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

Reserved on : 29th September, 2018

Pronounced on : 27th November, 2018

+ Crl.A.39/2015

GURTEJ SINGH BATTH Appellant

Through: Ms. Saahila Lamba, Adv.

versus

STATE Respondent

Through: Mr. Satish Aggarwala, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T

1. This appeal assails judgment, dated 14th August, 2014, passed by the learned Special Judge (NDPS), whereby the appellant stands convicted of having committed the offences contemplated under Section 21(c) and 23(c) read with Section 28 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the “NDPS Act”), and the consequent order, dated 19th August, 2014, whereby the appellant stands sentenced, for the said offence, to 10 years’ rigorous imprisonment with fine of ₹ 1 lakh and default simple imprisonment of 3 months, for each of the aforementioned offences, the sentences being directed to run concurrently.

2. The issue in controversy stands covered by the judgment in *Mohan Lal v. State of Punjab*, (2018) SCC OnLine SC 974 and *Arif*

Khan v. State of Uttarakhand, (2018) SCC OnLine SC 459. As such, it is not necessary to dwell deep into the facts of the case. An overall view, thereof, to the extent it is necessary to justify the present judgment, would suffice.

3. The case of the prosecution may be set out thus.

4. PW-1 Rajendra Verma, Intelligence Officer in the Directorate of Revenue Intelligence (DRI) received intelligence, on 12th April, 2010, to the effect that the petitioner would be travelling from Delhi to Toronto by Air India Flight No. AI 187, on 13th April, 2010, and would be carrying narcotics in his baggage. The said information was reduced, by PW-1, into writing, and put up to his immediate superior Man Singh Yadav (PW-6), who after discussing the matter with his senior officer, directed PW-1 to form a team and act on the information. Consequent thereto, a team of DRI officers, led by the I/O Rajendra Verma (PW-1) reached the departure hall of the Indira Gandhi International Airport, accompanied by two independent *panch* witnesses. The appellant, who was spotted near the Air India check-in counter, was intercepted before he could check-in to the flight. Two suitcases of the appellant, which had already been checked in were withdrawn. The appellant was also carrying one hand baggage.

5. The appellant was, thereafter, taken to the traffic office of Air India, where a written notice under Section 50 of the NDPS Act (Ex. PW-1/A) was served on him, informing him of his right to be searched before a Magistrate or a Gazetted Officer, to which the appellant

replied, in writing, on the body of the said notice itself, agreeing for his search to be conducted by the raiding officers.

6. Consequent thereto, the appellant was searched by the DRI Officers. The two checked-in baggages of the appellant were also searched. On opening them, the rear walls of the suitcases were found to have wooden frames, behind which, cavities, containing transparent plastic polythene packets, were seen. One such packet was recovered from the grey suitcase of the appellant, and marked 'A' and three packets were recovered from the black suitcase of the appellant and marked 'B', 'C' and 'D'. These packets, on being opened, were found to contain an off white coloured powdery substance, which, on being tested with the Field Testing Kit carried by the officials, tested positive for heroin. The net weight of the packets came to 2.960 kg, 0.956 kg, 1.004 kg, 1.033 kg, working out to be a total net weight of 5.923 kg of heroin, valued at around ₹ 6 crores.

7. Two samples of 5gm each were retrieved from the above mentioned four packets, and transferred to 8 separate transparent polythene pouches, individually marked. The said pouches were seized and, after following due procedure, transported and deposited in the Central Revenues Control Laboratory (CRCL), which returned a finding to the effect that the packets contained heroin of 65.8% to 84.8% purity.

8. Summons, under Section 67 of the NDPS Act, were served on the appellant by the I/O Rajendra Verma (PW-1), in consequence

whereof, the statement of the appellant (Ex. PW-1/H) was recorded in the DRI office. The appellant admitted, in the said statement, to having sought to export heroin, and also disclosed the circumstances in which he had been driven to do so. He named one Bhupender, a truck driver, as having intoxicated him into the said trade and stated that the heroin had been handed over to him by another person in Jalandhar named Bhajji.

