

THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.128 OF 2016

Ms. Edyma Siregar,]
 Jl. Setia Ujung No.25, Dusun XIV, Mulio]
 Rejo, Deli Serdang, Indonesia.]
 [Presently Lodged in Yervada Jail]] ... Appellant

Versus

1. V. V. Satardekar,]
 Intelligence Officer, Air Intelligence]
 Unit, Chhatrapati Shivaji International]
 Airport, Sahar, Mumbai – 400 099.]
2. The State of Maharashtra] ... Respondents

...

Mr. P. Rajgopal with Mr. Drushti Shah i/b Ms. Rekha Rajgopal for
 the Appellant.

Ms. Anuradha A. Mane for Respondent No.1 – Union of India.

Mr. H.J. Dedhia, A.P.P. for the State.

...

CORAM : MRS. BHARATI DANGRE, J.

RESERVED ON : 08TH APRIL, 2021.

PRONOUNCED ON : 30TH APRIL, 2021.

JUDGMENT:-

1. This Appeal is preferred by the Appellant, an Indonesian National assailing the judgment and order dated 19/08/2015 passed by the Special Judge in N.D.P.S. Special Case No.21 of 2013 thereby convicting and subjecting her to undergo sentence on such conviction. By the impugned judgment, the Appellant stands convicted for the offences punishable under Sections 8(c) read with Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“**NDPS Act**”) and sentenced to undergo RI for a term of 14 years and to pay fine of Rs.1 lakh, in default, to undergo SI for one year. The Appellant is also convicted for offences under Section 23 read with Section 28 of the NDPS Act and has been sentenced to undergo RI for 16 years and to pay fine of Rs.1 lakh, in default, to suffer SI for one year. The substantive sentences on both counts are directed to run concurrently.

The Appellant was found in possession of 3.930 kgs. Of Methamphetamine, a psychotropic substance in contravention of provisions of the NDPS Act and was therefore tried for commission of offences punishable under relevant provisions of the NDPS Act.

2. The prosecution case can be aphoristicly stated as under:-

(a) On 22/08/2012, Customs Officers intercepted one passenger Ms. Edyma Siregar on the basis of prior information, as she was arriving by Ethiopian Airlines Flight No.ET 610 from Addis Ababa, and was to be in transit at Mumbai for onward journey to Singapore. In the presence of panchas, on arrival of the Ethiopian Airlines Flight No.ET-610 on Aerobridge Bay No.50, the Customs Officers in presence of the panchas started checking passports of disembarking passengers, one by one, to intercept the suspect lady passenger, and finally intercepted her. She was found carrying one piece of brown colour checked design Louis Vuitton bag as hand baggage. The Customs Officers questioned her about her travel details and checked in baggage, upon which she informed that she was also carrying one piece of checked in baggage and produced a baggage claim tag No. XH-247600 for Flight No.ET-610. She also informed that she was a transit passenger in Mumbai, and was about to travel to Singapore, by flight no.9W-0012 dated 22.08.2012.

(b) In presence of the panchas, the passenger was asked whether she was carrying any contraband concealed or otherwise in her baggage, to which she replied in the negative. Not being satisfied with her answer, the Customs Officers called for her checked in baggage from the Ethiopian Airlines staff. Shri Narendra Kotian of Ethiopian Airlines immediately directed his junior staff to locate the checked in baggage of Ms. Edyma Siregar, and produced the

same for examination by Customs Officers. The Ethiopian Airlines staff produced one piece of checked in baggage comprising of a light green coloured moulded plastic suitcase with wheels of “Tuff” make and having baggage tag No.XH-247600 ET 610 dated 21/08/2012. The same was claimed by the passenger as her checked in bag in the presence of panchas. The Customs Officers requested ASI Shri V.D. Chavan to allow sniffer dog to sniff the checked in baggage. ASI Shri V.D. Chavan informed the officers that there was a positive indicator for Narcotic Drug.

(c) The Customs Officers decided to examine the baggage. Before examining the said bag, the officers once again asked the suspect as to whether she was carrying any contraband items to which she replied in negative. As stipulated under the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substance Act, 1985, the officers asked her in presence of the panchas whether she would like to examine herself and her baggage in the presence of a Gazetted Officer of Customs or the Magistrate, to which she replied, that she would like to be examined in the presence of a Gazetted Officer of Customs. She then informed the panchas that the secret code number of the lock is ‘000’ for both sides, after which the Customs Officers asked the passenger Ms. Edyma Siregar to open the bag in the presence of panchas. She opened the bag after setting the lock at ‘000’. The bag contained used clothes and the contents were emptied in presence of panchas. It was found

that the bottom of the bag was tampered with, and had a false bottom which was clearly visible. The Customs Officers ripped off the false bottom of the bag in the presence of the panchas, the officers and in presence of the passenger. On removing it, the Customs Officers found a brown coloured cellophane bag concealed by sticking with strong adhesives on both the sides of the bottom and the light green coloured plastic sheet was used to create false bottom. The officers made a small cut on the said brown coloured cellophane bag, and noticed a crystalline substance inside, which they suspected to be a narcotic drug or psychotropic substance. As detailed examination of her bag could not be conducted on the Aerobridge bay of the CSI Airport, Mumbai, all the contents of the bag including the personal items were repacked in the light green coloured plastic bag by the Customs Officers in presence of the panchas and passenger, Ms. Edyma Siregar along with her checked in baggage was escorted by the Customs Officers to the immigration office at arrival, as the passenger did not have an Indian visa. Thereafter, on request of the passenger and the written request of the Customs to grant her visa for temporary stay in India, the Immigration Authorities granted temporary visa to Ms. Edyma Siregar, and thereafter the Customs Officers escorted the passenger to the office of Air Intelligence Unit at CSI Airport, Mumbai along with the panchas for detailed examination.

(d) The Customs Officers emptied the contents of the brown

coloured cellophane bag, and collected the same in a transparent polythene bag. The Customs Officers, in presence of the panchas and the passenger, tested a small quantity of the said white coloured crystalline substance with the help of the Narcotic Drug Detection Kit available in the AIU Office, and the same tested positive indicating the substance to be cocaine. The result of the narcotic field testing kit was shown to the panchas.

