

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 586 OF 2005
WITH
INTERIM APPLICATION NO. 1238 OF 2022**

Bankim Rasiklal Shah

...Appellant

Versus

1. N.C.B., Ahmedabad

2. Administration of

Dadra & Nagar Haveli Silvassa

3. State of Maharashtra

...Respondents

....

Mr. Naveen Chomal a/w Mr. Shekhar Bhandary, Advocate for the Appellant.

Mr. Shreeram Shirsat, Spl. P. P. a/w Mr. Amandeep Singh SRA a/w Ms. Nishi Singhvi a/w Mr. Shekhar Mane a/w Mr. Anna Oommen, Advocate for Respondent-N.C.B..

Mr. Arfan Sait, APP for the Respondent – State.

**CORAM : PRAKASH D. NAIK, J.
RESERVED ON : 26th APRIL, 2022
PRONOUNCED ON : 27th SEPTEMBER, 2022**

JUDGMENT:

1. The appellant have preferred this appeal under Section 374 of Code of Criminal Procedure challenging judgment and order dated 27th April, 2005 passed by learned Special Judge, Dadra and Nagar Haveli, Silvassa convicting the appellant for offences punishable under Sections 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances (for short N.D.P.S. Act), and sentencing him to suffer imprisonment of fourteen years and to pay fine of

Rs.2,00,000/- and in default to suffer imprisonment for two years.

2. The case of the prosecution is as follows:-

i. On 12th February, 2002 specific information was received by Zonal Director, Narcotics Control Bureau, (for short N.C.B.), AZU, Ahmedabad that, Mr. Bankim, resident of Mumbai is in possession of huge quantity of Charas kept in his factory premises at Silvassa. The said information was reduced to writing and forwarded to the superior officer in compliance of Section 42(2) of the N.D.P.S. Act.

ii. Joint team of officers of N.C.B., Ahmedabad and Customs, Valsad was formed on 17th February, 2002. Panchas were called. The team, reached in two vehicles viz. Maruti Van and Maruti Gypsy, near Masat Police outpost. The panchas were appraised about the information. The team proceeded towards plot No.53/54 at Masat industrial area. The workers at the said place told that Mr. Bankim Shah is not available but his brother Mangesh Shah is residing at first floor of double storied building. The panchas and the team went to the first floor. Mr. Mangesh Shah was present. He was told about the purpose of visit.

iii. Mr. Mangesh was given option under Section 50 of the N.D.P.S. Act and he was told that, his search may be taken in the presence of any Magistrate or Gazetted officer. At the same time Mr. Mangesh was informed that Mr. Pawan Tomar, Zonal Director,

N.C.B., Mr. P. N. Pandey Deputy Commissioner customs and Mr. C. I. Mathew superintendent (customs) are three Gazetted officers present in the team. Mr. Mangesh consented for search by Mr. Vikram Ratnoo. Personal search of Mangesh was conducted by Mr. Ratnoo in the presence of panchas and other officers of the team. Search of the building was conducted. Nothing objectionable was found Panchanama was drawn. The panchas left the premises.

iv. Summons was served upon Mr. Mangesh Shah for recording his statement under Section 67 of the N.D.PS Act. He gave statement that, Mr. Bankim was in Silvassa and proceeded to Ladol for attending marriage. One Godown at Demni road, Dadra is in possession of Mr. Bankim Shah. He showed his willingness to show the said Godown.

v. Panchas were called. They were told about the information. The team proceeded to plot No.53/54 with Mangesh. They reached the Godown. Mr. Mangesh showed them the Godown. It was locked. Mangesh opened the lock and thereafter, all entered the Godown.

vi. Number of cartoons were found in the Godown. Mangesh could not say anything about the contents of the boxes. The boxes were opened. They were covered with white woven sacks. On removing the upper cover a corrugated box of brown colour was

taken out. On opening the box big size kettle was found. It was rapped in transparent polythene. It was found heavy. It was broken from the bottom. When it was broken some burada and rectangular patties rapped with brown adhesive tape came out. This burada and patties were between inner and outer layer of the kettle. On opening one of the patties red transparent polythene was found. After removing red transparent polythene, third covering was of transparent polythene. It was taken out. Rectangular patties of dark brown colour were found. It was tested with drug testing kit. The result was positive for Charas (Hashish).

vii. All 470 boxes were loaded in the vehicle. The boxes were taken to Masat plot No.53/54. All the boxes were unloaded in a hall where lathe machine was installed. The boxes were opened. The packing of boxes was identical.

viii. Intimation was given to trace Bankim Shah at Ladol. He was traced. Summons was served upon him. He was searched. Some documents and SIM card were recovered from him. From 222 boxes patties were not found. They were returned to Mangesh and Bankim Shah. The process of seizing, sampling and sealing was undertaken by the team members in the presence of panchas. The boxes were divided into groups of ten.

ix. On 18th February, 2022 Bankim Shah was arrested. Report

was given under Section 57 of the N.D.P.S. Act to Zonal Director on 19th February, 2002. Statement of Bankim Shah was recorded under Section 67 of N.D.P.S. Act about details of articles/documents recovered during his personal search. Samples were forwarded to FSL, Ahmedabad along with test memo on 21st February, 2002. Statement of Mangesh was recorded on 13th February, 2002 statements of other witnesses were recorded. On completing investigation, complaint was filed in the Court on 1st August, 2002.

3. Charge was framed against the accused. The evidence of witnesses was recorded. They were cross examined by the defence. Statement of the accused was recorded under Section 313 of Cr.PC.

