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Neutral Citation No. - 2024:AHC:18078

Reserved on 16.10.2023

Delivered on 02.02.2024

In Chamber

Case :- CRIMINAL APPEAL No. - 6549 of 2018

Appellant :- Satyapal And Anr.
Respondent :- State of U.P.
Counsel for Appellant :- Murtuza Ali,Gufran Ahmad Khan,Imtiyaj Ali
Counsel for Respondent :- G.A.

Hon'ble Ram Manohar Narayan Mishra,J.

1. The instant Criminal Appeal has been preferred by the accused/convict Satyapal and Saifuddin Urf Sheruddin who are convicted and sentenced on 02.10.2018 for charge under Section 8/15-(C) NDPS Act, Case No.39 of 2018 (State of U.P. Vs. Satyapal and other) arising out of Case Crime No.994 of 2004, Police Station Kotwali, District Bareilly by Additional Sessions Judge, Court No.30 Bareilly and sentenced to 10 years rigorous imprisonment and Rs.1,50,000/- fine with a default stipulation. Another co-accused Pappu died during trial and the case was abated in respect of him due to his death.

2. Heard Sri N.I. Jafri, learned senior counsel assisted by Sri Sadrul Islam Jafri, learned counsel for the appellant and learned AGA for the State and perused the material available on record.

3. The brief facts of the case, leading to filing of present Criminal Appeal are that on 03.05.2004 PW1 S.S.I. Jagdish Kumar Arora accompanied by SI Siddhartha Mishra and SI Subhash Tiwari (PW2)

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two constables came to Chowki Crossing P.S. Kotwali, Bareilly in connection with their official duty on 03.05.2004. They inspected the Truck Bearing Registration No.DL-1 GA-6583 on a tip off received from a secret informer around 11:20 am. Prior to this they tried to enjoin public witnesses amongst passersby but they refused to stand as a witness. The truck driver disclosed his name as Saifuddin Urf Sheruddin and admitted that in that truck Poppy straw (doda) was loaded which belonged to businessmen Pappu and Satyapal, who were sitting on sacks keeping in the truck. These two persons have collected Poppys Straw near Bhamaura area and were taking this contraband to Bahedi District Bareilly to sell. The two persons were found to be sitting on sacks in the truck were asked to get down, who disclosed their name as Pappu and Satyapal, and on interrogation they confessed that they had collected these Poppy's Straw from Bhamaura, Awlan and Aliganj area and were taking it to sell in Bahedi, district Bareilly. They are engaged in trade of Poppy's Straw. The three persons caught by police were offered an option by Investigating Officer, that if they wish, their search may be conducted in presence of competent Magistrate or Gazetted Officer, they can even be called on the spot, whereupon the concerned persons reposed their faith in arresting officer, and stated that there is no need to call any other officer, they repose their faith in police team present on the spot, and they may be searched out by them. Thereupon , the police team search the plastic sacks loaded on the truck which found to be having Poppys Straw on smell. The truck was seized and all three persons caught from the truck were taken into police custody. The truck alongwith sacks containing the contraband was sent for weighing at nearby Jaiswal Dharamkata Shahjahanpur, Bareilly alongwith truck driver Saifuddin Urf Sheruddin; they were accompanied by two Police Officers, for being weighted at said Dharamkata. The total weight of contraband was found to be 43 quintal and 30 Kg. and weight of truck and contraband was recorded in receipt

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dated 03.05.2004, which was annexed with recovery memo. 5Kg sample was taken from the sack of recovered Poppy's Straw (doda powder), and it was kept and sealed in a cloth, as the concerned persons could not produce any authority for having such huge quantity of Poppy's Straw with them, they were arrested after disclosure of reasons of arrest at around 12:15 hours on 03.05.2004 in presence of police witnesses. Recovery memo was prepared on the spot and FIR was lodged at P.S. concerned at 15:30 hours on the basis of recovery memo prepared by SSI Jagdish Kumar Arora, which bears signature of other members of police team and thumb impression of arrested accused persons. The sample was taken on the spot from one sack containing Poppy straw and sent for chemical examination at Forensic Science Laboratory, Agra which was found as pieces of doda opium in chemical examination report submitted by Joint Director FSL to the Special Judge NDPS Act bearing dated 08.06.2004. The investigation of the case was carried out by S.I. Harveer Singh, P.S. Kotwali, Bareilly who recorded statements of the witnesses, prepared site plan of the place of incident and after collection of evidence filed chargesheet against three arrested accused persons under Section 8/15 NDPS Act, before the court of Special Judge with payer to prosecuted them.