(e) The transparent polythene bag containing the white coloured crystalline substance purported to be Cocaine was then weighed on the electronic weighing scale of brand Eagle available in the AIU Office, and the same was found to be weighing 3.930 kgs. after deducting the weight of the empty polythene bag. Thus, the net weight of the recovered white coloured crystalline substance purported to be Cocaine was noted as 3.930kgs.

(f) Thereafter, the brown coloured checked in handbag of 'Louis Vuitton' make of the passenger was examined in presence of the panchas, and the following documents and articles were recovered:

- (i) E-Ticket having reservation for the route
Kulalumpur - Mumbai - Addis - Ababa -
Cotonou and for return journey routing Cotonou
- Addis Ababa - Mumbai - Singapore - Dill,

Timor Leste – Singapore - Jakarta, Indonesia
from the dates 16/08/2012 to 28/08/2012.

(ii) Boarding cards for ET 916 dated 21/08/2012 in the name of Ms. Edyma Siregar for Cotonou to Addis Ababa, bearing immigration stamp of Republique Du Benin.

(iii) Baggage Claim tag No.XH 247600 affixed on Electronic Ticket Receipt bearing the name of the passenger Ms. Edyma Siregar.

(iv) Five old and used mobile phones having make Nokia, Cross and Esia.

(g) Meantime, Supdt. Smt. Ragini Venugopalan was also called and the personal search of the passenger was carried out by lady officer Smt. Vishakha V. Satardekar, in presence of Supdt. Smt. Ragini Venugopalan, Air Customs Suptd., in the adjacent room of the AIU Office where pancha No.2 was also present. After completion of the search it was informed that nothing of incriminating was found or taken over.

(h) Thereafter, the recovered 3.930 kgs of white coloured crystalline substance purported to be cocaine valued at

Rs.1,96,50,000/- (Rupees One Crore Ninety Six Lakhs Fifty Thousand only/-) as per illicit international market value was taken over and seized by the Customs Officers under the provisions of Narcotic Drugs and Psychotropic Substance Act, 1985 under the reasonable belief that the same was attempted to be smuggled out through India and, was therefore, liable to be confiscated under the provisions of the Narcotic Drugs and Psychotropic Substance Act, 1985.

3. In the above framework, the offence was registered, investigated and the suspect became an accused, who was charged and became a convict, as an outcome of the trial, and it is this convict, who has challenged her conviction in the present Appeal.

In support of the Appeal, I have heard Mr. Rajgopal, learned counsel appearing for the Appellant and Ms. Anuradha Mane, learned counsel appearing for Respondent No.1-Union of India. Though Mr. Dedhia, learned A.P.P. appeared for Respondent No.2-State, since the State of Maharashtra is a formal party, learned A.P.P. did not advance any submission.

4. Learned advocate Mr. Rajgopal assails the conviction of the Appellant on the ground that the case of the prosecution suffered from a basic flaw as it has proceeded as if the case falls within the ambit of Section 43 of the NDPS Act, which is not so, as the case is initiated on receipt of prior information and, this is so indicated by

the Complainant (PW-1), the Intelligence Officer working with the Air Intelligence Unit (“AIU”), present at the Chhatrapati Shivaji International Airport, Sahara, Mumbai and, therefore, the compliance of sub-section (2) of Section 42 is imperative and, in absence of which, the prosecution must fail. Learned counsel would submit that the Special Court has committed a grave error in accepting the case of the prosecution that it simply falls within the purview of Section 43 of the NDPS Act, the seizure of the psychotropic substance being taken place at the Aerobridge, which is a public place and, therefore, would not involve compliance of sub-section (2) of Section 42 of the NDPS Act. According to him, the Special Judge has fallen in a grave error in recording the finding qua the procedural compliance contemplated under the NDPS Act as the prosecution has failed to adhere compliance. Referring to the scheme of the enactment, learned counsel urges that the officers, who undertook the search and seizure of the Appellant at the Aerobridge, were gazetted officers of Customs Department. The powers given to the officers are distributed between Sections 41 and Section 42 of the NDPS Act and from the scheme of the enactment, it can be clearly discerned that a gazetted officer would come within the purview of both the said sections but Section 41(2) only covers authorized officers and gazetted officers in exclusion to the officers below the rank of a peon, sepoy or a constable whereas, Section 42 covers all officers enlisted therein including those excluded by sub-section (2) of Section 41.

According to learned counsel, in relation to the gazetted officer, the only classification between the two sections is the exercise of powers and, in the given case, the gazetted officer conducted the search and seized the contraband, which the Appellant is alleged to have been carrying and, therefore, the officer is functioning under Section 42 and not under Section 41(1) of the NDPS Act. The submission is that the gazetted officer under Section 41(2) only has a power to search and arrest and all other powers are derived from Section 42 including amongst others, the power of seizure. Therefore, any gazetted officer, who seized any article in compliance with NDPS Act is purportedly exercising his power under Section 42 and, therefore, he is bound to comply with subsection (2) of Section 42 i.e. the officer ought to have informed his superior. The Appellant came to be apprehended at the Aerobridge, which is a public place and on that pretext, Section 43 of the NDPS Act has sought to be invoked and applied but according to learned counsel, the said provision was never invoked and, therefore, the investigation as well as the charge-sheet based on such investigation, suffer from the legal backing. According to learned counsel, powers under Section 43 flow from Section 42 and, in fact, the only effective section which would have governed the search and seizure in the case of the Appellant was Section 41(2) and Section 42. In absence of the compliance as contemplated by the said provision, according to learned counsel the entire proceedings against the Appellant are vitiated and would

not stand the test of law. He placed heavy reliance on the Constitution Bench judgment of the Apex Court in *Karnail Singh v. State of Haryana*¹, which clearly drew a distinction between the provisions of Sections 41, 42 and 43 and, according to him, the prosecution has miserably failed to draw a distinction and even the Special Judge has erred in not noting the thing but significant distinction in the two provisions. Learned counsel has also placed reliance on the decisions of the Apex Court in *Darshan Singh v. State of Haryana*², *Raj Kumar Singh @ Raju @ Batya v. State of Rajasthan*³ and *State of Maharashtra v. Sukhdev Singh*⁴.

