

**HIGH COURT OF TRIPURA
AGARTALA
Crl. A. No.27 of 2024**

The State of Tripura,
Represented by the Secretary,
Home Department, Government of Tripura

----- Appellant

Versus

Sri Prasenjit Nath,
S/O Sri Prabhat Nath,
Resident of Padmapur,,
Ward No.20, P.S.- Dharmanagar,
District- North Tripura

----- Respondent

For Appellant(s)	:	Mr. Raju Datta, P.P.
For Respondent(s)	:	Mr. Bhaskar Deb, Adv, Mr. Victor Ghosh, Adv.
Date of hearing	:	17.03.2025
Date of delivery of Judgment & Order	:	26.03.2025
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

This appeal is preferred challenging the judgment and order dated 04.07.2024 delivered by Learned Special Judge (NDPS), North Tripura, Dharmanagar in connection with case No. Special(NDPS) No.42 of 2019. By the said judgment, the respondent was acquitted from the charge levelled against him under Section 21(b) of NDPS Act.

2. Heard Learned P.P., Mr. Raju Datta appearing on behalf of the appellant and also heard Learned Counsel, Mr. Bhaskar Deb along

with Learned Counsel, Mr. Victor Ghosh appearing on behalf of the respondent.

3. At the time of hearing of argument, Learned P.P. drawn the attention of the Court that the Learned Trial Court failed to appreciate the provisions of Section 42, 50 and 57 of the NDPS Act and delivered the judgment acquitting the respondent-accused from the charge of this case. He further submitted that Section 50 of NDPS Act was not applicable in this case but the Learned Court below came to the observation that no notice was served before carrying out the search. In respect of Section 57 of NDPS Act, it was the observation of Learned Court below that the Officer conducting search is duty bound to communicate the arrest and seizure to the superior official but in this case, no such communication is produced or proved by the prosecution before the Learned Trial Court. According to Learned P.P. those documents were available with the record but through *bona fide* mistake, the same documents could not be produced for which the prosecution has submitted another prayer under Section 391 of Cr.P.C. corresponding to Section 432 of BNSS for allowing the prosecution to adduce additional evidence for the sake of justice. It was further submitted that there is every possibility to succeed in the appeal and if the prayer submitted by the prosecution is not allowed then the prosecution would suffer irreparable loss. He also relied upon few citations which would be discussed later on.

4. On the other hand, Learned Counsel for the respondent-accused first of all drawn the attention of the Court that Learned Special Judge (NDPS) after considering the evidence on record rightly

and reasonably delivered the judgment acquitting the respondent-accused from the charge of this case. He further submitted that before the Learned Trial Court, prosecution did not adduce the IO nor took any step to prove the documents which at this stage prosecution refers by submitting a petition for permitting the prosecution to adduce additional evidence. He further submitted that even no such prayer was submitted by the prosecution before the Court of Learned Special Judge (NDPS) as to why the IO was not produced and as to why those documents were not produced and proved. So, he further referred the evidence of PW-5, Rupendra Debbarma who in course of his cross-examination stated that the seizure list and sample drawn memo were written by SI Ratan Rabi Das. The pre-search memo was also written by SI Ratan Rabi Das. He only put his signature on the documents. The said witness further stated that he communicated the information regarding seizure and arrest of the accused to the higher authority but the said fact is not mentioned in the Case Diary and in the *suo motu* FIR and seizure list, he did not mention the specific place in the house of accused from where the contraband was recovered. The IO SI Ratan Rabi Das accompanied with him to the PO. Referring the cross-examination part of the said witness, Learned Counsel for the respondent submitted that said PW-5 was not produced before the Learned Trial Court. Even no step was taken by the prosecution to ensure attendance of the said witness. So, at this belated stage, there is no scope to allow the prayer of prosecution. Furthermore, he submitted that prosecution at this stage is trying to fill up the gap of the prosecution case which is not permissible in the

eye of law and he also relied upon one citation of the Hon'ble Supreme Court of India reported in **(2024) 4 SCC 453** in connection with **Crl. A. No.478 of 2024** [titled as **Ajitsinh Chehuji Rathod v. State of Gujarat and another**] dated **29.01.2024** wherein in para No.8, Hon'ble the Apex Court observed as under:

"8. At the outset, we may note that the law is well-settled by a catena of judgments rendered by this Court that power to record additional evidence under Section 391 CrPC should only be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that non-recording of such evidence may lead to failure of justice."

