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Court No.13

Case :- CRIMINAL APPEAL No.-213 of 2019

Appellant :- Smt. Shraswati

Respondent :- State of U.P.

Counsel for Appellant :- Piyush Kumar Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Karunesh Singh Pawar, J.

- (1) Heard Shri Piyush Kumar Singh, learned Counsel for the appellant and Ms. Nikita Mishra, learned A.G.A. for the respondent State.
- (2) This criminal appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 has been preferred by the appellant, **Smt. Shraswati**, challenging the judgment and order dated 27.01.2017 passed by the Additional Session Judge, F.T.C.-II, Bahraich in Special Sessions Trial No. 48 of 2012 : *State of U.P. vs. Smt. Shraswati*, arising out of Case Crime No. 403 of 2012, under Sections 8/17/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "**N.D.P.S. Act, 1985**"), police station Rupaideeha, district Bahraich, whereby the appellant

was convicted under Sections 8/17/20 N.D.P.S. Act, 1985 and sentenced him to undergo 12 years' rigorous imprisonment and a fine of Rs.1,25,000/ and in default of payment of fine to undergo additional one year simple imprisonment.

- (3) The prosecution case as per the recovery memo (Ext. Ka.1), is that on 29.7.2012, at 15.00 hours, an information was received from reliable sources that one Nepalese woman wearing red saree would reach to India from Nepal via Rupaideeha main road with opium. Taking this information seriously and on the direction of Assistant Commandant Shri Ashwani Singh, S.I. Janak Singh along with Constable Ganesh Singh, Umesh Prasad Yadav, Neeraj Kumar Srivas, Suvita T., Neetu Pal, Sunita and Shyam Pratap Singh had constituted a special search team; reached at the check post of Armed Border Force located at Nepalganj-Rupaideeha main road along with informer; and started waiting there for the said woman to come. Around 17.15 hours, resembling the description given, one Nepali woman was seen coming from Nepal to India on a a rickshaw. Upon a signal of the informer, the said Nepali woman was stopped by the

woman constable for search. During search, something seemed to be tied around the waist of the said woman. Thereafter, following the orders of Human Rights and High Court, the said woman was told that bringing and carrying opium anywhere is an offence under Sections 8/20/17 of N.D.P.S. Act. The said woman was asked that whether she wants her search to be made before Magistrate or any other place, then, the said woman told that when it is certain that she is carrying opium then they may take the search. Thereafter, on the spot, consent form was got prepared; it was read over to her; and got her signature/thumb impression on it. Thereafter, in the presence of Assistant Commandant, woman Constable Suvita T. and Sunita, who were present on the spot, searched each other but no incriminating material was found from them. After that, according to the order of Assistant Commander, Sunita T. was asked to search the said woman. On being asked during the search, the said woman stated her name as Saraswati wife of Hom Bahadur, resident of Ghorai New Bazar Gawisa Gorai, district Dang Nepal, aged about 28 years, and from her search, apart from the opium tied near the waist in red cloth, nepali currency amounting to 100/-

and 20/- was recovered. After testing the recovered opium with the available drug testing kit, *prima facie* opium was found. Thereafter, on being weighed with the available beam scale, total weight of the recovered opium was 3kg 500gram. From the recovered opium a sample of 24x2 grams were drawn and the samples were sealed in a white cloth with the seal of SSB (Shashatra Seema Bal). Upon enquiry, the Nepali woman said that in the morning one man, namely, Pravesh Budha came and said her that if she delivers the maal (opium) to Rupaideeha (India) bus stop, he will give her nepali currency amounting to 6000/- and on this assurance, she agreed to do this work. Thereafter, on completing all necessary formalities, she was handed over to Police Station Rupaideeha for further action under N.D.P.S. Act. The copy of the recovery memo was read over to the appellant and her signature/thumb impression was taken on it. A copy of the recovery memo (Ext. Ka.2) was also handed over to her, but she torned it and threw away.

