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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: 16th August, 2010

Date of Order: September 16, 2010

+ Crl. Appeal No.617/2004

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Union of India

16.09.2010

...Appellant

Versus

Victor Nnamdi Okpo

...Respondent

Counsels:

Mr. Satish Aggarwala with Mr. Shirish Aggarwal for appellant
Mr. Ankit Khetarpal for respondent.

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. The present appeal under Section 378 (4) of the Code of Criminal Procedure, 1973 has been preferred by the appellant Union of India assailing the judgment dated 20th March, 2003 passed by learned Special Judge, NDPS Act, New Delhi acquitting the respondent/accused of the charges under Section 21, 23 and 28 of Narcotic Drugs and Psychotropic Substances Act ("NDPS Act" for short).

2. Brief facts relevant for the purpose of deciding present appeal are that respondent/accused, a Nigerian citizen holding Nigerian Passport No.C-420048 was intercepted on 15th September, 1998 while he had checked in for going to Lagos at Indira Gandhi International Airport. After checking in for boarding Ethiopian Airline and after clearance of immigration and custom formalities, while he was proceedings towards

Security Hold Area, he was intercepted by the custom officers and was asked if he was carrying a narcotic drug for foreign currency or any contraband goods either on his person or in any checked-in-baggage or hand baggage. To this, the respondent/accused replied in negative. Thereafter, he was served a written notice under Section 50 of NDPS Act informing him that his baggage and person would be searched and if he desired, his search could be conducted in presence of either a Magistrate or a Gazette Officer of Customs to which he replied, in writing, that his baggage could be searched in presence of any custom officer. His baggage which he had already checked was retrieved noting down the baggage number from his ticket tag and called from the belt. He was also having hand baggage. On checking checked-in-baggage nothing incriminating was found. However, when his black coloured leather executive handbag was checked, a false bottom was found in this executive bag which on opening resulted in the recovery of two polythene bags containing brown powder. The brown powder was tested with the help of Field Test Kit. It gave result of heroin. The respondent/accused was taken to Custom Prevention Room situated in the Departure Hall itself and his personal search was conducted. Nothing incriminating was found on the personal search. This entire operation of search had taken place in presence of witnesses. The respondent/accused was asked if the brown powder recovered from the false bottom of his handbag in the polythene was heroin, to which he admitted. The brown powder in two polythene bags was marked as A and B weighed. Packet marked A was having gross weight of 1090 gms and net weight of 1065 gms and packet marked B was having weight of 1065 gms and net weight of 920 gms. Thus the total quantity of heroin was found to be 1985 gms. This brown power was confiscated by the custom authorities along with executive handbag and polythene bag used for packing and sealing the brown powder. Two representative samples each of 5 gms were taken from the two polythene bags and were marked as A1 and A2, B1 and B2 and kept in small polythene bags separately further kept in paper envelopes and sealed with the seal of custom officers. Rest of the brown

powder was placed in a round metal container and was sealed separately under the signatures of the signatories to the *punchnama*. Torn inner lining of handbag and its plywood rectangular sheet were put in the black coloured leather executive handbag itself and then the bag was wrapped with white cloth and sealed under the signatures of the signatories of the *punchnama*. The boarding card of the respondent/accused in respect of flight ET-619, his air ticket, his baggage claim stubs affixed on his ticket, handbag, tag of economy class of Ethiopian Airline were also seized. The statement of respondent /accused under Section 67 of NDPS Act was recorded by the custom officer wherein respondent admitted recovery of brown powder and other incriminating facts. The respondent was arrested and was produced before the concerned court and remanded to judicial custody. On 16th September 1998 i.e. the next date, two representative samples with test memo in duplicate were sent to Central Revenue Control Laboratory for analysis through Mr. Rama Shankar, Air Custom Officer and the samples were deposited with the laboratory on 16th September 1998. The chemical analysis report dated 16th November 1998 confirms that the samples were of diacetylmorphine (heroin). On 15th September 1998 itself a letter was written to Joint Secretary, Ministry of External Affairs indicating arrest of the respondent.

3. Since the entire recovery and investigation was done by the Custom Department, a complaint for offence was filed before the learned Special Judge by the Air Customs Officer Mr. P.K. Chattopadhyaya giving details of the facts of the recovery and the proceedings.

