

GAHC010040002020



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : Crl.A./113/2021**

SMTI DURGA DEVI  
D/O- TANKANATH,  
R/O- SATIKHOLA, SADAR HILL, WEST KANGPOKPI,  
P.S.- KANGPOKPI, SENAPATI, DIST- MANIPUR, PIN- 795129.

VERSUS

THE UNION OF INDIA AND ANR  
REPRESENTED BY NCB

2:ANJANI KUMAR  
INTELLIGENCE OFFICER

NARCOTICS CONTROL BUREAU

GUWAHATI ZONAL UNIT  
VIP ROAD  
RUPKUNWAR PATH  
CHACHAL  
GUWAHATI-781022

**Advocate for the Petitioner : MS. S K NARGIS**

**Advocate for the Respondent : MR. S C KEYAL(SC, NCB)**

**BEFORE**  
**HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

**JUDGMENT**

**Date : 19-10-2023**

**1.** Heard Ms. S.K. Nargis, learned counsel for the petitioner as well as Mr. S.C. Keyal, learned Standing Counsel for the NCB.

**2.** This appeal is directed against the judgment and order dated 24.01.2017, passed by the learned Additional Sessions Judge No. 2, in connection with NDPS Case No. 10/2016, convicting Smti Durga Devi (herein after also referred to as the accused or appellant) under Sections 21(c)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing her to undergo Rigorous Imprisonment for ten years and to pay fine of Rs. 1,00,000/- with default stipulation.

**3.** The Union of India and the Intelligence Officer of NCB are arrayed as O.P. No. 1 and 2 respectively. The brief facts leading to this case are that on 16.10.2015, at about 17:05 hours, on a tip off received by Sri Aram Anth Investigating Officer (I/O in short) of Narcotics Control Bureau (NCB for short), a team was formed to conduct a search operation. At about 02:30 hours midnight on 17.10.2015, the team proceeded towards the ISBT. The secret information that three ladies, namely, Durga Devi, Sangita Devi Dahal and Smti Nemneihat Chongloi would be transporting illegal consignment of morphine was reduced to writing and was submitted to the immediate Superior Officer Smti Tulika Morang, Superintendent of NCB (PW-3). The search party approached two independent witnesses, namely Ripon Kalita and Pragya Kalita and requested them to be witnesses to the search and seizure. After some time, the informer (secret informer) identified the three accused persons, who were approached by the team. The team disclosed their identity and requested the accused to cooperate with the search. The three accused disclosed their names as Durga Devi-appellant herein, Sangita

Devi Dahal and Smti Nemneihat Chongloi. A temporary enclosure was made with the help of a bed-sheet for the purpose of carrying out the search operation.

**4.** Notices were served under Section 50 of the NDPS Act to the accused persons and the contents of the notices were explained to them. The accused opted out to be searched in presence of any Gazetted Officer or a Magistrate and allowed the female team member to search them. During personal search, no contraband was recovered but one black coloured Samsung mobile, one Airtel SIM and voter ID card, and cash worth Rs. 400/- was found with the present appellant. Mobile Phone, Sim Card, Copy of Aadhar Card, cash of Rs. 500 and 600 were recovered from the other accused persons. The appellant was found carrying one blue coloured handbag, which was searched and brown coloured powdery substance, suspected to be contraband, was found inside the bag. The powdery substance was inside a transparent polythene bag. A small quantity of the powder was tested using a Drug Detection Kit yielding a positive result for morphine.

**5.** The accused also admitted that the powder was morphine. The polythene bag containing the powdery substance was weighed with the help of a digital weighing machine and the gross weight was found to be 950 grams. The suspected morphine powder and the other articles recovered from the

possession of the accused as well as the appellant were seized in presence of two independent witnesses and two samples of 5 grams each were drawn from the contraband and packed in Polythene packets and kept inside an envelope and the remaining seized suspected morphine was sealed with the NCB brass Seal No.1 and properly labelled after the signatures of the witnesses, accused persons and the Seizing Officer were taken. After completion of seizure process notices were issued to the accused persons. The statements of the accused were recorded and they have admitted their complicity. The accused were arrested and produced before the Court of the learned CJM along with the seized articles and thereafter, the samples were forwarded for chemical examination. When the report of chemical analysis was received, offence report was submitted against the accused persons.

