

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO. 4450 OF 2015**

The State of Maharashtra  
(at the instance of DCB CID Unit-I  
in C.R./Spl. LAC No.16/2015 registered with  
Marine Drive Police Station) ... Petitioner

Vs.

1. Dharmaraj Baburao Kalokhe,  
Age 52 Years, Address- A/31, First Floor,  
D.B.Marg Police Line, Grant Road,  
Mumbai.
2. Satish Ramesh Patankar  
Age 28 Years, Address – Sidharth Nagar  
Welfare Society, Room No.774, Dr. A.B.Road,  
Opp. Podar Hospital, Worli, Mumbai 18
3. Shahikala Ramesh Patankar @ Baby Patankar  
Age 55 Years, Address – Sidharth Nagar  
Welfare Society, Room No. D-1/10,  
Dr. A.B.Road, Opp. Podar Hospital,  
Worli, Mumbai-18
4. Gyan Mallikam Samuel  
Age-49 years, Address-New Ganesh  
Nagar, Room No. 15, Near Vidyalankar  
College, Wadala (E), Mumbai-37
5. Paulraj Duraisamy Padaiyatchi.  
Age-47 years, Address-Bungalow No-355,  
Valallar Street, Opp. Muthumalai Marraige  
Hall, Periyar Nagar (South),  
Vrindhachalam, Dist-Kudlore,  
State-Tamil Nadu.

6. Suhas Umakant Gokhale.  
Age-58 years, Address-Building No.2,  
Block no.1, Ground floor,  
Police Officers Quarters, Opp. Agripada  
Police Station, Agripada, Mumbai-11.
7. Gautam Anna Gaikwad.  
Age-58 years, Address-New Bhavana  
CHS., 3<sup>rd</sup> Flr, Room No. 6, L.B.S.,  
Road, Uthalsar Naka, Thane.
8. Sudhakar Keshav Sarang  
Age-47 years, Address-E/42, Bandra  
Police Quarters, R.K.Patkar Marg,  
Near Bhabha Hospital, Bandra(W),  
Mumbai-50
9. Jotiram Shivram Mane  
Age-55 years, Address-Trimurti Sadan,  
Room No.2, Near Fish Market,  
Behind Police chowkie, Kanjurmarg (E),  
Mumbai -42
10. Yashwant Shantaram Parte  
Age-52 years, Address-3/402,  
Kole Kalyan Police Quarters,  
Kalina, Santacruz (E) Mumbai-55 ... Respondents

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Mr. Deepak Thakare, Public Prosecutor a/w Ms. Anamika Malhotra, Special Public Prosecutor and Mr. P.H. Gaikwad, APP for the Petitioner.

Mr. Ayaz Khan for the Respondent Nos.1,2, 3 and 6.

Ms. Sartaj Shaikh for the Respondent No.4.

Mr. Kunal H. Kamble for the Respondent No.7

Mr. S.S. Bhandari for the Respondent Nos. 5, 8, 9 and 10.

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**CORAM : PRAKASH D. NAIK, J.**

**DATE : 26<sup>th</sup> JULY, 2018.**

**JUDGMENT**

1. The petitioner / State of Maharashtra has preferred this petition under Article 227 of Constitution of India. The petitioner have also invoked the inherent power of this Court under Section 482 of the Code of Criminal Procedure. The petitioner is aggrieved by order dated 17<sup>th</sup> August, 2015 passed by Learned NDPS Special Judge, City City & Sessions Court, Greater Bombay in NDPS Special R.A. No. 88 of 2015 rejecting application preferred by prosecution for re-sending / re-sampling. The offences were registered vide C.R.No. 16 of 2015 under Sections 8(c), 21, 29 of NDPS Act read with Section 66(1)(b) of Bombay Prohibition Act. The investigation was conducted by Marine Drive Police Station which was subsequently transferred to Unit-1, DCB CID, Mumbai.

2. The brief facts of the prosecution case are as follows :-

(a) On 9<sup>th</sup> March, 2015, acting upon the secret information police attached to Satara Police Station apprehended Dharmaraj Kalokhe and his neighbour while removing the stock of 112 kg of Mephedrone (M.D) from his house at Satara and registered the case under NDPS Act. Shri Dharmaraj Kalokhe was arrested.