- (4) On the basis of aforesaid recovery memo (Ext. Ka.2), on 29.07.2012, at about 07:15 p.m., case crime no. 403 of 2012,

under Section 8/20/17 N.D.P.S.Act was registered against the appellant Saraswati at police station Rupaideeha, district Bahraich. Head Moharrir Umesh Kumar Bhardwaj had scribed the chik F.I.R. (Ext. Ka-1), which has been mentioned in rapat no. 41 of the general diary of police station Rupaideeha and Ext. Ka. 10 has been entered on the carbon copy of it. During the investigation, the Investigating Officer had mentioned copy of the recovery memo, copy of rapat and the statements recorded under Section 161 Cr.P.C. of the scriber of F.I.R. Constable Moharrir Umesh Kumar Bhardwaj, accused/appellant Saraswati, complainant S.I. Janak Singh, Umesh Kumar Yadav, Head Constable Ganesh Singh Rawat, Niraj Kumar Srivas, Constable Suvita T., Constable Nitu Bala, Constable Sunita, Constable Shyam Pratap Singh, Aswani Kumar, Rasul, Moin, Constable Indresh Kumar in the general diary and after conducting inspection of the place of occurrence, site plan was prepared, which has been mentioned as Ext. Ka.7. For testing of recovered item, docket no. A-8/2 was prepared and filed the same on Forensic Science Laboratory, Mahanagar, Lucknow under serial no. 5830/12. After completion of the investigation, charge-sheet (Ext. Ka.8) was filed against the accused/appellant Saraswati and on receipt of the report from Forensic Science

Laboratory, U.P., Lucknow, the same i.e. paper No. A-8/3 was filed.

- (5) On 07.08.2014, the Additional Sessions Judge, Court No.4, Bahraich had framed charges against accused/appellant Saraswati under Section 8/17/20 of N.D.P.S. Act. The charges were read out to the accused/appellant and explained. Accused/appellant pleaded not guilty to the charges and claimed to be tried.
- (6) During trial, in all, the prosecution examined three witnesses, namely, P.W.1-Janak Singh, who is the complainant of the case; P.W.2-Suvita T., who searched the accused/appellant on the date of the incident; and P.W.3-Subhash Yadav, who is the Investigating Officer of the case. In support of its case, the prosecution has also produced the documentary evidence viz. consent form of accused Saraswati to search her during the course of search (Ext. Ka.1), Chik recovery memo (Ext. Ka.2), the arrest form of the accused Saraswati (Ext. Ka.3), memo of weight of recovered opium (Ext. Ka.4), memo of search (Ext. Ka.5), memo of the marks of fingers of left and right hand of accused (Ext. Ka.6), site-plan (Ext. Ka.7), charge-sheet (Ext. Ka.8), Chik F.I.R. (Ext. Ka.9), carbon copy of GD (Ext. Ka.10).

- (7) After the completion of the prosecution evidence, the statement under Section 313 Cr.P.C. of the accused Saraswati was recorded, wherein her defence was of denial. She stated that charges are false and false recovery has been made. She stated that due to enmity, the complainant used to take *begar* from her and upon demand of her wages, he refused and due to this enmity, she has been falsely implicated by showing the recovery.
- (8) P.W.1-Janak Singh, who is the complainant of the case and also the recovery witness, had reiterated the recital contained in the F.I.R. However, making improvement from the recovery memo, he had deposed that on the signal of the informer, the woman Constable stopped her and asked her, then, she told that she is carrying opium tied in her waist. She was told that she has right to be searched before any Gazetted Officer or any Magistrate. P.W.1 had deposed that the Nepali woman said that she does not want to go anywhere and upon her consent, the consent letter (Ext. Ka.1) was prepared. He directed woman Constable Suvita T. (P.W.2) and Sunita, who after taking search of each other and after finding, no incriminating article each other, Suvita T. (P.W.2) conducted the search of the Nepali woman and found opium tied in her waist wrapped in red cloth and also nepali currency amounting to 100/- and 20/-. The recovered