4. The facts as stated in the complaint were proved by examination of PW-1 Mr. P.K. Chattopadhyaya, Air Customs Officer who was the officer who had intercepted the respondent/accused and effected recoveries. He testified on the lines of his complaint and punchnama. The other witnesses examined also supported the prosecution case in toto. However, the learned Special Judge acquitted the respondent/accused on the

ground that there was no evidence whatsoever as to where the case property had been kept after the same was seized and there was non-compliance of Section 55 of the NDPS Act. The learned Special Judge observed that after seizure of the case property for remaining substance after taking out samples, there was no evidence as to where it was kept till it was produced in the Court and there was no evidence when the case property was kept for safe custody and there was no explanation as to why the case property and samples were deposited with SDO-I and remained with him till the samples and the case property were produced in the court and why this method was adopted and SDO-I to whom the case property was entrusted was not produced in the court. Thus, a prejudice was caused to the accused/ respondent because of non-compliance of provisions of Section 55 of NDPS Act which was meant to safeguard the interest of the accused. The other observation made by learned Special Judge was that the custom seal affixed on the case property was easily available to the officers of custom as and when they required and this caused prejudice to the accused and there was probability of tampering with the seals on the case property. The next observation made by learned Special Judge is that provisions of Section 50 of NDPS Act were not complied with as the notice given to the accused/respondent under Section 50 stated that if he desired he could be searched before a Magistrate or a Gazette Officer of customs while law requires that he should have been informed about his right to be searched by any gazette officer and not a Gazette officer of customs. Since the notice mentioned that he could be searched before a gazetted officer of customs, the notice was not a proper notice under section 50 of NDPS Act. The learned Special Judge turned down the arguments that there was no requirement of serving a Section 50 notice in case of a search of handbag and observed that in view of the judgment of *Namdi Francis Nwazor v Union of India* and another 1996 (4) Scale (SP), Section 50 would apply even in case of search of handbag carried by a person. The learned Special Judge also observed that PW-1 has stated that the test memo was prepared on the spot but he admitted in cross examination that he affixed

seal on test memo by going to SDO-1 and taking seal from him and then affixing seal on test memo. He thereafter returned the seal. She observed that since the seals were obtained from SDO-1, the importance of preparing test memo on the spot was lost. She, therefore, held that there were serious discrepancies in the case of the prosecution and the accused/respondent was entitled for benefit of doubt. The learned Special Judge also observed that the prosecution had not produced the public witness, therefore, an adverse inference was to be drawn against the prosecution.

5. The accused/respondent was charged for offence under Section 8(c) of NDPS Act read with Section 21, 23 and 28 of the NDPS Act. Section 8(c) of NDPS Act reads as under:

“8. Prohibition of certain operations

No person shall-

(a) cultivate any coca plant or gather any portion of coca plant;

or

(b) cultivate the opium poppy or any cannabis plant; or

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State export inter-State import into India, export from India or transship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of license, permit or authorization also in accordance with the terms and conditions of such license, permit or authorization:

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

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

6. Section 21 of NDPS Act prescribes punishment for contravention of the provisions of the Act including Section 8. Section 23 makes export from India or transport or shipment of any narcotic drug and narcotic substance as an offence and provides sentence for this. Section 28 makes attempt to commit offence as an offence. The offence under section 8(c) of NDPS Act, 1985 is complete if it is proved that a person produces, manufactures or possesses narcotic drug or psychotropic substance. The possession of narcotic substance in this case was proved by credible evidence. The learned Special Judge has not at all doubted the evidence of any of the witness regarding possession of narcotic substance i.e. heroin weighing 1985 gms by the accused/respondent and recovery of the same by the complainant. PW-1 categorically testified that on 15th September 1998 the respondent/accused was intercepted after he had cleared the immigration area and custom counter and was going to security hold area and heroin was recovered from him in a false bottom of his briefcase, held by him.

7. Service of notice under Section 50 of NDPS Act is not denied in this case. The respondent/accused in his own handwriting has written on the notice that he may be searched by any custom officer. The view taken by learned Special Judge that notice under Section 50 was not a notice in the eyes of law is clearly an illegal view. Section 50 puts an obligation on officer conducting search that he shall before conducting search tell the suspect that if he so requires his search can be conducted either before a Magistrate or a gazetted officer. Since the respondent/accused was intercepted at the airport and gazetted officers of customs department were available at the airport, a notice under Section 50 of NDPS Act stating that he could be searched before a Magistrate or a gazetted officer of customs would not be an invalid notice. Rather the notice shows that the searching officer was being more honest and clearly stated the

department of which gazetted officer were readily available on the spot. It was for the accused/respondent to say that he wanted to be searched before the MM. The option before the respondent/accused was not only of gazetted officer of customs but also of a Magistrate. Once the searching officer had made it clear to the accused/respondent that he could be searched before a Magistrate or a gazette officer from customs, the requirement of Section 50 of NDPS Act stands complied with and the notice cannot be considered to be invalid.