During the course of investigation, he disclose that contrabands seized by police belong to Smt. Shashikala @ Baby Ramesh Patankar residing at Mumbai. It was also disclosed that her son Satish Ramesh Patankar had transported these contraband from Pune to Mumbai.

(b) On 10<sup>th</sup> March, 2015, news item was published in Daily Marathi Newspaper stating that 100 kg drugs were found in the house of police constable attached to Marine Drive Police Station, Mumbai. The house of the police constable is situated at village Kanheri, Tal. Khandala, District Satara.

(c) The Senior Officers (Additional Commissioner of Police, South Region Mumbai, Dy. Commissioner of Police Zone-1, Mumbai) directed Senior Police Inspector of Marine Drive Police Station and others to conduct the search of personal cupboard of police constable Dharmaraj Kalokhe situated at Marine Drive Police Station in the presence of panchas and seize the contrabands if found in accordance with the procedure under N.D.P.S. Act. As such, the Senior Inspector of Police attached to Marine Drive Police Station conducted search of the cupboard kept at the police station by the aforesaid person, in the presence of officer deputed from Anti Narcotics Cell, Police Inspector Gokhale

attached to said cell. On search, the police found 11kg 976 gms Mephedrone (M.D) drugs covered under N.D.P.S Act and other objectionable material in the cupboard. The said drug and other articles were seized under the panchanama in accordance with the procedure prescribed under NDPS Act. FIR was registered on the same day with Marine Drive Police Station against constable Dharmaraj Kalokhe.

(d) Marine Drive Police Station took custody of accused Dharmaraj Kalokhe and Satish Patankar on 24<sup>th</sup> March, 2015 and 14<sup>th</sup> April, 2015. During the course of investigation, the role of Sashikala Patankar was confirmed. She was later arrested on 22<sup>nd</sup> April, 2015. The investigation was then entrusted to DCB-CID.

(e) During the course of investigation, Smt. Sashikala Patankar revealed that she had procured 150 kg Mephedrone from one G. Manikkam Samuel R/o Wadala who in turn got the same from one Paulraj Duraisami Padaiyachi from Tamil Nadu. During the course of further investigation, involvement of several persons was came to light which included police personal. While investigation was in progress, the Investigating Officer received negative FSL report regarding sample sent by earlier Investigating Officer to Forensic Science Laboratory, Kalina Mumbai.

(f) On 29<sup>th</sup> May, 2015, the Investigating Officer applied for re-sampling of material seized. The application was rejected on 17<sup>th</sup> August, 2015.

3. Learned Public Prosecutor Shri Thakre made the following submissions.

(i) The application for re-sampling was preferred within stipulated time.

(ii) There is no violation of the directions of the Supreme Court in the case to Thana Singh Vs- Central Bureau of Narcotics<sup>1</sup>

(iii) The decision in the case of Thana Singh (supra) permits the application for re-sampling be made in exceptional circumstances and this was an exceptional case which required re-sampling. The samples were drawn by the First Investigating Officer API Janardhan Patil (complainant) under guidance of Senior PI Shri Suhas Gokhale who was subsequently impleaded as accused. The said officer Suhas Gokhale was in contact with prime accused Smt. Shashikala Patankar prior to and post registration of offence.

(iv) The report of FSL Kalina was brought to the notice of Investigating Officer on 14<sup>th</sup> May, 2015 for re-sampling. The application was preferred before the trial Court on 29<sup>th</sup> May, 2015

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1. (2013) (2) Supreme Court Cases 590.

and therefore, it was within the span of 15 days as stipulated in the decision of Thana Singh case (supra).

(v) Assuming that the case of the accused is true, there is delay of one day which could be condoned, considering the magnitude, seriousness and gravity of the offences.

(vi) The trial Court has miscalculated the time limit in which the application was preferred by the prosecution on the basis of the fact that the report was received on 13<sup>th</sup> May, 2015.

