Reserved on: 24.05.2024

Delivered on: 23.07.2024

A.F.R.

Court No. - 13

Case :- CRIMINAL APPEAL No. - 1146 of 2019

Appellant :- Sajeb Ali @ Shakeel

Respondent :- State of U.P.

Counsel for Appellant :- Soniya Mishra, Anjali, Ashok Kumar,Azmi Yousuf, Chandra Prakash, Neeraj Kumar Rastogi, Rajiv Mishra

Counsel for Respondent :- Govt. Advocate

Hon'ble Saurabh Lavania,J.

1. Heard Ms. Azmi Yousuf, learned counsel for the appellant and Shri Ajay Kumar Srivastava, learned A.G.A. for the State.

2. The instant appeal under Section 374(2) has been filed challenging the judgment dated 13.08.2018 passed by learned IIIrd Additional Sessions Judge, Lakhimpur Kheri in Session Trial No. 08 of 2015 arising out of Case Crime No. 219 of 2014 under Section 8/20 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "Act") Police Station - Gaurifanta, District - Lakhimpur Kheri whereby the appellant has been convicted and sentenced for a period of twenty years along with the fine of Rs. 1,00,000/- and in default of fine to undergo additional six months' imprisonment.

3. It is to be noted that the appellant was apprehended/arrested on 22.11.2014 and he was never enlarged on bail. In this view of the matter, he has already gone sentence of nine years and six months.

4. The case of prosecution, as per material available on record, is to the effect that on 22.11.2014, the accused/appellant was apprehended by

Amresh Vishwas on an information received from the police informant at about 16:45 hours and thereafter the accused/appellant was searched and from his possession 9 kg and 800 gram of charas was recovered. This charas was recovered from the bag which the accused was carrying at relevant point of time, and thereafter, recovery memo was prepared.

5. After completion of necessary formalities, the charge sheet was submitted in Case Crime No. 219 of 2014 under Section 8/20 of the Act which was registered after preparation and submission of report by the concerned Police Officer of the Police present at the site of the crime.

6. Taking note of the material available on record, the trial Court on 15.04.2015 framed charge against the appellant under Section 8/20 of the Act and the said charge was read over and exlained to the accused/appellant, who thereafter, denied and upon denial, the appellant was put to trial.

7. To prove it case, the prosecution examined Amresh Viswas/PW-1, Krishna Murari Sharma/PW-2, A.S.I. Ashok Kumar/PW-3, Constable Dev Narain Singh/PW-4 and also placed on record the Fard Baramadgi (Ex. Ka.1), Site Plan (Ex.Ka.2), Charge Sheet (Ex. Ka.3), FSL Report (Ex. Ka.4), Packet(s) found in bag (Ex. Nos. 1 to 5), Plastic Packets(Ex. Ka-7), which were proved by the witnesses named above.

8. In response to the question(s) put to the accused/appellant in terms of Section 313 Cr.P.C., the accused/appellant denied the case of prosecution.

9. Thereafter, the trial court after due consideration of the submissions advanced by the learned counsel for the parties and evidence available on record passed the judgment of conviction, which has been assailed in the present appeal.

10. Impeaching the judgment under appeal, learned counsel for the accused/appellant stated that the prosecution before the trial court failed to

prove its case as required under the law. The provisions of the Act and the law on the subject including the mode and the manner prescribed under Standing Order No.1/88 and the Standing Order No.1/89 as also Section 52A of the Act, as explained by various pronouncements, should be followed and any lacunae/variation in the procedure prescribed which was/is mandatory in nature, would be fatal to the case of prosecution. The prosecution was/is under obligation to follow the same for establishing its case beyond doubt.

11. It is also stated that the evidence particularly the samples produced before the trial court along with FSL Report ought not to have been considered by the trial court in absence of sample prepared and report obtained in terms of Standing Orders and Section 52A of the Act.

12. It is stated that as per Standing Orders on the subject and Section 52A of the Act, the samples were not taken. In this case, five packets were recovered from the bag of the accused/appellant, as per the case of prosecution, and from the said given packets, one sample of 100 gms. was drawn. From the recovery memo, it is not clear that as to whether from all five packets, charas was taken and thereafter one sample was drawn or only from one packet the sample was taken and it is also not clear that as to whether sample was taken in duplicate or not.

13. It is further stated that in the instant case, as per prosecution, the charas was recovered from the possession of the accused/appellant and accordingly in terms of Standing Order No.1/88 and Standing Order No. 1/89 particularly Clause 1.6 and Clause 2.3, respectively, from all/each alleged packet(s) recovered minimum 24 gms. charas ought to have been taken as sample (in duplicate) for chemical test or packet(s) recovered should have been mixed to make homogeneous and representative before the sample (in duplicate)is drawn.

