

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

+ **LPA No.996/2011, CM No.570/2012, 21654/2011**

% *Reserved on: 15th March, 2012*

Pronounced on: 13th July, 2012

SHRI ZAHID PARWEZ

through :

.....APPELLANTS

Mr.Saurav Kirpal with Mr.
B.B. Bhatia, Mr.Navjot
Kumar, Mr. Rajendra Sahu
and Ms. Jyoti Taneja

VERSUS

UNION OF INDIA & ORS.

through:

.....RESPONDENTS

Mr. A.S. Chandhiok, ASG
with Mr.Ruchir Mishra, Mr.
Ritesh Kumar, Mr. Piyush
Sanghi and Mr. Yash
Wardhan Tiwari for the
UOI.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI (Acting Chief Justice)

1. The appellant was issued a show cause notice dated 20.4.1994 under Section 68H(1) of the Narcotic Drug and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act') stating that he was covered under Section 68A(2)(d) of the NDPS Act and had acquired certain properties specified in the said notice illegally within the meaning of the said provision of Section 68B(g) of the NDPS Act. After receiving the reply, the Competent Authority passed the orders dated 16.10.1997 holding that the properties were acquired illegally, which were forfeited by the

Central Government free from all encumbrances. The appeal filed by the appellant before the Competent Authority for the forfeited properties was dismissed. Challenging that order, the appellant preferred a Writ Petition under Article 226 of the Constitution, which was also dismissed vide impugned judgment dated 21.10.2011. It is against this order, the present Letters Patent Appeal is filed by the appellant under Clause 10 of the Letters Patent Charter.

2. The relevant facts leading to the passing of the aforesaid orders may be recapitulated at this stage. The appellant herein is brother of one Mohd. Azad @ Avid Parwiz son of Abdul Rouf (hereinafter referred to as the 'Detenu'). In the case of the detenu, orders dated 26.7.1989 were passed by the Government of India under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PITNDPS Act) with a view to prevent him from engaging in manufacture, possession, sale, purchase, transportation, warehousing, import and export inter-state of narcotic drugs. Pursuant thereto, the detenu was detained on 10.7.1991. The period of detention is three months. However, on 12.8.1991 the Government issued a declaration under Section 10(1) of the PITNDPS Act to justify the detention beyond the initial period of three months. The detenu challenged the said detention order dated 26.7.1989 before the Calcutta High Court. The writ petition filed by him was dismissed upholding the detention. The detenu had approached the Supreme Court by way of Special Leave which was also dismissed. The detenu also challenged the declaration made under Section 10(1) of the PITNDPS Act by filing a writ petition in this Court. This writ

petition was allowed holding that though initial period of detention was justified, continuous detention beyond three months was vitiated.

3. Under Chapter V-A of the NDPS Act there can be forfeiture of property derived from or is used in illicit traffic. Section 68A enlists the persons who would be covered by the said chapter. A person in respect of whom an order of detention has been made, *inter alia*, under the PITNDPS Act is obviously covered by the provisions of this Chapter. In addition, as per Section 68A(2)(d), any person who is relative of a person so detained, also gets covered. The appellant being a brother of the detenu would fall within the coverage net. He was issued show cause notice under Section 68H(1) of the NDPS Act on 20.4.1994. It would be relevant here to reproduce Sections 68H(1), 68-I(1) and 68J, which read as under:-

“68H. Notice for forfeiture of property.-(1) If, having regard to the value of the properties held by any person to whom this Chapter applies, either by himself or through any other person on his behalf, his known source of income, earnings or assets, and any other information or material available to it as a result of a person from any officer making an investigation under section 68E or otherwise, the competent authority has reason to believe (the reasons for such belief to be recorded in writing) that all or any of such properties are illegally acquired properties, it may serve a notice upon such person (hereinafter referred to as the person affected) calling upon him within a period of thirty days specified in the notice to indicate the sources of his income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause

why all or any of such properties, as the case may be, should not be declared to be illegally acquired properties and forfeited to the Central Government under this Chapter.

