

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 27TH DAY OF NOVEMBER 2015/6TH AGRAHAYANA, 1937

CRL.A.No. 758 of 2004 (A)

AGAINST THE JUDGMENT IN CC 2/2003 of SPL. COURT (NDPS ACT CASES),
THODUPUZHA DATED 31-03-2004

APPELLANT/ACCUSED::

SANTHOSH, S/O. NANDANAN NAIR,
AGED 38 YEARS, THANNIPARA HOUSE, MANKUA KARA
KONNATHADY VILLAGE.

BY ADVS.SRI.C.M.TOMY
SRI.MATHEW SKARIA

RESPONDENT/COMPLAINANT::

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

By P.P.SRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-10-2015,
THE COURT ON 27.11.2015 DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.758 of 2004
.....

Dated this the 27th day of November, 2015

JUDGMENT

The accused in C.C.No.2/2003 on the file of the Special Judge for N.D.P.S Cases, Thodupuzha is the appellant herein.

2. The appellant was charge sheeted by the Circle Inspector of Police, Adimaly in Crime No.83/2001 of Vellathooval police station under sections 20(a) read with section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the NDPS Act').

3. The case of the prosecution in nutshell was that, on 12.3.2001, at about 1.30 p.m, the accused was found to be in possession of 300 grams of dried ganja in his residential house and he had also cultivated ganja plants in the property in his possession and thereby he had committed the offence punishable under sections 20(a) read with section 20(b)(i) of the NDPS Act.

4. After investigation, final report was filed before the Special Court by the investigating officer. After receiving the final report, the Special Judge took cognizance of the case as

C.C.No.2/2003. When the accused appeared before the court below, after hearing both sides, charge under section 20(a) read with section 20(b)(i) and section 20(b)(ii)(A) of the NDPS Act as to be stood amended as per the NDPS (Amendment Act), 2001 and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 10 were examined and Exts.P1 to P14 and Mos 1 to 3 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under section 313 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and he has been falsely implicated in the case at the instigation of one Tomy and Augustine, who were in enmical terms with him and he was taken into custody while he was returning home from the road and he has been falsely implicated in the case. No defence evidence was adduced on his side except marking Exts.D1 and D1(a), the contradiction in the 161 statement of PW5 during cross examination. After considering the evidence on record, the court below found the appellant

guilty under section 20(a) read with 20(b)(i) (A) of the NDPS Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of Rs.10,000/-, in default to undergo rigorous imprisonment for six months under section 20(a) of the NDPS Act and further sentenced to undergo rigorous imprisonment for six months under section 20(b)(ii)(A) of the NDPS Act and directed the sentences to run consecutively one after the expiry of the other. Set off was allowed for the period of detention already undergone under section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard counsel for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that the court below has not properly appreciated the evidence. There is no evidence to show that the accused was in possession of the land or house in question from where the ganja plants and dried ganja were seized so as come to the conclusion that he was in exclusive possession of the property so as to convict him for the possession of ganja and also cultivation of ganja in the property.

The court below had relied on the evidence of the Village Officer, PW8 and Exts.P13 and P14 to prove possession of the property. It will be seen from the evidence of PW8 that it was a Government purampoke land and no possession certificate can be given in respect of that land and he also admitted that there was no document in the village office to show that the accused was in possession of the house or the property. Further, there is no evidence adduced from the side of the prosecution to prove that the house from where the alleged contraband article was seized is in the possession of the accused or owned by him so as to come to the conclusion that he was in conscious possession of the contraband article and there is no possibility of any other person keeping the same in the house. Further, the independent witnesses to the seizure, Pws 2 and 3, have not supported the case of the prosecution regarding the seizure but only stated that they came to the house after seizure and they have only signed the documents as directed by the detecting officer, the Sub Inspector of Police, Vellathooval and not seen actual seizure of any article from the house or from the property. So, their evidence is not helpful to prove the search as such. Further, it was brought out in the evidence that they

have got some enmity with the accused and there were litigations between them in respect of the same property and as such, they cannot be treated as independent witnesses as required under law to prove the seizure. Further, the court below should not have relied on Ext.P14 possession certificate given by PW8 to prove ownership and possession of the property as it was the material collected during investigation by the investigating officer and the contents in that letter is hit by section 162 of the Code. Further there is non compliance of the mandatory procedural formalities. Though PW1 had stated that he had recorded the reliable information received and forwarded the same to his superior officer immediately, there is no evidence to prove that fact. The original report said to have been prepared was not produced in court. Further, there was no endorsement on Ext.P1 that it was delivered on the superior officer on the same day as required under section 42(2) of the NDPS Act which is mandatory in nature. Further, the officer through whom it was sent to be delivered was also not examined. Further, immediate superior officer of PW1 is the Circle Inspector of Police, Adimaly and there is no evidence to show that he was not available on that day so as to deliver