**6.** Copies were furnished to the accused persons and after hearing both sides, a formal charge under Section 21(c)/29 of the NDPS Act was framed and read over to the accused who abjured their guilt and claimed innocence. On a later date, before pronouncement of judgment charge simpliciter under Section 21(c)/29 of the NDPS Act was framed and read over and explained to the appellant to which the appellant claimed not guilty and claimed to be tried.

**7.** To connect the appellant to the crime, the prosecution adduced the

evidence of 6(six) witnesses and the defence cross examined the witnesses to refute the charges. The accused did not tender any evidence in defence.

**8.** On the incriminating circumstances arising against them, several questions were asked to the accused under Section 313(1)(b) Cr.P.C and their responses were recorded.

**9.** The learned counsel for the appellant Ms. S.K. Nargis laid stress in her argument that the bus number has not been mentioned by a single witness. It has surfaced through the evidence that the appellant alighted from a bus but not a single witness could provide the number of the bus in which the appellant was allegedly travelling before she was apprehended by the NCB team. The failure of the prosecution to examine the independent witnesses casts a shadow of doubt over the veracity of the evidence adduced by the prosecution. The major discrepancy is that the procedure as mandated u/s 52A(2) of the NDPS Act was not complied with. An important witness Praveen Kumar was not examined in support of the evidence to prove the movement order marked as Ext.-9. Section 50 of the Act was not complied with. As the appellant is incarcerated under a grave offence, prescribing stringent punishment, it is the bounden duty of the investigating agency to scrupulously follow the procedure mandated u/s 52A of the Act. Only when the prosecution is able to prove its

case beyond the reasonable doubt, the reverse burden of prove operates against the appellant. In this case presumption relating to culpable mental state does not exist against the appellant as per Section 35 of the NDPS Act.

**10.** Per contra the learned Standing Counsel Mr. S.C. Keyal laid stress in his argument that each and every procedure was meticulously followed by the NCB team during the investigation. The secret information was reduced to writing and forwarded to the officer concerned. As per order of Praveen Kumar a team was formed and the team proceeded towards the ISBT. Two independent witnesses were also informed about the transportation of the contraband and they also agreed to be witnesses. As soon as the accused were identified by the informer, the NCB team went ahead and identified themselves and the articles which were recovered from the possession of the appellant were seized as per proper procedure. It is also further submitted that the evidence of the witnesses are corroborating. Conscious possession has been proved beyond reasonable doubt and the appellant failed to rebut the evidence of possession of drugs. She was carrying a blue handbag and the contraband was found inside the handbag belonging to the appellant. The appellant deserves stringent punishment as transportation of drug is a serious offence against the society at large.

**11.** I have given my thoughtful consideration to the submissions at the bar.

**12.** On the anvil of these submissions, the question that falls for consideration is that whether the trial court erred by convicting the appellant u/s 21(c) of the NDPS Act.

**13.** To decide this case in its proper perspective, the evidence has to be reappraised. Shri. Pavan Baisane, deposed as PW-1 that on 16.05.2015, he was posted at NCB Guwahati, as Intelligence Officer. On that day, at about 17 hours, another Intelligence Officer, Shri Aram Anth, received a secret information from a reliable source regarding transportation of drug by three ladies. This information was reduced to writing and the team was constituted and he was one of the members of the team. Accordingly, they proceeded and reached the ISBT at around 03:00 A.M. and requested two persons who were standing near the gate to be witnesses of the search operation. After some time, the informer pointed out towards three ladies alighting from the bus and the search team rushed towards them and introduced themselves and confronted the ladies about any consignment of illegal morphine. Personal search of the three ladies were conducted as per due procedure of law, but no contraband was found after personal search. The present appellant was carrying a blue handbag and the bag was searched in front of the other accused as well as the independent witnesses and one polythene pouch containing suspected morphine was recovered from the blue coloured handbag. A small quantity was extracted from