contraband was tested by the drug testing kit and it was found opium, which was weighed by beam scale and total weight of the recovered opium was 3 kg 500 grams, out of which, sample of 24 x 24 grams was taken from the recovered opium in a white cloth and sealed it and rest of the recovered opium were also sealed in a white cloth. After that describing the offence of Section 8/20 of the N.D.P.S. Act, the woman was taken into custody and recovered contraband was taken under police custody and sample seal was prepared. He also prepared the recovery memo (Ext. Ka.2). A copy of the recovery memo was also given to the accused/appellant Saraswati. He also prepared memo of notice of arrest as well as memo of search. He proved arrest memo (Ext. Ka.3), memo of weight of recovered opium (Ext. Ka.4), memo of search (Ext. Ka.5). He took the recovered contraband, the accused and the other documents prepared on the spot to police station Rupiadeeha and were deposited in the police station Rupiadeeha. He also deposited the recovered contraband to Malkhana.

In the cross-examination, P.W.1 had deposed that the Nepali woman was not searched before the Gazetted Officer or the Magistrate rather she was searched in the presence of his

Senanayak. The recovery memo was in the handwriting of Constable Shyam Pratap. On the recovery memo, all the eight persons of the search team have signed the recovery memo, which was prepared at 05:15 p.m. in the headquarter office and the signature of Commandant was not in the recovery memo as he was not present at that time and was out of station. The Investigating Officer did not went to inspect the place of occurrence.

- (9) PW-2 Suvita T., who was posted as Constable in 7th Battalion S.S.B., Nanpara Company at Rupaideeha, had also repeated the same prosecution story. She had deposed before the trial Court that recovery memo was prepared by common person, namely, Shyam Pratap Singh upon the dictation of Janak Singh (P.W.1). She had deposed that the recovered contraband from accused Saraswati, which is brought in the Court, is the same which was recovered by her from the accused Saraswati and identified her signature on the same, which is Ext.1.

In cross-examination, P.W.2 had deposed that the search of the accused was not conducted by any Gazetted Officer rather search was taken by them (special team). During the general search, they (special team) had caught Saraswati (appellant) at the Border. She further deposed that the entire documentation

and proceedings were done at the place where Saraswati was caught i.e. Rupaideeha Check Post. On the recovery memo, apart from her, all the other members of the search team signed on it. The signature of the Assistant Commander is not on the recovery memo as he was not present at the time of recovery of contraband. The sample seal was prepared. She did not remember that after how much time, the recovered contraband and the accused were sent to the police station. She also not knew the name of the person who took the accused to the police station. She denied the suggestion that opium has not been recovered from Saraswati (appellant).

- (10) P.W.3 S.I. Subhash Yadav (P.W.3), the Investigating Officer, in his examination-in-chief, had deposed that he had entered the copy of the chik report in CD-1 and recorded the statement of Constable Moharrir Umesh Kumar Bhardwaj, scribe of the chik F.I.R. and the statement of the accused Saraswati on the same day and mentioned in the CD-2 on 01.08.2012. He took the statement of the prosecution witness. He inspected the place of occurrence and prepared the site plan and said that the same site plan on which Ext. Ka7 is written. On 9.8.2012 prayer for remand was made. On 10.8.2012, he had written the CD-4 in which he has registered the receipts of the sample in the Forensic Science Laboratory and took the statement of constable

Indresh in CD. After completing the investigation he filed the charge-sheet against the accused Saraswati and proved Ext. Ka-9. On 13.12.2012 SCD-1 was issued and report of the FSL Laboratory was mentioned in the SCD in which opium was found.

