conflict with each other.

26. In **State of Haryana Versus Jarnail Singh & others, 2004(5) SCC 188**, the recovery of contraband was from a tanker which was stopped at a Nakabandi by a party headed by an SP rank officer. The Hon'ble

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Supreme Court held that as the search was not made in a private enclosed place but at a public place namely, a highway, Section 43 of the NDPS Act was applicable and not Section 42 of the NDPS Act. It further came to the conclusion that as the SP was also a member of the searching party, he being a Gazetted Officer, Section 41(2) of the NDPS Act would come into play and there was additionally, no requirement of compliance of Section 42 of the NDPS Act. Reliance was placed on the judgment in **M. Prabhulal** (supra).

The relevant paragraphs of the said judgment are as under:-

“2. The facts of the case are not in dispute. The case of the prosecution is that on February 20, 1992 Sub-Inspector Mehar Singh , SHO Police Station Mullana alongwith Head Constable, Om Parkash and other members of the police force, was on patrolling duty and was moving about in a Government jeep. On the way they met Mahinder Singh Ahlawat, Superintendent of Police, whereafter alongwith him they started checking vehicles moving on the highway at about 8.00 p.m. For this they held a naka-bandi on the turning of village Dhanora. At about that time a tanker bearing No. URM-2092 came from the side of Sadhora. It was signalled to stop, but rather than stopping, the tanker sped away. This gave rise to suspicion and therefore the tanker was chased and compelled to stop. It was found that there were three persons sitting in the cabin of the tanker and it was being driven by respondent Mohan Krishan. The others two, namely Jarnail Singh and Prithvi Raj were sitting with him. They were interrogated and thereafter, the tanker was searched in the presence of the witnesses and the Superintendent of Police. On the opening of the lid of the middle chamber of the tanker a lot of gunny bags were found lying there. One of the gunny bags was taken out and on being checked it was found to contain poppy

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husk. Thereafter, all the bags were taken out numbering 73 and on checking, it was found that they also were filled with poppy husk. Weighing scales were brought and the bags were weighed separately. It was found that each bag contained 18 kgs. of poppy husk. Thereafter, the samples were sealed as required by law and thereafter, all necessary steps were taken under the Narcotic Drugs And Psychotropic Substances Act and the Rules. The respondents were put up for trial and were convicted by the trial court as noticed earlier. On appeal by the respondents the High Court held that they were entitled to acquittal in view of the fact that the mandatory requirements of Section 50 and Section 42 of the Narcotic Drugs and Psychotropic Substances Act were not complied with. The High Court held that the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act applied and before searching the vehicle the accused had to be informed of his right to be searched in the presence of a Magistrate or a gazetted officer. It made no difference that a Superintendent of Police, who was a gazetted officer, was a member of the searching party who searched the vehicle. It further held that Section 42 of the Act had not been complied with inasmuch as the SHO-Mehar Singh did not record the grounds for his belief before entering upon the search that he had reasons to believe that some contraband offending the Narcotic Drugs And Psychotropic Substances Act was being carried in the vehicle and that an attempt to get a search warrant from a competent Magistrate would frustrate the object or facilitate escape of the offender. Consequently, the trial was vitiated also for non-compliance of the provisions of the proviso to Section 42(1) of the Narcotic Drugs and Psychotropic Substances Act.

3. In the appeal before us counsel for the State of Haryana contended that the High court was entirely wrong in holding that the provisions of Sections 42 and 50 of the Narcotic Drugs and Psychotropic Substances Act applied to the facts and

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circumstances of this case. He argued that the search was not made in a private enclosed place but was made in a public place, namely the highway. Thus Section 43 of the Narcotic Drugs and Psychotropic Substances Act was applicable and not Section 42. There was, therefore, no obligation to comply with the requirements of Section 42. Secondly, Section 50 of the Narcotic Drugs and Psychotropic Substances Act did not apply to the facts of the case because the contraband article was not recovered on personal search of the accused, but on search of the vehicle. Section 50 is limited in its application to personal search.

6. The next question is whether Section 42 of the Narcotic Drugs and Psychotropic Substances Act applied to the facts of this case. In our view Section 42 of the Narcotic Drugs and Psychotropic Substances Act has no application to the facts of this case. Section 42 authorises an officer of the departments enumerated therein, who are duly empowered in this behalf, to enter into and search any such building, conveyance or place, if he had reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug or psychotropic substance etc. is kept or concealed on any building, conveyance or enclosed place. This power can be exercised freely between sunrise and sunset but between sunset and sunrise if such an officer proposes to enter and search such building, conveyance or enclosed place, he must record the grounds for his belief 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.

7. Section 43 of the Narcotic Drugs and Psychotropic Substances Act provides that any officer of any of the departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance etc. in respect of which he has reason to believe that an offence punishable under the Act has



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been committed. He is also authorised to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that for the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

8. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act for searching the vehicle between sunset and the sunrise.