4. Vide judgment and order dated 27th April, 2005, the accused Bankim Rasiklal Shah (appellant) was convicted for offence punishable under Section 20(b)(ii)(c) of N.D.P.S. Act, and sentenced to suffer fourteen years rigorous imprisonment and to pay a fine of Rs.2,00,000/- in default to suffer further rigorous imprisonment for two years setup is given to the appellant.

5. The prosecution has filed interim application No.1238 of 2022 seeking directions under Section 391 of Cr.PC. permitting the prosecution to adduce/lead additional evidence in Special Case No.3 of 2002, either before this Court or before the Court of Sessions at Dadra and Nagar Haveli, Silvassa.

6. Learned Advocate for the appellant submitted as under:-
 - a. The trial Court has committed an error in convicting the appellant. There was no evidence before the Court to establish that the appellant was in possession of Charas seized by respondents.
 - b. The information recorded on 12th February, 2002 was not on record. It was not proved and exhibited. There is no record that PW-6 sent the information to his superior.
 - c. Neither PW-2 Mr.Malik nor Mr. Virendra Daru can be independent person. Shri. Malik is the Inspector of Excise, the Central Excise of Customs Department. The raid was conducted by customs department. Shri. Virendra Daru is working with Police department of Silvassa.
 - d. Statement of independent persons were not recorded about the raid effected at Godown or at the sealing at Masat. No panchyat record of Godown is produced.
 - e. No statements of persons who handled the property from Godown till the samples had reached the laboratory were recorded by the Investigating Officer.
 - f. When the kettle was opened in the Godown there was no balance/scale with the team to weigh the patti.
 - g. The key and lock of the Godown were not attached.

h. The statement recorded under Section 67 of the N.D.P.S. are not legally admissible evidence against accused.

i. The appellant was not present during the search carried out at Godown. The statement leading to Godown was allegedly made by Mangesh Shah. His personal search was conducted. He lead the team to the godwon. He was ignorant about the contents of the kettle, contents of the boxes containing kettle.

j. There is no cogent evidence to establish that the Godown was in possession of the appellant.

k. According to PW-4, on 17th February, 2002 at about 8.30 a.m. when he was at Silvassa, the vechicle was stopped on the way near Maskat industrial area and Mr. Tomar appraised about information. According to him the information was given that one Mr. Bankim Shah residing at Malad, Mumbai is having factory at Masat and there is likelihood of concealment of huge quantity of Charas. If this information is considered to be the information given by Mr. Tomar then the information mentioned in the panchnama at exhibit-103 must have been manipulated by PW-4. The information given in the panchanama does not mention the plot number of the factory. So also the reference of Godown and the extent of quantity of Charas.

l. PW-4 has not stated about communication of any information

by Mr. Tomar to him on 16th February, 2002 at Ahmedabad. As stated in his cross examination the team left Ahmedabad on 16th February, 2002. They came together from Vapi to Silvassa. He had no knowledge that they were to go to Silvassa in connection with the case relating to the Charas. PW-6 stated that on 16th February, 2002, he called the officers and discussed about specific information received.

m. The prosecution case is false. The prosecution has not examined vital witnesses. There is non compliance of Sections 42 and 50 of N.D.P.S. Act.

n. PW-6 Pawan Singh Tomar claims to have received information on 12th February, 2002, that appellant is in possession of Charas at factory in Silvassa. Copy of information written down under Section 41(1) is not produced. According to him he sent copy of information to superior officer under Section 42(2) on 12th February, 2002. Photocopy of document purporting to be forwarding letter submitted without copy of actual information claimed to have been written down by him and without any proof either its actual dispatch to superior officer. He has admitted that on 17th February, 2002 was holiday.

o. PW-4 Vikram Ratnoo has deposed that, PW-6 appraised all of them about information on 17th February, 2002 at Silvassa at 8 to

8.30 A.M. Search panchanama dated 17th February, 2002 records that PW-4 told that he has some secret information. PW-1 Monish Bhalla is silent about any information shared with officers by PW-6 on 16th February, 2002. The witness also claimed having received information under Section 41(1) on 17th February, 2002 from Manish Shah that appellant is having another Godown at Demni road, Dadra. He claims reducing the information in writing. He claimed that information received from Mangesh was sent to superior officer, on 20th February, 2002. Photocopy of forwarding letter without actual information produced.

p. PW-4 Vikram Ratnoo stated that having drawn first search panchanama on 17th February, 2002 at Silvassa, factory did not find any contraband substance. He also stated that appellant was not present there. Thus, they did not find anything to show appellants existence or that he was inhabiting there. He recorded statement of Mangesh has not been examined. He had drawn second search panchanama on 17th and 18th February, 2002 from Silvassa factory to Godown at Demni road, Dadra and back to Silvassa factory. Which PW Nos.4 and 5 do not state that Mangesh having said anything about Charas stored at Demni road, Dadra Godown, search panchanama records that, appellant is in possession of Godown at Demni road, Dadra and huge consignment of Charas is

stored there. Thus, even before starting to go to Godown, N.C.B. had already at Silvassa itself decided to show that Charas is found in Godown. Dadra Godown did not find any evidence to connect appellant with said place, neither any board bearing his name nor any Article inside Godown belonging to him. No photographs were taken despite admitting that there are instructions in the manual to take photographs if possible. No explanation is given for not taking photographs. The prosecution did not produce the muddemal before trial Court save and except the samples being claimed to have drawn by them. In such circumstance the prosecution could have led evidence being extracted from kettles in Silvassa factory by putting on record photographs to lend assurance to their case.

q. There is violation of Section 50 of N.D.P.S. Act. On 18th February, 2002 the appellant should have been explained of his right of personal search before Magistrate or Gazetted officer. The appellant was told about presence of three Gazetted officers in raiding team and was not informed of his right to be searched before Magistrate or Gazetted officer.