the lot consisting the suspected morphine to be tested with the Drug Detection Kit (carried by the NCB team) which yielded a positive result for morphine. All the three ladies (accused) also admitted that the powdery substance was illegal morphine. The morphine was weighed with the help of the digital weighing machine carried by the NCB team and two samples of 5 grams each were extracted from the contraband. The signatures of the accused and the independent witnesses were taken down by the Seizing Officer Aram Anth (PW-6), who also served notices to the accused. The statements of the accused were also recorded after notice was given to them. Exhibit-1, 2 and 3 are identified as the notices under Section 67 of the NDPS Act.

**13.** Another Officer of the NCB, Tulika Morang testified as PW-3 that on 16.10.2015, while working as Superintendent, NCB, Guwahati Zonal Unit, Aram Anth (PW-6), the Intelligence Officer, NCB forwarded the secret information received by him in writing. The information was regarding three ladies (accused) transporting consignment of morphine. She (PW-3) forwarded the information to her Senior Officer Shri Praveen Kumar with an official note for forming a team of officers' to investigate into the matter.

**14.** PW-3 further deposed that the Zonal Director, Praveen Kumar formed a team of officers consisting of herself (PW-3), Aram Anth (PW-6), Anjani Kumar

(PW-4), Bam Sankar (PW-5), P.B. Singh, Ruskin Talukdar, Pavan Baisane (PW-1) and Havildars (Sepoy) Hridesh Kumar, Ram Surat, Atul Giri, Vikram Singh, Sandeep and Vipin Kumar. On 17.10.2015 at about 02:30 A.M. they proceeded to the ISBT and met Pragya Kalita and Ripon Kalita. They disclosed their identity and shared the information and requested them to be witnesses. The informer was also present at the ISBT. At about 03:15 A.M., the informer pointed towards three ladies (accused) who were approaching from the bay of the parking lot. The NCB team apprehended the ladies (accused) and disclosed their identity and asked the ladies to cooperate with them. The ladies (accused) also disclosed their identities as Durga Devi (appellant), Nemneihat Chongloi and Sangita Devi.

Durga Devi (appellant) was carrying a handbag and she placed the bag on the ground as per her (PW-3's) instruction. They served notice under Section 50 of the NDPS Act to the accused and searched the body of the accused and found no contraband in their possession. Then they searched the bag of Durga Devi and found one packet of suspected contraband inside the bag. The contents of the packet was examined with the help of a Drug Detection Kit and it was found that the contents yielded positive result for morphine. The Seizing Officer, Aram Anth (PW-6) seized the contraband and collected the samples.

**15.** This witness has proved the secret information as Exhibit-8. She proved her signature as Exhibit-8(2). She identified the Office Order as Exhibit-9. She also identified the statement of Durga Devi as Exhibit-10 and she proved her own signatures as Exhibit-10(1) and 10(2).

PW-3, further stated that after completing the formality on the spot, they returned to the office along with the accused persons and the seized articles and she took charge of the seized articles as the godown in-charge and she issued a receipt to the Seizing Officer (PW-6). She proved the receipt of the seized articles as Exhibit-11 and Exhibit-11(1) as her signature. For production of the seized articles, she handed over the articles to the officer Aram Anth (PW-6) and after production, the Seizing Officer handed back the articles to her and she kept the seized articles in the NCB godown. She proved this receipt as Exhibit-12 and Exhibit-12(1) as her signature. PW-3 further deposed that on 17.10.2015, the Seizing Officer Aram Anth submitted a report under Section 57 of the NDPS Act and she had acknowledged the report and she proved the report as Exhibit-13 and his signature as Exhibit-13(1) and the signature of Aram Anth as Exhibit-13(2). She further stated that on 19.10.2015, Aram Anth (PW-6) forwarded the samples of the seized morphine to the Directorate of Forensic Science (DFS for short). She proved the forwarding of the samples as Exhibit-14 and Exhibit-15 as the test memo. Vide Exhibit-16, the DFS received

the samples. The cross-examination of the witnesses will be discussed at the appropriate stage.