14. In this case, from recovery memo, it is apparent that the process as indicated in Standing Order No. 1/88 and 1/89 was not adopted. In clarification, appellant's counsel also stated that one view which is possible that from one packet, 100 gms. was taken as sample and as such, in these circumstances, the procedure as required was not followed. Thus, entire case of prosecution against the accused-appellant has no force.

15. It is also stated that the sample was not drawn in terms of procedure prescribed under Section 52A of the Act and despite the same the trial Court treated the sample as an evidence based upon the FSL Report for passing the judgment of conviction. Thus, the trial Court erred in doing so.

16. In support of the aforesaid contention, learned counsel for the accused/appellant placed before this Court various pronouncements and Standing Order No. 1/88 as also Standing Order No.1/89 and based upon the same, she submitted that the appeal is liable to be allowed and the judgment under appeal be set aside and the accused/appellant be set free.

17. Per contra, Sri Ajay Kumar Srivastava, learned AGA says that main witness of prosecution namely Amresh Vishwas/P.W.1, who apprehended the appellant and who was responsible for search and seizure and was present at the relevant point of time before the trial court specifically stated that from all the packets, charas was taken and thereafter sample of 100 gms. charas was drawn. He further submitted that a conjoint reading of recovery memo, FSL Report, which finds favour of prosecution story and the statement of P.W.1 would show that before the trial Court the prosecution proved its case. The appeal is liable to be dismissed. However, he could not dispute that prosecution failed to comply with the provisions of Section 52A (2) of the Act.

18. Considered the submissions advanced by the learned counsel for the parties and perused the record, which is available before this Court.

19. Having considered the aforesaid, this Court finds that the issue in the instant appeal relates to the seizure and sampling and if the seizure and sampling is not carried out in terms of the settled proposition of law which includes Section 52A of the Act, Standing Order No(s). 1/88 and 1/89 and the principles settled by the Hon'ble Apex Court in this regard then what would be the effect of the same?

20. In order to decide the aforesaid, this Court finds it appropriate to first take note of relevant provisions on the issue as also the principles settled by the Hon'ble Apex Court.

21. On the aforesaid, the Central Government issued Standing Orders way back in the year 1988 and issued certain directions for drawing a sample of the contraband substance.

22. Section 52A of the N.D.P.S. Act was introduced by way of an amendment by the Central Government in the year 1989 and the matter relating to sampling is governed by the said Section of the law and the various instructions issued by the Govt. of India from time to time.

> *"Section 52A of the NDPS Act reads as hereunder provided:*
>
> *[52A. Disposal of seized narcotic drugs and psychotropic substances.*
>
> *—*
>
> *(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances 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 drug or psychotropic substance 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 or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances 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 or psychotropic substances 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 such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in then 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 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence]."

23. After insertion of Section 52A of the Act, the Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. The said Order of 1989 succeeds the previous Standing Order No.1 of 1988. Again, two subsequent standing orders, one dated 10-5-2007 and the other dated 16-1-2015, deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing orders that prescribe the procedure for conducting seizures.

24. The manner of drawing a sample of narcotics as laid down in Standing Order 1/88 dated 15.03.1988 issued by the Narcotics Control Bureau can be deduced from the following paragraphs of the said Standing Order:

> *"1.4. If the drugs seized are found in packages/containers the same should be serially numbered for purposes of identification. In case the drugs are found in loose form the same should be arranged to be packed in unit containers of uniform size and serial number should be assigned to each package/container. Besides the serial number, the gross and net weight, particular of the drug and date of seizure should invariable be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.*
>
> *1.5 Place and time of drawal of sample. - Samples from the Narcotic Drugs and Psychotropic Substances seized, must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug is recovered, and mention to this effect should invariably be made in the panchnama drawn on the spot.*
>
> *1.6 Quantity of different drugs required in the sample*
>
> *- The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.*
>
> *1.7 Number of samples to be drawn in each seizure case-*
>
> *(a) In the case of seizure of single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container.*

(b) However, when the package/container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/the packages/container may be carefully bunched in lots of 10 packages/containers may be bunched in lots of 40 such packages such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.

(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers.

(e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."

1.8. Numbering of packages/containers- Subject to the detailed procedure of identification of packages/containers, as indicated in Para 1.4 each package/container should be securely sealed and in identification slip pasted/attached on each one of them at such place and in such manner as will avoid easy obliteration of the marks and numbers on the slip. When more than one sample is drawn, each sample should also be serially numbered and marked as S-1, S-2, S-3 and so on, both original and duplicate sample. It should carry the serial number of the packages and marked as P-1, 2, 3, 4 and so on.