9. It is not necessary for the limited purpose of this judgment, to dwell into further particulars of the statement of the appellant under Section 67 of the NPDS Act.

10. Suffice it to state that the appellant was arrested on 13th April, 2010 and, on 7th October, 2010, a criminal complaint was filed, against the appellant, before the learned Special Judge, by PW-1 Rajendra Verma, the I/O. Charge was framed, against the appellant, on 5th March, 2011, whereafter trial commenced.

11. The prosecution/DRI cited ten witnesses.

12. PW-1 Rajendra Verma, who was the I/O in the case and was an Intelligence Officer in the DRI, testified to having received secret intelligence, reduced it to writing and having headed the raiding team of the DRI, which apprehended the appellant from the Airport and recovered contraband material from the suitcase in his possession. This testimony was corroborated by the evidence of PW-4 Pramod Kumar, Assistant Manager, Security, Air India and, PW 10 Sonaram

Chaudhary, Customer Agent of Air India, who were the two independent *panch* witnesses. The interception of the appellant, his search and the recovery of heroin from the suitcase in his possession, were also testified by PW-6 Man Singh Yadav, Deputy Director, DRI, who also claimed to have been part of the raiding team.

13. PW-2 Lakhi Ram, PW-3 K.P. Singh, PW-5 Rohitash Pandey and PW-8 Sanjay Kumar, all from the DRI, testified regarding the recovery of samples of the powder and the depositing, thereof with the CRCL. PW-7, Dr. Rajkumar, of the CRCL, confirmed that the sample, deposited with the CRCL, tested positive for heroin.

14. Pursuant to the recording of the evidence of the above prosecution witnesses, the statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure. The appellant claimed complete innocence and stated that he had been falsely implicated in the case. He admitted the fact that he had been intercepted at the Air India check-in counter but denied that any heroin or other contraband substance have been recovered from his checked-in baggage. He further submitted that no search or seizure proceedings were conducted in his presence and that he had been made to wait outside a room, and, after some time, had been taken inside and confronted with the packets, stated to be containing heroin. He completely disowned any connection with the said packets.

15. The appellant also led the evidence of his wife Kuldeep Kaur as DW-1, which was insubstantial.

16. The learned Special Judge relied on the statement of the appellant under Section 67 of the NDPS Act, as well as the deposition of various prosecution witnesses, as confirming the recovery of heroin from the appellant. A specific submission was raised, before the learned Special Judge, to the effect that the proceedings stood vitiated because the I/O (PW-1) was the complainant; however, the learned Special Judge dismissed the said submission, holding that the I/O Rajendra Verma had filed the complaint in his official capacity. A detailed analysis of the evidence of various prosecution witnesses is contained in the impugned judgment, which, consequent thereto, holds the charge of commission of offence by the appellant under Section 23 of the NDPS Act to have been established.

17. The appellant is in appeal thereagainst.

18. I have heard Ms. Saahila Lamba appearing for the appellant and Mr. Satish Aggarwala, learned counsel for the DRI. Mr. Aggarwala has also filed written submissions.

19. Ms. Saahila Lamba, appearing for the appellant, advanced only two submissions, highlighting two infirmities in the proceedings, which in her submission, vitiated them in their entirety. The first was that the I/O and the complainant happened to be one and the same person, namely PW-1 Rajendra Verma, which, according to learned counsel, resulted in the proceedings being completely vitiated, applying the law as laid down by the Supreme Court in *Mohan Lal*

(*supra*). The second submission was the infraction of Section 50 of the NDPS Act, inasmuch as the search of the appellant's person, as well as the baggage in his possession, had been effected and the search was not carried out in the presence of a Magistrate or a Gazetted Officer.