In the cross-examination, P.W.3 has stated that he inspected the site and prepared the site plan. He deposed that he is not aware whether the accused was searched before the Magistrate or not as this fact could be stated by S.S.B. personnel, however, he wanted to know this fact from the witnesses during the investigation, then, witnesses told him that accused had consented to give her search from the staff who caught her, therefore, after preparing consent letter, search was conducted. He deposed that incident was of 29.07.2012 and he recorded the statement of complainant and witnesses on 01.08.2012. He prepared the docket of sample, which was sent to the Forensic Science Laboratory for testing on 8.8.2012 and the same was received in the Forensic Science Laboratory on 9.8.2012. He also deposed that the cost of the recovered contraband according to SSB was to the tune of Rs.35,00,000/-. He denied the suggestion that he had conducted the entire investigation while sitting at the police station and he did not go to the place of occurrence for conducting the investigation.

- (11) Learned counsel for the appellant has submitted that there is no compliance of Section 50 of the NDPS Act. The report of arrest and seizure have not been sent within 48 hours to the immediate superior officer although prior information was received, however, the same has not been reduced in writing. According to him, malkhana register has not been produced; the date of deposit in Malkhana is not known; when the contraband deposited in Malkhana is also not known; test sample is missing; and sample seal was not produced before the trial Court. He also submitted that the secret prior information received has not been reduced into writing nor sent a copy of the same to the Senior Officer as mandated under Section 42 (2) of the NDPS Act.
- (12) Learned A.G.A. has opposed the contention of the learned counsel for the appellant. It is submitted on behalf of the State that 3 kg 500 gm opium was found from the personal search of the accused/appellant by the search team. The consent letter was prepared.
- (13) So far as the first contention of learned counsel for the appellant that there is complete non-compliance of Section 50 NDPS Act is concerned, this Court has taken note of the fact that in the

recovery memo dated 29.7.2012, the accused/ appellant was searched first and after it appeared to the searched team that there is something tied up in her waist, she was asked for the same and then she told that there is opium in it. After that giving reference to the provision of NDPS Act and human rights as well as orders of the Courts, she was asked whether she wanted to be searched in front of Magistrate or anywhere else, then she stated that once it is certain that there is a opium with her, then, they may take her search. The fact that as per the recovery memo, the accused/appellant was searched first and upon a suspicion arose that she is carrying opium in her waist, she was given the option to be searched before the Magistrate or anywhere else, thus, corroborated with the statement of P.W.2 Constable Suvita T, who, in her cross-examination, has stated that during the general search on the border, they had caught Saraswati. Both PW1-S.I. Janak Singh and PW2-Savita T. had stated that the appellant was informed of her right to be searched before the Gazetted Officer or the Magistrate in their examination-in-chief, however, both of them had admitted that search was not in front of any Gazzeted Officer or Magistrate. PW1-Janak Singh, in her cross-examination, had stated that in the closed room, she was searched by Constable Suvita T. (P.W.2) and she was not searched before any Magistrate or any

Gazetted Officer rather she was searched before her Senanayak. PW 2-Suvita T., in her cross-examination, had stated that the accused was not searched by any Gazetted Officer rather she was searched by them. It is clear from the recovery memo as well as the evidence of PW1-Janak Singh and PW2-Suvita T. that she was not searched before the Gazetted officer or the Magistrate. It is also clear that she was not searched before any independent witnesses.

- (14) From the statement of PW1-Janak Singh and PW2-Suvita T., it is also clear that none of the police officials of the police party, who recovered the contraband opium, were Gazetted Officer. Thus, they were not empowered to make search the applicant as provided under Section 50 of the NDPS Act except in the presence of either Magistrate or Gazetted Officer. The search of the recovery of the alleged contraband opium has to be in direct authorization and confirmation that is requirement of Section 50 NDPS Act. It is incumbent and mandatory for the prosecution to prove that search and recovery were made from the applicant in presence of Magistrate or a Gazetted Officer.
- (15) Hon'ble Supreme Court in the case of **Arif Khan alias Agha Khan v. State of Uttarakhand** : AIR 2018 SC 2123 has held in para 28 as under :-

"28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer."

