

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 26th April, 2017**

+ CRL.M.C. 5105/2015 & CRL.M.A.18398/2015

NARCOTICS CONTROL BUREAU

..... Petitioner

Through: Mr.Subhash Bansal, Standing Counsel
with Mr.Shashwat Bansal, Adv.

versus

UNKNOWN PERSON

..... Respondent

Through: Mr.S.S. Gandhi, Sr., Advocate
(Amicus Curiae)
Ms.Kusum Dhalla, APP for State

CORAM:

HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

I.S. MEHTA, J.

1. The petitioner-Narcotics Control Bureau (*hereinafter referred as NCB*) has preferred the instant petition under Sections 482 Cr.P.C. for setting aside the impugned order dated 15.07.2015 passed by the learned Special Judge, NDPS/N. Delhi in the case titled as *NCB vs. Unknown Person*. Further the petitioner also seeks for confiscation and disposal of the case property, i.e. seized property:- 45gm Cocaine, 555gm Heroin and 320gm Hashish along with its seized articles, packing materials and samples, under Section 63 (2) of the Narcotic

Drugs and Psychotropic Substances Act, 1985 (*hereinafter referred as NDPS Act*).

2. The brief facts stated are that on 03.01.2011 Shri M.M. Bhandari, Intelligence Officer NCB received an information about some parcels lying at the RLO, SRT Nagar, PO Building, New Delhi which were suspected of containing narcotic drugs. In pursuance of the said information a team was constituted which reached the abovementioned address and recovered nine parcels/packets and a recovery memo was prepared. Thereafter, the recovered parcels were tested with the field testing kit which gave positive results of cocaine, heroin and hashish respectively. The quantity of seized substances were measured, i.e. 45gm Cocaine, 555gm Heroin and 320gm Hashish, seizure report was prepared and the samples were forwarded to CRCL for examination and a report with positive result for cocaine, heroin and hashish was received from the CRCL.
3. The petitioner department/investigation officer made several efforts to trace the persons who committed the offence in connection with the seized narcotic substances but same cannot be found and on finding no possibility of any information to be received in the near future the petitioner moved an application under Section 63(2) of NDPS Act in the Court of Special Judge, NDPS/N. Delhi for confiscation and disposal of the case property along with its seized articles, packing materials and samples.
4. Consequently, the learned Special Judge, NDPS/N, Delhi vide impugned order dated 15.07.2015 dismissed the aforesaid application filed by the petitioner department under Section 63(2) of NDPS Act.

Hence the present petition.

5. The learned standing counsel for the petitioner/NCB has submitted that several orders have been passed under Section 63 (2) of NDPS Act for disposal of case property. He has further submitted that provision of Section 63 (2) of NDPS Act clearly states that where any article is seized or appears to be confiscated under Sections 60/61/62 of NDPS Act, but the person who committed the offence is not known or found, the Court may inquire into such liability and may order confiscation of such articles accordingly. Therefore, in the present matter where the person cannot be found or identified after investigation, the case property or confiscated article are to be disposed of under Section 63 (2) of NDPS Act.
6. The learned standing counsel for the petitioner has submitted that whenever any article/thing or drug is seized under the NDPS Act, it is to be confiscated. He further submits that the statutory provisions under Section 63 of the NDPS Act cannot be ignored and there is no lapse anywhere except to destroy the property seized after the trial is over. It was further pointed out that under Section 63 sub-Clause (2) of NDPS Act where "the person who committed the offence is not known or cannot be found the Court may enquire into and decide such liability and may order confiscation accordingly" and it is the duty of the Court to look into its liability and proceed the matter as per law.
7. The learned standing counsel has submitted that while adopting the NDPS Act, the legislature has also formulated the procedure for destroying the narcotic substances under Section 52A of NDPS Act by adopting notification procedure so laid down in said Section of the

NDPS Act. It is further submitted that Section 52A sub-clause(2) of NDPS Act is the procedure wherein the narcotics drugs substance recovered from the person of the accused, if there is a shortage of storage to keep the seized goods, the Government has to follow the procedure as per Section 52A sub-clause (2) of NDPS Act.