8. Even otherwise, the legal position is that no notice was required to be served under Section 50 NDPS Act if handbag of a person was to be searched. In *Ajmer Singh v State of Haryana Criminal Appeal No.436 of 2009 2010(2) SCR 785*, the Supreme Court made the position clear in following terms:

"13. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, brief case etc., carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance of Section 50 of the N.D.P.S. Act is relevant only where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of Section 50 of the N.D.P.S. Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the Section speaks of taking of the person to be searched by the Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res-integra in view of the observations made by this court in the case of Madan Lal vs. State of Himachal Pradesh 2003 Cr.L.J. 3868. The Court has observed:

"A bare reading of Section 50 shows that it only applies in

case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (See Kalema Tumba vs. State of Maharashtra and Anr. (JT 1999 (8) SC 293), State of Punjab vs. Baldev Singh (JT 1994 (4) SC 595), Gurbax Singh vs. State of Haryana (2001 (3) SCC 28). The language of section is implicitly clear that the search has to be in relation to a person as contrast to search of premises, vehicles, or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance."

14. *In State of Himachal Pradesh vs. Pawan Kumar, [2005 4 SCC 350], this Court has stated:*

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

After discussion on the interpretation of the word 'person', this Court concluded:

"that the provisions of section 50 will come into play only in

the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which (the accused) may be carrying"

The court further observed:

"In view of the discussion made, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag, which was being carried by the accused."

9. I, therefore, consider that the learned Special Judge's observations that Section 50 was not complied with, does not hold ground.

10. The proceedings of seizure of contraband were carried out at the airport itself and all documents were prepared in the custom area of IGI Airport. The observation of learned Special Judge that PW-1 went to collect seal from SDO-I and then put seal so collected from SDO-I on the documents created doubt on the preparation of these documents on the spot is contrary to the evidence and the inference drawn by learned Special Judge is also uncalled for. PW-1 categorically stated that the accused/respondent was intercepted few yards away from the Custom Counter which is known as transit area. During cross examination, the witness affirmed that Section 50 notice, punchnama and other seizure proceedings were conducted in English and punchnama contents were explained to the accused and witnesses. The notice under Section 50 of NDPS Act was prepared by one of his colleagues and he signed the notice after reading the same. To a question put by defence counsel, this witness also confirmed that three persons were detained at IGI Airport on that day including the accused/respondent and the witnesses arrived at Custom Preventive Room and remained there for conducting proceedings from 3.15 am to 10.30 am. From this testimony, it stands rather admitted by the accused/respondent that the accused was intercepted along with two more persons at IGI Airport on suspicion and the proceedings

were carried out in Custom Prevention Room and there were about 7-8 persons in the room including the accused. Thus, there could have been no doubt about the recovery of 1985 gms of heroin from the accused/respondent. The only suggestion given by the accused to the witness was that the recovery made from some other person was planted on him but no suggestion was given if PW-1 was having an enmity with the accused/respondent so as to implicate him falsely in the case or he was having some affinity with other persons so as to spare them if recovery had been made. The conduct of PW-1 of not involving other two persons in a case of NDPS Act, since no recovery was made from them and only proceeding against the accused from whom recovery was made is a creditworthy conduct and not a condemnable conduct. If PW-1 had to falsely implicate the innocent persons, then he would have implicated other two persons also from whom no recovery was made. But the fact that he did not implicate the other two persons from whom no recovery was made does not mean that the case made against the respondent/accused was a false case. Putting seal of SDO-I on the test memo and punchnama cannot be a ground to doubt the veracity of the testimony or preparation of documents. It is not required nor necessary that every custom officer would carry his seal with him all the time nor it is necessary that a officer should affix his personal seal. A sample is to be sealed with a seal and the same seal is to be put on test form. The samples and test form sealed with the same seal are to be sent to the laboratory, as per rules. In this case, proceedings of seizure were conducted upto 10.30 am on 15th September, 1996 and thereafter accused/ respondent was produced before the concerned court on the same day and the samples were sent to the laboratory along with test form on the following day i.e. 16th September, 1996. There is no suggestion given to the witness that in between samples were tampered or the rest of the material recovered from the accused was tampered. In his statement under Section 313 Cr.P.C, to the question that accused was intercepted while he was through the security hold area, the accused/respondent stated that it was incorrect. This false answer of the accused shows

