

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 406 of 2012****Reserved on : 19.11.2018****Delivered on : 28.11.2018**

1. Krishnachand @ Krishno Sao, S/o Madan Sao, aged about 49 years, work as Kuli.
2. Smt. Laxmi Sao, W/o Krishnachand @ Krishno Sao, aged about 43 years, occupation- maker of sweet betel.

Both are R/o Lachhapura. P.S. & District- Barampur (Orissa).

---- Appellants**Versus**

State of Chhattisgarh, Through:- Police Station Supela, District- Durg (C.G.)

---- Respondent

For Appellants : Mr. B.P. Singh, Advocate.

For State/respondent : Mr. Vinod Kumar Tekam, Panel Lawyer.

Hon'ble Shri Justice Ram Prasanna Sharma**CAV JUDGMENT**

1. This appeal is preferred under Section 374(2) of the Code of Criminal Procedure, 1973 against judgment dated 11.01.2012 passed by Special Judge (NDPS), Durg (C.G.) in NDPS Special Case No. 03/2009, wherein the said court convicted both the appellants for commission of offence under Section 20(b)(ii)(C) of Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "the NDPS Act, 1985") and sentenced to undergo R.I. for 10 years and fine of Rs. 1 lakh each with further default stipulations.
2. As per case of the prosecution, Station House Officer, Police Station-

Khursipar received an information on 18.04.2009 that some persons are in the house of one Udho Singh @ Uddhav Singh which is situated at Shaheed Veer Narayan Singh Nagar, Khursipar, Bhilai for selling illegal contraband article ganja. The police inspector called for witnesses namely Prem Mishra and Suresh Sahu and made Panchnama of information and informed to the then superior police officer C.S.P. Chhawani through his constable. On instruction of superior officer, the police inspector went to the house of Udho Singh @ Uddhav Singh where both the appellants were found. The police party searched them and before searching them one translator namely Haribandhu was called for understanding language of police party and therefore, search was made. Three suitcase and three bags were found in which contraband like substance were kept in a polythene packets. The substances are identified as ganja and when it is weighted, the total quantity was found to be 45 Kg. & 500 grams. Two samples of 25-25 grams of ganja were separated from each packets which was sealed and seized articles were also sealed. Property was handed over to in-charge of malkhana and samples were sent for chemical examination to Forensic Science Laboratory where test of ganja was found positive. Both the appellants were charge-sheeted and convicted as mentioned above.

3. Learned counsel for the appellants submits as under:-

(i) The appellants did not know Hindi language because they are resident of Orissa, they know only Oriya language, but the prosecution has given notice them in Hindi and consent letter is not written in

Oriya language, but it is written in Hindi and try to convenience them in Hindi language, so the story of the prosecution is liable to be vitiated on this ground alone.

(ii) Haribandhu (PW-5) was translator of the Oriya language, but in panchnama, seizure memo, and in the notice of Section 50 of the NDPS Act, 1985, the language of those documents pertains to in Hindi language and in the cross-examination, Haribandhu (PW-5) has stated that he has not translated Oriya language into Hindi on the spot, but he fairly admits that he translated the Oriya language into Hindi in police station, therefore, it is material contradiction about the translation acted by Haribandhu, therefore, the mandatory provisions could not be complied with by the prosecution. Case of the prosecution is not established.

(iii) As per Haribandhu (PW-5), he knows only Udho Singh and he doesn't know to the appellants and he has also admitted that he has not approached anywhere except police station, therefore, he could not explain that from where ganja were seized. He was not being taken to the spot and he has clearly admitted this fact that the police has not asked from the appellants that from whom either Magistrate or Gazetted Officer, they want to search them, therefore, case of the prosecution is not established.

(iv) The prosecution has utterly failed to establish the conscious possession of the seized article from the appellants. The article could not produce before the trial court therefore, prosecution story is not proved as the article is not marked before the trial court.

(vi) The prosecution has utterly failed to establish that the appellants were the tenants of the co-accused Udho Singh at the time of seizure of ganja and no any such documents are available on record by which it can be easily assess that the appellants were the tenants of Udho Singh.

(vii) On the same set of fact, the trial court has acquitted one co-accused namely Udho Singh, but on the same set of facts, the appellants are convicted which is not permissible by law.

(viii) Mandatory provisions of the NDPS Act, 1985 have not been complied with therefore, it is not a case of conviction of the appellants and the same is liable to be reversed.

4. Learned counsel for the appellants placed reliance in the matter of **State of Rajasthan Vs. Parmanand & another**, reported in **(2014) 1 SCC 345** and **Mohan Lal Vs. The State of Punjab**, reported in **2018 SAR (Criminal) 990**.
5. On the other hand, learned State counsel submits that the finding arrived at by the trial court is based on relevant material placed on record and the same does not warrant any interference of this Court with invoking jurisdiction of the appeal.
6. Inspector- Ramashankar Dwivedi (PW-9) deposed that he received an information that one male and one female have transported illegal contraband article and have kept the same in suitcase and bags in the house of one Udho Singh which was recorded by him in rojnamchasanha and thereafter, two independent witnesses namely Prem Mishra and Suresh Sahu were called giving notice (Ex. P/1) and

this information was sent to C.S.P. Chhawani through constable as per Ex.P/12. Thereafter, he reached the spot with police personnel and independent witnesses and informed the appellants about searching of their house.