5. Another submission advanced by learned counsel is about the possession of the contraband and by relying upon a decision of the Apex Court in the case of *Mohan Lal v. State of Rajasthan*⁵, learned counsel would urge that the term ‘possession’ under the Narcotic Drug laws means the actual control and management of the drugs. He would submit that when the Appellant is charged of ‘possession’ of a controlled substance, he could be said so only when he can be aware of the substance’s presence and substance is immediately accessible and he will be exercising domain or control over the substance. Relying on the said decision, the submission is that a functional and flexible approach must be adopted by the court in understanding the concept of the term ‘possession’ and

1 (2009) 8 SCC 539

2 (2016) 14 SCC 358

3 AIR 2013 SC 3150

4 AIR 1992 SC 2100

5 (2015) 6 SCC 222

with reference to the context of the enactment.

Learned counsel would also argue his case on the basis of the non-compliance of the provisions of Section 50 of the NDPS Act and submit that the said lacuna is fatal to the prosecution.

6. Per contra, learned counsel Ms. Anuradha Mane appearing for Respondent No.1 would urge that the search and seizure took place at the Aerobridge, which is a public place and necessarily Section 43 of the NDPS Act get attracted. She placed reliance on the decision of the Apex Court in the case of Narayanaswamy Ravishankar v. Assistant Director, Directorate of Revenue Intelligence⁶, which in unequivocal terms ruled that when the search and seizure takes place at Airport, which is a public place, it is Section 43 of the NDPS Act, which is applicable and not Section 42. The submission advanced is that during the search of check-in baggage of the Appellant, the contraband was found and since the search took place at the Aerobridge No.50 of the International Airport, Section 42 is not at all attracted. Relying upon the decision of the Apex Court in the case of State of Punjab v. Balbir Singh⁷, the learned counsel would submit that under Section 42(2), the empowered officer, who takes down any information in writing or record the grounds under the proviso to Section 42(1) should forthwith send a copy to immediate officer superior to him and though the provision has been held to be mandatory, in the present

⁶ 2003 Cri. L.J. 27

⁷ (1994) 3 SCC 299

case, the non-compliance of the said provision does not affect the prosecution case as in the present case, PW-10 is the Assistant Commissioner of Customs, who received the information and he immediately telephonically informed his immediate superior, Additional Commissioner of Customs, who issued directions to work out the same and, thereafter, under the supervision and in presence of PW-10, the search, seizure and arrest were done by the Investigating Officer and by relying on a decision of this court in the case of *Salim @ Kania v. State of Maharashtra*⁸, she would submit that conveying the information telephonically to the superior has been held to be substantial compliance of Section (2) of Section 42. As regards the alleged contravention of Section 50 of the NDPS Act, learned counsel would urge that the said provision is not at all applicable in the case of the present Appellant as the contraband was found in the checked-in baggage of the accused and not on her person, during the personal search. She would further submit that the possession need not be a physical possession but it could be a constructive possession having power and control over the article and in the present case, since the Appellant identified her check-in baggage and she opened the baggage using the code of the lock and the baggage tag tallied with her ticket and other documents, the evidence established the link of the Appellant to the bag from which the contraband has been seized. Considering the nature, gravity and seriousness of the

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offence as huge quantity of the contraband has been seized from the Appellant, learned A.P.P. would submit that since the prosecution has proved its case beyond reasonable doubt before the trial court by producing the oral and documentary evidence, the conviction and sentence imposed on the accused should be confirmed and the appeal be dismissed.

7. The Appellant/Accused came to be charged on 04/02/2014 for being in possession of 3.93 kg. of Methamphetamine, a psychotropic substance, in contravention of provisions of the NDPS Act and thereby committing an offence under Section 8(c) read with Section 22(c) of the NDPS Act. She was also charged for offences punishable under Section 8(c) read with Section 29 of the NDPS Act for being party to criminal conspiracy to contravene the provisions of NDPS Act viz. to possess, transport and export the psychotropic substance. Further, for an attempt to import psychotropic substance of 3.93 kg in contravention to the provisions of NDPS Act, she was charged for offences punishable under Section 23 read with Section 28 of the NDPS Act.

Since the accused denied the charge and claimed to be tried, the prosecution led its case before the Special Court through 14 witnesses, which included 4 officials from the Air Intelligence Unit (“AIU”) and the panch witnesses. The Chemical Analyzer from New Delhi was examined as PW-12. Further, the prosecution strengthened its case by examining persons from Ethiopian Airlines

– Mr. Narendra Kotian (PW-13) and Mr. Prashant Akre (PW-14), who granted temporary visa to the Appellant. The key witnesses, on whom the prosecution rests its case are PW-1, PW-5 and PW-10. PW-1, Mrs. Vishaka Satardekar, is the officer on duty at Sahara International Airport, Mumbai, AIU on the said date when the information was received about a passenger landing at Mumbai Airport on transit vide Flight No.ET-610 with contraband. She is corroborated by PW-5 Mr. Venugopal Iyer, Superintendent (Customs) at CSI Airport, who recorded the statement of the Appellant and had deposed that he had issued summons to her and explained her that the statements will be used against her. It is the same officer who ensured compliance of provisions of Section 50 of the NDPS Act. He has proved the statement of the accused recorded under Section 67 and also recorded the statements of other persons, who participated in the proceedings including Mr. Umesh Gaikwad, working as cleaner, House Keeping Department, who had witnessed the proceedings regarding seizure of the contraband from the passenger, who arrived by Ethiopian Airlines and was in transit. Another witness to the panhanama is Mrs. Lata Pawar. Her statement is also recorded by the said officer along with statement of one Narendra Kotian, Senior Customer Service Agent working with Ethiopian Airlines.

One more significant witness examined by the prosecution is Mr. Sameer Wankhede (PW-10), Assistant Commissioner, AIU, a gazetted officer, who received information from his Indian informer

about a passenger arriving with some contraband items and who conveyed the information to the Additional Commissioner on his cell phone and received directions to work out the said information. The proceedings of search, seizure and arrest of the accused were carried out in his presence along with PW-1 - Vishaka and PW-5 - Venugopal. Through the evidence of the said witnesses, the prosecution attempted to establish its case of possession of the psychotropic substance by the Appellant in contravention of the provisions of the NDPS Act and of importing of the said substance and committing an offence punishable under Section 23 read with Section 28 of the NDPS Act.