r. PW-2 Pradeep Kumar Chotelal Malik, Inspector in central Excise is panch witness for search panchanama's. He is working as Inspector in Central Excise. Officers from Central Excise get

transferred to N.C.B. and repatriated subsequently. Officers from there two departments are closely associated. Thus, there is question mark over his independence. PW-6 had sufficient time from 12th February, 2002 till 17th February, 2002 to arrange for independent pancha. The place when search was carried out is a proper industrial estate with many persons around PW-2 is bound to support N.C.B..

s. No record was produced before Court regarding N.C.B. having in its possession rest 238 tea kettles. After showing only 10 kettles.

t. Custody of Charas and tea kettles were allegedly given to N.C.B. officer Shailendra Lodha. It is alleged that he deposited Charas in customs Godown, Valsad and rest muddemal in Ahmadabad Zonal Office. He is not examined. His statement was not recorded. The carrier of samples of Charas to Forensic Laboratory was not examined.

u. PW-1 Monish Bhalla deposed that on 17th February, 2002 he received message from Zonal Director, PW-6, that appellant is required to be interrogated in connection with search carried out at Silvassa and to trace him out as he is not in Silvassa. He went to Ladol as directed by PW-6. He traced appellant. Summons was served upon him on 17th February, 2002 between 5.30 P.M. to 6.00

P.M. asking him to reach Silvassa on 18th February, 2002. It is the prosecution case that, on 17th February, 2002 Charas was not found at Masat, Silvassa. N.C.B. team was leaving from there towards Godown in another township i.e. Demni road, Dadra and they were not aware what is lying at said place. However, in the summons to appellant, it was beforehand mentioned that, an enquiry in connection with search of factory premises at 53, 54 Masat Silvassa belonging to appellant is conducted and appellant was summoned to appear before Investigating Officer on 18th February, 2002 at Masat, Silvassa factory and not at Dadra Godown. Hence, the question arises as to how N.C.B. officials anticipated that on search at Dadra Godown, Charas would be recovered concealed in kettles and since it would be difficult for them to cut kettles at Dadra, Mangesh will offer them to take tea kettles to factory at Masat, Silvassa on 18th February, 2002. Accordingly appellant was summoned to Masat Silvassa instead of Godown at Demni road, Dadra.

v. The entire story of prosecution is unbelievable. It is concocted. The statement of appellant and others recorded under Section 67 of N.D.P.S. Act are not admissible in evidence.

w. PW-1 doesn't say anything as to from the evening of 18th February, 2002, after completion of search panchanama till 20th

February, 2002, where exactly did they keep such a huge consignment of 372 k.g. Charas and 248 boxes of big size steel tea kettles in their custody, N.C.B. did not have their office at Silvassa.

x. N.C.B. officers wanted to frame appellant and Sunday, the industrial holiday was chosen to show raid at Silvassa factory. However, unexpectedly workers were found there, so they could not claim recovery of Charas there and hence, they concocted story of second panchanamas of discovery of Charas at another place in Demni road Godown.

y. Recording of additional evidence cannot be permitted. The purpose of Section 391 Cr.P.C. is not to permit such type of additional evidence, which would clearly amount to a Retrial and allowing prosecution to cover all lacuna and build a new case to the prejudice to the appellant.

7. Learned Advocate for the appellant has relied upon following discussions:-

i. Tofan Singh Vs. State of Tamil Nadu (2021) 4 SCC 1.

ii. Sanjeev and Another Vs. State of Himachal Pradesh.

iii. Vijaysingh Chandubha Jadeja Vs. State of Gujarat (2011) 1 SCC 609.

iv. State of Rajasthan Vs. Permanand and Another (2014) 5 SCC 345.

- v. K. Mohanan Vs. State of Kerala (2000) 10 SCC 222.*
- vi. State of Punjab Vs. Baljinder Singh (2019) 10 SCC 473.*
- vii. Naresh Kumar @ Nitu Vs. State of Himachal Pradesh (2017) 15 SCC 684.*
- viii. Noor Aga Vs. State of Punjab and Another (2008) 16 SCC 417.*
- ix. Karnail Singh Vs. State of Haryana (2009) 8 SCC 539.*
- x. Boota Singh and Others Vs. State of Haryana 2021 SCC online SC 324.*
- xi. Omprakash @ Baba Vs. State of Rajasthan (2009) 10 SCC 632.*
- xii. Avatar Singh and Others Vs. State of Punjab (2002) 7 SCC 419.*
- xiii. Mohd. Aslam Khan Vs. N.C.B. and Another (1996) 9 SCC 462.*
- xiv. Rajaswar Prasad Misra Vs. State of West Bengal and Another (1996) 1 SCR 178.*
- xv. Rambhau and Another Vs. State of Maharashtra (2001) 4 SCC 759.*
- xvi. Rajvinder Singh Vs. State of Haryana (2016) 14 SCC 671.*

xvii. Nishar Ahmed Fajmohammed Kaji Vs. State of Gujrat (1998) 9 SCC 23.

xviii. Bir Singh and Others Vs. State of Uttar Pradesh (1977) 4 SCC 420.