9. In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. Section 43 therefore clearly applied to the facts of this case. Such being the factual position there was no requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42. Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449 : 2004(1) RCR (Criminal) 160 (SC) that where a search is conducted by a gazetted officer himself acting under Section 41 of the Narcotic Drugs and Psychotropic Substances Act, it was not necessary to comply with the requirement of Section 42. For this reasons also, in the facts of this case, it was not necessary to comply with the requirement of



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the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act.

10. We, therefore, hold that in the facts of this case Section 50 of the Narcotic Drugs and Psychotropic Substances Act was not applicable since the contraband was recovered on search of a vehicle and there was no personal search involved. The requirement of the proviso to Section 42 was also not required to be complied with since the recovery was made at a public place and was, therefore, governed by Section 43 of the Act which did not lay down any such requirement. Additionally, since the Superintendent of Police was a member of the search party and was exercising his authority under Section 41 of the Narcotic Drugs and Psychotropic Substances Act, the proviso to Section 42 were not attracted.”

(emphasis supplied)

27. In Union of India Versus Major Singh & others, 2006(9) SCC 170, the search was made of a public carrier at a public place and the Hon’ble Supreme Court came to the conclusion that Section 42 of the NDPS Act would have no application. The relevant paragraphs of the judgment are as under:-

“3. The High Court has recorded the acquittal on two counts; firstly, the provisions of Section 50 of the Act and secondly, under Section 42(2) of the Act have not been complied with. So far as Section 50 of the Act is concerned, in the present case, the same shall have no application as the search and seizure was made from a truck and not from person of any of the accused persons. This question has been examined by a Three Judge Bench of this Court in the case of *State of H.P. v. Pawan Kumar, 2005 (4) SCC 350*, in which it has been categorically laid down that search of a bag, briefcase or any such article or container which is being carried



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by a person is not search of a person, as such the provisions of Section 50 of the Act would not apply in case search and seizure is not made from person of the accused. In the present case, as the search and seizure have not been made from the person of the accused but from the truck, the provisions of Section 50 of the Act shall have no application.

4. Turning now to Section 42(2) of the Act, in this regard, it may be stated that from the prosecution case and evidence it would be clear that search and seizure was made of a public carrier at a public place and 127 bags of poppy straw (opium) was seized from a public carrier. This point is also concluded by a judgment of this Court in the case of State of Haryana v. Jarnail Singh and Ors., 2004 (5) SCC 188, in which it has been categorically laid down that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 for searching the vehicle between sunset and sunrise. In the case in hand the search was made of a public conveyance at a public place between sunrise and sunset. Therefore, the provisions of Section 42(2) of the Act shall have no application to the case. This being the position, the High Court was not justified in acquitting the respondents and the trial court was quite justified in convicting them.”

(emphasis supplied)

28. The aforementioned judgments were followed by this Court in the case of Ankit Kumar Versus State of Punjab, Criminal Appeal No.D-1097 of 2009-(DB) wherein, the recovery was effected from a private car which was stopped at a Naka. This Court held that as the recovery was from a public place, Section 42 of the NDPS Act had no application. The relevant paras of the judgment are as under:-

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“2. As the story of the prosecution goes on 6.7.2008, police from CIA Staff Patiala headed by ASI Harbinder Singh PW 5 while present at Pul Tangri in the revenue estate of village Aaujan for checking bad elements as well as patrolling duty were given instructions by Inspector Jassa Singh PW 2 after he received secret information. On the basis of this information, a naka was laid on the Patiala Pehowa road at the Markanda bridge. At about 5.30 PM, a white coloured car make Accent bearing registration No. UP-11-J-6745 (in short, the Car) came from the side of Pehowa in which two persons were sitting. On signal, the persons tried to escape but were apprehended. The driver of the car disclosed his name as Sachin Sharma and the person sitting next to his seat revealed his name as Ankit Kumar, both present appellants. Meanwhile, on request, DSP Devinder Singh PW 7 arrived at the spot who revealed his identity to both the accused and his status of being a Gazetted Officer. The police showed its resolve to search the car as they were suspicious that some contraband was being ferried. The accused were apprised of their rights under the law and their option of search either before the presence of a Gazetted Officer or a Magistrate was sought. Accused Ankit Kumar gave his consent Ex. PC and Sachin Sharma Ex. PD whereby they reposed confidence in DSP Devinder Singh.

3. On the instructions of PW 7, PW 5 conducted search of the car from which five Jute Bags each containing poppy husk were recovered. As per the requirement, from each of the Jute Bags, two samples each of 100 grams were separately and individually drawn and prepared into separate parcels and were numbered and sealed with seal of the Investigating Officer bearing impression 'HS' and of the DSP bearing seal impression 'DS'. Sample seal impressions were also prepared. On being weighed, each of the residual Jute Bags was found to contain 39.800 kilograms poppy husk. The same were prepared into separate parcels with the same very seals and were taken into police possession through memo Ex. PE. All these

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proceedings were conducted in the presence of independent witness Sahib Singh who was handed over seal of the Investigating Officer. The car was taken into police possession through memo Ex. PF. Finding that the accused were not having any licence or authorisation to carry this contraband, a ruqa Ex. PG was prepared and sent to police station leading to the registration of the FIR Ex. PA by ASI Gurpal Singh PW 1.