Referring the same, Learned Counsel for the respondent-accused submitted that from the record of the Learned Court below, it is crystal clear that no such step was taken by the prosecution before the Learned Court below in this regard during trial of the case showing justification as to why those documents as referred now, could not be produced before the Learned Trial Court. Even there was also no such prayer as to why the IO could not be produced. So, at this belated stage there is no scope to consider such prayer and finally urged for dismissal of this appeal.

Further, Learned Counsel also drawn the attention of the Court to the FIR laid by the informant Rupendra Debbarma, SI of Police who was examined as PW-5 and submitted that in the FIR, it was written by the informant that on arrival to the house of Prasenjit Nath, he along with women Constable searched the house in presence of witnesses and after proper searching recovered the contraband items but during his cross-examination, he stated that the seizure list and the sample drawn were written by SI Ratan Rabi Das, the pre-

search memo was also written by SI Ratan Rabi Das and there was huge contradiction between the contents of the FIR and the statement of the witness which the prosecution also failed to explain before the Court and as such, Learned Counsel fairly submitted that the prosecution miserably failed to prove the charge levelled against the respondent-accused before the Learned Trial Court. Thus, the present appeal is not maintainable and urged for dismissal of the same.

5. In this case, the prosecution was set into motion on the basis of an FIR laid by SI Rupendra Debbarma on 15.05.2019 to O/C, Dharmanagar PS alleging inter alia that on 14.05.2019 one ASI Kishore Banik received an information from local public of Padmapur area that one Prasenjit Nath, resident of Padmapur, Ward No.20 stored huge quantum of heroine for the purpose of selling to the local youths at his residence at Padmapur. The matter was entered into Dharmanagar PS GD book and after that, the matter was informed to the higher authority i.e., SDPO Dharmanagar and SP North vide GD Entry No.44 dated 14.05.2019 and Dharmanagar PS DM No.108018-19 dated 14.05.2019 and after that on the basis of information, the informant along with SI Ratan Rabi Das and other men and women police personnel went to the place of occurrence and conducted search in the house of Prasenjit Nath and according to him, he along with constable Moushumi Paul started searching the house of Prasenjit Nath after preparing pre-search memo and obtaining search authorization letter from O/C, Dharmanagar PS and during search he found some contraband items and accordingly seized the same in presence of witnesses from the possession of Prasenjit Nath and as he

could not show any valid documents, he was taken into custody and hence, the informant laid the FIR. Accordingly, on the basis of his FIR, Dharmanagar PS case No.61/2019 under Section 21(b)/29 of NDPS Act was registered. The accused was produced before the Court and after completion of investigation, charge-sheet was submitted against him. Learned Special Judge (NDPS) framed charge under Section 21(b) of NDPS Act against the respondent-accused.

To substantiate the charge, prosecution before the Learned Trial Court has adduced in total 6 nos. of witnesses and relied upon some documents which are marked as Exhibits in this case.

