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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.L.P. No.284/2011**

% *Judgment delivered on:25th November, 2011*

CUSTOMS

..... Petitioner

Through:Mr.P.C.Aggarwal & Mr.Sunder Lal,
Advs.

versus

MOHAMMAD BAGOUR

..... Respondent

Through : Mr.Yogesh Saxena, Adv.

WITH

+ **CRL.L.P. No.275/2011**

CUSTOMS

..... Petitioner

Through:Mr.P.C.Aggarwal & Mr.Sunder Lal,
Advs.

versus

HAJI MOHMAD

.... Respondent

Through : Mr.Yogesh Saxena, Adv.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

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

SURESH KAIT, J. (Oral)

1. Since the facts and the law involved in both the cases are similar, therefore both the petitions are being taken to deliver common judgment. The case of Mohammad Bagour is being taken as a lead case.
2. Vide the instant petition, the petitioner has challenged the impugned order dated 26.03.2011, whereby Ld. Special Judge, NDPS, Dwarka Court, New Delhi has acquitted the respondent / accused from the charges.
3. The case in brief is that on 18.10.2007, accused arrived at IGI Airport by KAM Air-flight No. RQ-0013 holding Passport No. OR686259 dated 13.05.2006. He was carrying only handbag and was not having any checked in baggage. Surveillance was kept on him in the arrival Hall at IGI Airport on the suspicion that he may be carrying some contraband substance. He was stopped near exit Gate of Arrival Hall after crossing the green channel and was asked by the Custom Officers as to whether he was carrying any goods, to be declared to customs, but he replied that he was carrying only personal effects. Thereafter, he was specifically asked whether he was carrying any contraband goods, but he denied. Mr. Ganpat Singh, (ACO) was not satisfied with his reply and he called two independent witnesses to join and in their presence, respondent / accused was again asked whether he was carrying any goods or contraband goods to be declared to customs, but he claimed to be carrying only personal effects. Thereafter notice under Section 50 of NDPS as well as Section 120 of Customs Act was served upon the respondent / accused that he had an option to get the examination of his baggage and personal search conducted before a Gazetted Officer of Customs or a Magistrate. Since the respondent / accused did not know either Hindi or English Language, as such one Burham Ahmedi, an official

from KAM Airlines, who knew language of the respondent, was asked to make him understand the contents of the notice. The said Burham Ahmedi explained to him the contents of the notice. He expressed that he had no objection if any Custom Officer searched him or his Baggage. The respondent produced his travel documents i.e. the Boarding Card and Afghan Passport. He was taken to Customs Preventive Room in the Arrival Hall for further examination. The handbag carried by the respondent / accused was checked in the presence of Panch Witness, which was found containing cloths and personal effects. The bag was emptied of its content and the bottom portion of the bag was then cut opened and a white colour stitched cotton cloth belt with velcro having four partitions was detected, which was pricked with the help of a needle and white powder oozed out of the same, suspected to be some Narcotics substance. Respondent / accused was asked about the substance and he affirmed that it was Narcotic Substance.

4. It is further alleged that after removing the stitches of cotton belt, 4 packets wrapped with yellow adhesive tape were recovered, which were given Mark E,F,G and H respectively and were found containing off- white Powder which was tested with the field test kit and found positive for 'Heroin'.

5. The contents of each bag were weighed and were found to be 600 grams, 1263 grams, 1279 grams and 1159 grams. respectively, the total weight being 4301 grams.

6. Thereafter, the said substance was seized as per procedure. Three representatives sample of 5 grams each were drawn from the contents of

each of the pocket and were given Mark E-1,E-2,E-3,F-1,F-2,F-3,G-1,G-2,G-3 and H-1,H-2 and H-3 and were kept in 12 poly packs and further placed in 12 brown envelopes sealed with custom seal no. 6 over label bearing the details of the contents, the signatures of Panch Witness, respondent / accused and the complainant.

7. The remaining substance was kept in four separate plastic bags of flamingo duty free and then kept in plastic containers which were wrapped with off White cloth separately and were given Mark-E,F,G and H and were sealed with customs seal no.6 over label bearing the details of the contents, the signatures of the Panch Witness, respondent / accused and the complainant.

8. The statement of the respondent was recorded under Section 67 NDPS Act on 09.10.2007 wherein he admitted the recovery of contraband from his possession. The respondent / accused was arrested under the Provisions of NDPS Act. Thereafter, report under Section 57 NDPS Act was sent by the complainant to Sh. Sanjeev Jain, ACS on 09.10.2007.

