

State of Himachal Pradesh Vs. Pawan Kumar

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Court : Supreme Court of India

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Reported in : AIR2005SC2265; 2004(2)ALD(Cri)847; (2006)1CALLT1(SC); 2005CriLJ2208; 2005(99)ECC737; JT2005(4)SC373; 2005(3)KLT195(SC); (2005)4SCC350

Judge : R.C. Lahoti, C.J.,; G.P. Mathur and; P.K. Balasubramanyan, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 2, 18, 41, 42, 43, 50, 50(1) and 50(4); Code of Criminal Procedure (CrPC) - Sections 103 and 165; Indian Penal Code (IPC) - Sections 11; General Clauses Act - Sections 3(42); [Constitution of India](#) - Article 20(3); [Evidence Act, 1872](#)

Appeal No. : Criminal Appeal Nos. 222 of 1997 and 375 of 2003

Appellant : State of Himachal Pradesh;state of Rajasthan

Respondent : Pawan Kumar;bhanwar Lal

Advocate for Def. : Nanita Sharma, ; Vivek Sharma and ; Janeshg Singh, Advs.

Advocate for Pet/Ap. : J.S. Attri, Addl. Adv. General and; L.R. Rath, Adv. for in Crl. A. No. 222/97 and;

Disposition : Appeal allowed

Prior history : From the Judgment and Order dated 26.8.96 of the Himachal Pradesh High Court in Crl. A. No. 2 of 1995

Books referred : Craies on Statute Law, Seventh ed.; Chambers's Dictionary; Webster's Third New; Black's Law Dictionary; Law Lexicon; Statutory Interpretation by Francis Bennion (Third ed.)

Judgement :

G.P. Mathur, J.

Criminal Appeal No. 222 of 1997

1. In view of difference of opinion between two learned Judges who heard the appeal, the matter has been placed before this larger bench and the question for consideration is whether the safeguards provided by Section 50 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short 'the NDPS Act' or 'the Act') regarding search of any 'person' would also apply to any bag, briefcase or any such article or container etc., which is being carried by him.

2. The essential facts of the case, which are necessary for decision of the appeal, may be stated in brief. According to the case of the prosecution, Hukum Singh and Munshi Ram, Head Constables and some police personnel were checking buses at the bus stand, Mandi in the night of 18.7.1994. While checking a bus at about 8.45 p.m., they noticed that the accused Pawan Kumar (respondent herein), who was carrying a bag, Ex.P3, slipped out from the rear door of the bus and thereafter started running towards Subzi Mandi side. The police personnel got suspicious and after a chase apprehended him near the gate of bus stand. They felt smell of opium emitting from the bag and, therefore, telephonically informed Prem Thakur, Deputy S.P./S.H.O., P.S. Sadar, Mandi. Prem Thakur came to the spot and inquired from the accused whether he wanted to be searched by police or by a Magistrate. The accused disclosed his name and expressed his willingness to be searched by the police. A search of the accused and the bag being carried by him was then conducted and 360 gms. of opium wrapped in polythene was found inside the bag. Two samples of the recovered opium, each weighing 20 gms. were

taken and were sealed separately and a seizure memo was prepared. On the basis of the Ruka Ex.P8, an FIR was lodged at the Police Station and thereafter usual investigation followed which culminated in filing of a charge-sheet against the accused. The learned Sessions Judge, Mandi, by the judgment and order dated 26.11.1994 convicted the respondent (accused) under Section 18 of the NDPS Act and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lakh. The respondent preferred an appeal against his conviction and sentence before the High Court of Himachal Pradesh. The High Court held that the opinion given by the Chemical Examiner regarding the substance recovered from the bag of the accused could not be treated to be opinion of the Chemical Examiner as defined under the Act and the Rules and, therefore, the same had to be excluded from consideration. It was further held that the provisions of Section 50 of NDPS Act had not been complied with while conducting the search of the bag and, therefore, recovery of opium from the possession of the accused was not established. On these findings, the appeal was allowed by the judgment and order dated 26.8.1996 and the conviction of the respondent was set aside.

