# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CRIMINAL APPELLATE JURISDICTION

## CRIMINAL APPEAL NO. 7 OF 2019

## WITH

## CRIMINAL APPLICATION NO.282 OF 2019

**Alishan Chaitanya Sharma @** ]
**Alishan Asif Khan** ]
R/o Flat No.305, 3rd Floor, ]
God's Gift Tower, Yari Road, ]
Versova, Andheri (W), ]
Mumbai 400 061 ] **.. Appellant**

**VERSUS**

1. **Union of India** ]
(Directorate of Revenue Intelligence ]
F.No.DRI/MZU/C/INV-14/2013-14) ]

2. **State of Maharashtra** ] **.. Respondents**

## WITH

## CRIMINAL APPEAL NO.28 OF 2019

**Kiran Vijay Jangale** ]
Resident of Room No.1, Lukiya ]
Nagar Chawl, Lokmaniya Tilak ]
Nagar, Boaraspada Road, Poisar, ]
Kandiwali (W), Mumbai 400067 ] **.. Appellant**

**VERSUS**

1. **Union of India** ]
(Directorate of Revenue Intelligence ]
F.No.DRI/MZU/C/INV-14/2013-14) ]

**2. State of Maharashtra ] .. Respondents**

**WITH**

**CRIMINAL APPEAL NO.1572 OF 2018**

**WITH**

**CRIMINAL APPLICATION NO.186 OF 2019**

**Praveen Kumar** ]
R/o 103/48, Adarsh Colony, ]
Guru Nanak Road, Subhash Nagar, ]
Dehradun, Uttarakhand ] **.. Appellant**

**VERSUS**

1. **Union of India** ]
(At the instance of Intelligence ]
Officer, Directorate of Revenue ]
Intelligence, UTI House, Churchgate, ]
Mumbai 400 020 ]

2. **State of Maharashtra ] .. Respondents**

Mr.Ayaz Khan for the Appellant in Appeal No.7 of 2019.

Mr.Dilip Mishra for the Appellant in Appeal No.28 of 2019.

Mr.Anil Lalla for the Appellant in Appeal No.1572 of 2018.

Ms.Ameeta Kuttikrishnan for Respondent No.1-Union of India.

**CORAM: BHARATI DANGRE, J.**

**RESERVED ON : 21st JUNE, 2021**

**PRONOUNCED ON : 13th SEPTEMBER, 2021**

**<u>JUDGMENT</u> :-**

1. The three Appeals pose challenge to the judgment delivered by the Special Court for Greater Mumbai under the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short, **"NDPS Act"**) in NDPS Special Case No.152 of 2014. All the three Appellants were tried jointly and came to be convicted and sentenced accordingly.

## <u>DETAILS OF THE APPEALS</u>

Criminal Appeal No.7 of 2019 is instituted by Accused No.1-Alishan Chaitanya Sharma, Criminal Appeal No.28 of 2019 is filed by Accused No.2-Kiran Jangale whereas Criminal Appeal No.1572 of 2018 is filed by Accused No.3-Praveen Kumar.

Accused No.1 is convicted for the offence punishable under Section 8 (c) read with Section 22(c) of the NDPS Act and sentenced to suffer R.I. for 10 years and to pay fine of Rs.1,00,000/-, in default to suffer R.I. for 1 year. All the three Accused are convicted for the offence punishable under Section 28 read with Section 8(c) and Section 22(c), Section 29(1) read with Section 8 (c) and Section 22(c) of the Act and are sentenced to suffer R.I. for 10 years and to pay fine of Rs.1,00,000/-, in default to suffer R.I. for 1 year, on each count.

All the Accused stand convicted under Section 30 read with Section 27A and 2(viiia)(iii) of the Act and sentenced to suffer R.I. for 5 years and to pay fine of Rs.50,000/-, in default to suffer R.I. for six months.

All the accused persons are in custody since the date of their arrest; Accused Nos.1 and 2 being arrested on 15/02/2014 whereas Accused No.3 is arrested on 17/02/2014.

2. The Appeals came to be admitted by this Court on 15/12/2018.

By order dated 23/10/2020, on receipt of R & P, the Appeals were directed to be listed for final hearing on 27/11/2020 and from time to time, they were listed for final hearing. In view of the circulation sought for final hearing, the Appeals were fixed for hearing by consent of parties and came to be heard together and are disposed of by this common judgment.

3. I heard learned counsel Mr.Ayaz Khan for the Appellant in Appeal No.7 of 2019, learned counsel Mr.Dilip Mishra for the

Appellant in Appeal No.28 of 2019 and learned counsel Mr.Anil Lalla for the Appellant in Appeal No.1572 of 2018. The Union of India is represented by Ms.Ameeta Kuttikrishnan.

## CASE OF THE PROSECUTION

4. Before appreciation of the rival submissions, a brief background of the prosecution case is necessary.

**A)** PW 1 received specific intelligence on 10/02/2014 at around 7 to 7.15 p.m. that a courier parcel has been booked with International City Runners India Pvt. Ltd. situated at 2, Grace Chambers, Andheri Kurla Road, Amrut Nagar, Chakala, Andheri (East), Mumbai -93 indicating Ketamine Hydrochloride, a psychotropic substance covered under the NDPS Act, is booked for being dispatched to London, by concealing the same in the consignment containing foodstuff. The said intelligence was reduced into writing at 7.30 p.m. and placed before superior officers, who directed on working out the said intelligence.

**B)** Based on said intelligence, a team of officers under the supervision of PW 4 -Hatangadi rushed to the said premises, called panchas and inquired with the Manager, Mr.Nixon D'Souza, who was present, about a courier parcel booked for London containing foodstuffs/eatables. He led them to a consignment enroute to London vide Airway Bill No.1234581054.

One carton was produced, which contained a pouch of documents, affixed to one of its sides. Perusal of the documents revealed that it was the aforesaid Airway Bill, where name of the shipper reflected as R.C.Patel, 503, Sita Sadan Tower, Malad Link Road, Malad, Mumbai 64 and the receiver was shown as V. Rathore, 50, Aspern Grove, Belsize Park, London NW32BX. The other document was the list of item and the details of the consignor and consignee.

On opening of the carton, it was found to contain some foodstuffs, clothes and beauty products. On examination of 10 sealed boxes of beauty products, each of them, contained a silver coloured sealed pouch. On opening the said, it was found to be containing white colour crystalline substance and on testing, it gave positive result for presence of Ketamine Hydrochloride.

The contents of the said pouches were emptied in a Blue colour plastic bag and the said silver colour pouches were re-paced in the same box. The same was weighed on the weighing scale of the courier company. The weight of the white crystalline substance was ascertained to be 5 kgs. and the same was seized under the provisions of the NDPS Act.

Three samples of 15 gms. each were drawn. The said samples were put in self locking plastic pouches which were put in separate envelopes bearing the case details. The said envelopes were sealed with DRI Seal No.18 and were marked as original, duplicate and triplicate. The panchas, the DRI officers and Nixon D'Souza put their signatures with date on the said envelope.

10 plastic boxes alongwith clothes were seized and put in a cardboard carton. It was packed and sealed. The carton was packed using self adhesive tapes, tied with thread (sutli) and sealed with DRI seal No.18. A tag bearing the case details, signature of panchas, DRI officer and Nixon D'Souza was affixed.

All the perishable food articles were seized and packed in a separate carton and sealed. The carton was packed using self adhesive tapes, tied with thread (sutli) and sealed with DRI seal No.18. A tag bearing the case details, dates signature of panchas, DRI officer and Nixon D'Souza was affixed.

The panchnama commenced at 23.00 hrs. and concluded at 5 a.m. on 11/02/2014.

**C)** PW15 received a phone call on 13/02/2014 at 9.30 a.m. that another courier has been booked with International City Runners India Pvt. Ltd. indicating, Methaqualone, a psychotropic substance being consigned to London by concealing it in a consignment containing foodstuff.

The said intelligence was reduced into writing and placed before superior officers, whereupon directions were given for working out the said intelligence.

Based on said intelligence, a team of officers under the supervision of PW 4-Hattangadi rushed to the said premises on 13/02/2014, called the same set of panchas and inquired with Nixon D'Souza, who was present there, about a courier parcel booked for London containing foodstuff/eatables. Nixon D'Souza informed about a consignment in their operational area, being booked for London, but the Airway Bill was not ready. One staff member brought one cardboard carton before the officers and informed that it was the same courier parcel.

The said cardboard carton was heavily strapped with brown colour self adhesive tape. Mr.Nixon D'Souza also handed over a handwritten inventory of the goods contained in the carton and informed that it was given by the person who had come to book the parcel. The reverse side of the paper scribed name of the consignor as Mohan Madan Sethy, 403, 404 Darya Ganj Apartment, Ansari Road, Versova, Andheri (W), Mumbai 53 and the receiver was Mrs.S.Panchal, 23, Alicia Gardens, Kenton Harrow, London HA38JB.

On opening the carton, it was found to contain foodstuffs and clothes. On opening 10 sealed MTR ready to eat food packets, it was found to be containing white colour crystalline substance and on testing, it gave positive result for Methaqualone.

The contents of the said 10 MTR packet were emptied in a blue colour plastic bag and the said MTR packets were re-packed in the same carton from which it was removed. The weight of the white crystalline substance was ascertained to be 4.996 kgs. The same was seized under the provisions of the NDPS Act.

Three samples of 15 gms. each were drawn. The said samples were put in self locking plastic pouches which were put in self locking plastic pouches which were put in 3 separate envelopes bearing the case details. The said envelopes were sealed with DRI Seal No.18 and were marked as original, duplicate and triplicate. The panchas, DRI officers and Nixon D'Souza put their signatures with date on the said envelopes.

The blue colour plastic bag containing 4.951 Kgs. of contraband was put in a separate carton. The carton was packed using self adhesive tapes, tied with thread (sutli) and sealed with DRI seal No.18. A tag bearing the case details, dated signatures of panchas, DRI officer and Nixon D'Souza was affixed.

**D)** On 14/02/2014 at about 13.00 hrs, a batch of DRI officers and 2 panchas went to the house of Kiran Jangale (Accused No.2) and informed him that they wanted to search his room in connection with the seizure of contraband in two courier parcels. He admitted to booking the 2 parcels and also admitted that there were 3 more parcels containing food stuff to be booked at the same courier company as per directions of his employer, Alishan Sharma (Accused No.1).

Kiran Jangale retrieved 3 parcels from the loft of his room. Search of his premises resulted in recovery of 1 digital kitchen scale, 1 digital bathroom scale, 1 hot seal plastic bag sealing machine and also 129 empty plastic pouches. For the purpose of examining the parcels, each carton was marked as 'A', 'B' and 'C'.