9. After sending the information to various authorities by the Assistant Commissioner Preventive on 09.07.2007 regarding the Heroin and arrest of the accused on 10.10.2007, the representative samples Mark E-1, F-1, G-1 and H-1 along with test memo in triplicate were deposited in CRCL by the Complainant along with forwarding letter duly signed by the ACS. Vide test report F.No.1/ND/R/2007/CLD – 493 to 496 (N) dated 21.11.2007 of CRCL, it was opined that on analysis the sample Mark E-1, F-1, G-1 and H-1 answered positive as 'Diacetylmorphine'. The remaining samples were again sent to CRCL on 15.02.2008 through Sh. Ashok Kumar (ACO) for

determining the purity percentage. Fresh report dated 05.03.2008 was received in this regard from CRCL and from the same, the purity in sample Mark E-1, F-1, G-1 and H-1 was found to be as follows:-

Mark	Percentage DAM (Heroin)
E1	37.6
F1	40.7
G1	39.7
H1	39.2

10. After completion, the case against the respondent / accused as filed under Section 21, 23 and 28 NDPS Act. On the basis of the material available on record charge was also framed under the aforementioned provisions, to which he plead not guilty and claimed trial.

11. The prosecution in support of its case has examined 7 witnesses.

12. After hearing both the parties, Id. Trial Judge passed his judgement on the basis of evidence on record that admittedly accused was intercepted at IGI Airport on his arrival from Afghanistan. However, it is denied by him that any incriminating substance was recovered from his possession. To prove the recovery of the contraband from the possession of the accused the prosecution has examined only PW-5, who is the complainant/ seizing / arresting officer in the present case. In his testimony he deposed about interception of respondent / accused at IGI Airport which is admitted by the respondent / accused. The said witness testified about service of notice U/s 50 NDPS Act upon the respondent / accused. He testified that thereafter the hand bag of the accused was checked and was found containing at its bottom portion, white colour cotton cloth stitched velcro belt which was found containing one small and three big packets containing substance suspected to

be Heroin, However, his aforesaid testimony has not been corroborated by any independent evidence as both the panch witnesses and even Burhan Ahmadi who could have supported his testimony in this regard being the interpretor in whose presence all the proceedings were conducted, have not been examined by the prosecution and these witnesses were dropped on the request of Ld. SPP for Customs.

13. It is further recorded that though non-examination of independent witnesses by itself does not become fatal to the prosecution. However, it has to be appreciated differently in the facts and circumstances of each case. So far the present case is concerned, prosecution itself has claimed that the accused was not aware of Hindi or English language and as such Burhan Ahmadi who was acquainted with Afghani language i.e. Dari and Farsi was joined in the proceedings to explain notice U/s 50 NDPS Act and notice U/s 102 Customs Act upon the accused, to explain panchnama proceedings to the accused and to record his statement U/s 67 NDPS Act. The non-examination of Burhan Ahmadi effects the prosecution case adversely as it was only this witness who could have explained to the court the manner in which both the notices U/s 50 NDPS Act and U/s 102 Customs Act were served upon the respondent / accused.

14. Ld. Trial Judge has also recorded that the offence under NDPS Act is a grave one. Procedural safeguards provided to the accused under a statute require strict compliance. Section 50 NDPS Act provides an extremely valuable right to the concerned person/ suspect to get his person searched in presence of a Gazetted Officer or a Magistrate. The compliance with the procedural safeguards contained in Sec. 50 of NDPS Act, is intended to

protect a person against false accusation and frivolous charges, as also to lend creditability to the search and seizure conducted by the empowered officer. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and credit worthiness to the search and seizure proceeding and it would also strengthen the prosecution case. It is the duty of the empowered officer to inform the concerned person/ suspect of the existence of his right to have his search conducted before a Gazetted Officer or by a Magistrate, so as to enable him to avail of that right. The prosecution must at the trial establish that the empowered officer had conveyed the information to the concerned person of his/ her right of being searched before the Magistrate or a Gazetted Officer at the time of intended search.