3. The State of Himachal Pradesh preferred the present appeal by special leave challenging the judgment of acquittal passed by the High Court. The appeal was initially heard by a Bench of two learned Judges. Hon'ble Y.K. Sabharwal, J. held that the view taken by the High Court that the report of the Chemical Examiner could not be taken into consideration was not correct. The finding recorded by the High Court that the prosecution had failed to prove that any incriminating substance had been recovered from the possession of the accused was accordingly reversed. Regarding the applicability of Section 50 of the NDPS Act after referring to *Namdi Francis Nwazor v. Union of India and Anr.* : (1998)8SCC534, His Lordship held as under :

'The answer to the real question in cases where the line of separation is thin and fine can be obtained by applying the test of inextricable connection and then conclusion reached as to whether the search was that of a 'person' or not. If the search is of a bag which is inextricably connected with the person of the accused, Section 50 of the NDPS Act will apply, and if it is not so connected, the provisions will not apply The offending article was

found in the bag which accused/respondent was carrying. The test of inextricable connection between the person searched and the object recovered is demonstrably applicable. It cannot be held that Section 50 has no application merely because the offending article was in the bag which the accused was carrying with him.'

Finally it was held as under :

'On this fact situation, it cannot be held that the search was not of a person but was of a bag. Both are inextricably connected. It has to be held that the search was that of the respondent's person. Clearly, Section 50 of the NDPS Act was applicable but was not complied. Therefore, the conviction of the respondent could not be sustained and the High Court rightly held that Section 50 had been breached.'

Hon'ble Arijit Pasayat, J. expressed agreement with the view that the report of the Chemical Examiner could not be excluded but on the question of applicability of Section 50 of NDPS Act held that the said provision was applicable only in the case of a search of a person and not when search of a bag which is being carried by a person on his shoulder or back is conducted. His Lordship accordingly held that having regard to the purport and object of the NDPS Act, the language of Section 50 cannot be given any strained meaning so as to frustrate the legislative purpose. It was thus held that there was no infraction of the requirement of Section 50 and the finding to the contrary recorded by the High Court was clearly wrong. In view of this difference of opinion, the appeal has been placed before the present Bench.

4. The controversy turns round Section 50 of the NDPS Act and the same (at the relevant time) read as under :

'50. Conditions under which search of persons shall be conducted - (1) When any officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest

Magistrate.

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

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

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

5. The question, which requires consideration, is what is the meaning of the words 'search any person' occurring in Sub-section (1) of Section 50 of the Act. Learned counsel for the accused has submitted that the word 'person' occurring in Section 50 would also include within its ambit any bag, briefcase or any such article or container, etc., being carried by such person and the provisions of Section 50 have to be strictly complied with while conducting, search of such bag, briefcase, article or container, etc. Learned counsel for the State has, on the other hand, submitted that there is no warrant for giving such an extended meaning and the word 'person' would mean only the person himself and not any bag, briefcase, article or container, etc., being carried by him.

6. The word 'person' has not been defined in the Act. Section 2(xxix) of the Act says that the words and expressions used herein and not defined but defined in the Code of Criminal Procedure have the meanings respectively assigned to them in that Code. The Code of Criminal Procedure, however, does not define the word 'person'. Section 2(y) of the Code says that the words and expressions used therein and not defined but defined in the Indian Penal Code have the meanings respectively assigned to them in that Code. Section 11 of the Indian Penal Code says that the word 'person' includes any Company or Association or body of persons whether incorporated or not. Similar definition of the word 'person' has been given in Section 3(42) of the General Clauses Act. Therefore, these definitions render no assistance for resolving the controversy in hand.

7. One of the basic principles of interpretation of Statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary to, or inconsistent with, any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity (See Craies on Statute Law, Seventh ed. page 83-85). In the well known treatise - Principles of Statutory Interpretation by Justice G.P. Singh, the learned author has enunciated the same principle that the words of the Statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context or in the object of the Statute to suggest the contrary (See the Chapter - The Rule of Literal Construction -page 78 - Ninth ed.). This Court has also followed this principle right from the beginning. In *Jugalkishore Saraf v. Raw Cotton Co. Ltd.* : [1955]1SCR1369 , S.R. Das, J. said: -

'The cardinal rule of construction of statutes is to read the statute literally, that is, by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation.'