8. The learned standing counsel further submits that the procedure adopted by the Government would not contravene Section 52A sub-clause (4) of NDPS Act where the goods seized required for the purposes of the evidence.
9. The learned standing counsel further submits that Sections 52 and 52A of NDPS Act does not spell out the term 'confiscation'. In Sections 52 and 52A of NDPS Act, the word 'confiscation' is not used because the trial is yet to come and it is the duty of the trial Court "to confiscate or not to confiscate" as per the legal provisions. Whereas, Section 63(2) of NDPS Act the word 'confiscation' is mentioned because the article seized is without the person and whose identity cannot be ascertained at the relevant point of time. Therefore, in the present case Section 63(2) of NDPS Act would be applicable to attract Section 482 Cr.P.C. as the petitioner has filed the same before this Court.
10. The learned standing counsel for the petitioner has submitted that the Hon'ble Supreme Court in the case *Union of India vs. Mohanlal and Anothers; 2012 7 SCC 719* has not dealt with the provision of Section 63 (2) of NDPS Act. The law disclosed in the aforesaid judgment of the Apex Court is not applicable in the present case. It is further submitted that before destroying of the case

property, responsible official concern makes endorsement that these articles are being destroyed because the same cannot be put to accused qua against any person on the basis of disclosure statement. Once the NCB Deptt. come before the Court that seized goods could not be put to the accused then it is Section 63(2) of NDPS Act which is to be invoked and not Section 52A of NDPS Act. It is further submitted that Section 52(A) of NDPS Act does not speak about the confiscation and that it only speaks about the pre-trial disposal.

11. The learned Standing Counsel on behalf of the petitioner submits that Section 63(2) of NDPS Act is an independent Section and pointed out that there are previous orders dated 16.05.2011 and 05.09.2013 on record which were passed under said Section for confiscation and disposal of the case property being contraband alongwith seized articles and packaging material as per the procedure prescribed under the NDPS Act and the rules pertaining to disposal have already been framed by the Government of India by notification dated 16.01.2015 and the lower Court below has passed the wrong order which is liable to be set aside.
12. On the contrary the learned Amicus Curiae points out that Section 43 of NDPS Act deals with power of seizure and arrest in public place. The purpose of Section 52A of NDPS Act is to avoid pilferage of article seized as there is scarcity of storage, to collect the evidence, and thereafter destroy the articles as prescribed by the Central Government by keeping the primary evidence/seized document, i.e. Panchanama and complete sample which, become primary evidence and can be used in future if accused is arrested. The

articles may and may not be exclusively narcotics but could be the goods attached or which are coming with narcotics.

13. The learned Amicus Curiae has further submitted that in the event of non-identity of the persons involved and the narcotics has been recovered from different places at the relevant point of time and subsequent period, in that situation, the provisions of Section 52A of NDPS Act are to be followed by keeping the samples and its report intact and the rest of the narcotics substance could be destroyed as per the procedure prescribed by the Government notification dated 16.01.2015 which has given the details of how it could be destroyed. The purpose of Section 52A of the NDPS Act is that if the accused is later on identified and if the accusation qua against him comes, the sample kept could be put to him and trial could begin; unless the samples are kept the accused could not be put on trial for want of evidence.

14. The learned Amicus Curiae has referred to a judgment of the Hon'ble Supreme Court in case ***Union of India vs. Mohanlal and Another; 2012 7 SCC 719*** wherein an accused was acquitted as neither the evidence under Section 52A of NDPS Act nor the articles were kept and, therefore, no seizure in the subsequent trial could be proved. It is pointed out that if procedure under Section 52A of NDPS Act would have been followed then this acquittal could not have been taken place. Subsequently, the Hon'ble Supreme Court in such a situation has given the guidelines in the case ***Union of India vs. Mohanlal and Anr; 2016 3 SCC 379*** wherein another judgment in the case ***Union of India vs. Mohanlal and Anr; 2012 7 SCC 712*** was

referred. The guideline has already been given in the said judgment in para 12 regarding the seizure, storage and judicial supervision and subsequently, after collecting the data from all over the country, the Hon'ble Supreme Court in the case *Union of India Vs. Mohanlal and Another; 2016 3 SCC 379* which is a continuing judgment in para 26 onwards has laid down the procedure for disposal of the drugs which is summed up in para 31 of the judgment. Moreover, on the basis of earlier direction, the government came out with the detailed notification dated 16.01.2015 which superseded the earlier notification dated 10.05.2007.