4. Before commencement of prayer accused Pappu died and trial in respect of him was abated vide order dated 07.03.2014.

5. Learned Additional Session Judge, Court No.8, Bareilly framed charge under Section 8/15(C) NDPS Act against surviving accused Satyapal and Saifuddin Urf Sheruddin on 21.04.2007.

6. Prosecution examined PW1 Jagdish Kumar Arora, the search and arresting officer who proved recovery memo in his own signature and in hand-writing of his colleague Sidharth Mishra as Ex. Ka1 in his evidence. PW2 SI Subhash Tiwari was also examined as witness of

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search, recovery and arrest and he acknowledged his signature on recovery memo Ka1. 5Kg Opium Poppy was taken from one sack as sample and sent for chemical examination at FSL Agra was produced before the court during evidence of PW2 who proved the plastic sack containing 5 Kg of Opium Poppy taken as sample as material Exhibit ME1 and contents of sample of Poppy straw as ME2. He also corroborated the evidence of PW1 in regard to search, seizure and arrest PW3 SI Harveer Singh who is Investigating Officer of the said case who proved site plan of the place of arrest and recovery as Exb. Ka2 and chargesheet submitted by him against the accused persons as Exb. Ka3 by his evidence. The statement of accused appellants were recorded under Section 313 Cr.P.C. after conclusion of prosecution evidence. The accused persons declined to adduce any defence evidence, their defence is of denial and false implication.

7. Learned counsel for the appellants submitted that they were falsely implicated in the case, they were enlarged on bail during trial by the orders of this Court. The entire action of search and seizure is wholly illegal.

8. He further submitted that the judgment of the trial court, whereby the appellants were convicted and sentenced, is vitiated by legal and factual errors committed by the learned trial court in appreciation of evidence on record. There is no cogent and plausible evidence on record, which is sufficient for recording conviction of the appellants. Infact, prosecution failed to prove its case beyond reasonable doubt. Inasmuch as the bulk of case property was not produced during trial as material exhibit and only 5kg sample which was allegedly taken on the spot from one sack of Poppy straw (Doda) and sent for chemical examination to FSL was only produced during evidence of PW2. In absence of production of bulk of case property before the Court, link evidence, which is very relevant in cases based

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on recovery of contraband is missing in the case. There is total non-compliance of Sections 57, 42(2) and particularly Section 52(A) of NDPS Act,1985 which is held as mandatory in recent pronouncements of Hon'ble Apex Court. Even number of sacks containing Poppy straw is neither mentioned in recovery memo nor in statement of the witnesses. The truck owner was not made accused during investigation which also raises suspicion in case set up by the police. The accused persons have denied the recovery of contraband from their possession from very beginning and in the absence of production of case property during remand proceedings as well as during trial, it cannot be discerned that such huge quantity of contraband was recovered from the possession of the appellants. The appellants have stated in their statements under Section 313 Cr.P.C. before the trial court that in the truck polish of rice was loaded and not Doda Poppy. The truck mistakenly entered into no entry zone. The appellants were not in conscious position of any contraband what so ever, and they were falsely implicated by the police. The truck in which alleged contraband was being transported, was released in favour of its registered owner Anis vide order dated 28.10.2004 passed by this Court subject to certain conditions. The search and seizure operation was conducted in violation of the mandatory provisions of Section 52A of the Act as the procedure prescribed therein was not followed in drawing the samples and seizing the alleged contraband. Further there is a serious doubt about the correctness of samples for analysis as to whether they were actually the samples of seized contraband.