A catena of subsequent decisions have followed the same line. It, therefore, becomes necessary to look to dictionaries to ascertain the correct meaning of the word 'person'.

8. The dictionary meaning of the word 'person' is as under :

Chambers's Dictionary : An individual; a living soul; a humanbeing;b: the outward appearance, & c :bodily form; a distinction inform; according as the subject of theverb is the person speaking, spoken toor spoken of.Webster's Third New : An

individual human being; a human body as distinguished from an animal or thing; an individual having a specified kind of bodily appearance; the body of a human being as presented to public view normally with its appropriate coverings and clothings; a living individual unit being possessing or forming the subject of personality. Black's Law Dictionary : In general usage, a human being (i.e. natural person), though by statute term may include labour organizations, partnerships, associations, corporations. Law Lexicon : The expression 'person' is a noun by P. Ramanatha Aiyar according to grammar and it means a character represented as on the stage, a human being; a self-conscious personality.

9. We are not concerned here with the wide definition of the word 'person', which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the Section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad commonsense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word 'person' appears to be - 'the body of a human being as presented to public view usually with its appropriate coverings and clothings'. In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word 'person' would mean a human being with appropriate coverings and clothings and also footwear.

10. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in Section 50 of the Act,

11. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the word 'search of person'. One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is provided by Sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free.

12. The scope and ambit of Section 50 of the Act was examined in considerable detail by a Constitution Bench in *State of Punjab v. Baldev Singh* : 1999 CriLJ3672 and para 12 of the reports is being reproduced below :

'12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.'

The Bench recorded its conclusion in para 57 of the reports and sub-paras (1), (2), (3) and (6) are being reproduced below :

57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under Sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

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

during a search conducted in violation of the provisions of Section 50 of the Act.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.'

13. The above quoted dictum of the Constitution Bench shows that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which he may be carrying.

14. Learned counsel for the State has referred to large number of decisions of this Court wherein Section 50 was held inapplicable in the case of search of some baggage or article etc., which was in immediate possession or was being carried by the accused. We do not consider it necessary to burden this judgment by referring to all the authorities cited but would only give a gist of some of the cases which is as under : -

I. Abdul Rashid Ibrahim Mansuri v. State of Gujarat : 2000 CriLJ1384 - This is a decision by a Three Judge Bench presided over by Dr. A.S. Anand, C.J., who wrote the opinion of the Court in the Constitution Bench decision in State of Punjab v. Baldev Singh. In this case four gunny bags were found in an auto rickshaw which the accused was driving and there was no other person present. The argument based on non-compliance of Section 50 as explained in the case of Baldev Singh was rejected on the ground that the gunny bags were not inextricably connected with the person of the accused.

II. Madan Lal v. State of H.P. : 2003 CriLJ3868 (para 16) - It was held that Section 50 would apply in the case of search of a persona as contrasted to search of vehicles, premises or articles.

III. Gurbax Singh v. State of Haryana : 2001 CriLJ1166 - Accused got down from a train carrying a Katta (gunny bag) on his shoulder. Held that Section 50 was not applicable.

IV. State of Punjab v. Makhan Singh : (2004)92CTR(SC)564 - The accused was apprehended while alighting from a bus with a tin box in his hand in which contraband was found. The High Court acquitted the accused on account of non-compliance of Section 50. On the finding that Section will not apply, the judgment of the High Court was reversed and the accused was convicted.

V. Kanhaiya Lal v. State of M.P. : (2000)10SCC380 -One kg. of opium was found in a bag which was being carried by the accused. The argument based on Section 50 was rejected on the ground that it was not a case of search of the person of the accused.

VI. Birakishore Kar v. State of Orissa : AIR 2000 SC3626 - Accused was found lying on a plastic bag in a train compartment. Argument based on Section 50 was rejected on the ground that the accused was sitting on the plastic bag and it was not a case of the search of the person of the accused.

VII. Krishna Kanwar v. State of Rajasthan : 2004(91)ECC545 (para 19) -Held, Section 50 applies where search has to be in relation to a person as contrasted to search of premises, vehicles, articles or bag.

VIII. Sarjudas v. State of Gujarat : 2000 CriLJ509 - The accused were riding a scooter on which a bag was hanging in which charas was found - Section 50 was held not applicable as it was not a case where the person of the accused was searched.