15. The learned Amicus Curiae has submitted that the notification and the rules have already been framed under Section 52(A) of NDPS Act and the said notification is the only procedure laid down by the Government and no other forum is required. He further submitted that for pre-trial cases and after confiscation the procedure to be followed is Section 52(A) of NDPS Act which is prescribed by the notification dated 16.01.2015.

16. Under the NDPS Act there are two types of seizure of the narcotic drug, psychotropic substance or controlled substance:-

- i. Narcotic drug, psychotropic substance or controlled substance seized from a person.
- ii. Narcotic drug, psychotropic substance or controlled substance seized from a public place and the offender is not known or is

likely to be not known in the near future.

17. The narcotic drug, psychotropic substance or controlled substance, etc which is seized from a person or from a public place is dealt under Sections 41/42/43/44 of NDPS Act and the procedure for its disposal is dealt under Sections 52/52A of NDPS Act.

Whereas, confiscation of the narcotic drug, psychotropic substance or controlled substance, etc is dealt under Sections 60/61/62/63 of NDPS Act.

18. Sub clause (2) of Section 63 of NDPS Act specifically states "where any article or thing seized under this Act appears to be liable to confiscation under Section 60 or Section 61 or Section 62, but the person who committed the offence in connection therewith is not known or cannot be found, the Court may inquire into and decide such liability, and may order confiscation accordingly".

19. Therefore, there are two ways formulated for destroying the narcotic drug, psychotropic substance or controlled substance under the NDPS Act:-

- i. under Section 52A of NDPS Act and;
- ii. under Section 63(2) of NDPS Act.

20. The whole question hinges around whether the case property in the instant petition is to be confiscated/disposed/destroyed under Section 52A of NDPS Act or under Section 63(2) of NDPS Act?

21. In the instant petition the nine seized parcels/packets were booked by the following accused persons:-

- i. From- Sharma Kumar, 1497 Main Bazar, Paharganj, New Delhi-110055 to Antonio Ramirez Riera, C/Perez Galdos No. 36 Escalera de Atico 07006 Palma De Mallorca Baleares, Spain.
- ii. From- N/A to Mr. Anderson Moutrese, Zip Gola-216227-741-130-946, South Africa.
- iii. From- Neha Gupta, House No-19, Main Chowk, Outer Line, Kingsway Camp, New Delhi-110009 to Mr. Anderson Moutrese, Zip Gola-216227-741-130-946, South Africa.
- iv. From- Mark Lopez, WZ-13A, Main Bazar, Paharganj, New Delhi-110055 to Rahul Lopez Cancho Caddle De Italia 33 4G 28943, Fuenlebrade Madrid Espoana, Tel-634107960.
- v. From- F. Last P.O. Betal Batin India to J Fransten Sandbygardsvej, 232, Sal 2450, Bronshoj Denmark.
- vi. From- Rev. J.I Kumar, H No. 62, Tagore Park, New Delhi to David Aigetu, 102, Jerragle Hill, Ph-II, Rugby Road, Johannesburg, South Africa.
- vii. From- Akai Yepothna, A-261, Opp. Regal Palace, GT Karnal Road, Ist Floor, Derawala Nagar, Delhi-110009 to John Douglas, 10938 Ensbouigs Drive, Houston Taxes, 77099-4706(USA).
- viii. From- Khekota, D-56 Arjun Nagar, New Delhi-110029 to Dr. Gordon Smith, 10938 end strook drive, Houston Taxes, 77099-

4706(USA).

- ix. From- Chika Okoli, Sec-10, H No. 327, Dwarka, New Delhi-110075 to Gillyote Awrinsw, 6/130 Redfe-Edfern, NAW-20, Australia.