20. Mr. Satish Aggarwala submits, *per contra*, that **Mohan Lal** (*supra*), has no applicability, whatsoever, to the investigations carried out by the DRI, which are not based on information but on intelligence. He submits that **Mohan Lal** (*supra*) barred an informant from being the I/O, and not the complainant from being the I/O. He sought, therefore, to distinguish between “an informant” and a “complainant”. He submits that there was no proscription, in **Mohan Lal** (*supra*), to the seizing officer being the complainant, which was what had happened in the present case. Insofar as filing of the complaint by PW-1 was concerned, Mr. Aggarwala reiterated the finding, of the learned Special Judge, that PW-1 had filed a complaint in his official capacity and that the said act could not vitiate the proceedings.

21. The judgment in **Arif Khan** (*supra*) was also sought to be distinguished on the ground that recovery had taken place, not from the appellant's person, but from his baggage.

22. Vehement though the submission of Mr. Aggarwala may be, it is a stand authoritatively discountenanced by the pronouncements of

the Supreme Court on the issue, which bind this Court, by virtue of Article 141 of the Constitution of India.

23. Submissions, identical to those advanced by him in the present case, were advanced by Mr. Aggarwala himself, in another matter, recently adjudicated by me, in *Anabelle Analista Malibago v. DRI, 2018 SCC Online Del 12114* where *Mohan Lal (supra)* came in for exhaustive consideration.

24. As in the present case, Mr. Aggarwala had, even in that case, sought to distinguish between an “informant” and a “complainant”, and contend further, that the seizing officer was not barred from filing the complaint, in his official capacity. These submissions, I had followed, could not sustain in view of the law laid down in *Mohan Lal (supra)*. My reasoning, in the said judgment, applies, squarely, to the facts of this case and may, therefore, be reproduced thus :

“2. Ms. Inderjeet Sidhu, appearing on behalf of the appellant, restricts her submission to one single ground, viz. that the entire proceedings were vitiated as the Investigating Officer (hereinafter referred to as the “IO”) was herself the complainant, who had submitted/filed the written complaint, wherefrom these proceedings emanated. She relies on a recent judgment of the Supreme Court, rendered by a Bench of three Hon'ble Judges, in *Mohan Lal v. State of Punjab, 2018 SCC OnLine SC 974*.

3. Arguing *per contra*, on behalf of the Directorate of Revenue Intelligence (hereinafter referred to as “DRI”), Mr. Satish Aggarwala, learned counsel, would seek to distinguish the judgment in *Mohan Lal (supra)* on the ground that the said judgment held the proceedings to be vitiated where the *informant* was the IO, and not where the *complainant* was the IO. He submits that there is a distinction between an “informant” and a “complainant”, and that the cases

investigated by the DRI are based, not on information, but on intelligence sourced by the DRI and the documents recovered pursuant thereto. He submits that, where the seizing officer was the complainant, as in the present case, the proceedings were not vitiated and *Mohan Lal (supra)* would not apply. He draws my attention to the contents of the complaint, and to the contentions advanced by him in his written submissions before the learned ASJ.

4. Ms. Sidhu, in rejoinder, submits that the distinction, sought to be drawn by Mr. Aggarwala, between an informant and a complainant, is a distinction without a difference, in cases relating to prosecution under the NDPS Act, as the source of intelligence was not known in such cases. Besides, she submits that a holistic reading of *Mohan Lal (supra)* reveals that it covers cases where the informant was the IO, as well as cases where the complainant was the IO. She, therefore, reiterates her reliance on *Mohan Lal (supra)*.

10. Insofar as the applicability of *Mohan Lal (supra)* is concerned, Mr. Aggarwala, as already noted hereinabove, seeks to distinguish the said case by drawing my attention to the distinction between an “informant” and a “complainant”, and that in cases investigated by the DRI, there was no “informant”, as the cases proceeded on prior intelligence, and that the seizing officer was the complainant. He submits that there is no prohibition to the seizing officer being the complainant and that if, therefore, the seizing officer, who also investigated the case, happened to file the complaint, against the appellant-accused in court, no illegality, warranting a decision in favour of the accused, could be said to have been committed.