7. From the documents Ex. P/1 & P/2, it is clear that it was search of house, suitcase and bags and it was not a search of person. There is no document on record that any personal search was conducted by this officer. When search of house or suitcase or bags is conducted, Section 50 of the Act, 1985 is not applicable. In the present case, since no personal search is made, Section 50 of the Act, 1985 has no applicability, therefore, arguments advanced on behalf of the appellants with respect to provisions of Section 50 of the NDPS Act, 1985 has not been complied with, is not tenable.
8. From evidence of Inspector- Ramashankar Dwivedi (PW-9), it is established that 19.5 Kg. of contraband was seized from possession of the appellant No.1- Krishnachand @ Krishno Sao and 20 Kg. of contraband was seized from possession of appellant No. 2- Smt. Laxmi Sao.
9. From evidence of the police officer and malkhana register (Ex. P/27), it is established that seized articles were sealed and kept in safe custody of malkhana. Again, it is established that 7 samples were prepared from all the three packets and it was sealed and same was kept in safe custody of malkhana which was later on given to Prakash Chandra Tiwari (PW-8) who was constable of police station— Chhawani. As per version of Prakash Chandra Tiwari (PW-8), he

deposited the 7 packets at Forensic Science Laboratory, Raipur and received acknowledgment (Ex. P/17).

10. As per version of the police official, report of Forensic Science Laboratory was received in which test of ganja was found positive in all the 7 packets sent for examination. From the evidence of this witness, his version is supported by version of Premnarayan Mishra (PW-1). From version of Suresh Kumar Sahu (PW-4), it is established that contraband article was seized from possession of the appellants as mentioned above. From statement of Constable- Jitendra Shukla (PW-7), it is established that information received by the police officer sent to superior officer C.S.P. Chhawani as per Ex.P/12 which is compliance of Section 50 of the NDPS Act, 1985.
11. From evidence of Motiram Sahu (PW-3), information received by the authorities regarding possession of illegal contraband article ganja, was sent to C.S.P. Chhawani which is supported by version of Jitendra Shukla (PW-7). As per version of Ramashankar Dwivedi (PW-9), he sent the information of seizure and search to the superior officer as per Section 57 of the NDPS Act, 1985. In this way, it is established that information was sent to the superior officer as per Section 57 of the NDPS Act, 1985 and again, seized articles were kept in safe custody as per Section 55 of the NDPS Act, 1985, therefore, arguments advanced on behalf of the appellants that mandatory provisions of the NDPS Act, 1985 is not complied with, is not tenable.
12. From order-sheet dated 02.08.2011 of the trial court, it is clear that seized articles were produced before the trial court, therefore,

arguments advanced on behalf of the appellants that seized articles were not produced before the trial court, is not sustainable. Again, no one has lodged report in his private capacity in the police station, but information was received through some unknown person by the Station House Officer which is recorded in police station, therefore, it is not a case where any person who informed the commission of offence has investigated in the matter. Arguments advanced on this count is also not sustainable.

13. Now the point for consideration is as to what offence has been committed by the appellants. 20 Kg. ganja is commercial quantity as per table given below in the NDPS Act, 1985. Possession of contraband article ganja to the tune of 20 Kg. is offence punishable under Section 20(b)(ii)(C) of the NDPS Act, 1985 for which the trial court has convicted the appellant No. 2- Smt. Laxmi and the same is hereby affirmed. Quantity of 19.5 Kg. contraband article ganja was seized from possession of Krishnachand @ Krishno Sao which is not commercial quantity and it is not small quantity, therefore, offence of appellant No. 1- Krishnachand @ Krishno Sao falls within Section 20(b)(ii)(B) of the NDPS Act, 1985. His conviction is modified and he is convicted under Section 20(b)(ii)(B) of the Act NDPS, 1985.

Heard on the point of sentence.

14. Looking to the quantity of contraband article ganja, the trial court awarded jail sentence of 10 years to the appellant No. 2- Smt. Laxmi Sao which is minimum sentence and less than minimum cannot be awarded. The trial court has awarded jail sentence of 10 years to the

appellant- Krishnachand @ Krishno Sao, his sentence cannot be termed as harsh, disproportionate or unreasonable and the same is not liable to be interfered with. The sentence part is also not liable to be interfered with. Accordingly, the appeal is liable to be and is hereby dismissed.

15. The appellants are reported to be in jail therefore, no order for their arrest etc. is required.

Sd/-
(Ram Prasanna Sharma)
Judge