that accused was out to deny everything. The accused even denied his written response to Section 50 notice. He was put question that his check-in-baggage containing black coloured zipper suitcase was called and the baggage was matched with his ticket tag number. To this also, he gave negative answer. However, during trial the accused/respondent made an application to learned Special Judge on 30th September 1998 wherein he had admitted that his luggage and baggage was seized by the custom authorities and he wanted that an order of release of this baggage and personal luggage be passed by the court. He similarly made another application for release of his personal search. He also made an application on 16th September 1996 itself of retracting his statement under Section 67 NDPS Act made before the custom officers. This shows that the accused was very conscious of his rights from the very beginning and deliberately gave wrong answer to the question that he was intercepted at the airport and his baggage was matched with the luggage stubs etc.

11. The other reason for acquittal of the accused/respondent as given by learned Special Judge is that public witnesses were not examined by the prosecution. A perusal of record of learned trial court would show that notices were sent to both the public witnesses namely Mr. Bahadur Singh and Davender Kumar. These notices came back unserved with the report that the addresses given by the witness were wrong. It is a common knowledge that generally public is averse to become a witness in a criminal case because of the attitude of the Courts in summoning the witnesses time and again and sending them back on the ground that either the counsel for accused was not available or accused was not there. Even in this case, PW-1 was not cross examined on the date he deposed and his cross examination was deferred because the counsel for the respondent/accused was not available. Similarly PW-2 was not cross examined on the date he was examined in chief and his cross examination was deferred. So on 22nd September 1999 and on 10th July, 2000 when the two witnesses were examined, the

cross examination was deferred as counsel for accused was not available. These are departmental witnesses and felt themselves duty bound to appear in the court, as many time as they are called but same is not true in respect of public witness. While departmental witnesses get leave from their office and also get necessary support from the office regarding TA, DA, public witness are treated in a very clumsy manner in the courts and they keep standing from morning till evening and then they are told that defence counsel is not available. That is the reason that public persons are scared to become a witness in a criminal case and it is hard to find public witnesses these days. The case of the prosecution cannot be rejected on the ground of non examination of public witness or on account of non-joining of public witness. Neither the prosecution version of incident can be disbelieved only on the ground of non-joining public witness or non examination of public witness for valid reasons.

12. The case property in this case was produced in the Court duly sealed with seal of Customs, IGI Airport with signatures of signatories of *punchnama*. It has to be seen that the *punchnama* was signed by public witnesses and the sealed parcel was also signed by the public witnesses. These two public witnesses were the persons available at the airport and were asked to join at the time of investigation. It seems that they joined investigation but gave their wrong and incorrect addresses. However, the paper slips bearing signatures of these witnesses were found intact on the cloth parcel which was sealed with the seal of custom and bore signatures of the witness. This cloth parcel contained the round metal container containing rest of heroin (brown powder) recovered from the possession of the accused/ respondent. The container was marked Ex. P4 and paper slips were marked Ex.P1. The other bags of accused/respondent were marked as Ex.P2 and P3. The handbag from which the contraband was recovered was marked as Ex.P5. The inner lining and sheet and false bottom were produced in the court and were marked as Ex.P7 and P8. No suggestion was given to the witness that the case property

produced in the court was not having proper seal or was substituted or tampered with. The only suggestion given was that the contraband recovered from the other person was planted on the respondent. It may be noted that no name of the other person was given in the suggestion. The suggestion given about tampering of samples was denied by the witness. In view of this testimony of PW-1 who testified that the samples were taken from the contraband recovered from the accused/respondent and were separately sealed and the property was separately sealed and deposited with SDO-I. It is not a case of non-compliance of Section 55 of NDPS Act resulting into prejudice to the accused/respondent. The reason given by learned Special Judge that the witness testified only during cross examination that the samples were deposited with SDO-I and he did not testify this during his examination in chief makes no sense. The testimony given by a witness whether during examination in chief or during cross examination is 'evidence' given in the court on oath and it has same weightage and value whether it was given during examination in chief or during cross examination. Once it was deposed by the witness that the samples and the case property was deposited with SDO-I and the case property produced in the court bore the signatures of those public witness who were not traceable no doubt could have been entertained in respect of the property not being the same which was recovered from the respondent/accused. Even no suggestion was given by the accused/respondent to the witness that this was not the same case property or his handbag was not the same or his handbag had no false bottom. Hence it stands admitted, since no contrary questions were asked, that the handbag seized from the accused was having false bottom and it contained contraband. In view of this clinching evidence, it is surprising that it could have been held by learned Special Judge that it was a doubtful case.

