

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc. First Bail Application No. 20 of 2024

Haider @ Langda Applicant

Versus

State of Uttarakhand Respondent

Present:-

Mr. Vinod Sharma, Advocate for the applicant.

Mr. Pankaj Joshi, AGA for the State.

Third Bail Application No. 79 of 2024

Sompal Applicant

Versus

State of Uttarakhand Respondent

Present:-

Ms. Divya Jain, Advocate for the applicant.

Mr. Pankaj Joshi, AGA for the State.

1st bail Application No. 146 of 2024

Deepak Singh Applicant

Versus

State of Uttarakhand Respondent

Present:-

Mr. Shashank Saun, Advocate for the applicant.

Mr. Pankaj Joshi, AGA for the State.

Hon'ble Ravindra Maithani, J. (Oral)

Since in all the bail applications, common question of law has been raised, they are heard together and being decided by this common order.

FACTS:

BA 1 No. 20 of 2024.

2. The applicant Haider @ Langda is in judicial custody in Case Crime No. 392 of 2023, under Section 8/20/27A/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act"),

Police Station Vikasnagar, District Dehradun. He has sought his release on bail.

3. According to the FIR, on 01.10.2023, 1.510 kg. *Charas* was allegedly recovered from the possession of the applicant Haider @ Langda, which he was carrying in his bag.

BA 3 No. 79 of 2024.

4. The applicant Sompal is in judicial custody in FIR No. 329 of 2024, under Sections 8 and 21 of the Act, Police Station Doiwala, District Dehradun. He seeks bail. This is third bail application of the applicant Sompal. His first and second bail applications have been rejected by this Court on 14.03.2024 and 28.11.2024 respectively.

5. According to the FIR, on 23.10.2023, 265 gms. *Smack* was allegedly recovered from the possession of the applicant Sompal.

BA 1 No. 146 of 2024.

6. The applicant Deepak Singh is in judicial custody in FIR/Case Crime No. 132 of 2023, under Section 8/20/60 of the Act, Police Station Clement Town, District Dehradun. He has sought his release on bail.

7. According to the FIR, on 23.12.2023, 1022 gms. *Charas* was allegedly recovered from the possession of the applicant Deepak Singh.

8. Heard learned counsel for the parties and perused the record.

9. Learned counsel for the applicant Haider @ Langda would submit that a mandatory provision of law has been violated in the instant case, therefore, the applicant is entitled for bail. Especially, it is argued that it is a case of non-compliance of provision of Section 52A of the Act. It reads as follows:-

“52A. Disposal of seized narcotic drugs and psychotropic substances.—(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

10. Learned counsel would raise the following submissions in his arguments:-

(i) In view of sub-section (4) of Section 52A of the Act, the certificate prepared by the Magistrate under Section 52A of the Act shall be treated as primary evidence. He would submit that the inventory that is to be prepared by the Magistrate is required to be prepared in a prescribed form.

(ii) In the instant case, the Magistrate has not certified about the inventory under Section 52A of the Act.

- (iii) In absence of certificate certifying the inventory by the Magistrate, there remains no primary evidence.
- (iv) Preparation of inventory and certification of it under Section 52A is mandatory. It is not a choice of the Investigating Officer.
- (v) Referring to Rules 8, 9 and 10 of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022, it is argued that non-compliance of these Rules renders the whole procedure of sampling invalid. These Rules are as follows :-

“8. Application to Magistrate. – After the seized material under the Act is forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53 of the Act or if it is seized by such an officer himself, he shall prepare an inventory of such material in Form-4 and apply to the Magistrate, at the earliest, under sub-section (2) of section 52A of the Act in Form-5.

9. Samples to be drawn in the presence of Magistrate. – After application to the Magistrate under sub-section (2) of section 52A of the Act is made, the Investigating Officer shall ensure that samples of the seized material are drawn in the presence of the Magistrate and the same is certified by the magistrate in accordance with the provisions of the said sub-section.