15. Learned Trial Judge has relied upon on the judgment of Hon'ble Supreme Court in *State of Punjab v. Baldev Singh JT 1999(4) SC 595* that courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Sec. 50 NDPS Act, that no presumption U/s 54 NDPS Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court that the requirements of Sec. 50 were duly complied with. It is held that the safeguard or protection to be searched in presence of a Gazetted Officer or a Magistrate has been incorporated in Sec. 50 of NDPS Act to ensure that persons are only searched with a view to maintain veracity of evidence derived from such search. The severe punishments have been provided under the Act for mere possession of illicit drugs and narcotics substances. Personal search, more particularly for offences under the NDPS Act are crucial means of obtaining evidence of possession and it is, therefore, necessary that the safeguards

provided in Sec. 50 of the Act are observed scrupulously. It was further held that provisions of sub section (1) of Section 50 of NDPS Act, make it imperative for the empowered officer to inform the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate and failure to “inform” the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act.

16. The Apex Court also noted that in case of **Baldev Singh (Supra)** it was not necessary that the information required to be given under Section 50 of NDPS Act, should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a Gazetted officer or a Magistrate, if so required by him.

17. The Trial Judge has also referred the case of **Vijaysinh Chandubha Jadeja v. State of Gujarat 2010(4) LRC 225 (SC)** wherein it was held that:

“The object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz., to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. The obligation of the authorised officer under subsection (1) of Section 50 of the

NDPS Act is concerned, it is mandatory and requires a strict compliance.”

18. So far as the present case is concerned, as per the prosecution, notice U/s 50 NDPS Act was served upon the respondent/ accused with the help of interpreter Borhan Ahmadi as the accused had language problem and was unable to understand the Hindi and English language. PW 5 testified in his chief examination that in the presence of panch witnesses he had disclosed to the accused that he had the option that the search of his baggage and himself could be conducted before a Magistrate or a Gazetted officer of a Custom officer to which he told that he did not know Hindi and English language. However, he understood the Farsi and Dari languages. He stated that by the expression of respondent/accused he came to know that he did not know Hindi or English language and knew only Dari and Farsi languages and one person namely Borhan Ahmadi was called from KAM Airline who was acquainted with Dari and Farsi languages, to translate the proceedings to the accused in his own language. On his request Borhan Ahmadi explained the contents of both the notices to the accused and informed him that he had option to get search of his baggage or his person in the presence of a Magistrate or a Gazetted Officer of customs and accused told Borhan Ahmadi that he had no objection if any custom officer took the search of his person or his baggage. Thereafter the signatures of both the panch witnesses, accused and Borhan Ahmadi were taken on both the notices Ex. PW 5/A and Ex. PW 5/B respectively. The respondent / accused had also put his thumb impression on the notices at point F and G. That

Borhan Ahmadi had made an endorsement at point X to X on both the notices to the effect,

“Read over and explained in vernaculars to Mr Mohd. Bagour who consented for search by any custom officer and signed in token of acceptance.”

19. So far as Borhan Ahmadi is concerned, he has not been examined in the present case on the ground that he is not residing at the given address. The panch witnesses namely Mohd. Shafiq and Bhupender Singh have also not been examined, despite last opportunity they were not produced by the prosecution and were dropped from the array of the witnesses by the court vide order dated: 11.01.2011 and 01.2.2011 respectively. PW 5 admitted in answer to court queries that the consent of the accused for his search by the custom officer was not taken in writing in his own language and that no reason has been given for not obtaining his consent in his own handwriting which could have been later on translated to the court by the interpreter. In the absence of examination of Borhan Ahmadi, particularly, when PW 5 himself is not aware of the Afghani language, as such it has not been proved on record in any manner that the accused was explained the contents of the notices U/s 50 NDPS Act and even U/s 102 Customs Act properly. The endorsement of Borhan Ahmadi made on the notice Ex. PW 5/B from point X to X that *“Read over and explained in vernaculars to Mr Mohd. Bagour who consented for search by any custom officer and signed in token of acceptance,”* itself shows that the accused had not been explained in any manner. It was his legal right to get his person or baggage searched in the presence of a Gazetted officer or a Magistrate, as in the notice U/s 50 NDPS Act it is not mentioned at all that it was the legal right of the accused.

20. Ld. Trial Judge has also recorded that even the statement of Borhan Ahmadi U/s 67 NDPS Act Ex. PW 5/Q does not find mention the manner in which the notice U/s 50 NDPS Act was served upon the accused nor it finds mention that the accused was explained that it was his legal right to get his search conducted in the presence of a Magistrate or a Gazetted officer.

21. Further Id. Trial Judge has also observed that if the notice was served upon the accused by Borhan Ahmadi at the instance of PW5, then the reply of the notice should have been taken from the respondent / accused in his own handwriting which could have cleared all the doubts about the manner in which it was served and whether the respondent / accused had understood the contents and the purpose of Sec. 50 of the Act and whether he had consented for his search to be conducted by the officer of customs or before a Magistrate or any other the Gazetted Officer.

