

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (MAIN) NO.196 OF 2018

1. Mr. Sergius Victor Manka,
31 years of age,
Son of Mr. Darius Manka,
German National,
resident of Street
Schwarzenbachstr. 8,
Zip 72379
City Hechingen,
Presently residing at
r/o Witmen Hospital Y,
District Satara,
Maharashtra.

2. Mr. Sebastian Steinmuller,
25 years of age,
Son of Mr. Markus Steinmuller,
German National,
Resident of Street
Konigsberstrase 12,
Zip 72411,
City Bodelshavsen,
Both presently residing at
House No.106, Vila Almeida,
Morning Battir,
Pernem Goa 403 512.

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Petitioners

Versus

State,
Through Incharge
Pernem Police Station, Goa.

...

Respondent

Mr. Aman Preet Singh Rahi and Mr. Pulkit Bhandodkar, Advocates for the Petitioners.

Mr. S. R. Rivankar, Public Prosecutor for the Respondent.

***Coram : R. D. Dhanuka &
Prithviraj K. Chavan, JJ.***

***Reserved on : 13th March, 2019
Pronounced on: 2nd April, 2019***

ORDER (Per Prithviraj K. Chavan, J)

By this application under Section 482 of the Criminal Procedure Code the Petitioners who are the German nationals have invoked the jurisdiction of this Court for quashing the First Information Report and charge-sheet filed by the Respondent against them in Crime No.177 of 2017 registered with Pernem Police Station under Section 22(C) of the NDPS Act, *inter alia*, praying for release of their passports.

2. Brief facts can be summarised as follows :

Acting on the basis of a specific and reliable information by the Pernem Police Station on 12th December, 2017 between 1.35 hours to 3.30 hours, the Pernem Police Station led by Police Inspector Mr. Chodankar along with two pancha witnesses and raiding party conducted a raid at house No.378, Madhalawada, Arambol Pernem Goa, where the Petitioners were found present. During the house

search, the team found 64 grams of liquid LSD drops worth about Rs.64,00,000/- along with some other articles including a mobile phone and cash of Rs.27,500/-. The Investigating Officer had seized the contraband substance and other articles under the panchanama along with cash of Rs.27,500/-. The Petitioners were brought to the Police Station along with the seized articles which were handed over to a writer H.C. of the Police Station.

3. According to the prosecution, during the house search, the Petitioners were found in possession of commercial quantity of liquid LSD. Thus, they have been duly arrested and intimation of their arrest has been given to the FRRO, Panaji. During the interrogation to find out the source of contraband article which was found in their possession, nothing could be unearthed from the Petitioners.

4. The attached Exhibit I containing the suspected LSD liquid was sent to the Director, Central Forensic Science Laboratory at Hyderabad for examination on 10th January, 2018. However, the CFSL, Hyderabad returned the Exhibit with a letter stating that they could not accept the case due to absence of standard reference material of LSD in their laboratory and the same was under process of procurement. It is stated on behalf of the Petitioners that, therefore, even after expiry of more than 84 days, the Investigating Agency was not in a position to *prima facie* bring on record that the seized article

was a psychotropic substance.

5. The Petitioners have mentioned the details of the panchanama which are as under : -

“Allegedly the information was reduced to writing.

At 23.55 hrs the information was forwarded to the residence of SDPO, Mapusa through PC7393.

At 24.00 hrs the presence of 2 panchas i.e. Sh. Balkrishna (retd.) 70 years and Sanjay (businessman) 53 years is secured through PC5990 and are called to the Police Station.

Raiding part consisted of PI S. Chodankar; PSI Sagar; PC 4700 Prasad; PC5990 Premnath; PC 7750 Anish Kumar & PC7666 Sapil excluding the 2 panchas.

Seal of Pernem Police Station with inscribed “Police Station Pernem Goa No.2 with Ashoka emblem is shown. KitBox containing weighing machine, packing material, sealing material, writing material and plastic empty bottles.

At 01.00hrs dt. 12.12.2017 Raiding party except PC7666 (who drove motorcycle) went in a police vehicle.

At 01:30 hrs raiding party reached behind High School and parked the vehicle.

Finding the door open all entered the house and found both the accused persons sitting on chairs and saw that on the table is a Plastic Bottle with inscription “LUPIN” (containing transparent liquid) and one plastic pump.

Both accused persons were appraised in “ENGLISH” about the secret information that they are dealing with Liquid LSD and were informed about personal search and house search which can be conducted in the presence of Gazzt. Officer or Magistrate, however, both of them allegedly declined.

i. Personal search on body is conducted on both accused

person and nothing incriminating is found.

ii. Search of the entire house is done and no other material is found.

The Plastic Bottle with inscription "LUPIN" (containing transparent liquid) is weighed and found to be 78 gms by the PI S Chodankar and PC 4700 Prasad.

The plastic bottle (carried along by the raiding party) with inscription on the bottom as "SIEGMA PET" having green cap with writing as "CIPLA" is weighed and found to be 14 grams.