68-I Forfeiture of property in certain cases (1)

The competent authority may, after considering the explanation, if any, to the show cause notice issued under section 68H, and the materials available before it and after giving to the person affected (and in a case where the person affected holds any property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any of the properties in question are illegally acquired properties:

Provided that if the person affected (and in a case where the person affected holds any property specified in the notice through any other person such other person also) does not appear before the competent authority or represent his case before it within a period of thirty days specified in the show cause notice, the competent authority may proceed to record a finding under this sub-section ex parte on the basis of evidence available before it.

68-J. Burden of Proof.— In any proceedings under this Chapter, the burden of proving that any property specified in the notice served under section 68H is not illegally acquired property shall be on the person affected.”

4. In the notice dated 20.4.1994 it was stated that the appellant had acquired certain properties, particulars whereof were furnished therein, which were beyond known source of income and an opportunity to show cause was given to him as to why these

properties be not forfeited. The appellant gave his reply which was considered by the Competent Authority but was not found satisfactory. Order dated 16.10.1997 was passed under Section 68-I(3) of the NDPS Act was passed. The appellant submitted his reply wherein the case set up by him was that he was running his own business under the name and style of “Nu-York” at Motiganj Bazar, Balasore. He was an income-tax assessee. The properties in question were actually purchased by his father Abdul Rouf in the year 1985 out of his father’s own income and since then he was possessing and looking after these properties. He also stated that he has no connection with his brother Mohd. Azad (the detenu) and they did not live in the same house. He also stated that since the properties were purchased by his father, who died in 1989, source of money would be known to his mother and as such he would have to refer to the documents showing the knowledge of his mother regarding the source of the money. However, he did not produce any such documents. Reply was considered and order was passed, *inter alia*, stating that he could not give any evidence whatsoever in support of his contention and could not offer the source of money from which the aforesaid properties were purchased. It was, thus, concluded that these were illegally acquired properties within the meaning of Section 68G of the NDPS Act and stood forfeited to the Central Government free from all encumbrances.

5. The appeal preferred by the appellant was dismissed by the Appellate Authority vide order dated 7.6.1999. The Appellate Authority gave the following reasons while upholding the order of the Competent Authority:-

“3. The source of funds for the above stated properties is claimed to be from the father of the appellant, who is stated to have expired in 1989. However, there is no corroboratory evidence to indicate that the father of the appellant was in any position to have provided the money for the investment in these properties or had actually done so. The Competent Authority did not accept this contention of the appellant as according to him there was no documentary evidence to support such a claim. The Competent Authority has discussed this point in para 4 of his order.

4. It had been further claimed before the Competent Authority that the appellant had been running his own business under the name and style of M/s. NU YORK at Motiganj Bazar, Balasore. However, the Competent Authority has mentioned in para 5 of his order that enquiries made from the office of the Balasore Municipality indicated that no trade licence was issued by the municipality in the business name and style of M/s. NU YORK. Keeping in view the facts and circumstances of the case, apparently the appellant must have been helping his detenu brother in his illegal activities and was either being rewarded by the detenu brother with some of the funds earned from the drug trade or the younger brother was being used as the benami to make some investments by the elder brother. It is not very material as to whether these properties were being held by holding them in trust for his detenu brother as in either case the money invested in them appears to have come from illegal activities of the detenu brother. Under the circumstances the order of the Competent Authority forfeiting all the three immovable properties is upheld. The appeal is dismissed.”

6. Before the learned Single Judge the appellant raised the following contentions:-

- a) Show cause notice was incompetent as the appellant was not covered under Chapter V-A of the NDPS Act. It was premised on the basis that as detention beyond three months was held to be illegal under Section 68Z of the NDPS Act came into play which provides that where the detention order of the detenu is set aside or withdrawn, properties seized or frozen under the said Chapter stand released.
 - b) show cause notice issued to the appellant was without any inquiry or *prima facie* appreciation of any relevant material.
7. It was argued that there is absolutely no nexus established between the appellant's properties and the detenu or his income allegedly derived from his alleged dealings in narcotic drugs and psychotropic substances. It was argued that onus to establish this nexus was upon the respondents which they failed to discharge.
8. As far as first contention is concerned, the detailed submission of the appellant's counsel was that the effect of order dated 16.5.2002 was considered by this Court in ***Shahid Parvez v. Union of India & Others***, 175 (2010) DLT 547. The said order dated 16.5.2002 held that the detention for the initial period of three months was valid but for the remaining period it was invalid. In ***Shahid Parvez (supra)*** the Court held that order dated 16.5.2002 had attained finality. In that order, while the period of three months of detention was held valid, the detention order was itself held to be *void ab initio*, that is from the date it was issued. On this basis, it was argued that since the detention order itself was *void ab initio*, there could not have been any notice to the appellant as provisions of Chapter V-A of the NDPS Act did not apply. The learned Single Judge has repelled this contention holding that the facts