22. Learned SPP for Customs argued before the Trial Court and learned counsel for the appellant has also argued before this Court that the notice under Section 50 NDPS Act was not required to be served upon the respondent/accused in the present case as recovery was effected from his handbag and nor from his person. In support of his arguments he has relied upon the case of *Ajmer Singh v. State of Haryana 2010(1) LRC 278 (SC)* and has referred to para 13 wherein the contention of the appellant was recorded that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase etc., carried by the person and its non compliance would be fatal to the proceedings initiated under the Act. Their lordships find no merit in the contention of the learned counsel. It requires to be noticed that question of compliance or non-compliance of Section 50 of

the NDPS 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, briefcase, container, etc., does not come within the ambit of Section 50 of the NDPS 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 a Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue was considered in ***Madan Lal v. State of Himachal Pradesh (2003) Crl.L.J. 3868*** wherein the Court has observed, “A bare reading of Section 50 of the NDPS Act, shows that it only applies in a case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises.”

23. This issue has already decided in the case of ***Union of India vs. Shah Alam and Anrs.*** reported in ***2009 (3) RCR (Criminal)*** and held that before the recovery was effected from his bag, baggage and at the time when notice was served upon the respondents /accused, it was not known to PW5 that recovery would not be effected from his person but from his bag or baggage.

24. The Trial Judge has recorded that notice Ex PW5/B served upon the respondents/accused was not in compliance of provisions of Section 50 of NDPS Act, as it was partial notice and as the respondents/accused had offered to be searched in the presence of a Gazetted Officer of a custom besides a Magistrate. The purpose behind Section 50(1) NDPS Act, is to avoid criticism of arbitrary and high handed action against authorised officer. It has to be borne in mind that a Gazetted officer belonging to the department which is effecting a seizure may have bias in favour of the department, whereas no such bias can be attributed to a Magistrate or a

Gazetted Officer belonging to the other department. Thus, associating a Gazetted Officer with the raiding party makes such officer impliedly interested in the success of the raid.

25. Admittedly, in the present case the notice under Section 50 of NDPS Act, served to respondent/accused and option was given to the accused that if he so desires his baggage and personal search could be conducted before the Magistrate or a Gazetted Officer of a Customs.

26. The Trial Judge has also relied upon a case of ***Kuldeep Singh v. NCB 2000(1) JCC Delhi 74*** in which it has been held by this Court that the Gazetted Officer belonging to the department which is effecting a seizure may have bias in favour of the department, whereas no such bias can be attributed to a Magistrate or a Gazetted Officer belonging to the other department. Thus in the present case the offer given to the accused to be searched by a Magistrate or by a Gazetted Officer of the custom was partial offer as the accused was not given an option for her baggage and personal search to be conducted in the presence of a Gazetted Officer belonging to the other department.

27. Learned Trial Judge has opined that neither notice Ex.PW5/B was proper notice nor it was served upon the accused and the accused was not informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate which is mandatory.

28. The Trial Judge has also recorded that non-examination of Borhan Ahmadi is fatal to the prosecution, as he was the best witness to prove as to what was explained by him on behalf of the complainant, to the accused

while serving notice under Section 50 NDPS Act. Mere examination of PW5 and his testimony to the effect that notice was served through Borhan Ahmadi upon the accused by itself is not sufficient.

29. The Trial Judge has referred to the case of Supreme Court in ***Vijaysingh Chandubha Jadeja v. State of Gujarat 2010(4) LRC 225 (SC)***; wherein it is recorded that the provision of Section 50 of NDPS Act, are mandatory and non-compliance renders the recovery of illicit article suspect. Thus the non-compliance of these provisions is viewed seriously and adverse inference is drawn against the prosecution, particularly, when the accused has denied that he was served any such notice and it has created doubt with regard to the truthfulness of the prosecution witness.

30. As far as notice under Section 50 of NDPS is concerned, Hon'ble Supreme Court in ***Narcotics Central Bureau v. Sukh Dev Raj Sodhi 2011 VII AD (SC) 27*** has held in para nos.5 & 6 as under:

*“5. The obligation of the authorities under Section 50 of the NDPS Act has come up for consideration before this court in several cases and recently, the Constitutional Bench of this Court in the case of **Vijaysingh Chandubha Jadeja v. State of Gujarat [(2011) 1 SCC 609]** has settled this controversy. The Constitution Bench has held that requirement of Section 50 of the NDPS Act is a mandatory requirement and the provision of Section 50 must be very strictly construed”.*

*“6. From the perusal of the conclusion arrived at by this court in **Vijaysingh Chandubha Jadeja's** case it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer*

or the Magistrate and in Para 32, the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate”.

