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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-30695-2016

Date of Decision:- December 6, 2017

Kulwant Singh

.... Petitioner

Versus

State of Punjab

.... Respondent

CORAM: HON'BLE MR. JUSTICE SHEKHER DHAWAN

Present: Mr. Vipin Mahajan, Advocate,
for the petitioner.

Ms. Jaspreet Kaur, AAG, Punjab.
for the respondent – State.

SHEKHER DHAWAN, J.

Present petition under Section 482 of Code of Criminal Procedure [“**Cr.P.C.**”] is for quashing of FIR (Annexure P/1) No. 48 dated 26.08.2012 registered under Sections 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, “**the Act**”) registered at Police Station Kahnuwan, District Gurdaspur, alongwith all consequential proceedings arising out of the same.

2. Facts relevant for the purpose of decision of this petition; that the petitioner was allegedly found to be in possession of 500 grams of intoxicating power. Sample of 10 gms of the said intoxicant powder was taken and sent for chemical analysis to the Chemical Examiner, Kharar. As per the report of Chemical Examiner, Kharar, Annexure P/2, dated

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5.11.2012, the same contained "Pheniramine Maleate", which is not covered under the Act. Thereafter, an application was filed before Judicial Magistrate Ist Class, Gurdaspur on 16.11.2012 (Annexure P/3) for production of second sample lying in the Malkahana and for sending the same again to the Chemical Examiner. However, the said application was dismissed by learned Judicial Magistrate Ist Class vide order dated 5.1.2013 (Annexure P/4), on the ground that there was no provision under the Act for sending second sample for re-testing. However, the sample was sent for re-analysis to Forensic Science Laboratory (FSL), Chandigarh and on the second sample, report (Annexure P/5) dated 18.10.2014 was received that the sample contained "Dextropropoxyphene" and on that basis, report under Section 173 Cr.P.C. was filed in the Court and learned trial Judge framed charge against the petitioner.

3. Learned counsel for the petitioner mainly contended that there is no provision under the Act for sending second sample for re-analysis and such an application, moved by the prosecution, was rightly turned-down by learned Judicial Magistrate Ist Class on 16.11.2012. Still the sample was again sent for re-testing and on that basis of such report, Annexure P/5, charge was framed against the petitioner and the proceedings are continuing which is misuse of the process of law and the same be quashed.

4. Learned State counsel while arguing this point, fairly admitted the fact that as per report (Annexure P/2) of the Chemical Examiner, Kharar, the alleged powder was found to be "Pheniramine Maleate" and

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thereafter the application was dismissed. However, thereafter, an appeal was filed before learned Judge, Special Court and the said appeal was allowed vide order dated 19.2.2014 (Annexure R/1) and after obtaining orders from the Court, second sample was sent for re-analysis and as such, there is no ground for quashing the FIR, charge having been framed against the petitioner and the present petition be dismissed.

5. Having considered the submissions made by learned counsel for the parties and appraisal of the record, available on the file, this Court is of the considered view that certain facts are not disputed that the alleged recovery of some powder was effected from the petitioner and sample of 10 gms was drawn therefrom and the same was sent for analysis purpose to the Chemical Examiner, Kharar and as per his report, Annexure P/2, the same was found to be containing “Pheniramine Maleate”, which is not covered under the Act. Thereafter, prosecution moved application, Annexure P/3 before learned Judicial Magistrate Ist Class on 16.11.2012 and the same was dismissed by learned Magistrate on 5.1.2013 vide order Annexure P/4 on the ground that there was no provision under the Act to send second sample. Thereafter, another application of the prosecution was filed and vide order dated 19.2.2014 passed by Judge, Special Court, Gurdaspur, sample was sent for re-analysis to FSL, Chandigarh and report, Annexure P/5 was received, wherein it was mentioned that the sample contained “Dextropropoxyphene”, which is covered under the Act and charge was accordingly framed. The main point involved in this case is – Whether there is any provision under the Act for sending second sample for re-

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analysis?