11. Mr. Satish Aggarwala has also filed written submissions, in which, besides advancing the legal arguments already noted hereinabove, it has been sought to be contended that Ms. Anju Singh was neither the informant nor the investigating officer, as “almost the entire investigation” had been conducted by PW-4 Ramesh Kumar, Senior Intelligence Officer (SIO). My attention has been invited, in this context, to the testimonies of Anju Singh and Ramesh Kumar, testified as PW-1 and PW-4 respectively. The filing of complaint by

Anju Singh, it is sought to be contended in the written submissions, was only by way of discharge of her official duties.

12. Before examining the rival contentions, it would be appropriate to peruse the judgment of the Supreme Court in ***Mohan Lal (supra)***, which constitutes the sheet-anchor, and the *summum bonum*, of the appellant's case.

13. ***Mohan Lal v. State of Punjab, 2018 SCC OnLine SC 974***

14. The proceedings, in ***Mohan Lal (supra)*** commenced from an FIR, lodged on 3rd February, 1997 by PW-1 Chand Singh, Sub-Inspector, who alleged that, while on patrol duty in the company of other officers of the police station, they saw ***Mohan Lal*** and, on entertaining doubts, called Mr. Rajinder N. Dhole, a gazetted IPS officer and, in his presence, searched ***Mohan Lal***, leading to recovery of 4 kg of opium in a bag carried by him. The matter proceeded, inexorably, to his incarceration, trial and eventual conviction.

15. Based on the contentions advanced before it, the Supreme Court delineated the “primary question” arising for its consideration, in para 5 of the judgment, “whether in a criminal prosecution, it will be in consonance with the principles of natural justice, fair play and a fair investigation, if the informant and the investigating officer were to be the same person”. Additionally, the Supreme Court examined whether, in such a case, it was “necessary for the accused to demonstrate prejudice, especially under laws such as NDPS Act, carrying a reverse burden of proof”.

16. On the “reverse burden of proof” cast by the NDPS Act, the Supreme Court ruled, in para 13 of its judgment thus:

“13. Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the F.I.R recites compliance with statutory procedures leading to recovery, the

burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability.

The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities.”

17. Thereafter, the prime necessity of the investigation, in cases under the NDPS Act being scrupulously fair and free from any objectionable features or infirmities, was highlighted in paras 14 to 16 of the judgment, thus:

“14. A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary powers in the police which may well lead to false implication also. Investigation in such a case would then become an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.

15. That investigation in a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on part of the

accused was noticed in ***Babubhai v. State of Gujarat, (2010) 12 SCC 254*** as follows:

“32. The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the investigating officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The investigating officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The investigating officer “is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth”.

33. In ***State of Bihar v. P.P Sharma, 1992 Supp (1) SCC 222 : AIR 1991 SC 1260*** this Court has held as under:

“57. ... Investigation is a delicate painstaking and dextrous process. Ethical conduct is absolutely essential for investigative professionalism. ... Therefore, before countenancing such allegations of mala fides or bias it is salutary and an onerous duty and responsibility of the court, not only to insist upon making specific and definite allegations of personal animosity against the investigating officer at the start of the investigation but also must insist to establish and prove them from the facts and circumstances to the satisfaction of the court.

59. Malice in law could be inferred from doing of wrongful act intentionally

without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power.

...

61. An investigating officer who is not sensitive to the constitutional mandates, may be prone to trample upon the personal liberty of a person when he is actuated by mala fides.”

16. The duty of the prosecution under the NDPS Act, considering the reverse burden of proof, was noticed in *Noor Aga v. State of Punjab, (2008) 16 SCC 417* observing:

“58.....An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.”

18. The Supreme Court, thereafter, went on to examine the implication of the IO, carrying out investigation under the

NDPS Act, being the informant, *as well as being the complainant*, in paras 18 to 31 of the decision, thus:

“18. In a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during investigation, but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, *who makes the allegations himself*, is asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. *It would be illogical to presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would therefore be a foregone conclusion.*