12. After hearing at length Shri Vipul Jindal, Advocate for the appellants and Shri Pavit Mattewal, Additional Advocate General, Punjab for the State. The first and foremost point raised by the learned counsel for the appellants is to the effect that there has been utter violation of the provisions of Section 42 of the Act and trying to impress the Court that the provisions of Section 42(2) of the Act is mandatory and in this case, the police has failed to take down in writing the prior information so received by it and therefore, goes to the roots of the prosecution story which needs to be out rightly rejected. Shri Pavit Mattewal has sought to impress upon the Court that it was recovery on the basis of secret information received by a senior officer and that the conveyance was in transit in a public place, therefore, the provisions of Section 42(2) of the Act are not applicable in the facts of the present case.

15. A reading of Section 42 of the Act shows that the requirement to take down the secret information in writing and sending to superior officers prior to search is in respect of recoveries made from a private place such as building, conveyance or enclosed place. There is no requirement to record such information in writing in respect of search and arrest in a public place or in transit. The expression 'transit' in Section 43 of the Act is applicable to the expression 'conveyance' used in Section 42 of the Act as well, which is evident from the provisions of Section 49 of

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the Act, which authorizes an empowered officer to stop any conveyance, if the officer is suspecting that such conveyance is carrying narcotic drug or psychotropic substance or controlled substance. Thus Sections 43 & 49 of the Act, in respect of conveyance, creates an exception to carry out the search and seizure operations in respect of a vehicle in motion. The Supreme Court in State of Haryana v. Jarnail Singh, 2004 (19) AIC 818 SC : (2004) 5 SCC 188, while considering search of a tanker moving on a public highway, found that Section 43 is applicable to the case in question. It was observed as under:-

"8. section 43 of the NDPS Act provides that any officer of any of the Departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance, etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorised to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. V Explanation to Section 43 lays down that for the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to section 42 of the NDPS Act for searching the vehicle between sunset and sunrise.

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10. In the instant case, there is no dispute that the tanker was moving on the public highway when it was stopped and searched. Section 43 therefore clearly applied to the facts of this case. Such being the factual position there was no requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42....."

16. Such view was reiterated by the Court in a later judgment reported as *Union of India v. Major Singh & others*, (2006) 9 SCC 170, wherein the court observed as under:-

"3. The High Court has recorded the acquittal on two counts; firstly, the provisions of Section 50 of the Act and secondly, under Section 42(2) of the Act have not been complied with. So far as Section 50 of the Act is concerned, in the present case, the same shall have no application as the search and seizure was made from a truck and not from the person of any of the accused persons. This question has been examined by a three-Judge Bench of this Court in *State of H.P. v. Pawan Kumar*, 2005 (30) AIC 497 SC : (2005) 4 SCC 350 in which it has been categorically laid down that search of a bag, briefcase or any such article or container which is being carried by a person is not search of a person, as such the provisions of Section 50 of the Act would not apply in case search and seizure is not made from the person of the accused. In the present case, as the search and seizure have not been made from the person of the accused but from the truck, the provisions of Section 50 of the Act shall have no application.

4. Turning now to Section 42(2) of the Act, in this regard, it may be stated that from the prosecution case and evidence it would be clear that the search and seizure was made of a public carrier at a public place and 127 bags of poppy straw (opium) were seized from a public carrier. This point is also concluded by a judgment of this Court in *State of Haryana v. Jarnail Singh*, 2004 (19) AIC 818 SC : (2004) 5 SCC 188 in which it has been categorically

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laid down that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 for searching the vehicle between sunset and sunrise. In the case in hand the search was made of a public conveyance at a public place between sunrise and sunset. Therefore, the provisions of Section 42(2) of the Act shall have no application to the case. This being the position, the High Court was not justified in acquitting the respondents and the trial court was quite justified in convicting them."