31. The prosecution has also relied upon the statement of respondent/accused recorded under Section 67 of NDPS Act which is Ex PW5/E on record. The prosecution has relied upon the statement of respondents/accused under Section 67 of NDPS Act, before the Trial Court which is Ex PW5/C and before this Court.

32. The law is settled that confessional statement of the accused is a weak type of evidence and conviction should not be based on it and it needs to be corroborated by independent evidence.

33. The learned counsel for the appellant in support of this argument has relied upon a judgment of the Supreme Court in ***State of Haryana v. Mai Ram, Son of Mam Chand*** 2008(3) JCC (Narcotics) 188 wherein it is recorded that so far as examination of only official witness is concerned it is to be noted that only independent witness who was examined to speak about the seizure did not support the prosecution version, no material was brought on the record by the defence to discredit the evidence of official witnesses. The ultimate question is whether the evidence of official witnesses suffered from any infirmity.

34. In the case of ***Union of India v. Balmukand & Ors.*** 2009(2) Crimes 171 SC it is held that conviction should not be based merely on the basis of statement made under Section 67 of the Act without any independent

corroboration.

35. PW5 in his cross-examination stated that he had given questions to Borhan Ahmadi which were put by him to the accused and then he had reduced into writing his reply in English language. However, it is seen that there is no such framed questions filed on record which were put to the accused by Borhan Ahmadi and in response to the same he recorded the statement of accused under Section 67 NDPS Act except the bald testimony of PW5, there is no evidence on record that the statement Ex.PW5/E was made by the accused through Borhan Ahmadi, as Borhan Ahmadi has not been examined as a prosecution witness to prove as to what statement was made by the respondents/accused to him in his own language which he translated in English language. It is seen that there is no statement of the accused recorded by Borhan Ahmadi in the language of the accused so as to say that the English translated version of the accused was correct. Deposition would have been different if the statement of respondents/accused had been recorded in his own language and thereafter translation of the same in English language was filed on record. It is also not on record that accused was warned before recording his alleged statement that he had a right to maintain a silence which was his legal right.

36. The Trial Court has also taken note that statement of Borhan Ahmadi himself was recorded on 21st March, 2008 i.e., after more than five months of the alleged incident and there is no explanation on behalf of the prosecution as to why his statement was recorded with inordinate delay and at the same time non mentioning in his statement about fact that he had recorded the statement of accused U/s 67 NDPS Act after he was given

questions by PW 5 to be put to the respondent/accused, leads to the inference that no such statement was made by the accused.

37. In these circumstances, the Trial Court has recorded that it becomes immaterial whether the accused retracted from his such statement or not. At the same time the admission of the accused in the said statement about recovery of contraband from his possession becomes immaterial, particularly, in view of the fact that it is admitted by the prosecution that the accused did not know any other language except Dari and Farsi language and the said statement is in English language and it is not proved on record that it was made by the accused.

38. The Trial Judge has also recorded that there is no evidence on record except the bald testimony of PW5 that the contents of panchnama Ex.PW5/C were read over to the accused in his own language by Borhan Ahmadi for the reasons that Borhan Ahmadi had not appeared in the witness box.

39. Besides, the Trial Court also find discrepancies with regard to preparation of Test Memo. The complaint is silent about preparation of the Test Memos at the time of drawl of sample. It does not find mention as to when the Test Memos were prepared. PW5 in his chief examination testified that the Test memo was prepared in triplicate at the time of the drawal of the samples, whereas perusal of the Test Memo Ex.PW5/L shows that it is bearing the date under the signature of PW5 as 10.10.2007 and as such the same was prepared on 10.10.2007. Therefore, there is contradictory evidence led by the prosecution with regard to the date of the preparation of the Test Memos. If the chief examination of PW5 is believed to be correct,

then it is for the prosecution to explain as to where are the Test Memos prepared on 09.10.2007 and in case the Test Memo Ex.PW5/L is believed to be correct then the question arises why the Test Memos were not prepared on the date and time of drawal of the samples which amounts to non-compliance of the standing instructions 1/88.