1.9. It needs no emphasis that all samples must be drawn and sealed in presence of the accused, Panchanama witnesses and seizing officer and all of them shall be required to put their signature on each sample. The official seal of the seizing officer should also be affixed. If the person from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the samples.

1.10. Packing and sealing of samples: The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and

safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the S.No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret - Drug sample/Test memo", to be sent to the chemical laboratory concerned.

1.13. Mode and Time limit for dispatch of sample to Laboratory: The samples should be sent either by insured post or through special messenger duly authorized for the purpose. Despatch of samples by registered post or ordinary mail should not be resorted to. Samples must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal objection.

1.21. Custody of duplicate sample: Duplicate sample of all seized narcotic drugs and psychotropic substances must be preserved and kept safely in the custody of the investigating officer along with the case property. Normally duplicate sample may not be used but in case of loss of original sample in transit or otherwise or on account of trial court passing an order for a second test, the duplicate sample will be utilized."

25. Standing Order No.1/89 dated 13.06.1989 issued under sub section (1) of Section 52A of NDPS Act by the Department of Revenue, Ministry of Finance, Government of India. Section (II) of the said Order of 1989 provides for the general procedure for sampling, storage, which reads as under:-

"2.1. All drugs shall be properly classified, carefully weighed and sampled on the spot of seizure.

2.2. <u>All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.</u>

2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4. In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5. However, when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (i n duplicate) may be drawn.

2.6. Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain and, in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7. If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8. While drawing one sample (in duplicate) from a particular lot , it must be ensured that representative samples in equal quantity are taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9. The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the No. of the

package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret - Drug sample/Test memo", to be sent to the chemical laboratory concerned.

3. The seizing officers of the Central Government Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotic s Control Bureau, Directorate of Revenue Intelligence, etc. should despatch samples of the seized drugs to one of the laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities . The other central agencies like BSF, CBI and other central police organizations may send such samples to the Director, Central Forensic Laboratory, New Delhi. All State enforcement agencies may send samples of seized drugs to the Director/Deputy Director/ Assistant Director of their respective State Forensic Science Laboratory.

3.1. After sampling, a detailed inventory of such packages/containers shall be prepared for enclosure with the panchnama. Original wrappers shall also be preserved for evidentiary purposes."

26. In **State of Kerala and Ors. v. Kurian Abraham (P) Ltd., (2008) 3 SCC 582** following the earlier decision in **Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1**, it was held that the aforesaid statutory instructions are mandatory in nature.

27. Considering the Standing Order 1/89, the Hon'ble Apex Court in **Noor Aga v. State of Punjab (2008) 16 SCC 417**, held as under:-

"91. 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 of 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."

28. It would be apt to indicate that the conflict between the Standing Order No. 1/89 and Section 52A (2) (c) of the NDPS Act, related to sampling as Standing Order No. 1/89 provides for at the spot of seizure and sending the same to laboratory within 72 hours whereas Section 52A provides for sampling before a Magistrate, and this conflict has been dealt with by the Hon'ble Apex Court elaborately in **Union of India (UOI) v. Mohanlal and Ors. (2016) 3 SCC 379**. The relevant paragraphs of the said Judgment of the Hon'ble Apex Court are reproduced hereunder:

> *"**Seizure and sampling***
>
> *12. Section 52A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads:*
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> *"2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."*
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> *13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences*

under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

14. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

> *"52A.Disposal of seized narcotic drugs and psychotropic substances.—(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances 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 drug or psychotropic substance 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 or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances 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 or psychotropic substances 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 such drugs or substances and certifying such photographs as true; or*

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances 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) When 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 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, 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."

15. It is manifest from Section 52A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of

(a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52A 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 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 52A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52A 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.

19. Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made

without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions."

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31. *To sum up we direct as under:*

31.1. *No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.*

31.2. *The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs and psychotropic and controlled substances and conveyances duly equipped with vaults and double-locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1 of 1989 to ensure proper security against theft, pilferage or replacement of the seized drugs.*

31.3. *The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.*

> ***31.4.*** *Disposal of the seized drugs currently lying in the Police Malkhanas and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading "disposal of drugs".*

29. On the issue of sampling, the Hon'ble Apex Court in the case of **Gaunter Dewin Kircher vs. State of Goa** reported in **(1993) 3 SCC 145,** held as under:-

> *"5. The next and most important submission of Shri Lalit Chari, the learned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gms. Of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W. 1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms. Of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis cannot be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under S. 27 of the Act and the accused should have been given the benefit of that section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he cannot get the benefit of S. 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W. 1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychol, tropic*

substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W. I it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms, was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not, practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law."