Prosecution Witnesses :

1. PW-1: Smt. Moushumi Paul
2. PW-2: Sri Biswajit Sutradhar
3. PW-3: Sri Abhijit Mallik
4. PW-4: Mr. Suman Kumar Chakraborty
5. PW-5: Sri Rupendra Debbarma
6. PW-6: Sri Kishore Banik

Exhibits of the prosecution :

1. Exbt.1/1, 2/2 and 3/1- Signature of PW-2 on sample drawn memo, seizure list and pre-search memo.
2. Exbt.4- Signature of PW-4 on SFSL report.
3. Exbt.3(as a whole)- The pre-search memo and signature of PW5 on the same.
4. Exbt.2(as a whole)- Seizure list and signature of PW5 on the same.
5. Exbt.1(as a whole)- Sample drawn memo and signature of PW5 on the same.
6. Exbt.5(as a whole)- Ejahar and signature of PW on the same.

Finally, on conclusion of trial, Learned Special Judge (NDPS) acquitted the respondent-accused from the charge of this case and challenging the judgment, this present appeal is filed before this High Court.

6. I have heard the submission of both the sides at length and perused the record of the Learned Court below and also the citations

as referred by Learned Counsel for both the sides. In course of hearing of argument, Learned P.P. appearing on behalf of the State drawn the attention of the Court referring Section 50 of NDPS Act and submitted that Learned Special Judge (NDPS) at the time of disposal of the case wrongly came to an observation that no notice upon the respondent-accused was issued under Section 50 of NDPS Act. But in this regard, he drawn the attention of the Court referring the judgment of the Hon'ble Apex Court reported in **2023 SCC OnLine SC 1262 [titled as *Ranjan Kumar Chadha v. State of Himachal Pradesh* dated 06.10.2023]** wherein in para No.36, Hon'ble the Apex Court observed as under:

"36. Considering the aforesaid provisions, the inference which can be drawn is that "to search any person" would mean only search of the body or wearing apparels of such person and in that case the procedure which is required to be followed would be the one prescribed under Section 50 of the NDPS Act. In contrast, if search of any building, conveyance or place, including a public place, is to be carried out, then there is no question of following the procedure prescribed under Section 50. However, when a suspected or arrested person is to be searched, then the procedure prescribed under Section 50 comes into operation and the procedure thereunder is required to be followed. This can be seen by referring to Section 100(3) of the CrPC 1973 which provides that where any person is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency. The concealment which is suspected is on the person or about his person."

Referring the same, Learned P.P. drawn the attention of the Court that in this case no notice was required to be served under Section 50 of NDPS Act since the contraband item was recovered from the residence of the respondent-accused not from the person of the respondent-accused but the Learned Special Judge (NDPS) came to the observation that notice was required to be served under Section

50 of the NDPS Act upon him which the prosecution failed to explain but in view of the principle laid down by the Hon'ble Apex Court in the aforementioned case, no notice was required to be served upon the respondent-accused.

Learned P.P. further drawn the attention of the Court referring another citation of the Hon'ble Apex Court in **Ashok Tshering Bhutia v. State of Sikkim** dated **25.02.2011** reported in **(2011) 4 SCC 402** wherein in para No.32, Hon'ble the Apex Court observed as under:

"32. In view of the above, the law on the point can be summarized to the effect that additional evidence can be taken at the appellate stage in exceptional circumstances, to remove an irregularity, where the circumstances so warrant in public interest. Generally, such power is exercised to have formal proof of the documents, etc. just to meet the ends of justice. However, the provisions of Section 391 CrPC cannot be pressed into service in order to fill up lacunae in the prosecution case."

Referring the same, Learned P.P. drawn the attention of the Court that since in this case, the required documents could not be proved by the prosecution before the Learned Special Judge (NDPS) as such, there is no bar to approach to the Appellate Court for allowing the prayer of the prosecution to adduce additional evidence.