6. Similar matter was before Hon`ble Apex Court in **Thana Singh Vs. Central Bureau of Narcotics, 2013 (1) R.C.R. (Criminal) 861** and Hon`ble Supreme Court while dealing with the provisions of re-testing under the Act observed as under:-

“.....While re-testing may be an important right of an accused, the haphazard manner in which the right is imported from other legislations without its accompanying restrictions, however, is impermissible. Under the NDPS Act, retesting and re-sampling is rampant at every stage of the trial contrary to other legislations which define a specific time-frame within which the right may be available. Besides, reverence must also be given to the wisdom of the Legislature when it expressly omits a provision, which otherwise appears as a standard one in other legislations. The Legislature, unlike for the NDPS Act, enacted Section 25(4) of the Drugs and Cosmetics Act, 1940, Section 13(2) of the Prevention of Food Adulteration Act, 1954 and Rule 56 of the Central Excise Rules, 1944, permitting a time period of thirty, ten and twenty days respectively for filing an application for retesting.”

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“25. Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the concerned laboratories, results of the same must be furnished to all parties concerned with the matter. Any requests as to re-testing/re-sampling shall not be entertained under the Narcotic Drugs and Psychotropic Substances Act as a matter of course. These may, however, be permitted, in extremely exceptional circumstances for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period

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of fifteen days of the receipt of the test report; no applications for re-testing/resampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the Narcotic Drugs and Psychotropic Substances Act.”

7. Similar matter was before this Court in **Amarjit Singh Vs. State of Punjab**, **2013(4) R.C.R. (Criminal) 524** and Hon`ble Division Bench of this Court observed as under:-

22. Even though the Narcotic Drugs and Psychotropic Substances Act does not have any provision pertaining to the second test of the sample, at the instance of the prosecution, there may arise an occasion which would warrant recourse to second test. It may be a case where the sample contraband sent for examination was lost in transit or could not be traced before ever the test was embarked upon by the Laboratory. The sample would have been subjected to damage during transit or at the Laboratory. There may be a case where the seal found affixed on the sample does not match with the sample seal sent along therewith for comparison by the Chemical Examiner before ever opening the sample for test. Though the Narcotic Drugs and Psychotropic Substances Act does not recognize the right of the prosecution to go in for second test, the aforesaid contingencies warrant second test in the interest of justice. Negation of the plea for second test even in such contingencies would definitely lead to miscarriage of justice....”

8. Applying the same principle to the present set of facts, there

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was absolutely no ground for sending second sample for re-testing even as per orders Annexure R/1, passed by learned Judge, Special Court, Gurdaspur.

9. There is another aspect of the matter. As per law laid-down in **Thana Singh's case (supra)**, such an application for sending second sample for re-analysis should be made within 15 days. In this case, the second application was filed before learned Judicial Magistrate Ist Class on 16.11.2012 itself and the same was dismissed on 5.1.2013. However, the subsequent application was moved before learned Judge, Special Court, Gurdaspur on 19.2.2014 and on that, even no notice was issued to the accused before passing order Annexure R/1 on the application, which is contrary to the principles of law laid down by Hon`ble Apex Court and on the principles of equity and natural justice. As such, the order cannot be considered to be legal permission for sending the second sample.

10. In view of the above, FIR (Annexure P/1) No. 48 dated 26.08.2012 registered under Sections 22 of the Act, registered at Police Station Kahnuwan, District Gurdaspur and all consequential proceedings arising out of the same as also entire proceedings initiated on the basis of report having been received on second sample and report submitted by the Police under Section 173 Cr.P.C. and charge framed against the petitioner are quashed.

11. The petition stands allowed in the above terms.

December 6, 2017
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(SHEKHER DHAWAN)
JUDGE

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Speaking/Reasoned
Reportable

Yes
Yes