30. The Hon'ble Apex Court passed in the case of **Yusuf @ Asif vs. State of U.P.,** reported in **2023 SCC OnLine SC 1328,** while dealing with the case in which 20 Kg. of heroine was recovered from the possession of accused/Usuf @ Asif, took note of Section 52A and observed that if a sample is not drawn in terms thereof, the sample drawn during the course of search is not liable to be treated as primary evidence and after observing the same, the Hon'ble Apex Court acquitted the appellant, who was imprisoned for a period of 6 years. The relevant paragraphs of the report placed before this Court reads as under:-

*"**3.** On the basis of the information received by the Intelligence Officer of Narcotics Control Bureau, a lorry parked near Puzhal Central Jail, Chennai, was intercepted by NCB on 28.03.2000 early in the morning. Four persons were found in the lorry and upon search, they were found in possession of commercial quantity i.e. 20 kgs of heroin kept in two jute bags. The samples were drawn from each of the packets i.e. 14 big and 12 small polythene packets kept in the two jute bags and they were seized under a seizure memo i.e. Mahazar. All the four persons were arrested after receiving the analyst report that the seized substance was nothing else but heroin.*

***4.** Consequently, the case crime No.113/2000 was registered. The trial court upon consideration of the evidence on record held all the four persons guilty under the provisions of the Narcotic Drugs and*

Psychotropic Substances Act, 19852 and convicted them to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1 lakh each, in default of which a further imprisonment of one year was ordered.

5. *All the four accused persons preferred appeal before the High Court. During the pendency of the appeal, A4 (Ganesh Ram) died and the appeal was dismissed as abated against him vide order dated 15.07.2022. The High Court vide judgment and order dated 11.10.2022 dismissed the appeal holding that there is no error in the findings recorded by the trial court and, therefore, the accused persons were directed to serve the remaining sentence after adjusting the period of imprisonment already undergone.*

6. *Aggrieved by his conviction and sentencing by the trial court and its affirmation by the High Court, A1 alone has preferred the present appeal assailing the judgment and order of the High Court dated 11.10.2022.*

7. *It may be relevant to mention here that A1 is the owner of the contraband and the same was being transported from Madhya Pradesh to Chennai with the help of A2 to A4. A1 had reached the place of seizure of the contraband to receive it, once it had reached Chennai.*

8. *We have heard learned Senior counsel for the appellant. The main plank of his argument is that the entire action of seizure and sampling is wholly illegal. It was done in violation of the mandatory provisions of Section 52A (2) of the NDPS Act as the procedure prescribed therein was not followed in drawing the samples and seizing the alleged narcotic substance. Further, there is a serious doubt about the correctness of samples sent for analysis as to whether they were actually the samples of the seized contraband.*

9. *Learned counsel for the respondent on behalf of the State submitted that the search and seizure was based upon the prior information received by the Intelligence Officer of NCB who has been examined as PW1. The accused persons were disclosed the identity of the officers and after obtaining their consent in writing, the search was carried out in the presence of Superintendent of Police, NCB (PW8) who was a gazetted officer.*

After seizure, two samples from each packet were drawn and packed separately and were sealed. The NCB seal No.12 was affixed to it and the correct seal number was mentioned in the Mahazar and all other documents except in the godown receipt whereby inadvertently seal No.11 was mentioned. The Officers involved in the search, seizure and arrest operation had duly submitted their report as referred to under Section 57 of the NDPS Act.

10. *In order to test the above submissions, it would be relevant to refer to the provisions of Section 52A (2), (3) and (4) of the NDPS Act. The aforesaid provisions provide for the procedure 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 the samples in connection thereof on being certified by the Magistrate shall be recognized as the primary evidence in connection with the offences alleged under the NDPS Act.*

11. *For the sake of convenience, relevant subsections of Section 52A of the NDPS Act are reproduced hereinbelow:*

> ***"52A. Disposal of seized narcotic drugs and psychotropic substances.-***
>
> *(1) .....*
>
> *(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officerincharge of the nearest police station or to the officer empowered under section 53, the officer referred to in subsection (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 subsection (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 [such drugs or 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 subsection (2), the Magistrate shall, as soon as may be, allow the application.*

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

12. *A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, 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.*

13. *Notwithstanding the defence set up from the side of the respondent in the instant case, 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 that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

14. *It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not 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 of the list of samples so drawn.*

15. *In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officerincharge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further*

laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

16. *In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.*

17. *Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.*

18. *The appellant has already undergone more than 6 years of imprisonment out of 10 years awarded to him. He is on bail and has been granted exemption from surrender by this Court. Therefore, his bail bonds, if any, stands cancelled.*

19. *The appeal is allowed with no order as to costs."*

31. In **Simarnjit Singh Vs. State of Punjab**, reported in **2023 SCC OnLine SC 906**, Hon'ble the Supreme Court while acquitting the accused relied upon **Union of India Vs. Mohan Lal and Another**, reported in **2016 (3) SCC 379** and held that mandate of Section 52A of the Act was not complied with, and made the following observations in para No. 10 and 11:-