- (16) In the case of **Vijaysinh Chandubha Jadeja Vs. State of Gujrat** reported in **2011 (1) SCC 609**, Hon'ble Supreme Court in para 32 has held that at the first instance, an effort should be made by the prosecuting agency to produce the suspect before the Magistrate to ensure generating more confidence of common man as compared to any other officer as it will add legitimacy to the search proceedings and will also strengthen the prosecution case as well.

- (17) It is not disputed rather admitted that none of the members of the raiding officer is gazetted officer. No effort whatsoever was made by the raiding team to produce the accused before the Gazetted Officer or the Magistrate, hence it is a case of total non-compliance of Section 50 of NDPS Act which vitiates the search.
- (18) So far as the contention of learned counsel for the appellant that Section 57 of the NDPS Act has not been complied with as no report of seizure of property has been sent within 48 hours after the arrest to his immediate superior officer by the arresting officer is concerned, PW1-Janak Singh, PW2-Suvita T. and PW3-S.I. Subhash Yadav, in their statement, had nowhere stated that a report to the superior officer under the provisions of NDPS Act was sent. Thus prosecution has failed to prove compliance of Section 57 of the NDPS Act.
- (19) This Court in the case of **Ram Pal Yadav Vs. State of U.P.** reported in 2008 (1) JIC 776 has held that to avoid any reasonable doubt of ante time reports, the report under Section 57 of the NDPS Act must be sent within 48 hours. Relevant paragraphs 10 and 11 are extracted below :-

"10. Section 57 deals with report of arrest and seizure. Even the Criminal Procedure Code is based on a system of "checks and balances"

and in that Code it has been provided that at least in respect of a serious offence when a report is lodged at the police station a special report should be sent immediately to the higher officers. Such provision has been inserted to rule out any possibilities of ante-timed reports. Similarly in the N.D.P.S. Act also section 57 provide that whenever any person makes any arrest or seizure he shall submit report thereof to his superior officer within 48 hours of such arrest or seizure. But in the present case no such report has been brought on record which also creates a reasonable doubt, I find substance in these submissions.

11. It is true that these provisions are not mandatory and are merely directory as was held in the case of Babubhai Odhavji Patel and Ors Vs. State of Gujrat, reported in 2006(1) JIC 732 (SC) : (2005) 8 SCC 725, relied upon by the learned A.G.A. But these lapses shatter the value of evidence and in such cases the possibilities of plantation of the contraband and cannot be ruled out as was held by this Court in the case of Roshan Lal Vs. State of U.P., reported in 2007(2) JIC 650 (SC) : 2007 (58) ACC 723. Even if the aforesaid provisions are directory it does not mean that those should be given a complete go by. In the present case these lapses do create a ring of doubt and possibility of plantation of contraband material as suggested by defence cannot be ruled out.”

- (20) It has been submitted by learned A.G.A. that compliance of Section 57 NDPS Act is not mandatory. As regards Section 57 NDPS Act, the Hon'ble Supreme Court in "**State of Punjab Vs. Balbir Singh**" reported in (1994) 3 SCC 294 has held in para 24 as under:-

“24. Sections 52 and 57 come into operation after the arrest and seizure under the Act. Somewhat similar provisions are also there in

the CrPC. If there is any violation of these provisions, then the Court has to examine the effect of the same. In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.”

- (21) It is, therefore, clear that non-compliance of Section 57 of NDPS Act is not mandatory but if its non-compliance prejudices the accused, it will certainly have an adverse effect on the prosecution case keeping in view the stringent punishment under the provisions of NDPS Act.