19. The discussion in the present case may not be understood as confined to the requirements of a fair investigation under the NDPS Act only carrying a reverse burden of proof. **Baldev Singh (supra)** related to a prosecution under Section 165A of the IPC. Nonetheless, it observed that if the informant were to be made the investigating officer, it was bound to reflect on the credibility of the prosecution case. **Megha Singh (supra)** concerned a prosecution under the Terrorist and Disruptive Activities (Prevention) Act, 1985. It was held that the Head Constable *being the complainant himself* could not have proceeded with the investigation and *it was a practice, to say the least, which should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.* **Rajangam (supra)** was a prosecution under the NDPS Act. An objection was taken that PW6 *who apprehended the accused could not have investigated the case.* Upholding the objection, relying on **Megha Singh (supra)** the accused

was acquitted. The view taken by the Madras High Court in ***Balasundaran v. State, 1999 (113) ELT 785 (Mad.)***, was also noticed as follows:

“16. Learned Counsel for the appellants also stated that P.W 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W 5 was the person who really investigated the case. *P.W 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency.* On this score also, the investigation is bound to suffer and as such *the entire proceedings will be vitiated.*”

20. ***Bhaskar Ramappa Madar (supra)*** concerned a prosecution under Section 304B, I.P.C which also carries a reverse burden of proof. The Trial Court held that *the investigating officer who was also the complainant could not have investigated*, and on that ground, held the prosecution to be tainted. The acquittal was reversed by the High Court. In appeal, this Court declined to interfere with the conviction. After referring to ***Bhagwan Singh (supra)*** and ***Megha Singh (supra)***, it was observed that the principles laid down therein had to be confined to the facts of the said cases and that the matter would have to be decided on the facts of each case without any universal generalisation.

21. ***Hardip Singh v. State of Punjab, (2008) 8 SCC 557*** concerned a prosecution under the NDPS Act. The contention was that the Inspector, PW5 *being the complainant himself* would be an interested person and

should not have been made the investigating officer. The argument was repelled relying on *State rep. by Inspector of Police, Vigilance and AntiCorruption, Tiruchirapalli, Tamil Nadu v. V. Jayapaul, (2004) 5 SCC 223* observing as follows:

“6.... We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased.”

22. Significantly, *V. Jayapaul, (supra)* related to a prosecution under the Prevention of Corruption Act which sought to distinguish *Megha Singh, (supra)* on its facts.

23. *Baldev Singh, (supra)* relied upon by the State is distinguishable on its own facts concerning an irregularity in an investigation by an officer not especially empowered under the NDPS Act to do so.

24. In *Surender (supra)*, the prosecution was under the NDPS Act. There was no independent witness. The objection that PW6, Subinspector Satbir Singh being the complainant could not have investigated relying on *Rajangam, (supra)* and *Megha Singh, (supra)* was rejected on the ground that he was not the sole person investigating the case, and that the ground had not been raised before the High Court in appeal.

25. In the nature of the controversy, it would be useful to also notice the view taken by different High

Courts on the issue. In *State of Himachal Pradesh v. Atul Sharma, 2015 (2) shimLC 693* (Crl. Appeal No. 246 of 2008, decided on 28.02.2015), under the NDPS Act, it was observed as follows:

“10.8 In present case it is proved on record that complainant is SI Bahadur Singh as per FIR Ext.PW12.A and it is proved on record that entire investigation has been conducted by complainant himself and there is no evidence on record in order to prove that investigation was handed over to some other independent Investigating Officer. It is not the case of prosecution that no other independent Investigating Officer was available to conduct impartial investigation. We are of the opinion that conducting entire investigation i.e preparation of seizure memo, site plan, recording statements of witnesses by complainant himself has caused miscarriage of justice to accused qua fair investigation.”

26. A similar view has been taken in *Shri Fayas Ali v. State of Mizoram* Crl. Appeal No. 26 of 2013 (J) dated 19.09.2013, relating to prosecution under the NDPS Act, by the Gauhati High Court as follows:

“From the evidence of PWs 1 and 4, it is clearly found that the major part of the investigation including the arrest of the accused, preparation of seizure, taking of sample, examination of the seizure witnesses and examination of the accused person, was completed by the PW1, who was the informant/complainant in the present case. Therefore, it is clearly found that the investigation, in its true sense, was done by the complainant himself. In the case of *State by Inspector of Police, Narcotic Intelligence Bureau, Madurai (supra)*, the Supreme Court, relying on the decision held in the case of *Megha Singh (supra)*, observed that the investigation is to be done by a person other than the complainant and that the investigation done

by the complainant is bound to suffer and vitiate the entire proceeding.”