"10. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal. This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

11. Hence, the case of prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence."

32. The Hon'ble the Supreme Court in **Mangilal Vs. State of Madhya Pradesh,** reported in **2023 SCC OnLine 862**, while acquitting the accused, has observed that mandate of Section 52A of the Act has to be complied with by observing that:-

> *"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 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 seriatim wise and keeping them in lots preceded by compliance of the procedure for drawing samples."*

33. For coming to the conclusion that sampling was carried out,in other words sample/samples was/were drawn, strictly in terms of law or not, this Court finds it appropriate to take note of the recovery memo which is extracted herein-under:

> *"सेवा में,*
>
> *श्रीमान् थाना प्रभारी महोदय कोतवाली गौरीफन्टा जनपद खीरी आज दिनांक 22/11/2014 को मैं INSP/GD अमरेश विश्वास मय हमराही बल सं० नं० 9062910 मु०आ० अशोक कुमार नं0 080070426 सा०/आ०–रनदेव प्रशान्त नं. 09060141 सा०/आ० मोहन कुमार साहु नं. 110662756 सा०/अ० उमेश कुमार गुप्ता नं0 110665676 सा०/आ० भवर योगेश व थाना गौरिफेन्टा से वास्ते संयुक्त चेंकिग हेतु उपस्थित आए आरक्षी नं० 968CP उदय राज पटेल व आरक्षी 586 CP सनवाय देवनारायण सिंह के सशस्त्र सीमा बल 39 वीं वाहिनी "जी" समवाय गौरिफन्टा के नेपाल सीमा से भारत की तरफ आने वाले वाहनों आदि की चेंकिग अभियान ड्यिुटी ड्गिनियां तिराहा के पास मामूर थे कि एक व्यक्ति जंगल के रास्ते होते हुए ड्गिनियां तिराहा के पास सड़क पर पहुंचा कि हम लोगों को देखकर ठीठका व पिछे मुड़कर वापस होना चाहा कि हम लोगों ने रोका व टोका तथा घेर कर पास*

पहुंचकर वापस होने का कारण पुछा तो उक्त व्यक्ति ने बताया की साहब हमारे पास नाजायज चरस है इस कारण आप लोगों के डर से वापस होने लगा था इस पर नाम पता पुछा गया तो उसने अपना नाम साजेब अली उर्फ शकील पुत्र अख्तर अली निवासी पुराना फुलवारी बस पार्क धनगड़ी थाना धनगड़ी जनपद कैलाली नेपाल राष्ट्र बताया चूंकि उक्त व्यक्ति अपने पास चरस होने की बात बताई जो 8/20 NDPS Act के अन्तर्गत दण्डनीय अपराध है उपरोक्त को उसके अधिकार से अवगत कराते हुए कि तुम्हारे पास चरस है अपनी जमा तलासी किसी राजपत्रित अधिकारी / मजिस्ट्रेट को दे सकते हो तलासी हेतु राजपत्रित अधिकारी अथवा मजिस्ट्रेट को बुलाया जाय इस पर उक्त व्यक्ति ने कहा की साहब जब आप लोग ने पकड़ लिया है तो आप लोग ही मेरी तलासी ले ले मजिस्ट्रेट अथवा राजपत्रित अधिकारी को बुलाने की आवश्यकता नहीं है इस पर मेरे द्वारा पकड़े गये पुरूष की समक्ष हमराही कर्मचारीगण जमा तलासी ली गई तो अपने पीठ पर लटकाये बैग जो ब्लैक हल्का ब्राऊन कलर का है बैग की तलासी बैग उत्तरवा कर ली गई बैग के अन्दर 5 पैकेट में पोलोथीन से लिपटी हुई वस्तु बरामद हुई जिसकी पोलोथीन खोलकर देखा गया सभी जमा तलासी से उसके पास से पांचो पैकेट चेक किये गये तो चरस बरामद हुई तथा जमा तलासी से उसके पास पहने पैन्ट से 600 रू० भारतीय मुद्रा व एक अदद मोबाइल Intex डबल सीम बरामद हुआ चुके उक्त व्यक्ति का यह कार्य 8/20 NDPS Act के अन्तर्गत दण्डनीय अपराध है अतः बाजाफ्ता कारण गिरफ्तारी बताते हुए 16.45 Pm पर हिरासत में लिया गया बरामद चरस का वजन कराने हेतु नं0 080070426 सा०/आरक्षी रनदेव प्रशान्त को कम्पनी मुख्यालय भेजकर इलेक्ट्रोनिक तराजु मंगाया गया और चरस का वजन किया गया तो 9 किलो 800 ग्राम पाया गया बरामद चरस से 100 ग्रा० अलग परीक्षण हेतु अलग से नमुना निकाला गया शेष चरस उसी बैग में रखकर एक कपड़े में रखकर सर्व मोहर किया गया नमूना मोहर तैयार किया गया तथा नमुना चरस को भी एक कपड़े में सर्व मोहर कर नमुना मोहर तैयार किया गया दौराने गिरफ्तारी बरामदगी मौके पर आए राहगीरों से गवाही हेतु कहा गया परन्तु कोई भलाई–बुराई के कारण तैयार नहीं हुआ फर्द मौके पर नं० 090541707 सा०/ आरक्षी अनिश कुमार से बोल बोल कर लिखाई गई हमराही कर्मचारीगणों को पढ़कर सुनाकर हस्ताक्षर बनवाये जा रहे हैं गिरफ्तारी व बरामदगी के समय माननीय सर्वोच्च न्यायालय व मानवाधिकारों के आयोग के आदेशों/निर्देशों का अच्छे से पालन किया गया आ०/स० अनिश कुमार तराजु के साथ कम्पनी से मौके पर आया था।"