9. Per contra, learned A.G.A. for the State submitted that there is no infirmity or legal and factual error in the impugned judgment and order passed by learned court below. The prosecution has successfully proved its case against the appellants during trial by legal evidence. The appellants were found to have transported 43 quintal and 30 Kg

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contraband i.e. Opium Poppy with a truck driven by accused Saifuddin Urf Sheruddin, appellant Satyapal and deceased accused Pappu were found to be sitting on sacks contained Doda Poppy in said truck. It is neither possible nor natural on the part of the police officer who were performing their official duty to plant such huge quantity of contraband against the appellants. The contraband could not be produced before the trial court as the same was disposed of under the provisions of Section 52-A of NDPS Act, which provides for disposal of seized Narcotic Drugs and Psychotropic Substances. The appeal is devoid of merit and is liable to be dismissed.

10. Learned counsel for the appellants placed reliance on judgment of Hon'ble of this Court in Mohd. Idris and another Vs. State of U.P., 2017 0 Supreme (All) 1327, Kishan Chand vs State Of Haryana AIR 2013 (SC) 357, Gorakh Nath Prasad Vs. State of Bihar AIR 2018 (SC) 704, Javed A. Bhat Vs. Union of India, 2007 Cr.LJ, 3145 (Bom) in support of his submissions.

11. Let us examine the statutory provision relevant to present Section 8 of N.D.P.S. Act, 1985 reads as under:-

> *"**8. Prohibition of certain operations.**—No person shall —*
>
> *(a) cultivate any coca plant or gather any portion of coca plant; or*
> *(b) cultivate the opium poppy or any cannabis plant; or*
> *(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:*

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Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:

[Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.]"

12. Section 15 of N.D.P.S. Act of 1985 is reproduced as under:-

"[15. Punishment for contravention in relation to poppy straw.— *Whoever, in contravention of any provisions of this Act or any rule or order made or condition of a licence granted thereunder, produces, possesses, transports, imports inter-State, exports inter-State, sells, purchases, uses or omits to warehouse poppy straw or removes or does any act in respect of warehoused poppy straw shall be punishable,—*

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to 2 [one year], or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

13. The notification of Central Government with regard to quantity of contraband which may be recovered a small, commercial or

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intermediate quantity for the purposes of Section 15 are specified vide S.O. 1055 (E) dated 19.10.2001 published in the Gazette of India Extra. dated 19.10.2001 in this schedule the quantity of different kind of Narcotic Drugs and Psychotropic Substances Act, 1985 for purposes of specifying the same in said quantity is provided by said notification in a table at the end of the Act of 1985 as amended by the Narcotic Drugs and Psychotropic Substance (amendment) 2001. In this table at Serial No.110 it is provided that accordingly 1 Kg of Poppy straw is comes within 1Kg Poppy's Straw comes under small quantity and 50Kg under commercial quantity. Therefore, Poppy straw more than 1 Kg and less than 50 Kg will be considered as intermediate quantity for the purposes of Section 15 of the Act which provides for punishment according to quality of contraband involved in the case. In the present case, the quantity of Poppy straw is shown as 43 quintal 30 Kg which apparently comes under commercial quantity.

14. In the present case, the charge against the appellants is that 43 quintal and 30 Kg of illegal opium powder, recovered from joint possession of the appellants who were travelling in a truck and contraband was found to be loaded in the truck on the date of search, seizure, recovery and arrest. All the sacks from which contraband was recovered were loaded in the truck according to prosecution version and 5 Kg sample was taken out from one of the sacks on the spot. The contraband was weighted in a nearby Dharamkata and for that purpose a truck was sent to Dharamkata when the raiding team intercepted the truck and was apprised that illegal Poppy's Straw in huge quantity was loaded in the truck.