IX. Saikou Jabbi v. State of Maharashtra : 2003(158)ELT801(SC) - Heroine was found in a bag. It was held that Section 50 was not applicable as it applies to search of a person.

15. Learned counsel for the respondent has placed strong reliance on Namdi Francis Nwazor v. Union of India and Anr. : (1998)8SCC534 which is a decision by a Bench of three learned Judges. In this case, the accused had checked in at the

Indira Gandhi International Airport for taking the flight from Delhi to Lagos. A team of the Narcotics Control Bureau, on suspicion, decided to check his baggage. At the point of time when the actual search took place, he was carrying two handbags but nothing incriminating was found therefrom. He had booked one bag which had already been checked in and was loaded in the aircraft by which he was supposed to travel. The bag was brought to the customs counter and on checking 180 gms. of heroine was found therein. The Bench held that on a plain reading of Sub-section (1) of Section 50, it applies to cases of search of a person and not to search of any article in the sense that the article is at a distant place from where the offender is actually searched. After arriving at the above finding, the Bench also observed - 'We must hasten to clarify that if that person is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act. However, when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that it was not found on the accused person.' The Bench then finally concluded that on the facts of the case Section 50 was not attracted. The facts of the case clearly show that the bag from which incriminating article was recovered had already been checked in and was loaded in the aircraft. Therefore, it was not at all a search of a person to which Section 50 may be attracted. The observations, which was made in the later part of the judgment (reproduced above), are more in the nature of obiter as such a situation was not required to be considered for the decision of the case. No reasons have been given for arriving at the conclusion that search of a handbag being carried by a person would amount to search of a person. It may be noted that this case was decided prior to the Constitution Bench decision in *State of Punjab v. Baldev Singh*. After the decision in *Baldev Singh*, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him.

Another judgment relied upon by the learned counsel for the accused is *Beckodan Abdul Rahiman v. State of Kerala* : 2002 CriLJ2529 . Here 11 gms of opium was found in a polythene bag which had been concealed in the fold of dhoti which the

accused was wearing. This was clearly a case of search of a persons, as explained above, and Section 50 was rightly held applicable.

16. There is another aspect of the matter, which requires consideration. Criminal law should be absolutely certain and clear and there should be no ambiguity or confusion in its application. The same principle should apply in the case of search or seizure, which come in the domain of detection of crime. The position of such bags or articles is not static and the person carrying them often changes the manner in which they are carried. People waiting at a bus stand or railway platform sometimes keep their baggage on the ground and sometimes keep in their hand, shoulder or back. The change of position from ground to hand or shoulder will take a fraction of a second but on the argument advanced by learned counsel for the accused that search of bag so carried would be search of a person, it will make a sharp difference in the applicability of Section 50 of the Act. After receiving information, an officer empowered under Section 42 of the Act, may proceed to search this kind of baggage of a person which may have been placed on the ground, but if at that very moment when he may be about to open it, the person lifts the bag or keeps it on his shoulder or some other place on his body, Section 50 may get attracted. The same baggage often keeps changing hands if more than one person are moving together in a group. Such transfer of baggage at the nick of time when it is about to be searched would again create practical problem. Who in such a case would be informed of the right that he is entitled in law to be searched before a Magistrate or a Gazetted Officer? This may lead to many practical difficulties. A statute should be so interpreted as to avoid unworkable or impracticable results. In Statutory Interpretation by Francis Bennion (Third ed.) para 313, the principle has been stated in the following manner :

'The court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. Sometimes however, there are overriding reasons for applying such a construction, for example where it appears that Parliament really intended it or the literal meaning is too strong.'

The learned author has referred to *Sheffield City Council v. Yorkshire Water Services Ltd.* (1991) 1 WLR 58 , where it was held as under :

'Parliament is taken not to intend the carrying out of its enactments to be unworkable or impracticable, so the court will be slow to find in favour of a construction that leads to these consequences. This follows the path taken by judges in developing the common law. '... the common law of England has not always developed on strictly logical lines, and where the logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society.'

While interpreting a provision in the Finance Act, 1972, Lord Denning in *S.J. Grange Ltd. v. Customs and Excise Commissioners* (1979) 2 All ER 91, observed that if the literal construction leads to impracticable results, it would be necessary to do little adjustment so as to make the section workable.