He also referred another citation of the Hon'ble Supreme Court in **State of Gujarat v. Mohanlal Jitamalji Porwal and another** dated **26.03.1987** reported in **(1987) 2 SCC 364** wherein in para No.5, Hon'ble the Apex Court further observed as under:

5. The next question which arises is as regards the request made by the learned Assistant Public Prosecutor for adducing additional evidence in order to prove letter Ex. 26 received from the Mint Master certifying that the article in question was made of gold of the purity of 99.60. The request was made in order to invoke the powers of the court under Section 391 of the Code of Criminal Procedure, 1973, which inter alia provides that in dealing with any

appeal under Chapter 29 the appeal court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself or ask it to be taken by a magistrate. The High Court rejected the prayer on the ground that it did not consider it "expedient in the interests of justice to open a new vista of evidence" in view of the fact that the offence had taken place six years back. The mere fact that six years had elapsed, for which time-lag the prosecution was in no way responsible, was no good ground for refusing to act in order to promote the interests of justice in an age when delays in the court have become a part of life and the order of the day. Apart from the fact that the alleged lacuna was a technical lacuna in the sense that while the opinion of the Mint Master had admittedly been placed on record it had not been formally proved the report completely supported the case of the prosecution that the gold was of the specified purity. To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender. Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The Community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the Community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The Community or the State is not a persona-non-grata whose cause may be treated with disdain. The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest. The High Court was therefore altogether unjustified in rejecting the application made by the learned Assistant Public Prosecutor invoking the powers of the court under Section 391 of the Code of Criminal Procedure. We are of the opinion that the application should have been granted in the facts and circumstances of the case with the end in view to do full and true justice. The application made by the learned Assistant Public Prosecutor is therefore granted. The High Court will issue appropriate directions for the recording of the evidence to prove the report of the Mint Master under Section 391 CrPC when the matter goes back to the High Court and is listed for directions. The appeal is therefore allowed. The order of acquittal is set aside. The matter is remitted to the High Court for proceeding further in accordance with law in the light of the abovesaid directions.

Referring the same, he further submitted that there is no bar to allow the prayer of the prosecution to adduce additional evidence.

He further referred another citation of the Hon'ble Apex Court in **Brigadier Sukhjeet Singh (retired) MVC v. State of Uttar Pradesh and others** dated **25.01.2019** reported in **(2019) 16 SCC 712** wherein in para Nos.22, 23 and 24, Hon'ble the Apex Court observed as under:

"22. Chapter XXIX of the Code of Criminal Procedure, 1973 deals with "Appeals". Section 391 CrPC empowers the appellate court to take further evidence or direct it to be taken. Section 391 is as follows:

"391. Appellate court may take further evidence or direct it to be taken. (1) In dealing with any appeal under this Chapter, the appellate court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the appellate court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the appellate court, and such court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

23. The key words in Section 391(1) are "if it thinks additional evidence to be necessary". The word "necessary" used in Section 391(1) is to mean necessary for deciding the appeal. The appeal has been filed by the accused, who have been convicted. The powers of the appellate court are contained in Section 386. In an appeal from a conviction, an appellate court can exercise power under Section 386(b), which is to the following effect:

"386. (b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;"

24. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the appellate court to secure ends of

justice. The scope and ambit of Section 391 CrPC has come up for consideration before this Court in *Rajeswar Prasad Misra v. State of W.B.* :AIR 1965 SC 1887 Hidayatullah, J., speaking for the Bench held that a wide discretion is conferred on the appellate courts and the additional evidence may be necessary for a variety of reasons. He held that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. Following was laid down in paras 8 and 9: (AIR p. 1892)

"8. ... Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if was possible) to list here. We do not propose to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise.""

Referring the aforesaid citation, Learned P.P. reiterated the same submission as made by him earlier regarding scope for adducing additional evidence and finally, he referred one citation of this High Court dated **17.02.2025** passed in **Crl. App. No.8 of 2024** and urged for allowing the prayer of the prosecution.

7. I have perused the said citations of the Hon'ble Apex Court and this High Court referred by Learned P.P. representing the appellant. For the sake of convenience, I would like to refer herein below the provision of Section 391 of Cr.P.C corresponding to Section 432 of BNSS which provides as under:

Section 391 of Cr.P.C.