8. Learned Advocate for Respondents submitted that, there is sufficient evidence against the appellant to convict him. Before deciding this appeal the prosecution may be permitted to adduce additional evidence in accordance with Section 391 of Code of Criminal Procedure. During course of investigation the investigating officer has recorded statements of several witnesses for the purpose of proving the prosecution case. Summons under Section 67 of the N.D.P.S. Act were issued to several persons and their statement were recorded. Viz. Mangesh Shah (brother of appellant), who showed the Godown where Charas was found stashed in kettle. Dharmesh Kasturchand Shah who produced the lease deed between his father and the appellant in respect to Godown from where the Charas is recovered. Mr. Ghesubhai Purushottam Mehta from whom the appellant had purchased the tea kettles for the purpose of stashing Charas. Mr. Jayantilal Kachrabhai who introduced the appellant to Mr. Ghesubhai Mehta, Mr. Hasmukhbhai Patel, the persons who introduced the appellant to Jayantibhai Kacharabhai on the request of appellant for purchase

of tea kettles. The prosecution examined six witnesses namely PW-1 Manish Bhalla, intelligence officer, PW-2 Pradeepkumar Malik, panch witness, PW-3 Jan Mohammad Fakirbhai Mansoori, the Scientific Officer cum-assistant-chemical-analyser at FSL Ahmedabad, PW-4 Vikram Ratnoo, intelligence officer, PW-5 Paul Kundu Parambil, intelligence officer and PW-6 Pawansingh Tomar, Zonal Director, N.C.B. During the course of trial, statements of Mr. Mangesh Shah, Mr. Dharmesh Shah, Mr. Ghesubhai Mehta, Mr. Jayantibhai Kacharabhai were proved through investigating officer by exhibiting their statements being admissible in evidence under Section 67 of the Act. The statement of Mr. Mangesh Shah, whose statement was recorded under Section 67 came to be exhibited as Exhibit-122 through PW-4, the intelligence officer Mr. Vikram Ratnoo. The statement of Mr. Dharmesh Shah was exhibited as Exhibit No.124 through PW-4-Vikram Ratnoo. Statement of Mr Jayantibhai Patel was exhibited as Exhibit No.159. Statement of Mr. Ghesubhai Mehta was exhibited as Exhibit No.162 and statement of Mr, Hasmukhbhai Patel is exhibited as Exhibit No.160. At the relevant time the statements recorded under Section 67 were admissible in evidence. Hence, there was no occasion for examining those witnesses. The trial Court had observed vide order dated 12th January, 2005 and 31st March, 2005 that, the statements

recorded under Section 67 of the N.D.P.S. Act are admissible. The evidence is required to be adduced in the interest of justice. The statements recorded by intelligence officers were admissible in evidence as per law prevailing then, and therefore, it was not deemed necessary for the prosecution at that time to examine those witnesses. However, with the latest Judgment in the case of Tofan Singh Vs. Union of India, it has been held that, statements recorded under Section 67 are not admissible in evidence. Hence, it is necessary to examine these witnesses. Even otherwise the evidence adduced by prosecution has been considered by the appellant. The prosecution has proved that the appellant was in conscious possession of Charas. There is evidence of Mr. Tomar who had stated that on getting additional information from Mangesh one Godown is independently in possession of Bankim at Demni raod Dadra, he reduced the additional information into writing and forwarded the same to his immediate superior Mr. Vikram Ratnoo has fully corroborated evidence of Mr. Tomar on additional information. These officers has stated that key of Godown was with Mangesh and he showed his willingness to take the team to the Godown. Mr. Malik supported the evidence of Mr. Ratnoo and Mr. Tomar that Mr. Mangesh opened the Godown. The prosecution has discharged its burden to establish conscious possession of accused.

Section 42 of the Act was complied. PW-6 Mr. Tomar has stated that, on receipt of specific information that Mr. Bankim was in possession of huge quantity of Charas, he informed his immediate superior vide letter Exhibit-150. Search was in premises and Section 50 was not applicable. Raid was conducted in presence of Gazetted Officers. All the safeguards under N.D.P.S. Act were complied. Learned counsel relied upon following decisions:-

- I. Zahira Sheikh Vs. State of Gujrat (2004) 4 SCC 158.
- II. Brig. Sukhjeet Singh (Retd), Mvc vs The State Of Uttar Pradesh decided by Hon'ble Supreme Court in Criminal Appeal No.148 of 2019 dated 25 January, 2019.
- III. Mohd Zahid vs State, Through N.C.B. decided by Hon'ble Supreme Court in Criminal Appeal No.1457 of 2021 dated 7 December, 2021.
- IV. Karnail Singh vs State Of Haryana (2009) 8 SCC 539.
- V. The State Of Punjab vs Baljinder Singh and Anr decided by Hon'ble Supreme Court in Criminal Appeal No.1565 of 2019 dated 15 October, 2019.
- VI. Than Kunwar vs The State Of Haryana decided by Hon'ble Supreme Court in Criminal Appeal No.2172 of 2011 dated 2nd March, 2020.
- VII. Abdul Aziz & Another Vs. Central Narcotics Bureau decided

by Madhya Pradesh High Court in Criminal Appeal No.743 of 2001.

VIII. Jagdish Purohit Vs. State of Maharashtra (1998) 7 SCC 270.

IX. Megh Singh Vs. State of Punjab (2003) 8 SCC 666.

X. Ramji Duda Makwana Vs. State of Maharashtra (1994) 1 BOM CR 488.

9. Learned Advocate for the appellant submitted that, at this stage the prosecution should not be allowed to adduce additional evidence by invoking Section 391 of Code of Criminal Procedure. The prosecution had adduced the evidence of witnesses, the appellant was subjected to trial. He has been convicted. He is in custody. The prosecution was not prevented from examining the aforesaid witnesses. The prosecution can not be allowed to fill up lacuna by permitting to bring on record new evidence. Assuming that, the statements were recorded under Section 67 during the course of investigation, exhibiting them by itself does not become evidence. The substantive evidence of witnesses was in any case not recorded. Assuming that there is change in law about admissibility of statement under Section 67 of the Evidence Act, the prosecution can not be permitted to examine those witnesses.