27. The Punjab & Haryana High Court in ***Gannu v. State of Punjab, 2017 (3) RCR (criminal) 566*** (Crl. Appeal No. 1688SB of 2004 dated 26.05.2017) relating to the NDPS Act, after referring to ***Noor Aga, (supra)*** and the views of the Calcutta High Court also, apart from ***Atul Sharma (supra)***, concluded as follows:

“14. Another aspect of the matter is that in sheer violation of the principles of fair and impartial investigation, the complainant and the investigating officer is the same person, which makes the prosecution case doubtful. In ***Laltu Prasad v. State of West Bengal, 2017 (2) R.C.R 21 (Criminal) 237 (Calcutta) (DB)***, it was held that the complainant himself acting as the investigating officer violating the principles of fair and impartial investigation is a practice, to say the least, should not be resorted to and it is a disturbing feature. To the same effect, is a Division Bench judgment of Hon'ble Himachal Pradesh High Court reported as ***State of Himachal Pradesh v. Atul Sharma, 2015 (6) R.C.R (Criminal) 949***, wherein, it has been held that where the complainant himself conducts investigation, it causes miscarriage of justice to accused qua fair investigation.”

28. A Single Judge of the Kerala High Court in ***Naushad v. State of Kerala, 2000 (1) KLT 785***, relating to the NDPS Act held as follows:

“... In a case of this nature, *when the complainant himself is a Police Official, the investigation should have been conducted by his top ranking officer and the final report also ought to have been filed by the higher official. A complainant being a police officer cannot be an Investigating Officer.* For, in such case, the accused and the prosecution will be deprived of their valuable rights of contradicting and

corroborating, the previous information recorded under Ss. 154 or 155 Cr.P.C and previous statement of the witness, being a police officer, complaint recorded, under S. 161 Cr.P.C enjoined in S. 145 and 157 of the Indian Evidence Act and proviso of S. 162 Cr.P.C In the instant case, before me, PW1 is an Assistant Sub Inspector of Police, 22 and I understand from the Public Prosecutor as well as from the Counsel for the petitioner that the particular Police Station has got a Sub Inspector of Police. Therefore, in this case, the investigation ought to have been conducted by the Sub Inspector of Police or any other Police Officer above the rank of PW1. In the instant case, thus *an incurable infirmity and flaw have been committed by the prosecution*, quite against the proposition of law. Therefore, on that score itself, the petitioner is entitled to get an order of acquittal. In view of my above conclusion on the footing of position of law, this is a fit case, which has to be allowed by acquitting the petitioner.”

29. Disapproving of the same, a Division Bench in ***Kader v. State of Kerala, 2001 Cri LJ 4044***, held:

“6. Unlike usual cases under the Criminal Procedure Code, in cases under the NDPS Act, by the time of arrest, main part of investigation will be completed and duty of the investigating officer is mainly in sending the samples for chemical analysis and other routine work and there is no likelihood of any prejudice in usual circumstances. Therefore, we are of the opinion that merely because a detecting officer himself is investigating officer or the officer of the same ranks as that of the detecting officer is investigating the case and files report before the Court will not vitiate the proceedings under N.D.P.S act in the absence of proof of specific prejudice to the accused. Therefore, legal position stated in ***Naushad v. State of Kerala, 2000 (1) KLT 785*** to the contrary is overruled.”

30. The view taken by the Kerala High Court in ***Kader (supra)*** does not meet our approval. It tantamounts to holding that the F.I.R was a gospel truth, making investigation an empty formality if not a farce. The right of the accused to a fair investigation and fair trial guaranteed under Article 21 of the Constitution will stand negated in that event, with arbitrary and uncanalised powers vested with the police in matters relating to the NDPS Act and similar laws carrying a reverse burden of proof. An investigation is a systemic collection of facts for the purpose of describing what occurred and explaining why it occurred. The word systemic suggests that it is more than a whimsical process. An investigator will collect the facts relating to the incident under investigation. The fact is a mere information and is not synonymous with the truth. ***Kader (supra)*** is, therefore, overruled. We approve the view taken in ***Naushad (supra)***.