(vii) The trial Court overlooked the important aspect of the investigation that the seizure panchanama and FIR registered with Marine Drive Police Station dated 10<sup>th</sup> March, 2015 mentioned that sample were drawn by the then Investigating officer API Patil under the guidance of senior police inspector Suhas Gokhale. The investigation was then transferred to another investigating officer as the supervisory officer were not satisfied with the investigation carried out by the first Investigating Officer. Subsequently, the investigation was then transferred to Crime Branch. The newly appointed investigating authority reviewed all steps taken by the earlier officers. Thereafter decision was taken to refer the sample to the CFSL Hyderabad, Delhi, Calcutta and Chandigarh.

(viii) In the circumstances, the earlier investigation qua drawing of

samples was tainted. The Crime Branch thought it fit to go for second sample. The trial court has committed an error in rejecting the application. The trial Court overlooked that the factual aspects involved in the case of Thana Singh indicates that the application was moved by the accused and not by the prosecution. Since there was no provision for re-testing or re-sampling under NDPS Act, the Apex Court laid down the guidelines by stipulating time to prefer such application.

(ix) Learned APP relied upon the endorsement behind FSL report dated 2<sup>nd</sup> May, 2015 which shows that senior Police Inspector (In-charge of the Officer Unit) received the same on 14<sup>th</sup> May, 2015 and then it was forwarded to Investigating Officer on 14<sup>th</sup> May, 2015. Thus, there was no delay preferring the said application which ought to have allowed by the trial Court.

(x) The fact that there was involvement of police in this case and there was seizure from cupboard of one of the constable at Marine Drive Police Station, makes the present case exceptional and considering that huge quantity of contraband was seized it is necessary to ascertain the presence of drug in seizure.

4. The learned counsel representing respondents lead by Mr. Ayaz Khan vehemently opposed the grant of relief. Learned

counsel made following submissions.

(I) There is no reason to interfere in the impugned order. The trial Court has assigned the reasons for rejecting the application preferred by the petitioner. The proceedings are pending before the trial Court since 2015, the application was rejected on 17<sup>th</sup> August, 2015. Some of the accused are police personnel. This writ petition is pending in this Court since 2015. In the absence of any forensic report, the proceedings are kept pending against the respondents causing undue harassment to them.

(II) The report of Forensic Science Laboratory, Kalina, Mumbai is very clear. There is no ambiguity in the report. The requisite test were carried out by the laboratory and negative report was submitted. There is no reason to doubt the genuineness of the said report.

(III) Application for re-sampling can be made only in exceptional circumstances as per the decision of Apex Court in Thana Singh's case such application cannot be entertained in routine course. Even if the case is made out that the application has been preferred under exceptional circumstances it has to be preferred within stipulated time of 15 days and not beyond that.

(IV) The investigating authority had received the sample on 13<sup>th</sup>

May, 2015 and the application for re-sampling was preferred on 29<sup>th</sup> May, 2015 which is beyond 15 days. The trial Court had come to the conclusion that the application for re-sampling was filed beyond the stipulated time on the basis of documents on record and making appropriate inquiry with the officer of the Investigating machinery and there is no reason to disturb the said order.

(V) The accused cannot be forced to face the prosecution for indefinite period when the FSL report indicates that the sample does not show presence of Mephedrone. The prosecution did not succeed in convincing the Court, first of all that this was an exceptional case for granting request for re-sampling. It is not the case of the prosecution that Kalina Laboratory is not equipped with the equipment for analysing the samples. The report clearly indicates that the exhibit also did not show presence of mephedrone, Alprazolam, Diazepam, Larazepam, Nitrazepam, Morphine, Heroin, Cocaine, Methaqualone, Methylenedioxymethamphetamine, Ketamine and Methamphetamine etc. The entire case of the prosecution thus collapsed on account of said report. Reliance was placed on the decision of the Supreme Court in the case of Thana Singh (supra)

as well as the decision in the case of Karu Lal Vs State of Punjab delivered in Special Leave Appeal No. 7646 of 2013 by Supreme Court and the decision of the Supreme Court in the case of Laxmi Nagappa Koli Vs. Narcotic Central Bureau and another delivered in Criminal Appeal No. 2149 of 2014.

