

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.11.2017

PRONOUNCED ON : 21.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

CRL.A.NOS.80 AND 195 OF 2016
AND CRL.M.P.NOS.1276 AND 2685 OF 2016

Shri Krishnan Sridaran Rajendran @
Krishnan Seedaran Rajendran @
Madan
S/o.Shri Krishnan Sridaran ... Appellant in Crl.A.No.80/2016

Shri Chaval Shimanram @ Rahul
S/o.Shri Shimanram Appellant in Crl.A.No.195/2016

Vs.

State rep by
The Intelligence Officer
Directorate of Revenue Intelligence
Chennai Zone Unit
Chennai 600 017. ... Respondent in both the appeals

Criminal Appeals filed under Section 374 of Cr.P.C. to set
aside the conviction and sentence imposed in C.C.No.4 of 2013
dated 29.01.2016 on the file of the II Additional Special Court
for NDPS Cases, Chennai.

For Appellant : Mr.A.Raghunathan, Senior Counsel
in Crl.A.No.80/2016 for Mr.O.Raman

For Appellant : Mr.B.Kumar, Senior Counsel
in Crl.A.No.195/2016 for Mr.O.Raman

For Respondent : Mr.N.P.Kumar
in both appeals Special Public Prosecutor for DRI
Cases

C O M M O N J U D G M E N T

These appeals have been filed to set aside the judgment dated 29.01.2016 passed in C.C.No.4 of 2013 by the II Additional Special Court for NDPS Cases, Chennai.

2. For the sake of convenience, the accused, viz., Krishnan Sridaran Rajendran @ Krishnan Seedaran Rajendran @ Madan [A1] and Chaval Shimanram @ Rahul [A2] will be referred to as Madhan [A1] and Chaval [A2] respectively.

3. The factual matrix of the prosecution case is as under:

P.V.Jayaraman [P.W.1], Intelligence Officer, Directorate of Revenue Intelligence (DRI), received information on 08.07.2012, to the effect that one Babulal of Ahmedabad, along with one Chaval [A2], Proprietor of Rajeshwar Textiles, Ground Floor, New No.194, Old No.236, Thambu Chetty Street, Mannadi and one Madhan [A1], a Sri Lankan national having Passport No. N-0990980 are indulging in trafficking of narcotic drugs and they have transported a consignment from Ahmedabad to Chennai, which would reach Rajeshwar Textiles around 11.00 in the morning.

[a] P.V.Jayaraman [P.W.1] recorded the information vide Ex.P.1 and submitted the same to the Assistant Director, DRI, Chennai, who further directed R.Padmanabhan, Senior Intelligence Officer, DRI, Chennai to arrange a team and proceed immediately. R.Padmanabhan, Senior Intelligence Officer, DRI, along with a team of Officers, viz., P.V.Jayaraman [P.W.1], Intelligence Officer, DRI, Chenchuraman [P.W.3], Intelligence Officer, DRI, Shyamalnath [P.W.8], Intelligence Officer, DRI, Vijayakumar [P.W.9], Intelligence Officer, DRI and others proceeded to Rajeshwar Textiles in Thambu Chetty Street. They called two persons, by name M.Sakthivel and K.Kumar, to be witnesses for the search. When the Officers went to Rajeshwar Textiles, Madhan [A1] and Chaval [A2] were there. They introduced themselves and when they questioned the duo about the information they have received, the duo came forward and handed over a parcel wrapped in white colour LDPE sack strapped with plastic straps, which was found with the marking, "From: King Collection to RAJESHWAR TEXTILES, No.194, Thambu Chetty Street, Mannady, Chennai" in black marker pen.

[b] On opening the parcel, the Officers found 23 packets of unstitched churidar materials in a carton. On further examination of the churidar materials, the Officers found 46 packets of white colour substance concealed amongst churidar materials. Each packet weighed around 99 grams and the contents of the 46 packets were mixed and they weighed 3,785 gms [3 kgs 785 gms]. The Officers tested the substance with the test kit available with them and it was found to answer the test for heroin. Three samples of about 5 gms. each were drawn and kept

in zip lock polythene covers and were marked as P1S1 [M.O.8], P1S2 [M.O.9] and P1S3 [M.O.10]. The balance contraband was also sealed with DRI seal and was marked as M.O.11 before the trial Court. Thereafter, the Officers gave the option under Section 50 of the Narcotic Drugs and Psychotropic Substances Act [for short "the NDPS Act"] to both the accused explaining them of their right to be searched before a Gazetted Officer or a Magistrate. The accused declined the offer and on the personal search of Madhan [A1], the following items were seized:

"DOCUMENTS AND CURRENCIES RECOVERED AND SEIZED FROM SHRI KRISHNAN SRIDARAN RAJENDRAN @ KRISHNAN SEEDARAN RAJEMDRAM @ MADAN

Sl. No.	Description of documents	Exhibits /M.Os.
1	e-ticket bearing No.5899486811869 dated 5.7.2012 in respect of Shri Krishnan Sridaran Rajendran holder of Sri Lankan Passport No.N0990980	Ex.P.4
2	Boarding pass of Jet Airways flight No.9W 0251 dated 6.7.2012 in respect of Shri Krishnan Sridaran Rajendran	Ex.P.5
3	Copy of Passport No.N0990980 in respect of Shri Krishnan Seedaran RajemDRAM	Ex.P.6
4	Indian currency of Rs.60550/-, US\$ 153 and Sri Lankan currency of 4670	M.O.3, M.O.4, M.O.5
5	Mobile No.9840879662; IMEI No.352858/05/782230/1; Code No.0592282 Airtel SIM No.89914 00000 07130 43962; Mobile make: NOKIA Model No.1280 - Type RM-647 Made in India	M.O.1
6	Mobile No.0721010119 with No.35928904 2146445; Etisalat SIM No.8994035170 112000092; Markings FCCID - LJPRM - 801; Tray markings 059L975 Type RM-801; NOKIA Lumia 800 Made in China	M.O.2

[c] On the personal search of Chaval [A2], the following items were seized:

"DOCUMENTS AND CURRENCIES RECOVERED AND SEIZED FROM SHRI CHAVAL @ RAHUL

Sl. No.	Description of documents	Exhibits /M.Os.
1	Delivery Receipt/Cash Receipt No.305200 dated 8.7.2012 of M/s Anmol Transports, Regd. Office No.9, Hirabhal Market, Outside Raipur Gate, Kankaria Road, Ahmedabad 22 (having office at Chennai at Old No.3, New No.5, Varadha Mutiyappan Street, Chennai 600 001) consigned to M/s.Rajeshwar Textiles	Ex.P.7
2	L.R.No.446660 dated 3.7.2012 of M/s Anmol Transports, Ahmedabad Consignor : King Collections, Ahmedabad Consignee: Rajeshwar Textiles one parcel declared value Rs.27,720/- (Invoice No.92)	Ex.P.8
3	Bill of M/s. King Collection, 329/4, Adovala Ka Dehia, Nr. Gheekanta Police Chowkey, Gheekanta, Ahmedabad 380 001 Book No.92 Bill No.92 dated 3.7.2012 Transport : Anmol Transport	Ex.P.9
4	Visiting card of M/s. Anmol Transports	Ex.P.10
5	Indian Currency of Rs.1,18,000/-	M.O.7
6	Mobile No.9500043090 IMEI Nos.355317/04/141932/5 & 355318/04/141932/3; Airtel SIM No.89914 00000 06745 67579H1; Mobile make : SAMSUNG DUOS Model No.GT-B7722 Made by Samsung; with Serial No.RFDB448318M	M.O.6

[d] From Rajeshwar Textiles, the Officers seized the following articles:

"DOCUMENTS RECOVERED AND SEIZED FROM M/S. RAJESWAR TEXTILES, NEW NO.194 OLD NO.236, THAMBU CHETTY STREET, CHENNAI 600 001

Sl. No.	Description of documents	Exhibits /M.Os.
1	Delivery Receipt/Cash Receipt No.303598 dated 22.06.2012 of M/s Anmol Transports, Regd. Office No.9, Hirabhal Market, Outside Raipur Gate, Kankaria Road, Ahmedabad 22 (having office at Chennai at Old No.3, New No.5, Varadha Mutiyappan Street, Chennai 600 001) consigned to M/s.Rajeshwar Textiles	Ex.P.11

Sl. No.	Description of documents	Exhibits /M.Os.
2	Bill of M/s. King Collection, 329/4, Adovala Ka Dehia, Nr. Gheekanta Police Chowkey, Gheekanta, Ahmedabad 380 001 Book No.345 Bill No.754 dated 18.6.2012 Transport : Anmol Transport	Ex.P.12

"

[e] Chenchuraman [P.W.3] prepared a Mahazar (Panchanama) [Ex.P.2] narrating the entire sequence of events, including the seizure of the contraband and other documents. The Mahazar [Ex.P.2] also bears the facsimile specimen seal of the DRI that has been affixed on the seized contraband, viz., M.Os.8 to 11. The packing materials used for packing the contrabands were also seized and marked as M.O.12. The cartons containing the churidar materials amongst which the contraband was kept concealed were seized along with churidar materials and were marked as M.Os.13 and 14. The seizure mahazar bears the signatures of P.V.Jayaraman [P.W.1], Seizing Officer, Chenchuraman [P.W.3], R.Padmanabhan, Senior Intelligence Officer, DRI, Madhan [A1], Chaval [A2], the two witnesses, viz., Sakthivel and Kumar. The seizure proceedings was completed at 18.30 hours on 08.07.2012 and thereafter, Madhan [A1] and Chaval [A2] were issued summons under Section 67 of the NDPS Act and their statements were recorded at the office of the DRI.

[f] Vijayakumar [P.W.9], Intelligence Officer, DRI, questioned Madhan [A1] and a handwritten statement [Ex.P.65] of Madhan [A1] in Tamil was obtained, wherein, he has stated that he is from Sri Lanka and that his Passport Number is N0990980; that from 2003-2011, he was doing ready-made garment business in Sri Lanka; that through one Nasli, a Sri Lankan Muslim, he got introduced to one Babulal, whom he had met in Bombay in the month of May; that he had gone to Ahmedabad, where he was introduced by Babulal to his brother Chaval [A2]; that he engaged himself with Babulal and Chaval [A2] in trafficking heroin; that they had earlier supplied 1,700 gms. of heroin by concealing it in ready-made garments, which was sent in the name of 'Kushboo Fabrics' by air courier to Sri Lanka and the consideration of Rs.10 lakhs was paid to the brothers by hawala; that again, Babulal asked him to come and collect 3.735 kgs, of heroin from his brother Chaval [A2]; that he came to Chennai on 06.07.2012 by Jet Airways 0251 and booked a room at NST Palace in Thambu Chetty Street; that he contacted Chaval [A2] to find out if the parcel had reached; that he handed over Rs.1,18,000/- [M.O.7] on 07.07.2012 to Chaval [A2]; that on 08.07.2012, on coming to know that the parcel had reached the shop of Chaval

[A2], he went there and collected it and at that time, the DRI Officers came there and effected seizure; that Rs.18 lakhs was already paid to Chaval [A2] by hawala and that he was intending to take the contraband to Sri Lanka for giving it to one Damini.