original of Ext.P1 to the Deputy Superintendent of Police, who was not examined in this case. So, under the circumstances, the court below was not justified in convicting the appellant for the offence alleged. He had relied on the decisions reported in **C. Chenga Reddy and others v. State of Andhra Pradesh** (AIR 1996 SC 3390), **Rajeevan and Others v. Superintendent of Police, Cochin and Another** (2011(1) KHC 738), **Jose v. State** (1997 (1) KLT 551), **Naushad v. State of Kerala** (2000 (1) KLT 785) and **State of Punjab v. Balbir Singh** (AIR 1994 SC 1872) in support of his case.

7. On the other hand, learned Public Prosecutor submitted that the evidence adduced on the side of the prosecution proved the case of the prosecution beyond reasonable doubt and it was brought out in the evidence of Pws 2, 3 and 5 that the accused was in possession of the house and the property and it was from where the articles were seized. Even assuming that Ext.P14 cannot be relied on, the evidence of ocular and neighbouring witnesses is sufficient to prove the possession of the house and the property with the accused. There is compliance of formalities required under law and as such, the prosecution has proved the case against the accused and the court below was

perfectly justified in convicting the appellant for the offence alleged.

8.The case of the prosecution as emerged from the prosecution witnesses was as follows:

On 12.3.2001, while PW1, the Sub Inspector of Police, Vellathooval police station along with PW7, the police constable attached to that police station, were doing patrol duty in Kambalikandam and Vellathooval areas. While so on the way, PW1 got information that ganja was stored in the house of Thannippara Santhosh Mankuva and they immediately came to the police station and recorded the reliable information received and prepared original of Ext.P1 report and sent the same to the Deputy Superintendent of Police, Adimaly, his superior officer as Circle Inspector of Police was not available on that day, as required under section 42(2) as then stood of NDPS Act. Thereafter he sent original of Ext.P2 letter through PW7 to PW4, the Principal of Government Higher Secondary School, Vellathooval, to witness the seizure and accordingly PW4 came to the police station and PW1 along with PWs 4 and 7 and others went to the house of the accused. He sent the original of Ext.P3 search memorandum to court. After reaching

the house of the accused, he saw the accused in the house. He conducted search of the house in the presence of Pws 2 and 3 and PW4, a Gazatted officer, and found a plastic bag in the corner portion of the room on the southern side of the house. He examined the plastic bag and found a packet covered with paper and he opened the same and found that it was dried ganja. He asked PW7, the police constable, to get the balance and weighing stones. It was taken from the shop of PW5. Thereafter the ganja was weighed and found that it was having weight of 300 grams. Thereafter he took two samples of 25 grams each from the ganja and packed and sealed the same and affixed label containing the signature of himself, witnesses and the accused. He had packed the remaining ganja in the same paper and sealed and labelled the same in the same fashion. The sample packets after chemical analysis were identified as MO1 series and the bulk ganja seized was identified as MO2.

9. Thereafter when he examined the property, he found two ganja plants with flowering tops, which was planted by the accused and he had plucked the same and packed and sealed the same in the same manner and seized the samples of ganja,

remaining ganja and the ganja plants after describing the same in Ext.P6 search list cum seizure mahazer in the presence of Pws 2 to 4. The label affixed on MO1 series and the remaining ganja packets were identified as Ext.P4 series, while the label affixed on MO3 was identified as Ext.P5. He arrested the accused and prepared Ext.P7 arrest memo and intimated his arrest to his wife and thereafter came to the police station and registered Ext.P8 First Information Report as Crime No.83/2001 of Vellathooval police station under sections 20(b) (i) and 20(a)(i) of the NDPS Act against the accused. He produced the accused before court along with the remand report. He prepared Ext.P9 property list and produced the same before court along with the contraband articles seized. He sent Ext.P10 report regarding the things transpired after sending Ext.P1 report as contemplated under section 57 of the Act to the Deputy Superintendent of Police, Munnar. He sent Ext.P11 forwarding note to court with a request to send the sample for analysis and the same was sent for analysis from court and Ext.P12 chemical analysis report obtained which shows that the sample sent was ganja.