The contents of the Plastic Bottle with inscription "LUPIN" are transferred by way of plastic pump of the accused persons into the plastic bottle (carried along by the raiding party) with inscription on the bottom as "SIEGMA PET" having green cap with writing as "CIPLA".

The "SIEGMA PET" bottle is weighed and found to be 78gms along with the Liquid LSD weighing 64gms, its neck is packed with adhesive tape and sealed being EXHIBIT A.

The empty Plastic Bottle with inscription "LUPIN" is also packed and sealed being EXHIBIT B.

The plastic pump is also packed and sealed being EXHIBIT C.

PI S. Chodankar informed the raiding party that the Liquid LSD recovered from the accused persons is worth Rs.64,00,000/- (sixty four lakhs).

The Panchanama is written in English by PSI Sagar as directed by PI S. Chodankar and explained to the panchas in their language.

At 03.30 hrs the said seizure & panchanama is signed only by PI S. Chodankar and the 2 panchas even though it was written by PSI Sagar, it is alleged that accused persons refused to sign.

In the meanwhile allegedly at 01.45 hrs the information is received by the SDPO at his residence."

6. It is contended that on 9th January, 2018, an inventory proceedings of drawing samples were conducted before the Executive Magistrate. The contents of Exhibit A being liquid LSD weighing 64 grams was again transferred to other bottle with the help of another plastic pump and marked as Exhibit I.

7. The Petitioners further state that the empty bottle with traces of LSD allegedly sealed during the inventory is marked as Exhibit II. The prosecution has not sent the second plastic pump (original plastic pump) for examination which is marked as Exhibit III.

8. It is further contended that Exhibit I is sent to FSL, Hyderabad on 9th January, 2018. The said Exhibit I is returned in original by FSL, Hyderabad, on the ground of non availability of standard reference material of LSD and therefore, the same remained in the custody of HC-3782 Ladu Shetye of Police Station, Pernem on 12th January, 2018. Thus, it is the contention of the Petitioners that from 12th December, 2017 to 9th January, 2018, the samples remained in the custody of Pernem Police Station and is unknown why the representative samples were not drawn immediately and sent to CFSL.

9. It is further contended that on 18th September, 2018, the CFSL, Kolkata, communicated to the Inspector General of Police,

Panaji that LSD/MDMA standards are not available in their laboratory. However, utilizing the mass spectrum laboratory available with GC-MS system of CFSL Kolkata, the detection of LSD and MDMA from the said crime exhibits will be possible.

10. The Petitioners contend that the CFSL, Kolkata on analyzing three sealed packets which were not at all original seized material detected only the presence of LSD content in each of three exhibits without determining the exact weight and even the seal of the Police Station mentioned is different since Exhibit A and Exhibit C were never sent for examination and Exhibit B is different from the one as seized.

11. The Petitioners have also disputed that at the time of sealing, it was mentioned as “Police Station, Pernem Goa No.2” whereas what was examined carries the seal of “Police Station, Pernem Goa No.4” prepared during the inventory on 9th January, 2018. The samples are not drawn as per the Standing Order No.1/1989 issued by the Narcotic Control Bureau, Government of India.

12. According to the Petitioners, the other infirmities in the FSL examination are as follows :

“EXHIBIT-1 bottle containing alleged LSD having Police Station Pernem Goa No.4 seal.

i. Colour of the bottle is mentioned as Amber.

- ii. Weight of the LSD is mentioned as 64.3102 gms excluding the plastic bottle whereas it was only 64 gms at the time of seizure (the entire substance is sent for examination)*
- iii. Liquid substance is mentioned as brown whereas it was transparent as per Panchas report.*
- iv. That after examination the remanant LSD weighing 45.5613 grams (excluding the plastic bottle) is re-sealed and returned.*
- v. The examination of the Liquid substance consumed 18.7489 gms whereas as per Entry 133 mere 0.002 mg is non commercial and 0.1mg is commercial quantity.”*

13. The learned counsel for the Petitioners took us through the contents of search and seizure panchanama dated 12th December, 2017 as well as the report of CFSL, Kolkata dated 18th January, 2018 and the final report under Section 173 of the Criminal Procedure Code. The learned counsel has also placed reliance on various authorities.

14. According to the learned counsel, since the Investigating Agency has violated various provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 including Section 52A, there is hardly any chance of conviction of the Petitioners as neither the 'LUPIN' nor 'SIEGMA PET' bottles were sent to CFSL Kolkata for chemical analysis. The charge-sheet even does not form the part of 'SIEGMA PET' and 'LUPIN' bottle, but instead, four other bottles were shown. There is change of seal by the Investigating Agency. No

standard reference material of LSD was available in India and therefore, he strenuously argued that this is a fit case in which the FIR and the charge- sheet can be quashed.

15. On the other hand, Shri Rivankar, learned Public Prosecutor strongly objected for quashing of the proceedings mainly on the ground that the Petitioners will have an opportunity under Section 227 of the Criminal Procedure Code for seeking discharge before the Special Court. There is presumption under Sections 35 and 54 of the NDPS Act, in the sense that there is a reverse burden upon the Petitioners to establish that they were not in possession of narcotic substance. It is further contended that search and seizure panchanama has been duly drawn by the Investigating Officer and there is enough material to frame a charge against the Petitioners.