15. PW3 Inspector Harveer Singh CB CID stated in his evidence that he received FSL report from the office of Police Station on 20.06.2004 and transcribed its content in the case diary. Police Team left the police station at 11:20 hours on the date of incident by making an entry in

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G.D. vide Rapat No.27. The docket was prepared from the court, where jurisdiction of NDPS Act case was entrusted and for that purpose sample was brought from the police station. He had send the sample for FSL examination after receiving the same from Thana Malkhana. The docket was sent for chemical analysis through constable 414 Brijesh Mishra. He has not taken any action in respect of Section 52-A of NDPS Act. PW2 had produced the sample for doda powder (Poppy's Straw) which was sent for chemical analysis to FSL, Agra in sealed cover which was opened before the Court. This is admitted fact that except sample taken from one of the sacks containing Poppy's Straw seized in the case and send for chemical analysis to FSL was produced before the court during the evidence of PW2, but entire case property was never produced before the Court either at the time of seeking judicial remand of the accused persons or during trial.

16. PW3 Inspector Harveer Singh has proved the FSL report as Ka4 during his evidence. He also proved the copy of Chick FIR prepared by Constable Kripal Giri related to Crime No.994 of 2004, in the absence of its author and stated that he was posted with Constable Harveer Singh at relevant time. He also stated that said constable Harveer Singh has transcribed the copy of recovery memo on the back of chick FIR word to word. He also proved copies of general diary of registration of case while GD No.34 time 15:30 hours dated 03.05.2004. The Chick FIR is exhibited as Ka5, and copy of GD of registration of Case as Ex.Ka7. He also produced a copy of report of SSP Office, in which it is stated that Original GD of Registration of Case dated 03.05.2004 has been weeded out.

17. The appellants are presently held in jail custody since 20.10.2018. There is a report in the record of trial court submitted by S.H.O. Kotwali, Bareilly bearing dated 10.08.2018, in which it is stated that according to Malkhana Register of 2014, 43 quintal and 30 Kg

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doda related to Case Crime No.994 of 2004, under Section 8/15-C of NDPS Act, which was loaded in the truck got rotten due to rain and an entry in this regard has been made in G.D. Report No.54 dated 15.11.2004. Although there is an over writing in date of report of GD, as well as GD number and date of GD.

18. From this report it is obvious that contraband could not be produced before the court below on account of being destroyed to to rain, since the same was kept in Malkhana; after getting this report, the trial court took strong objection to this state of affair, and he had written a letter to the Director General of Police, Lucknow apprising him of the fact that the case property in the case was not produced before the court and a brief report has been filed by concerned Police Official that same has been destroyed, whereas it was kept in the Malkhana. Therefore, this reveals that the slackness and negligence on the part of concerned police officials with regard to upkeep of case property, he shall issue directions to various officers facing responsibility including concerned Investigating Officer/Station House Officer or any other person with regard to destruction of case property during the pendency of appeal.

19. The Hon'ble Supreme Court in **Mangilal Vs. State of Madhya Pradesh** in similar case while deciding the appeal against conviction and sentencing for charge under Section 8(b) read with Section 15-C of NDPS, Act in Criminal Appeal No.1651 of 2023 Mangilal Vs. State of Madhya Pradesh considering scope of Section 52-A of NDPS, Act, which reads as under:-

SCOPE OF SECTION 52A OF THE NDPS ACT, 1985:

Section 52A of the NDPS Act
[52A. Disposal of seized narcotic drugs and psychotropic substances.-

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage

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space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the[narcotic drugs, psychotropic substances, controlled substances] or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of 4[such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the innventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

20. Hon'ble Supreme Court observed in ***Mangilal Vs. State of Madhya Pradesh*** (supra) as follows:-

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"4. Sub-section (1) of Section 52A of the NDPS Act facilitates the Central Government a mode to be prescribed to dispose of the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter.

5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn. In due compliance of Section 52A(1) of the NDPS Act the Ministry of Finance (Department of Revenue) issued a Notification No. G.S.R. 339(E) dated 5 10.05.2007 which furnishes an exhaustive manner and mode of disposal of drugs ending with a certificate of destruction:

"4. Manner of disposal

1) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, of the Act, or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs or psychotropic substances as per Annexure 1 to this notification and apply to any Magistrate under

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sub-section (2) of section 52A as per Annexure 2 to this notification.