[g] After recording the statement of Madhan [A1], Vijayakumar [P.W.9], Intelligence Officer, placed Madhan [A1] under arrest by serving on him the Arrest Memo [Ex.P.66]. He also submitted a report under Section 57 of the NDPS Act [Ex.P.68] to his official superior. Since Chaval [A2] was a Rajasthani, he was questioned by Shyamalnath [P.W.8], Intelligence Officer, DRI in Hindi and a statement written in Hindi was obtained by him and was marked as Ex.P.60. The translation of the said statement into English was marked as Ex.P.61. In the statement [Ex.P.60], Chaval [A2] has stated that he hails from Jodhpur District in Rajasthan and that his brother Babulal was living in Ahmedabad; that Babulal started Rajeshwar Textiles in Chennai and handed over the same to him and he became the sole Proprietor of the business; that in June 2012, Babulal sent heroin concealed in packing material to be handed over to Madhan [A1] and the same was handed over; that a sum of Rs.10 lakhs was received from Madhan [A1] through hawala; that again, Babulal informed him that he is sending another consignment of heroin through Anmol Transport, vide LR No.446660 dated 03.07.2012; that Madhan [A1] who was staying in NST Palace met him on 07.07.2012 and gave Rs.1.18 lakhs [M.O.7] for the consignment and that on 08.07.2012, he sent his staff Mahendar to Anmol Transport, Chennai to collect the consignment and bring it to the shop. Accordingly, the consignment was brought to the shop and Madhan [A1] came to the shop and the parcel was handed over to him and at that time, the DRI Officials came there. Shyamalnath [P.W.8], Intelligence Officer, DRI placed Chaval [A2] under arrest by serving on him the Arrest Memo [Ex.P.62]. Shyamalnath [P.W.8] submitted a report under Section 57 of the NDPS Act [Ex.P.63] to his official superior.

[h] After the arrest of the duo, P.V.Jayaraman [P.W.1] prepared a Remand Application [Ex.P.14] and produced the accused along with the information report, seizure mahazar, seized documents and seized contraband before the Additional Chief Metropolitan Magistrate, E.O.II, Chennai, at 10.50 a.m. on 09.07.2012. The learned Remanding Magistrate made the following endorsement in the Remand Application Ex.P.14:

"Accused produced at 10.50 am. No complainant. Remanded to custody till 23.07.2012. Accused to be produced before Special Court on 23.07.2012".

[i] The seized properties were received by the Remanding Magistrate and were returned to the DRI with the endorsement "10 items produced and returned to complainant for production of the property before Special Court." After the transmission of the records from the Court of the Remanding Magistrate to the Special Court, P.V.Jayaraman [P.W.1] has submitted the properties to the Special Court for NDPS Act Cases on 16.07.2012 with a requisition to send sample P1S1 to the Central Revenues Control Laboratory, Chennai, for chemical analysis. Accordingly, the learned Special Judge for NDPS Act Cases sent the sample P1S1 with the seal of the DRI and the seal of the Special Court to the Central Revenues Control Laboratory, vide Ex.P.17. The sample was received on the same day by the laboratory and it was tested by Gandhimathy, Assistant Chemical Examiner [P.W.4], who, in her evidence before the Court and in the Test Report [Ex.P.49] has stated that the sample answered positive for the presence of Diacetyl morphine (heroin). The relevant portion of the test report is as under:

"Report: Lab No.425, dt.16.07.2012 (marking as P1S1)

The sample is in the form of a brown coloured powder. It answers the tests for the presence of Diacetyl morphine Heroin) and is covered under NDPS Act 1985.

Weight of sample received with plastic cover = 5.67 gms

Weight of remnant sample returned with plastic cover = 4.58 gms

Note: The quantitative analysis of the sample could not be carried out as the instrument (GLC) is not in working condition.

The test report is given under the hand of Government Scientific Expert mentioned in the section - 293 Cr.P.C.73 read with Notification dt 17.7.1976 and 2.2.1977 issued by the Govt. of India, Ministry of Finance (Department of Revenue and Banking) Published in the Govt. India, Gazette Part I Section 2 on 21.08.76 and 12.03.77 respectively."

[j] Though the provisions of Section 293 Cr.P.C. would apply and the Test Report given by the laboratory can be marked, yet, Gandhimathy, Assistant Chemical Examiner was examined as a prosecution witness before the trial Court. The Officials of the DRI examined one Chandrasekar, the Manager of NST Palace, from whom the original Passport of Madhan [A1] was collected. A letter dated 09.07.2012 [Ex.P.21] was sent by the Assistant Director, DRI, Chennai to the Deputy High Commissioner, Sri Lankan High Commission, Chennai, informing him about the seizure

of the heroin and arrest of Madhan [A1] and his lodgment in the Central Prison, Puzhal, Chennai. The Assistant Director of DRI, sent a letter dated 23.07.2012 [Ex.P.34] to the Deputy General Manager, Bharti Airtel Limited, for him to produce the Call Detail Records [CDRs] of four mobile numbers, for which Bharti Airtel Limited sent a letter dated 14.08.2012 [Ex.P.35] enclosing the copies of the Call Detail Records sought by the DRI.

[k] K.Engineer, Additional Director of DRI, Chennai sent a letter dated 18.07.2012 addressed to the Additional Director, Ahmedabad requesting him to trace the whereabouts of Babulal and search his premises. He was also requested to conduct enquiry about the Transport Office and take steps to apprehend Babulal. The task of conducting enquiry and apprehending Babulal was entrusted to Shaji Mathew [P.W.6], Senior Intelligence Officer, DRI, who, in his evidence has stated that he obtained search warrant to search the premises of King Collection at 329/4, Adovaia Ka Dehla, near Gheekanta Police Chowky, Ahmedabad, but he was not able to execute the search warrant, as the premises was not found. He enquired with the Ahmedabad Branch of Anmol Transport and recorded the statement of Upendra Singh Sisodiya, loading incharge and the same was marked as Ex.P.50. He obtained two lorry receipts dated 15.06.2012 [Ex.P.52] and 03.07.2012 [Ex.P.53]. His attempts to locate King Collection proved futile.

[l] On the request of DRI, Chennai, Bhawar Singh, Inspector of Customs and Central Excise, Jodhpur, searched the residence of Chaval [A2] in Jodhpur in the presence of his father and no incriminating materials were seized. The search mahazar was marked as Ex.P.58. After collating all the records and documents, P.V.Jayaraman [P.W.1] filed the complaint in C.C.No.4 of 2013 before the Special Court for NDPS Act Cases, Chennai, against Madhan [A1], Chaval [A2] and Babulal [A3] for the offences under Sections 21 (c), 27-A, 28 and 29 of the NDPS Act read with Section 8(c) and Section 135(A) of the Customs Act.

[m] The case against Babulal [A3] was split up and he was shown as absconding accused.

[n] After taking cognizance of the complaint, the copies of the complaint and relied upon documents were furnished to Madhan [A1] and Chaval [A2] and the trial Court framed two charges, viz., under Section 8(c) read with 29 of the NDPS Act for conspiracy to possess, transport and export heroin; and under Section 8(c) read with 21(c) of the NDPS Act for possession of 3.735 kgs of heroin. When questioned, the accused pleaded 'not guilty' to the charges.

4. To prove the case, the prosecution examined 9 witnesses, marked 68 exhibits and 14 material objects. When the accused were questioned under Section 313 Cr.P.C, they denied the incriminating circumstances. On behalf of the accused, two witnesses, viz., K.S.Gowrishankar [D.W.1] and M.Sakthivel [D.W.2] were examined and Exs.D1 to D15 were marked.

5. After considering the evidence on record and hearing either side, the trial Court, by judgment dated 29.01.2016 in C.C.No.4 of 2013, convicted both the accused for the offences charged and sentenced them to undergo 14 years Rigorous Imprisonment for each charge and pay a fine of Rs.1,40,000/- for each charge, in default to undergo Simple Imprisonment for one year. The sentences were directed to run concurrently and the set off under Section 428 Cr.P.C. was given.

6. Heard Mr.A.Raghunathan and Mr.B.Kumar, learned Senior Counsel representing Mr. O. Raman, learned counsel on record for Madhan [A1] and Chaval [A2] respectively and Mr.N.P.Kumar, learned Special Public Prosecutor for NDPS Act Cases.

7. At the commencement of their submissions, learned Senior Counsel contended that though the prosecution had taken a stand that the search team was headed by R.Padmanabhan, Senior Intelligence Officer, DRI, he was neither cited as a witness in the memo of evidence annexed to the complaint nor was he examined in the trial Court.

8. Mr.N.P.Kumar, learned Special Public Prosecutor submitted that R.Padmanabhan had died and that the trial Court, in paragraph 29 of the judgment, has referred to this aspect in the following words:

"But the accused have opted to conduct their personal search by the Gazetted Officer Mr.R.Padmanaban, Senior Intelligence Officer. Counsel for accused argued that the said R.Padmanaban has not been examined as a witness by the prosecution. Public Prosecutor argued that the above said Padmanaban is no more, hence he has not been listed as a witness, hence the question of examination of R.Padmanaban will not arise."

Except this stray statement in the judgment of the trial Court, the prosecution did not place any tangible material before the trial Court in support of this fact. Therefore, this Court, in exercise of the powers under Section 391 Cr.P.C., passed an order dated 27.11.2017 for recalling P.V.Jayaraman [P.W.1].

9. On 29.11.2017, P.V.Jayaraman [C.W.1], was examined by this Court in the presence of both the accused and their

counsel. In his evidence before the Court, P.V.Jayaraman [C.W.1] has stated that R.Padmanabhan, Senior Intelligence Officer of DRI was in the cadre of Superintendent and was a Group 'B' Gazetted Officer and that he had died on 26.12.2012. His Death Certificate was marked as Ex.C.1 and his signature in the Mahazar [Ex.P.2] was identified. Learned Senior Counsel appearing for the accused fairly conceded the position and did not cross-examine P.V.Jayaraman [C.W.1]. Since both the accused were present in the Court, this Court questioned them under Section 313 Cr.P.C. about the evidence given by P.V. Jayaraman [C.W.1] and also about the averments in their statements under Section 67 of the NDPS Act, viz., Exs.P.65 and 60, for which, both the accused submitted that they were illegally detained in the DRI Office and were forced to copy the statement that was kept prepared by them. This Court will consider all these aspects in the course of the judgment.