10. PW-1 Monish Bhalla deposed that he was working as intelligence officer at N.C.B. Ahmedabad from October, 2000 to September, 2021. On 17th February, 2002 he got message from Mr.

Pawansingh Tomar, Zonal Director, N.C.B. Ahmedabad that Mr. Bankim Shah was required to be interrogated in connection with the search which was being carried out at Silvassa and therefore, he had to trace him as he is not at Silvassa. He proceeded with others to Ladol to trace Bankim Shah. They could trace him and summons was served upon him. He was asked to remain present at Silvassa on 18th February, 2002. Mr. Bankim Shah came to Silvassa alongwith them. They went to factory premises plot No.53/54 where the search was carried out. Mr. Mangesh Shah (brother of Bankim Shah) was present at factory during search. Mr. Bankim Shah was informed that his personal search is to be carried out in the presence of Gazetted officer, if he desire. He was also informed that there were three Gazetted officers present there. Mr. Bankim Shah gave option that, he would like to be searched before Mr. P. N. Pandey. His search was conducted. Some documents were found. The process of cutting tea kettle, recovery of Charas, sampling etc. was going on. Mr. Bankim Shah was interrogated by him. He was informed about Section 67 of the N.D.P.S. Act. He agreed to give voluntary statement. Mr. Bankim Shah gave his statement in his own handwriting and confessed his involvement in crime. He was arrested. Statement of accused Bankim was marked as Exhibit 92. Statement of Dharmesh Kasturchand was recorded about rent

agreement of the Godown from where Charas was recovered. Mr. Bankim Shah was produced before the Court. He was remanded to custody. Mr. Shilendra Lodha was to deposit the seized property of Custom Godown Valsad. On 19th February, 2002 property was handed over to Mr. Lodha and it was deposited by him on 20th February, 2002 at Valsad Custom Godown. On 21st February, 2002 samples were dispatched by Mr. Vikram Ratnoo to FSL Ahmedabad. Investigation was referred to him. He found that, two more persons were involved in the Charas deal. They were Mr. Chandraprakash Sharma @ Shankar and Mr. Satyaprakash Behl. Mr. Chandraprakash Sharma was in jail at Navsari. Jail authority was requested to supply details of visitors from visitor register, to find out who visited him. Statement of Mr. Satyaprakash Behl was recorded, he confessed that, there was transaction of Rs.11,00,000/- between him and Mr. Bankim Shah. Mr. Chandraprakash Sharma was in custody in another case. His statement was recorded. He was arrested in the present case and produced before concerned Court. The details of visitors of Mr. Chandraprakash Sharma at Navsari Jail were called. It was noted that, Mr. Mangesh Shah (brother of Bankim Shah) had met Chandraprakash Shah in Navsari Jail on 20th September, 2000. Mr. Mangesh Shah was interrogated. Statement of Mangesh was

recorded on 13th May, 2002. Statement of Mr. Jayantabhai Patel was recorded on 4th June, 2002. He identified the photograph of Mr. Bankim Shah. Statement of Mr. Hasmukh Patel was recorded on 4th July, 2002. Statement of Mr. Pathan manager of Hotel Galaxy Vapi was recorded on 4th July, 2002. He stated that DRI had searched hotel premises in September, 2000 and Charas was recovered. Mr. Chandraprakash Sharma was involved in seizure. Statement of Mr. Ghesubhai Mehta was recorded on 10th April, 2002. He gave information that 1129 tea kettles were supplied by him to Bankim. Statement of Dinesh Kabra was recorded on 5th July, 2002. After completing investigation he filed complaint.

11. PW-1 was cross examined by the Advocate for the accused No.1. He stated that, he is not aware whether diary is maintained about the activities done in particular Zonal office. Whenever any offence is detected crime register is maintained. The entries in crime are made normally by Investigating Officer. In his absence the Zonal Directors instructions are followed. They do not maintain arrest register. Godown register is maintained in respect of the seized muddemal. Zonal Director is the custodian of seized muddemal and Godown register. Normally officer who is in charge of the case has to take Godown register from the Zonal Director and to make entry. Inward and outward register is maintained in

their department. He is not aware whether dispatch register is maintained. As an investigating officer, he inquired when entries in crime register were made in this case. He do not recollect whether he made inquiry, who had recorded entry in crime register. On 17th itself he came to know that, crime was given No.3 of 2002. He cannot give any reason as to why crime number is not mentioned in the Exhibit 91. He was on the way to Ladol. From Ahmadabad to Ladol he was in touch with Mr. Tomar whenever required. He is not aware whether their office is maintaining movement register of all officers. A log book is required to be maintained by them for Government vehicles. After returning to headquarter each officer has to report verbally or in writing to Zonal Director. Except his oral words there is nothing in writing to show at what time he left for Ladol. There is no record to show who were the persons who accompanied him. There is no record to show when and why he contacted ATS. He has not contacted ATS but the officer from ATS contacted him. On 16th morning Mr. Tomar had left Ahmedabad along with team for Silvassa. That time he had no knowledge about the purpose for which Mr. Tomar left Ahmedabad. He cannot say whether crime register was in the office when Zonal Director left with the team. He do not recollect whether crime register was moved at any time from the Zonal office. He did not obtain extract

of crime register during investigation. Distance between Ahmedabad to Ladol is around 70 to 80 k.m. He did not find it necessary to record statement of officers who accompanied him or any other person to show that they had been to Ladol and served summons to Mr. Bankim Shah. He had not given intimation to Mr. Shivnani that Narcotic offence is registered against Mr. Bankim and therefore, they have to go to Ladol. He told Shivnani that they have to locate Mr. Bankim Shah. They reached Ladol at about 6.30 p.m. After he reached Silvassa he came to know that Bankim is involved in such grave offence of Narcotics. He did not think it necessary to make further record in connection with his visit to Ladol after the case was assigned to him. His sepoy pointed out one house and said Mr. Bankim resides there. Mr. Bankim arrived from marriage. Some persons were with him. Summons to the witnesses are served through registered post, speed post, special messenger or by I.O. himself. He received message from Director to serve summons on Bankim. It was a Sunday. He was at home. He made inquiry about owner of the house from telephone inquiry. He did not inquire about the owner of that house from telephone exchange. He did not peruse telephone directory. He did not make inquiry personally regarding ownership of that house. He had not made any record as to who identified Mr. Bankim before him. He was not knowing Mr.