31. *In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided.* It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.”

(Emphasis and underscoring supplied)

19. The opening words of para 31 of the judgment make it apparent that, prior thereto, there was considerable divergence of judicial opinion, amongst decisions of various benches, in each case of two Hon'ble judges of the Supreme Court, regarding the issue of whether the fact that the informant/complainant/searching officer, was the IO, was fatal to the prosecution, especially in cases where the statute casts a reverse burden of proof. Needless to say, this Court is loath to revisit the issue and, thereby, undo the efforts of the Supreme Court, as manifested by the judgment in ***Mohan Lal (supra)***, which sets the legal position at rest. For the nonce, at least, this Court is sanguine about the position, in law, that all prosecutions, under the NDPS Act - or, for that matter, under any "criminal" statute which casts a reverse burden of proof - must abide by the enunciation of the law in ***Mohan Lal (supra)***.

20. Another feature which becomes apparent, from the underscored words in the above extracted passages from ***Mohan Lal (supra)***, is that they apply, not only to a situation in which the IO is the informant, but also to a situation in which the IO is the complainant or even, for that matter, the searching officer.

21. With those prefatory remarks, the following principles may justifiably be said to emerge, from the judgment in ***Mohan Lal (supra)***, insofar as the effect, on prosecutions under the NDPS Act, of the IO being the informant, complainant or searching officer, is concerned:

(i) In every criminal prosecution, it was essential that the investigation, on the face of it, had to be free, judicious and just, and that it had also to appear to be so, eschewing any conduct or impression which may give rise to a real and genuine, and not a mere fanciful, apprehension, in the mind of the accused, that the investigation was not fair.

(ii) If, therefore, the informant police official in a criminal prosecution, especially one which carries a reverse burden of proof, *who had made the allegations*, was himself asked to investigate, serious doubts would naturally arise with regard to his fairness and impartiality.

(iii) Actual proof of bias was not required in such a case. It would be illogical to presume and contrary to normal human conduct, that the IO would, in such a case, conclude the investigation with a closure report, which would mean that he had falsely implicated the petitioner and would result in attendant consequences on the complainant himself.

(iv) In *Megha Singh v. State of Haryana*, (1996) 11 SCC 709, it had been held that the Head Constable, *being the complainant himself, could not have proceeded with the investigation*, and such a practice was one which should not be resorted to, so that there can be no occasion to suspect the fairness and impartiality of the investigation.

(v) Following the law laid down in *Megha Singh (supra)*, the Supreme Court had, in *State v. Rajangam*, (2010) 15 SCC 369, acquitted the accused, in a case under the NDPS Act, on the ground that the officer *who apprehended the accused* could not have investigated the case. The Supreme Court also affirmed the view taken by the Madras High Court in *Balasundaran v. State*, 1999 (113) ELT 785 (Mad.), which held that the person *who had searched the appellants* could not be the investigating officer.

(vi) In *Naushad v. State of Kerala*, 2000 (1) KLT 785, it was categorically held by a learned Single Judge of the Kerala High Court, in a case relating to the NDPS Act that “the complainant being a police officer cannot be an investigating officer” as, “in such case, the accused and the prosecution will be deprived of their valuable rights of contradicting and corroborating, the previous information recorded under Sections 154 or 155 of CrPC and previous statement of the witness, being a police officer, complaint recorded, under Section 161 CrPC enjoined in Section 145 and 157 of the Indian Evidence Act and proviso of Section 162 CrPC”. The fact that the complainant was the investigating officer was held, by the learned Single Judge of the High Court of Kerala, to constitute an

“incurable infirmity”, entitling the petitioner to an order of acquittal. The said judgment of the learned Single Judge in *Naushad (supra)* stands specifically approved in *Mohan Lal (supra)*, which overrules the contrary view, expressed by a Division Bench of the High Court of Kerala, in *Kader (supra)*. The view of the learned Single Judge of the High Court of Kerala in *Naushad (supra)* stands, thereby, elevated to the status of the opinion of a bench of three Hon'ble judges of the Supreme Court.