10. Now, it may be necessary to catalogue the points raised by Mr.A.Raghunathan and Mr.B.Kumar, learned Senior Counsel for Madhan [A1] and Chaval [A2] respectively.

(A) SUBMISSIONS OF MR.A.RAGHUNATHAN, LEARNED SENIOR COUNSEL FOR MADHAN [A1]:

- 1 The Special Court should not have framed charges first and tried the accused under Chapter XVIII of the Code - Trial before a Court of Session and should have tried the accused under Chapter XIX-B - Cases instituted otherwise than on police report.
- 2 Reliance was placed on the provisions of Section 44 (2) (d) of the Prevention of Money-Laundering Act, 2002 [for brevity "the PMLA"] and Section 36-A of the NDPS Act. Apart from Section 36-C of the NDPS Act, there is no other provision indicating as to how the trial in this regard should be held in a case instituted on a complaint by Revenue Officials.
- 3 The trial Court had failed to appreciate the evidence of Dr.K.S.Gowrishankar [D.W.1], the Prison Doctor, who had stated that Madhan [A1] had two contusions on his buttocks and an injury on his left thigh and that those injuries could have been caused by an iron rod or a casuarina stick. If this evidence of Dr.K.S.Gowrishankar [D.W.1] is accepted, it would go to show that Madhan [A1] was tortured by the DRI officials and therefore, the statement given by him under Section 67 of the NDPS Act, viz., [Ex.P.65] cannot be relied upon.

- 4 The trial Court had failed to appreciate the evidence of Sakthivel [D.W.2], who was the mahazar witness and not examined by the prosecution, but was examined by the accused as defence witness in order to show that a false case has been put up against the accused.
- 5 The failure of the prosecution to examine the other mahazar witness, viz., K.Kumar is also fatal to the case of the prosecution, though his statement was recorded by the Officers on 29.08.2012 itself and therefore, an adverse presumption under Section 114 (g) of the Evidence Act should be drawn.
- 6 The testimony of the DRI Officers without corroboration by independent sources should not be accepted.
- 7 There has been infraction of Section 50 of the NDPS Act, inasmuch as the accused were not properly apprised of their right to be searched in the presence of a Gazetted Officer or a Magistrate and that search of the person of the accused in the presence of a Gazetted Officer of DRI will vitiate the search.
- 8 Strong reliance was placed on the following judgments of the Supreme in Dilip and another vs. State of Madhya Pradesh [(2007) 1 SCC 450], Union of India vs. Shah Alam and another [(2009) 16 SCC 644]; and State of Rajasthan vs. Parmanand and another [(2014) 5 SCC 345].
- 9 In Ex.P.41, the summons that was issued to K.Kumar, the date has been shown as 15.12.2012, whereas, Kumar was asked to appear before the DRI on 29.08.2012 and therefore, the statement of Kumar [Ex.P.42] stands vitiated.
- 10 The accused retracted his confession statement and alleged that it was obtained by torture by sending a letter from the prison to the Special Court on 23.07.2012.

(B) SUBMISSIONS OF MR.B.KUMAR, LEARNED SENIOR COUNSEL FOR CHAVAL [A2]:

- 1 The information report [Ex.P.1] is very exhaustive and appears very artificial and improbable.
- 2 The search of the person of the accused in the presence of Padmanabhan, Gazetted Officer, will not satisfy the provisions of Section 50 of the NDPS Act.
- 3 Reliance was placed on K.Mohanan vs. State of Kerala [(2000) 10 SCC 222], Karnail Singh vs. State of Haryana [(2009) 8 SCC 539] and State of Rajasthan vs. Parmanand and another [(2014) 5 SCC 345].
- 4 There is no clear evidence by the Officials to show who had given the option under Section 50 of the NDPS Act to the accused, inasmuch as Vijayakumar [P.W.9] has stated that Padmanabhan had given the option, whereas, the Mahazar states that the option was given in Hindi, but the Hindi knowing Officer Shyamalnath [P.W.8] has not stated in his evidence that he has given the option.
- 5 Non-examination of Mahendar, Office Boy, who is said to have brought the consignment from Anmol Transport to Rajeshwar Textiles is fatal.
- 6 Non-examination of persons from Anmol Transport to show that the consignment was transported from Gujarat to Chennai is fatal.
- 7 Non-examination of Sisodiya of Anmol Transport in Ahmedabad to show that the consignment was booked at Ahmedabad is fatal.
- 8 Invoice recovered from the person of the accused does not show that the consignment was delivered. If the documents seized from the personal search of the accused are excluded for violation of Section 50 there is no material to show that the accused is connected to Rajeshwar Textiles.
- 9 No material to show that Chaval [A2] was the owner of the shop premises or whether he was a tenant in the shop premises since the shop was located in a commercial complex.

10 The telephone Call Detail Records are inadmissible, since they do not bear the certification under Section 65-B of the Evidence Act. Reliance was placed on the judgment of the Supreme Court in Anvar P.V. v. Basheer and others [(2014) 10 SCC 473].

11 The confession was retracted on 22.08.2012 by sending a communication from the prison to the Court and therefore, the confession statement cannot form the basis of conviction.

12 Non-examination of the mahazar witnesses is fatal to the prosecution case.

11. In reply to the submissions, Mr.N.P.Kumar, learned Special Public Prosecutor submitted as follows:

- 1 Just because information received by P.V.Jayaraman [P.W.1] contains several details, that cannot be a ground to suspect the same.
- 2 The provisions of Section 42 of the NDPS Act will not apply, since the search team was headed by R.Padmanabhan, Senior Intelligence Officer of the rank of the Superintendent and a Gazetted Officer.
- 3 Reliance was placed on Mr.Prabhulal vs. Assistant Director, DRI [(2003) 8 SCC 449] and G.Srinivas Goud vs. State of Andhra Pradesh [(2005) 8 SCC 183] to show that a Gazetted Officer acting under Section 41 of the NDPS Act is not required to follow Section 42 of the NDPS Act.
- 4 The provisions of Section 50 of the NDPS Act will not apply, because the recovery of contraband was not from the person of the accused, but was from the textile consignment.
- 5 Reliance was placed on the Constitution Bench judgment of the Supreme Court in Vijaysinh Chandubha Jadeja vs. State of Gujarat [(2011) 1 SCC 609].

- 6 That Sakthivel [D.W.2], who was a mahazar witness, has been won over by the accused and that is why he has been evading the receipt of summons from the Special Court and ultimately, appeared as a defence witness, as he was in the clutches of the accused.
- 7 One of the principal accused, viz., Babulal, the elder brother of Chaval [A2], is still in abscondence and that has to be borne in mind and the drug syndicate is tampering the evidence against the accused.
- 8 When the accused were produced before the remanding Magistrate, they did not lodge any complaint of torture or beating to the Magistrate, which the Magistrate has recorded in the remand application.
- 9 After the orders of remand, the accused were produced before the Medical Officer at the General Hospital, who has also not noted any injury on the person of the accused and only thereafter, the accused was admitted into the prison.
- 10 Dr.K.S.Gowrishankar [D.W.1], who had the outpatient ticket of the General Hospital to show that the accused were examined, did not choose to produce the same when he came to give evidence.
- 11 Both the mahazar witnesses were kept away by the accused party and in fact, one of the mahazar witnesses, Sakthivel was examined as defence witnesses in order to demolish the prosecution case. But, there is a rank contradiction in the evidence of Sakthivel [D.W.2].
- 12 The DRI has conducted investigation in Ahmedabad and Jodhpur about King Collection and Babulal [absconding accused], but they have not apprehended the latter and on that score, the evidence on record showing the possession of the contraband by the accused herein in Rajeshwar Textiles at the time of seizure will not stand vitiated. When once possession is established, the presumption under Sections 35 and 54 of the NDPS Act comes into play, which the accused had failed to discharge satisfactorily.

13 There are a line of judgments of the Supreme Court to show that Section 50 of the NDPS Act would apply only if the person is searched and would not apply where recovery has been effected from a vehicle or a place in the possession of the accused.

12. This Court gave its anxious consideration to the rival submissions.

13. P.V.Jayaraman [P.W.1], was examined-in-chief on 20.02.2014 and 26.02.2014. He was cross-examined on 07.03.2014, 01.04.2014, 19.05.2014, 15.07.2014, 04.08.2014 and 14.07.2015. P.V.Jayaraman [P.W.1] in his evidence has stated that he was working as Intelligence Officer in the DRI, Chennai and that the officers of the DRI are empowered to conduct search and seizure and arrest under the NDPS Act; that on 08.07.2012, around 10.00 a.m. he received information from his informant that one Chaval [A2], Proprietor of Rajeshwar Textiles and his brother Babulal [A3-absconding from Ahmedabad] have planned to transport Narcotic Drugs and that one Madhan [A1] is going to receive it. This information has been recorded under Section 42 of the NDPS Act, vide Ex.P.1 and has been submitted to the Senior Officers of DRI. It is true that the Information Report [Ex.P.1] contains details and description of the accused, their addresses, their nationalities, etc.

14. Mr.B.Kumar, learned Senior Counsel contended that since the Information Report [Ex.P.1] contains wealth of details, it deserves to be rejected as contrived. He further contended that, in the cross-examination of P.V.Jayaraman [P.W.1], he has stated that he has received the information over phone and while he was receiving it, he typed it out in his computer. It would have been impossible for P.V.Jayaraman [P.W.1], to have received the information over phone and simultaneously type it in his computer. On a perusal of the Information Report [Ex.P.1], it is evident that it is a computer print out. It is common knowledge that every Intelligence Agency in this country has its own informants and moles to gather intelligence. Exchange of intelligence amongst Intelligence Agencies for proper and concerted action is also possible. Section 68 of the NDPS Act is akin to Section 125 of the Evidence Act and an Officer cannot be compelled to disclose his informant to anyone. It is possible that the informant would have been gathering intelligence about the gang for over a period of time and would have passed on all minute details relating to the players in the offence to the concerned Officer. Therefore, the law does not permit this Court to hazard a guess and conclude on surmises that the informant would not have given such amount of details to the officer over phone. It also depends upon the level of confidence and trust between the informant and the Officer,

which cannot be subjected to assessment objectively. Therefore, this Court is unable to subscribe to this submission of Mr.B.Kumar, learned Senior Counsel for Chaval [A2].