Bankim Shah previously. In the complaint and entire record there is nothing to show that Bankim was identified by somebody at Ladol. In the subsequent investigation it transpired that, wife of Mr. Bankim Shah was with him at Ladol. After coming to Silvassa he did not personally inspected the factory premises where Mr. Bankim was staying. He did not make inquiry of owner of tempo in which muddemal was shifted from Dadra to Masat. He did not make inquiry about name of driver of tempo. He did not record statement of driver. He did not ascertain the name of persons who loaded muddemal in tempo from Dadra. He did not make inquiry about workers working in the factory at Silvassa. He did not make inquiry about manufacturing activities being carried out in that industry. Till the arrest of Bankim muddemal was in the factory premises. He do not know where the muddemal after 12 o'clock night of 18th. He did not make any inquiry as to whether any receipt was obtained from Shailendra Lodha regarding handing over of attached muddemal. He did not come across any separate receipt passed by Mr. Shailendra Lodha regarding taking over custody of muddemal. Inventory receipt on record covers this aspect. He do not know on whose computer inventory receipt was prepared. He has not recorded statement of superintendent custom Valsad who issued Godown receipt No.II dated 20th February, 2002.

He did not make inquiry as to where muddemal was lying till 20th February, 2022 at 10.00 A.M. So far as transportation of muddemal concerned except inventory receipt, Godown receipt, truck receipt and toll naka receipt, there is no other record with N.C.B. On 20th February, 2002, the Godown officer has not informed that, they will receive part of Muddemal for want of space and they will not be able to receive the remaining muddemal. He did not record statement of Shailendra Lodha. He did not receive copy of Godown register of Valsad customs Godown. He did not make inquiry whether Valsad customs Godown officer has resealed the property on its receipt. He did not collect copy of register during investigation. He did not make any inquiry as to whether the officer who received the property at Ahmedabad resealed the property on its receipt. He has not come across any receipt which Mr. Shailendra Lodha took from Godown in-charge, N.C.B. Ahmedabad. He did not make inquiry how long the property was lying in N.C.B. Ahmedabad, Godown. There is no practice of resealing the property on its receipt by the custodian of Godown in N.C.B., Ahmedabad. There is no instructions that officer recording statement has to record in his own handwriting. Bankim gave statement in his handwriting. He has not made any endorsement on any statement that witness has voluntarily given statement in

own handwriting. When the application for production of property was moved in the Court, he made statement that muddemal is about two truck loads. 222 empty kettles were left at factory premises. As Charas was not found those kettles were returned to Mangesh. Surendra Dataniya carried the property to FSL, Ahmedabad. He did not record his statement. Accused Chandraprakash was in jail since September, 2000, in connection with other offence. Sketch map of the place was not prepared from where the goods were seized. Residence of Bankim's brother Mr. Mangesh is in the premises of factory. Till 6 o'clock on 18th he did not make any inquiry about the family background and other details of Bankim.

12. PW-2 Pradeepkumar Chotelal Malik has stated that, he was in Central Excise at Vapi as Inspector. He acted as a panch in a raid conducted on 17th and 18th February, 2002. He had gone to plot No.53/54 along with the N.C.B. team. On inquiry about Mr. Bankim the workers told that there was residence of brother of Bankim. They went to residence. They met Mangesh (brother of Bankim Shah). He told them that, Bankim had gone to attend marriage. He was told by the team that they have come for search operation. They informed Mangesh that, they are Gazetted officers. Mangesh was informed that as per N.D.P.S. Act his personal search

was to be taken in presence of Gazetted officer/Magistrate. He was also informed that three Gazetted officers Mr. Pandey, Mr. Mathew and Mr. Tomar were present there. Mangesh agreed for personal search. Mangesh was personally searched. Nothing incriminating was found from him. Entire residential building was searched. Nothing incriminating was found. Compound and sheds were searched. Nothing incriminating was found. Panchnama was recorded. On 17th February, at 4.30 P.M. he received a phone call from Mr. Ratnoo. They went to the Godown at Dadra-Demni road. Mangesh showed one shed. It was opened by him. All of them entered the shed. Some boxes were kept in the shed. On opening box tea kettle was found. There were layers to the kettles. On opening from the bottom burada and patties were found. Sample was tested with field drug testing kit. It was Charas. It was 6.30 P.M. There was no light. Mangesh said other boxes which are to be checked can be shifted to their Masat plant where there is a machine to open the tea kettles. 470 boxes were loaded in one mini truck. They went to Masat plant. All boxes were unloaded. Tea kettles were opened. In some kettles patties were found and in some patties were not found. On 18th February, 2002 at about 9.00 A.M. some persons come. Bankim Shah was with them. Mangesh identified him as his brother. Mr. Ratnoo told Bankim that his

personal search was to be taken in the presence of Gazetted officer. He informed him that Mr. Tomar, Mr. Pandey and Mr. Mathew are Gazetted officers present there. Mr. Bankim gave option that he can be searched before Mr. Pandey. Mr. Ratnoo took personal search of Mr. Bankim before Mr. Pandey patties were removed from tea kettles in which they found Charas. Samples collected. Panchanama was drawn.