17. Thus, we find that the provisions of Sections 42, 43 & 49 of the Act are to be read conjointly. The harmonious construction of the provisions of the Act makes it clear that the empowered officer is competent to search a conveyance in transit in a public place and that it is not necessary to record secret information in writing and to communicate the same to the Superior Officer. The provisions of Sections 42 and 43 of the Act show the intention of the Legislature is different in respect of each of the two provisions as is revealed from the language of these Sections. Section 43 authorizes any officer of the department mentioned in Section 42 for search, seizure, arrest or detention in any public place or in transit in respect of any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article is liable to be confiscated under the Act, or any document or other article which he has reason to believe may furnish evidence of the commission of an offence under this Chapter relating to such drug or substance whereas Section 42 speaks about search and seizure from any building, conveyance or in the case of private/personal place. The very wording of Section 42 in regard to information to be taken down in writing has been intentionally omitted in the wording of Section 43 purportedly and deliberately so advisedly in as much as the police officer in Section 42 may get



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information with regard to the person in any public place or in transit at the best moment and if he has to undergo procedure of taking that information into writing and recording the reasons for his belief, possibly such information may not be useful. More so in the prevalent situation of fast transmission of information by use of modern electronic equipments certainly would add to the woes of the Investigating Officer if he is made to trudge such an arduous procedure. Therefore, we find that an empowered person while acting under Section 43 of the Act need not record any reason of his belief as is required under Section 42(2) of the Act.

(Emphasis supplied)

29. Subsequent thereto, however, in **State of Rajasthan Versus Jag Raj Singh @ Hansa** (supra), the recovery of contraband came to be effected from a private vehicle while in transit. The Hon'ble Supreme Court came to the conclusion that Section 42 of the NDPS Act was to be complied with and Section 43 of the NDPS Act had no application as the vehicle was a 'private' one and not a 'public conveyance'. However, the judgments in **State of Haryana Versus Jarnail Singh** (supra) and **Union of India Versus Major Singh** (supra) were not considered. The relevant paragraphs of the said judgment are as under:-

"2. The prosecution case in the nutshell is: Shishupal Singh, Station House Officer, Bhadra received a secret information on 9th August, 1998 at 8 P.M. that a blue jeep car No. HR 24-4057 would come and pass through Haryana via Sirsa. A memo was prepared regarding the above information which was also entered into Roznamacha and information was also conveyed to the Circle Officer, Nohar at 8:05 p.m. on the same day through a constable. Station House Officer along with certain other police personnel proceeded after taking two

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independent witnesses namely Hawa Singh and Karam Singh. At 10:15 p.m. Jeep HR 24-4057 was seen coming from Sahaba. It was stated that one driver and two other persons were sitting who told their names as Jagraj Singh and Kishan Lal. Bags were lying in the jeep. Station House Officer gave notice to Jagraj and Krishan Lal and thereafter search was conducted. Nine bags containing opium powder were recovered from the jeep for which the accused were having no licence. Opium powder was weighed and two samples of 200 grams each were taken from each bag. Seizure memo was prepared on the spot. Both the persons were arrested. Material was sealed and after reaching the police station first information report being FIR No. 291/98 was registered. Samples were sent to Forensic Science Laboratory, Jaipur and on receiving a positive report, charge sheet was filed against both the accused under section 8/15 of the Act. The prosecution produced 12 witnesses including Station House Officer, Shishupal Singh as PD-11. Two independent witnesses PD-2 Hawa singh and PD- 3 Karam Singh were declared hostile. Prosecution also produced documents Exh. P1 to P40. Statements of accused were recorded under section 313 of Cr. P.C. Sri Ram Meena the then Circle Officer, Nohar was examined as defence witness-1.

3. Before the learned Sessions Judge, accused contended that the mandatory provisions of Section 42(1) and 42 (2) as well as section 50 of the NDPS Act have not been complied with; both the independent witnesses have not supported the status of recovery and that entire action had taken place at police station; the chain of event is not present so as to convict the accused. The test report is not admissible and readable. The contentions of accused were refuted by the learned Special Public Prosecutor. Learned Sessions Judge held that information received by Station House Officer was recorded as Exh. P-14 and the same was sent to Circle Officer, Nohar by Exhibit P-15. Hence, the Station House Officer has fully complied with the provisions of Sections 42(1) and 42(2). Sessions Judge further held that the vehicle was being used to transport passengers as has been

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clearly stated by PW-4 Veera Ram, hence, as per explanation to section 43 of the NDPS Act, vehicle was covered within the ambit of public place. Therefore, there was no need of any warrant or authority to search. Learned Sessions Judge also found that Section 50 was complied since notices were issued to both the accused before search. Sessions Judge noted that although both the independent witnesses have turned hostile but the police officers and officials have been examined on behalf of the prosecution with whom the fact of enmity has not been proved. Chain of event was complete. After coming to the aforesaid conclusion, learned Sessions Judge convicted both the accused.

4. Both the Criminal Appeals filed by Kishan Lal and Jagraj Singh were decided by a common judgment of the High Court dated 24.11.2003. The High Court while allowing the appeal gave following reasons and findings:

(i) The secret information which was recorded as Exh. P-14 and in Exh. P-21 Roznamacha it was not mentioned that "two persons will come from Jhunjhnu who are carrying powder of opium", whereas Exh.P-15, the information sent to the Circle Officer, Nohar which was also received by Circle Officer, Nohar the above fact was mentioned which was missing in the Exh. P-14 and P-21. In view of the above, Section 42(2) was not complied with.