2) After the Magistrate allows the application under sub-section (3) of section 52A, the officer mentioned in clause (1) above shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the drug consignments to the Chairman of the Drug Disposal Committee for a decision by the committee on the disposal. The officer shall send a copy of the details along with the drug consignments to the officer-in-charge of the godown.

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4.2 Mode of disposal of drugs. (i) Opium, morphine, codeine and thebaine shall be disposed of by transferring to the Government Opium and Alkaloid Works under the Chief Controller of Factories. (ii) In case of drugs other than the drugs mentioned in clause (i), the Chief Controller of Factories shall be intimated by the fastest means of communication available, details of drug consignments that are ready for disposal. (iii) The Chief Controller of Factories shall indicate within 15 days of the date of receipt of the communication, the quantities of drugs, if any, that are required by him to supply as samples under Rule 67B. (iv) Such quantities of drugs, if any, as required by the Chief Controller of Factories under clause (iii) shall be transferred to him and the remaining quantities of drugs shall be destroyed as per the procedure outlined in para 4.1.2. (v) Destruction shall be by incineration in incinerators fitted with appropriate air pollution control devices, which comply with emission standards. Such incineration may only be done in places where adequate facilities and security arrangements exist. In order to ensure that such incineration may not be a health hazard or polluting, consent of the State Pollution Control Board or Pollution Control Committee, as the case may be, should be obtained. Destruction shall be carried out at the presence of the Members of the Drug Disposal Committee.

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4.4 Certificate of destruction. A certificate of destruction (in triplicate) containing all the relevant data like godown entry number, gross and net weight of the drugs seized, etc., shall be prepared and signed by the chairman and members of the Drug Disposal Committee as per format at Annexure 3. The original copy shall be pasted in the

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godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Drug Disposal Committee. Details of disposal of drugs shall be reported to the Narcotics Control Bureau in the Monthly Master Reports."

7. To be noted, the aforesaid notification was in existence at the time of the commission of the offence alleged in the case on hand, stood repealed with effect from ***23.12.2022 vide Notification No. G.S.R.899(E)****. In any case a notification issued in derogation of the powers conferred under sub-section (1) of Section 52A of the NDPS Act can never contradict the main provision, particularly sub-Section (2). However, any guideline issued by way of a notification in consonance with Section 52A of the NDPS Act has to be followed mandatorily.*

8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatimwise and keeping them in lots preceded by compliance of the procedure for drawing samples. The afore-stated principles of law are dealt with in extenso in ***Noor Aga v. State of Punjab, (2008) 16 SCC 417:***

"89. Guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued

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by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of ***Kerala v. Kurian Abraham (P) Ltd. [(2008) 3 SCC 582]*** *, following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.*

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

92. Omission on the part of the prosecution to produce evidence in this behalf must be linked with a second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. The respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time had any prayer been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1-B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory, etc. The same does not contain within its mandate any direction as regards destruction.

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95. The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.

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96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.

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100. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect to the prosecution's endeavour to prove the fact of possession of contraband by the appellant. This aspect of the matter has been considered by this Court in ***Jitendra v. State of M.P. [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028]*** *in the following terms: (SCC p. 565, para 6)*

"6. … In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act.""

9. On the issue of seizure in the presence of Magistrate, we wish to place reliance upon the decision of this Court in ***Union of India v. Mohanlal, (2016) 3 SCC 379:***

"16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which

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samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. 17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. 18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction."

21. On Section 52A of the NDPS Act, this Court in **Union of India v. Jarooparam, (2018) 4 SCC 334** has held as follows:

"8. What transpires from the abovequoted paragraph is that after taking out two samples of 30 gm each, the Executive Magistrate returned the entire remaining seized property to the investigating officer PW 6. To further ascertain the same, we have also carefully perused the exact content of the proceedings dated 14-10-2004 (Annexure P-5) recorded by the Executive Magistrate, Singoli Tappa. The proceedings recorded as far as the respondent herein is concerned, read thus: Proceedings 14-10-2004:
Proceedings
Case submitted. Shri Harvinder Singh, Inspector (Investigating Officer), Narcotics Bureau, Singoli has submitted three sealed packets of seized stuff in Crime No. 1