13. In the cross examination PW-2 stated that, he was posted at custom Daman. Whenever officer is asked to act as a pancha he has to report in the office after proceedings are over. The name of factory worker was not asked by him or Mr. Ratnoo in his presence. There was only one lathe machine. Mangesh informed that, Bankim alongwith wife had gone for marriage to Ladol. No sketch was drawn of the Godown. He do not know who had brought mini truck. At the time of loading he had not seen anybody with the driver. They did not enquire about the name of driver. Dadra, Demni is an industrial area. Sepoy and labour were removing patties and burada from the kettle. Mr. Ratnoo did not ask their names in his presence. No identification mark was made to show from which kettle, which patties were removed.

14. PW-3 Jan Mohammad Mansuri is Scientific Officer and Assistant Chemical Examiner at FSL, Ahmedabad. He stated that

muddemal was received by laboratory on 21st February, 2002. Samples were given to him on 13th March, 2002 for analysis. Samples were found to be Charas. He stated that in 2002 there were four officers in the laboratory who were analyzing Narcotic Drugs samples.

15. PW-4 Vikram Ratnoo deposed that, he was attached to N.C.B. Ahmedabad. On 17th February, 2002, he was at Silvassa. Mr. Tomar, Mr. Pathak, Mr. Lodha and Mrs. Chaube were in the team. Mr. Tomar apprised all of them about information. The information was that one Mr. Bankim Shah was residing at Malad, Mumbai, having factory at Masat and there is likelihood of concealment of huge quantity of Charas. Panchas were called. They reached plot No.53, 54 at Masat Industrial area. Plot No.53 , 54 had a common boundary. Some workers were there. They enquired with them about Bankim. They told that Bankim was not there but his brother Mangesh is available on first floor of residential building. They went there. Mangesh was present. The team took search of first floor of residential building nothing objectionable found. Search of big halls was taken. Nothing objectionable found. Panchanama recorded. Summons was served on Mangesh. He gave statement. He stated that Bankim has proceeded to Ladol for attending marriage. He also informed that there is one more Godown in

possession of Bankim at Demni road. The team decided to search Godown at Demni road. Panchas were called. They proceeded to Godown. Mangesh was having keys of locks. He opened the lock. They entered the Godown. Cartoons were lying in Godown. On opening box tea kettle was found. Tea kettles were containing Charas. It was decided to take all cartoons to Masat Industrial area. Cartoons were loaded in vehicle. They went to Masat. They entered plot No. 53, 54. Cartoons were offloaded from vehicle. Kettles were opened. Charas was found in some kettles. On 18th February, at 9.00 A.M. Mr. Bhalla and others came to plot No. 53, 54 with Bankim. He was explained provisions of Section 50 and he was given option for his search before Magistrate or the Gazetted officer. He was told that there are Gazetted officers Mr. Tomar, Mr. P. N. Pandey and Mr. Mathews. Mr. Shah agreed for search before Mr. Pandey. He was searched some documents and Sim Card was recovered. Kettles in which Charas was not found were returned to Bankim and Mr. Mangesh. Process of Sealing, sampling completed. Panchnama drawn. Mr. Bhalla have served summons on Mr. Bankim Shah at Ladol. He served summons on Dharmesh Shah. He handed over agreement between his father and Bankim Shah in respect to Godown at Demni. On inquiry he found that Mr. Chandraprakash Sharma was in Badodara Jail. Summons was

served upon him and Statement was recorded. Mr. Tomar informed him that, information was received by him, that Mr. Mangesh Shah was first person to meet Chandraprakash Sharma in Jail. On 8th May, 2002 he issued summons to Mangesh Shah. His statement was recorded.

16. In the cross-examination he stated that the team left Ahmedabad on 16th March, 2002. Till the arrest of Bankim Shah he had not seen the paper on which information was written by Mr. Tomar. He had not recorded the information immediately after it was given by Mr. Tomar. He was not given instructions by Mr. Tomar in writing to carry on the search. It was verbally given. He had not recorded in first document which he had prepared that instructions were verbally given to him by Mr. Tomar. He did not inquire about ownership of plot Nos.53 and 54. When they reached the spot he did not find it necessary to make local inquiry from near by persons. When they went to first floor and the person introduced himself he did not get it confirmed from anyone else. He did not inquire about the names of workers. Mr. Tomar introduced Mr. Daru and Mr. Malik as Panchas to him. He did not disclose information to customs team. There was no photographer in the team. Photographs of first search were not taken. He had not prepared any sketch of any premises. He did not inform Mangesh

Shah in writing about their right to be searched before the Magistrate or Gazetted officer. He did not ask Mangesh to handover the keys of Godown to him. He has not attached key and lock. The process of opening kettle was over at 12.00 noon. He did not record statement of Shailendra Lodha. After recording the statement of Mangesh and Bankim, he did not find it necessary to inquire into ownership of plot Nos.53/54.

17. PW-5 Paul Kunduparanbil has stated that he joined as Senior Intelligence Officer in DRI Surat in 1997. Chandraprakash Sharma, Baliram Prasad and Bijaysingh were accused in seizure of Hashish at Vapi on 5th September, 2000. Complaint in respect to said seizure has been filed in Sessions Court Valsad at Navsari. In that case Mansingh was the investigating officer and he was present as Gazetted Officer. He had recorded statements of Chandraprakash in that case.