(ii) The proviso to sub-section (1) of Section 42 provides that if such officer has reasons to believe, he may carry the search after recording the grounds of belief whereas no ground of belief as contemplated by the proviso was recorded in the present case and search took place after sun set which violates the provisions of Section 42(2) proviso.

(iii) The jeep which was the personal jeep of Viraram could not be treated as public transport vehicle. No evidence was brought on the record that there was any permit for public transport vehicle. The brother in law of Viraram i.e. Kartararam do not support the case that the vehicle was a public transport vehicle. Section 43 of the

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Act was not applicable; hence, the view of the court below that compliance of Section 42 was not necessary, is incorrect.

(iv) Further, the secret information from informer was received and recorded and search was conducted thereafter. The present was not a case of conducting the search at public place suddenly.

(v) The sealing of the material sample was not proper nor the sample of seal was deposited in the stock house. The seal vide which material has been sealed has not been kept safe any where, it remained in the possession of the officer who conducted the search.

(vi) The independent witnesses have not supported the case of prosecution at all.

5. The State of Rajasthan feeling aggrieved against the judgment of the High Court has come up in this appeal. Learned counsel for the appellant has contended that there was compliance of provisions of Section 42(1) and (2) of Section 42 and moreover, the vehicle being used to carry passengers as has come in the statement of the owner of the vehicle Vira Ram PW-4 and the search being at public place, by virtue of Section 43 there was no necessity of compliance of Section 42. It is further contended that minor discrepancy in Exh. P-14 and that of Exh. P-15 was inadvertent mistake due to which it cannot be said that provisions of Section 42(1) was not complied with. It is contended that Station House Officer and other police personnel accompanying the team have been examined and they have proved the recovery and chain of events. The High Court has committed error in acquitting the accused whereas there was sufficient ground and material to support the conviction order recorded by the Special Judge.

8. Whether the High Court committed error in acquitting the accused is the issue which needs to be considered in this appeal. Whether there were sufficient material to support the findings of the High Court regarding non - compliance of Section 42(1) and Section 42 (2) and whether Section 43 was applicable in the present



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case are the other issues which need to be answered. Whether recovery as claimed by the prosecution is supported from the evidence on record and material and samples were properly sealed are other related issues.

12. The High Court has come to the conclusion that there is breach of mandatory provisions of Section 42(1) and Section 42(2) and further Section 43 which was relied by the Special Judge for holding that there was no necessity to comply Section 42 is not applicable. We thus proceed to first examine the question as to whether there is breach of provisions of Section 42(1) and Section 42(2). The breach of Section 42 has been found in two parts. The first part is that there is difference between the secret information recorded in Exh. P-14 and Exh. P-21 and the information sent to Circle Officer, Nohar by Exh. P-15. It is useful to refer to the findings of the High Court in the above context, which is quoted below:

" From the above examination, it is not found that Exh. P-14 the information which is stated to be received from the informer under Section 42(2) of Act or Exh. P-21, the information given by the informer which is stated to be recorded in the Rozanamacha, copy whereof has been sent to C.O. Nohar, who was the then Senior Officer, Rather, Exh. P-15, the letter which was sent, it is not the copy of Exh. P-14, but it is the separate memo prepared of their own. From the above examination, it is not found in the present case that section 42 (2) of Act, 1985 is complied with."

16. Explanation to Section 43 defines expression "public place" which includes any public conveyance. The word "public conveyance" as used in the Act has to be understood as a conveyance which can be used by public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary

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permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers. The High Court has looked into the evidence and come to the conclusion that there was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court has further held that even Kartara Ram who as per owner of the vehicle Veera Ram was using the vehicle, do not support that the jeep was used as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle. Following observations were made by the High Court:

"Kartara Ram is produced as PD-5, who has deposed the statement that Vira Ram is his brother-in-law (Saala), on whose name jeep bearing No.HR 24 4057 is lying registered. He had employed Inderjit singh as driver for that jeep. Person namely Krishan has never been employed as driver. This witness has been declared hostile and he has been examined too, who does not support the prosecution case. In this manner, Viraram is the owner of the jeep. According to him he had given the jeep to Kartara Ram, but Kartara Ram has not stated anywhere in his statement that this jeep was given to him and he used the same as Public Transport Vehicle. Since powder of opium was caught in this jeep and even Notice Exh. P-6 was also served upon him by the police, he with a view to save himself, can also depose such statement that Kartara used to use the jeep as Public Transport Vehicle, whereas Kartara Ram PD-5 does not affirm this fact. Jeep was personal, it is clear on the record. In this manner, just on this ground that he has given the jeep to his brother-in-law and he used it to carry the passengers, the personal jeep could not be treated as public transport vehicle. However, the fact that jeep is used to carry the passengers has not been affirmed from the statements of Kartara Ram. There is no



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evidence on record on the basis of which it could be stated that jeep was public transport vehicle and they have the permit for it, rather it was the private vehicle and it is stated that Vira Ram himself is the owner of that vehicle"