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of 2004 under Sections 8/18 and 8/29 of the NDPS Act, 1985. These packets were marked A, B and C and the details are given as under: 1-A: On the packet marked "A" it was indicated that packet contains 7.200 kg opium seized from Jaroopram, s/o Ganga Ram Bishnoi. On opening the packet, transparent polythene bag was found, in which again two polythene packets were found. One polythene indicated 4.000 kg and the second one 3.200 kg opium, respectively. A composite sample of 30-30 gm each have been taken from the two packets and kept in a small plastic polythene and marked A-3 and A-4 and sealed. The remaining seized stuff and samples sealed as usual are handed over to the presenting officer Shri Harvinder Singh, Inspector.

9. From the above proceedings, it is crystal clear that the remaining seized stuff was not disposed of by the Executive Magistrate. The contraband stuff as also the samples sealed as usual were handed over physically to the Investigating Officer Harvinder Singh (PW 6). Also the trial court in its judgment specifically passed instructions to preserve the seized property and record of the case in safe custody, as the co-accused Bhanwarlal was absconding. The trial court more specifically instructed to put a note with red ink on the front page of the record for its safe custody. In such a situation, it assumes importance that there was nothing on record to show as to what happened to the remaining bulk quantity of contraband. The absence of proper explanation from the prosecution significantly undermines its case and reduces the evidentiary value of the statements made by the witnesses.

10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of the Court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is for its disposal is to obtain an order from the competent court of Magistrate as envisaged under Section 52-A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application (see also Noor Aga

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> ***v. State of Punjab, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748).***
> ***11. There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the allegedly seized bulk quantity of contraband material nor was any such order passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction/disposal. It is also pertinent here to mention that the trial court appears to have believed the prosecution story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence.***

22. In **Kishan Chand vs State Of Haryana (supra)** the Hon'ble Supreme Court observed as follows:-

> *15. The learned Trial Court in para 34 of its judgment clearly recorded that admittedly in the present case, the secret information was received against the accused. The Investigation Officer did not reduce the secret information in writing nor did he send the same to the higher officer or to the police station for registration of the case. However, stating that if this was done, there was possibility that the accused escaped, the trial court observed that if the Investigating Officer did not reduce into writing the secret information and sent the same to the superior officer, then in light of the given circumstances, it could not be said that any prejudice was caused to the accused.*
> *16. We are unable to contribute to this interpretation and approach of the Trial Court and the High Court in relation to the provisions of sub- Section (1) and (2) of Section 42 of the Act. The language of Section 42 does not admit any ambiguity. These are penal provisions and prescribe very harsh punishments for the offender. The question of substantial compliance of these provisions would amount to misconstruction of these relevant provisions. It is a settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, ought to be construed strictly. The doctrine of substantial*

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compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the cases where the language of the provision strictly or by necessary implication admits of such compliance.

17. In our considered view, this controversy is no more res integra and stands answered by a Constitution Bench judgment of this Court in the case of Karnail Singh (supra). In that judgment, the Court in the very opening paragraph noticed that in the case of ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513]****, a three Judge Bench of the Court had held that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of Sajan Abraham (supra), again a Bench of three Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, if there is total non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not, will be a question of fact in each case. The Court in paragraph 35 of the judgment held as under:-*

35. In conclusion, what is to be noticed is that 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 Sections 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 register concerned 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

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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 with requirements of subsections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with 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 of a copy of such information to the 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.

23. Reverting to the facts of the present case, we have already noticed that both the Trial Court and the High Court have proceeded on the basis of substantial compliance and there being no prejudice to the accused, though clearly recording that it was an admitted case of total non-compliance. The statement

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> *of PW7 puts the matter beyond ambiguity that there was 'total non-compliance of the statutory provisions of Section 42 of the Act'. Once, there is total non-compliance and these provisions being mandatory in nature, the prosecution case must fail.*

23. In **Gorakh Nath Prasad Vs. State of Bihar** (supra) one the main plank of arguments of learned defence counsel was that seized contraband allegedly 59 kg of Ganja was never produced as material exhibit during the trial. Therefore, the benefit of doubt will have to be given to the appellants. The Hon'ble Supreme Court allowed the criminal appeal preferred by the accused/appellant against the judgment of High Court, wherein conviction and sentence awarded to the appellant by Additional Session Judge was affirmed and acquitted the appellant.