13. Section 53 of NDPS Act authorizes Central Government to invest the officers of Central Excise and Customs etc. with the powers of an officer in charge of a police

station for investigation of the offences under this Act. Thus, the custom officers have been specifically authorized by the government with powers of an officer in charge of a police station i.e. SHO. If the case property is kept in the custody of SDO-I (who is a custom officer) during trial and is produced in an intact condition at trial before the court of learned Special Judge, it cannot be said that since the case property was not sent to police station in-charge of the area it caused prejudice to the accused/respondent. Once an officer of custom department is equivalent to that of officer in charge of police station, the custom department officer is equivalent to SHO and the compliance under Section 55 of NDPS Act is substantially done if the property is kept in the custom department and found in intact condition.

14. In *State of Punjab v Leema 2009(8) SCALE 564(SC)* the Supreme Court observed as under:

“12. It is not in dispute that provisions of Sec. 55 are directory in nature. In the instant case, the DSP who was examined as PW.1 is an officer and was higher in rank or of the same rank as the SHO in the instant case. There is no reason indicated as to how the accused has been prejudiced by PW.1 putting his seal instead of the SHO. The provisions are directory and as there is no doubt about the authenticity of the official Act, the High Court ought not to have held that there was non-compliance of requirement of Sec. 50. Coming to the plea as confined to the conclusion that officer witnessed were examined in the Court the conviction could not be maintained. Firstly Sec.50 of the Act has no application as there was no personal search. The issue has been examined in several cases and it has been held that clearly shows that the official witnesses have been examined. It is not sufficient to be doubtful the evidence of the official witnesses. The elementary question is whether the evidence of official witness suffers from any infirmity. In the instant case there is no finding in that regard. Coming to the plea of the respondent accused that the seals were found smudged, it is to be noted that the trial Court has noticed this aspect and held that they were produced before the Court after one year and by the time of production there is likelihood the seal getting protection or get smudged.”

15. In *Hardip Singh v State of Punjab* (2008) 8 SCC 557, Supreme Court observed as under:

“13. The contention of Mr. Singh that Section 55 of the Act, which is a mandatory provision, was violated is also found to be without merit in the light of the decision of this Court in Karnail Singh v. State of Rajasthan [(2000) 7 SCC 632] relied by him in order to buttress his argument, wherein, a similar contention was raised that after the seizure the goods were sent to the Superintendent, Central Narcotics Bureau, Kota, who, as per law, was in charge of a police station but had not affixed his seal on the articles and the samples, and therefore the whole of the procedure followed became illegal, entitling the appellant to be acquitted. In the light of the aforesaid submissions, the Supreme Court proceeded to hold that with the application of Section 51 read with Sections 52 and 53, the officer required to affix the seal etc., under Section 55, would be "the officer in charge of the nearest police station" as distinguishable from an officer in charge of a police station empowered under Section 53. It was also held that if the arrested person and the seized articles are forwarded under Section 52(3)(b) to the officer empowered under Section 53, the compliance with Section 55 cannot be insisted upon. The Supreme Court further held in the said case that keeping in view the multifarious activities and the duties cast upon the officer in charge of the police station under the Code of Criminal Procedure and he being apparently busy with the duties under the Code, the officers mentioned in Section 53 of the Act have been mandated to take action for disposal of the seized narcotic drugs and psychotropic substances by filing an application which, when filed, has to be allowed by the Magistrate as soon as may be.”

16. In view of the fact that in this case, the seizure was done by the Air Custom Officer and the case property was kept in safe custody of SDO-I of the Air Customs Officer, I find no reason to agree with learned Special Judge that a prejudice was caused to the accused because the case property was not sent to SHO of the area.

17. From the entire evidence it is clear that the recovery of heroin to the tune of 1985 gms from the accused/respondent was proved beyond reasonable doubt, when he was

just ready to enter the security area at IGI Airport after clearance of immigration. The accused/respondent was acquitted by the learned Special Judge on non-existing technical grounds taking a wrong view of law. I, therefore, set aside the impugned judgment passed by learned Special Judge. The accused/respondent is convicted under Section 8(c) read with Sections 21 and 23 of NDPS Act. He is sentenced to ten years rigorous imprisonment and a fine of Rs.1 lac, which is the minimum sentence that can be awarded by the Court keeping in view the fact the quantity of heroin recovered from the respondent/accused was commercial quantity. The respondent be taken into custody to serve the sentence awarded.

18. The appeal stands allowed.

September 16, 2010
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SHIV NARAYAN DHINGRA, J