8. In order to establish that the substance found from the checked-in baggage of the Appellant, which came to be seized under the panchanama and described as white coloured crystalline substance, which was purported to be cocaine, the prosecution relied upon testimony one Mr. Prashant Kumar s/o. Janardhanan, Assistant Chemical Analyzer in Central Revenue Control Laboratory, New Delhi (PW-12). He specifically deposed and proved that by applying the TLC test, the result revealed that the substance recovered from the Appellant was Methamphetamine. The witness has deposed that he conducted colour test of cocaine, which gave a negative result and subsequently, he conducted two colour tests, one Cobalt Thiocyanate test and Fischer Morris test, which tested positive for Methamphetamine. The test results

exhibited that the sample contained 93.3% of Methamphetamine.

Another relevant witness is PW-13, Mr. Narendra Kotian, Senior Customer Services Agent in Ethiopian Airlines at CS International Airport, Andheri. The said witness was in-charge of passenger handling of Ethiopian Airlines on 21/08/2012 and, on his instructions, the baggage of the intercepted lady passenger was brought to the aerobridge by the staff of Ethiopian Airlines. Another officer working as Assistant Immigration Officer at Arrival Terminus T-2 at CSI Airport Mr. Prashant is examined as PW-14. It is this witness, who established that the passenger was granted temporary landing facility for a period of 14 days on obtaining requisite fee and on endorsement being made on her passport. The said permission was granted by Senior Assistant, Foreign Registration Office. He identified the stamp of temporary landing facility on the passport of the Appellant/Accused.

9. The above framework was laid by the prosecution before the Special Court, which worked out on the same, by appreciating and scrutinizing the same during the course of trial. The statement of the accused came to be recorded under Section 313 of the Code of Criminal Procedure Code and her stand is of complete denial and the case of the prosecution being false. The accused pleaded that it was a case of planting of the contraband while she was on transit, enroute her destination.

10. I shall now advert to the most significant document, the panchnama drawn by PW-1 Vishaka Satardekar and signed by two panchas Mr. Umesh Gaikwad and Mrs. Lata Pawar, which is exhibited as Ex-13. The same records that the panchas were called by PW-1, the Intelligence Officer of Customs at the Aerobridge to witness the search of a lady passenger, who was arriving by Ethiopian Airlines and was in transit at Bombay for onward journey to Singapore. The panchnama record the happenings from 5.10 A.M., when the panchas were called at Aerobridge Bay No.50 of CSI Airport, Mumbai till the time, when the proceedings were concluded at 11.30 hours on 22/08/2012. There is no challenge raised to the said panchnama by the counsel for the Appellant/Accused, either during the trial or when the appeal was argued. Ex-13 explicitly narrates the procedure followed by the team comprising of PW-1, PW-5 and PW-10, with the panchas leading to search, seizure and arrest of the accused at the Airport. Challenge is, however, raised to the procedure adopted while carrying out the search and seizure.

The argument revolves around whether the procedure under Section 42 of the NDPS Act should have been adhered to since the process of search springed off when, PW-10 Sameer Wankhede received the secret information and, therefore, the submission advanced is compliance of sub-section (2) of Section 42 is imperative. Noteworthy to mention that PW-10, the Assistant Commissioner in AIU himself is a gazetted officer. PW-1 Vishaka

has revealed the same when she has stated that Mr. Sameer Wandhede (PW-10) and Mr. Venugopal (PW-5) were the gazetted officers present and she has deposed that as per Section 50 of the NDPS Act, the accused was made aware of her right to examine her baggage either before the Magistrate or before the gazetted officer and she preferred her baggage to be examined before the gazetted customs officer. In fact, such a right, which she was apprised of, being a right conferred under Section 50 of the NDPS Act, in fact, is to be availed only when personal search has to be carried out and not when the baggage is being searched, the position of law on the said point being amply clear to that effect. PW-1 afforded an opportunity to the accused to avail her right under Section 50 of the NDPS Act while the search of checked-in baggage was carried out, by way of abundant precaution. The search of the checked-in baggage was carried out in the presence of PW-10 and PW-5, both, gazetted officers. It is this checked-in baggage, the search of which, led to recovery of a white coloured crystalline substance, which was subsequently analyzed as psychotropic substance. Therefore, there is no contravention of any of the procedural aspect while the checked-in bag of the accused was searched and the objectionable substance therein being seized. As far as the personal search is concerned, there is no recovery of any incriminating material from her person and, therefore, the argument qua compliance of Section 50 of the NDPS Act pressed into service by learned counsel for the Appellant is of no consideration at all.

11. In the light of the counter submissions advanced, I will first refer to the argument advanced about the compliance under Section 42 as it appears to be the bone of contention amongst the parties.

Chapter V of the NDPS Act sets out the procedure to be followed and the three provisions involved are Sections 41, 42 and 43. The provisions contained in the Chapter intend to provide certain checks on exercise of powers by the Authorities concerned in order to strike a balance between the need of a stringent law and enforcement of such law as against the protection of citizen from the oppression and injustice at the hands of those exercising the authority. The search and seizure, which are essential steps in the armoury of an investigator in an investigation of a criminal case, the manner in which such powers to be exercised and the officers, who will exercise such power in the enactment, which contain stringent provisions for the control and regulation of narcotic drugs and psychotropic substance is the nub of the legislation.

Section 41 is the power of the Special Magistrate of the class specified, to issue a warrant and it is the officers of the Gazetted rank who give authorization to his juniors for the arrest of any person, whom he has reason to believe to have committed any offence punishable under the NDPS Act and for the search of any building, conveyance or place in which any narcotic drug or psychotropic substance or controlled substance is kept or concealed.

Section 42(1) as it's heading suggests, applies to cases of officers carrying out search and seizure without warrant or authorization under Section 41 (1) or (2). Proviso of sub-section (2) of Section 42 are meant to cover cases falling under Section 42(1). Therefore, the requirement under Section 42(2) need not be extended to cases of arrests, search and seizure by gazetted officers.

The observations of the Hon'ble Apex Court in the case of **G. Srinivas Goud v. State of A.P.**⁹ would make the position crystal clear.

“8. The question for our consideration is: whether it is necessary for officers of gazetted rank to comply with sub-section (2) of Section 42 i.e. send the action taken down in writing by the officers to immediate official superior within seventy-two hours. According to the learned counsel for the appellants Section 42(2) is mandatory and covers all officers including officers of gazetted but does not make any distinction between a gazetted and a non-gazetted officer. Therefore, all empowered officers must comply with sub-section (2) of Section 42.