34. To prove the above quoted recovery memo/arrest memo, Inspector Amresh Vishwas was produced as witness/P.W.1. The statement of this witness reads as under:

"अमरेश विश्वास इंस्पेक्टर एस०एस०बी० 39 बटालियन गौरीफन्टा वर्तमान 19 बटालियन ठाकुरगंज, जिला विशनगंज बिहार ने सशपथ बयान किया कि माह नवम्बर सन् 2014 में मैं सशस्त्र सीमा बल 39 वाहिनी G. समवाय गौरीफंटा में कार्यरत था। दिनांक 22.11.14 को मुख्य आरक्षी अशोक कुमार सामान्य आरक्षी रनदेव प्रशांत व सामान्य आरक्षी मोहन कुमार साहू व सा० आरक्षी दिनेश कुमार गुप्ता तथा सामान्य आरक्षी भंवर योगेश सहित गौरीफंटा थाने से संयुक्त चेकिंग के लिये थाने के आरक्षी उदय राज पटेल तथा आरक्षी देवनरायन सिंह के साथ नौपाल सीमा से भारत की तरफ आने वाले वाहनो की चेकिंग अभियान में डिगनिया तिराहे के पास मामूर थे कि एक व्यक्ति जंगल के रास्ते तिराहे के पास सड़क पार आया। और हम लोगों के देखते ही ठिठका और पीछे मुड़कर वापस होना चाहा शक होने पर हम लोगो ने उसे रोका व टोका तथा घेर कर पास पहुंचकर वापस होने का कारण पूछा तो उसने कहा कि साहब हमारे पास नाजायज चरस है जिसके डर के कारण मैं वापस हो रहा था। उसका नाम पता पूछा तो उसने अपना नाम साजेब अली @ शकील S/० अख्तर अली निवासी पुराना फुलवारी बस पार्क धनगढ़ी थाना धनगढ़ी जिला कैलाली नेपाल बताया।

उसके तथा अपने पास चरस होने की बात बताये जाने पर उससे मेरे द्वारा बताया गया कि तुम अपने पास नशीली बस्तु चरस होना बता रहे हो इसलिए तुम अपनी जामा तलाशी किसी राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष दे सकते हो यह तुम्हारा अधिकार है। यदि तुम कहो तो उन्हे यही बुला लिया जाय। तो उसने मौखिक सहमति देते हुए कहा कि अब और किसी को बुलाने की आवश्यकता नहीं है। अब आप लोगों ने पकड़ ही लिया है तो आप लोग ही मेरी जामा तलाशी ले लो। तलाशी से उसकी पीठ पर लटकाये बैग की तलाशी ली गयी तो उसके अन्दर पांच पैकेट में पालीथीन से लिपटी हुई वस्तु बरामद हुई। जिसकी पालीथीन खोल कर देखा गया व चेक किया गया तो वह पांचो पैकेट चरस थे। तथा पहने पैंट की जेब से मु० 600/– रूपया भारतीय तथा एक मोबाइल फोन इन्टेक्स कम्पनी का डबल सिम का बरामद हुआ। बरामद चरस को वजन करने के लिए आरक्षी रनदेव प्रशांत की कम्पनी मुख्यालय से इलेक्ट्रानिक व तराजू मंगाया गया। और वजन किया गया तो उसका वजन नौ किलो आठ सौ ग्राम पाया गया। <u>जिसमें से सभी पैकटों से बतौर नमूना 100gm चरस लेकर अलग तथा शेष पैकेटों को उन्ही पैकटों में रखकर कर कपड़े में सील सर्व मुहर कर नमूना मुहर तैयार किया।</u>