24. The Hon'ble Supreme Court while placing reliance on a earlier judgment in ***Jitendra and another Vs. State of M.P. (2004) 10 SCC 562***, observed in paragraph 7 as under:-

> *"7. In the facts of the present case, the independent witnesses with regard to the search and seizure, PW-2 and PW-3, having turned hostile deposing that their signatures were obtained on blank paper at the police station, the mere fact of a FSL Report (Exhibit 8), being available is no confirmation either of the seizure or that what was seized was Ganja, in absence of the production of the seized item in Court as an exhibit. The non-production of the seized material is therefore considered fatal to the prosecution case. The issue whether there has been compliance with Sections 42 and 50 of the NDPS Act loses its relevance in the facts of the case."*

25. On the facts of the case, we find many irregularities which finds no justification what so ever maybe. On perusal of alleged evidence adduced by prosecution witnesses in light of recovery of arrest memo Ex. Ka1. According to prosecution version three

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accused persons were arrested from the truck loaded by contraband Poppy's Straw (doda) on the date and time of incident. Accused Saifuddin @ Sheruddin who was driver of the truck and other two accused persons were traders, who were staying on sacks loaded on the body of the truck containing contraband Poppy's Straw. This is admitted fact that sample was not taken from the bulk of Poppy's Straw recovered from the joint possession of the accused persons on the spot and not before the Magistrate as provided under Section 52A of the NDPS Act. According to PW1 and PW2 the bulk of the contraband was weighed by sending the same on said truck, by which it was being transported to a nearby Dharamkata, where total weight of contraband was found to be 43 quintal and 30 kg. Out of which 5kg sample was taken from one of the sack and kept in a empty sack. The police witnesses could not disclose, whether the empty sack was kept on seized truck or it was arranged from some other place. This is also mentioned in recovery memo Ex. Ka1 that it was prepared on the spot, where search and seizure was carried out by police team. The signature and thumb impression of the accused persons and signature of the police witnesses is appended on recovery memo Ex. Ka1.

26. The GD Entry of departure of PW1 the search and recovery officer, from police station on the day of search and seizure has not been brought on record. The witnesses have stated that, when they reached at Chowki crossing at around 11:30 am, the secret informer reached there, who informed them about a truck loaded with doda Opium, which was likely to pass. However, PW1 has admitted in his cross- examination that he neither recorded the information nor informed any high police official about this information, resulting in total non-compliance of the mandatory provisions of Section 42 of NDPS Act. He subsequently, informed superior officers about

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the recovery, but even a copy of that information has not been brought on record. PW1 has stated that after receiving information about the movement of the said truck, he asked passersby to be a witness, but they refused his request due to citing personal reasons. He did not record name of any such person in recovery memo, due to this omission it is difficult to believe that in fact PW1 had asked any passersby to be a witness of imminent police action with regard to search and recovery from said truck.

27. PW1 has stated in his evidence that truck driver was sitting in cabin alone. The contraband was loaded on the truck in plastic sacks, but they were not counted. He was even not able to tell the number of sacks recovered from said truck which contained contraband. Even in recovery memo, number of sacks recovered from the truck is not mentioned. This is prosecution case that truck loaded with contraband was sent for weighing in nearby Dharamkata, which was accompanied by two Sub Inspectors of Police Team from the place of seizure to Dharamkata, and a receipt comprising the weight of truck, and the weight of loaded and empty truck was mentioned therein. PW1 stated that in the said receipt the weight of goods loaded on truck (doda) is shown as 43 quintal and 30 kg, the receipt bears No.3213 dated 35/2004. But this receipt was not exhibited during the evidence of PW1 who produced said receipt. This receipt is mentioned in recovery memo, but PW1 admitted in cross examination that receipt was mutilated and the portion thereof, in which weight and part of truck is missing. The sample was weighed on the spot by bringing a weighing balance machine, but he could not specify the mode and manner of weighing the sample.