15. P.V.Jayaraman [P.W.1] has further stated that a team of Officers headed by Mr.R.Padmanabhan, Senior Intelligence Officer, was constituted and the team comprised apart from himself, Chenchuraman [P.W.3], Shyamalnath [P.W.8] and Vijayakumar [P.W.9]. The team proceeded to Rajeshwar Textiles in Thambu Chetty Street and R.Padmanabhan had called two persons by name Sakthivel [D.W.2] and Kumar [not examined], who were found in that area to stand as independent witnesses and they agreed; that they entered the shop around 11.45 a.m. and saw Madhan [A1] and Chaval [A2] there; that they introduced themselves as Officials of DRI and when they asked the names of the two persons, they disclosed their names; that they told Madhan [A1] and Chaval [A2] that they have received information that Babulal has sent a parcel from Ahmedabad with heroin kept amongst churidar materials.

[a] At that time, Chaval [A2] showed the carton [M.O.13] and stated that Madhan [A1] has planned to take it to Sri Lanka. The parcel had white LDPE sack with the markings "From: King Collection to RAJESHWAR TEXTILES, No.194, Thambu Chetty Street, Mannady, Chennai" in black marker pen [M.O.12]. On opening the container, P.V.Jayaraman [P.W.1] found churidar materials inside in 23 small packets. There were totally 92 churidar materials and amongst 46 pieces, small polythene bags were found; that the same were collected and weighed and found to weigh 3.785 kgs. The polythene bag was weighed and was found to be of 50 gms. The powder was tested and it answered positive for heroin.

[b] P.V.Jayaraman [P.W.1] has further stated that an option under Section 50 of the NDPS Act was given to both the accused and they were explained of their right to be searched before a Gazetted Officer or a Magistrate. Shyamalnath [P.W.8] explained this to Chaval [A2] in Hindi. P.V.Jayaraman [P.W.1] has stated that he explained this right to Madhan [A1] in Tamil; that in the presence of R.Padmanabhan, Senior Intelligence Officer, who is an Officer of a Gazetted rank, the personal search was conducted and the items that are listed above were recovered.

[c] He has further deposed that 3 samples of 5 gms. each were drawn and they were given marking as P1S1, P1S2 and P1S3 and in the Court, they were marked as M.Os.8 to 10. The balance contraband was also sealed with DRI seal and was marked in the Court as M.O.11. The seized covers used for packing the contraband was marked as M.O.12 and the cartons containing the churidar materials was marked as M.Os.13 and 14. This Court

called for M.Os.12,13 and 14 for inspection and found that M.O.12 is a packing material, viz., LDPE sack and M.Os.13 and 14 contain churidar materials. On similar lines is the evidence of Chenchuraman [P.W.3] Shyamalnath [P.W.8] and Vijayakumar [P.W.9]. Since R.Padmanabhan, Gazetted Officer had died on 22.11.2012 [vide Ex.C1], his name was not included in the list of witnesses appended to the complaint that was filed in the Special Court for NDPS Act Cases on 26.12.2012, as could be seen from the date seal affixed on the complaint [Ex.P.44].

16. Learned counsel for the defence contended that Shyamalnath [P.W.8] has not stated that he explained the option in Hindi to Chaval [A2] and Chenchuraman [P.W.3] has stated that the option under Section 50 of the NDPS Act was given by R.Padmanabhan to Madhan [A1]. In fact, the defence contended that the prosecution has failed to adduce evidence cogently to show as to who had given the option under Section 50 of the NDPS Act and therefore, there has been infraction of the provisions of Section 50 of the NDPS Act, the consequence of which is that the accused should be acquitted. Much of the arguments were based on Section 50 of the NDPS Act and therefore, it has become imperative for this Court to analyse the submissions of either side threadbare.

17. Section 50(1) of the NDPS Act reads as follows:

"50. Conditions under which search of persons shall be conducted.-(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate."

(emphasis supplied)

18. Both sides submitted rulings in support of their respective contentions. Admittedly, in this case, the contraband was not seized pursuant to the search of the person of the accused. It is the specific case of the prosecution that the contraband was seized from amongst churidar materials kept inside the carton [M.O.13] in Rajeshwar Textiles.

19. Now, the question that requires to be answered by this Court is, even if there is infraction of provisions of Section 50 of the NDPS Act, will it vitiate the seizure in this case. The judgments relied upon by the defence are as under:

(1) In Dilip and another vs. State of Andhra Pradesh [(2007)

1 SCC 450], the Supreme Court has stated as follows:

"16. ... provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but keeping in view the fact that the person of [the accused] was also searched, it was obligatory on the part of [the officers] to comply with the said provisions."

(2) In Union of India v. Shah Alam and another [(2009) 16 SCC 644], the Supreme Court followed the law in Dilip (supra) and refused to interfere with the order of acquittal on facts and held as under:

"We have carefully gone through the records of this case. From the evidence of the complainant, PW 1 and the seizure memo (Fard Baramdegi), Ext. Ka-2 it is evident that the two respondents were subjected to a body search in course of which packets of heroin were found in the shoulder bags carried by them and were recovered from there. The facts of the case in hand are very close to another decision of this Court in Dilip v. State of M.P. [(2007) 1 SCC 450]."

(3) In State of Rajasthan v. Parmanand [(2014) 5 SCC 345], the Supreme Court relied upon Dilip (supra) and Shah Alam (supra) and has held as under:

"15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

20. In the following line of judgments, the Supreme Court has held that the provisions of Section 50 of the NDPS Act will apply only when the contraband has been recovered from the search of the person of the accused and not from a bag or box, etc.

20 (1) In Banobi and another v. State of Maharashtra [1999 (9) Supreme 174], the police recovered 13 gms. and 700 ml gms of charas from the hollow space near the hearth in the house

of A1 and A2. From the body search of A1, who is the wife of A2, 13 small packets of heroin were recovered. The Supreme Court held that the recovery of heroin from the body search of A1 stands vitiated and acquitted A1 for possession of heroin, but convicted A1 and A2 for the possession of charas in their house.

20 (2) In *Kalema Tumba vs. State of Maharashtra* and another [1999 (9) Supreme 179], heroin was recovered from the baggage carried by the accused and the Supreme Court confirmed the conviction by holding that the provisions of Section 50 of the NDPS Act will not apply for the search of baggage of a person.

20 (3) In *Sarjudas and another vs. State of Gujarat* [1999 (8) Supreme 548], charas was seized from a bag that was hanging on the scooter of the accused and the Supreme Court held that Section 50 of the NDPS Act will not apply.

In all the above three cases, the Supreme Court has relied upon the Constitution Bench judgment of the Supreme Court in *State of Punjab vs. Baldev Singh* [(1999) 6 SCC 172] and has held that Section 50 of the NDPS Act will not apply.

20 (4) In *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat* [2000 (1) Supreme 363], the accused was carrying four gunny bags in his auto-rickshaw which was found to contain charas. The accused contended that there was violation of Section 50 of the NDPS Act. The Supreme Court has relied upon the above three judgments and also the judgment in *Baldev Singh* (supra) and has held that it is an idle exercise in this case to consider whether there was no compliance of the conditions stipulated in Section 50 of the Act.

20 (5) In *Birakishore Kar v. State of Orissa* [JT 1999 (10) SC 350], the accused was found lying on a plastic bag in a train compartment and on checking the plastic bag, it was found to contain 10 kgs of poppy straw. The Supreme Court placed reliance on *Baldev Singh* (supra) and held that Section 50 of the NDPS Act will not apply.

20 (6) In *Gurbax Singh vs. State of Haryana* [(2001) 1 Supreme 625], the accused was carrying a gunny bag which was found to contain 2 kgs of poppy straw. The Supreme Court relied upon *Baldev Singh* (supra) and has held that Section 50 of the NDPS Act will not apply.

20 (7) In *Kanhaiya Lal vs. State of Madhya Pradesh*, [2000 (10) SCC 380], the accused was found carrying 1 kg of opium in a bag and the Supreme Court held that Section 50 of the NDPS Act will not apply.

20 (8) In Madan Lal and another vs. State of Himachal Pradesh [(2003) 6 Supreme 382], the accused was travelling in a car, in which, a black colour bag was found. On checking the bag, it was found to contain 820 gms. of charas. Relying upon Baldev Singh (supra), the Supreme Court held that Section 50 of the NDPS Act will not apply.

20 (9) In Saikou Jabbi vs. State of Maharashtra [2003 (8) Supreme 582], the accused was intercepted in Sahara Airport in Bombay with a baggage and 1 kg of heroin was seized therefrom. Relying upon the judgment in Baldev Singh (supra), the Supreme Court held that the provisions of Section 50 of the NDPS Act will not apply.

20 (10) In State of Himachal Pradesh v. Pawan Kumar [2005 AIR SCW 2154], a three Judge Bench of the Supreme Court was specially constituted to consider the applicability of Section 50 of the NDPS Act. The Supreme Court went into all the previous judgments and after placing reliance on Baldev Singh (supra) has held as under:

"22. As a corollary, there is no warrant or justification for giving an extended meaning to the word "person" occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him."

20 (11) In State of Rajasthan v. Daulat Ram [2005 AIR SCW 4423], the accused was found carrying 16 kgs of opium in a bag and the Supreme Court relied upon Pawan Kumar (supra) and held as under:

"9. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

20 (12) In State of Rajasthan v. Babu Ram [2007 AIR SCW 3799], the accused was found carrying a bag, from which, contraband was recovered. The Supreme Court relied upon Pawan

Kumar (supra) and reversed the order of acquittal of the High Court and remanded the matter back to the High Court on the ground that the acquittal of the accused for non compliance of Section 50 of the NDPS Act was bad in law.

20 (13) In *Ajmer Singh v. State of Haryana* [(2010) 3 SCC 746], the accused was carrying a bag, from which, 500 gms of charas was recovered and the Supreme Court in paragraph 13 has held as under:

"15.It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in *Madan Lal v. State of H.P.* [(2003) 7 SCC 465 : 2003 SCC (Cri) 1664".

20 (14) Very recently, in *Makhan Singh vs. State of Haryana*, [(2015) 12 SCC 247], the accused was sitting in a fitter-rehra, from where 120 kgs of poppy husk was seized. The Supreme Court relied upon *Baldev Singh (supra)*, *Pawan Kumar (supra)* and *Ajmer Singh (supra)* and held that Section 50 of the NDPS Act cannot be applied to the case. However, the Supreme court acquitted the accused on the ground that the prosecution had failed to prove through independent evidence connecting the appellant with the fitter-rehra.