9. It will be seen from Section 41(2) that it refers to only officers of gazetted rank and it is such officers who can authorise their subordinates, not below the rank of peon, sepoy or constable, to carry out arrest, search or seizure. The function of the arrest, search and seizure carried out under Section 42(1) is by officers who do not have warrants or authorisation in their hands before proceeding to

9 (2005) 8 SCC 183

take action. This is as per the heading of the section which reads: "Power of entry, search, seizure and arrest without warrant or authorization." Under Section 41, it is the specified Magistrate, who issue warrants of arrest and it is officers of gazetted rank who give authorization in favour of their juniors. Provisions of sub-section (2) of Section 42 are meant to cover cases falling under Section 42(1). Therefore, in our view, the requirement under Section 42(2) need not be extended to cases of arrest, search and seizure by officers of gazetted rank. The officer of gazetted rank while authorising junior officers under Section 41(2) knows what he is requiring them to do and, therefore, there is no need for reporting. For this reason Section 41 does not contain such requirement. The need for reporting under Section 42(2) arises because the officer proceeds without authorization in terms of Section 41(1) or 41(2). The requirement of informing the immediate official superior under Section 42(2), in our view, has to be confined to cases where the action is taken by officers below the rank of gazetted officers without authorisation."

Section 42 is the power of entry, search, seizure and arrest, to be exercised without warrant or authorization and sub-section (1) of Section 42 relates to any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments mentioned in the said section and such an officer may between sunrise and sunset, (a) enter into and search any such building, conveyance or place; (b) in case of resistance, break open any door and remove any

obstacle to such entry; (c) seize such drug or substance and all materials used in the manufacture thereof and any other article, which he has reason to believe to be liable to confiscation; and (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe that he has committed any offence punishable under the NDPS Act. Sub-section (2) of Section 42 provides that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within 72 hours send a copy thereof to his immediate official superior. The proviso appended to the said section and sub-section (2) however, do not constricts the power of an officer, who is a gazetted officer.

12. Another important provision of the Act is contained in Section 43 being the power of seizure and arrest in public place; the power to be exercised by any officer of any of the departments mentioned in Section 42 and this include the power to seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which the officer has reason to believe that an offence punishable under the NDPS Act has been committed. The said section also confer power to detain and search any person. Explanation appended to the said section provide that for the purposes of the section, the expression 'public place' includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

13. Pertinent to note that the three sections being Sections 41, 42 and 43 pose three situations and exercise of powers in these different situations. Section 41(2) contemplate an officer of gazetted rank of the departments mentioned in the said sub-section or a person, who received authorization as contemplated in sub-section (2) but superior in rank to a peon, sepoy or a constable whereas Section 42 enumerates the officer being an officer superior in rank to a peon, sepoy or constable, who exercise the power conferred under Section 42.

The material and significant difference in Sections 42 and 43 was noted by the Apex Court in case of **Narayanswamy Ravishankar (supra)**, where according to the prosecution 5940 grms of heroin concealed in the bottom of suitcase alleged to be belonging to the Appellant was recovered when he was attempting to transport the same from the International Airport, Chennai to Singapore. The Trial Court acquitted the Appellant holding that the mandatory provision of Section 42 and Section 50 has not been complied with. The High Court reversed the decision and in an appeal, before the Highest Court, it has been contended on behalf of the Appellant that provisions of Section 42 are not complied with. The issue was answered in the following words.

“5. In the instant case, according to the documents on record and evidence of witnesses, the search and seizure took place at the Airport, which is

a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable, the seizure having been effected in public place, the question of non compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant.”

14. The position as regards the scope of Sections 42 and 43 is well settled. In case of **Rajendra vs. State of M.P.**¹⁰, the Apex Court was dealing with the prosecution case, in which an Inspector of Police at GRP Police Station, Bhopal has received an information that two persons had got down from Madhya Pradesh Express and they were waiting at Platform No.2 for coolie with suitcases and bags in which they were carrying contraband articles (ganja). The information came to be recorded by the Inspector and he proceeded with his staff to the place in terms of the information where the accused was found standing with suitcases and bags which led to seizure of 23 kgs of ganja. In support of the Appellant, when Section 42(2) was pressed into service, their Lordships of Apex Court held as under:

“8. Section 42 enables certain officers duly empowered in this behalf by the Central or State Government, as the case may be, to enter into and search any building, conveyance or enclosed place for the purpose mentioned therein without any warrant or authorization. Section 42 deals with “building, conveyance or enclosed place” whereas Section 43 deals

¹⁰ (2004) 1 SCC 432

with power of seizure and arrest in public place. Under sub-section (1) of Section 42 the method to be adopted and the procedure to be followed have been laid down. If the officer concerned has reason to believe from personal knowledge, or information given by any person and has taken down in writing, that any narcotic drugs or substance in respect of which an offence punishable under Chapter IV of the Act has been committed or any other articles which may furnish evidence of the commission of such offence is kept or concealed in any "building or conveyance or enclosed place", he may between sunrise and sunset, do the acts enumerated in clauses (a), (b), (c) and (d) of sub-section (1).

9. The proviso comes into operation if such officer has reason to believe that search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escaped offender, he may enter and search such building, conveyance or enclosed place any time between sunrise and sunset after recording grounds of his belief. Section 42 comprises of two components: one relates to the basis of information i.e.: (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates as was noted in Baldev Singh case that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate superior official. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in

any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place.

15. It was held that there was no violation of Section 42(2). As regards the compliance of Section 50, the same judgment has laid down the following proposition of law.

“12. As in the instant case, the search was of the bags and not of the persons, Section 50 has no application and the High Court was right in its conclusions.

13. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises. (See Kalema Tumba v. State of Maharashtra, Baldev Singh case and Gurbax Singh v. State of Haryana.) The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

16. In case of **Ravindran @ John v. Superintendent of Customs¹¹**, the position of law qua the distinction between 43 and 43 and compliance of Section 50 was again examined. In the backdrop of the prosecution case that on receipt of the information, the officials of Customs Sea Base Party, Tiruchendur rushed

¹¹ (2007) 6 SCC 410

Kayalpattinam Bus stand. On receipt of reliable information that one person carrying psychotropic substance was to come there. On finding the said person, his personal search was carried out and the accused was found to be carrying a white coloured polythene bag, which contained Diazepam which was seized. The submission advanced on behalf of the Appellant was about non compliance of mandatory provisions of Section 42(2) and Section 50 of the Act. The High Court rejected the submission qua Section 42 and the said view was upheld by the Apex Court with the following observations.