10. Drawing the samples. – (1) One sample, in duplicate, shall be drawn from each package and container seized.

(2) When the packages and containers seized together are of identical size and weight bearing

identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than ten packages or containers, and for each such lot of packages and containers, one sample, in duplicate, shall be drawn:

Provided that in the case of ganja, poppy straw and hasish (charas) it may be bunched in lots of not more than forty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that representative sample in equal quantity is taken from each package or container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.”

11. Learned counsel for the applicant Haider @ Langda has referred to the judgment in the cases of Yusuf @ Asif v. State, 2023 SCC OnLine SC 1328; Mohammed Khalid and another v. State of Telangana, 2024 SCC OnLine SC 213; Mustkin v. State of Chhattisgarh, Criminal Appeal No. 1442 of 2024; Mangilal v. the State of Madhya Pradesh, Criminal Appeal No. 1651 of 2023.

12. In the case of Yusuf @ Asif (*supra*), the Hon’ble Supreme Court in para 16 observed as follows:-

“16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

13. In the case of Mohammed Khalid (*supra*), the Hon’ble Supreme Court observed that “**Admittedly, no proceedings under**

Section 52-A of the NDPS Act were undertaken by the investigating officer PW 5 for preparing an inventory and obtaining samples in the presence of the jurisdictional Magistrate. In this view of the matter, the FSL report (Ext. P-11) is nothing but a waste paper and cannot be read in evidence.”

14. In the case of Mustkin (*supra*), the Hon’ble Supreme Court granted bail observing that in that case the sampling of alleged contraband was made in violation of Section 52A of the Act.

15. In the case of Mangilal (*supra*), the Hon’ble Supreme Court observed that **“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”**.

16. Learned counsel would also submit that the a person can be deprived of his right to life and liberty only as per the procedure established under law. It is argued that Section 52A of the Act provides for procedure and if the procedure is not followed and inventory is prepared and charge sheet is submitted, it amounts to an incomplete charge sheet. It is also argued that the applicant is a handicapped person.

17. Learned counsel appearing for the applicants Sompal and Deepak Singh also submit that their cases are also cases of violation of Section 52A of the Act, which entitles the applicants to bail.

18. Learned State Counsel would submit that non-compliance of Section 52A of the Act *per se* would not give a right to bail to any accused. He would submit that as the heading of Section 52A suggests, this provision is with regard to disposal of seized narcotic drugs and psychotropic substances, which is other than the trial of accused under the Act. Learned State Counsel also submits as follows:-

- (i) Primary evidence in such cases is recovered article and not the inventory. The inventory under Section 52A of the Act is prepared if the articles are disposed of prior to their production in the court.
- (ii) In the case of Mangilal (*supra*), it is argued that, recovered article was not produced before the court and the provisions of Section 52A of the Act was not followed.

19. Learned State Counsel also referred to the observations made by the Hon'ble Supreme Court in the case of Mangilal (*supra*). In the case of Mangilal (*supra*) the Hon'ble Supreme Court observes as follows:-

“5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such

inventories, photographs and list of samples drawn with certification of Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

8. Before any proposed disposal/destruction mandate of Section 52A of the NDPS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatimwise and keeping them in lots preceded by compliance of the procedure for drawing samples. The afore-stated principles of law are dealt with in extenso in *Noor Aga v. State of Punjab*, (2008) 16 SCC 417:

“89. Guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in *State of Kerala v. Kurian Abraham (P) Ltd.* [(2008) 3 SCC 582], following the earlier decision of this Court in *Union of India v. Azadi Bachao Andolan* [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance

therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

92. Omission on the part of the prosecution to produce evidence in this behalf must be linked with a second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. The respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time had any prayer been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1-B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory, etc. The same does not contain within its mandate any direction as regards destruction.

XXX XXX XXX

95. The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.

96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.