16. While exercising the powers under Section 482 of the Criminal Procedure Code, it has been held by catena of decisions that such powers should be exercised sparingly in rarest of the rare cases. It is equally important to note that such powers are to be exercised with circumspection. Enquiry as to reliability of allegations made in the first information report or complaint are not to be examined. Thus, the High Court has no jurisdiction to examine the correctness or otherwise of the allegations made in the complaint. The Supreme Court in a well known case of *State of Haryana and others Vs Bhajan*

*Lal and others*¹ had laid down the law and carved out certain principles which can be enumerated as under :

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a

¹ 1992 Supp (1) SCC 335

cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

17. In the light of the aforesaid principles, the facts and material on record need to be scanned in order to see as to whether this is a fit case for exercising powers under Section 482 of the Criminal Procedure Code.

18. Undisputedly, the Petitioners were found in possession of 64 grams of alleged liquid LSD in a plastic bottle inscribed “LUPIN” containing transparent liquid which was weighed and found to be 78 grams by PI Mr. Chodankar. The said bottle is marked as Exhibit B. It

is also an undisputed fact that the content of the said bottle came to be transferred in another bottle by the PI Mr. Chodankar over which it was inscribed as "SIEGMA PET". The weight of "SIEGMA PET" bottle which was carried by PI Mr. Chodankar was 14 grams. The contents from the bottle seized from the Petitioners having inscription as "LUPIN" was transferred into "SIEGMA PET" bottle with green cap and with a writing as "CIPLA" by means of "Plastic Pump" which was with the Petitioners themselves. The Investigating Officer thereafter packed the neck of "SIEGMA PET" bottle with adhesive tape and sealed it properly which is marked as Exhibit A. The empty "LUPIN" bottle is marked as Exhibit B. The plastic pump was also duly sealed which is marked as Exhibit C. The Investigating Officer had also seized cash of Rs.27,500/- (Exhibit D), the passport of Petitioner No.1 Mr. Sergius Victor Manka as Exhibit E. His iphone as Exhibit F and another mobile of second Petitioner as Exhibit G.

19. The search and seizure panchanama dated 12th December, 2017 depicts the manner in which the search and seizure was conducted by Mr. Chodankar in the presence of panchas namely Balkrishna Vishnu Kauthankar and Sanjay Kashinath Bondre. The learned counsel for the Petitioners has mainly aggrieved on the point, the manner in which the alleged liquid LSD came to be seized and transferred from one plastic bottle to another as well as non compliance of Section 52A of the NDPS Act, more particularly, in the

light of the fact that the contraband seized is a commercial quantity as per the Notification in the table shown at Sr. No.133 – Commercial quantity of LSD, LSD-25 is 0.1 gram (+) LYSERGIDE.

20. It is also the grievance of the learned counsel for the Petitioners that there was an inordinate delay not only in sending the representative sample to the CFSL but there was delay in receiving the report from the FSL and, therefore, there is hardly any chance of the Petitioners getting convicted on the basis of such defective investigation.

21. It is also the contention of the learned counsel that the charge-sheet does not form part of either the “SIEGMA PET” bottle or “LUPIN” bottle, instead, four other bottles are shown. As such, it is the argument of the learned counsel that there is every likelihood of tampering with the bottles and therefore, this Court can exercise its powers under Section 482 of the Criminal Procedure Code for quashing the charge-sheet and FIR.

22. We are afraid, we cannot buy the arguments of the learned counsel for the reasons to follow. As already stated, while exercising the inherent jurisdiction under Section 482 of the Criminal Procedure Code, unless it is shown that there is an abuse of the process of Court or for the purpose of securing the ends of justice, such powers are

required to be exercised, this Court cannot embark upon an enquiry as to reliability or genuineness of the allegations which are to be tested during the trial on merits.

23. The Investigating Officer Mr. Chodankar while drawing the search and seizure panchanama dated 12th December, 2017, appears to have followed the procedure as contemplated in law. He had carried the seal of the Police Station inscribed on it as “ Police Station, Pernem Goa No.2” with Ashoka emblem. When the raid was conducted along with raiding party and panchas at about 1.30 hours they noticed the Petitioners sitting on the chair in front of a table over which contraband article i.e. alleged liquid LSD was found in a plastic bottle. The Petitioners were duly informed by Mr. Chodankar after disclosing his identity, the purpose of his visit and even informed the Petitioners about their right to be searched in the presence of Gazetted Officer or Magistrate, if the Petitioners so desired. It appears that the Petitioners declined the offer. Mr. Chodankar had also informed the Petitioners that they had a right to search the members of the raiding party including the panchas, however the Petitioners declined the said offer also.