“7. We hold that the High Court was right in coming to the conclusion that Section 42 of the Act was not attracted to the facts of this case. In the instant case on information received by PW 2 who communicated the same to PW 1, the witnesses went to the bus-stand where the person carrying the drug was expected to arrive. The appellant was arrested at the bus-stand. The appellant was, therefore, not searched and arrested in exercise of power of arrest, search, and seizure under Section 42 of the Act. Section 42 applies to a case where the officers concerned on information received, or having reason to believe from personal knowledge that any offence has been committed in relation to any drug or psychotropic substance, etc. and which is kept or concealed in any building, conveyance or enclosed place may, between sunrise and sunset, enter into and search any building, conveyance or place. They are also vested with the power of search and seizure and authorised to arrest the person whom they have reason to believe to have committed any offence punishable under this Act. The facts of this case

disclose that the arrest and seizure took place at the bus-stand and not in any building, conveyance or enclosed place. The High Court has rightly held that the case was covered by Section 43 of the Act which does not require the information of any person to be taken down in writing. Similarly, there is no requirement that the officer concerned must send a copy thereof to his immediate official superior within 72 hours. We, therefore, hold in agreement with the High Court that Section 42 of the Act was not attracted to the facts of the case. It is, therefore, unnecessary to burden this judgment with decisions cited at the Bar regarding the effect of non-compliance with Section 42 of the Act.”

17. As regards the compliance of Section 50, the following observations are relevant for the case in hand being dealt by me.

“8. It was then submitted on behalf of the appellant that the provisions of Section 50 of the Act which are mandatory in nature were also not complied with. Reliance was placed on the decision of this Court reported in Namdi Francis Nwazor v. Union of India. Learned Additional Solicitor General appearing on behalf of the Union of India submitted that the aforesaid judgment of this Court has been explained in a subsequent judgment of this Court in State of H.P. v. Pawan Kumar in which it has been held that the observations relied upon in Namdi Francis Nwazor were obiter on this point. In the later judgment it has been held as under: (SCC p. 360, para 11)

“11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are

given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in Section 50 of the Act."

9. In the instant case, it is not in dispute that the appellant was carrying a plastic bag in which the drug in question duly packed had been kept. Section 50 is, therefore, not attracted to the facts of this case."

18. The Constitution Bench of the Apex Court in the case of **Karnail Singh (supra)** reiterated in position of law in the following words.

"26. The material difference between the provisions of Sections 42 and 43 of the NDPS Act is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with

regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article, etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.”

19. Recently, in case of **Raju v. State of West Bengal¹², (2018) 9 SCC 708**, the position of law is again reiterated and clarified as to when the obligation under Section 42(1) with the proviso being followed as a mandatory requirement and when it is not. Dealing with an appeal filed by the Appellant, who was prosecuted under the provisions of NDPS Act in the backdrop of the case of the prosecution that information was received by the Sub Inspector of Narcotic Cell that a drug dealer is likely to be in the vicinity of Tiljala, Falguni Club, Picnic Garden Road to supply narcotic drugs in the afternoon. Permission was sought from the superior officer to organize raid which was granted and the Appellant was found coming along Picnic Garden Road. He was intercepted and detained. His search led to 19 (deep brown/blackish broken rectangular sheets) from a black polythene packet, which was inside a biscuit coloured jute bag, which the Appellant was carrying in his right hand. The sheets, when tested on spot with the help of test kit, revealed the substance to be charas.

¹² (2018) 9 SCC 708

The counsel for the Appellant advanced argument that there was non compliance of Section 42 particularly when permission was sought from the Assistant Commissioner of Police, Anti Narcotic Department. Argument was also advanced that Section 50 had also not been complied with since not only was the bag of the Appellant searched but search of the person of the Appellant also resulted in recovery of cash from the pocket of his trouser. The said submission was dealt with the extensively reproducing Section 42 and Section 43. Rejecting the submissions advanced qua Section 42, it was held as under:

“9. We are unable to accept the submission made by the learned counsel for the appellant that Section 42 is attracted to the facts of the present case. In State of Punjab v. Baldev Singh (“Baldev Singh”), Dr A.S. Anand, C.J. speaking for a Constitution Bench of this Court, held: (SCC p. 189, para 10)

“10. ...The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article, etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be

unlawful.” (emphasis supplied)

10.

11. *In Krishna Kanwar v. State of Rajasthan*, a two-Judge Bench of this Court considered whether a police officer who had prior information was required to comply with the provisions of Section 42 before seizing contraband and arresting the appellant who was travelling on a motorcycle on the highway. Answering the above question in the negative, the Court held: (SCC pp. 615-16, para 16)

“16. ... Section 42 comprises of two components. One relates to the basis of information i.e.: (i) from personal knowledge, and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates, as was noted in *Baldev Singh* case that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents, etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document, etc. must be in any building, conveyance or enclosed place.”

(emphasis supplied)

12. An empowered officer under Section 42(1) is obligated to reduce to writing the information received by him, only when an offence punishable under the Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with Section 42, including recording of information received by the empowered officer, is not mandatory, when an offence punishable under the Act was not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

13. The appellant was walking along the Picnic Garden Road. He was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the phrase “public place” in the Explanation to Section 43. Section 42 had no application.

14. The cases relied on by the learned counsel for the appellant will also not apply in the context of the facts before us. In Mansuri, an autorickshaw driver was intercepted by police personnel. Four gunny bags of charas were recovered from the autorickshaw. The police officer who had prior information about transportation of some narcotic substance, had neither taken down the information before carrying out the seizure and arrest, nor apprised his superior officer. He contended that the action taken by him was under Section 43 and not Section 42. Rejecting the argument of the State, this Court held that compliance with Section 42 was

required as the autorickshaw was a private vehicle and not a public conveyance as contemplated under Section 43. Similarly, in Jag Raj, contraband was recovered from a jeep which was intercepted by police personnel on a public road after receiving prior information. The police officer who had received the information, admitted to not taking it down in writing, contending that Section 43 would be applicable. Rejecting the argument of the State, this Court held that the jeep which was intercepted, was not a public conveyance within the meaning of Section 43 and compliance with Section 42(1) was therefore mandatory. In Holia Mandrax tablets were recovered from the hotel room of the respondent. The information was not reduced to writing by the officer who had first received the information. The State claimed that compliance with Section 42 was not required as the hotel was a public place. Rejecting the submission of the State, this Court held that while a hotel is a public place, a hotel room inside it is not a public place. This Court held thus: (SCC pp. 377-78, para 14)

“14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. ... It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also

recording the reasons therefor coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or housekeeping of the room, the guest is entitled to maintain his privacy.”