Thus, as against three judgments relied upon by the defence, there are 11 judgments of the Supreme Court which are to the effect that for attracting the provisions of Section 50 of the NDPS Act, recovery should have been pursuant to the search of the person of the accused. In fact, the following passage from the Constitution Bench judgment of the Supreme Court in *Baldev Singh (supra)* answers the issue beyond cavil.

"12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc.."

(emphasis supplied)

.....

57(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

21. Mr.A.Raghunathan, learned Senior Counsel for the accused contended that the Constitution Bench judgment of the Supreme Court in Vijaysinh (supra) that was relied upon by the learned Special Public Prosecutor cannot be pressed into service for the reason that the issue before the Constitution Bench was whether Section 50 of the NDPS Act casts a duty on the empowered Officer to inform the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate, if he so desires or whether a mere enquiry by the said Officer as to whether the suspect would like to be searched in the presence of a Magistrate or a Gazetted Officer can be said to be due compliance with the mandate of the said Section.

22. It is true that the issue before the Constitution Bench was not whether Section 50 of the NDPS Act would apply if the search has been from a bag or premises, because that issue is no more res integra in the light of the Constitution Bench judgment of the Supreme Court in Baldev Singh (supra) and the specially constituted 3 Judge Bench of the Supreme Court in Pawan Kumar (supra). However, in Vijaysinh (supra), the Constitution Bench clearly held as follows:

"29. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search."

(emphasis supplied)

23. Thus, it is clear that from the above passage that there can be no pale of doubt that if an illicit article has been recovered from the search of the person of the accused in violation of Section 50 of the NDPS Act, the recovery will become suspect. In Banobi (supra), charas was recovered from the house and heroin was recovered from her person and the Supreme Court acquitted the accused for possessing heroin, since the search was conducted in violation of Section 50 of the NDPS Act, but convicted the accused for the recovery of charas from

her house. Even after such an authoritative pronouncement of the Supreme Court, it is too late in the day to canvass that Section 50 of the NDPS Act would apply even in a case where the recovery has not been made from the search of the person of the accused.

24. In this case, the conviction of the appellant has been for possession of 3.750 kgs of heroin in a carton amongst churidar materials in the premises of Rajeshwar Textiles, where both Madhan [A1] and Chaval [A2] were available at the time of seizure. It was only on their showing, the carton [M.O.13] was opened and searched and heroin was recovered from amongst churidar materials.

25. At this juncture, it may be necessary to advert to one submission of Mr.B.Kumar, learned Senior Counsel that the recovery of the documents, viz., Exs.P.4 to 10 and recovery of Nokia mobile [M.O.1], Nokia Lumia mobile [M.O.2], Indian currency of Rs.60,550/- [M.O.3], 153 US Dollars [M.O.4], Sri Lankan currency 4,670/- [M.O.5], Samsung mobile [M.O.6] and recovery of currency of Rs.1,18,000/- [M.O.7], will stand vitiated for infraction of Section 50 of the NDPS Act.

26. This Court is unable to countenance this submission, because Exs.P.4 to 10 and M.Os.1 to 7 are not illicit articles per se under the NDPS Act. The possession of these exhibits and material objects, viz., visiting card, delivery receipt, mobile phones, Indian currency, US dollars and Sri Lankan currency will not attract punishment under the NDPS Act, because they do not come within the definition of a Narcotic drug or a psychotropic substance. These documents and material objects will assume significance only as corroborative pieces of evidence and mere possession of that will not entail conviction under the NDPS Act. It may be relevant to extract Section 66 of the NDPS Act, which reads as follows:

"66. Presumption as to documents in certain cases.—Where any document— (i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed by the Central Government) in the course of investigation of any offence under this Act alleged to have been committed by a person, and such document is tendered in any prosecution under this Act in evidence against him, or against him and any other person who is tried jointly with him, the court shall—

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting; and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document."

27. The LDPE sack [M.O.12] was examined by this Court and it was found to contain the markings "From: King Collection to RAJESHWAR TEXTILES, No.194, Thambu Chetty Street, Mannady, Chennai". From Chaval [A2], Exs.P.7, 8 and 9 were recovered. Ex.P.7 is the delivery receipt dated 03.07.2012 of Anmol Transports; Ex.P.8 is the lorry receipt, LR No.446600 dated 03.07.2012 of Anmol Transports, Ahmedabad, wherein consignor is shown as King Collection, consignee is shown as Rajeshwar Textiles and Ex.P.9 is the bill of King Collection, 329/4, Adovaia Ka Dehla, near Gheekanta Police Chowky, Ahmedabad. These three items were seized from Chaval [A2] and by invoking Section 66(c) of the NDPS Act, this Court can draw presumption and link it with M.O.12, the packing material used for packing the contrabands. To say that the DRI Officers brought all those documents, including Indian currency of Rs.1,18,000/-, US dollars and Sri Lankan currency, from their Office and planted them on the accused along with the contraband and churidar materials, defies credulity.

28. In M.Prabhulal (supra), the Supreme Court has clearly held that an Officer of a Gazetted rank acting under Section 41 of the NDPS Act need not comply with Section 42 of the Act. In this case, the search team was headed by R.Padmanabhan, Senior Intelligence Officer, who is an Officer of Gazetted rank in the DRI under whom P.V.Jayaraman [P.W.1], Chenchuraman [P.W.3], Shyamalnath [P.W.8] and Vijayakumar [P.W.9] went to Rajeshwar Textiles. Just because R.Padmanabhan died prior to the filing of the complaint, it cannot be stated that Section 41 of the NDPS Act would not apply. Had R.Padmanabhan been alive and still, if he had not been examined without adequate reasons, then, the situation may be different. Unfortunately, R. Padmanabhan died on 22.11.2012, to substantiate which Ex.C.1 has been marked and therefore, the prosecution had not included his

name in the complaint that was filed on 26.12.2012. Therefore, even if there is infraction of Section 42 of the NDPS Act, the seizure having been effected by the team headed by R.Padmanabhan, a Gazetted Officer, the same will not stand vitiated.

EVIDENCE OF SAKTHIVEL [D.W.2]

29. It is the case of the prosecution that the Officers requested one Sakthivel and K.Kumar to stand as independent witnesses for the search operation and that in their presence, the contraband was recovered under the cover of Mahazar [Ex.P.2]. Sakthivel and K.Kumar have signed the Mahazar [Ex.P.2]. Sakthivel has given his address as No.7, Mariappa Naicker Street, Dr.Kanu Nagar, Nesappakkam, Chennai 600 078. P.V.Jayaraman [P.W.1], in his evidence, has stated that he issued summons under Section 67 of the NDPS Act to Sakthivel on 03.12.2012 asking him to appear before him on 19.12.2012 for the purpose of recording his statement. The summons had returned unserved and the returned unserved cover with the summons has been marked as Ex.P.40. Therefore, the DRI Officers were not able to record the statement of M.Sakthivel. However, they have recorded the statement of the other Mahazar witness K.Kumar on 29.08.2012, which has been marked as Ex.P.42. The fact remains that the prosecution was not able to examine both the mahazar witnesses, viz., Sakthivel and Kumar during trial. The occurrence in this case has taken place in the year 2012, as could be seen from the records. The trial commenced with the examination of P.V.Jayaraman [P.W.1] on 20.02.2014. The cross-examination of P.V.Jayaraman [P.W.1] was completed only on 14.07.2015. Thereafter, the prosecution collected witness summons for Sakthivel and K.Kumar and they were not able to serve it on them as could be seen from the memo dated 13.05.2015 that has been filed in the trial Court and which is available in the Court records. The memo dated 13.05.2015 reads as follows:

"2. It is respectfully submitted that this Hon'ble Court had issued summons to serve to Shri M.Sakthivel s/o S.Madhachary (Late) as Witness 13 and to Shri K.Kumar S/o K.Kothandaraman as Witness 14 to appear in this Hon'ble Court on 13/05/2015. Both the summons were sent by speed post and were returned by the postal authorities as "Door Locked/Not claimed"

3. It is respectfully submitted that efforts were made to handover the summons to both the witnesses on the said address and found the doors locked. Though the whereabouts of the said persons were enquired with the neighbours, no clues were forthcoming immediately. The un-served

summons returned by the postal department is returned through this Memorandum."

30. Therefore, this is not a case where the prosecution had not made any attempt to examine the mahazar witnesses. Both the witnesses were not available in the address given by them at the time of seizure. However, the defence was able to produce Sakthivel as defence witness. Therefore, it is clear that Sakthivel is not a fictitious person. Sakthivel [D.W.2], in his evidence, has stated that on 07.07.2012, he came to Chennai to write Group-IV examination; that after the examination was over, his friend Senthil Kumar told him that he is meeting his friend from Sri Lanka and asked him to accompany him [Senthil Kumar]; that around 6.00 p.m., he went to NST Palace lodge in Thambu Chetty Street, where, Madhan [A1] was staying; that he spent the night with Madhan [A1] and on the next day, around 7 O'clock he went to Kaligambal temple and returned to the lodge; that around 9.30 a.m. to 10.00 a.m., four or five persons came to the lodge and banged the door; that he opened the door and they came in and looked out for Madhan [A1] with a Passport in hand; that they brandished a revolver at Madhan [A1] and asked him as to what work he was doing there; that they beat Madhan [A1]; that they handcuffed him and took him to the DRI Office in T.Nagar; that he also accompanied them to the DRI Office; that in the DRI Office, Madhan [A1] was kept in a separate cell and he and Senthil Kumar were kept in another room; that Madhan [A1] was interrogated by the Officers from morning till evening and he heard sounds of beating and Madhan [A1] shouting; that around 8.00 p.m. on that day, the DRI Officers enquired him [Sakthivel -D.W.2] and obtained his address and on the next day, they obtained his signatures on various documents, including the Mahazar [Ex.P.2]; that his signature in Ex.P.2 and other documents were marked as Exs.D5 to D14; that on 09.07.2012, Madhan [A1] told him that he was beaten by the Officers. The examination-in-chief ended with this.