17. There is nothing to impeach the aforesaid findings. We have also perused the statement of Vira Ram in which statement he has never even stated that he has any permit for running the vehicle as transport vehicle. He has stated that "..... I had given this jeep to Kartara Ram resident of who is my relative to run it for transporting passengers" Admittedly the jeep was intercepted and was seized by the police. In view of the above, the jeep cannot be said to be a public conveyance within the meaning of Explanation to Section 43. Hence, Section 43 was clearly not attracted and provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

19. Thus the present is not a case where Section 43 can be said to have been attracted, hence, non-compliance of Section 42(1) proviso and Section 42(2) had seriously prejudiced the accused. This Court had occasion in large number of cases to consider the consequence of non-compliance of provisions of Section 42(1) and 42(2), whether the entire trial stand vitiated due to above non compliance or conviction can be set aside. In this context reference is made to the judgment of this Court in State of Punjab v. Balbir Singh 1994(1) RCR (Criminal) 736 : (1994) 3 SCC 299. In the above batch of cases, the High Court has acquitted accused on the ground that search was conducted without conforming to the provisions of the NDPS Act. Sections 41,42 43 and other relevant provisions came for consideration before this Court, referring to the provisions of Chapter IV following was stated in paragraph 8:



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"8. But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Sub-section (2) of 8 1990 Cri LJ 414 (Del) Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior."

(Emphasis supplied)

30. The decision in **State of Rajasthan Versus Jag Raj Singh @ Hansa** (supra) was followed by the Hon'ble Supreme Court in **Boota Singh Versus State of Haryana** (supra), wherein once again the Hon'ble Supreme Court held that if a private vehicle in a public place was sought to be searched the compliance of Section 42 of the NDPS Act was necessary. Once again, the judgment in **State of Haryana** (supra) and **Union of India** (supra)

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were not considered to. The relevant paragraphs of the said judgment are as under:-

“2. The basic facts and the case of prosecution as recorded by the High Court in its judgment are as under:

"2. The facts as put forth by the prosecution are to the effect that on 28.01.2002, S.I. Nand Lal along with fellow police officials were present at the canal bridge on Surtia-Rori road, where he received a secret information to the effect that the accused are selling poppy straw in a vehicle bearing registration number GUD-4997 on a 'kacha path' at Rori-Jatana road and they can be apprehended if raid is conducted. Accordingly, a raid was conducted and the accused were found sitting in the jeep bearing registration number GUD-4997 at the aforesaid place. Major Singh, co-accused of the appellants, managed to slip away, whereas, the appellants were apprehend at the spot. They were found sitting upon two bags kept in the said jeep. Notices under Section 50 of the Act were served upon them but the appellants reposed faith upon the police officials. The search of the bags led to the recovery of poppy straw. One bag was containing 39 kg of poppy straw and the second bag was containing 36 kg of poppy straw. Two samples weighing 100 grams each were separated from each bag. The sample parcels and the bulk parcels were converted into separate parcels and sealed with the seal bearing impression 'CS'. The jeep along with weighing scale, two weights of 500 grams each were also recovered and taken into possession vide recovery memos. Ruqa was recorded and dispatched to the police station on the basis thereof, the FIR was registered. Subsequently, Major Singh, co-accused, was arrested. and on completion of investigation, the challan was presented in the Court.

4. In support of its allegations, the prosecution has examined four witnesses. Inspector Nand Lal (PW4) has conducted the search of

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the accused in the presence of ASI Jaswant Singh (PW3). The case property was retained in the malkhana by Kuldeep Singh (PW2) and Constable Gurjit Singh (PW 1) took the sample parcels to the FSL. The prosecution has also 2 of 10 produced documentary evidence to substantiate the version as put forth by it."

4. During trial, PW4 Inspector Nand Lal, the Investigating Officer deposed in his examination-in-chief as under:

"On 28.1.2002 I was posted as Sub Inspector/SHO in Police Station Rori. On that day, I along with ASI Jaswant Singh and other police officials were present at the canal bridge on Surtia Rori-road in connection with patrolling. I received a secret information that all the accused are selling poppy straw in a vehicle bearing no.GUD-4997 upon a 'Kacha Rasta at Rori-Jatana road and can be apprehended red handed if a raid is conducted. I tried to join two persons who were going to water the fields in the investigations but they refused. Thereafter I organised a raiding party and conducted a raid. All the accused were found in the jeep bearing no GUD-4997, upon a kacha rasta by the side of Rori-Jatana Road, Upon seeing the police party, one of the accused, namely, Major fled the spot. I knew the accused Major Singh since long. Remaining three accused were apprehended at the spot. Accused Boota Singh, Gurdeep Singh and Gurmahender Singh alias Mitta were found sitting upon two bags lying in the said Jeep. Thereafter, I served notices Ex.PC, Ex.PD and Ex.PE upon accused Gurdeep, Boota and Gurmahender Singh respectively under section 50 of NDPS asking them as to whether they desired their search before a gazetted officer or a Magistrate. Vide replies Exl.PC/1.1, Ex.PDA and Ex.PE/I, accused Gurdeep Singh, Boota Singh and Gurmahender Singh alias Mitta declined the offer and reposed faith in the police. ..."