20. In the light of the said authoritative pronouncement, drawing a distinction between Section 42 and Section 43, where Section 43 is the power of seizure and arrest in public place, which on its plain reading does not attract the rigors of Section 42. The submission of learned counsel for the Appellant is on the basis of the complaint in the present case which is lodged by PW-1, an officer of Customs, AIU, Sahar Airport, Mumbai, who intercepted the Appellant on the basis of prior information which was received by the Assistant Commissioner of Customs (PW-10), that a passenger was arriving from Addis Ababa and was to be in transit at Bombay for her journey to Singapore. The said passenger is the present Appellant, who was intercepted on Airobridge Bay No.50, who admitted that she was a transit passenger in Mumbai and about the travel to Singapore on the very same day i.e. 22/08/2012. The search is carried out in the presence of PW-10, the Assistant Commissioner of AIU, who himself is a gazetted officer and he is also the person

who received the information on telephone about a passenger arriving with contraband item. PW-10 deposed that he made a phone call to his superior, Additional Commissioner and conveyed the information, who directed to work out the information and on confirmation of the information received and on finding her name in the manifesto, PW-10 proceeded to Aerobridge No.50 where PW-1 was present at the Aerobridge with her team, which included the panchas in whose presence the staff of the Ethiopian Airlines were asked to bring the baggage at the Aerobridge. The baggage was identified by the Appellant and it was tallied with the tag and the noting on the boarding pass and a search was carried out. The baggage, which was checked in was found to contain crystalline powder. Since the passenger was a transit passenger, an application was made to immigration officer for transit of the passenger, who along with the baggage was taken to AIU office. PW-10 has proved the document (Ex-57) by which the transit of the passenger was asked for. Though the accused was subjected to personal search, nothing incriminating was recovered but the cabin bag, which contained the contraband substance, was seized.

21. The Appellant was intercepted, acting on the specific information of the officers of AIU, Chhatrapati Shivaji International Airport and the search led to the recovery of 3.930 kgs. of cocaine, which was concealed inside the false bottom of check-in baggage of the passenger. PW-1, the Intelligence Officer at

the Chhatrapati Shivaji International Airport duly empowered under the provisions of Section 43 of the NDPS Act effected the arrest of the Appellant on 22/08/2012 at 19:00 hours for her involvement, concealment, possession, carriage, transportation and conspiracy to attempt to smuggle through India a white coloured substance purported to be cocaine vide panchnama dated 22/08/2012. The arrest was effected in a public place vide Ex-14 by an officer duly empowered to effect an arrest and since the arrest is made after a search of the cabin baggage, which was found laden with cocaine, the compliance of sub-section (2) of Section 42 is not warranted. Pertinent to note that PW-1 was empowered under the provisions of Section 43 of the NDPS Act and though the search and arrest as triggered by the secret information received by PW-10, the Assistant Commissioner, AIU, the Additional Commissioner, his superior was conveyed the information and he received command to work out the information. In the light of the exercise being carried out under Section 43 of the NDPS Act, the empowered officer has the power to seize in any public place or in transit any narcotic drug or psychotropic substance or controlled substance and detain such person and if it appear that the possession of such substance is unlawful, he is empowered to arrest the person. Section 43 being attracted in the present case, compliance of Section 42 is immaterial on two counts, the first being the search took place in a public place and second being the search was by a gazetted officer, who was tipped of the information

and who appraised his superior of the same.

The position of law being very clear on this aspect, there is no force in the submission of learned counsel to the effect that since the seizure and arrest of the Appellant is made at the Aerobridge, this becomes illegal on account of non-compliance of sub-section (2) of Section 42, since the power, which has been exercised is under Section 43 and the search carried out in presence of PW-10, a gazetted officer himself.

22. As far as the ground raised for compliance of Section 50 of the NDPS Act, the said ground is just referred for being rejected since Section 50 of the NDPS Act postulates conditions under which search of persons shall be carried out and it contemplates search of any person under the provisions of Sections 41, 42 or 43, but in the present case, the contraband has not been seized from the person of the Appellant but was found to be concealed in the checked-in baggage, and was brought at the Aerodrome with the assistance of the Ethiopian Airlines. The personal search of the Appellant did not reveal any incriminating material and, therefore, the provisions of Section 50 of the NDPS Act cannot be invoked to defeat the search carried out under Section 43.

23. Dealing with the submission about the non compliance of Section 50, the latest judgment, to which a reference is made above (Raju v. State of West Bengal (supra)) when charas was recovered

only from the bag of the Appellant and no charas was found on his person, the question that was considered for determination, on the first question being answered in the affirmative was whether Section 50 was complied by PW-2 and PW-4. On factual analysis, it was held that the search of the Appellant was conducted in the presence of PW-4, a gazetted officer and, therefore, there was strict compliance with requirement of Section 50(1), the following observations are made:

16. In Vijaysinh Chandubha Jadeja v. State of Gujarat ("Vijaysinh"), a Constitution Bench of this Court interpreted Section 50 thus: (SCC pp. 617-18 & 622, paras 20, 29 & 31)

"20. The mandate of Section 50 is precise and clear viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so.

* * *

29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law-enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be

searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

* * *

31. We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case.”

24. The position on the aspect of compliance of Section 50 has already been referred to in the above paragraph, when reliance was placed on the judgment of the Apex Court in the case of **Ravindra @ John (supra)**. In the case of **State of H.P. v. Pavan Kumar** ¹³. The position as regards the compliance of Section 50 was clarified in view of the difference of opinion between the two learned Judges of the Supreme Court on this issue and it would be apposite to

¹³ (2005) 4 SCC 350

quote the following observations of the Apex Court.