XXX XXX XXX

100. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g)

of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect to the prosecution's endeavour to prove the fact of possession of contraband by the appellant. This aspect of the matter has been considered by this Court in *Jitendra v. State of M.P.* [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] in the following terms: (SCC p. 565, para 6)

“6. ... In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act.”

12. We further find that memorandum under Section 27 of the Act, as witnessed by the two witnesses, P.W.3 and P.W.4 would be of no value in evidence as there is no discovery of new fact involved. Be that as it may, these witnesses also turned hostile. The record would also indicate that an order was passed by the trial Judge permitting the prosecution to keep the seized materials within the police station, to be produced at a later point of time. This itself is a sufficient indication that the mandate of Section 52A has not been followed. There is no explanation either for non-production of the seized materials or the manner in which they are disposed of. No order passed by the Magistrate allowing the application, if any, filed under Section 52A of the NDPS Act. P.W.10, Executive Magistrate has deposed to the fact that he did not pass any order for the disposal of the narcotics substance allegedly seized. Similarly, P.W.12 who is Incharge of Malkhana also did not remember any such order having been passed. On the issue of disposing narcotic substance in derogation of the compliance contained in Section 52A of the NDPS Act, this Court in *Union of India v. Jarooparam*, (2018) 4 SCC 334 has held as follows:

“8. What transpires from the abovequoted paragraph is that after taking out two samples of 30 gm each, the Executive Magistrate returned the entire remaining seized property to the investigating officer PW 6. To further ascertain the same, we have also carefully perused the exact content of the proceedings dated 14-10-2004 (Annexure P-5) recorded by the Executive Magistrate,

Singoli Tappa. The proceedings recorded as far as the respondent herein is concerned, read thus:

Proceedings 14-10-2004:

Case submitted. Shri Harvinder Singh, Inspector (Investigating Officer), Narcotics Bureau, Singoli has submitted three sealed packets of seized stuff in Crime No. 1 of 2004 under Sections 8/18 and 8/29 of the NDPS Act, 1985. These packets were marked A, B and C and the details are given as under:

1-A: On the packet marked "A" it was indicated that packet contains 7.200 kg opium seized from Jaroopram, s/o Ganga Ram Bishnoi. On opening the packet, transparent polythene bag was found, in which again two polythene packets were found. One polythene indicated 4.000 kg and the second one 3.200 kg opium, respectively. A composite sample of 30-30 gm each have been taken from the two packets and kept in a small plastic polythene and marked A-3 and A-4 and sealed. The remaining seized stuff and samples sealed as usual are handed over to the presenting officer Shri Harvinder Singh, Inspector.

9. From the above proceedings, it is crystal clear that the remaining seized stuff was not disposed of by the Executive Magistrate. The contraband stuff as also the samples sealed as usual were handed over physically to the Investigating Officer Harvinder Singh (PW 6). Also the trial court in its judgment specifically passed instructions to preserve the seized property and record of the case in safe custody, as the co-accused Bhanwarlal was absconding. The trial court more specifically instructed to put a note with red ink on the front page of the record for its safe custody. In such a situation, it assumes importance that there was nothing on record to show as to what happened to the remaining bulk quantity of contraband. The absence of proper explanation from the prosecution significantly undermines its case and reduces the evidentiary value of the statements made by the witnesses.

10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of the Court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by

the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is for its disposal is to obtain an order from the competent court of Magistrate as envisaged under Section 52-A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application (see also *Noor Aga v. State of Punjab*, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748).

11. There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the allegedly seized bulk quantity of contraband material nor was any such order passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction/disposal. It is also pertinent here to mention that the trial court appears to have believed the prosecution story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence.