31. Even if the Public Prosecutor had stated no cross, the evidence of this witness ex facie lacks credibility and militates against the dictates of common sense. In fact, Section 114 of the Evidence Act states that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. According to this witness, he was abducted by the Officers along with Madhan [A1] and lodged in the DRI Office. If this is accepted, then one can infer that the DRI Officials knew that he [Sakthivel] was a close friend of Madhan [A1]. If that had been so, would they have joined him as a witness in the panchanama proceedings? Even an investigator with a modicum of common sense will not be

gullible to have a close friend of the accused as panchanama witness. A panchanama witness should be a person who should not be known to the raiding party and the accused. That apart, according to this witness, he was also detained illegally on 08.07.2012 and 09.07.2012. He has not stated as to what was done to him thereafter. Therefore, it has to be inferred that he was let off by the DRI Officials after getting his signature in the panchanama and other documents. Thereafter, what did he do? There is no explanation at all in his examination-in-chief. He has stated that he came to Chennai to write Group-IV examination on 07.07.2012, which means that he should be a graduate. He disappeared after 09.07.2012 and resurfaced only on 11.12.2015 to give evidence in favour of the accused. In the first portion of the chief-examination, he has stated that his friend Senthil Kumar called him over phone and told him that his friend [Senthil Kumar's] is coming from Sri Lanka and asked him to join him. Therefore, he went to NST Palace around 6 O'clock and there, he saw Madhan [A1], who was already known to him. In one breath, he states that Senthil Kumar had called him to meet one of his Sri Lankan friends, who had come to Chennai and in another breath, he says that on going there, he saw Madhan, who was already known to him. He has further deposed that the DRI Officers brandished a revolver at Madhan [A1], whereas, Madhan [A1], in his 313 Cr.P.C. statement that was given to the Court on 26.06.2015, has not stated anything about the Officers brandishing a revolver at him.

32. Now, this Court proposes to advert to the cross-examination of this witness. In the cross-examination, Sakthivel [D.W.2.] has stated that he was a law college student having studied law for four years and thereafter, discontinued and had acquired a B.A. degree in Tamil; that he knew Madhan [A1] from 2010 onwards; that he had met Madhan [A1] in the prison 3 or 4 times after his arrest; that one month prior to giving evidence, he met Madhan [A1] in prison at 11 O'clock in the morning; that he had given his correct address to Madhan [A1], so that Madhan [A1] can send summons to him through the Court; that on 27.11.2015, he had met the accused in the prison and had given his correct address; that he had not given any complaint to anybody in this regard.

33. What surprises this Court is that, a person who had studied law for 4 years, who is a graduate and who has written Group-IV examination had remained silent without any protest even in respect of his own alleged illegal detention by the DRI Officers on 08.07.2012 and 09.07.2012. Though it is a trite that the evidence of a defence witness should be given equal weightage as that of the prosecution witnesses, yet, where the evidence is so unbelievable, no credence need be attached to such testimonies.

34. It is the case of the prosecution witnesses that the two independent witnesses, Sakthivel and Kumar, were called by R.Padmanabhan, Senior Intelligence Officer, DRI, to stand as panchanama witnesses. The untimely death of R.Padmanabhan after the seizure and his non-availability was taken advantage of by the accused, to project a case as if Madhan [A1] and Sakthivel [D.W.2] were abducted from NST lodge on 08.07.2012 to the DRI Office.

35. As regards the submission of Mr.A.Raghunathan stated in para 10(A)(9) above relating to two dates in the summons [Ex.P.41], viz., 15.12.2012 and 29.08.2012, this Court is of the view that nothing turns out in this because, Kumar has received the summons on 29.08.2012 and has given his statement [Ex.P.42] on the same day. Therefore, reference to the dated 15.12.2012 [Ex.D.1] is obviously a typographical error. Even if this Court were to give the benefit of this discrepancy to the accused, no consequences would follow because, Kumar was not examined in the trial Court and therefore, his statement [Ex.P.42] is worthless.

36. Time and again, the Supreme Court has stated that the evidence of the Investigating Officer relating to search or seizure will not become vitiated solely for the reason that the evidence is not supported by independent witnesses [See: Akhal Ahmed vs. State of Delhi [(1999) SCC (Cr1.) 425], Prabhulal vs. Assistant Director, DRI [2003] 8 SCC 449] and Sahib Singh v. State of Punjab [(1996) 11 SCC 685]].

37. To recapitulate, in this case, the evidence of the Officers show that R.Padmanabhan, Senior Intelligence Officer, DRI had called two persons, viz., Sakthivel [D.W.2] and Kumar to stand as search witnesses. R.Padmanabhan died even before the complaint was filed. Summons were taken by the prosecution to examine Sakthivel [D.W.2] and Kumar, but in vain. However, Sakthivel [D.W.2] has been examined by the accused as defence witness, about which, this Court has discussed above.

38. In Sahib Singh (supra), the Supreme Court has held that, before conducting a search, the Police Officer is required to call upon some independent and respectable people to stand as witness. In a given case, it may happen that no such person was available or even if available, was not willing to be a witness. It may also be that, after joining the search, he might have turned hostile. In such cases, the evidence of the Police Officer cannot be disbelieved. If it is found that no attempt was even made by the Police Officer to join independent witness, it would only affect the weight of the evidence of the police,

though not its admissibility.

39. Thus, this is not a case in which the Officers did not have independent witnesses at the time of seizure. This is a case where, Sakthivel [D.W.2] and Kumar stood as witnesses, but despite efforts, the prosecution was not able to produce them as prosecution witnesses, whereas, Sakthivel [D.W.2], was produced as defence witness. In such view of the matter, non-examination of independent witnesses is not fatal to the prosecution case.

CONFESSION STATEMENT OF THE ACCUSED:

40. The Officers of the DRI are not police officers and they have power under Section 67 of the NDPS Act to record statements. If a statement of a person is confessional in nature, the same is relevant and admissible in evidence, provided it is voluntary and truthful.

41. Learned counsel for the defence relied upon the judgment of the Supreme Court in Tofan Singh vs. State of Tamil Nadu [(2013) 16 SCC 31], wherein, the Supreme Court has doubted the correctness of the admissibility of a confession recorded by a Revenue Officer under Section 67 of the NDPS Act and has referred the matter for a decision by a larger Bench. Relying upon this judgment, the learned counsel submitted that this Court should not place reliance upon the confession statement of the accused.

42. In the opinion of this Court, the Supreme Court, in Tofan Singh (supra), has referred to a long line of judgments and has held that a statement made to a Revenue Officer, if it is confessional in nature, would be admissible in evidence. Therefore, until the decision of the larger Bench on this issue, this Court is bound by the judgments of the Supreme Court, wherein, the Supreme Court has held that such confessions are admissible in evidence. सत्यमेव जयते

43. Learned counsel for the defence contended that the confession would be hit by Section 24 of the Evidence Act, if it is shown that the same has been obtained under coercion. This Court has no iota of doubt on this legal proposition. The defence counsel relied upon the evidence of Dr.K.S.Gowrishankar [D.W.1] who has stated that he examined Madhan [A1] in the jail on 09.07.2012 and noted a contusion on both buttocks region, thigh, which were two day old injuries. The Health Screening report has been marked as Ex.D2. He has also stated in his examination that the 4 injuries could have been caused by beating with lathi or iron rod. In his cross examination, he has stated that every prisoner will be admitted into the prison

only after he is examined by a Medical Officer of the Government Hospital. Accordingly, Madhan [A1] and Chaval [A2] were also produced before the Medical Officer in the Government Hospital, who has issued an outpatient ticket, wherein, no injuries have been noted. Dr.K.S.Gowrishankar [D.W.1] admitted that the outpatient tickets issued by the Government Hospital before the admission of Madhan [A1] and Chaval [A2] in the jail were seen by him and there was no injury recorded in the outpatient tickets. P.V.Jayaraman [P.W.1], in his cross-examination, has stated that the Magistrate remanded the accused to judicial custody and thereafter, he took both the accused to the Government General Hospital and had them examined by the Doctor there and along with the outpatient tickets, produced them to the jail authorities. Strangely, Dr.K.S.Gowrishankar [D.W.1] did not bring with him the original outpatient tickets issued by the Government General Hospital and a photocopy of the same is available in the case records. However, he has admitted in the cross-examination, that he did not find any injury recorded in the outpatient tickets. Dr.K.S.Gowrishankar [D.W.1], neither in his evidence nor in his Health Screening report [Ex.D.2], had stated at what time he examined Madhan [A1] in prison.

44. At this juncture, it may be pertinent to mention here that when the accused were produced before the Remanding Magistrate at 10.50 a.m. on 09.07.2012, they did not make any complaint to the Magistrate of ill-treatment. To recapitulate, the mahazar proceedings got over at 6.30 p.m. on 08.07.2012 and on 09.07.2012 at 10.50 a.m., the accused have been produced before the Additional Chief Metropolitan Magistrate, Chennai for remand. At the time of remand, they did not make any complaint of ill-treatment. Thereafter, they were produced before the Medical Officer, Government General Hospital, who has not noted any injury. In Ex.D2, Dr.K.S.Gowrishankar [D.W.1] has stated that the injuries are two days old. Therefore, two days old means, it must be on 07.07.2012 and are not fresh injuries.

45. In Prabhulal (supra), the Supreme Court has held as follows:

"5.Further, it is also to be borne in mind that the appellants did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the trial Judge under Section 313 of the Code of Criminal Procedure that a vague stand about the torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made the basis of the appellants' conviction."

46. In A.K.Mehaboob vs. Intelligence Officer, Narcotics Control Bureau [(2001) 10 SCC 203], the Supreme Court has observed as under:

"It must be remembered that the appellant Naushad has no case that when he was produced before the Magistrate immediately after his arrest, that he made any grievance of any maltreatment administered to him by the members of the Narcotics Control Bureau."

Therefore, this Court has no reason to believe that the accused were subjected to torture and the confessions were obtained thereafter.

RETRACTED CONFESSION:

47. Madhan [A1] and Chaval [A2] did not retract their confession statement at the time when they were produced before the Magistrate for remand on 09.07.2012. Madhan [A1] has sent a retraction letter, which has been received by the Special Court on 23.07.2012, in which he has stated that he used to purchase textiles from Rajeshwari Textiles and that the Officers forcibly took him away from his lodge room and foisted a case against him. Chaval [A2] has sent a retraction letter dated 22.08.2012 stating that, he hails from Jodhpur in Rajasthan and is into textile business; that the DRI Officers have foisted a false case on him. The question is, what weight can be attached to a retracted confession. The Supreme Court, in State of Tamil Nadu v. Kutty @ Lakshmi Narasimhan [JT 2001 (6) SC 352], has held that just because a confession has been retracted, it cannot be presumed that the confession is tainted. After holding so, the Supreme Court has held as under:

"13.....As a matter of practical knowledge we can say that non-retracted confession is a rarity in a criminal cases."

48. In K.I.Pavunny vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin [(1997) 3 SCC 721], a three Judge Bench of the Supreme Court has considered the law relating to the evidentiary value of a confession statement given to a Customs Officer and has held that a conviction can be based on a retracted confession. In the said judgment, the Supreme Court has further held as follows:

"If a confession is proved by unimpeachable evidence and if it is of voluntary nature, it

when retracted, is entitled to high degree of value as its maker is likely to face the consequences of confession by a statement affecting his life, liberty or property."