391. Appellate Court may take further evidence or direct it to be taken.- (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

Section 432 of BNSS

Appellate Court may take further evidence or direct it to be taken [S.432]

432. Appellate Court may take further evidence or direct it to be taken.- (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his advocate shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

From the aforesaid provision, it is clear that the Appellate Court has got the power to allow the prayer for adducing additional

evidence if it thinks to be necessary, provided the power must be exercised sparingly and only in suitable cases.

Here in the case at hand, from the FIR laid by the informant dated 15.05.2019 it appears to this Court that in the FIR it was written by the informant that on the alleged day he conducted search along with one Moushumi Paul and prepared pre-search memo and also seized the contraband items. But surprisingly, when he appeared before the Court to depose as a witness, during his cross-examination, he specifically stated that the seizure list and the sample memo were drawn by SI Ratan Rabi Das and the pre-search memo was also written by SI Ratan Rabi Das and further, he stated that he communicated the information to the higher authority but surprisingly that document was not proved through the evidence of said witness by the prosecution before the Learned Special Judge (NDPS). Furthermore, prosecution also failed to produce said SI Ratan Rabi Das before the Learned Special Judge (NDPS) to substantiate the allegation of the prosecution. Even no such prayer was submitted by the prosecution before the Learned Trial Court to prove those documents. There was no explanation from the side of the prosecution as to why the IO was not produced before the Learned Trial Court. Now if we go through the evidence of PW-6, who in his deposition stated that on 14.05.2019 he was performing GD duty from 2 pm when he received an information and he entered the information in GD book vide No.44 thereafter, he informed the matter to O/C, PS and the information was thereafter communicated to SP of the District and after that, they went to the PO. But surprisingly

prosecution also did not take any step to prove that information/document through the evidence of said PW-6. Even PW-5 nowhere stated that he was authorized to carry out search. Although in the FIR and also in his examination-in-chief he stated that he prepared pre-search memo and also seized the offending article but during cross-examination, he stated that pre-search memo and seizure list were prepared by SI Ratan Rabi Das. There was serious discrepancy and contradiction in the evidence of said witness PW-5 in his examination-in-chief and cross-examination. Prosecution failed to explain all these loopholes before the Learned Trial Court and before this Court at the time of hearing. Furthermore, seizure also could not be proved by the prosecution in course of trial in accordance with law. PW-2, Biswajit Sutradhar is a public witness who stated that he signed some documents as per instruction of the IO but said witness also not declared by the prosecution. Situated thus, it appears that the prosecution has miserably failed to conduct the case before the Learned Trial Court properly. So, Learned Special Judge, in my considered view rightly and reasonably delivered the judgment of acquittal in this case. The citation as referred by Learned P.P. are no doubt significant but the principles of those citations could not be applied in this case since there was no any attempt or effort from the side of prosecution before the Learned Trial Court to prove the relevant documents which at this belated stage prosecution intended to prove by submitting prayer for permitting to adduce additional evidence. Even the IO was also not produced before the Court by the prosecution to substantiate the evidence of PW-5 i.e. the informant of

this case. As such, I do not find any error or illegality in the judgment of Learned Special Judge (NDPS) to be interfered with.

8. In the result, the appeal filed by the prosecution deserves no consideration. Accordingly, the same is dismissed. The judgment and order of acquittal dated 04.07.2024 delivered by Learned Special Judge (NDPS), North Tripura, Dharmanagar in connection with case No. Special(NDPS) No.42 of 2019 is hereby affirmed and the same is upheld accordingly. The prayer submitted by the prosecution under Section 391 of Cr.P.C. corresponding to Section 432 of BNSS is accordingly stands dismissed being devoid of merit.

With this observation, this appeal stands disposed of.

Send down the record of the Learned Court below along with a copy of this judgment and Order.

Pending applications(s), if any, also stands disposed of.

JUDGE