clearly demonstrate that the detention order was not *void ab initio*. In fact, it was affirmed by the Calcutta High Court and even the Supreme Court had dismissed the SLP. Further order dated 16.5.2002 passed by this Court in WP(Crl.) No.351/1992 wherein continued detention was held to be illegal, in so far as initial detention order dated 26.7.1989 is concerned, same was held to be legal and valid. The learned Single Judge has taken pains to point out that in *Shahiz Parvez (supra)* where the word ‘detention’ is mentioned, in the 13th line of para 16, it appears to be a typographical error and the word should have been ‘declaration’.

9. We entirely agree with the aforesaid conclusion of the learned Single Judge. The initial detention order dated 26.7.1989 was the subject-matter before the Calcutta High Court and was specifically affirmed. This order had attained finality. It is only a declaration under Section 10(1) regarding continuous detention, which was challenged in WP(Crl.) No.315/1992 in this Court and therefore, while holding the continued detention to be illegal, this Court could not have held initial detention also to be illegal, which was not even the subject-matter. On the contrary, it was specifically obscured and concluded that initial period of detention was valid and the learned counsel for the detenu had even conceded this position as is clear from the following portion of the order in WP(Crl.) No.315/1992:-

“It is agreed between the parties that this matter is covered by the decision of this Court in *Akhilesh Kumar Tyagi Vs. Union of India* reported in 1995 IV AD (Delhi) 107. The writ petition is allowed in terms thereof. The initial period of detention of three months is sustained.

..... I, therefore, hold that the detention for a period of three months is valid and continue detention is vitiated.”

10. In so far as second contention is concerned, namely, absence of nexus between the appellant's property and the detenu or his income allegedly derived from his alleged dealing in narcotic drug and psychotropic substances, the appellant had again relied upon the decision in ***Shahid Parvez (supra)***. We would like to point out that Shahid Parvez was also the brother of the detenu and identical notice was issued to him also and order was passed forfeiting his property which order was confirmed by the Appellate Authority as well. However, writ petition filed by Shahid Parvez was allowed vide judgment dated 27.10.2010 passed in WP(C) No.4800/2008 titled ***Shahid Parvez v. Union of India & Ors.***, 175 (2010) DLT 547, as noted above. In this judgment, the Court observed that there was no systematic inquiry or investigation by the Appellate Authority appreciating the passing of the order of forfeiture of properties of Shahid Parvez. No effort was made by the Competent Authority to be *prima facie* satisfied that essential conditions existed to attract that provision. Initial burden was on the office of the Competent Authority to show that the properties in the name of Shahid Parvez were acquired by him through illegal earnings of his brother.
11. On the facts of this case the learned Single Judge opined that the appellant was a minor of about 12 years at the time when the properties in question were acquired in the year 1985. He did not have any independent source of income of his own at that time. The case set up by the appellant at the appellate stage was that his

father acquired the properties but he failed to produce any material in support of this plea. The learned Single Judge observed that for the first time in the present writ petition the appellant asserted that his father was having liquor vends; he was an income-tax assessee and that he had rental income. This, according to the learned Single Judge, was an afterthought plea with an attempt to improve his case inasmuch as from the known source of the income of the appellant or the aforesaid properties were not established to have been acquired. The learned Single Judge also placed reliance upon the judgment of the Supreme Court in *Kesar Devi v. Union of India & Others*, (2003) 7 SCC 427 and on that basis observed that:

“18. The statutory framework appears to be founded upon the fact that the details and particulars as to how a particular property has been acquired by a person are within his special knowledge. It is for him to explain as to how he has acquired it, and the source of the funds from which the property had been acquired.”