12. Turning to the other discrepancies in the prosecution case, PWs 1 and 2 the independent witnesses portrayed by the prosecution have turned hostile and did not support its case. It is manifest from the record that they had simply put their signatures on the papers at the whims of the investigating agency. Another aspect that goes in favour of the accused is that, the version of prosecution that the respondent voluntarily made the confessional statement cannot be believed in the light of admission by Narcotics Officer (PW 5), a key prosecution witness, that the statement of the respondent-accused under Section 67 of the Act was recorded while he was in his custody and the time was not mentioned on the statements. This fact further gets corroborated with the statement of PW 6 also that the statement of the accused was recorded after arrest and while in custody. Thus, it cannot be said that the statement of the accused confessing the crime was voluntarily made under the provisions of the Act.”

20. In support of his contention, learned State Counsel has also placed reliance on the judgment in the case of *State of Punjab v. Makhan Chand*, (2004) 3 SCC 453.

21. In the case of Makhan Chand (*supra*), an argument was raised on behalf of the accused that Section 52A of the Act requires a particular procedure to be followed for drawing of samples and contended that since this procedure had not been followed, the entire trial was vitiated. On this aspect, the Hon'ble Supreme Court observed as follows:-

“10. This contention too has no substance for two reasons. Firstly, Section 52-A, as the marginal note indicates, deals with “disposal of seized narcotic drugs and psychotropic substances”. Under sub-section (1), the Central Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substances, having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-sections (2) and (3). If the procedure prescribed in sub-sections (2) and (3) of Section 52-A is complied with and upon an application, the Magistrate issues the certificate contemplated by sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) of Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances.

11. Secondly, when the very same Standing Orders came up for consideration in *Khet Singh v. Union of India* [(2002) 4 SCC 380 : 2002 SCC (Cri) 806] this Court took the view that they are merely intended to guide the officers to see that a fair procedure is adopted by the officer in charge of the investigation. It was also held that they were not inexorable rules as there could be circumstances in which it may not be possible for the seizing officer to prepare the mahazar at the spot, if it is a chance recovery, where the

officer may not have the facility to prepare the seizure mahazar at the spot itself. Hence, we do not find any substance in this contention.”

22. Learned State Counsel has also relied on the principle of law as laid down in the judgments of Shovraj v. State Govt. of NCT of Delhi, Bail Application No. 2537 of 2023, Karn @ Karan Kumar Das v. State of Maharashtra, Criminal Application (BA) No. 1135 of 2023, Pavithran v. State of Kerala, AIR OnLine 2017 Ker 2, Ranjit Singh v. State of H.P. and another, Cr. M.P. No. 4162 of 2023, Amt. Anita @ Guddi v. State of Uttarakhand, Second Bail Application No. 602 of 2020 in Criminal Appeal No. 492 of 2019 and Mukesh Rajaram Chaudhary v. The State of Maharashtra, Bail Application No. 54 of 2023.

23. In the case of Shovraj (*supra*), the Hon’ble Delhi High Court discussed the law laid down by the Hon’ble Supreme Court in the case of Yusuf @ Asif (*supra*) and Mohammed Khalid (*supra*) and held as follows:-

“51. Insofar as the judgments in the case of Yusuf v. State (*supra*) and Mohamed Khalid and another v. the State of Telangana (*supra*) are concerned, they appear to be cases where the muddamal or contraband was disposed of. No arguments to the contrary are noted in the judgments. The said judgments, in the opinion of the Court, will not apply in a case where contraband is not destroyed. From a bare reading of these judgments, it is clear that the Hon’ble Supreme Court was dealing with a situation wherein the muddamal or contraband was destroyed and the original seizure of contraband was not available with the court for being proved as per the Indian Evidence Act, 1872.

53. As held by the Hon’ble Apex Court in Mohammed Khalid and another v. The State of Telangana (*supra*), when the contraband is not available as an exhibit, the absence of a certificate under Section 52A of the NDPS Act can be fatal to the case of the prosecution since the very

primary evidence to prove the recovery of the contraband is not available.