In his cross-examination, the witness stated:-

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"I did not record the secret information in writing. Wireless in my jeep was out of order at that time. I did not obtain any search warrants for conducting the search of the jeep of accused during night hours. I did not record any ground for not obtaining the requisite search warrants in my police file. The writing work was done while sitting in the jeep."

5. After considering the evidence on record, the Trial Court by its judgment and order dated 12.08.2004, acquitted accused Major Singh but convicted accused Boota Singh, Gurdeep Singh and Gurmohinder Singh, under Section 15 of the NDPS Act and sentenced them to suffer rigorous imprisonment for 10 years with imposition of fine in the sum of Rs. 1,00,000/-, in default whereof they were directed to undergo further rigorous imprisonment for a period of two years.

On the question of applicability of Section 42 of the NDPS Act, the Trial Court stated:-

" ... Learned counsel sought acquittal of accused due to noncompliance of Section 42 of N.D.P.S. Act. However, above said argument could help the accused if recovery had been effected from the house, building etc. of the accused. Admittedly, recovery in question was effected from the accused while they were sitting on road in a jeep at a public place. Therefore, case of accused would be covered by Section 43 of N.D.P.S. Act and not by Section 42 of N.D.P.S. Act. Under these circumstances, argument of learned counsels for accused is overruled."

6. The convicted accused, being aggrieved, preferred the aforementioned Criminal Appeal before the High Court, which was dismissed by the High Court.

On the question whether the matter came within the scope of Section 42 of the NDPS Act, the High Court observed:-

14. Furthermore, in the case in hand, the accused were present in a jeep on a public path and in such circumstance, the provisions of Section 43 and not of 42 of the Act come into play.

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As per explanation to Section 43 of the Act, the public place includes a conveyance also. Section 43 of the Act contemplates a seizure made in a public place or in transit. As such, Section 42 of the Act is not applicable to the facts of the present case ..."

11. In Jagraj Singh alias Hansa, the facts were more or less identical. In that case, the vehicle (as observed in para 5.3 of the decision) was not a public transport vehicle. After considering the relevant provisions and some of the decisions of this Court including the decision in Karnail Singh, it was observed:-

"14. What Section 42(2) requires is that where an officer takes down an information in writing under sub-section (1) he shall send a copy thereof to his immediate officer senior. The communication Ext. P-15 which was sent to the Circle Officer, Nohar was not as per the information recorded in Ext. P-14 and Ext. P-21. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

.....

16. In this context, it is relevant to note that before the Special Judge also the breach of Sections 42(1) and 42(2) was contended on behalf of the defence. In para 12 of the judgment the Special Judge noted the above arguments of defence. However, the arguments based on non-compliance with Section 42(2) were brushed aside by observing that discrepancy in Ext. P-14 and Ext. P-15 is totally due to clerical mistake and there was compliance with Section 42(2). The Special Judge coming to compliance with the proviso to Section 42(1) held that the vehicle searched was being used to transport passengers as has been clearly stated by its owner Vira Ram, hence, as per the Explanation to Section 43 of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court has reversed the above findings of the Special Judge. We thus, proceed to



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examine as to whether Section 43 was attracted in the present case which obviated the requirement of Section 42(1) proviso.

.....

29. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance with requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance with Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in para 5. The present is not a case where insofar as compliance with Section 42(1) proviso even an argument based on substantial compliance is raised there is total non-compliance with Section 42(1) proviso. As observed above, Section 43 being not attracted, search was to be conducted after complying with the provisions of Section 42. We thus, conclude that the High Court has rightly held that non-compliance with Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order."

(Emphasis added)

12. The evidence in the present case clearly shows that the vehicle was not a public conveyance but was a vehicle belonging to accused Gurdeep Singh. The Registration Certificate of the vehicle, which has been placed on record also does not indicate it to be a Public Transport Vehicle. The explanation to Section 43 shows that a private vehicle would not come within the expression "public place" as explained in Section 43 of the NDPS Act. On the strength of the decision of this Court in Jagraj Singh alias Hansa, the relevant provision would not be Section 43 of the NDPS Act but the case would come under Section 42 of the NDPS Act."

(Emphasis supplied)

31. The Patna High Court in **Rubul Hussain @ Rubul Hasan Versus The State of Bihar & Ors., Criminal Appeal (DB) No.6 of 2021,**



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decided on 12.07.2023, followed the dictum of law laid down in State of Rajasthan Versus Jag Raj Singh @ Hansa (supra) and Boota Singh Versus State of Haryana (supra) and held that where the recovery was from a private conveyance (truck), Section 42 of the NDPS Act was required to be complied with.