(VI) The application moved by accused Sashikala @ Bebi Ramesh Patankar in NDPS Special Case No. 3 of 2015 was allowed by the special Court vide order dated 28<sup>th</sup> August, 2017 on the ground that there is nothing to show that the alleged drug was seized from the said accused and the report of CSFL report show it is not Mephedrone. The petition is being devoid of merits and the same be dismissed.

(VII) Police Inspector Gokhale has not participated in sampling, sealing and labelling. The seizure memo and statement of API Janardan shows that samples were drawn by him. The advocates representing other respondents adopted the arguments of learned counsel Mr.Khan.

5. The prosecution has filed additional affidavit dated 8<sup>th</sup> June, 2017 in which it is stated that Senior PI Shri Suhas Gokhle was deputed to render technical assistance to Investigating Officer of the case in respect of search, seizure and sampling. In the

circumstances, they might not have followed proper procedure. The samples were drawn in a faulty manner. Therefore, it is strongly suspected that the sample taken in this case under the supervision of the said officer may not be true representative of the seized material. It is further stated that the report was actually received on 14<sup>th</sup> May, 2015 although date of endorsement is 13<sup>th</sup> May, 2015. That date of endorsement indicates the arrival of report in department after which it is allocated to concerned police officer. Hence, in substance and effect the report was received on 14<sup>th</sup> May, 2015. The date when incharge police official had access to the report would necessarily be the date of receipt of CA report. The prosecution had approached for re-sampling in peculiar circumstances of the case. It is further stated that the role of Mr. Gokhale in helping the accused is established in the investigation. Therefore, re-sampling in this case is of crucial importance in the process of trial. The present case is rare case as police officers are hand in gloves with main accused. They made every possible to save the main accused from arrest. There was constant communication between Mr. Gokhale who is impleaded as accused and the principal accused. Thus, there were exceptional circumstances which requires re-sampling in the seized material in

the larger interest of society. Thus, the present case falls under the category extremely exceptional circumstances as initiated in the decision of the Supreme Court in the case of Thana Singh. The accused being public servant, re-sampling will not only help the court and build the confidence in general public that the investigating agency is not biased when the offence is committed by their own police man. It is also essential that all accused brought to books and the entire racket or chain be apprehended, lest, the safety of society at large will be endangered.

6. In the application preferred by the prosecution on 29<sup>th</sup> May, 2015 it was stated that the sample of the contraband seized in this case was forwarded to Forensic Laboratory at Kalina and report in that regard is received which is negative to the prosecution. To clear the doubt about the fact that the contraband is Narcotic drug or not, it is necessary to re-examine the sample by sending them to Central Forensic Laboratory. It was also stated that contraband was recovered from the cupboard of the arrested accused Dharmaraj Kalokhe which was kept at the police station. Hence, it was prayed that the investigating authorities may be permitted to check the re-sample of the contraband be forwarding it to Central Forensic Laboratory.

7. The learned Special Judge while rejecting the application preferred by the prosecution has observed that the Apex Court in the case of Thana Singh has directed that after completion of necessary step by the concerned labourtary, the result of the same must be furnished to all parties concerned with the matter. Any request as to re-testing / re-sampling shall not be entertained under the NDPS Act as a matter of course. This may however be permitted in extremely exceptional circumstances for cogent reason to be recorded by the Presiding Judge. Application in such rare cases must be made within a period of 15 days of the receipt of test report and no applications for re-testing / re-sampling shall be entertained thereafter. In the absence of compelling circumstances in form of re-testing / re-sampling is strictly prohibited under NDPS Act. The special Court also referred to the decision in the case of Karu Lal (supra) wherein the court has referred to the decision in the case of Thana Singh and by setting aside the impugned order therein directed the Court not to rely on the second report which was ordered to be provided without any valid ground. The reference was also made to the decision of this Court in the case of Laxmi Nagappa Koli. The learned Special Judge then observed that the use of word “must” by the Apex