**16.** Anjani Kumar testified as PW-4 that on 16.10.2015 as per order of the Zonal Director Praveen Kumar, he along with the other members of the NCB team proceeded towards the ISBT, Guwahati. The team was led by Tulika Morang (PW-3) and consisted of 10/12 employees of the NCB. On 17.10.2015. At about 3 AM they reached the ISBT. Three ladies (accused) were intercepted by the team after indication was given by the informer. The team recovered a packet consisting of 950 grams of morphine from the bag carried by Durga Devi (appellant herein). The team apprehended the three women and served notice u/s 50 of the NDPS Act. The accused Durga Devi, after service of notice voluntarily gave her statement in his presence.

The PW-4 proved his notice as Ext.-16 and his signature on the notice as Ext.-16(1).

He proved the reply of the accused Durga Devi as Ext-17 and his signature as Ext.-17(1).

He proved Ext.-19 as the notice issued u/s 50 of the Act to Durga Devi; and

he proved Ext.-19(1) as his signature.

**17.** PW-4 further deposed that the statement of Durga Devi was recorded after recovery of the contraband. Prior to recording of her statement, notice u/s 67 of the NDPS Act was issued to Durga Devi vide Ext.-3.

He proved his signature as Ext.3(1).

He proved the statement of Durga Devi as Ext.-10 and Ext.-10(2) and 10(4) as his signatures; and

he identified the signature of Durga Devi as Ext.10(5) and 10(6).

**18.** PW-4 further deposed that on 19.10.2015 Zonal Director, NCB Praveen Kumar entrusted him to investigate the case. He proved the order of Zonal Director as Ext.-21 and identified the signature of the Zonal Director as Ext.-21(1).

After receiving the report from the DFS, he served a copy of the report to the accused through the Superintendent of the Central Jail. He submitted the final complaint against the accused u/s 21(c)/29/35 of the NDPS Act.

He proved the complaint as Ext.-23 and Ext.-23(1) upto 23(11) as his signatures with the seal.

**19.** Bam Shankar deposed as PW-5 that on 16.10.2015, the Intelligence Officer of NCB, Sri Aram Anth (PW-6) received a secret information regarding contraband being transported by three ladies from Imphal to Guwahati. An

office order was prepared and a team was formed under the leadership of Tulika Morang (PW-3). On 17.10.2015, they reached the ISBT at about 3 AM. They contacted one Ripon Kalita and another person Pragya Kalita and requested to them to be witnesses in the seizure procedure and they shared the information with them. They met the person who gave the secret information to Aram Anth (PW-6) and the person showed the three ladies (accused) who were alighting from the night super bus. Thereafter the NCB team along with the independent witnesses showed their identity cards to the ladies. He identified the accused-persons who were present in the dock.

**20.** PW-5 further deposed that the ladies disclosed their names and the seizing officer searched a blue coloured bag which was carried by the accused Durga (appellant herein). The seizing officer recovered a packet containing brown coloured powder which was tested with the help of a drug detection kit. The powder was found to be morphine. The seizing officer completed the seizure procedure as per law in his presence and thereafter they returned to their office along with the accused persons.

**21.** Sri Aram Anth deposed as PW-6 that on 16.10.2015, he was posted as intelligence officer, NCB, Guwahati. On that day he received an information that a consignment of illegal morphine was being carried by three ladies (accused)

through Imphal by Guwahati road. He was informed that the ladies will be proceeding to ISBT, Guwahati. This information was reduced to writing and was submitted to his senior superior officer Smt. Tuliaka Morang (PW-3). Then Tulika Morang directed him to take immediate steps regarding the information.

He proved Ext.-8 as the information which was reduced to writing and Ext.-8(1) as his signature.