17. As pointed out in *State of Punjab v. Baldev Singh*, drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nation Conventions against illicit trafficking in narcotic drugs, which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in this kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage in a fraction of second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article.

18. It will be useful here to take note of the general law regarding search and seizure and the effect of any illegality committed during the course of search on the seizure or recovery made of any incriminating article. In *State of Maharashtra v. Natwarlal Damodardas Soni* : 1980 CriLJ429 , the Anti-Corruption Bureau had recovered 100 gold bars each weighing 10 tolas having foreign markings from the

residential premises of the accused, consequent upon which the custom authorities initiated proceedings in which he was convicted. The contention raised was that the search and seizure of the gold by the police was illegal. It was held that the police had powers under the Code of Criminal Procedure to search and seize the gold if they had reason to believe that a cognizable offence had been committed in respect thereof. Assuming argue do that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the custom authorities or the validity of the trial which followed on the complaint of the Assistant Collector of Customs.

19. In *Radha Kishan v. State of U.P.* : (1963)ILLJ667SC , the recovery of certain articles was challenged on the ground that the search was made in contravention of Sections 103 and 165 Cr.P.C. The contention was repelled thus -

'So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provision of Sections 103 and 165, Code of Criminal Procedure, are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues.'

20. Again in *Shyam Lal v. State of M.P.* : 1972 CriLJ638 , it was held that even if the search is illegal being in contravention with the requirement of Section 165 Cr.P.C. that provision ceases to have any application to the subsequent steps in the investigation. This question has recently been examined by a Three Judge Bench of this Court in *State v. N.M.T. Joy Immaculate* : 2004 CriLJ2515 and the relevant portion of paragraph 14 and 15.1 are being reproduced below :

'..... .The admissibility or otherwise of a piece of evidence has to be judged having regard to the provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that matter any other law in India does not exclude relevant evidence on the ground that it was obtained under an illegal search and seizure. Challenge to a search and seizure made under the Criminal Procedure Code on the ground of violation of fundamental rights under Article 20(3) of the

Constitution was examined in *M.P. Sharma v. Satish Chandra* : 1978(2)ELT287(SC) by a Bench of 8 Judges of this Court. The challenge was repelled and it was held as under :

'A power of search and seizure is in any system of jurisprudence an over-riding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches.'¹⁵. The law of evidence in our country is modeled on the rules of evidence which prevailed in English Law. In *Kuruma v. The Queen* 1955 AC 197 an accused was found in unlawful possession of some ammunition in a search conducted by two police officers who were not authorised under the law to carry out the search. The question was whether the evidence with regard to the unlawful possession of ammunition could be excluded on the ground that the evidence had been obtained on an unlawful search. The Privy Council stated the principle as under :

'The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how it was obtained'.^{15.1} This question has been examined threadbare by a Constitution Bench in *Pooran Mal v. Director of Inspection* : [1974]93ITR505(SC) and the principle enunciated therein is as under :

'If the [Evidence Act, 1872](#) permits relevancy as the only test of admissibility of evidence, and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence. Nor is it open to us to strain the language of the Constitution, because some American Judges of the American Supreme Court

have spelt out certain constitutional protections from the provisions of the American Constitution. So, neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search.

So far as India is concerned its law of evidence is modeled on the rules of evidence which prevailed in English Law, and Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. Where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.'

21. In the United States the law regarding illegally obtained evidence has been stated as under in 29 American Jurisprudence 2d (para 408):

'408. Generally

In criminal prosecutions, in particular, evidence is frequently obtained by methods that are morally reprehensible and offensive to fair dealing, under circumstances which meet with disapprobation of the courts, and in many instances, by means that are illegal. However, it is a rule of the common law that the admissibility of evidence is not affected by the illegality of the means by which it is obtained, and if evidence offered in support of a fact in issue is relevant and otherwise competent, it is generally admissible, though it may have been obtained unethically, wrongfully, or unlawfully, unless its admission will violate a constitutional guaranty of the person against whom its admission is sought, or is in contravention of a statutory enactment of the jurisdiction. Accordingly, the exclusion of evidence logically relevant in a criminal prosecution can be justified only by an overriding public policy expressed in the Constitution or the law of the land. The underlying principle admitting evidence wrongfully or illegally obtained is that the objection to an offer of proof made upon the trial raises no question other than competency, relevancy, and materiality, and the court cannot enter upon the trial of collateral issues as to the source from which the evidence was obtained. It has also been said that a far-reaching miscarriage of justice would result if the public were to be

denied the right to use convincing evidence of a defendant's guilt because it had been brought to light through the excessive zeal of an individual, whether an officer or not, whose misconduct must be deemed his own act and not that of the state.'