54. It is also relevant to note that the Hon'ble Apex Court in *State of Punjab v. Makhan Chand (supra)* had held that Section 52A of the NDPS Act only deals with the disposal of seized narcotic drugs and psychotropic substances and the certificate issued by the Magistrate is to be treated as primary evidence in respect of the offence in terms of Section 52A(2) of the NDPS Act. It was also held that Section 52A(1) of the NDPS Act does not lay down the procedure for search of an accused but only deals with the disposal of seized narcotic drugs and psychotropic substances. It was held as:

"9. Learned counsel for the respondent-accused relied on certain standing orders and standing instructions issued by the Central Government under Section 52-A(1) which require a particular procedure to be followed for drawing of samples and contended that since this procedure had not been followed, the entire trial was vitiated.

10. This contention too has no substance for two reasons. Firstly, Section 52-A, as the marginal note indicates, deals with "disposal of seized narcotic drugs and psychotropic substances". Under sub-section (1), the Central Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substances, having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-sections (2) and (3). If the procedure prescribed in sub-sections (2) and (3) of Section 52-A is complied with and upon an application, the Magistrate issues the certificate contemplated by sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) of Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence.

Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances."

24. In the case of Karn @ Karan Kumar Das (*supra*), the High Court of Judicature at Bombay, Nagpur Bench observed as follows:-

“3. The learned counsel for the applicant Mr. Bhangde submitted that intermediate quantity of 16 Kg 430 Grm was seized from the present applicant. There is no compliance of Section 52-A. The definition of alleged contraband is specifically defined under Section 2(3)(b) the elementary certificate is not in consonance with the definition and Section 52 of the Act which is prepared mechanically and without application of mind. In view of the observation of the Hon'ble Apex Court in the decisions Simarnjit Singh Vs. State of Punjab in Criminal Appeal No.1443 of 2023 (Arising out of S.L.P.(Cri.) No.1958/2023) dated 09.05.2023, Yusuf @ Asif Vs. State in Criminal Appeal No.3191 of 2023 [Arising out of SLP (Cri.) No.3010/2023] dated 13.10.2023 and Mangilal (3) ba.1135.2023 Vs. The State of Madhya Pradesh in Criminal Appeal No.1651/2023 dated 12.07.2023. The non compliance of Section 52-A of the NDPS Act vitiate the trial. In view of that, the applicant be released on bail.

15. While dealing with the question whether this judgment completely take away the discretion of (12) ba.1135.2023 the Court while considering the question of grant or refusal of the bail to an accused under the NDPS Act. This Court at Principal Bench Mukesh Rajaram Chaudhary Vs. State of Maharashtra reported in 2023 SCC OnLine Bom 2096 observed that it is undoubtedly true that when the investigating agency has not followed the procedure under Section 52-A of the NDPS Act, the deeming fiction of photographs, samples etc., being treated as primary evidence as provided under Sub-section (4) of Section 52-A would not be available. However, the question is this the only mode in which the prosecution can establish the charge against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52-A and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provided under Section 52-A before destroying or disposing off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52-A of the NDPS Act. The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the goods have been destroyed with the permission of the Magistrate. In (13) ba.1135.2023 such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52-A of the NDPS

Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it. For example, if the process of taking samples may not be in the presence of the Magistrate, but is shown to be properly followed with the aid of the support of the panch witnesses which the court finds believable and reliable, I do not see how the prosecution case would be destroyed totally. In either of the scenarios noted above, it would be eventually a question of what evidence is brought on record and how such evidence is to be evaluated. Both the aspects are in relation to conduct of trial.”

25. In the case of Pavithran, the Kerala High Court observed as follows:-

“21. In that view of the matter, the mere fact that the Investigating officer has not moved the learned Magistrate under section 52A will not in any way affect the case of the prosecution in the instant case. The very purpose of Section 52A is to ensure that the contraband substance is disposed of under the supervision of a Magistrate and if the Magistrate follows the mandate under Section 52A, then the certificate issued by him is per se admissible in evidence and it is not necessary for the police or the investigating agency to produce the bulk seized material which is the case property before the court. In case Section 52A is not complied with and the seized material is not destroyed, then it is the duty of the prosecution to produce the same before the trial court during the stage of trial. These petitions are accordingly dismissed.”