24. Further, the description in the search and seizure panchanama reveals the plastic bottle on the table containing transparent liquid along with the plastic pump. On being asked,

Petitioner No.1 Mr. Sergius Victor Manka answered that it contains liquid LSD which was confirmed by the second Petitioner. The said bottle having inscription as “LUPIN” containing the said liquid weighed 78 grams. It was then emptied in another bottle carried by the raiding party having inscription as “SIEGMA PET” having a green cap with writing “CIPLA”. The SIEGMA PET bottle weighed 14 grams. The alleged liquid LSD was transferred in the second bottle. It was closed and after it was found to be weighing about 78 grams. The neck of the second bottle was packed with adhesive tape with a seal of Pernem Police Station having inscription as “Police Station, Pernem Goa Seal No.2” by Mr. Chodankar. As already stated herein above, the manner in which Mr. Chodankar had sealed the empty bottle as well as the bottle in which the alleged liquid LSD was transferred with the help of plastic pump, *Prima facie*, we do not find any material irregularity or illegality in the search and seizure panchanama drawn by Mr. Chodankar.

25. According to the prosecution, Mr. Chodankar had informed the raiding party that the liquid LSD recovered from the Petitioners is worth Rs.64,00,000/-. The panchanama was written in English by PSI Sagar as per the directions given by Mr. Chodankar which was explained in their language. It was duly signed by Mr. Chodankar and panchas. It is alleged that the Petitioners refused to sign the same. It also reveals that the SDPO was informed about the

search and seizure at about 1.45 hours and an FIR came to be registered bearing No. 177/17 at 5.00 hours under Section 22(C) of the NDPS Act by Mr. Chodankar. Though it is the contention of the Petitioners that FIR is sans the names of the raiding party as well as the description of the alleged contraband, FIR is just to set a criminal law into motion which need not contain all the details, more particularly, in the light of the fact that the search and seizure panchanama described almost all the details.

26. So far as the inventory which came to be drawn on 9th January, 2018 as per Section 52A of the NDPS Act, depicts that it was drawn in the presence of the Executive Magistrate Eshant Sawant, keeping in mind the guidelines in the judgment of the Supreme Court in the case of *Union of India Vs Mohanlal*, in Criminal Appeal No.652/2012. It reveals from the inventory that on 9th January, 2018, PI Mr. Chodankar introduced the Executive Magistrate Eshant Sawant who came to be appointed by the SDPO, Pernem vide Memorandum No. DCP/ANC/2017/3526 dated 18th December, 2017. Mr. Chodankar also introduced Devidas Malkar, PC 7547 of Pernem Police Station who was directed to click the photographs of the inventory proceedings. Mr. Chodankar had shown his seal having inscription of "Pernem Police Station Seal No.4" with Ashoka emblem and informed that the said seal will be used for sealing during the inventory proceedings.

27. The learned counsel for the Petitioners tried to confuse us by stating that two seals have been used by the Investigating Officer; first seal was used having inscription as “Police Station, Pernem Goa No.2” with Ashoka emblem and thereafter the second with “Police Station, Pernem Goa No.4”. As a matter of fact during the seizure and search, Mr. Chodankar had used the seal having inscription of “Police Station, Pernem Goa Seal No.2” and subsequently at the time of the inventory another seal was used having inscription of “Police Station, Pernem Goa Seal No.4”. These are altogether different procedures wherein two different seals have been used and therefore, it would not result in any illegality.

28. The inventory further indicates that Mr. Chodankar had produced one plastic bottle marked as Exhibit A as already described hereinabove as contraband seized from the possession of the Petitioners which is a “SIEGMA PET” bottle in which contents from “LUPIN” bottle was transferred. He has stated as to how the said contraband material was sealed from the possession of the Petitioners under a panchanama on 12th December, 2017. The plastic bottle having seal on the cap cover with adhesive tape had inscription as “Police Station, Pernem Goa Seal No.2”. The bottle was found intact with relevant details on paper lable pasted on it namely as “ This sealed bottle contains liquid LSD weighing 64 grams W/Rs.64,00,000/- seized during the search and seizure panchanama at House No.378,

Madhalawada, Arambol, Pernem Goa, on 12th December, 2017 and marked as Exhibit A. The inventory further reveals that Mr. Chodankar thereafter took plastic bottle having adhesive tape on the cap and having seal of Pernem Police Station on the cap with relevant details. Mr. Chodankar wore disposable hand gloves. The sealed plastic bottle containing liquid on the electronic weighing machine was found weighing 84 grams. Mr. Chodankar informed that the said plastic bottle containing liquid is suspected to be LSD and same is required to be sent for chemical analysis after inventory proceedings.

29. Thereafter, in order to ascertain the exact weight of the suspected LSD liquid, Mr. Chodankar took one empty plastic bottle having silver colour cap (brought by police) having inscription as “PHARMED” on the cap and weighed the same on electronic weighing scale. It was weighing 14 grams. Mr. Chodankar thereafter removed adhesive tape from the cap of the plastic bottle with the help of cutter containing suspected LSD liquid. After opening the bottle, he transferred all the suspected LSD liquid to another plastic bottle brought by the police with the help of plastic pump and the same was weighed on electronic weighing scale. It was found weighing 78 grams. Thus, Mr. Chodankar informed that weight of the LSD was 64 grams. Thereafter, the said cap of plastic bottle containing suspected LSD was sealed with adhesive tape and placed the same in one green colour

clothline envelope. He had written relevant details and inserted the plastic bottle containing suspected liquid in the said green colour clothline envelope. It was packed and sealed with the seal of Pernem Police Station Seal No.4 with Ashoka emblem at seven places. Mr. Chodankar also applied cello tape on the seven seals affixed. The envelope was signed by Mr. Chodankar as well as the Executive Magistrate Eshant Sawant, which is marked as Exhibit -I.