“11. A bag, brief case or any such article or container etc. can under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a brief case, a suit case, a tin box, a thaila, a jhola, holda, carton, etc. wearing size dimension or weight. They would have to be carried either by hand or hung on the shoulder or back or placed on the head. In common parlance, it would be said that a person is carrying a particular article specifying a manner in which it is carrying like hand, shoulder, back or head, etc. Therefore, it is not possible to include this article within the ambit of the word “person” occurring in Section 50 of the Act.

12. An incriminating article can be kept concealed in the body or clothing or covering in different manner or in the footwear. While making search of that type of article which have been kept so concealed, it would certainly come within the ambit of the words “search of person”. One of the test, which can be applied is where in the process of search, the human body comes in contact or shall have to be touched by the person carrying out the search, it will be search of a person. In case of a bag, brief case or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. In

order to make a search of such type of object, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person viz., the body of the human being. Inextricably means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free.”

25. The Constitution Bench in the case of **State of Punjab v. Baldev Singh**¹⁴, has also clarified the position of law as regards compliance of Section 50 in the following words:

“12. On its plain reading, Section 50 will come into play only in the case of a search of a person as distinguished from search of any premises, etc. However, if the empowered officer, without any prior information as contemplated by Section 42 makes a search or causes arrest of a person during normal course of investigation into an offence, or suspected offence, and on completion of that search, a contraband under NDPS Act is also recovered, the requirement of Section 50 of the Act are not attracted.”

The aforesaid dictum of the Constitution Bench thus settle the position of law, that the provisions of Section 50 will come into play only in case of personal search of human being and not a baggage like a bag, container, etc. which he may be carrying.

In the light of the aforesaid position of law, the argument

¹⁴ (1999) 6 SCC 172

advanced by learned counsel Mr. Rajagopal qua non compliance of Section 50 do not hold good when the facts clearly establish that the contraband was found in the check-in baggage belonging to the Appellant. The argument about violation of Section 50 advanced by learned counsel do not, in any way, benefit the Appellant or take her case any further.

26. Another argument advanced by learned counsel for the Appellant that she was not in immediate possession of the bag from where the contraband was seized and after the bag was checked-in at the starting point of the journey till the destination point, she had no access to her luggage and, therefore, there was a possibility of the contraband being planted during the course of journey in the baggage, also do not deserve any consideration.

27. The Apex Court in the case of Mohanl Lal (supra), has clarified the term “possession” and held that it is a flexible concept and its meaning depends upon the contextual purpose and object of the statute and appropriate meaning has to be assigned to the word to effectuate the statutory object. Ordinarily, the elements of possession are physical control or animus to control the thing, however, even in absence of physical control of the contraband culpable mental state of the accused can arise if the accused still has requisite degree of control over the contraband.

28. The legislature while enacting the NDPS Act, was aware of the element of conscious possession and, therefore, created a presumption under Section 35 of the Act of a culpable mental state. The said provision reads as under:

“35. Presumption of culpable mental state.—

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.—In this section “culpable mental state” includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

The said provision, therefore, contemplate the knowledge of a fact and conscious or mental state of possession is necessary and that is the reason for incorporating Section 35 in the NDPS Act. In case of **Noor Aga v. State of Punjab**¹⁵, while upholding the constitutional validity of Section 35 of the NDPS Act, the Apex Court held as under.

15 (2008) 16 SCC 417

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."

29. The prosecution necessarily has to discharge the initial burden to prove the foundational case for Section 35 to come into play. As far as the present case is concerned, the Appellant checked-in her baggage at the starting point of her journey and the said baggage was brought for search on the basis of the baggage tag supplied by her and when the baggage was brought at the Aerobridge, the Appellant identified it to be belonging to her. Not only this, by applying the secret code, she opened the baggage. It

was not the case put up before the Trial Court that the baggage do not belong to her. The defence taken is that there is a likelihood of the contraband being planted into the baggage, which in no case, raises any probability since after the baggage was checked in at destination “A”, it was to travel to Singapore and it was only because the passenger was intercepted, while she was enroute to her destination the baggage underwent a search, where the contraband was found. The statement of the Appellant recorded under Section 67 of the NDPS Act speak of her culpability as a corroboration to the case of the prosecution. However, in view of the position of law being recently declared to the effect that the statement under Section 67 of the NDPS Act is inadmissible in evidence and, therefore, I refrain from referring to the said statement. The baggage being identified by the Appellant as belonging to her and which travelled along with her from Addis Ababa and was checked-in for the ultimate destination, in absence of any evidence brought on record by the defence, that the bag had been handled during the said journey by a third person, the said submission of learned counsel do not warrant any consideration.

30. The prosecution has proved its case to the effect that the transit passenger, Edyma Siregar was intercepted and a panchanama was prepared, which contain a detailed narration about her interception, and the interrogation, in relation to the check-in bag being produced by the staff of Ethiopian Airlines with

tag number XH-247600 ET-610/21.8.12 which was claimed by the passenger to be her own. The baggage tag number was verified by the baggage claim tag affixed in the passenger's e-ticket and was found to be in order. The green coloured model plastic suitcase received positive indication of narcotic drugs and on being searched led to the contraband. The passenger was appraised of the provisions of Section 50 and option was given to her whether she would like the baggage to be examined in presence of the gazetted officers of customs or the magistrate, since PW-5 as well as PW-10 were the gazetted officers present there. The accused exercised her option to get her luggage examined in the presence of gazetted officers of customs and accordingly, the search of the bag was carried out, which revealed presence of the psychotropic substance. The prosecution has clearly followed the mandate of the statute while carrying out the search, seizure and arrest. The statutory provision being adhered to and clearly connecting the accused to the charge levelled, and positive evidence being led to that effect, the prosecution has succeeded in seeking a finding of guilt and resultantly, a punishment has been imposed. There is no challenge to the quantum of punishment by the Appellant.

31. In the light of the aforesaid discussion, the finding of guilt recorded by the Trial Court warrants no interference, since the prosecution has proved its case beyond reasonable doubt by adducing cogent and reliable evidence. Since I find no legal

infirmity in the impugned decision, the Appeal do not warrant any consideration and is resultantly dismissed. The judgment of the Special Court of Greater Bombay dated 19/08/2015 in NDPS Special Case No.21 of 2013 is upheld.

[SMT. BHARATI DANGRE, J.]