12. Mr. Kirpal, learned counsel appearing for the appellant, expressed serious reservation on the aforesaid approach taken in the impugned order. His first submission was that in case the learned Single Judge wanted to record a discordant note, in so far as the ratio in *Shahid Parvez (supra)* is concerned, the appropriate course of action was to refer the matter for a decision by a larger Bench. It was also contended that even otherwise the contention of the appellant was not appreciated in the right perspective. Mr. Kirpal reiterated the submission with much emphasis that the notice of forfeiture of property under Section 68H of the NDPS Act could be served only if the Competent Authority had “reasons to

believe (the reasons for such belief to be recorded in writing)” that all or any such properties are illegally acquired properties. His submission was that there could be a forfeiture of the properties only if nexus was established between these properties and the purported illegal earnings of the detenu from dealing in narcotic drugs and psychotropic substances. His submission was that this plea should have been reflected in the show cause notice itself and when it was not there, the very show cause notice was illegally and proceedings generated as a consequence thereof were also illegal and vitiated. In support of his submission he relied upon the following two judgments of the Supreme Court:-

1. *P.P. Abdulla and Another*, (2007) 2 SCC 510

2. *Aslam Mohammad Merchant v. Competent Authority and Others* (2008) 14 SCC 186

13. Mr. A.S. Chandhiok, learned Additional Solicitor General, refuted the aforesaid contention of the appellant’s counsel. It was his submission that entirely a new case was projected in the writ petition and the appellant was precluded from setting up a new case. He argued that after the show cause notice was issued to the appellant vide letter dated 1.6.1994, he requested for a copy of the reasons recorded for initiating the proceedings under Section 68H(1) of the NDPS Act. These reasons were supplied to him by letter dated 8.2.1996 and were duly received by the appellant. He further pointed out that in so far as stand of the appellant to the show cause notice is concerned, he initially submitted that he was running his own business under the name and style of ‘NU-York’ and was an income-tax assessee. Thereafter, he stated that the

properties in question were purchased by his father out of his father's own funds and he had no connection with the detenu. Even when he had asked for opportunity to provide documents to show that properties were purchased by his father out of his income he had failed to do so. Mr. Chandhiok, thus, argued that in view of such an explanation, the matter was to be examined from this angle only, which was examined and no fault is found in the orders of the Competent Authority or the Appellate Authority. He also submitted that the appellant was changing stand as he initially claimed that the properties were acquired by his father but before the Appellate Authority his submission was that these were acquired properties of the appellant.

14. Mr. Chandhiok also referred to the reasons given by the learned Single Judge in the impugned judgment and made his endeavour to justify the same.
15. We have considered the submission of both the sides. We would first like to deal with the contention of the learned counsel for the appellant that the learned Single Judge could not have held that the judgment of another Single Judge in *Shahid Parvez (supra)* was *per incuriam* and the only course open was to refer the matter to the larger Bench. We find the following comments of the learned Single Judge in the impugned judgment pertaining to *Shahid Parvez (supra)*:

“15. On the other hand, the principle of law contained in the aforesaid observations made by this Court in *Shahid Parvez (supra)*, with due respect, appears to be *per incuriam*. I may refer to the provision contained in Section 68J of the NDPS Act which provides that “in any proceedings under this Chapter, the burden of

proving that any property under Section 68H is not illegally acquired property shall be on the person affected.” Therefore, the observation of the learned Judge that the onus would be on the respondent authorities is in the teeth of the said statutory provision. I may note that Section 68J has not been noticed by the learned Judge in *Shahid Parvez* (supra).”

16. We are of the opinion that it would have been more appropriate for the learned Single Judge to refer the matter to Division Bench in the case of difference of opinion. Be as it may, since the matter is now before the Division Bench we proceed to determine as to which opinion is correct in law and therefore, advert ourselves to the central issue raised before us. It was agreed to by the learned counsel for the parties as well.
17. Submission of the learned counsel for the appellant questioning the validity of show cause notice and resultant proceedings is precluded of *P.P. Abdulla and Another* (supra) and *Aslam Mohammad Merchant v. Competent Authority and Others* (supra).
18. It is pertinent here to reproduce paras 4 to 7 of the judgment in the case of *P.P. Abdulla and Another* (supra):

“4. The appellant challenged Exts.P5 and P6 orders in O.P. No. 27488/2000 which was allowed by the learned Single Judge of the High Court relying on the decision of the Supreme Court in *Fatima Mohd. Amina (dead) through LRs. v. Union of India and Anr.*, (2003) 7 SCC 436, holding that since there is no allegation regarding the existence of any link or nexus between the property sought to be forfeited and the illegally acquired money of the detenu under

the Act, the orders of forfeiture could not be maintained.