Court is indicative of the fact that it has left no scope for the dispute whether the observations of the Apex Court are mandatory or directory. The word “must” is indicative of the command which has to be followed without any condition. It was further observed that the Court called for the register and compared the true copies certificate by PI Shri Kasare with the original through Sheristdar and in the probe with PI Kasar it was revealed that report was brought by him from FSL on 13<sup>th</sup> May, 2015 and hence the submission of receipt of FLS report on 14<sup>th</sup> May, 2015 has been falsified. In the Inward Register it is clearly shown that the report has been received by the prosecution had been brought by PI Kasar on 13<sup>th</sup> May, 2015. Thus, the application filed on 29<sup>th</sup> May, 2015 is hopelessly barred by limitation. The special judge also turned down the submission of the prosecution that the surface sample was taken by the Police Inspector Gokhale it was tainted, as there was nothing indicated in the application preferred by the prosecution in that regard. If this was the reason impelled the prosecution to have been moved the court for re-sending or re-sampling then one fails to understand as to why the prosecution had been oblivious in mentioning this significant fact in the submission. PI Gokhale has no reason to tamper with the sample.

On 10<sup>th</sup> March, 2015 he had no reason to take only surface sample which gives indication of the chemical quantities of the substance seized. There is no reference of Police Inspector Gokhale being participated actively in the sampling, selling and labelling mission. Thus, for the reasons stated therein the Court rejected the application.

8. On hearing both the sides and going through the record before the court, the following facts emerge which are relevant for adjudicating this petitioner.

(i) On 9<sup>th</sup> March, 2015, the respondent No.1 and another person were apprehended while removing stock of 112 kg of Mephedrone from his house at Satara and the case was registered under NDPS Act. He was arrested. During the course of investigation involvement of Respondent Nos. 2 and 3 was disclosed.

(ii) On 10<sup>th</sup> March, 2015, Superior officers from the police department directed Senior Inspector of Police, Marine Drive Police Station to conduct search of personal cupboard of respondent No.1 in the presence of panchas. Search operation was conducted on the same day which resulted in recovery of 11 kg 976 grams drug namely Mephedrone from the cupboard used by

respondent No.1 which was lying at Marine Drive Police Station. Panchanama in that regard was recorded. The case was registered.

(iii) Respondent No.1 and 2 were arrested in this case on 24<sup>th</sup> March, 2015 and 14<sup>th</sup> April, 2015. Subsequently, Respondent No.3 was arrested on 22<sup>nd</sup> April, 2015. The investigation was transferred to DCB CID.

(iv) Several accused were arrested. The Investigating Officer received FSL report from Forensic Science Laboratory, Kalina, Mumbai. Report submitted by Director of Forensic Science Labortary Kalina dated 2<sup>nd</sup> May, 2015 indicate that Exh. No. 1 to 12 does not show presence of Mephedrone, Lorazepam, Nitrzepam, Morphine, Heroin, Cocaine, Methaqualone, Methylenedioxymethamphetamine, Katamine and Methamphetamine. However, the report mentioned about the detection of Sodim Glutamate in the said Exhibits.

(v) The prosecution preferred an application to the Special Court on 29<sup>th</sup> May, 2015 for re-testing / re-sampling of samples by other laboratories. It was stated that the samples of drugs were forwarded for examination to forensic examiner, forensic science

labourtary at Kalina which do not support prosecution and the prosecution is not in agreement with the said report. It is further stated that the examination kit for examining Mephedrone drug viz characteristic and identification of the said drug is not available. It is necessary to ascertain and the doubt whether the seized contraband is Narcotic drug or not and therefore it is necessary to re-examine the same for which the sample is required to be forwarded to Central Forensic Laboratory. It is also stated that contraband was seized from the cupboard used by accused Dharmraj Kalokhe which was lying police station to which he was attached. It is an exceptional case that the Narcotic drug was seized from the cupboard of police personal. It was therefore prayed that the prosecution be allowed to carry out re-sampling and forward the sample to the central Forensic Laboratory at Chandigrah for re-testing.