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28. PW2 is also a witness of search and recovery, who was a member of police team engaged in process of search and seizure. He has corroborated the evidence of PW1 in his evidence before the court and proved the sample taken from bulk of Opium Doda, which was sent for chemical examination at FSL, Agra as material Ex.Ka 2. He has stated that in a bag containing the sample the figure 994/04 is mentioned, which is a crime number. He stated the sample was taken and weighed on the spot. He also admitted that the sacks which was seized from the spot were not sealed and out of seized sacks sample was taken, but he could not specify as to whether the empty sack was procured from where. He could not speak as to what quantity of doda powder was kept in each of the sacks. Thus non sealing and stamping of sacks containing contraband either on spot or thereafter at police station is a major omission in prosecution case. This prosecution case that sample was taken from one of the sacks and not from each one of them. Thus it is difficult to comprehend, as to what was in fact filled up in remaining sacks. Inasmuch, the bulk was never produced before the court, either at the time of remand for judicial custody of the accused persons or during trial.

29. Hon'ble Apex Court in aforementioned judgments, has observed that non production of the bulk before the court during trial and disposal of contraband in violation of mandatory provisions of Section 52A of NDPS Act, is fatal to prosecution case. In the present case the bulk of contraband reportedly got destroyed in Malkhana, due to heavy rain during passage of time. This is nothing, but gross negligence in upkeep of case property that too in a case under NDPS Act, for which severe punishment has been provided under the Act. It is evident that the case property

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got destroyed, in violation of the provisions of Section 52A of NDPS Act, as stated above.

30. Section 52A (2), (3) and (4) of the NDPS Act provides for the procedure and and manner of seizing, preparing the inventory of the seized material, forwarding the seized material and getting inventory certified by the Magistrate concerned. It is further provided that the inventory or the photographs of the seized substance and any list of samples in connection thereof on being certified by the Magistrate shall be recognized as a primary evidence in connection with the offences alleged under the NDPS Act.

31. A perusal of the aforesaid provisions reveals that any contraband/narcotic substance seized and forwarded to the police or to the officer so mentioned under Section 53, of the Act, the officer so referred to in sub section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

32. No evidence has been brought on record to the effect that the procedure prescribed under subsections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record in the case in hand that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. It is an admitted position on record that the samples from the seized

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substance were drawn by the police team in the presence of the gazetted officer, nor in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or the list of samples so drawn. Even no inventory as envisaged under Section 52A of the Act has been prepared and only the weight of seized contraband namely doda (power) Poppy's Straw is mentioned in recovery memo. For non-compliance of mandatory provisions of Section 52A, the samples drawn from the bulk could not be treated as a valid piece of primary evidence in the trial, and for want of primary evidence the trial stands vitiated on this count also.

33. Accordingly, this Court is of the opinion that the failure of the police team which carried out the proceedings of interception of truck search and seizure failed to lead primary evidence in regard to seized contraband and samples drawn there from, due to non production of bulk of the seized contraband and non drawing of samples in presence of the Magistrate, and in view of foregoing discussion the conviction of the appellants deserves to be set-aside.

34. The impugned judgment passed and sentence awarded by trial court convicting the appellants Satyapal and Saifuddin Urf Sheruddin and sentencing them to undergo 10 years rigorous imprisonment and Rs.1,50,000/- fine with a default stipulation is hereby set-aside. Accordingly, the appeal stands **allowed.**

35. Consequently, the appellants stand acquitted of the aforesaid charge, as they are held in jail custody, the court concerned will issue a release order in compliance of this judgment, and if they are not wanted in other case, they shall be set at liberty forthwith.

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36. The appellants will execute, a personal bond and two sureties each in the like amount to the satisfaction of the court concerned, within one week of their release from jail, in compliance of provision of Section 437 (A) Cr.P.C. to the effect that they would appear before the higher court, as and when such court issues notice in respect of any appeal or petition filed against the judgment of this Court, such bail bonds shall be enforced for six months.

Order Date :- 02.02.2024

Ashish/-