The Fourth Amendment of American Constitution guarantees the 'right of the people to be secure in their persons, houses, papers and effects and against unreasonable searches and seizures.' On the basis of the aforesaid Constitutional provision, the United States Supreme Court in some earlier decisions laid down the rule that evidence obtained by means of an unlawful search and seizure by federal officers is not admissible against an accused in a criminal prosecution in a federal court where timely objection to the use of such evidence has been made. However, in *Stone v. Powell* 428 US 465 the aforesaid view was reversed and it was held that the application of the rule deflects the truth finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded to a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. It was observed that although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice. The Court quoted with approval the following point highlighted by Justice Black, in his dissenting opinion in an earlier decision rendered in *Kaufman v. United States* 394 US 237:

'A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty,'

22. The Constitution Bench decision in *Pooran Mal v. The Director of Inspection* : [1974]93ITR505(SC) was considered in *State of Punjab v. Baldev Singh* : 1999 CriLJ3672 and having regard to the scheme of the Act and especially the provisions of Section 50 thereof it was held that it was not possible to hold that the

judgment in the said case can be said to have laid down that the 'recovered illicit article' can be used as 'proof of unlawful possession' of the contraband seized from the suspect as a result of illegal search and seizure. Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used a very strict view of Section 50 of the Act, was taken and it was held that failure to inform the person concerned of his right as emanating from Sub-section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word 'person' occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him.

23. Coming to the merits of the appeal, the High Court allowed the appeal on the finding that the report of the Chemical Examiner had to be excluded and that there was non compliance of Section 50 of the Act. The learned Judges of this Court, who heard the appeal earlier, have recorded a unanimous opinion that the report of the Chemical Examiner was admissible in evidence and could not be excluded. In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag, which was being carried by the accused. The High Court did not examine the testimony of the witnesses and other evidence on merits. Accordingly, the matter has to be remitted back to the High Court for a fresh hearing of the appeal.

24. In the result, the appeal is allowed. The judgment and order dated 26.8.1996 of the High Court is set aside. The appeal preferred by the respondent Pawan Kumar shall be heard afresh by the High Court in the light of the findings recorded by this Court and in accordance with law.

Criminal Appeal No. 375 of 2003

According to the case of the prosecution, Ram Niwas, SHO Police Station Pilibanga received information that the accused who was indulged in smuggling of

opium was standing at the bus stand. A police party reached the main bus stand at about 7.10 p.m. and found the accused standing with an attach in his hand. A written notice was then given to the accused that his attach-case will be searched as information has been received that the same contains opium. He was also asked whether he would like the search to be conducted before a Magistrate or a Gazetted Officer. This fact was also mentioned in the notice. The accused said that he did not want to be searched before any Magistrate or Gazetted Officer and the SHO could carry on the search. This statement of the accused was signed by him. The search of the attach revealed 5 kgs. of opium. After conducting other formalities and investigation of the case, the accused was put up for trial. The learned Sessions Judge convicted the accused under Section 8/18 of the NDPS Act and sentenced him to 10 years RI and a fine of Rs. 1 lakh. The High Court by a very cryptic judgment held that the provisions of Section 50 of the NDPS Act were not complied with as the accused was not informed of his right to be searched in presence of a Magistrate or a Gazetted Officer and accordingly allowed the appeal and set aside the conviction and sentence of the accused.

For the reasons discussed earlier, the view taken by the High Court cannot be sustained as it was a case of search of an attach which was carried by the accused. The appeal is accordingly allowed and the judgment and order dated 5.10.2001 of the High Court is set aside. The matter is remitted back to the High Court for a fresh consideration of the appeal on merits and in accordance with law.

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