(vi) While hearing the application before the trial Court, the prosecution has submitted that it is essential to send the sample to CSFL to confirm the doubt whether the sample seized is infact the contraband. This is necessary because the seized substance was recovered from the cupboard of police head constable accused

No.1 which is a rare circumstances. It was also argued that the Chemical Analysis Report was received by the Investigating Officer on 14<sup>th</sup> May, 2015 and the application for re-testing and re-sampling was preferred on 29<sup>th</sup> May, 2015 which is within time, as supported in the decision of Thana Singh. This was an exceptional case. It was contended that accused No.6 Police Inspector Gokhale from ANC was a member of raiding party he was call in aid of the raid. However, it was found that Police Inspector Gokhale was involved in harboring accused No.3 and he took sample of surface substance and therefore the same was not representative samples. Although the report was brought on 13<sup>th</sup> May, 2015 which was received by the Investigating Officer on 14<sup>th</sup> May, 2015 which is apparent from requisite entry.

10. It is therefore apparent in the application dated 29<sup>th</sup> May, 2015 it was stated that this is an exceptional case where the contraband was recovered from the cupboard of police constable lying in the premises of police station to which he was attached. Although, this ground was not stated in the application, during the course of the argument, the circumstances as stated were canvassed before the Special Court. It is pertinent to note that

huge quantity of the contraband was recovered during the search. The Police Officers were involved in the crime and they are being prosecuted. Mephedrone is a narcotic drug covered by the provisions of NDPS Act. It was contended that Police Inspector Gokhale was acting in connivance with the co-accused was also acquainted with the investigation. The seizure panchanama dated 10<sup>th</sup> March, 2015 indicate his presence at the time of seizure being deputed from Anti Narcotic Cell. It is obvious that he was deputed being expertise from Anti Narcotic Cell. It was also necessary to note that for the just decision of the case and to prove the case beyond doubt that the quantity recovered is covered by NDPS Act it would be necessary to refer it to CFSL for re-examination/re-testing. The factual matrix of the case itself makes it exceptional. The Special Court has relied upon the fact that inquiry was made with Police Officer Kasare during the course of hearing of the application which revealed that report was received on 13<sup>th</sup> May, 2015. However, the Special Court has not taken into consideration the entry dated 14<sup>th</sup> May, 2015 which indicate that the Senior Police Inspector Incharge had received the report on 14<sup>th</sup> May, 2015. The Special Court has adopted hyper technical approach. The Hon'ble Supreme Court in the decision of Thana Singh has

stated that re-sampling / retesting is required to be done in extremely exceptional circumstances and that too within a period of 15 days from the date of receipt of the report. For all these reasons submitted before the Special Court and before this Court as well as going through the contents of this petition and the additional affidavit filed by the prosecution, it would be necessary in the interest of justice and for just decision of the case to forward the sample for re-testing to the laboratory as prayed by the petitioner. This is indeed an exceptional case where huge quantity of drug was recovered from the police station. Learned APP during the course of argument has relied upon the call data report in respect to the call between PI Suhas Gokhle and accused No.3 to establish his connivance with the said offence. The said officer was a part of investigation and thus the ground raised by the petitioner has merits and requires consideration. Even keeping aside the issue relating to participation of Mr. Gokhale in investigation as stated above the factual aspects of this case render it an exceptional case.

11. The affidavit filed by petitioner/State demonstrate that the prosecution suspects that the contraband contains Mephedrone

and not Sodium Glutamate which is type of salt which is required in small quantity for cooking. It is contended that the accused were not conducting any eating house. The contraband would not have been stored or sold in such huge quantity. The accused / respondent No.3 is drug peddler. She does not conduct any restaurant for using Ajinomoto. It is also stated that Sodium Glutamate or Monosodium Glutamate also called as Ajinomoto is used as filler or adulterant with other narcotic drug or psychotropic substance particularly in Mephedrone or any other similar drug to dilute its purity. The price of Sodium Glutamate is Rs.40/- per keg, whereas the statement of witness mentions that respondent No.3 has sold Gold worth Rs.80,00,000/- when she was accompanied by accused No.2. The sources of such income is suspicious. Thus, it is inferred that the accused is indulging in sale of contraband MD and not Sodium Glutamate. Hence, re-sampling is necessary.