On opening the cardboard carton marked 'A', it was found containing some foodstuffs and clothes. The MTR packets marked as MTR Rawa Idli, on being opened, led to white crystalline powder, which gave positive result for presence of Methaqualone. The said packet was marked as A1 and it was found to be weighing 500 gms. In a similar manner, other six packets of MTR were opened, which contained Methaqualone and they came to be marked as A2 to A7. The total contents of the said packets was 3500 gms. from cardboard carton marked as 'B', 7 packets of MTR Rawa Idli and 3 packets of MTR Rawa Dosa were found containing Methaqualone. The packets were marked as B1 to B10 and the total quantity of the contraband was weighed to be 5 Kgs.

On opening of the cardboard carton marked as 'C', which contained some foodstuffs, beauty products and clothes, no contraband was recovered. On opening the packet of Swaroop Herbal Beauty Product, it was found to contain off-white crystalline powder, which was tested by the field testing kits as Methaqualone. The 8 jars of beauty product were marked as C1 to C8, which contained 4 Kgs. off-white crystalline powder, being Methaqualone. Three samples of 15 gms. were drawn from each carton and put in polythene bags, which were sealed and then kept in separate envelopes. The envelopes came to be seized and marked. The panchas, including the officer and

Kiran Jangale put their signatures on the envelope. Other articles in form digital kitchen scale, digital bathroom scale, one hot seal plastic bag sealing machine and 10 empty pouches were also seized alongwith empty packets of MTR Rava Idli and MTR Rava Dosa, by preparing a panchnama, which was signed by the panchas, DRI Officer and Accused No.2-Kiran Jangale. The panchnama concluded at 21.30 hrs.

**E)** On 14/02/2014 at 13.30 hrs., a batch of DRI officers visited the house of Alishan (Accused No.1) after arranging the panchas, where he was present and on search of the said premises, the officers recovered bank statement of Alishan and maintenance bill alongwith Indian currency worth Rs.33,50,000/-. The said document alongwith money was seized under a panchnama, being the sale proceeds of Narcotic Drugs. The panchnama concluded at 17.00 hrs.

**F)** Intelligence regarding mobile number 9897640490 revealed that it was registered in the name of Pankaj Kumar, r/o Brahma Singh, 95, Shukratal Nakur, UP 247342. This information was forwarded to Deputy Commissioner of Central Excise and Customs at Shaharanpur to make further inquiries.

Accordingly a team headed for house of Pankaj Kumar at Saharanpur, UP, and made inquiry and executed panchnama dated 14/02/2014. During the course of inquiry, it was revealed that mobile number 9897640490 was being used by his elder brother Praveen Kumar (Accused No.3), who is resident of 103/48, Adarsh Colony, Gurunanak Road, Subhash Nagar, Dehradun.

**G)** Vide panchnama dated 15/02/2014, house premises of one Vikram Athawale was searched. The mother of Vikram Athawale was found to be present there and certain writing pads were seized during the course of panchnama.

**H)** Vide letter dated 18.08.2014, Addl. Director H.R.Garg wrote to the Commissioner of Customs for disposal of the drugs after preserving the attached identification tags, seals etc.

On 12/08/2014 vide a panchnama under Section 52A, the proceedings were carried out, where samples from all the three abovementioned seizures were drawn at the Customs Basement Warehouse at Ballard Pier (Ex.139). The learned Magistrate also issued a certificate to the effect of correctness of the inventory and the list of samples drawn. The abovesaid documents are marked at Ex.139.

**I)** After completion of investigation by PW 15, Satyaprakash (Intelligence Officer, DRI), the complaint was filed in August 2014.

## CHARGE AGAINST ACCUSED

5. On investigation being completed and charge-sheet being filed, the Accused persons are charged by the Special Court on 06/01/2016.

The Accused are charged for conspiring and abetting the commission of offence under the NDPS Act from December 2013 to 14/02/2014 by acquiring, possessing, storing and transporting psychotropic substance such as Ketamine and Methamphatamine and thereby committing an offence punishable under Section 29 read with Sections 22 and 8(c) of the NDPS Act.

The Accused are charged under Section 22 read with Sections 8(c) and Section 29 of the NDPS Act, for the conspiracy being committed on or about 10/02/2014 and 11/02/2014 in acquiring, possessing, storing and transporting 5.00 Kgs. of Ketamine HCL, recovered from packets with marking as foodstuffs and beauty products and found in an export consignment of one carton to London at the premises of International City Runners India Private Limited.

Charge is also framed against the accused persons under Sections 8(c) and 29 of the NDPS Act, for conspiracy by alleging that on or about 13/02/2014 at Mumbai, they acquired, possessed, stored, transported 4.996 kg. of Methamphetamine, recovered from packets with marking as foodstuff. They are also charged for conspiracy for attempting to export the seized 5.00 Kgs. of Ketamine HCL and 4,996 Kgs. of Methamphetamine.

All the three Accused are charged for acquiring, possessing, storing and transporting 12.50 Kgs. of psychotropic substance, which was recovered from packets with marking as foodstuff found in three ready to export consignment in form of cartons, headed to London, at the residential premises of Accused No.2-Kiran Jangale and thereby committing an offence punishable under Section 22 read with Sections 8(c) and 29 of the NDPS Act. Charge is also framed under Section 30 read with Sections 8(c), 22 and 29 of the NDPS Act in view of the preparation to export 12.500 kgs. of psychotropic substance, recovered from the packets of foodstuff.

Accused No.2 is also charged for committing an offence punishable under Section 25 of the NDPS Act for knowingly allowing the use of his residential premises to commit an offence under the NDPS Act.

6. Since all the three accused persons pleaded not guilty and preferred to be tried, they were subjected to trial.

**GIST OF WITNESSES EXAMINED DURING THE TRIAL**

7. The prosecution laid its case before the Special Court through 18 witnesses. The witnesses of the prosecution can be classified under different heads to the following effect :-

**INVESTIGATING OFFICERS**

| | |
|---|---|
| PW 1 | G. Shiv Shankar |
| PW 2 | Mubeen Ahmed Juvale |
| PW 3 | S. Venkata Subramanium |
| PW 4 | Saikrishna Bhadrinath Hatangadi |
| PW 6 | Arjun Raghvendra M. |
| PW 8 | Yogita Bhangare |
| PW 15 | Mr.Satyaprakash |
| PW 16 | Mr.Vitthalbhai Ranchodbhai Parmar |

**PANCH WITNESSES**

| | |
|---|---|
| PW 5 | Mohammed Shaikh Nadeem |
| PW 14 | Ms.Neha Sanjay Gejge |
| PW 17 | Ms.Bharti Kiran Nakum |

**OFFICE BEARERS OR DIRECTORS OF INTERNATIONAL CITY RUNNERS INDIA PRIVATE LIMITED**

| | |
|---|---|
| PW 7 | Nixon D'Souza |
| PW 9 | Stephanie Miskquitta |

**CHEMICAL ANALYSERS**

PW 11 Satyakumar Shrinarayanlal Gupta

PW 18 Mr.Krishanmurari Varshney

**WITNESSES TO ESTABLISH CONNECTION OF ACCUSED**

PW 10 Smita Shrikant Athavale

PW 12 Vicky Ramesh Sharma

PW 13 Amin Aman Shaikh

8. The defence examined two witnesses, being DW 1 – Vijayu Jangale (Accused No.2's father) and DW 2 – Minal Sharma (Accused No.1's mother).

**SUBMISSIONS ADVANCED**

9. The respective counsel advanced their submissions, in support of the respective appellants and the submissions can be encapsulated to the following effect :

To begin with, learned counsel Mr.Ayaz Khan, appearing for the Appellant-Alishan (Accused No.1), would invite my attention to a most important fact to the effect that Accused No.2 is acquitted of the charge under Section 25 framed against him for using the residential premises for commission of offence, but DRI has not preferred any Appeal. The falsity in the case of the prosecution is alleged since Accused No.1 is convicted for possession of the contraband though he is not found with the contraband and though there is no charge framed against him under Section 27-A, he is convicted under Section 27-A and sentenced. Section 27-A pertains to financing and submission of the learned counsel is that he has set up a defence by examining DW 2 qua the recovery of amount of Rs.33,00,000/- from his house. By pointing out the inconsistency in the timings in recording of his statement under Section 67 of the NDPS Act, learned counsel would submit that the recording of the said statement is not possible, since at the same time, the panchnama was being recorded in the flat of Accused No.2-Kiran Jangale. Simultaneous recording of the two is not possible, is the submission of Mr.Khan. Apart from this, learned counsel is extremely critical of the manner in which the prosecution case has been conducted.

10. According to the learned counsel Mr.Khan, the seizure of amount of Rs.33,50,000/- from the house of Accused No.1 vide Ex.24 on the pretext that it is received through hawala from one Vikram Athavale is also not proved. It is submitted that to substantiate the said allegations, prosecution has placed

reliance on statement of Accused No.1-Alishan and one Vitthalbhai Patel, who is alleged to have been involved in the hawala transaction and the statement is exhibited as Ex.03, but Vitthalbhai is not examined as a witness. No details are given as to how much and on what date, the money was received. On the contrary, Accused No.1 has examined the defence witness to substantiate his case that Rs.24,50,000/- was received from Nihal Khal in family settlement and Rs.8,000/- has been received from Subhash Singh and rest of the money belonging to his family, was kept together. By stepping into the witness box, DW 2 has proved the same through two documents being Exs.178 and 180, the genuineness of which is not challenged by the prosecution.

The statement of the Accused recorded under Section 67 of the NDPS Act, in the wake of the latest position of law laid down in the case of **Tofan Singh Vs. The State of Tamil Nadu**[1], has lost its efficacy and need to be ignored is the submission of the learned counsel. He would urge that there is no material other than the said statement, which would sustain his conviction.

11. Learned counsel Mr.Lalla allege violation of Section 42 of the NDPS Act by submitting that the prosecution rely on one

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document being Ex.19 to show the compliance, which is exhibited through PW 1. He submit that the timing on the said document is recorded as 07.30 p.m. on 10/02/2014 and PW 1 has deposed that to collect the information, he did not go out of the office, but the received the same on phone. According to the learned counsel Mr.Lalla, if the information was received at 07.30 p.m., the officer of DRI could not have been at the office of Mr.Nixon (PW 7) at 07.30 p.m., taking into account the distance between the DRI office, which is located at Marine Lines and the raid being conducted at Chakala, Andheri. As far as Ex.19 is concerned, his submission is that since PW 1 has admitted that he taken the information on rough papers, which he has not retained and no entry is taken in the Register maintained as DRI I and Ex.19, which is typed on computer being not saved, the information does not fall within the ambit of Section 41(2) and further PW 4 not being a Gazetted Officer, the alleged seizure in an enclosed place, post sunset, without authorization or search warrant cannot be sustained.