22. Section 63(2) of NDPS Act specifically states that the confiscation of the articles could be made where the person who committed the offence is not known or cannot be found, but here in the instant case the persons involved are:-

- i. Sharma Kumar, 1497 Main Bazar, Paharganj, New Delhi-110055
 - ii. N/A
 - iii. Neha Gupta, House No-19, Main Chowk, Outer Line, Kingsway Camp, New Delhi-110009
 - iv. Mark Lopez, WZ-13A, Main Bazar, Paharganjh, New Delhi-110055
 - v. F. Last P.O. Betal Batin India
 - vi. Rev. J.I Kumar, H No. 62, Tagore Park, New Delhi
 - vii. Akai Yepothna, A-261, Opp. Regal Palace, GT Karnal Road, Ist Floor, Derawala Nagar, Delhi-110009
 - viii. Khekota, D-56 Arjun Nagar, New Delhi-110029
 - ix. Chika Okoli, Sec-10, H No. 327, Dwarka, New Delhi-110075
- and the addresses of the addressee are:-

- i. Antonio Remirez Riera, C/Perez Galdos No. 36 Escalera d'Aticob 07006 Palma De Mallorca Balears, Spain.
- ii. Mr. Anderson Moutrase, Zip Gola-216227-741-130-946, South Africa.

- iii. Mr. Anderson Moutrase, Zip Gola-216227-741-130-946, South Africa.
- iv. Rahul Lopez Cancho Caddle De Italia 33 4G 28943, Fuenlebrade Madrid Espoana, Tel-634107960.
- v. J Fransten Sandbygardsvej, 232, Sal 2450, Bronshoj Denmark.
- vi. David Aiget, 102, Jerragle Hill, Ph-II, Rugby Road, Johannesburg, South Africa.
- vii. John Douglas, 10938 Ensbouigs Drive, Houston Taxes, 77099-4706(USA).
- viii. Dr. Gordon Smith, 10938 end strook drive, Houston Taxes, 77099-4706(USA).
- ix. Gillyote Awrinsw, 6/130 Redfe-Edfern, NAW-20, Australia.

and the whereabouts of such accused persons are a matter of investigation.

- 23. Once it comes on the record that the aforesaid accused persons have booked the seized parcels/packet the onus lies on the respondent/NCB to prove under Section 108 of the Indian Evidence Act, 1972 that no such person exists.
- 24. In such a situation the seized property becomes the case property which is required to be kept in safe custody by the respondent/NCB and could be disposed off under the guidelines laid down in the judgment of the Apex Court in the case of **Union of India vs. Mohanlal and Anr; 2016 3 SCC 379** under Section 52A of NDPS Act only.
- 25. The mere application for confiscation and disposal of the case property under Section 63(2) of NDPS Act itself is not sufficient

enough to dispose off the case property along with the seized articles and packing material in existence of the aforesaid named persons who had booked the nine seized parcels/packets containing narcotic drug, psychotropic substance or controlled substance.

26. An application under Section 63(2) of NDPS Act for confiscation and disposal of the case property deals specifically only to unclaimed seized articles where no claimant could be found either on the spot or after the investigations.

27. In such situation the drug law enforcement officer(DLEO) after one month of seizure should apply to the Court informing the details of the case and the efforts put in to identify the accused and the fact that such persons could not be known or identified and pray for confiscation of the goods under Section 63 of the NDPS Act and the Court after considering the aforesaid application may pass an appropriate order accordingly as done in the past practice which is reproduced as under:-

*"IN THE COURT OF SH. SANJEEV JAIN,
SPECIAL JUDGE, NDPS ACT, NEW DELHI*

Application No. 05/2011

In RE:

Narcotics Control Bureau

Vs. Unknown Person

16.5.11

ORDER

An application is moved u/s 63 (2) NDPS Act seeking permission to confiscate and dispose off case property i.e.

recovery / seizure of 474 Gms. Heroin along-with seized articles and packaging material.

It is submitted that an information was received that a parcel booked under Airway Bill bearing no. 856477238429 was lying at Fedex Express, III-1/2 Gopinath Bazar, Church Road, Delhi, Cantt., New Delhi, suspected to contain Narcotics Drug. On this information raid was conducted. Parcel was seized which on opening had brown powder which gave positive test for Heroin weighing 474 gms. Seizure memo was prepared in the presence of witnesses, statements of witnesses were recorded u/Sec. 67 of NDPS Act. The samples were also sent to CRCL which gave positive results for Heroin.