26. In the case of Ranjit Singh, the Hon’ble Supreme Court observed as follows:-

“4. Mr. George, learned counsel for the applicant submitted that there is a violation of Section 52A of the ND&PS Act. The case property did not remain intact from the time of its seizure till its analysis. These facts show that the appeal is, prima facie likely to succeed. Hence, he prayed that the present application be allowed and the execution of the sentence imposed by the learned Trial Court be suspended during the pendency of the appeal. He relied upon the judgment of the Hon'ble Supreme Court in Mangi Lal Vs. State of Madhya Pradesh 2023 INSC 634 and Anjana Vs. State of Rajasthan 2009 (3) SCC 767 in support of his submissions.

12. Similarly, it was laid down in Sandeep Kumar Vs State of H.P., 2022 Law Suits (HP) 149, that the provisions of

Section 52-A is not mandatory and non-compliance with Section 52-A is not fatal to the prosecution case. It was observed:-

"24. It has also been strenuously argued on behalf of the appellants that the investigating agency had failed to comply with the provisions of Section 52-A of the NDPS Act and thus cast a shadow of doubt on its story. The contention raised on behalf of appellants is that the rules framed for investigations under the NDPS Act are mandatory and have to be strictly followed. Neither the required sample was taken on the spot nor the samples were preserved by complying with Section 52-A of the Act. It has been argued that compliance with Section 52-A of the Act is mandatory.....

xxxxxx

27. The precedent relied upon on behalf of the appellants, however, did not lay down the law that non-compliance with Section 52-A of the Act is fatal to the prosecution case under the NDPS Act. On the other hand, in State of Punjab vs. Makhan Chand, 2004 (3) SCC 453, the Hon'ble Supreme Court while dealing with the question of the effect of non-compliance of Section 52-A has held as under: -

10. This contention too has no substance for two reasons. Firstly, Section 52A, as the marginal note indicates, deals with the of "disposal of seized narcotic drugs and psychotropic substances". Under Sub-section (1), the Central Government, by notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substances having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in Sub-sections (2) & (3). If the procedure prescribed in Sub-sections (2) & (3) of Section 52A is complied with and upon an application, the Magistrate issues the certificate contemplated by Subsection (2), then Sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under Sub-section (2) of Section 52A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52A(1) does not empower the Central Government to lay down the procedure for the search of an accused but only deals with the disposal of seized narcotic drugs and psychotropic substances.

11. Secondly, when the very same standing orders came up for consideration in Khet Singh v. Union

of India, 2002 (4) SCC 380, this Court took the view that they were merely intended to guide the officers to see that a fair procedure is adopted by the Officer-in-Charge of the investigation. It was also held that they were not inexorable rules as there could be circumstances in which it may not be possible for the seizing officer to prepare the mahazar at the spot if it is a chance recovery, where the officer may not have the facility to prepare the of seizure mahazar at the spot itself. Hence, we do not find any substance in this contention."

27. In the case of Mukesh Raja Ram Chaudhary, the Bombay High Court has observed as follows:-

"37. It is undoubtedly true that when the investigating agency has not followed the procedure under Section 52A of the NDPS Act, the deeming fiction of photographs, samples etc. being treated as primary evidence as provided under Sub-section (4) of Section 52A would not be available. However, the question is, is this the only mode in which the prosecution can establish the charge against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52A and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provide under Section 52A before destroying or disposing off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52A of the NDPS Act. The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the goods have been destroyed with the permission of the Magistrate. In such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52A of the NDPS Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it. For example, if the process of taking samples may not be in the presence of the Magistrate, but is shown to be properly followed with the aid of the support of the panch witnesses which the court finds believable and reliable, I do not see how the prosecution case would be