गिरफ्तारी व बरामदगी से संबंधी फर्द मौके पर ही मेरे द्वारा बोलने पर आरक्षी अनिश कुमार से लिखवाई। गिरफ्तारी व बरामदगी के संदर्भ आने जाने वाले जनता के लोगों से बतौर साक्षी हस्ताक्षर करने के लिए कहा गया। तो सभी बिना नाम बता बताये चले गये। फर्द को पढ़कर सभी को सुनाकर मैंने अपने हस्ताक्षर बनाये तथा हमराहियान ने भी उस पर हस्ताक्षर बनाये। फर्द की एक प्रति अभियुक्त को देकर सुनाकर उससे भी हस्ताक्षर करवाये। गिरफ्तारी के समक्ष मानवाधिकार व सर्वोच्च न्यायालय के निर्देशों का पालन करते हुए समस्त कार्यवाही की गई। तत्पश्चात् गिरफ्तारी शुदा मुल्जिम व बरामद शुदा माल थाने लाकर मेरे द्वारा अभियुक्त के विरूद्ध मुकदमा कायम कराया गया। अभियुक्त की गिरफ्तारी समय 16.45 pm पर की गई थी। फर्द पत्रावली पर उपलब्ध है जिस पर मेरे भी हस्ताक्षर है। जिस पर प्रदर्श क–1 डाला गया। घटना की बाबत विवेचक ने मुझसे पूंछताछ भी की थी।

X X X By Defence Counsel

मैं कैम्प से गिरफ्तारी होने के आधा घंटे पहले चला था। शेष हमराहियान डिगनिया तिराहे पर मिले थे। डिगनिया तिराहे पर एक चाय की छोटी सी दुकान है। वहीं पर टूटा फूटा यात्री प्रतीक्षालय भी बना हुआ है। तिराहे के थोड़ा आगे बाबादास की झोपड़ी पड़ी है। यह मुझे याद नही है कि मैं डिगनिया तिराहे पर कितने बजे पहुंच गया था। अभियुका साजेब अली जंगल से मेन रोड पर आ रहा था। अभियुका रोड के नजदीक आने पर हम लोगों को देखकर मुड़ा था। आवाज देने पर रूक गया था। रोड से 30 मीटर की दूरी पर ही हम लोगों ने अभियुका को पकड़ लिया था। मैं नहीं बता पाऊंगा कि पलिया गौरी फंटा रोड पूरब पश्चिम को है या उत्तर दक्खिन की है। ***अपठनीय*** *चौकी मार्ग बनकटी होकर जाता है लेकिन किस दिशा में जाता है राह मुझे याद नहीं है। काफी समय की बात है। डिगनियां तिराहा पर आवागमन रहता है। लेकिन शाम होते ही आवागमन बन्द हो जाता है। हम लोगों ने अभ्युिक्त को लगभग 4.45 PM पर गिरफ्तार किया था। गिरफ्तारी करने के बाद हम लोगों ने अभियुक्त की तलाशी ली थी। तलाशी में छः पैकेट बरामद नहीं हुए थे बल्कि पांच पैकेट बरामद हुए थे। यह पैकेट पालीथीन में लिपटे थे। पालीथीन का रंग मुझे याद नही है जिस बैग से चरस बरामद हुई थी वह शायद काले रंग का था। चरस की जानकारी मुझे अभियुक्त ने स्वयं दी थी। एवं मेरे साथ मौजूद पुलिस व अपने साथियों के बताने के अनुसार मैंने पाया था कि चरस है। फर्द बरामदगी मैंने मौके पर तैयार कराई थी। बरामद माल का नमूना अलग कपड़ों में सील किया गया था। नमूना की फर्द अलग से नहीं लिखी गई थी। फर्द बरामदगी में ही इंगित कर दिया गया था। अभियुक्त की तलाशी लेने व फर्द लिखने में लगभग एक घंटा बीस मिनट लग गया था। अभियुक्त के पहले हम लोग जिप्सी से लेकर अपने मुख्यालय पर आये। उसके बाद थाने ले गये थे। मुख्यालय पर लाने व विभागीय कार्यवाही व थाने तक ले जाने में लगभग 12 घंटे का समय लगा था। जिस समय गिरफ्तारी की गई थी उस समय कोई*