30. Mr. Chodankar took one more green coloured clothline envelope and written details on it. He inserted empty plastic bottle containing traces of suspected LSD liquid and pieces of adhesive tape on the cap and seal of Pernem Police Station No.2. He packed and sealed it with the seal of Pernem Police Station No.4 with Ashoka emblem at seven places. It was marked as Exhibit -II. In similar manner, the plastic pump which was used to transfer the suspected LSD from one bottle to another also came to be sealed and marked as Exhibit -III. The photographs of the inventory were taken by PC 7547 Devidas Malkar of Pernem Police Station. The inventory appears to have been signed by Mr. Chodankar as well as the Executive Magistrate Eshant Sawant who certified that the inventory proceedings of drawing samples had been conducted by Mr. Chodankar and his staff in his presence at Pernem Police Station on 9th January, 2018.

31. The learned counsel for the Petitioners took strong

exception for the delay of about one month which occurred in sending Exhibit I to FSL Hyderabad on 10th January, 2018 when, in fact, the raid was conducted and contraband was seized on 12th December, 2017. According to him, the delay is unexplained. The prosecution has justified that since the FSL Hyderabad had returned the contraband on the ground of non availability of standard reference material of LSD with the said laboratory, the samples were with the Investigating Agency from 12th December, 2017 to 9th January, 2018.

32. There is nothing on record though it has been argued by the learned counsel for the Petitioners that there was an attempt in tampering with the sample during that period, as it can be seen from the inventory that seals were intact and there was no question of any tampering. The sample was thereafter sent to CFSL Kolkata and on 18th September, 2018, the CFSL Kolkata had communicated the IGP of Panaji that the LSD/MDMA standards were not available in their laboratory. However, they utilized the mass spectrum laboratory available with GC-MS system of CFSL Kolkata. The detection of LSD and MDMA from the said crime exhibits was possible. The said letter is at Annexure F. Since the CFSL Kolkata had developed a technique of detection of LSD and MDMA by GC-MS system while examining various elements of chemicals, a report thereafter was forwarded to the prosecution agency.

33. The arguments of the learned counsel for the Petitioners that the CFSL Kolkata on analysing the three sealed packets which were not at all original seized material, detected only the presence of LSD content in each of the three Exhibits without determining the exact weight and even the seals of the Police Station mentioned is different since Exhibits A and C were never sent for examination and Exhibit B is different from the one seized, cannot be accepted as the description given in the inventory and the seizure panchanama takes care of this aspect. Merely because the inventory dated 9th January, 2018 does not indicate the specific inscription as “LUPIN”, “SIEGMA PET” would not mean that some different bottles were produced at the time of inventory proceedings. There is no reason for the prosecution to falsely implicate the Petitioners in the sense that there is no abuse of process of law. This factor can very well be considered even at the time of framing charge by the Special Court under Section 227 of the Criminal Procedure Code.

34. There are minor discrepancies in describing the pump as a “dropper” which, according to us are not very fatal at this stage in order to quash the entire proceedings. As already stated, mere non mentioning of “LUPIN, SIEGMA PET, CIPLA” in Exhibit -II would not *prima facie* render the entire prosecution case unbelievable.

35. The CFSL Kolkata in its report dated 18th January, 2018

described the parcel Nos.1, 2 and 3 which reads thus :

“1. The duly sealed and signed green coloured paper packet related to Pernem P.S. Case No.177/2017 dated 12.12.2017 and marked by the forwarding authority as “Exhibit-I” having 07 nos. of lac seals with an inscription “POLICE STATION PERNEM GOA NO.4 with Ashoka emblem” contained one amber coloured plastic bottle having adhesive tape on the cap both of which were marked in the Chemistry Division of CFSL, Kolkata as Chem 413/18/1. The said bottle contained 64.3102 gram (excluding plastic bottle) brown coloured liquid substance.

2. The duly sealed and signed green coloured paper packet related to Pernem P. S. Case No.177/2017 dated 12.12.2017 and marked by the forwarding authority as “Exhibit II” having 07 nos. of lac seals with an inscription “POLICE STATION PERNEM GOA NO.4 with Ashoka emblem” contained one amber coloured plastic bottle labelled as “Exhibit “A” and having one lac seal with an inscription “POLICE STATION PERNEM GOA NO.2 with Ashoka emblem” on adhesive tape fixed around the neck of the bottle, all of which were marked in the Chemistry Division of CFSL Kolkata as Chem 413/18/2. The said bottle appeared to be empty and nothing could be visualized. The bottle was extracted with Methanol for analysis.