Further, submission is to the effect that seizure memo dated 10-11/2/2014 (Ex.39) is not believable and is proved in accordance with law. In support of the said submissions, Mr.Lalla rely upon the depositions of PW 1, PW 4, PW 5, PW 7 and PW 9 and submit that the panchnama (Ex.39) is prepared and signed by PW 4 and it commenced at 23.00 hrs. on 10/02/2014 and concluded at 05.00 hrs. on 11/02/2014. He submit that PW 1 does not depose anything about the seizure, but PW 5 has deposed that the names of the consignor and consignee were mentioned on the courier packets. PW 7, however, has deposed that Hatangadi came to the office at about 07.30 p.m., accompanied by one more officer and within their presence, the concerned box was located, meaning thereby the box was located even before the raid, which commenced at 23.00 hrs. PW 7 has deposed that he was not assisting Hatangadi (PW 4) in locating the box and if there is any document to show that he had assisted him, the document is incorrect. The panchnama (Ex.39), according to learned counsel Mr.Lalla, reflect that Mr.Nixon (PW 7) verified on the computer about the consignment and at his instruction, the staff member produced the courier parcels. The learned counsel strenuously urge that the prosecution witnesses contradict each other, as PW 9 in her cross-examination admit that when she came to the office on the next date i.e. on 11/02/2014 at around 9.30 to 10.00 a.m., the consignment was shown to her in the cabin of Mr.Nixon and the crystal powder packet was shown to her. According to learned counsel Mr.Lalla, this inconsistency in the version of the prosecution witnesses make the seizure vide Ex.39 doubtful. According to him, the evidence of PW 9 is fatal and amount to complete demolition of the case of the prosecution. Apart from this, the submission advanced is that the bulk contraband is not proved, in accordance with law. The seizure dated 13/02/2014 vide Ex.44 is also argued to be not believable and proved in accordance with law. Same argument is advanced qua the seizure dated 14/02/2014 vide Ex.129 as Kiran Jangale was present in the DRI office, when the statement of Accused No.1-Alishan was being recorded and he could not have presented himself at the place where the search and seizure was conducted. This inconsistency in the prosecution case goes to the root of the matter, according to Mr.Lalla, and in absence of the seizure being proved, the case of the prosecution as alleged, is based on unsteady grounds.

12. Learned counsel Mr.Mishra appearing for Accused No.2-Kiran Jangale also tow the line of argument advanced by the respective counsel as regards the seizures carried out on two dates vide two distinct panchnamas. The flaw in the seizure

and as to the timings, belie the prosecution case, is also argued by Mr. Mishra. He submit that the seizure at his house on 14/02/2014 vide panchnama (Ex.129) is a sham, since at the time when his house was being searched, Kiran is shown to be present in the DRI office when Accused No.1's statement was being recorded. This fallacy makes the prosecution case extremely doubtful is his submission. His further submission revolve around the illegality committed while recording the statement under Section 67 of the NDPS Act and according to Mr.Mishra, both the Accused were brought to the DRI office. Their statements were allegedly recorded and they were placed under arrest. According to the learned counsel, it can be safely submitted that the statements of the Accused are recorded by keeping them in custody and delaying their arrest and, therefore, the said statements cannot be admitted in terms of law.

In nut shell, the respective counsel have assailed the impugned judgment as perverse and unsustainable, as not based on appropriate appreciation of the circumstances placed before the Court and since there is a gross failure by the Special Judge to scrutinize the evidence on record, resulting into misappreciation of material facts transpiring in evidence and it has resulted into serious miscarriage of justice. The Appellants, therefore, seek their acquittal by overturning the impugned judgment.

13. Ms.Ameeta Kuttikrishnan appeared for Union of India and she do not dispute the position of law holding the field about admissibility of the statement recorded under Section 67 of the NDPS Act, in light of the decision of the Hon'ble Apex Court in case of **Tofan Singh** (supra). She, however, contest the stand of the Appellants that the search and seizure itself is unsustainable in light of the glaring discrepancies. According to her, the discrepancies are trivial in nature, and do not in any way, shake the credibility of the prosecution case. She would urge that the charges faced by the Appellants are serious and since, the prosecution has succeeded in establishing the same, the impugned judgment, which convict them, do not call for any interference.

## CONSIDERATION OF THE PROSECUTION CASE

### A] SEARCH AND SEIZURE OF CONTRABAND IN FIRST RAID

14. The initiation of the prosecution case is the information received by PW 1, the Intelligence Officer working with DRI. On 10/02/2014, at around 7.00 to 7.15 p.m., he received secret

information that a courier parcel has been booked with a courier company by name International City Runners India Pvt. Ltd. (hereinafter referred to as **"ICR India Pvt Ltd."**), containing Ketamine HCL, which is destined to London. As per PW 1, he prepared the intelligence note and put it before his Senior Intelligence Officer Mr.S.B.Hatangadi (PW 4). The said intelligence note is exhibited through him as Ex.19. The superior officer (PW 4) endorsed the same by putting his signature and recording as under :-

> "Let us form a team and go to the said courier office and examine the parcel meant for London as "food stuff".

The time of the endorsement is reflected as 07.50 p.m.. PW 1 has deposed that he was part of the team, which proceeded to the courier office and he is also part of the panchnama.

Though the witness admit that the information was received on phone, he admit that no CDR is produced. Handwritten notes were prepared by PW 1 on the rough sheets, but what was handed over to his superior was Ex.19. The information received is thus reduced into writing by PW 1 and placed before the superior officer (PW 4), who is a Gazetted Officer, thereby ensuring compliance of Section 42 of the NDPS Act. The argument advanced that there is no compliance of Section 42(2), cannot hold good, since the raid is conducted on authorization of PW 4 and he himself participated in the raid conducted on both the dates, being on 10/02/2014 and 13/02/2024 at ICR India Pvt. Ltd. Hence, the issue of authorization by a Gazetted Officer do not come into play.

15. PW 1 has proved Ex.19 and in order to ascertain whether there was compliance of Section 42, it would be apposite to refer to the evidence of PW 4, the Senior Intelligence Officer, before whom the information was placed. PW 4 is a Gazetted Officer and he depose that he was working as Senior Intelligence Officer, C-Cell, DRI, Mumbai Zonal Unit and he clarify that the equivalent post is of Senior Intelligence Officer in Customs and Central Excise is Superintendent. He confirm the statement of PW 1 that a note was put before him at 07.30 p.m. and he gave instructions to form a team to visit the premises and examine the consignment. He identified his signature on Ex.19 alongwith the signature of PW 4.

16. PW 4 deposed that a team comprising of Intelligence Officer (PW 1) and he himself, proceeded to the office of ICR India Pvt. Ltd. situated at Andheri and they reached the premises at about 10.45 p.m.. Since the search was to be carried out, two independent witnesses were arranged as panchas and on apprising them about the raid, they expressed their willingness to act as panchas. According to PW 4, at around 11.00 p.m., they entered the premises of the operational area of ICR India Pvt.Ltd. alongwith the panch witnesses. PW 4 speak of the presence of one Nixon D'Souza (PW 7) in the said area, who introduced himself as Director of the ICR India Pvt. Ltd. On informing about the purpose of visit, inquiry was made with him about any parcel of foodstuff to be transported to London. As per PW 4, Mr.D'Souza checked his computer system and informed the raiding team that one such parcel was booked and it was lying in the operational area, which was bearing Airway Bill No.1234581054 dated 10/02/2014. The parcel was brought before the raiding team and on one side, it was having some documents affixed. PW 4 has stated that on the Airway Bill, it was mentioned that the Carton contain foodstuff and it bear the names of the consignor and consignee. The consignor was one Patel,

resident of Malad Link Road, Mumbai whereas the name of the consignee was Mr.Rathod, resident of Belsize Park, London. The parcel was then opened, which contained different items of foodstuff, garments and 10 sealed plastic boxes, of beauty products. Inventory of the contents of the cardboard carton was prepared and classified into Table-A and Table-B. Table-A contained the food items alongwith the garments and Table-B contained ten sealed plastic boxes. After opening lid of one of the plastic boxes, it was found to contain cream and when around 5 to 6 spoons of cream was removed, a silver colour sealed pouch inside the said plastic box was found, which contained crystalline powder/substance. With the help of field testing kit, it was tested and gave positive result for Ketamine Hydrocloride. All other nine sealed plastic pouches contained similar silver pouch with crystalline substance. The total weight of the white crystalline substance removed from 10 silver colour pouches was found to be 5 Kg.. The said substance was seized and the three representative samples of 15 gms. were collected and packed in three different plastic pouches marked as original, duplicate and triplicate. The plastic pouches were then enveloped and came to be signed by PW 4, panch witness (PW 5) and Nixon D'Souza (PW 7). The panchnama drawn on 10-11/02/2014, effecting the seizure of Ketamine HCL valued at Rs.50,00,000/-, is exhibited as Ex.39 through PW 4.

The panchnama record that the raiding team reached the ICR India Pvt. Ltd. at 23.00 hrs and PW 7, after verifying the computer system, informed about a consignment being shipped to London. The said parcel was produced before the raiding team and all documents related to courier parcel were handed over. The documents were taken into possession by the officers and were signed by the panchas and the DRI officers. The panchnama record that it concluded peacefully at 05.00 hrs. on 11/02/2014. Mr.Nixon D'Souza (PW 7) signed on the panchnama, recording his presence when it was conducted.

**B] <u>SEARCH AND SEIZURE DURING SECOND RAID</u>**

17. The second raid dated 13/02/2014 is based on the information received by another Intelligence Officer, Mr.Satyaprakash (PW 15), who is also the Investigating Officer. On receiving the information on telephone that a parcel was headed to London through ICR India Pvt. Ltd. in which Methaqualone was concealed, intelligence note was prepared by him and put up before his superior officer,

Mr.Hatangadi (PW 4). The same is exhibited as Ex.43, which bear an endorsement to the effect that a team may be formed for the purpose of conducting the raid. PW 15 deposed that the intelligence note (Ex.43) was typed by him on 13/02/2014 at 9.30 a.m. and he assisted PW 4 in examination of the parcels lying at ICR India Pvt. Ltd.