10. The earlier part of the investigation in this case was

conducted by PW9, the then Circle Inspector of police, Adimaly police station. He verified the investigation conducted by PW1 and recorded the statement of CW8. Further investigation was conducted by PW8, his successor Circle Inspector of police, Adimaly. As per the request of the investigating officer, PW8-the Village Officer, Konnathady prepared Ext.P13 site plan of the place of occurrence and issued Ext.P14 possession certificate of the property in question. Pw10 verified the records and investigation conducted by his predecessor and prepared draft final report. PW6 after verification of the records, submitted final report in this case.

11. Before going to the facts of the case, let me consider the relevant provisions stood at that time regarding the formalities to be complied for conducting search. Section 42 of the NDPS Act deals with power of entry, search, seizure and arrest without warrant or authorization, which reads as follows:

42. Power of entry, search, seizure and arrest without warrant or authorization:- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of

the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and

any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence of facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior”.

12. Section 57 of the Act deals with procedure to be followed after arrest and seizure, which reads as follows:

“57. Report of arrest and seizure:- Whenever any person

makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior”.

13. Section 20 of the Act deals with punishment for contravention in relation to cannabis plant and cannabis prior to the amendment as follows:

“20. Punishment for contravention in relation to cannabis plant and cannabis:- Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder:-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable-

[(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b),-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months,

or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.]

14. Prior to the amendment, as per Section 42 of the Act, an empowered officer on receipt of reliable information regarding the commission of the offence, he has to record the reliable information in writing or record grounds for such belief under proviso to section 42(1) and forthwith send a copy thereto to his immediate superior officer. As per Section 57 of the Act as it stood then, whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight

hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

15. In the decision reported in **State of Punjab v. Balbir Singh** (AIR 1994 SC 1872), the Hon'ble Supreme Court has held that procedure under sections 41(1), (2) and 42(1) are mandatory in nature.

It is observed in this decision that:

“Under section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc, when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Ss.41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by any one other than such officers, the same would be illegal. Under S.41(2) only the empowered officer can give the authorization to his subordinate officer to carry out the arrest

of a person or search as mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction. Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to S.42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the

belief while carrying out arrest or search as provided under the proviso to S.42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements affects the prosecution case and therefore vitiates the trial.

It is also observed in the same decision that:

Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to S.42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision, the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not will be a question of fact in each case. If a police officer, even if he happens to be an “empowered” officer while effecting an arrest or search during normal investigation into offences purely under the provisions of the Cr.P.C fails to strictly comply with the provisions of Ss.100 and 165 Cr.P.C including the requirement to record reasons, such failure would only amount to an irregularity. If an empowered officer or an authorized officer under S.41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C namely Ss.100 and 165 Cr.P.C and if there is no strict compliance with the provisions of Cr.P.C, then such search would not per se be illegal and would not vitiate the trial. The effect of such failure has to be borne in

mind by the courts while appreciating the evidence in the facts and circumstances of each case”.

16. It is clear from the above dictum that, if an officer has got information regarding the concealment of any narcotic drugs and psychotropic substances and if he has got prior information regarding the same from any person, then that should be necessarily taken down in writing and he can conduct search on the basis of that information without getting a warrant before the sunrise and sunset. But, if he had to conduct search after sunset and before sunrise, as per the proviso, he will have to record his grounds of belief that such offence is likely to be committed and in order to prevent the delay and if it is delayed, there is a possibility of evidence being destroyed, then he will have to record his ground for belief before proceeding to that place. In the first case, the grounds for his belief need not necessarily be recorded, but in the latter case, it must be recorded. To that extent, the provision is mandatory. Further, prior to the amendment, the officer who records the information in writing or grounds of his belief as provided under section 42(1) of the Act, he must send a copy of the same to his immediate superior officer forthwith. These

are intended to safeguard the interest of the accused in such cases and as a precaution to manipulate documents later and to avoid all unnecessary harassment, non compliance of this vitiates trial. With these principles in mind, the case in hand has to be considered.

17. In this case, the prosecution relied on the evidence of PW1, the detecting officer, PWs2, 3 and 5, the independent witnesses, PW4-the Gazetted Officer, who was present at the time of seizure, and PW7-the police constable, who accompanied PW1 on that day. PW1 had categorically stated that, on 12.3.2001, there was a general strike and he was doing patrol duty in Parathod and Vellathooval areas and when he reached Vellathooval town, he got a reliable information that Thannippara Veetil Santhosh of Mankuva kara had kept dried ganja in his house. Immediately he came to the police station at 1.30 p.m and he had recorded that fact in the general diary. Since his immediate superior officer, the Circle Inspector, was not available, he informed the same to the Deputy Superintendent of Police, Munnar over phone and recorded the information in writing and sent the same to Deputy Superintendent of Police, Munnar and Ext.P1 is the copy of such