3. The duly sealed and signed green coloured paper packet related to Pernem P.S. Case No.177/2017 dated 12.12.2017 and marked by the forwarding authority as “Exhibit – III” having 07 nos. of lac seals with an inscription “POLICE STATION PERNEM GOA NO.4 with Ashoka emblem”, which was marked in the Chemistry Division of CFSL Kolkata as Chem 413/18/3

contained one graduated plastic dropper stated as 'plastic pump' having some brown stains in the inner side of the said dropper. The plastic dropper was extracted with Methanol for analysis.

Results of Examination

Using suitable chemical/colour tests (Ehrlich Reagent Test, Frohde's Test and Meck's Test) and instrumental methods of chemical analysis (TLC, UV Vis Spectrophotometer, FT-IR & GC-MS techniques) of the content of each of the exhibits and or chemical extracts marked here as Chem 413/18/1, Chem 413/18/2 and Chem 413/18/3 the following results were obtained :

1. Lysergic acid diethylamide (LSD) was detected in the content of each of the exhibits marked here as Chem 413/18/1, Chem 413/18/2, and Chem 413/18/3."

36. Having found that the LSD was detected in the content of each of the Exhibits, it is now for the trial Court to decide on the basis of evidence which will be produced on record during the course of trial.

37. The learned counsel for the Petitioners has pressed into service several authorities. Most of the authorities under the NDPS Act are after the conclusion of the trial on merits. Nevertheless, it would be appropriate to refer to the ratio of law laid down by the Supreme Court and some High Courts.

38. In the case of *Mohan Lal Vs The State of Punjab*², the

2 2018 AIR (SC) 3853

appellant came to be acquitted because of defective investigation. The appellant therein was convicted under Section 18 of the NDPS Act. It was held by the Supreme Court that 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, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. In the case at hand, the Investigating Officer is Anant A. Gaonkar and informant/complainant is PI Mr. Chodankar. Even otherwise, there is nothing on record *prima facie* indicating any unfair act on the part of the informant/Investigating Officer.

39. In the case of *Anand Kumar Mohatta and others Vs State (Govt. of NCT of Delhi) Department of Home and others*,³ the Supreme Court held that there is no doubt that the powers under Section 482 of the Criminal Procedure Code can even be exercised after filing the charge sheet, if it appears to the Court that the

3 AIR 2019 SC 210

circumstances so required. It was a case under Section 406 of IPC alleging that the appellant had clandestinely and surreptitiously transferred the subject property in the name of his wife-appellant no.2 in order to defeat the agreement with the Respondent. The Supreme Court observed that the petition was filed pre-maturely as the case was still at the stage of investigation. It being essentially a civil dispute between the parties and as the evidence collected in support of the case did not disclose the commission of any offence to make out any case against the accused, it is observed that it is a fit case to exercise inherent powers under Section 482 of the Criminal Procedure Code. There can be no doubt about the principles laid down by the Supreme Court as to the powers of the High Court under Section 482 of the Criminal Procedure Code.

40. In the case of *Rajesh Jagdamba Avasthi Vs State of Goa*,⁴ the Supreme Court had given benefit of doubt to the appellants who came to be convicted under Section 20(b)(ii) of NDPS Act, wherein it is observed that the appellant was found in possession of 180.70 gm of charas. The charas recovered from the possession of the appellant after search and seizure packed and sealed in two envelopes marked A and B. When those envelopes were opened in the laboratory by Junior Scientific Officer, he found the quantity to be different. While in one envelope the difference was only minimal than the quantity sealed and

⁴ (2005) 9 SCC 773

sent to him. The prosecution has failed to explain the said discrepancy and therefore the appellant was given benefit of doubt. It is observed by the Supreme Court that the credibility of recovery proceeding is considerably eroded if it is found that the quantity actually found by the analyst was less than the quantity sealed and sent to him. The question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis. As already stated, this aspect cannot be gone into at this stage but it can only be determined during the trial. It is more particularly in the light of the fact that in this case contraband article is LSD of which even 0.1 gram is a commercial quantity.

41. As stated herein above, we do not find any major discrepancies in so far as the application of Section 52 or Section 52A of the NDPS Act are concerned. The learned counsel for the Petitioners has then placed reliance on a case law reported in 2013 SCC Online Utt 554 in *Smt. Prema Shah Vs State of Uttarakhand*. Our attention is drawn to the judgment of the Supreme Court referred to in the said judgment in the case of *Kishan Chand V/s State of Haryana*⁵. The paragraph 14 of the said judgment reads thus :

“14. The Hon'ble Apex Court, in the case of *Kishan Chand V. State of Haryana*, reported in (2013) 2 SCC 502, in paragraph No.22, has observed as under :

5 (2013) 2 SCC 502

“22. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance with these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevance. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance with the provision.”

There is no question of element of prejudice in the case at hand. Moreover, this aspect will have to be considered by the Trial Court as, *prima faice*, we do not find anything on record by which it can be said that the investigation agency has failed in observing strict compliance of the provisions of the NDPS Act.