PW 4 has deposed about the second raid and he state that a team was constituted, which comprised of PW 15, himself and two panchas were asked to act as witnesses, who agreed. At about 11.00 a.m., the raiding team entered the premises of ICR India Pvt. Ltd. where they met Nixon D'Souza (PW 7). On informing the intention of the visit and on making an inquiry whether any parcel destined for London, declared as foodstuff, was booked through their office, he informed that one parcel is booked for London, but the Airway bill is not prepared since the KYC documents of the parcel were not available and the person, who came to book the parcel, had gone to procure the documents. On being directed, the parcel was brought for examination before the team and when asked, whether any note or document is accompanying the parcel, a handwritten note was produced, which mention the consignor as Madan Shetty, Versova and consignee as Mrs.Panchal, London, alongwith her telephone number. The said paper was seized for the purpose of investigation and was signed by the panch witnesses and PW 5. On examination of the said carton/ box, the inventory was prepared and the contents were categorised in Table-A and Table-B; Table-A consisted of food items such as biscuits and nankhatai etc. and one blue jeans pant. Table-B contained MTR Rava Idli and MTR Rava Dosa packets. When the seal of the packet was opened, white crystalline substance/powder was noticed and it tested positive for Methaqualone, a psychotropic substance. Other nine sealed packets of MTR brand contained similar substance and the weight of the crystalline substance/powder was noted as 4.996 Kgs. The three representative samples of 15 gms were drawn and sealed in plastic pouches and placed it in distinct envelopes marked as original, duplicate and triplicate. The envelopes were signed by the panch witnesses, PW 7 and PW 4. The panchnama drawn is exhibited as Ex.44 and it mention that it commenced at 11.00 hrs. on 13/02/2014 and concluded at 14.00 hrs. The two panchas, who signed the said panchnama, are the same who were present during the first search on 10-11/02/2014 and one of them is examined as PW 5. PW 7 signed the panchnama recording his presence during the conduct of panchnama. The proceedings also bear signature of PW 4, as the panchnama is prepared in his presence.

18. The panchnama at Ex.44 record that, when the panchas alongwith DRI officers entered the premises, one person introduced himself as Nixon D'Souza, the Director of the courier company and approached the officers. The said introduction assumes great significance since on the earlier date i.e. when the premises was raided on 10/02/2014, Mr.Nixon D'Souza was already introduced to PW 4 as Director of the courier company. In the wake of the two panchnamas, the testimony of PW 7 and PW 5-the panch, need an immediate reference, since Accused Nos.2 and 3 are introduced in the case through PW 7.

19. PW 7 in his examination-in-chief admit that in the evening of 10/02/2014, PW 4 approached his office and disclosed the information received by him regarding some contraband being concealed in a courier box and he was desirous of checking the same. In contrast to the recitals of the panchnama, PW 7 depose that he randomly checked the boxes and then laid his hand on the box in question, which was

in a closed condition and which had an invoice affixed on it. The staff opened the box. Some clothes, eatables and beauty products/cosmetics were found and some powder was found, which was indicated as drug. PW 7 deposed that his two employees signed on the panchnamas alongwith him and he identified his signature on Ex.39.

About the second raid, he depose that on 13/02/2014, one more consignment came to his office, which contained eatables, clothes and pouches of MTR, which were found to contain drug, in the guise of Idli Rava Mix. The panchnama (Ex.44) was signed by him along with two employees of his office and he identified the signature on Ex.44.

20. PW 7, in his examination-in-chief, state that Accused No.2-Kiran had come to book this parcel in his office, but when the parcel was booked, he was not in the office and, therefore, he is unable to identify the person, who booked the parcel. In the cross-examination, the witness has outlined the KYC procedure followed by his office for booking a parcel and only on production of the necessary documents, the KYC was registered and fed in the company record is his specific stand. When confronted with the KYC form (Ex.68 colly), which is in

the name of Kiran Jangale, he admit that the said form does not bear signature of the customer nor does it have photo identification or driving licence of the said customer.

PW 7 state that on 13/02/2014, he was called in DRI office at 9.00 a.m. and accordingly he presented himself. He state that 3-4 officers were present there which include Mr.Hatangadi (PW 4), Mr.Parmar (PW 16) and some junior officers, who interrogated him. He state that he was present in the office till 4 p.m.. From there, he went to his office and reached there at 5.30 p.m. and after carrying out the work for about an hour, he left for home. In the wake of this admission given by PW 7, the panchnama dated 13/02/2014, which is recorded by PW 4 by visiting the office of ICR India Pvt. Ltd. at 11.00 hrs. on 13/02/2014 become doubtful as the panchnama record that the intelligence officers entered the premises of PW 7 at 11.00 hrs. and he himself was present in his office and was was introduced to the officers and led them to the parcel lying in the operational area and which was to be shipped to London, without an airway bill and it is from this parcel, the MTR food packets were extracted, which are alleged to contain the contraband. The panchnama record that that it is concluded at 14.00 hrs. i.e. 2.00 p.m. PW 7, however, depose that he was present in the DRI office from 9.00 a.m. to 4.00 p.m. where the DRI officers were also present and he specifically mention about the presence of PW 4, PW 16 alongwith some other junior officers. According to PW 7, he reached his office only at 5.30 p.m.

21. Apart from this glaring admission given by PW 7, he admit that except recording his statement, the officers did not obtain his signatures on number of documents in the DRI office, but his signatures were taken on pages 83 and 84 of Ex.68-colly. in the office on 13/02/2014. As far as page No.86 of Ex.68-colly. is concerned, he has deposed that he signed the same on 12/02/2014 in his office, since the officer wanted record of the said transaction.

About the search carried in his office by PW 4 on 10/02/2014, he depose that Mr.Hatangadi came to his office at around 7.30 p.m. and an admission has been extracted from him that it take minimum one hour to reach his office from the DRI office. He depose that PW 4 was checking the boxes for about 1 to 2 hours and then concerned box was located. He deny the suggestion that he assisted him in locating the box and further explain that if there is any document to show that he assisted him in locating the box, then it is a incorrect document. He deny that he checked the details of the box in the computer data and state that he do not remember if airway bill number was written on consignment picked up by PW 4 on that date. He also do not remember if the label bearing name and address of the consignor and consignee was affixed to the parcel. When confronted with Ex.39, he depose that the said panchnama also does not reflect the names of the consignor and consignee. On being subjected to cross-examination on behalf of Accused No.2 and being confronted with page Nos.83 and 84 of Ex.68-colly, which is the KYC document, he admit that he has no acknowledgment of submission of the said document given to DRI or to the effect that it was received by his office. He admit that except the signature, page No.84 is blank. He further clarified that the signature is of the person whose photograph was affixed, but it is undated and without any name. He also depose that he was not sure that all the consignments coming to his office for export are physically verified about its contents, since it is the responsibility of the staff to check or not and, therefore, he cannot say that the consignment to be exported have been physically verified or not. He attribute the said job to Ms.Stephanie (PW 9) as the concerned staff responsible for physical checking of the consignment. He admit that for verification of the consignment, it is needs to be dismantled and opened for physical checking and he cannot say whether consignment in question was dismantled and opened before it is accepted by his office and he state that PW 9 would be in a better position to answer the said question. PW 7 state that one parcel was physically delivered in his office on 10/02/2014 in between 9 to 10 a.m. whereas the second parcel was delivered on 13/02/2014 in the morning in between 9 to 10 a.m., but he was not physically present on both the occasions when the parcels were delivered and he has no knowledge about the documentation done in respect of the said consignments. When he was confronted with the KYC from at page 83 of Ex.68-colly, he admit that there is alteration in the phone number of Kiran (Accused No.2), which is not authenticated and, therefore, he has no idea as to who has made the alteration. When confronted with page Nos.85 and 86 of Ex.68-colly, which is the bank statement, he state that the dates mentioned therein and the airway bill number are not in order and further depose that separate booklet for airway bill number is not maintained since the airway bill number is a bar code, which is generated. He also admit that page No.86 *per se* is not a bank statement.

22. The aforesaid admissions given by PW 7, which are heavily relied upon by the learned counsel appearing for the Appellants, has a great bearing on the prosecution case as the prosecution claim that amount towards the courier was paid to the Courier Company by Accused No.3 and Accused No.2 had dropped the parcel in office of PW 7. PW 7 further depose that PW 4 has visited his office at around 7.30 p.m. and the distance the DRI office and his office is of minimum one hour. Ex.19 which is the intelligence note received and put up before PW 4 record that the information is received at 7.30 p.m. and which receive an endorsement by PW 4 at 7.50 p.m. The panchnama drawn on the search of the premises i.e. Ex.39 record that the raiding team reached the office of PW 7 at 23.00 hrs. and the proceedings of search and seizure were concluded at 5.00 hrs. on 11/02/2014. As per PW 7, PW 4 himself checked the boxes for about 1 to 3 hrs. and then the concerned box was located, but he did not assist PW 4 in locating the box. The version in the panchnama (Ex.39) is that PW 7 was asked whether any courier parcel containing foodstuff was booked for London and

PW 7 after verifying the computer system told about the airway bill dated 10/02/2014 issued by their company and one of the staff members brought the carton before the officers, which had the airway bill affixed to it. The panchnama also record that PW 7 was asked to hand over all documents related to the said courier parcel and some documents were affixed to the carton in form of a pouch, which on its removal revealed the Airway Bill number issued by ICR India Pvt. Ltd. The panchnama further record that PW 7 was informed that the documents were being taken over by them under the provisions of the NDPS Act and the DRI officers put their signatures with date on the said document. PW 7, however, contradict the panchnama on this aspect. He also does not support the case of the prosecution that airway bill with the names of the consignor and consignee was affixed on the parcel. PW 7 was not present in the office when the parcel was received and, therefore, it wold be necessary to refer to the evidence of the concerned witness on the said aspect, being PW 9, since as per PW 7, she had received the parcel and was responsible for ascertaining its contents before it is accepted for export and she was the proper person to disclose details of the courier booked with his company.

23. Ms.Stephanie Miskquitta (PW 9) was working as the Customer Service Representative with ICR India Pvt. Ltd. and was assigned the job to take invoice, KYC and photo ID and to give copy of the airway bill to the customer. On the Accounts Department deciding the amount of payment as courier charges, she used to receive the payment.

Her evidence is very crucial for the involvement of Accused Nos.2 and 3. As per PW 9, one consignment was brought by Accused No.2 for booking on 10/02/2014. She depose that the said consignment was checked in by her boss i.e. PW 7, who found some 'untoxic' material and he called her, but she had left the office. She was inquired about the arrival of any such consignment and she responded in the affirmative. PW 9 depose that she had given the contact number and cell number of the person, who had sent the consignment. Accused No.2-Kiran Jangale is identified as the person, who delivered the parcel in the ICR India Pvt. Ltd. on 10/02/2014 and his implication is on the basis of the statement of PW 9. The role played by Accused Nos.2 and 3 has surfaced through her testimony.