- (22) The next submission of learned counsel for the appellant is that the Standing Instructions No. 1/88 and 1/89 issued by the Narcotics Control Bureau, New Delhi have not been complied with. He submits that sample has neither been drawn nor sent as per the aforesaid Standing Instructions.
- (23) According to the prosecution case, the incident took place on 29.7.2012 at 5.15 p.m. The samples were drawn on the spot and the same were sent to the Forensic Science Laboratory on 8.8.2012, which was received in the Forensic Science Laboratory on 9.8.2012 and the report of the Forensic Science Laboratory have been received on 17.11.2012.
- (24) As per Clause 1.13 of the Standing Instruction No.1/88 dated 15.03.1988, the samples must be dispatched to the laboratory within 72 hours of seizure to avoid any legal objection, whereas in this case, admittedly, samples, which were drawn on 29.7.2012, have not been sent within 72 hours but it was sent beyond 72 hours i.e. on 8.8.2012.
- (25) Para 1.21 of the aforesaid Standing Instruction No. 1/88 further provides that duplicate sample of seized narcotic drugs and psychotropic substances must be preserved and kept safely in the custody of Investigating Officer along with the case

property. Para 2.9 of the Standing Instruction No. 1/89 provides that the sample in duplicate shall be kept in heat-sealed plastic bags. The duplicate envelope containing the sample is required to have a reference of the test memo as well as are required to be legible. However, in this case, samples have not been sent within 72 hours from the date of seizure. There is no evidence led by the prosecution as to on which date and time, the recovered contraband was deposited in the Malkhana although in the statement of P.W.1-Janak Singh, it has come that recovered contraband was deposited in the Malkhana, however, time and date on which the alleged contraband was deposited in the Malkhana, has not been disclosed by the prosecution. The test sample has not been produced, which is mandatory requirement under para 1.13 of the Standing Instruction No. 1/88. The Malkhana register has not been produced before the Court to show when *maal* (opium) was deposited in the Malkhana. Clause 1.13 of the Standing Instruction No. 1/88 provides mode and time limit for discharge of the sample of the laboratory and it provides that sample should be dispatched to the laboratory within 72 hours. The relevant para 1.13 is extracted below:-

"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.

Dispatch 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.”

- (26) Taking note of the serious infirmity in not following the Standing Instructions, Hon’ble Supreme Court in **Union of India Vs. Bal Mukund and others** : 2009 (12) SCC 161 has held in para 36 as under :-

"36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW 7 had taken samples of 25 gm each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law."

- (27) Hon’ble Supreme Court in the aforesaid case has held that compliance of Standing Instruction is a requirement in law and non-compliance of the said Standing Instructions causes serious doubt in the prosecution case. The link evidence for want of production of the Malkhana register, the sample seals and date of the said sample deposited in the Malkhana is incomplete. Malkhana register has not been produced. The original seal, which was used for sealing at the place of seizure, has not been deposited in the Malkhana nor has been given in the custody of anyone.

(28) Taking into of the importance of the link evidence, Hon'ble Supreme Court in the case of **Valsala Vs. State of Kerala** : AIR 1994 S.C. 117 has held in para-4 as under :-

“4. We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one sealed parcel was received containing a powder and it was analysed to be Brown Sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on 14.1.88 i.e. after a period of more than three months and there is no evidence whatsoever at all to show with whom the seized article was lying and even assuming that it was in the custody of P.W.6, the Officer-in-charge of the Police Station who seized it, there is again nothing to show whether it was sealed and kept there. The learned Counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner. There is a big gap and an important missing link. In the mahazar Ex.P.2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even P.W.6 does not say that he continued to keep it in his custody under seal till it was produced in the court on 14.1.88. The evidence given by P.W.6 Police Sub-Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court. As a matter of fact he did not produce it in the court. P.W.3, A.S.I. is supposed to have produced the same in the court. But P.W.3 does not say anything about this. It is only P.W.7. the Circle Inspector who comes into the picture at a later date, who admitted in the cross-

examination that the seized article was sent by P.W.3 (A.S.I.) to the court and P.W.7 in his cross-examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through P.W.7 that the Chemical Examiner's Report is marked. P.W.7 further admitted that he did not even know when it reached the court We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. Therefore the evidence adduced is wholly insufficient to conclude that what was seized from the appellant alone was sent to the Chemical Examiner. Though this is purely a question of fact but this is an important link. Both the courts below have not examined this aspect in a proper perspective. No doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the courts can not convict.”