42. As already stated, we do not find that the continuation of the proceedings or trial after filing the charge-sheet would amount to abuse of process of Court in view of the discussions made herein above. However, the learned counsel for the Petitioners has placed reliance on an authority of the Supreme Court in the case of *Roy V.*

*D. Vs State of Kerala*⁶, wherein the Supreme Court observed that it was a fit case to exercise powers under Section 482 of the Criminal Procedure Code mainly on the ground that there was non compliance of Section 50 of the NDPS Act. However, the learned counsel for the Petitioners has not seriously challenged the aspect of personal search of the Petitioners and therefore, it is needless to go into that aspect.

43. However, in the case of *Union of India Vs Mohanlal and Another*⁷, it is laid down that there should be strict compliance of Section 52-A and 55 of the NDPS Act as handling and disposal of seized narcotic drugs and psychotropic substance, there being danger of re-circulation of seized contraband back into the system. It is equally important to see that the seized drugs are protected against theft, substitution and pilferage for which the Supreme Court has issued certain directions. The relevant paras of the said judgment can be quoted for advantage.

“12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and

6 (2000) 8 SCC 590

7 (2016) 3 SCC 379

do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

14. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

“Section 52A : Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and

certifying the correctness of any list of samples so drawn.

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

15. It is manifest from Section 52-A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so

drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.”

44. In the preceding paras, we have referred the inventory proceedings drawn by the Magistrate on 9th January, 2018 as per Section 52A of the NDPS Act. *Prima facie*, we find that the said procedure has been followed. However, the Petitioners are at liberty to point out any material discrepancy in the same before the Special Court, if any. We are not commenting on the merits of the case at this stage.

45. Next authority pressed into service on behalf of the Petitioners is reported in 2015(2) Bom CR (Cri.) 22 in the case of *Shailesh Kanada Vs Intelligence Officer & Another*. The paragraph 49 of the judgment reads thus :

“49 In my opinion, such a prosecution which has glaring and manifest defects cannot be permitted to be continued. It is nothing but an abuse of the process of the Court. That the report from CFSL, Hyderabad discloses that Methamphetamine and Ketamine were detected in the samples cannot come to the rescue of the prosecution to hold the present proceedings to be maintainable. The Investigating Agency has to blame itself for creating the present situation. Had it been sincere or careful, the Investigating Agency would have undoubtedly said that though the reports from Dy. C.C did not support the theory of the substance in question being Methaqualone, they still suspected the substance to be a psychotropic

substance and that, its further analysis was being done. Had such a sober and reasonable stand been taken without filing the complaint hurriedly, at the most, some of the accused would have got the benefit of the mandatory bail, but a proper complaint could have been filed after receipt of the report from CFSL. Today, if at all, the applicants and the other accused are to be prosecuted, it can be done only on the basis that the Methamphetamine and Ketamine were detected in the samples. Undoubtedly, this can be done only by placing reliance on the report from the CFSL, Hyderabad; and the question as to 'whether the report, which has been obtained by re-testing done without any permission or order from the trial Court, can at all be looked into' would arise in that eventuality. Certainly, the observations made by me that 'the report of CFSL cannot form the basis for the prosecution of the applicants and other accused', have been made in the context of the present case, (where the complaint proceeds on the basis that the substance in question was Methaqualone) and may not be treated as conclusive or binding in the event of the question of prosecuting the applicant and other accused on the basis that Methamphetamine and Ketamine were detected in the samples, arising. It is because such a question can be best decided only when a complaint/prosecution to that effect is filed. The Court concerned may decide the same at that time in accordance with law. The fact, however, remains that the present prosecution, as it is, cannot be permitted to be continued further."

46. This Court quashed the proceedings under the NDPS Act, mainly on the ground that the substance seized from the Applicant was Methamphetamine. It was indicated by the report of the

Field Testing Kit that it was sufficient for taking cognizance of the alleged offence. The applicant raised a contention that sending second set of sample for retesting for CFSL was contrary to law and not permissible. However, the prosecution put forward the circumstances justifying such a course. It is held by this Court that the act of sending sample for the purpose of retesting without permission of the Special Court was not justified. The report indicates that the substance recovered was not found to be Methamphetamine and therefore, the prosecution suffered from glaring and manifest error. This judgment can be distinguished as this is not the case of such a nature as is clear from the report of the CFSL Kolkata that what was detected was the LSD.

47. In the case of *Vineet Kumar and others Vs State of Uttar Pradesh and another*⁸, the criminal proceedings under Sections 452, 376(d) and 323 of IPC were quashed under Section 482 of the Criminal Procedure Code. The Hon'ble Supreme Court discussed the scope of Section 482. Paragraph 41 of the said judgment reads thus :

“41. Inherent power given to the High Court under Section 482 Cr.P.C. is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. The Court cannot permit a prosecution to go

8 (2017) 13 SCC 369

on if the case falls in one of the Categories as illustratively enumerated by this Court in State of Haryana vs. Bhajan Lal. Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are material to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 Cr.P.C. to quash the proceeding under Category 7 as enumerated in State of Haryana vs. Bhajan Lal, which is to the following effect:

“102. (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

Above Category 7 is clearly attracted in the facts of the present case. Although, the High Court has noted the judgment of the State of Haryana vs. Bhajan Lal, but did not advert to the relevant facts of the present case, materials on which Final Report was submitted by the IO. We, thus, are fully satisfied that the present is a fit case where High Court ought to have exercised its jurisdiction under Section 482 Cr. P.C. and quashed the criminal proceedings.”