12. In the case of Thana Singh (supra), the Apex Court has formulated the guidelines in relation to several aspect of investigation including re-testing. It would be appropriate to quote paragraphs 24 and 27 of the said decision, which read thus :

24. *The NDPS Act itself does not permit re-sampling or re-testing of samples. Yet, there has been a trend to the contrary; NDPS Courts have been consistently obliging to application for re-testing and re-sampling. These applications add to delays as they are often received at advanced stages of trials after significant elapse of time. NDPS Courts seem to be permitting re-testing nonetheless by taking resort to either some High Court judgments [see State of Kerala vs Deepak P. Shah and Nihal Khan v. State (Govt. of NCT of Delhi)] or perhaps to Sections 79 and 80 of the NDPS Act which permit application of the Customs Act, 1962 and the Drugs and Cosmetics Act: 1940. 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, re-testing 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 re-testing.*

27. *Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the laboratories concerned, 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 NDPS 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 of fifteen days of the receipt of the test report; no applications for re-testing /re-sampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the NDPS Act.*

13. The said order and directions were outcome of bail matter in Thana Singh V/s. Central Bureau of Narcotics (supra) illustrated before the Bench wherein the accused was languishing in prison for more than twelve years, awaiting the commencement of his trial for an offence under the NDPS Act. He was consistently denied bail, therefore, bearing in mind the said imperatives, the Court decided to take cognizance of status quo and gain a first hand account about the state of trial pending in all States. The Court therefore proceeded to lay down directions and guidelines. Hence, the Supreme Court issued directions with regard to adjournment, examination of witnesses, workload, Narcotic Laboratories, Personal monitoring, public prosecutors, re-testing provisions and other recommendations. It was observed that 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 accompany restrictions, however is impermissible. Under NDPS Act re-testing and re-sampling is rampant at every

stage of the trial contrary to other legislations which defines specific time frame. Hence, it is imperative to define re-testing rights. In the circumstance in paragraph 27 of the said decision, the Hon'ble Supreme Court observed that keeping in mind the array of factors discussed therein. From the observations made in paragraph 24 it appears that the Apex Court was considering the fact that Courts have been consistently obliging to applications for re-testing and re-sampling which causes delay as such applications are received at advanced stages of trials. The court was apparently referring to the right of the accused for re-testing. Thus in paragraph 24 of the said decision it was stated that while re-testing and re-testing may be an important right of accused, haphazard manner in which the right is imported from other legislations without its accompanying restrictions is impermissible. In the light of the said observations, it was further stated that re-testing and re-sampling are rampant at every stage of the trial contrary to other legislations. In the case of Karu Lal (supra) the court was concerned with the second report which was ordered to be provided without any valid ground and in the case of Laxmi Nagappa Koli (supra), FSL Mumbai had given opinion that it did not have sufficient infrastructure to test the sample provided to it

by the respondent and as such required the respondents to have the same tested by another laboratory. It is pertinent to note that the sample which is sought to be re-examined in the present case also by the same laboratory. Court further observed that separate sample was sent to Forensic Laboratory, Hyderabad which clearly recorded a conclusion that the sample contained Paracetamol and Fervunulin and report was clear and specific. In the circumstances, the Court took a view that it is not necessary to forward the third sample for testing before another Forensic Science Laboratory, in terms of the observations made by this Court in Thana Singh's case. It was further observed that the report submitted by the Forensic Science Laboratory, Hyderabad cannot be ignored.

14. For all these reasons, the impugned order passed by the Special Court is required to be set aside and this petition deserves to be allowed. Hence, I pass the following order.

### **O R D E R**

- (i) Criminal Writ Petition is allowed;
- (ii) Impugned order dated 17<sup>th</sup> August, 2015 passed by the learned NDPS Special Judge, City Civil & Sessions Court, Gr. Bombay in NDPS Special R.A. No. 88 of 2015 is set aside;

- (iii) The trial court is directed to take appropriate steps for sending the sample for retesting within three weeks from the receipt of the order to the Laboratory as claimed by the prosecution;
- (iv) Criminal Writ Petition No.4450 of 2015 stands disposed off.

( PRAKASH D. NAIK, J. )

Sachidanand  
Kuttan Nair

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by Sachidanand  
Kuttan Nair  
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