information sent. Thereafter he gave Ext.P2 letter to PW4, the Principal of Higher Secondary School, Vellatthooval to accompany him to conduct the search. Thereafter he sent Ext.P3 search memo to court and went to the house of the accused and conducted search and at that time, the accused Santhosh was there in the house. When they conducted search, they found a plastic bag kept in the corner of the southern room of the house and when he examined the same, he found that it contained a paper packet. When he opened the same, he found that it was dried ganja. Thereafter, he took the sample, sealed the same and affixed label containing the signature of himself, the witnesses and the accused and thereafter packed, sealed and labelled the remaining ganja in the same manner. Thereafter he examined the surroundings of the house and found on the north eastern corner of the property two ganja plants with flowering tops. He plucked the same, packed, sealed and labelled the same also in the same manner. He arrested the accused, prepared search list cum mahazer in the presence of PWs 2 and 3. He had brought the scale and weighing stones from the house of PW5 for the purpose of weighing the ganga. The evidence of PW1 in this case was

corroborated by the evidence of PW4-the Gazetted Officer, and PW7-the police constable who accompanied him. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. Though Pws 2 and 3 did not support the search as such, both of them admitted that they came to the house as requested by the Sub Inspector and they were present at the time when the articles were seized and they signed Ext.P6 mahazer and also in the paper slips Ext.P4 series and Ext.P5. They also admitted that the accused was arrested from that house. PW5 also admitted that he reached the house as requested by the police and he had seen seizure of the article from the house where the accused was said to be residing. The fact that they are neighbours of that house was not challenged. It was only brought out that there was some litigations pending between the relatives of the accused and the witnesses Pws 2 and 3 and PW5 is the father of PW2. But they have categorically stated that they have no enmity with the accused. They denied the suggestion that the accused was falsely implicated by the police at their instigation. So it can be safely concluded that the prosecution has proved beyond reasonable doubt that the ganja was seized from the house in

which the accused was alleged to be residing.

18. Mere seizure of certain articles from the house alone is not sufficient to convict the accused. It must be proved by the prosecution that he was in exclusive possession of the house and it was he who had kept the articles in the house and it was he who had cultivated ganja in the property. In order to attract an offence of cultivating ganja and keeping possession of ganja in the house under section 20 of the NDPS Act, there were no documents produced to prove that the accused was either the owner or occupier of the house or the property. It was admitted by PW8, the Village Officer, that there was no document available in the office to prove that the property or house was in the possession of the accused at the relevant time. He had prepared Ext.P13 site plan and issued Ext.P14 possession certificate only on the basis of some enquiry said to have been made by him. It was also admitted by him that it is a Government purmabokey land and there is a circular issued by the Government that no possession certificate can be given in respect of possession of property to any one. It is true that, as part of the investigation, for the purpose of proving possession in such cases, materials from local authorities or Village Officer

can be obtained. But even for that purpose, there must be some material available so as to prove that he was in exclusive possession of the same and there was no possibility of any other person having any access to that house. No ration card issued in the name of the house was seized by the detecting officer or the investigating officer.

19. In the decision reported in **Rajeevan and Others v. Superintendent of Police, Cochin and Another** (2011(1) KHC 738) relying on the decision reported in **Kali Ram v. State of H.P** (AIR 1973 SC 2773), the three Bench of the Supreme Court, it has been held that any document obtained by the investigating officer in the form of a reply from any witness like executive officer to prove a particular fact, then it will be a material collected under section 161 of the Criminal Procedure Code and that is hit by section 162 of the Criminal Procedure Code and that can be used only for the purpose of corroboration or contradiction and it cannot be treated as a substantive evidence as it is inadmissible in evidence. So Ext.P14 possession certificate issued by PW8 as such is not sufficient to prove the possession of the property and the house by the accused as claimed by the prosecution. The same

view has been reiterated in the decision reported in **Jose v. State** (1997 (1) KLT 551).