40. At the same time it is brought to the notice of the court by the defence counsel that PW5 in his cross examination categorically testified that he had not obtained the customs seal No.6 after 09.10.2007. If the seal was not taken again after 09.10.2007, then how the Test Memos were prepared on 10.10.2007 without customs seal No. 6. There is no evidence on record that on 10.10.2007 PW5 had withdrawn customs seal No.6 from the concerned SDO(A) and after preparing the Test Memo had returned the same. At the same time there is no evidence on record that the Test Memos were bearing the custom seal No.6 as there is no facsimile impression of the seal on the Test Memo. Perusal of the office copy of the Test Memo Ex.PW5/L shows that it is bearing the lac seal which too was found in broken condition and is covered with transparent adhesive tape and the seal impression is not legible.

41. Similarly, the Test Memo on which the report of the CRCL Ex.PX is prepared, the same is not bearing the facsimile of the customs seal no.6 and though the impression on fixation of lac seal is there but the lac is missing. In such circumstances, the seal impression could not have been read by the Lab Assistant, CRCL, or even the chemical examiner for comparing the same with the seals affixed on the sample parcel Mark E-1 to H-1. It is astonishing that in the report of the CRCL it is mentioned that the each sample packet was sealed with five red tape seals and impression of each

seal affixed on each of the four sample packets tallies with the facsimile of seal as given on the Test Memo, whereas in fact there is no facsimile of the seal on the Test Memo. There is no explanation on behalf of the prosecution that in such circumstances as to with which seal impression, the seals which were found on sample envelopes were compared by the officials or the chemical examiner in the CRCL. It appears that observation to this effect in the Test Report was made in routine without application of mind and comparison of the seals. Thus a important link in the chain of the prosecution evidence is missing and it cannot be said conclusively that the samples which were examined in the CRCL and were opined to be containing diacetylmorphine were the true representative of the samples drawn from the recovered substance.

42. I note that Ld. Trial Judge has also recorded that there is no evidence on record that the sample Mark E1 to H1 were withdrawn by PW 5 from the custody of any SDO(A) for deposit with CRCL. The only witness examined to this effect is PW 4 Sh. Kishan Chand, Supdt., who testified that on 9.10.2007 at about 8 am ACO Ganpat Singh i.e. PW 5 had handed over to him 18 packets vide DR Nos. 3927 to 3931 all dated 9.10.2007 vide entry No.4067 and all these packets were handed over by this witness to the next SDO (A) vide entry No 4069 dated 09.10.2007. Both these relevant entries are proved as Ex PW 4/A and are dated 09.10.2007. Besides, PW 4 no other SDO (A) or valuable godown incharge has been examined by the prosecution to prove the safe custody of the case property and the representative sample till the case property was produced in the court and sample Mark E 1 to H1 were sent to the CRCL. Neither any witness has been

examined nor any entry in the SDO(A) register or valuable godown register has been proved on record to prove that PW 5 had withdrawn samples Mark E1 to H1 on 10.10.2007 for deposit in the CRCL. Thus a vital link in the chain of the prosecution case is missing.

43. Another important fact also noted by Id. Trial Judge is that Test Memo in the present case was not prepared at the time of drawl of the samples on the intervening night of 08.10.2007/09.10.2007 but as per the testimony if PW 5 Sh. Ganpat Singh ACO and even the Test Memo Ex.PW 5/L itself speaks that the same was prepared on 10.10.07, there is no evidence on record that once seal was returned by PW 5 to PW 4 Sh. Kishan Chand SDO(A), the custodian of the seal, it was ever issued again to PW 5 for preparing the Test Memos. The trial court has opined that this itself leads to the inference that the seal was easily accessible to PW 5 Sh Ganpat Singh ACO and it is only for this reason he could prepare the Test Memos on 10.10.2007.

44. It is also observed that since the Test memos were prepared on 10.10.2007 and the custom seal was in the custody of PW 5, the samples Mark E 1 to H1 were also in his custody and as such the tampering of the said samples cannot be ruled out.

45. Keeping the discussion into view, the Trial Judge has acquitted all the charges under Section 21/23 read with Section 28 of NDPS Act, 1985.

46. Keeping the above discussion and settled law into view, I find no discrepancy in the order passed by Id. Trial Judge. Therefore, I am not

inclined to interfere with the judgment passed by Id. Trial Judge and confirm the same.

47. Accordingly, both Crl. LP 275/2011 & Crl.LP284/2011 are dismissed.

48. Consequently, both the respondents/accused shall be released forthwith, if not required in any other case.

49. Copy of order be sent to Jail Superintendent, for compliance.

50. No order to costs.

SURESH KAIT, J

November 25, 2011

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