(29) In the case of **State of Rajasthan Vs. Gurmail Singh** : 2005 (1)

JIC 844 (SC) upheld the acquittal order of the High Court as malkhana register was not produced by the prosecution to prove its case along with sample to the excise laboratory. Relevant para 3 of the said judgment is extracted below:-

"3. We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the malkhana on 20th May, 1995, the Malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by

PW-6 on June 5, 1995. We further find that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent."

- (30) In view of the discussion made hereinabove and the statement of P.Ws.1, 2 and 3, it is evident that there is definite non-compliance of Section 50 of NDPS Act, which are mandatory, coupled with the fact that the prosecution has not assigned any reason for not producing the other members of the raiding team as the prosecution witness.
- (31) There is also non-compliance of Section 57 NDPS Act and Standing Instructions No. 1/88 and 1/89, which have been held to be requirement in law by the Hon'ble Supreme Court in the case of Bal Mukund (supra). The link evidence is not complete as malkhana register has not been produced. The prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant. There is no independent eye-witness to the alleged recovery.
- (32) Admittedly, the appellant prior to her search has not been produced before the Gazetted Officer or the Magistrate, nor any

effort has been made by P.W.1 and P.W.2 to produce the appellant before any Gazetted Officer or the Magistrate as required under Section 50 of NDPS Act and as has been held by the Hon'ble Supreme Court in the case of **Vijaysinh Chandubha Jadeja (supra)**. The manner in which the appellant has been searched, is doubtful.

- (33) Considering the severe punishment provided in the NDPS case, the prosecuting agency has produced only two witnesses of fact despite the fact that as per the case of the prosecution itself, apart from P.W.1 and P.W.2, other witnesses of fact were also present at the place of occurrence and the prosecution has failed to give any germane reason or justification to not call other witnesses in the witness box during the trial.
- (34) The entire prosecution case is based on the sole testimony of PW-1 and PW-2. The seal, which was used for sealing the samples of contraband substance, has not been sent to Forensic Science Laboratory rather it seems that the same was kept by PW-1 himself. Had it been sent for Forensic Science Laboratory, it would have ensured as to whether the sample belongs to the same contraband/substance which was recovered from the accused-appellant from the spot and whether the remainder of the contraband/substance was sealed and sample seal was

produced before the Court or not at the time of recording the statement of PW-1 to prove beyond doubt that the contraband, which was produced before the Court, was the same, which has been extracted from accused-appellant from the spot.

- (35) It is also noted that since the recovery of contraband/substance could not be proved by the prosecution beyond reasonable doubt from the accused/appellant, no burden can be shifted on the accused/appellant to explain as to how she came in the possession of the contraband/substance under Sections 35 and 54 of NDPS Act. Thus, I am of the opinion that the prosecution has miserably failed to prove its case beyond reasonable doubt and the learned trial Court has failed to properly appreciate the evidence in a right prospective.
- (36) For the aforesaid reasons, the instant appeal is *allowed*. The judgment and order dated 27.01.2017 passed by the Additional Session Judge, F.T.C.-II, Bahraich (supra) is hereby set-aside. The appellant is acquitted from all charges leveled against her by the learned trial court.
- (37) The accused-appellant is on bail. Her bail bonds are canceled and sureties are discharged.

(38) Office is directed to transmit the lower court record along with a copy of the judgment to the Court concerned forthwith for information and follow up action.

Order Date :-28.8.2023

Madhu/-