22. A holistic reading of *Mohan Lal (supra)*, in my view, leaves no manner of doubt that the Supreme Court has disapproved, in cases relating to prosecution under the NDPS Act, not only the informant being the IO, but also the complainant, the officer who apprehends the accused, or the officer who conducts the search, being the IO. The reasons, for taking such a view are also clearly delineated in the said decision. The Supreme Court has clearly expressed a view that, if the person making the allegations is himself asked to investigate, serious doubts would arise with regard to his fairness and impartiality. It has also noted that it would be illogical to presume, and contrary to human conduct, to expect the IO, who had himself provided the initial information, or filed the complaint against the accused before the competent court, or even conducted the apprehension or search of the accused, to, at the conclusion of the investigation, submit a closure report, which could invite an inference that he had obviously implicated the accused, with all its attendant consequences, “*for the complainant himself*”. While limiting the earlier judgment in *Megha Singh (supra)* to its own facts, the Supreme Court also held that the complainant could not be the IO, and that such a practice was inherently pernicious in nature. *Rajangam (supra)* which arose under the NDPS Act, also stated that the officer who apprehended the accused could not have investigated the case. The judgment of the learned Single Judge of the Kerala High Court in *Naushad (supra)*, which stands affirmed by the Supreme Court in *Mohan Lal (supra)*, too, affirms the same view.

23. In view of the above, the submission, of Ms. Sidhu, to the effect that, if the complainant, who has filed the complaint in a case relating to prosecution under the NDPS Act, was herself/himself the IO, the entire investigation and subsequent

prosecution and trial stand vitiated, and that the accused is entitled, *ipso facto*, to acquittal, merits acceptance.”

25. In view of the law laid down in *Mohan Lal (supra)*, therefore the fact that PW-1 Rajendra Verma was the I/O, as well as the complainant, completely vitiated the proceedings in the present case.

26. Apropos *Arif Khan (supra)*, the contention of Mr. Aggarwala, is that the said judgment had no applicability, as the recovery had taken place, not from the person of the appellant, but from his baggage. This submission, too, has no force, in view of the law laid down by the Supreme Court in *Dilip v. State of Madhya Pradesh, (2007) 1 SCC 450* and *State of Rajasthan v. Parmanand, AIR 2014 SC 1384* which hold that, where the search of the baggage of the accused (from which the contraband was recovered) takes place alongwith the search of his person, Section 50 applies with full force. I may mention, here that I have, in my judgment in *Dharambir v. State, 2018 SCC OnLine Del 12305* also dealt with this aspect of the matter.

27. Once Section 50 of the NDPS Act, is treated as applicable, *Arif Khan (supra)* clearly applies, resulting in the present proceedings being vitiated additionally for the reason that the search and recovery did not take place in the presence of a Magistrate or a Gazetted Officer. The requirement of consent, from the appellant, for being searched by the members of the raiding team, would be irrelevant, in view of the law laid down in *Arif Khan (supra)*.

Conclusion

28. Resultantly, the proceedings against the appellant stand completely vitiated in law, for the above two reasons. It is not necessary, therefore, to enter into any other aspect of the controversy.

29. As a result, the appellant is entitled to be acquitted of the charge against him, of contravening Section 23 of the NDPS Act.

30. Accordingly, the appellant is acquitted of the said charge. The impugned judgment dated 14th August, 2014 and consequential order on sentence dated 19th August, 2014 of the learned Special Judge, stand quashed and set aside.

31. The appellant is entitled to be set at liberty unless his detention is required in any other case.

32. The appeal stands allowed accordingly. Trial court record be returned forthwith.

C. HARI SHANKAR, J

NOVEMBER 27, 2018/kr