She depose that before booking of the consignment in her office, she received a call from person by name Praveen

(Accused No.3), who wanted to speak to PW 7 in respect of booking of the consignment to London. She was informed that the consignment is from Delhi and when she established contact with her counterpart in Delhi office and contacted Praveen to inquire about the exact location from where the parcel is to be picked up, he inquired from her whether any person on his behalf can drop the consignment in the office in Mumbai. Accused No.2 is described as the person, who came to the office to drop the consignment. PW 9, however, do not recollect the date on which he had came, but assert that the said person was Kiran, who told that the parcel was to be dispatched to London and he is the person, who left the parcel. As per PW 9, after this Accused No.3-Praveen called and told her that his person would be coming to drop the parcel and she should accept the same. The name of the person, who was to receive the parcel i.e. the consignment was Mr.Raj Kamat. When Accused No.3-Praveen was contacted for charge of consignment, the account details of the bank were shared with him. PW 9 state that she confirmed the receipt of the amount and the transaction details were shared, though the receipt was not issued. For the purpose of establishing the identity of the person, who has dropped the consignment, PW 9 state that for booking of the consignment, she had obtained photo identity proof of the person, who has dropped the consignment and also collected the invoice copy. PW 9 admit her signature on the statement recorded by the authority, which she has signed in the DRI office on 15/02/2014, which is marked as Ex.74. She also identify page No.150 and page Nos.152 to 169, which are the documents relating to the invoice and airway bill.

In her extensive cross-examination she outline the procedure to be followed when a courier is received in the office and it is stated by her that the invoice is accompanied with the courier parcel, which contain the names of the consignor and the consignee and the consignor is required to sign the invoice. She also admit that a declaration is taken from the consignor that the parcel does not contain any illegal article and the declaration is singed by the consignor. The consignment bear the label of consignor and the consignee and the same is pasted on the parcel. She also admit that after the courier parcel is received, they open the parcel to verify whether the details mentioned in the invoice tally with the articles kept inside. Thereafter the consignment is closed and she issue an airway bill, which contain the details and weight of the consignment, names of the consignor and consignee and the stamp of the company and it is signed by her. Before accepting the consignment, the KYC documents are expected to be verified and for that purpose the identity proof of the consignor is obtained, is her version.

As per PW 9, on 10/02/2014 in between 11.00 a.m. to 12 noon, Accused No.2 came to her office and he complied with the entire procedure narrated by her in examination-in-chief. According to PW 9, opening and repacking of the parcel was done by the operational department of her office, after Accused No.2 left. She admit that the opening and repacking is to be done in the presence of the person, who brings the packet, but this process was not followed when this particular parcel was brought by Accused No.2 in the office. When confronted with Ex.75, whether the consignor was Mr.R.C. Patel, she state that she do not remember whether any document pertaining to R.C.Patel was collected by her. She did not hand over any document pertaining to identification of Mr.R.C.Patel as well as of Mr.Kiran (Accused No.2) while her statement was recorded by DRI.

In the evening of 10/02/2014, she received a phone call from PW 7, her boss, when she had left the office and on the next day morning, when she came to the office between 9.30 to 10.00 a.m., the consignment was shown to her by PW 7 in his cabin. She depose that she was shown the name of the consignor and the consignee on the courier packet as well as the crystal powder, which was white in colour. Further, PW 9 state that the said consignment was lying in their office for 2 to 3 days. She deny the suggestion that her office does not have any photo identity proof of Kiran Jangale (Accused No.2) issued by the Government.

24. Another admission of PW 9 is, on 13/02/2014, some officers of DRI were in her office, who were present when she attended her duty and her working hours are between 9.30 a.m. to 6.30 p.m. She depose that they remained in their office till 7.00 or 7.30 p.m. and they were taking charge of courier packet, which was found on 10/02/2014 and she was also investigated by DRI officers even on 13/02/2014. She attended the office of DRI on 15/02/2014 and she had put the signatures on the documents collectively exhibited as Ex.75, which include 10 invoices and airway bills. PW 9 categorically admit that the airway bill and invoice in respect of R.C.Patel, which is reflected on page 150 of Ex.75 at Sr.No.2 is not on record. She

also admit that she has signed the documents on 15/02/2014 and not prior to that. She, however, admit that the entire set of documents marked as Ex.75 had been prepared by her, but she has not collected any KYC document in respect of the details reflecting on page Nos.150 and 152 to 160 of Ex.75. She also admit that she had reported her higher authority about not collecting the KYC document, but this was after the raid by DRI. About the document at page 150, which is a table containing the details of airway bill and its dates and the details of the consignor and the consignee, it is admitted by her to be prepared on 14/02/2014. The witness was put to extreme scrutiny about the list of airway bill and the corresponding entries of the consignor and the consignee and when confronted with some of the entries and the phone number, she admit that in case of Mr.Ram Yadav, in whose name one of the invoices was prepared and which reflect his telephone number, she is unable to state, whether the said number is that of Mr.Ram Yadav, since she had not collected the KYC documents. Being confronted with page No.153, she admit that alteration of date was done by her at the DRI office, on the instructions of PW 7. She also admit that the alteration was made in the date (month), but do not remember whether the alteration was made in the DRI office. She categorically admit that she had followed the instructions of PW 7. Another admission is given by her about rewriting being done on page 162 in the DRI office and about the discrepancy in name on page Nos.162 and 163, she admit that none of the invoice produced below Ex.75 have invoice number. Another alteration made on page 165 is also admitted, but it is denied that it is done in DRI officer. Neither of the alterations were signed or initialled by her is admitted. She admit of change in date on page 168 of Ex.75, but state that alteration was made when copy of Airway Bill was prepared.

25. On being cross-examined on behalf of Accused No.3, who is alleged to have made phone call to the office, PW 9 state that on an average, she receive 40 calls in the office and on an average, 30 calls were made from the two landlines in the office and the phones were answered by her and one Sujoti, since there was no telephone operator. PW 9 admit that it is not possible to recollect the name of each person, who made the phone call in the office. She also admit that she do not have any documentary evidence to show that the charges of consignment mentioned in Ex.75 were deposited in the bank

account of the ICR India Pvt. Ltd. There is also a clear cut admission that on an average, she was dealing with 80 to 90 consignments for export and import.

26. From the conjoint reading of the testimony of PW 7 and PW 9, it is clear that they are the key witnesses, who led the prosecution to Accused Nos.2 and 3 as the parcel which is left in the courier company is alleged to have been deposited by Accused No.2, on instructions of Accused Nos.1 and Accused No.3, paid the courier charges. These two witnesses are relied upon to establish the circumstance that on 10/02/2014, Accused No.2 dropped the parcel and the parcel, which is opened by PW 4 is alleged to be bearing airway bill No. 1234581054 dated 10/02/2014 and the name of the consignor was recorded as R.C.Patel and the name of the consignee was recorded as Mr.Rathod, resident of Belize Park, London with his mobile number. How the parcel has been detected is a mystery as version of PW 4 is that he made inquiry with PW 7, on reaching the premises about a parcel containing foodstuff headed to London and from the computer entry, PW 7 traced it whereas PW 7 do not corroborate the said version and categorically depose that it was searched by PW 4 himself for 1

to 2 hours and located by him. As per PW 7, the said parcel was booked by Accused No.2, but he was not present in the office when the parcel was received and, therefore, he point his finger to PW 9 as the one responsible for following the procedural formality when the parcel is received in his office and she is the responsible person for physical checking of the consignment received. The testimony of PW 9, however, put a serious dent in the case of the prosecution as she identify the Accused present in the Court Box, but does not specifically recognize him as the person, who had visited her office for booking the consignment. She do not remember the date on which he visited. The parcel was not checked by her office in his presence, which is completely contrary to the procedure adopted by the courier company. She categorically admit in her cross-examination that the parcel bearing airway bill No. 1234581054 was booked in the name of R.C.Patel, but she has not obtained any KYC document of Mr.R.C.Patel nor she has handed over any documents pertaining to identification of Mr.R.C.Patel or Accused No.2-Kiran to the DRI. However, the DRI has shown certain documents, being handed over by this witness, which include a document at page 150 at E.75, which is prepared by her and include the parcel with airway bill dated 10/02/2014. Surprisingly, the very said witness has admitted in her cross-examination that on an average, she was handling 80 to 90 consignments, but why she had picked up only this consignment of 10/02/2014 while preparing the chart at page 159 is not known. She was not having the KYC documents of R.C.Patel nor has she tendered the same to the DRI is her statement. Ex.79-colly do not contain he details of airway bill in the name of R.C.Patel and the documents exhibited collectively at Ex.75 pertain to various dates, are clamped as manipulated and the defence has succeeded in creating doubt on its veracity by extensively cross examining the witness, who admitted the overwriting on these documents, at the instance of PW 7. In any case, in the entire compilation of documents, there is not a single document, which connect Accused No.2 to the said consignor. She admit that she has not handed over any document pertaining to identification of Kiran to DRI. One KYC document is part of Ex.68, which has been brought on record through PW 7 who has stated that his signatures were obtained on the said document on 13/02/2014. The KYC document exhibited through PW 7 is a blank document with some signatures scribed at the end of it, which have not been proved to be of

Accused No.2 and it is admitted by the prosecution witness that there is overwriting in the column of telephone number and the said correction/ overwriting is not authenticated. The prosecution has not established as to how this document came in custody of the Investigating Officer as it does not form part of any panchnama nor it is handed over by PW 9. Moreover, the seizure of this parcel vide panchnama (Ex.39) is contradicted by PW 9, as she has deposed that when she reported to the office on 11/02/2014, the consignment was shown to her by PW 7 in his cabin,which had the name of the consignor or consignee affixed on it and it contained crystal powder white in colour whereas the case of PW 4 is that the courier packet which is alleged to have contained the contraband was seized under panchnama Ex.39, samples were drawn and taken into possession. PW 9, however, say that the consignment was lying in their office for 2-3 days after 11/02/2014 and on 13/02/2014, when some officers came in her office, they took charge of the courier packet, which they found on 10/02/2014.

Even this witness does not speak of any panchnama being executed of some parcel on 13/02/2014 vide Ex.44 when the second seizure is alleged to have taken place and she speak in tune with PW 7, who state that he was called in the office of DRI on 13/02/2014 when his statement was recorded and he was present there till 4 p.m. The case of the prosecution about second seizure being effected vide Ex.44 on 13/02/2014 is, therefore, completely demolished by its own witnesses.