48. It is not the case at hand that the proceedings against the Petitioners have been instituted maliciously or with malafides as well as with some ulterior motive for wreaking vengeance of personal grudge and, therefore, the rulings can be accordingly distinguished.

49. So far as the ratio laid down by the Supreme Court in *E. Micheal Raj Vs Intelligence Officer, Narcotic Control Bureau*,⁹ the Supreme Court in the case of *Hira Singh and Another Vs Union of India and another*¹⁰ has observed thus :

“9. The respondents have rightly pointed out that the expression “neutral” substance has not been defined in the Act. That obviously has been coined by the Court to describe the other component of the mixture or preparation (other than the specified narcotic drug or psychotropic substance). We are also in agreement with the respondents that, the said decision nowhere makes reference to Note 2 (two) of the Notification dated 19.10.2001 and that the same may have some bearing on the issue under consideration. This decision also does not refer to Entry 239 and the interplay between the various provisions alluded to earlier while noting the argument of the respondents. That may have some bearing on the issue that has been finally answered. The judgment, however, after quoting the Notification dated 19.10.2001 took note of the purpose for which Amendment Act of 2001 was brought into force and then proceeded to hold that to achieve the said purpose of rationalisation of the sentence structure, the purity of the narcotic drug from the recovery or seizure made from the offender would be a decisive factor. In other words, the actual content or weight of the narcotic drug or psychotropic substance alone should be reckoned. For taking that view, support was drawn from the observations made in another two-Judges Bench decision in Ouseph Vs. State of Kerala which, however, has also not elaborately dealt with the issue finally answered in E. Micheal Raj.

9(2008) 5 SCC 161

10 (2017) 8 SCC 162

10. *It was possible to examine the wider issues raised by the respondents upon accepting their argument that the decision in E. Micheal Raj is per incuriam. However, in our view, that decision has interpreted Section 21 of the Act. That interpretation would bind us. Moreover, that decision has been subsequently noted in other decisions of this Court in Harjit Singh Vs. State of Punjab, Kashmiri Lal Vs. State of Haryana, State Vs. Mushtaq Ahmad-followed or distinguished. In Amarsingh Ramjibhai Barot vs. State of Gujarat, quantity of entire mixture was reckoned and not limited to the pure drug content therein. Significantly, in none of these decisions, was the Court called upon to examine the issues now raised by the respondents. Further, all these decisions are of two -Judges Bench.*

11. *Thus, considering the significance of the issues raised by the respondents and the grounds of challenge of the appellants/petitioners concerning the impugned notification, to observe judicial rectitude and in deference to the aforementioned decisions we direct that these matters be placed before at least a three Judges Bench for an authoritative pronouncement on the matters in issue, which we think are of seminal public importance.*

12. *The three Judges Bench may have to consider, amongst others, the following questions:*

12.1 *Whether the decision of this Court in E. Micheal Raj requires reconsideration having omitted to take note of Entry 239 and Note 2 (two) of the Notification dated 19.10.2001 as also the interplay of the other provisions of the Act with Section 21?*

12.2 *Does the impugned notification issued by the Central Government entail in redefining the parameters for constituting an offence and more particularly for*

awarding punishment?

12.3 Does the Act permit the Central Government to resort to such dispensation?

12.4 Does the Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?

12.5 Whether Section 21 of the Act is a stand-alone provision or intrinsically linked to the other provisions dealing with “manufactured drug” and “preparation” containing any manufactured drug?”

50. Since the matter was referred to the Larger Bench for reconsideration of the decision of the Supreme Court in *E. Micheal Raj*, the issue of pure drugs or its mixture as well as quantity cannot be gone into at this stage.

51. In the light of the observations made hereinabove, we do not deem it proper to exercise our inherent powers to quash the FIR and subsequent filing of the charge-sheet under Section 482 of the Criminal Procedure Code.

52. At this stage, the learned counsel for the Petitioners has drawn our attention to an order passed by the learned Single Judge of this Court on 21st March, 2018, directing the release of the Petitioners on bail, *inter alia* by putting a condition that the prosecution is at liberty to apply for cancellation or modification of the bail on receipt of the report of Chemical Analyser. It is submitted by the learned

counsel that the Petitioners be protected till the conclusion of the trial.

53. In case the prosecution so applies, the Petitioners are at liberty to move the Court. However, in view of the fact that the Petitioners are foreign nationals who are required to stay in this country without any source of livelihood, we expect that the Special Court shall make an endeavour to expedite the trial by keeping in mind the pendency of older matters on the file of that Court.

54. We also make it clear that the Special Court shall dispose off the case on its own merits uninfluenced by the observations made by us herein above.

55. The corollary of the above discussions is that the present application is devoid of merits and hence stands dismissed.

Prithviraj K. Chavan, J.

R. D. Dhanuka, J.

*at**