5. Against the aforesaid judgment of the learned Single Judge the competent authority and Union of India filed an appeal before a Division Bench of the High Court which was allowed by the impugned judgment, hence this appeal.

6. Learned Counsel for the appellant has invited our attention to Section 6(1) of the Act which states :

“6(1) If, having regard to the value of the properties held by any person to whom this Act applies, either by himself or through any other person on his behalf, his known sources of income, earnings or assets, and any other information or material available to it as a result of action taken under Section 18 or otherwise, the competent authority has reason to believe (*the reasons for such belief to be recorded in writing*) that all or any of such properties are illegally acquired properties, it may serve a notice upon such person (hereinafter referred to as the person affected) calling upon him within such time as may be specified in the notice which shall not be ordinarily less than thirty days, to indicate the sources of his income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be, should not be declared to be illegally acquired properties and forfeited to the Central Government under this Act.” (emphasis supplied)

7. Learned Counsel submitted that it has been expressly stated in Section 6(1) that the reason to believe of the competent authority *must be recorded in writing*. In the counter-affidavit it has also been stated in paragraph 8 that the reasons in the notice under Section 6(1) were recorded in writing. In our opinion this is not sufficient. Whenever the statute required reasons to be recorded in writing, then in our opinion it is incumbent on the respondents to produce the said reasons before the Court so that the same can be scrutinized in order to verify whether they are relevant and germane or not. This can be done either by annexing the copy of the reasons along with the counter- affidavit or by quoting the reasons somewhere in the counter-affidavit. Alternatively, if the notice itself contains the reason of belief, that notice can be annexed to the counter-affidavit or quoted in it. However, all that has not been done in this case.”

19. It would be worthwhile to reproduce paras 30, 31, 34, 40 and 41 from the judgment in the case of *Aslam Mohammad Merchant v. Competent Authority and Others (supra)*:

“30. Before, however, the actual order of forfeiture of such illegally acquired property is passed, issuance of a notice to show cause is essential so as to fulfill the requirements of natural justice.

Such a notice is to be issued by the Authority having regard to:

- (i) The value of the property held by the person concerned,
- (ii) His known source of income, earning or assets,

(iii) Any other information or material made available as a result of a report from any officer making an investigation under Section 68E of the Act or otherwise.

When the aforementioned conditions are satisfied, the competent authority would be entitled to issue a show cause notice, if he has reason to believe, wherefore reasons are to be recorded in writing that the properties are illegally acquired properties.

31. Once the notice to show cause is found to be satisfying the statutory requirements which are condition precedent therefor, a valid proceeding can be said to have been initiated for forfeiture of the property. Only in a case where a valid proceeding has been initiated, the burden of proof that any property specified in the notice is not illegally acquired property, would be on the 'person' affected.

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34. Analysis of the aforementioned provisions clearly establish that a link must be found between the property sought to be forfeited and the income or assets or properties which were illegally acquired by the person concerned.

XXXXX XXXXX XXXXX

40. Both the statutory elements, namely, 'reason to believe' and 'recording of reasons' must be premised on the materials produced before him. Such materials must have been gathered during the investigation carried out in terms of Section 68E or otherwise. Indisputably therefore, he must have some materials before him. If no such material had been placed before him, he cannot initiate a proceeding. He cannot issue a show cause notice on his own ipse dixit. A roving enquiry is not

contemplated under the said Act as properties sought to be forfeited must have a direct nexus with the properties illegally acquired.

41. It is now a trite law that whenever a statute provides for 'reason to believe', either the reasons should appear on the face of the notice or they must be available on the materials which had been placed before him."