चौपहिया वाहन नहीं निकले थे एक दो बाइक निकली थी लेकिन उन लोगों द्वारा कोई गवाही के लिए तैयार नहीं था। तिराहे पर चाय की दुकान ज्यादातर बंद रहती है व बाबादास झोपड़ी में उस समय मौजूद नहीं थे। गिरफ्तारी के स्थान से बनकटी लगभग 12 से दो किमी पर होगा। मैंने किसी अपने हमराही को बनकटी से गवाह लाने के लिए नहीं भेजा था। नमूना मोहर की सील किसकी थी मुझे याद नही है। बरामद माल आज मेरे सामने न्यायालय में मौजूद नहीं है। गिरफ्तारी के समय मैंने अभियुक्त से किसी राजपत्रित अधिकारी को बुलाने के लिए कहा था। और उसे राजपत्रित अधिकारी के पास चलने के लिए भी कहा था। यदि फर्द में किसी राजपत्रित अधिकारी के पास ले चलने वाली बात अंकित न हो तो मैं इस सम्बन्ध में नहीं बता सकता। फर्द की नकल अभियुक्त को दी थी। थाने पर FIR लिखने में आधा एक घंटा लगा था। दरोगा जी ने मुझसे घटना की बाबत पूंछतांछ की थी। घटना स्थल पर लेकर दरोगा जी मुझे गये थे। फर्द बरामदगी अनेश कुमार ने लिखी थी। मेरे साथ गौरी फंटा थाने के जो पुलिस के कर्मचारी थे उसमें हस्ताक्षर मैंने फर्द पर कराया था।

यह कहना गलत है कि कोई बरामदगी अभियुक्त से न हुई हो।

यह भी कहना गलत है कि अभियुक्त को घर से पकड़कर लाकर झूठा चालान कर दिया गया है।

बयान मेरे बोलने पर रीडर द्वारा लिखा गया। सुनकर तस्दीक किया।

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35. From a bare reading of recovery memo and the statements of witness namely Amresh Viswas it is evident that the sample was not taken/drawn in terms of Standing Order(s) on the subject and Section 52A of the Act. In this case, as per the case of prosecution, five packets were recovered from the bag of accused/appellant, as per the case of prosecution, and from the said five packets, 9 kg and 800 gms. charas was recovered and thereafter, one sample of 100 gms. was drawn. In the Recovery Memo, it is not indicated that from all five packets, charas was

taken and thereafter one sample was drawn. Recovery Memo does not indicate that charas of all the packets was mixed and therafter, 100 gms was taken for chemical examination and it also does not indicate that the sample was taken in duplicate. Improvement in this regard by the witness of prosecution namely Amresh Vishwas while making the statement before the Court during trial would be of no help to the prosecution.

36. In the instant case, as per prosecution, the charas was recovered from the possession of the accused/appellant and accordingly in terms of Standing Order No.1/88 and Standing Order No. 1/89 particularly Clause 1.6 and Clause 2.3, respectively, from all/each alleged packet(s) recovered minimum 24 gms. charas ought to have been taken as sample (in duplicate) for chemical test or packet(s) recovered should have been mixed to make homogeneous and representative before the sample (in duplicate)is drawn. It is apparent that the process as indicated in Standing Order No. 1/88 and 1/89 was not adopted.

37. Taking note of the aforesaid and principles/proposition settled on the subject in the pronouncements, referred above, this Court finds that the prosecution had not followed the procedure as prescribed while drawing the sample of recovered charas from the bag of the accused/appellant.

38. 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.

39. Section 52A (2), (3) and (4) of the NDPS Act provides for the procedure 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.

40. 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.

41. No evidence is 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 is 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 that the sample from the seized substance was drawn by the police team and not in the presence of the Magistrate. There is no evidence on record to prove that the Magistrate had certified the inventory of the substance seized or the list of samples so drawn. For non-compliance of mandatory provisions of Section 52A, the sample 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.

42. Accordingly, this Court is of the opinion that the failure of the police team which carried out the proceedings of interception and seizure failed to lead primary evidence in regard to seized contraband and sample.

43. In view of foregoing discussion the conviction of the appellant/accused deserves to be set-aside.

44. The impugned judgment passed and sentence awarded by trial court convicting the appellant Sajeb Ali @ Shakeel and sentencing them to undergo twenty years rigorous imprisonment and Rs.1,00,000/- fine with a default stipulation is hereby set-aside. Accordingly, the appeal stands **allowed**.

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

46. The appellant will execute, a personal bond and two sureties each in the like amount to the satisfaction of the court concerned, within one week of his release from jail, in compliance of provision of Section 437 (A) Cr.P.C. read with Section 481 of Bhariya Nagrik Suraksha Sanhita, 2023 to the effect that he 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.

47. Office/Registry is directed to send the copy of this judgment for necessary compliance along with trial Court record to the court concerned forthwith.

48. The Court records the valuable assistance given by Ms. Urmish Shankar, Research Associate, attached with me in drafting this judgment and finding out case laws applicable in the present case.

Order Date :- 23.07.2024

Mohit Singh/-