27. As far as Accused No.3, who is also implicated on the statement of PW 9 is concerned, she has deposed that she receive about 40 calls on an average and make 30 calls per day and it is not possible to recollect the name of each of the person, who makes phone call to the office. No special circumstance is pointed out by PW 9 as to why she remembered the name of Praveen, Accused No.3 on whose say, Accused No.2 brought the parcel on 10/02/2014, which is alleged to have contained the contraband. Her testimony about the phone call received by her from Accused No.3 for booking a consignment and the same being brought through Accused No.2 fail to inspire confidence, as in her examination-in-chief, she state that for booking of the consignment, she obtain the photo identity of the person, who has dropped the consignment and also collected the invoice copy. However, in her cross-examination, she admit that she had not collected

any photo identity proof of Kiran issued by Government nor any KYC document of the said Accused was handed over by her to DRI. As far as the payment alleged to have been made for the said consignment by Accused No.3 is concerned, she categorically admit in her cross-examination that she do not have any documentary evidence to show that the charges of consignment mentioned in Ex.75 were deposited in bank account of ICR India Pvt. Ltd. Moreover, when she admit that on an average, per day she deal with 80 to 90 consignments, it is unbelievable that she recollect about this particular consignment, the payment of which came from Accused No.3 Praveen.

28. These inconsistencies and failure of the prosecution to implicate Accused Nos.2 and 3 become worst when the testimony of PW 5, the panch witness is perused. It cannot be a sheer coincidence that PW 4 chose the two panchas in both raids, who expressed their willingness to act as panchana and they happened to be the employees of ICR India Pvt. Ltd. Further, it is also surprising that if a raid was conducted on 10-11/02/2014 and the parcel to be dispatched to London, containing contraband was seized by the DRI officials, another

parcel is dropped in the courier office on 13/02/2014 and without following the process of verifying KYC documents, it gets accepted for its onward journey and again this time, without ascertaining the details of the person who dropped it.

As per PW 5, on 10/02/2014 at about 11.00 p.m., when he was present outside the office gate alongwith other panch-Rohit, DRI officers approached them and inquired in respect of one consignment with airway bill. They approached PW 7, who confirmed about a courier destined to London. According to PW 5, they proceeded to operational area and checked the consignment, which was opened and found to contain the contraband and accordingly on conclusion of the procedure, Ex.39 was drawn. It cannot be a sheer coincidence that on 13/03/2014, when the DRI officers again visited, they approached the same panchas and the panchnama came to be executed in their presence as well as in presence of PW 7. As per PW 5, on the visit of DRI officers on 13/02/2014 at about 11.00 a.m., they made inquiries about one shipment and PW 7 checked about the said shipment, containing foodstuff and which was found to be containing Methaqualone. As per PW 5, panchnama started at 11.00 a.m. and concluded at 3.00 p.m. and was signed by him, other panch Rohit and his boss, Nixon

D'Souza. The documents attached with the panchnama are the packing list and the ID proof. In the cross-examination, the witness admit that when he was called to act as panch, his duty was over, but he was standing outside the office and he sought permission from Nixon D'Souza before accompanying the DRI officers. The said witness also admit that the details like invoice/KYC were asked before the consignment was accepted and he also admit that he did not personally see the airway bill on the box. It cannot be a sheer coincidence that on 10/02/2014, this witness is present outside the office and called to act as panch and same circumstances prevail on 13/02/2014 when again he was called from outside the office, to act as panch.

On being confronted with Ex.44 i.e. panchnama of second seizures drawn on 13/02/2014, he admit that he met Mr.Hatangadi and Mr.Satyaprakash for the first time and he introduced Mr.Nixon D'Souza with DRI officers. He never met them before and it was Mr.D'Souza who traced the consignment, on the basis of airway bill number. If he was a panch to the panchnama drawn during the first seizure on 10-11/02/2014 and if he signed the said panchnama prepared by Mr.Hatangadi (PW 4), his statement that he met Mr.Hatangadi for the first time when Ex.44 was drawn, completely discredit him and his testimony. As far as the recovery vide panchnama (Ex.44) is concerned, he categorically admit that, "Only the powder in one packet was tested. Contraband was found in ten packets. The samples were drawn from the packet in which powder was tested." He also contradict the Investigating Officer, who has deposed that the plastic pouch containing same was heat sealed whereas the panch witness state that it was punch sealed. As far as collection of samples during the raid conducted on 10/02/2014 (Ex.39) to which PW 5 is a panch, he has deposed that one silver pouch was found in a herbal cream box and three samples were drawn from it.

29. Another witness, who has participated in the second raid on 13/02/2014 is PW 15-Mr.Satyaprakash, who has put up the intelligence note before PW 4, pursuant to which the second raid was conducted. PW 15 has deposed that he assisted PW 4 in the examination of parcels at ICR India Pvt. Ltd. On 13/02/2014.

30. The testimony of PW 16-Vitthalbhai Ranchodbhai Parmar, though could be referred at a later point of time, for

the time being I must make a mention of it for a limited purpose. PW 16, in his examination-in-chief, depose that on 13/02/2014, he came to the office early in the morning and recorded the statement of PW 7, Nixon D'Souza in connection with seizure panchnama dated 10/02/2014 and 12/02/2014. He admit that Nixon D'Souza was issued summons and in furtherance of the said summons, he remained present in the office. The summons issued to Mr.Nixon D'Souza is exhibited as Ex.68 and it is under the signature of PW 16 whereby he was directed to remain present in the office of DRI for recording his statement under Section 67 of the NDPS Act at 9.00 a.m. on 13/02/2014. PW 16 also admit that Mr.Nixon D'Souza (PW 7) has produced a KYC document showing the details of the person, who booked the parcel. PW 16 identified the KYC document produced by PW 7 while giving his statement. In the cross-examination, he admit that in statement (Ex.68), complete name of Kiran is not mentioned and he had not inquired from Mr.D'Souza whether Kiran Vijay Jangale referred in KYC form was a same person referred as Mr.Kiran in statement (Ex.68). He admit that in Ex.68 it is not mentioned by him that Nixon D'Souza had given him documents annexed to the said statement which are at pages

85 and 86 and he has not investigated about bill referred in document at page 86. He has further admitted that it is not mentioned in Ex.68 that the documents were given by D'Souza and he had signed on those documents on 13/02/2014 nor had he signed on the document at page 83 to show that the KYC form was given by Mr.Nixon D'Souza to him on 13/02/2014. The witness has also admitted that he had not made any inquiry with Mr.D'Souza in respect of the documents after 13/02/2014.

The aforesaid evidence brought on record by the prosecution thus create a cloud over the two searches being search No.1 conducted vide Ex.39 and search No.2 conducted vide Ex.44.

## C] <u>THIRD SEARCH AND SEIZURE FROM THE HOUSE OF ACCUSED NO.2-KIRAN JANGALE</u>

31. Now I shall turn to the third search conducted at the house of Accused No.2 on 14/02/2014. The said search is conducted by the two officers of DRI, PW 15-Mr.Satyaprakash and PW 16-Mr.Parmar vide panchnama Ex.129 and the panchnama bear signatures of both the officers. It is also signed by Accused No.2 by stating that he was present throughout the search proceedings described in the said

panchnama. PW 16 depose that he accompanied with PW 15 and one lady officer alongwith some other officers, went to the house of Accused No.2-Kiran and arranged for two panchas, who were residents in the neighbourhood. On knocking the door, it was opened by Kiran himself, who has been identified by PW 16 in the Court and they gained entry in the house consisting of one small room with loft. According to PW 16, on being asked whether he had delivered the parcel at courier company, he admitted and stated that there were three parcels which were ready for delivery and they were prepared at the instance of Alishan (Accused No.1). The said three parcels came to be produced in presence of panchas and were searched which is alleged to have contained a crystalline powder, which tested positive for psychotropic substance, Methaqualone found in 7 packets. The substance when weighed was found to be 3.5 kgs from which three samples of 15 gram were segregated and after following the procedure, a panchnama was drawn, which is proved through PW 16.

When the said document is perused, it record that the intelligence officers and the two panchas reached Room No.1, Lukia Chawl, L.T.Nagar, Kandivali at 13.00 hrs. on 14/02/2014. The panchas were introduced to the intelligence officer, PW 16 and after being reported that he is prepared to search the premises under the NDPS Act, the search was carried out. The total collection of psychotropic substance from the three cartons found in the house of Accused No.2 is recorded as under :-

1. Carton No.A-Off white crystalline powder purported to be Methaqualone recovered from 7 Rava Idli packets totally weighing 3.500 kgs.
2. Carton No. B- Off white crystalline powder purported to be Methaqualone recovered from 10 Rava Idli/dosa packets totally weighing 5.000 kgs.
3. Carton No. C – Fine white crystalline powder purported to be Methaqualone recovered from 8 Plastic jars totally weighing 4.000 kgs.

Apart from this, the panchnama record seizure of some packing material, clothes, hot seal plastic bag etc. The panchnama record that it is concluded at 21.30 hrs. It bear the signatures of panchas, PW 15 and PW 16, the intelligence officers and of the Accused.

32. Now another action occurring somewhere else in the same timeframe, discredit this search and seizure. At the

time when the house of Accused No.2 was under search, the statement of Accused No.1 was being recorded by PW 3 in the DRI office, Mumbai at the instructions of PW 16. Summons was issued to Accused No.1 (Ex.39) which directed his presence in the DRI office at 2.30 p.m. on 14/02/2014. PW 3 depose that in pursuance of the said summons, Accused No.1 remained present before him and on being explained the purport of recording of statement under Section 67 of the NDPS Act, his statement came to be recorded. PW 3 state that he also produced one Kiran Jangale (Accused No.2) during the period of recording of statement and both identified each other and he obtained signatures of both Accused Nos.1 and 2 on the said statement, which is exhibited as Ex.30. At the end of the said statement, Accused No.1 has put his signature by scribing that he had read the statement running in seven pages and it is correctly recorded as per his say and the same is given by him, without any threat, force or pressure. PW 3 also signed it, as the officer of DRI before whom the statement is recorded. At the end of the said statement, Accused No.1 state as under :

> "Now one person is produced before me, whom I have identified as Kiran Jangle, about whom I have referred above in my statement. In turn Kiran Jangle has also

identified me and has put his endorsement alongside."

Below the aforesaid, both Accused Nos.1 and 2 have signed and put the date as 14/02/2014.

In the cross-examination PW 3 has admitted that the statement of Accused No.1 was recorded at 2.30 p.m. and it went for about four hours. In cross-examination, the witness admit that summons was issued to Accused No.2-Kiran Jangale before bringing him for confronting with Accused No.1.