20. It is mentioned that as per these judgments the requirements of valid show cause notice are: (i) 'reasons to believe' of the Competent Authority must be recorded in writing; (ii) on that basis show cause notices to be issued to the concerned persons and in this notice, apart from other essential requirements to be fulfilled, two statutory requirements, namely, 'reason to believe' and 'recording of reasons' must be premised on the basis of material produced by the Competent Authority. This material must be gathered during the investigation carried out in terms of Section 68E of the NDPS Act or otherwise. If no such material has been placed before the Competent Authority, it cannot initiate the proceedings; and (iii) this show cause notice should satisfy the statutory requirements, which are condition precedent therefor and only then it can be held that a valid proceedings have been initiated for forfeiture of the property. Link must be found between the properties sought to be forfeited and the income or assets or properties, which were illegally acquired by the persons concerned. Once statutory conditions are satisfied and it is found that valid proceedings had been initiated, the burden of proof that any property specified in the notice is not illegally acquired property, would be on the 'person affected'.

21. It would be pertinent to point out at this stage that in the impugned judgment the learned Single Judge has referred to and relied upon two Judge Bench judgment of the Supreme Court in *Kesar Devi v. Union of India & Others* (supra) wherein the Supreme Court has opined that no nexus or link between the **money or the debt sought to be forfeited** is required to be established under the Scheme of the Act. However, in *Aslam Mohammad Merchant v. Competent Authority and Others* (supra) the Supreme Court expressed his inability to agree with the said opinion held in *Kesar Devi v. Union of India & Others* (supra) in the following words:-

“45. We, with utmost respect to the learned Judges express our inability to agree to the said observations. The necessity of establishing link or nexus in our opinion is writ large on the face of the statutory provision as would appear from the definition of 'illegally acquired property' as also that of 'property'. The purport and object for which the Act was enacted point out to the same effect.

46. Fatima Mohd. Amin (supra) was followed by a Bench of this Court in P.P.Abdulla v. Competent Authority:(2007) 2 SCC 510, wherein it was observed: (P.P. Adbulla case, SCC p. 512, paras 7-8)

“7. Learned Counsel submitted that it has been expressly stated in Section 6(1) that the reason to believe of the competent authority must be recorded in writing. In the counter-affidavit it has also been stated in para 8 that the reasons in the notice under Section 6(1) were recorded in writing. In our opinion this is

not sufficient. Whenever the statute requires reasons to be recorded in writing, then in our opinion it is incumbent on the respondents to produce the said reasons before the court so that the same can be scrutinised in order to verify whether they are relevant and germane or not. This can be done either by annexing the copy of the reasons along with the counter-affidavit or by quoting the reasons somewhere in the counter-affidavit. Alternatively, if the notice itself contains the reason of belief, that notice can be annexed to the counter-affidavit or quoted in it. However, all that has not been done in this case.

8. It must be stated that an order of confiscation is a very stringent order and hence a provision for confiscation has to be construed strictly, and the statute must be strictly complied with, otherwise the order becomes illegal.”

It was also observed: (SCC p. 512, para 10)

“10. In the present case, in the notice dated 15-3-1988 issued to the appellant under Section 6(1) of the Act (copy of which is annexed as Annexure P-1 to this appeal), it has not been alleged therein that there is any such link or nexus between the property sought to be forfeited and the alleged illegally acquired money of the appellant.

47. In the final order, the rule of evidence as envisaged under Section 68-I read with Section 68J of the Act must be applied. A person affected would be called upon to discharge his burden provided a link or nexus is traced between

the holder of the property proceeded against and an illegal activity of the detenu. Such a formation of belief is essential.”