Despite efforts, whereabouts of the person who booked said parcels could not be traced. It is also submitted that there is no possibility of any information / clue to be received in near future.

In view of the submissions made and the fact that the person who had allegedly booked the parcel is not traceable. Permission is granted to confiscate and dispose off the case property being a contraband along-with seized articles and packaging material as per the procedure prescribed under the Act. The report be submitted to the court thereafter.

*sd/-
Sanjiv Jain
Spl. JUDGE NDPS
New Delhi
16.5.11*

XXXX XXXX XXXX XXXX

*NCB vs. Unknown person
MA-1/12*

5/9/2013

*Present: Sh.Subhash Bansal, Ld. SPP for NCB.
IO Azad Singh*

Today it is submitted by the IO present that the earlier IO of this case Jai Bhagwan, as per record had not

recorded the statement of any employee of the courier company so as to ascertain from where had the parcel been booked with the courier company. At this stage Ld. SPP for NCB states that the only prayer being made from this Court is that the NCB be allotted to dispose of the contraband seized in the present case, in view of the notification GSR 399 (E) dated 10/5/2007, which deals with the procedure to be adopted by the Drug Disposal Committee for disposal of Narcotics Drugs and Psychotropic Substances and that the NCB is not pressing that this Court must accept as correct, the investigation carried out by the Agency.

Keeping in view the said prayed made by the Ld.SPP and also taking into account the judgment passed by the Hon'ble Supreme Court recently in a case titled as Union of India vs. Mohan Lal and Anr. 2012 (SCC) 1712, wherein the Hon'ble Supreme Court has directed that the trial courts must ensure the destruction of seized drugs under the NDPS Act expeditiously, the prayer made by the Ld. SPP today stands allowed. Permission thereby is granted to NCB for the disposal of the seized drugs in the present case, as per law and as per the procedure laid down in the aforementioned notification. This application now stands disposed off. A copy of this order be given dasti to Ld. SPP, as requested.

*sd/-
(Anu Grover Baliga)
Spl. Judge, NDPS*

New Delhi/5/09/13"

28. Therefore, for the purpose of the instant petition the proper procedure for confiscation and disposal of the case property could be done under Section 52A of NDPS Act and not under Section 63(2) of NDPS Act as the instant facts of the petition is not that of the unclaimed articles(narcotic drug, psychotropic substance or controlled substance) seized from a public place as claimed by the respondent/NCB.

29. In the instant petition since the seized articles belonged to the aforementioned persons therefore, the lower Court was right in adopting the procedure for disposal of the case property under Section 52A of NDPS Act instead of under Section 63(2) of NDPS Act directly.
30. In the present petition out of the nine parcels/packets seized, one parcel/packet does not disclose the person who booked it. Since all the nine parcels/packets were seized jointly from the same spot/place the possibility of the said parcel/packet being booked by one of the abovementioned person cannot be ruled out therefore, the same could be kept jointly.
31. In view of the discussion made above the observation made by the lower Court in the impugned order dated 15.07.2015 that there is one provision in NDPS Act for disposal of the seized narcotic drugs and psychotropic substance, i.e. under Section 52A of NDPS Act, is set aside to that extent only in presence of Section 63(2) of NDPS Act. However for the purposes of the instant petition confiscation and disposal of the case property is rightly done under Section 52A of NDPS Act resulting into dismissal of the present petition.
32. Consequently, the impugned order dated 15.07.2015 passed by the learned Special Judge, NDPS/N. Delhi in the case titled as *NCB vs. Unknown Person* does not warrant any interference by this Court to invoke inherent powers under Section 482 Cr.P.C. as the trial/lower Court in its wisdom has rightly passed the impugned order dated 15.07.2015 in the application under Section 63(2) of NDPS Act moved by the respondent/NCB.

33. One copy of this judgment be sent to the concerned Court.
34. All the pending application(s) if any are disposed of accordingly. No order as to costs.

I.S.MEHTA, J

APRIL 26, 2017/km