49. Madhan [A1], in his confession statement, has stated that he has given Rs.1,18,000/- to Chaval [A2] towards the drug transaction. This sum of Rs.1,18,000/- has been recovered from Chaval [A2] and has been marked as M.O.7. He has further stated that he came by Jet Airways flight on 06.07.2012 from Sri Lanka to Chennai. His flight ticket and Boarding Pass, [Ex.P.4 and Ex.P.5] respectively corroborate this. In his retraction statement, he has stated that he was purchasing textiles from Rajeshwar Textiles. Chaval [A2] has stated in his retraction statement that he is into textiles business. The seizure has been from Rajeshwar Textiles Shop in Thambu Chetty street from textile materials. Therefore, Mr.B.Kumar's contention that the prosecution had failed to prove that Chaval [A2] was the Proprietor of Rajeshwar Textiles is unacceptable. Even if everything goes, the evidence of four witnesses to the effect that they went to Rajeshwar Textiles in Thambu Chetty Street on 08.07.2012 when Madhan [A1], a Sri Lankan national and Chaval [A2] were in the shop, is sufficient enough to establish the nexus between Chaval [A2] and Rajeshwar Textiles Shop.

50. In Hemraj vs. State of Ajmer [AIR 1954 SC 462], the Supreme Court has held that a confession can be corroborated with the materials already in the hands of the police.

51. In fine, this Court is of the view that the confession statement of Madhan [A1] and Chaval [A2] are voluntary and truthful and the same can be relied upon along with the seizure of the contraband.

52. In this case, the recovery of heroin has been made in the presence of Madhan [A1] and Chaval [A2]. It is not the case of the prosecution that they are linking the seizure to the accused via the confession statement alone. Confession of an accused will assume great significance in a case based on circumstantial evidence and not in a case based on direct evidence. In the former category of cases, the confession will act as a bridge between the maker [accused] and the offence. In this case, the accused were caught with the contraband in Rajeshwar Textiles. Had the seizure in this case been done by a Police Officer, the confession statement would have been hit by Section 25 of the Evidence Act and not relevant at all. Only to get over such contingencies, the Parliament has designed two presumptions under the NDPS Act, viz., Sections 35 and 54, which read as under:

"35. Presumption of culpable mental state.-

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

"54. Presumption from possession of illicit articles.-In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,

for the possession of which he fails to account satisfactorily."

53. In *Noor Aga vs. State of Punjab* [(2008) 16 SCC 417], the Supreme Court has held that the provision imposing reverse burden must not only be strictly complied with, but also may be subject to proof of some basic facts. However, the Supreme Court has held that Sections 35 and 54 of the NDPS Act cannot be said to be unconstitutional.

54. In this case, the prosecution have, via the evidence of P.V.Jayaraman [P.W.1], Chenchuraman [P.W.3], Shyamalnath [P.W.8] and Vijayakumar [P.W.9], cogently established the seizure of the contraband kept concealed amongst churidar materials in Rajeshwar Textiles in the presence of Madhan [A1] and Chaval

[A2] and in the cross-examination of the Officers, it has not been suggested that on account of previous motive or enmity, a false case has been foisted against the accused.

55. In Madan Lal (supra), the Supreme Court has held that once custody is proved, then, the accused should prove that they had no conscious possession. This principle has been reiterated in Megh Singh vs. State of Punjab [2003 AIR SCW 4536]. Therefore, even if the confession is kept at bay, there are overwhelming materials to show that Madhan [A1] and Chaval [A2] were in custody of the contraband and it is for them to disprove the prosecution case.

56. Learned Senior Counsel contended that the failure of the prosecution to examine Mahendar, Office Boy of Rajeshwar Textiles who is said to have brought the consignment from Anmol Transport Office in Chennai to Rajeshwar Textiles is fatal to this case.

57. It is seen that the DRI Officers have recorded the statement of Mahendar and he was also shown as witness no.15. He was a worker under Chaval [A2]. He admittedly hails from Rajasthan and he had given his Rajasthan address. The Court had sent summons, but the same could not be served on him and therefore, he was not examined.

58. Learned Senior Counsel also submitted that the failure of the prosecution to examine V.Chandrakumar, Manager of NST Palace from whom the DRI Officials obtained the passport of Madhan [A1], the Hotel Arrival Register and other documents, is fatal to this case.

59. In the opinion of this Court, the examination of this witness would have only shown that Madhan [A1] had taken a room in NST Palace. Madhan [A1], in his 313 Cr.P.C. examination, has submitted that he has taken a room in the NST Palace and it is his case that he was illegally abducted by the DRI Officials from the said lodge. Therefore, non-examination of Chandrakumar to prove this fact cannot be said to be fatal to the prosecution case.

60. Learned Senior Counsel further contended that the Call Detail Records (CDR) should not be relied upon, as they had no certification under Section 65-B of the Evidence Act, in the light of the law laid down by the Supreme Court in Anvar (supra).

61. The Call Detail Records (CDR) in question were obtained from the service provider, vide Ex.P.35 on 14.08.2012. At that

time, the law on the subject was governed by the judgment of the Supreme Court in State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru [(2005) 11 SCC 600]. Only in the year 2014, the law in Navjot Sandhu (supra) was reversed by the Supreme Court in Anvar (supra) and therefore, the Call Detail Records became inadmissible in evidence for want of certification against Section 65-B of the Evidence Act. Therefore, the DRI cannot be blamed for not collecting the evidence that is required for corroborating the statements of the accused, but the corroborative evidence become inadmissible pursuant to change in the law brought by the judgment of the Supreme Court in Anvar (supra).

62. Learned Senior Counsel for the defence submitted that adverse inference must be drawn under Section 114 (g) of the Evidence Act against the prosecution for not examining the mahazar witnesses, Mahendar, people from Anmol Transport and witnesses relating to the Call Details Records.

63. This issue has been answered by the Supreme Court in Harpal Singh vs. Devinder Singh and another [(1997) 6 SCC 660]. An illustration under Section 114(g) of the Evidence Act is only a permissible inference and not a necessary inference. Unless there are other circumstances, it should not be a mechanical process to draw adverse inference merely on the strength of non-examination of a witness, even if it is a material witness. In this case, one of the mahazar witnesses, viz., Sakthivel [D.W.2] has been won over by the accused and he deposed in their favour as D.W.2. The whereabouts of the other witness Kumar could not be ascertained. Similarly, Mahendar hails from Jodhpur in Rajasthan and he had only brought the consignment from Anmol Transport to Rajeshwar Textiles. Therefore, in the facts and circumstances of the case, no adverse inference can be drawn as canvassed by the learned Senior Counsel.

64. Now, coming to the first argument of Mr.A.Raghunathan, that the trial in this case should not have been conducted under Chapter XIX-B of the Code, this issue is no more res integra in the light of the authoritative judgment of this Court in M.Prabhu Lal vs. Assistant Director, Directorate of Revenue Intelligence, Tiruchirappalli [1997 (1) LW (CrL.) 60], wherein, this Court has gone into the entire gamut of the arguments and after relying upon the deeming provision in Section 36-C of the NDPS Act, has held as follows:

"16. In the light of the advertent of the observations of the Apex Court above referred regarding the deeming provisions and under the concept of legal fiction in the two judgments, and the specific provisions contained in Ss.36-A to 36-D of the N.D.P.S. Act, the very effort taken by

Mr.B.Kumar on behalf of the petitioner is being rendered futile and as such it cannot be countenanced. It would follow therefore that on identifying the proper materials for the framing of the charges after taking cognizance of the offences by virtue of S.36-A(1)(d) of the Act, the learned Special Judge is empowered to proceed further by framing the charges and examining the witnesses as the Sessions Judge and to dispose the case in accordance with law under the concept of legal fiction and all the more the provisions of the N.D.P.S. Act has provided the trial court with full power as specially constituted. Thus, the above provisions and the case laws cited and adverted to above, would provide a clear and total answer to the grievance projected on behalf of the revision petitioner. No other exercise has been done during the course of hearing the revision. After having considered the whole gamut of the case, I am constrained to say that there are no merits in this revision and accordingly, it is liable to the rejected even at this stage."

65. It may not be out of place to state that Prabhu Lal (supra) reached the Supreme Court and the conviction and sentence were confirmed and the judgment is reported in (2003) 8 SCC 449. At this juncture, it is pertinent to extract the following passage from the Constitution Bench judgment of the Supreme Court in Rao Shiv Bahadur Singh and another vs. State of Vindhya Pradesh [AIR 1953 SC 394], wherein, in paragraph 9, the Supreme Court has held as follows:

"9. In this context it is necessary to notice that what is prohibited under Article 20 is only conviction or sentence under an ex post facto law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot ipso facto be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular court or by a particular procedure, except insofar as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."

(emphasis supplied)

66. Mr.A.Raghunathan, learned Senior Counsel, referred to Section 44(1)(d) of the PMLA and submitted that in the absence

of such a provision in the NDPS Act, the trial should have been conducted in accordance with Chapter XIX-B of the Code. This Court does not want to repeat the reasons given in Prabhulal (supra) for negating this contention. However, since the PMLA has come in 2002, it becomes necessary to advert to the submissions of Mr.A.Raghunathan in this regard.

67. To answer Mr.A.Raghunathan's submission, it may be necessary to briefly narrate the history of the NDPS Act.

India being an opium producing country, became a hotbed for narco-arms smuggling, as opium is the base for preparing heroin (Diacetyl morphine), which is much in demand in the West. Heroin became a medium of exchange for purchase of arms by terrorists groups all over the world. Terrorism in Punjab reached its pinnacle in the early 1980's and Smt.Indira Gandhi, the then Prime Minister, fell victim to the bullets of her own bodyguards. In such a surcharged environment, the Parliament brought in two enactments, viz., Terrorist and Disruptive Activities (Prevention) Act, 1985 [for short "the TADA"] and the NDPS Act, 1985 in order to break narco-terrorism. Until then, drug related offences were being dealt under the Opium Act, 1878 and the Dangerous Drugs Act, 1930, which were effete. Though we had signed the Convention on Psychotropic Substances of 1971, we had not taken any steps to bring in statutory changes in our laws. The Parliament, in its wisdom, felt the need to have stringent drug laws which would not only contemplate severe punishment, but also confer investigation powers to both Central and State Government Agencies. The following passage from the Statements of objects and reasons of the NDPS Act is worth extracting:

"(ii) The existing Central laws do not provide for investing the officers of a number of important Central enforcement agencies like narcotics, customs, central excise, etc., with the power of investigation of offences under the said laws."