**22.** A team was formed and an order was issued by the Zonal Director, Praveen Kumar dated 16.10.2015. He identified the Ext.-9 as the office order. Their team of 13 members reached ISBT at around 3 AM and they approached the independent witnesses. After sometime the informer pointed towards the three ladies who were coming out of the ISBT. The team approached the ladies (accused) and identified themselves as NCB officer and explained to them about the information received by them. They explained the provision of Section 50 of the NDPS Act and asked the ladies to allow the NCB team to conduct personal search. After personal search, they found nothing in the possession of the ladies. This witness also identified the accused (ladies) in the dock.

**23.** PW-6 further deposed that they requested the three ladies i.e. the accused about searching their belongings to which the accused agreed. They searched the blue coloured handbag carried by the accused Durga and found a packet

containing brown coloured powder inside the bag. With the drug detention kit, they tested the powder and the powder yielded positive result for morphine. The powder was weighed with the help of a weighing machine in presence of independent witnesses, accused-persons and the total weight was found to be 950 gms. He (PW-6) seized the suspected morphine in presence of independent witnesses and the accused-persons vide Ext.-24. He proved his signature on Ext.-24 as 24(1) upto 24(6).

**24.** PW-6 further deposed that he obtained the signatures of the accused-persons on the seizure-list.

He identified the signatures of the accused Durga Devi as Ext.-24(7) upto 24(12).

He also seized three mobile handsets, identity proof documents and Indian currency rupees from the accused-persons vide Ext.-24, and the independent witnesses also affixed their signatures on the seizure list. He collected 10 gms of suspected morphine from the seized packets and prepared two samples of 5 gms each. He sealed the samples and the seized articles and obtained the signatures of the accused-persons and the independent witnesses on the seized articles and samples. He also affixed his signatures on the seized articles and samples and thereafter issued notices under Section 67 of the Act

to the accused-persons. He identified Exts-1, 2 and 3 as copies of notices u/s 67 of the NDPS Act and his signatures as Ext.1(2), 2(2) and 3(2).

**25.** PW-6 further deposed that his colleagues recorded the statements of the accused. Thereafter he arrested the accused and prepared the report u/s 67 of the NDPS Act and submitted the same to the Superintendent, Tulika Morang (PW-3) on 17.10.2015 and she acknowledged the same. He proved his report as Ex.-13 and Ext./.-13(2) as his signature. He identified the copy of the test memo as Ext-15 and his signature as Ext.-15(1).

**26.** PW-6 further deposed that he forwarded the samples to the DFS for chemical examination on 19.10.2015. The DFS acknowledged the receipt vide Ext.-16. On 17.10.2015, they completed the search and seizure at ISBT campus and thereafter they brought the seized articles along with the accused at Cachal. On the same day, they produced the accused before the Chief Judicial Magistrate, Kamrup (Metro). On the same day, i.e. on 17.10.2015, he deposited the seized articles at NCB godown and obtained receipt from the godown in charge Tulika Morang.

He proved the godown receipt and Ext.-11.

He proved another godown receipt as Ext.25 and Ext.-25(1) as his signature.

He identified and proved the Material Ext.-1 as the sealed packet consisting of 940 gms of morphines.

He proved and identified Material Ext.-2 as the remnant of the sample.

He proved and identified the personal belongings of accused Durga Devi as Material Ext.-4.

He proved and identified the duplicate samples marked as D(1) as Material Ext.-6.

he proved the seized currency notes amounting to Rs. 1500/- as Material Ext.-7; and

he proved the blue coloured empty bag recovered from Durga Devi (appellant) as Material Ext.-8.

PW-6 further deposed that on Material Ext.-1 to 8 he also took down the signatures of the accused-person and the witnesses alongwith his signatures.

**27.** Sri Gajendra Nath Deka deposed as PW-2 that on 19.02.2015 while serving as Deputy Director in the Drugs and Narcotics Division, DFS, Assam he received a parcel through the DFS in connection with NCB Case No. 12/2015 dated 17.10.2015. The parcel consisted of one Exhibit enclosed in a sealed envelope and the facsimile seal was found to be Narcotic Control Bureau 01.