If Accused No.2-Kiran was present before PW 3 when he recorded the statement of Accused No.1, which was concluded at 6.30 p.m., how it is possible that Accused No.2 was present during his house search in Kandivali, which commenced at 13.00 hrs. and was concluded at 21.30 hrs. and he has endorsed to the effect that he was present throughout the search proceedings. This glare discrepancy in the prosecution case strike it hard. The third recovery of the contraband and psychotropic substance from the house of Accused No.2 vide panchnama Ex.139 drawn on 14/02/2014 between 13.00 hrs. to 21.30 hrs. at Kandivali, when the presence of Accused No.2 is marked in the office of DRI, located at Marine Lines, Mumbai where the statement of Accused No.1 was being recorded by

PW 3 from 2.30 p.m. and which went for four hours, the panchnama (Ex.129) smells foul. PW 3 in his cross-examination depose that while he was recording the statement, photograph of Vikram Athavale, was given to him by his senior Intelligence Officer, Mr.Parmar (PW 16). PW 3 clarify that he was not present where the statement of Accused No.1 was being recorded. He does not clarify whether the photograph was forwarded on his mobile, by e-mail or through any distinct mode of communication, which clearly lead to an inference that Mr.Parmar was not present where the statement of Accused No.1 was being recorded, but he was present in the building of DRI. If he was present in the office, it is impossible for him to be present while the panchnama was being drawn at the house of Accused No.2, resulting into third seizure. These incompatible events make the recovery and seizure incoherent and incongruous. Only either of them can be believed, in the wake of the distance between the two places and even presence of DRI officials during seizure become doubtful.

**D] <u>FOURTH SEARCH AND SEIZURE FROM THE HOUSE OF ACCUSED NO.1</u>**

33. The fourth search conducted by the prosecution is in the

house of Accused No.1 – Alishan Sharma vide panchnama dated 14/02/2014 where it is recorded that he was present during the search, which led to the recovery of his bank statement and maintenance bill along with Indian currency worth Rs.33,50,000/-. The said document along with money was seized and the panchnama record the starting time as 13.30 hrs. and concluding time as 17.00 hrs. Senior Intelligence Officer who conducted the panchnama is examined as PW 2 and it is exhibited through the said witness at Ex.24. The panchnama is recorded in presence of two panch witnesses and PW 2 has deposed that when he proceeded with two other intelligence officers at Andheri, they were led to a flat occupied by Accused No.1. As per version of PW 2, on knocking the door of the concerned flat, it was opened by Accused No.1 and he was informed about the purpose of visit. The panchnama record that the sequence of events and seizure of one bank statement from 15/11/2010 to 15/05/2011 belonging to the Accused and maintenance bill of God Gift Tower Co-operative Housing Society Ltd, Andheri. The panchnama record that cash of Rs.33,50,000/- which was recovered, was in the denomination of notes of Rs.1,000/- and Rs.500/-. The panchnama is concluded at 17.00 hrs. on the same day. The panchnama is recorded in the presence of PW 2 and another Officer of DRI – Yogita Bhange (PW 8). It is signed by the two panchas and Accused No.1 has signed it by scribing, "I was present during the course of search proceedings".

Pertinent to note that the statement of Accused No.1 was recorded by PW 3 by issuing him a summons and directing him to remain present in the office of DRI at 2.30 p.m on 14/02/2014. The said summons is exhibited as Ex.29 and the statement of Accused No.1 as Ex.30. In the preface, Accused No.1 state that he has presented himself in response to the summons issued to him, directing him to present himself before the Intelligence Officer on 14/02/2014 at 2.30 p.m. His statement under Section 67 came to be recorded by PW 4 who has scribed a date at the end of the statement as '14/02/2014'. While his statement was recorded, Accused No.2 Kiran Jangale was also produced and the statement record that Accused No.1 has identified Accused No.2 and has put an endorsement alongside. At the end of the statement, signature of Accused Nos.1 and 2 is seen. Further, Accused No.1 has also scribed the following words :-

> "I have read over the above statement running in 7 pages and the same has been correctly recorded as per my say

and the same is given without use of force, threat or promise.”

34. PW 3 who has recorded the said statement has categorically deposed that statement of Accused No.1 was recorded at 2.30 p.m on 14/02/2014 and it went on for about four hours. In the wake of the statement on oath by PW 3 that Accused No.1 was present in DRI Office from 2.30 till 6.30 p.m, the house search conducted by PW 2 cannot be believed since the panchnama (Ex.24) record that the raiding team reached the residential premises of Accused No.1 located at Andheri at 13.30 hrs., where he was present in the house and identified himself on being informed about the purpose of the visit and the search was carried out till 17.00 hrs. Accused No.1 has endorsed that he was present during the course of search proceedings, the two events being taking place at the same time, one at Andheri i.e. in the flat of Accused No.1 and his statement, being recorded in the office of DRI at Marine Lines, which necessarily contemplate presence in the DRI Officer, create a serious doubt in the prosecution version, as either of this can only be true.

35. PW 3, the Senior Intelligence Office has claimed in his examination-in-chief that on 15/02/2014, summons was served on Alishan Sharma and his statement (Ex.32) was recorded wherein he identified Smita Athavale (PW 10). The statement was typed on the computer by PW 3 on which, endorsement of Alishan was obtained. It will be pertinent to note that Ex.32 is just a one page statement and the endorsement on that page reflects that Accused No.1 has scribed that he has read over the above statements running into 7 pages, in addition to the above, PW 3 has also admitted that as the statement run into one page, Alishan had no occasion to state that the statement was running into 7 pages. Further the said statement reflect that there was an identification of Mrs Smita Athavale and she had put her name/signature on it on 15/02/2014. She is examined as PW 10, however, neither she has been confronted with this endorsement nor any question is posed to her about the same. This is also fatal to the Prosecution case. This lead credence to the version of learned counsel Mr.Khan that Ex.32 is a computer typed false statement and bogus endorsements are obtained on it.

36. Apart from this, Accused No.1 has examined a defence witness who has offered an explanation about the cash which has been seized under the seizure panchnama, but the prosecution has failed to deal with the specific case set up by Accused No.1- Alishan.

37. The examination of PW 2 Mubin Juvale, SIO DRI is to the effect that cash of Rs. 33,50,000/- was seized from his house vide Ex.24, which is money received from trading in drugs and psychotropic substance. In his cross-examination, PW-2 admit that he did not make any inquiry about the business of the father, mother and the brother of the Appellant No.1 and he did not conduct any investigation, though he did not agree that Rs. 24,50,000/- out of Rs. 33,50,000/- was received on account of family settlement. He also deny the suggestion that there were documents explaining the money in the house and he purposely chose not to seize the documents. However, version of the panch witness do not corroborate his statement. The Panch (PW 12), who was a party to the seizure of Rs. 33,50,000/- vide Ex.24, has admitted that explanation during the panchnama was offered by Alishan, which was not accepted by the DRI officers. He state that Alishan, was

claiming innocence and pleading that he has not committed any crime, yet Alishan was forced to accompany the DRI officers. The said Appellant has also taken a stand vide Ex.166 in his statement recorded under Section 313, to that effect. The same is reflected on question No. 365, but the prosecution has failed to contradict the same.

38. The Appellant has examined his mother as DW 2, who has proved a Deed of Settlement i.e. Ex.178. The same reflects that a relative Nihal Khan had taken a commercial loan of Rs. 14,00,000/- from the Appellant, his father, mother and brother in January 2010 at 14% interest per annum. The said loan has been repaid after 4 years alongwith interest totaling to Rs. 24,50,000/- and the said amount was not deposited in the bank, as a new house was proposed to be purchased. Further, some amount is also claimed to have been received from Subhash Singh and document at Ex.180 is tendered as a proof thereof, which indicate that loan of Rs. 8,00,000/- was taken as a friendly loan. In the cross-examination, the prosecution has not asked a single question with regard to Ex.180. The prosecution has also not challenged the validity and correctness of the said document. The testimony of DW 2 has

gone unchallenged, as though extensively cross-examined, nothing worth damaging the explanation offered for cash received in the house, is brought on record.

39. The first statement of Accused Alishan was recorded on 14/02/2014 under Section 67 of the NDPS Act, whereas his second statement was recorded on 15/02/2014. Thereafter he was shown arrested vide Arrest memo dated 15/02/2014 at 14.00 hours.

PW-15 Satyaprakash has claimed to have recorded the statement of Alishan (Ex.105) on 23/05/2014. The gist of that statement is that Alishan had paid Rs. 11,50,000/- to Amin Shaikh for purchase of Yamaha R-1 bike and for Rs. 6,50,000/-, Amin Shaikh gave him a Ducati Bike, which he sold to Farhan. The sale amount was received in cheque and the cheque was deposited in the account of Smita Athavale.

The amount mentioned as Rs. 11,50,000/- is in direct contrast to his statement(Ex.32) under Section 67 dated 15/02/2014 wherein it is mentioned that Alishan gave Rs. 10,50,000/- to Amin Shaikh for purchase of Yamaha R-1 bike bearing Registration No. 88. There is further contradiction in the statement of Amin Shaikh (Ex.89) recorded on

28/02/2014, wherein it is mentioned that Rs. 12,50,000/- was paid by Alishan to Amin Shaikh for purchase of Yamaha R-1 bike however Alishan purchased a Ducati Monster bike for Rs. 6,50,000/-.

It is submitted that there are three versions about the money being paid to Amin Shaikh. PW 15 has been confronted with these versions, however, he admit that he has not made any investigation to the above effect. Neither Amin Shaikh (PW 13) has given any documentary proof about the receipt of money from Alishan. There is no document on record showing sale of Ducati Monster bike to him, though PW 13 claims to have given it to DRI officers. There is no investigation from the RTO about sale of any Ducati Monster Bike.

Thus, the statement of Accused Alishan (Ex.105), recorded under Section 67 of the NDPS Act is contradictory in all material particulars with no proof of its correctness. The same has no relevance to the alleged seizure at hand.

**E] <u>FIFTH SEARCH/SEIZURE FROM HOUSE OF MRS. ATHAVALE</u>**

40. Mr.Hatangadi (PW 4) has carried the search of house of Mrs.Smita Athavale on 15/02/20214 vide panchnama exhibited by PW 4 as Ex.47. PW 14 is a witness on the said

panchnama. The house belong to mother of Vikram Athavale, who was present in the house when the search was carried out. The panchnama record that a writing pad was seized during the course of panchnama. Nothing else was seized during the said search.