68. The NDPS Act, 1985 repealed the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 and by Sections 41, 42 and 43, it conferred powers to conduct search, seizure and arrest on a wide range of Officers, ranging from the local police to the Border Security Force. In 2001, the powers of search, seizure and arrest were extended to include even paramilitary and armed forces. The minimum sentence that was prescribed for possession of any quantity of 'Manufactured Drug' was ten years. Therefore, by virtue of 'II. Classification of offences against other laws' in Schedule-I of Cr.P.C., the cases arising under the NDPS Act became triable by Court of Session. When a Customs Officer recovered heroin from a passenger, he used to complete the investigation and file a complaint before

the jurisdictional Magistrate, who would take cognizance of the offence and issue process to the accused for his appearance. On the appearance of the accused, the Magistrate was required to record the statement of the complainant and the witnesses on oath under Section 202(2) Cr.P.C. and commit the case to the Court of Sessions under Section 208 Cr.P.C. On the other hand, a Police Officer was required to file a police report before the jurisdictional Magistrate and the case was committed to the Court of Sessions under Section 209 Cr.P.C. straightaway. This procedure was given a go-by, by the Parliament via the NDPS Amendment Act, 1988 (2 of 1989) with effect from 29.05.1989 by the constitution of Special Courts to try the cases without recourse to committal proceedings.

69. Section 36-A(1)(d) of the NDPS Act reads as under:

"36-A. Offences triable by Special Courts.- 1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a)

(b)

(c)

(d) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorized in the behalf, take cognizance of that offence without the accused being committed to it for trial."

70. Section 36-C was also brought in by Amendment Act 2 of 1989 with effect from 29.05.1989 and it reads as under:

"36-C. Application of Code to proceedings before a Special Court.-Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor."

71. It is beyond cavil that the Officers of the DRI have been authorised by the Central Government to file complaint before the Special Court under the NDPS Act. If Mr.A.Raghunathan's argument is accepted, there will be two forms of trial before the Special Court, viz., one under Chapter XVIII-Trial before a Court of Session, of the Code, if the case

is based on Police Report and the other under Chapter XIX-B-Cases instituted otherwise than on police report, of the Code, if it is on a Complaint by an authorised non-Police Officer.

72. This will indubitably lead to an incongruous situation where the Special Court will be a Sessions Court for the police, but a Court of Magistrate for others. It will also make the very constitution of the Special Court and Section 36-C of the NDPS Act otiose. The legal fiction in Section 36-C to the effect that the Special Court shall be deemed to be a Court of Session will be rendered nugatory.

73. Mr.A.Raghunathan submitted that, in a police case, the investigation will be conducted under Chapter XII of the Code beginning with the registration of an FIR, recording statements of witnesses under Sections 161, 164, etc. and filing of police report under Section 173 and such a scheme of investigation will help the accused for preparing his defence.

74. At the first blush, this argument may look appealing, but, on a closure scrutiny of the provisions of the NDPS Act relating to search, seizure and arrest, the fallacy in this argument would stand exposed. The Parliament was aware that Chapter XII of the Code will not apply to Customs Officers, Revenue Officers, Paramilitary Officers, et al and that is why, Sections 41 and 42 have been so drafted that, an information is required to be recorded; search and seizure can be conducted only when there is reason to believe from personal knowledge or information given by any person and taken down in writing; that an option under Section 50 of the NDPS Act should be given for personal search; report under Section 57 of the NDPS Act should be sent and statement can be recorded under Section 67 of the NDPS ACT. All these records, along with the complaint in writing by the authorised Officer, would provide enough materials for the accused to prepare his defence.

75. Now, coming to the comparison of the provisions of Section 44(1)(d) of the PMLA with the provisions of Section 36-A (1)(d) and 36-C of the NDPS Act in support of the contention that a Special Court under the NDPS Act should adopt procedure for Magisterial trials, if the prosecution is by a non-Police agency, PMLA envisages two category of offences, viz., scheduled offences and the offence of money-laundering. The offence of money-laundering under Section 3 of the PMLA can be invoked only if the offender had acquired money by commission of a crime enumerated in the schedule to the Act.

76. Section 44(1)(c) and (d) was introduced in the PMLA only by Central Act 2 of 2013 with effect from 15.02.2013. Under

Section 44(1)(b) of the PMLA, as it stood in 2002, a Special Court was competent to take cognizance of an offence under Section 3 of the PMLA on a police report and upon a complaint made by an authorised Officer. By Amendment Act 20 of 2005, the power of the Special Court to take cognizance based on police report was deleted with effect from 01.07.2005. Thereafter, by Act 2 of 2013, Section 44(1)(c) and (d) was introduced with effect from 15.02.2013. On a reading of this provision, it is clear that a Special Court cannot take cognizance on a police report and can take cognizance without committal proceedings on the complaint filed by authorised officers. Section 44(1)(c), which is a new provision introduced with effect from 15.02.2013, empowered a Court which has already taken cognizance of the scheduled offence to commit the case to the Special Court, if the Special Court had taken cognizance of the offence under the PMLA. For example, an offence under Section 420 IPC is a scheduled offence. Similarly, an offence under Section 135 of the Customs Act is a scheduled offence. Cases under Sections 420 IPC and 135 of the Customs Act are triable by Magistrates. If a person had amassed wealth by committing an offence under Section 420 IPC/135 of the Customs Act, a complaint can be filed against him for the offence under Section 3 of the PMLA before the Special Court. What Section 44(1)(c) of the PMLA states is that, on the filing of a complaint under the PMLA before the Special Court, the Magistrate before whom the prosecution under Section 420 IPC/135 of the Customs Act is pending, shall commit the case to the Special Court. Thus, Section 44(1)(c) and (d) of the PMLA provides for not only the trial of a case under the PMLA, but it also empowers the Special Court to try a case, which is otherwise triable by a Magistrate.

77. Now, when a case under Section 420 IPC/135 of the Customs Act is committed to the Special Court, the question is, what procedure the Special Court should follow, whether the procedure under Chapter XIX or the procedure under Chapter XVIII of the Code? This has been answered by Section 44(1)(d) of the PMLA. Section 44(1)(d) states that the trial of the scheduled offence and the trial of the money-laundering case shall be conducted in accordance with Chapter XVIII of the Code. Such a dichotomy cannot happen under the NDPS Act, because the offence under the NDPS Act is not dependent upon the commission of an offence under another enactment, whereas, the offence under Section 3 of the PMLA is dependent upon the commission of an offence mentioned in the schedule to the PMLA. Hence, the comparison is misconceived.

78. In the result, this Court does not find any infirmity in the conviction of the appellants by the Special Court warranting interference. As to the sentence, the trial Court has imposed

the sentence of 14 years for each charge against the appellants. Interest of justice will be served if the sentence is reduced to 10 years Rigorous Imprisonment, that being the minimum for the convicted offences.

79. Accordingly, the sentence imposed in C.C.No.4 of 2013 by the II Additional Special Court for NDPS Cases, Chennai is reduced to 10 years Rigorous Imprisonment.

80. Madhan [A1], being a Sri Lankan National, will be entitled to his Sri Lankan Passport at the time of his release from the prison. At the time of release after undergoing the sentence, the Superintendent, Central Prison, Puzhal, Chennai, shall hand over custody of Madhan [A1], to the Special Camp for Sri Lankan refugees, after informing the concerned District Collector and the 'Q' Branch police, so that he can be sent to Sri Lanka, if he is otherwise not required in India.

With the above direction and modification in sentence alone, these appeals are dismissed. Connected Crl.M.Ps. are closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gms

To

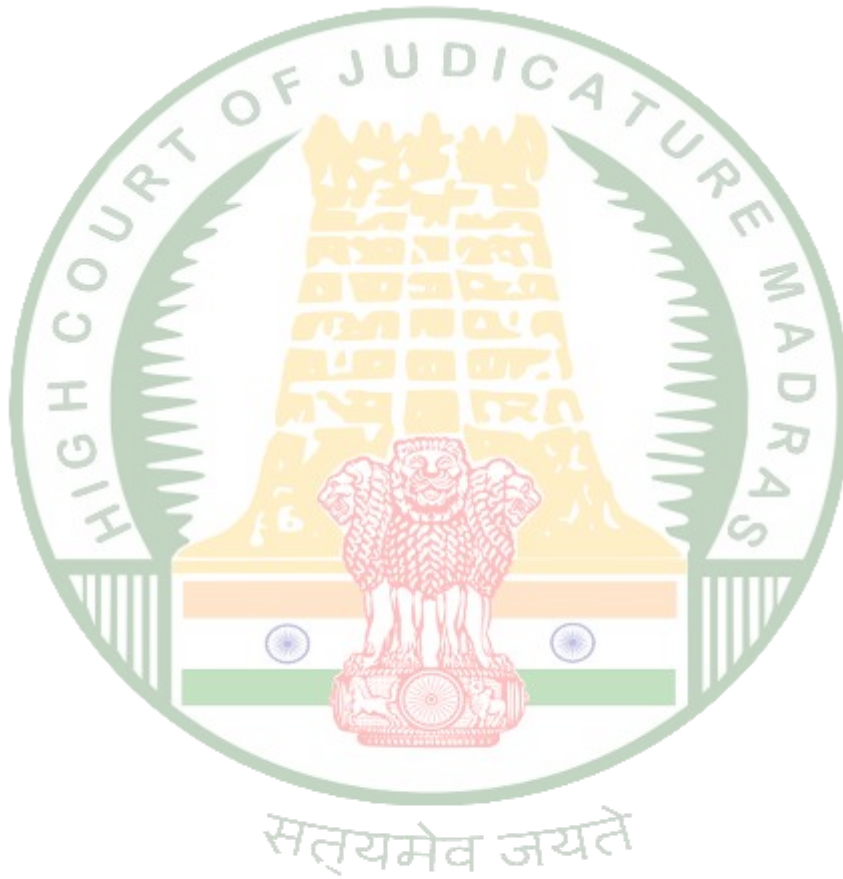
1. The Intelligence Officer
Directorate of Revenue Intelligence
Chennai Zone Unit
Chennai 600 017.
2. II Additional Special Court for NDPS Cases,
Chennai.
3. The Superintendent,
Central Prison, Puzhal, Chennai,
4. The Public Prosecutor,
High Court, Madras.
5. Mr.N.P.Kumar
Special Public Prosecutor for DRI Cases.

6. The Record Keeper,
Criminal Section,
High Court, Madras.

+2ccs to Mr.O.Raman, Advocate, S.R.No.91523, 91522

Crl.A.Nos.80 and 195 of 2016

AK(CO)
CS/05/01/17



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