## **Description of the seized articles.**

*One sealed envelope marked as SI having a closed polythene packet containing 5 grams brown coloured powder. This sample was again marked as DN- 355/2015*

### *Results of Examination:*

*The sample mentioned above was tested as per United Nations Drugs Testing Laboratory Manual and tested positive test for morphine.*

*The Exhibit DN- 355/2015 gave positive test for morphine and the percentage of morphine in the exhibit was found to be 53.80. This report was forwarded to the Superintendent, NCB, Guwahati Zonal Unit by the then Director In-charge Mr. Upen Bora.*

*Exhibit 6 is his report and Exhibit 6(1) is his signature.*

*Exhibit 7 is the forwarding of the report and Exhibit 7(1) is the signature of Mr. Upen Bora, the then Director, In-charge.*

**28.** An Analysis of the evidence reveals that on a tip off by a secret informer a team of 13 members was formed. All the witnesses PWs-1, 3, 4, 5 and 6 have categorically stated that the team proceeded towards the ISBT and as soon as the three ladies (accused) alighted from the bus, the team identified themselves and they made personnel search as well as search of the articles carried by the ladies as per Section 50 of the NDPS Act. The evidence of PWs-1, 3, 4, 5 and 6 clearly depicts that contraband was recovered from the bag carried by the appellant. The appellant tried to disown the bag and tried to

shift the burden to the co-accused who were acquitted from the corresponding case. This Court is not oblivious to the fact that the procedure was meticulously followed by the NCB team during investigation. It is also true that the evidence of the witnesses are corroborating. It cannot be ignored that despite extensive cross-examination of the witnesses, no contradiction could be elicited as per Section 145 of the Indian Evidence Act, 1872 (the Evidence Act for short) qua 164 Cr.PC. The only flaw which has surfaced through the evidence is that the procedure u/s 52A of the NDPS Act was not followed during the seizure of the articles and the drawing of samples as well as preparation of the inventory.

**29.** The evidence of the witnesses clearly depicts that the Seizing Officer, PW-6 had seized the contraband and the other articles at the place of occurrence. The seizure was conducted as per Standing Order 1 of 1989. The duplicate samples were prepared and one sample was forwarded to the DFS. On the intervening night of 16.10.2015 and 17.10.2015, the articles were seized and thereafter, the appellant along with the co-accused were produced before the CJM on the same day i.e. on 17.10.2015. The seized articles were deposited by PW-6 at NCB godown and he obtained the receipt from the godown in-charge Tulika Morang (PW-3). He also proved the godown receipts as Ext-11. He identified and proved the seized sample as

Material Ext.-6. He identified the contraband consisting of 940 gms of morphine as Material Ext.-1 and the personal belongings of the appellant as Material Ext.-4. The seized articles were forwarded for chemical analysis to the DFS on 19.10.2015.

**30.** The learned counsel for the appellant laid stress in her argument that it has been time and again held by the Hon'ble Supreme Court that the samples from the seized articles has to be drawn in the presence of the Magistrate and the certificate has to be issued by the Magistrate thereafter.

**31.** The learned counsel for the appellant relied on the decision of *Hon'ble the Supreme Court in Mangilal vs. The State of Madhya Pradesh* where in it has been observed and held that:-

**“6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory Rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn .....”.**

**32.** A close scrutiny of the Ext.-24 and the evidence of the witnesses clearly reveals that the samples which were drawn at the place of occurrence were not certified by the Chief Judicial Magistrate as mandated u/s 52A(2) of the NDPS Act. The correctness of the seizure list Ext.-24 was not certified by the Magistrate. Photographs of the contraband or samples were not taken. A

separate inventory was also not prepared by the PW-6. PW-6 has admitted in his cross-examination that he did not seize the articles or prepare the inventory as per Section 52A of the NDPS Act.