destroyed totally. In either of the scenarios noted above, it would be eventually a question of what evidence is brought on record and how such evidence is to be evaluated. Both the aspects are in relation to conduct of trial. At this stage when the court is concerned with the question of granting or refusing bail, this cannot be the sole consideration. It may be one of the relevant considerations but cannot be the sole consideration on the basis of which the moment it is shown that the procedure under Section 52A of the NDPS Act is not followed, the accused automatically becomes entitled to bail as a matter of right. The rigors of Section 37 of the NDPS Act would continue to apply. Only when the bail court is satisfied that reasonable grounds of believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail, the bail would be granted. I, therefore, do not find any merit in the submission of learned counsel for the applicant that in the present case non-compliance of Section 52A would entitle the applicant to bail.”

28. Learned counsel for the State would also submit that the judgment in the case of Yusuf @ Asif (*supra*) and Mohammed Khalid (*supra*) has not been taken note by the Hon’ble Supreme Court in the case of Makhan Chand (*supra*).

29. Learned counsel for the applicants rejoined to argue that, in fact, the Division Bench of this Court has, on 27.06.2024, in the case of Mohammad Khurshid v. State of Uttarakhand, Bail Application (IA No. 1/2022) in Criminal Appeal No. 383 of 2022, granted bail to the appellant observing that it is a violation of Section 52A of the Act. It is also argued that in the case of conflicting judgments, later judgment would prevail. He would place reliance upon the judgment in the case of Govindnaik G. Kalaghatigi v. West Patent Press Co. Ltd., 1979 Karnataka Series 1401. It was a Full Bench opinion and the Full Bench answered the reference as follows:-

“If two decisions of the Supreme Court on a question of law cannot be reconciled and one of them is by a larger Bench while the other is by a smaller Bench, the decision of

the larger Bench, whether it is earlier or later in point of time, should be followed by High Courts and other Courts. However, if both such Benches of the Supreme Court consist of equal number of Judges, the later of the two decisions should be followed by High Courts and other Courts.”

30. It is a stage of bail. Much of the discussion is not expected of. But, to the extent arguments are raised, particularly on the application of provisions of the Act, appreciation is being made, as Section 52A of the Act deals with disposal of seized narcotic drugs and psychotropic substances.

31. Undoubtedly, a person may not be deprived of his right to life to liberty other than the procedure established by law. In so far as the law of precedence is concerned, the Indian jurisprudence follows common law principle i.e. *stare decisis*.

32. In the case of Union Territory of Ladakh v. Jammu & Kashmir National Conference, 2023 SCC OnLine SC 1140, the Hon’ble Supreme Court made observations with regard to binding effect of judgments and in para 35 observed **“It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in National Insurance Company Limited v. Pranay Sethi, (2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it”**.

33. With regard to the applicability of principle of law as laid down in the case of Makhan Chand (*supra*), learned counsel for the applicants would argue that, in fact, no law has been laid down in the judgment in the case of Makhan Chand (*supra*) in so far as the applicability of Section 52A of the Act is concerned.

34. In fact, this argument has less merits for acceptance. In para 9 of the judgment, the Hon'ble Supreme Court has noted the arguments made in that case on behalf of the accused, where it was argued that the alleged recovery was made, where it has been argued that the alleged recovery was made in violation of Section 52A of the Act, which vitiates the trial. This argument was answered by the Hon'ble Supreme Court by stating that **"Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances."** In that case, the court has upheld the conviction. This principle of law as laid down in the case of Makhan Chand (*supra*) has not been considered in the case of Mangilal (*supra*) and Yusuf @ Asif (*supra*).

35. In view of the discussions made above, this Court is of the view that the bail applications deserve to be rejected.

36. The bail applications are rejected.

(Ravindra Maithani, J)
17.12.2024