20.Further, there is contradictions in the evidence of PWs 2, 3 and 5 as to who are all the persons residing in the house. They have not stated that the accused had cultivated ganja in the property. Further, there is dispute regarding the possession of the property between the witnesses Pws 2 and 5 and the accused as well which is clear from the evidence of Pws 2, 3 and 5. It was also stated by PW4 that accused was not there at the time when they went there and he came there only later. According to PW4, it was the accused who had told that ganja was cultivated in the property and it was cultivated by him. It is on that basis that the ganja plants were seized. But PW1, the detecting officer had no such case. Though there is some discrepancy regarding the time at which the letter was given to PW4 by PW1, in the evidence of PW4 and PW1 and in Ext.P7 that is not a ground to disbelieve his evidence regarding his presence at the time of seizure. None of the independent witnesses have stated that they have seen the ganja plants being removed in their presence. So under the circumstances and also in the absence of any evidence to prove that the

accused was in possession of the property, merely because some ganja plants were seen in the property alone is not sufficient to come to the conclusion that it was cultivated by him so as to convict him for the offence under section 20(a) of the NDPS Act. Appreciation of evidence in the absence of acceptable evidence and relying on the conflicting evidence given by Pws 2, 3 and 5 in this regard and convict the accused for the offence under section 20(a) of the NDPS Act is unsustainable in law and he is entitled to get acquittal of that charge levelled against him giving him the benefit of doubt.

21. As regards seizure of the articles from the house and connected the same with the accused is also concerned, there is no documentary evidence available to prove that the accused was in exclusive control over the property in which the house was situated. The case of the prosecution was that the accused had kept the ganja and cultivated ganja in the house and property owned and possessed by him. But there is no acceptable evidence adduced on the side of the prosecution to prove that the accused was in possession of the house and the property so as to infer conscious possession of the article said to have been seized from that house. The evidence of PWs 2,

3, 4 and 7 and that of the detecting officer-PW1 are contradictory to each other in this regard. The evidence of PW8-the Village Officer in the absence of any document available to prove his possession is not sufficient to come to the conclusion that the accused was in possession of the property and the house so as to infer constructive possession of the contraband article said to have been seized from the house. Unless the prosecution is able to prove that the accused is in exclusive possession and domain over the house and property from where the contraband articles were seized, it cannot be said that the prosecution has proved beyond reasonable doubt that the accused was in possession of the contraband article seized and it was he who had cultivated ganja in the property as found by the court below and consequential conviction entered by the court below for the said offence is unsustainable in law and the same is liable to be set aside.

22. Further, as per sections 42(1) and (2) of the NDPS Act as it stood prior to the amendment when the empowered officer received a reliable information regarding concealment of sample in a building, there is a duty cast on the empowered officer to record the information received by him in writing

and send a copy of the same to his immediate official superior forthwith before proceeding to the place where the contraband articles were said to have been kept for the purpose of search and seizure. In this case, PW1 had stated that since the Circle Inspector of Police was not available, he had contacted the Deputy Superintendent of Police, Munnar over phone and informed the same and thereafter prepared original of Ext.P1 and sent the same to Deputy Superintendent of Police, Munnar. But, there is no document produced to prove that this letter was served on the Deputy Superintendent of Police, Munnar on the same day. There is no endorsement obtained on Ext.P1 regarding service of the same. There is no document summoned from the concerned office of the Deputy Superintendent of Police to prove that this was sent by PW1 on the same day on getting information regarding keeping of ganja in the house of the accused and that was received by the Deputy Superintendent of Police on the same day. Mere production of a copy of the report without any endorsement of delivery of the same to the concerned officer will not be sufficient to prove the compliance of section 42(1) and 42 of NDPS Act which was held to be mandatory in the

decision reported in **Balbir Singh's case (cited supra)**. In the same decision, it has been observed that, non compliance of the procedure under sections 42(1) and (2) of the NDPS Act will vitiate the trial itself and that will entitle the accused to get acquittal. These aspects were not properly considered by the court below before coming to the conclusion that there is compliance of sections 42(1) and (2) of the NDPS Act.

23. When there will be documentary evidence available to prove this fact, non production of the same by the prosecution is fatal and an inference can be drawn when such a document is not produced. So the finding of the court below that there is compliance of sections 42(1) and (2) of the NDPS Act is also not sustainable in law and since there was non compliance of the mandatory provision, the conviction entered is vitiated and the same is liable to be set aside on that ground also.

24. In view of the discussions made above, the finding of the court below that the prosecution has proved beyond reasonable doubt that the accused was the owner and the person in possession of the house and land from where the contraband articles were seized and the consequential finding that the accused had committed the offence punishable under section

20(a) and 20(b)(ii)(A) of the NDPS Act and consequential conviction entered by the court below for those offences are unsustainable in law and the same are liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed is not proper and the same is also set aside.

In the result, the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under sections 20(a) and 20(b)(ii)(A) of the NDPS Act are hereby set aside and the appellant is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. The fine amount, if any, remitted by the appellant is directed to be refunded to him by the court below on making necessary application for this purpose.

Office is directed to communicate a copy of this judgment to the concerned court at the earliest.

Sd/-
K. RAMAKRISHNAN, JUDGE.

cl

/true copy/

P.S to Judge