Similarly, the Gujarat High Court in Yusufbhai Ismailbhai Vohra Versus State of Gujarat, 2020(2) GLR 908, while following the dictum in State of Rajasthan (supra) and Boota Singh (supra) held that a private car was not a public conveyance and therefore, Section 42 of the NDPS Act would be attracted to the case and not Section 43 of the NDPS Act.

32. Thus, quite apparently with respect to Sections 41 & 42 of the NDPS Act, the law is well-settled by the Hon'ble Supreme Court in M. Prabhulal (supra) to the effect that where secret information has been received by the Gazetted Officer, he is bound to reduce the same into writing and conduct the search himself or authorise a subordinate to do so. However, he is not required to send the information so received and reduced into writing to a superior officer as envisaged under Section 42(2) NDPS Act.

33. As regards Section 42 of the NDPS Act, where an information is received by an officer who is not a gazetted officer but an empowered one and neither is he a peon, sepoy or constable, he is bound to record the said information in writing and proceed to search any building, conveyance or

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place. The information received and reduced into writing shall be communicated to his immediate official superior within 72 hours.

However, under Section 43 of the NDPS Act, where the search and seizure is in a public place or in transit, compliance of Section 42 of the NDPS Act of recording of the secret information and sending it to a superior officer is not required. Public place is defined and includes a public conveyance. Thus, Sections 42 and 43 of the NDPS Act operate in different spheres.

34. The question which then arises is as to whether Section 42 of the NDPS Act or Section 43 of the NDPS Act would apply to a private vehicle sought to be searched and seized in a public place/transit.

35. A perusal of Section 42 of the NDPS Act would refer to the search of any building conveyance or enclosed place. Therefore, in cases where the access to the public is prohibited Section 42 of the NDPS Act comes into play. If a private conveyance is parked inside a private premises the protection of Section 42 of the NDPS Act is available and therefore, there was no need for the legislature to separately add the words 'conveyance'. The position is further clarified from Section 43 of the NDPS Act which refers to the seizure and arrest in a public place or in transit. The explanation of 'public place' includes 'public conveyance'. If Section 43 of the NDPS Act was to apply to both private and public conveyances inasmuch as the safeguards of Section 42 of the NDPS Act were not required to be followed, then the legislature would have used the words 'conveyance' in the

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explanation to Section 43 of the NDPS Act as against ‘public conveyance’. The position which thus emerges is that where secret information is received in terms of Section 42 of the NDPS Act, then the search of a private conveyance even in a public place/transit would require compliance of Sections 41(1) and 42(2) of the NDPS Act i.e. the information so received must be taken down in writing and conveyed to the immediate superior officer within 72 hours. However, where the search of a public conveyance is to be conducted in a public place/transit, no such compliance is required. Whether a vehicle is a private conveyance or a public conveyance would be a question of fact in each case.

36. We may also hasten to add here that even in *State of Haryana Versus Jarnail Singh*(supra) and *Union of India Versus Major Singh* (supra), the Hon’ble Supreme Court in each case assumed that a ‘public conveyance’ was being searched at a public place and there was no discussion vis-a-vis a private conveyance or public conveyance. The aforementioned judgments were followed by this Court in *Ankit Kumar Versus State of Punjab* (supra). However, this Court did not factor in that in each of the judgments, the Hon’ble Supreme Court had assumed that the vehicle which was being searched was a public conveyance though in *Ankit Kumar* (supra) it was clearly a private vehicle though in a public place.

While the judgments in *State of Rajasthan Versus Jag Raj Singh @ Hansa* (supra) and *Boota Singh Versus State of Haryana* (supra) do not consider the aforementioned two prior judgments of the Hon’ble

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Supreme Court but they have clearly explained the difference between a ‘private public’ and a ‘public conveyance’ and have gone on to hold that in the case of the former, Section 42 of the Act would apply and in the case of the latter, Section 43 of the NDPS Act would apply.

37. Coming back to the facts of the present case, PW8-DSP Balbir Singh was present at the naka. Though there is some discrepancy regarding as to which officer present at the naka received the secret information, the said fact would have little relevance because it is the case of the prosecution that the DSP was himself present there. In this situation, though he was bound to record the said secret information into writing, he was not required to send the same to a superior officer inasmuch as Section 41(2) of the NDPS Act would come into play as held in **M. Prabhulal** (supra). However, in the instant case, the secret information so received by PW8-Balbir Singh was admittedly not reduced into writing which is a requirement of Section 41(2) of the NDPS Act as well as Section 42 of the NDPS Act.

38. In view of the aforementioned discussion, we find no merit in the instant appeal and the same stands dismissed.

(JASJIT SINGH BEDI)**JUDGE****24.03.2025**

JITESH

(GURVINDER SINGH GILL)**JUDGE**

Whether speaking/reasoned:- Yes/No
Whether reportable:- Yes/No