**F] INQUIRY AND PANCHNAMA AT SHAHRANPUR, U.P.**

41. Intelligence regarding mobile number 9897640490 revealed that it was registered in the name of Pankaj Kumar, R/o: Brahma Singh, 95, Shukratal Nakur, UP 247342. That this information was forwarded to Deputy Commissioner of Central Excise and Customs at Shaharanpur to make further inquiries. Accordingly a team headed for house of Pankaj Kumar at Shahranpur, UP and made enquiry vide Panchnama dated 14.02.2014. During the course of inquiry it was revealed that mobile number 9897640490 was being used by his elder brother Praveen Kumar who is r/o: 103/48, Adarsh Colony, Gurunanak Road, Subhash Nagar, Dehradun.

**G] DISPOSAL OF THE DRUGS ALLEGED TO BE SEIZED DURING INVESTIGATION**

42. Vide Letter dated 18.02.2014 Addl. Director H. Garg wrote to the Commissioner of Customs for disposal of the drugs after preserving the attached identification tags, seals etc. On

12/08/2014 vide a panchnama under Section 52A, the proceedings were carried out where samples from all the three above mentioned seizures were drawn at the Customs Basement Warehouse at Ballard Pier. The Learned Magistrate also issued a certificate to the effect of correctness of the inventory and the list of  and the list of samples drawn the abovesaid documents are marked at Ex.139 and after completion of investigation by Mr.Satyaprakash, Intelligence Officer, DRI (PW 15),  he filed the complaint in August 2014.

43. The prosecution rest its case upon the aforesaid searches carried out at different places, at different time and allege that the psychotropic substance has been seized during search Nos.1 and 2 at the office of PW 7 and search No.3 carried out in the house of Accused No.2-Kiran.  The aforesaid searches form the basis of the charge levelled against the Accused persons, who face a charge of dealing with psychotropic substances by engaging in abetment and criminal conspiracy and in an attempt to commit an offence alongwith preparation to export the contraband.  Careful scrutiny of the distinct searches reveal the improbability and inconsistency in the case of the prosecution.

44. The discrepancies noted above, in the case of the prosecution, is the fulcrum of arguments advanced by the respective counsel. Apart from the aforesaid discrepancies, several other arguments are advanced to create a doubt in the case of the prosecution and one of the submissions is that the bulk contraband is not proved, in accordance with law. The respective counsel have also advanced their arguments on the manner of sealing of the contraband and submit that the case of the prosecution also faulter on that aspect. It is also canvassed that there is enough evidence to point out tampering of samples, as the samples did not reach the Chemical Analyser in the same condition, as deposed by the prosecution witnesses, in particular, PW 4 and PW 6. PW 11, who gave an admission that the sample packet received by him for analysis, was not having four wax seal in the corners of envelope and there is no godown number mentioned on sample packet, Art.4. PW 18 also admit that when envelope (Art.2) was received by him, it was not having seal impression of DRI on four corners and on perusing the Art.2/1, no marking was existing on it.

The impugned judgment, in detail, deal with the said submissions, but I do not deem it necessary to consider the same in the wake of the seizure of the contraband in all the three searches, being found to be doubtful and improbable, on account of the aforesaid discrepancies. Similarly, I do not deem it necessary to deal with the point raised by the respective counsel alleging non compliance of Section 53-A of the NDPS Act, which has also been extensively argued.

45. The prosecution case is to the effect that Accused Nos.1 to 3 had conspired for exporting the psychotropic substance to London and acted in furtherance of the said conspiracy. The case of the prosecution is that Accused No.2 at the instance of Accused No.1 dropped the parcel for its dispatch to London, in the office of PW 7 and for the said transaction, the courier charges were paid by Accused No.3. As far as involvement of Accused No.1 is concerned, it comes through the statement of the Accused persons, recorded under Section 67 of the NDPS Act. The said statements of Accused No.1, 2 and 3 inculpate each other and discern the conspiracy, abetment and preparation to commit the offence. The recovery of the contraband from the three searches and the recovery of cash from the house of Accused No.1 is sought to be connected by the prosecution through Mrs.Athavale, PW 10, mother of

Vikram Athavale, since the case alleged against the Accused persons is that the amount received from the export of contraband was deposited in her account and which was meant for her son, Vikram Athavale. However, the house search of Mrs.Smita Athavale do not lead to any material recovery establishing any connection as alleged by the prosecution. If the prosecution allege and accuse, it must prove the same by cogent and reliable evidence and not merely leave it for assumption. This is what the prosecution has precisely done in this case. It fails to connect different ends, which it invoke and by letting the ends go loose, it failed to weave the circumstances to nab the Appellants.

46. In the wake of the aforesaid inconsistencies in the case of the prosecution and its failure to prove the seizure of the alleged narcotic drug and the substance being recovered in the three searches, the prosecution fall back on the confessional statements of the three Accused recorded under Section 67 of the NDPS Act. The said statements also do not assist the prosecution, in light of the recent decision of the Hon'ble Apex Court, in case of **Tofan Singh (supra)** where the Hon'ble Court has extensively dealt with the evidentiary value of a statement

recorded under Section 67 of the NDPS Act and it is declared that officers invested with the powers under the NDPS Act are 'police officers' within the meaning of the Evidence Act and consequently any 'confessional statement' made to them will be inadmissible as an evidence, by virtue of Section 25 of the Evidence Act and cannot be taken into account in order to convict an accused. The position of law stands clarified in the following words of their Lordships of the Hon'ble Apex Court:

> "155. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any *non obstante* clause doing away with Section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.
>
> 156. The judgment in *Kahhaiyalal v. Union of India* [(2008)4 SCC 668] then goes on to follow *Raj Kumar Karwal v. Union of India* [ (1990) 2 SCC 409 ] in paras 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.
>
> 157. On the other hand, for the reasons given by us in this judgment, the judgments of *Noor Aga v. State of Punjab* [(2008) 16 SCC 417 ] and *Nirmal Singh Pehlwan v. Inspector, Customs* [(2011) 12 SCC 298 ] are correct in law.
>
> 158. We answer the reference by stating :
>
> 158.1 That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the

> Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.
>
> 158.2 That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

47. In light of the aforesaid authoratative pronouncement of law, the statement of the Accused recorded under Section 67 of the NDPS Act, cannot form basis of conviction, in absence of any other independent material brought on record by the prosecution and proved by cogent and reliable evidence.

48. The lengthy judgment delivered by the Special Court has failed to appreciate the discrepancies and inconsistencies in the prosecution case and it has held that they do not affect the case of the prosecution materially. Every piece of evidence lead before the Special Court has been believed by the Special Judge and even the evidentiary value of statement under Section 67 of NDPS Act was appreciated in light of the position of law, prevailing at the relevant time when the judgment was delivered, by holding that PW 16, who recorded the statement under Section 67 of NDPS Act, was not a police officer. Recording that the psychotropic substance recovered in the searches was of commercial quantity and holding that the

charge levelled against the Appellants was proved beyond reasonable doubt and the involvement of the Appellants being clearly surfaced on record through the evidence of the prosecution, the argument like non compliance of KYC documents and the discrepancies and corrections in the invoices was held to be trivial points to be paid heed to. The evidence of Ms.Stephanie (PW 9), who had a talk with Accused Praveen Kumar, is accepted by the Special Judge with a reasoning that on the basis of the telephone number given by her, the prosecution traced these Accused and that the Accused had identified each other during their statements before the DRI officers. When the recording of the panchnama leading to the seizure of contraband in the three searches is itself doubtful, it is surprising that the same have been accepted as gospel truth, irrespective of the discrepancy in the timings, reflecting that recording of the statement of the Accused and carrying of search panchnama at the same time cannot co-exist.

49. As far as the imposition of punishment is concerned, the learned Judge has also convicted the Appellants for the offence punishable under Section 30 read with Section 27A

and 2(viiia)(iii) of NDPS Act and sentenced them though being conscious of fact that charge under Section 27A was not framed. Further, Section 27A provides punishment for financing illicit traffic in any of the activities specified in the clauses No.(i) to (v) of clause (viiib). When the search at the house of Accused No.1-Alishan Sharma has led to seizure of cash amount and in absence of the said recovery being linked to the seizure of contraband, the conviction under of all the Accused under Section 27A, in absence of charge being framed, cannot be sustained. Section 27A adumbrate a serious offence which is punishable with RI for a term which shall not be less than ten years, but which may extend to twenty years and it is traversity of justice that without framing a charge under Section 27A against the accused persons, they are convicted for t he said offence and sentenced to suffer imprisonment, which is not in accordance with the statutory provision. The Special Judge appears to have been impressed by the notoriety of the drug involved, being Ketamine and Methamphetamine and in absence of antecedents, minimum punishment prescribed by the Statute has been imposed. The judgment cannot be sustained, since it does not appreciate the case of the prosecution brought on record, which is full of inconsistencies and discrepancies, rendering the search and seizure of the contraband doubtful in all the three searches. The learned Special Judge has grossly erred in not taking into account the above shortcomings. The improbabilities and inconsistencies, when put together, lead one to an irresistible and inescapable conclusion that the evidence brought on record by the prosecution falls short, as is required to prove a charge under the NDPS Act against the Appellants, where the stringent punishment is provided. Since, the prosecution has miserably failed to prove the charges, the Appellants deserve benefit of reasonable doubt and are entitled for their release from the accusations. Even by taking resort to the presumptions contained under Sections 35 and 54 of the NDPS Act, the prosecution is under obligation to prove the basic facts, which are totally absent in the present case. Further, there is a complete failure to establish link between the money recovered from the house of Accused No.1 and the alleged recovery of the psychotropic substance in the two searches in the office of ICR India Pvt. Ltd. and the house of Kiran, Accused No.2. In absence of the statement under Section 67 of NDPS Act being admissible in evidence, the material brought on record is not sufficient to sustain the conviction of the Appellants under the Sections with which they are charged. The impugned judgment, therefore, warrants an interference and is liable to be set aside on account of the gross error committed by the learned Special Judge in not appreciating the evidence on record, resulting into a perverse finding being rendered, which deserve to be set aside. The Appellants need to be restored with their liberty and are entitled to be released, on the impugned judgment of conviction and sentence being set aside.

Resultantly, the Appeals are allowed. The impugned judgment of conviction and sentence, dated 15/12/2018 delivered in Special Case No.152 of 2014 is quashed and set aside.

The three Appellants stand acquitted of the charges framed against them and they are set at liberty forthwith, unless their custody is warranted in connection with any other crime.

50. In view of the disposal of the Criminal Appeals, all pending Applications also stand disposed of.

**[SMT.BHARATI DANGRE, J.]**