**33.** The other flaw in the proceeding is that the prosecution failed to produce the independent witnesses in the Court. The evidence of the witnesses PWs-1, 3, 4, 5 and 6 clearly depicts that the articles were seized in presence of two independent witnesses, Ripon Kalita and Pragya Kalita but they were not produced as witnesses in the Court.

**34.** In this context the prosecution relied on the decision of Hon'ble Supreme Court in *Mukesh Singh v. State (Narcotic Branch of Delhi)*, reported in (2020) 10 SCC 120 wherein it has been observed that:-

*“it is not always necessary to corroborate the testimony of police officials through the testimony of independent witnesses.”*

**35.** However, in this case when the procedure u/s 52A of the NDPS Act was not properly followed, the examination of the independent witnesses was necessary to substantiate the evidence of the official witnesses. The cross-examination of PW-3 reveals that they have not mentioned that they were carrying drug detection kit, bed sheet and departmental seal in their movement order Ext.-9. PW-3 has also admitted that the place of occurrence was a busy area. PW-3 has also admitted that report u/s 57 of the Act was not produced before the Chief

Judicial Magistrate, Kamrup (M). PW-4 admitted in his cross-examination that he did not file any application or petition before the CJM or Special Judge for certifying the correctness of the inventory.

**36.** It has been submitted on behalf of the respondent that Hon'ble the Supreme Court has held in *Gurbax Singh vs. State of Haryana*, reported in (2001) 3 SCC 28 that provisions incorporated in Sections 52 and 57 are directory depending on the facts of the case. However, it was held that police should normally follow the same.

**37.** Relating to the procedure u/s 52A of the NDPS Act a decision of Hon'ble the Supreme Court can be referred with profit. It has been observed by Hon'ble the Supreme Court in *Union of India v. Mohan Lal and Another*, reported in (2016) 3CC 379 that:-

**“15. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application.**

**16. Sub-section (3) of Section 52. A requires that the Magistrate shall as soon as may be allow the application This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the**

supervision of the Magistrate and the entire exercise has to be certified by him to be correct

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19 Mr. Sinha learned Amicus, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons: There is in our opinion no manner of doubt that the seizure of the contraband may be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra) We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions

31.1 No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub- Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading seizure and sampling. The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order."

**38.** Reverting back to the case on hand, it is held that although the NCB team followed a proper procedure, but at the same time, the team failed to follow the procedure as mandated u/s 52A of the NDPS Act. Another discrepancy which thwarts the evidence is that independent witnesses were not examined to substantiate the evidence adduced by the prosecution. Thus it cannot be held that presumption operates against the present appellant.

**39.** It has been held in the case of *Toofan Singh vs. State of Tamil Nadu*, reported in (2021) 4 SCC 1 that presumption and commission of an offence u/s 54 NDPS Act is rebuttable. By projecting the failure of the investigation agency in preparing the inventory of drawing the samples as mandated by Section 52A of the NDPS Act, the appellant could rebut the presumption of possession of illicit articles as well as of culpable mental state. The appellant deserves the benefit of doubt.

**40.** In view of my foregoing discussions, it is hereby held that the prosecution failed to prove conscious possession of contraband by the appellant beyond a reasonable doubt. It is held that the prosecution failed to prove beyond reasonable doubt that the appellant is guilty of offence u/s 21(c) of the NDPS Act. The judgment and order dated 24.01.2017 convicting the appellant Durga Devi u/s 21(c) of the NDPS Act and sentencing her to undergo Rigorous

Imprisonment for 10 years and a fine of Rs. 1 lac is set aside.

**41.** However, keeping in view the provisions of Section 437-A Cr.PC, the appellant Durga Devi is directed to furnish a personal bond in the sum of Rs. 30,000/- (Rupees Thirty Thousand) and a surety bond in the like amount before the learned trial Court, which shall be effective for a period of 6 (six) months to the effect that in the event of filing of a Special Leave Petition against the present judgment on receipt of notice thereof, the appellant shall appear before the Hon'ble Supreme Court.

**42.** Send back the LCR.

**JUDGE**

**Comparing Assistant**