22. We are of the opinion that what is provided in para 47 reflects the principle of law laid down by the Apex Court. Reading this, it can be concluded that before issuing show cause notice some information or material has to be placed before the Competent Authority gathered during the investigation carried out in terms of Section 68E or otherwise. On the basis of this material the Competent Authority has to record his satisfaction to the effect that he has reason to believe that the property sought to be forfeited has link with the income or assets or properties which were illegally acquired by the persons concerned. The Competent Authority is required to record his reasons on the basis of that belief which reason should be either in the show cause notice itself or are recorded in the file. Once this exercise is done and reflected either in the notice or from record then the statutory requirement of show cause notice as per Section 68H of the NDPS Act shall be treated as satisfied. In that event the burden of proof would be on the notice to prove that any property specified in the notice served under Section 68H is not illegally acquired property. Section 68H is enacted keeping in mind the fact that the details and particulars as to how a particular property has been acquired by a person are within his special knowledge and it is for him to explain the source thereof.
23. We find that in the instant case the learned Single Judge has, on the basis of Section 68J of the NDPS Act, jumped to the second aspect holding that the appellant could not discharge the burden as to how

he acquired the property. First aspect, namely, validity of Section 68H of the Act, i.e., whether it fulfilled the statutory requirement as explained in *P.P. Abdulla and Another (supra)* and *Aslam Mohammad Merchant v. Competent Authority and Others (supra)* has not been gone into and in fact, two issues are mutually exclusive and are required to be examined independent of each other.

24. Be as it may, Mr. Chandhiok may be correct in his submission that this argument about the validity of the show cause notice was raised for the first time in the writ petition. The validity was not questioned before the adjudicating authority or the appellate authority and defence was given only on the sound aspects, i.e., on merits trying to explain the source of funds wherefrom the properties were purchased. Probably, that is the reason that the learned Single Judge has dealt with this aspect only. To examine the validity of show cause notice, we called for the records. We may point out that the 'reasons to believe' supplied to the appellant have not been placed on the record of this case. We were, therefore, in a disadvantageous position as in the absence thereof it could not be found as to whether necessary requirement for issuance of the show cause notice are fulfilled or not. For this reason, we directed production of the original records, including 'reasons to believe'. We have examined those records.
25. Record shows that the Inspector, Narcotics Control Bureau, Eastern Zonal Unit, Calcutta had frozen the properties in question by orders dated 15.7.1993 under Section 68F(1) of the NDPS Act and this order was confirmed by the Competent Authority, Calcutta on 28.7.1993 under Section 68F(2) of the Act. Thereafter, show

cause notice was issued to the appellant on 20.4.1994, *inter alia*, stating that on the basis of the relevant information and/or relevant materials available to the Competent Authority, he had reason to believe that properties in question held by the appellant were illegally acquired properties within the meaning of Section 68B(g) of the NDPS Act. The 'reasons to believe', which were recorded and supplied to the appellant start with the narration regarding detention order passed against the brother of the appellant under PITNDPS Act, 1988 and being a brother the appellant was a person covered under Section 68A(2)(d) of the NDPS Act. Thereafter, description of the three properties is given and it is mentioned that since the source of fund of the said properties could not be verified, the properties are taken as wholly and illegally acquired properties under Section 68B(g) of the NDPS Act and therefore, it is stated that for this reason notice be issued to the appellant to indicate source of his income, earnings or assets out of which or by means of which he had acquired such properties.

26. From the narration in 'reasons to believe' it becomes clear that the properties in question ostensibly in the name of the appellant were sought to be connected with his brother by specifically mentioning about his detention. Though it is not stated in so many words that the properties in question were acquired from the illegal income of the detenu, such a link can clearly be inferred and is discernible from the entire reading of the 'reasons to believe'. Record shows that the material gathered during investigation carried out in terms of Section 68E of the NDPS Act was produced before the Competent Authority. Investigation revealed that the source of fund of these properties could not be verified even when the

appellant was an income-tax assessee. On that basis, link was inferred with the detenu and the properties were taken wholly and illegally acquired properties under Section 68B(g) of the NDPS Act. On the basis of this material, we are of the opinion that statutory conditions laid down under the Act stand satisfied and the burden is shifted upon the appellant to show the source of the said properties and prove that they were not illegally acquired.

27. In so far as discharge of burden by the appellant as contemplated under Section 68J is concerned, from the reading of the orders of all the authorities below, including the learned Single Judge it is clear that he has miserably failed to do so and in fact, no attempt was made even before us to show the source of income from which the properties were purchased as there is no explanation worth the name coming on record from where the funds for purchase of these properties were arranged.
28. For the aforesaid reasons, we hold that the orders of the authorities below do not call for any interference. We accordingly dismiss the appeal with costs.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

**July 13, 2012
HP**