18. PW-6 Pawan Singh Tomar stated that information was received by him on 12th February, 2002 that, one person Mr. Bankim Shah is resident of Malad, Bombay and he is in possession of huge quantity of Charas at his factory at Silvassa. Mr. Bankim was in search of a buyer who can purchase the consignment of Charas. He sent the copy of information to his superior Shri. Kala, Deputy Director General Enforcement, N.C.B. Delhi. On 16th

February he called officers to his office and discussed with them about information and that they have to go to Silvassa. He told PW-4 Vikram Ratnool to be ready with kit. On 16th February, 2002 the N.C.B. team left for Silvassa. On 17th February, 2002 they reached plot No. 53, 54 at Masat Industrial Estate. There were workers. Enquiry was made with worker about Mr. Bankim. Worker told that Mr. Bankim is not there at the moment but his brother Mr. Mangesh is there on the first floor. The team went to first floor. PW-4 knocked the door. One person introduced himself as Mangesh Rasiklal Shah. His search was conducted. Nothing objectionable was found. Search of entire premises was conducted. Two big Godowns were there in which some machines and materials were there. Search was over. The first panchanama was over. Nothing objectionable was found. Statement of Mangesh was recorded. He stated that Mr. Bankim had gone to Ladol to attend marriage. One Godown is independently in possession of Mr. Bankim and he is having keys of Godown and he is willing to show them the Godown. He instructed Monish Bhalla (PW-1) to trace Mr. Bankim. Some panchas were called. Entire team went to Demni road Godown. It was around 5.30 PM. Mangesh opened the Godown. Boxes were kept there. One box was opened and found with steel kettle. Bottom side of kettle was broken. Charas was

concealed. There were so many boxes. Mr. Mangesh stated that he was not aware of contents of kettle. He informed that there is lathe machine in factory at plot No.53, 54. It was decided to transport all those boxes to the factory. Boxes were loaded in mini truck. At 9.30 P.M. they left the Godown. They reached factory at 10.00 P.M. All boxes were unloaded. Boxes were opened and bottom of kettle was broken. On 18th Morning Mr. Bhalla (PW-1) arrived at factory with Mr. Bankim. There were 470 boxes. In some boxes no patties were found. Those boxes were handed over to Mangesh. Samples were taken. Mr. Bankim was told that his personal search has to be taken. PW-4 explained the provisions of Section 50 to Mr. Bankim. Hence, Mr. Bankim was told that his personal search can be taken before Mr. Pande who was one of the Gazetted officer present with the team. In personal search some papers were found. Panchanama was concluded. PW-1 recorded statement of Mr. Bankim. He confessed his involvement, in the case. He was arrested. PW-4 submitted report under Section 57 to him. Custody of Muddemal was given to Shailendra. The Muddemal was loaded in truck. Muddemal was handed over to DC Customs Valsad. On 20th he sent reports to immediate superior Shri. Kala at Delhi office. One was in respects of Section 42 (2) regarding additional information received by him on 17th February. Second report was under Section

57. Case was handed over for further investigation to PW-1. PW-4 recorded statement of Chandraprakash Sharma at Vadodara Jail. He was arrested. In cross-examination he stated that whenever any place is to be searched usually local witnesses are to be kept present. He did not request Mr. Pande to secure presence of local witnesses. On 17th after coming to Silvassa he had not contacted any local Government Officer so as to secure presence of any Gazetted Officer or Magistrate. One of the Panch was from Excise and Customs. He didn't feel that a person from Excise and Customs would not be an independent Panch. He did not advise PW-4 or other officers to note down the names of workers in the factory. 17th was holiday. It was possible to send the information received on 17th to superior officer. They came to know during search that it was a factory for manufacturing steel utensils. He didn't ask any of the officers to draw sketch or map.

19. Appellant was arraigned as accused No.1. Accused No.2 Mr. Satya Prakash Bahl was discharged vide order dated 17th June, 2003. Criminal Revision Application No.55 of 2004 challenging order of discharge was dismissed by High Court on 19th October, 2004. Accused No.3 Chandraprakash Sharma and appellant were tried for offences punishable under Sections 20 (b) and 29 of N.D.P.S. Act. Accused No.3 was acquitted. Whereas appellant was

convicted. The trial Court held that the appellant was in conscious possession of Charas and he is connected with Charas. In paragraph 14 of the judgment, the trial Court has observed that to establish exclusive possession of Bankim over Demni Godown and the boxes kept therein, prosecution has relied upon (i) statement of Mr. Mangesh (Exh.122) recorded by Mr. Ratnoo under Section 67, (ii) statement of Dharmesh Shah (Exh.124) recorded by Mr. Ratnoo under Section 67, (iii) oral evidence of Mr. Malik, Mr. Ratnoo and Mr. Tomar, (v) statement of accused Bankim (Exh.92) recorded under Section 67 by Mr. Bhalla. It is pertinent to note that the prosecution did not examine Mangesh and Dharmesh Shah. The prosecution relied upon decision in Rajkumar Karwal Vs. Union of India and Ors. AIR 1991 SC 45 to contend that the officers of Narcotics Control Bureau are not Police Officers and therefore, statement recorded by them under Section 67 are admissible in evidence. The trial Court observed that, in view of the existing of legal position statements of witnesses recorded under Section 67 of the Act will have to be considered. The trial Court further observed that Mangesh is younger brother of Bankim and Dharmesh is son of his landlord. Omission to examine these witnesses by the prosecution would not adversely affect the prosecution case particularly when Mr. Ratnoo, Mr. Malik and Mr. Tomar have stated

that Mr. Mangesh had given additional information of Demni Godown in possession of Bankim. The trial Court relied upon the contents of statement of Magnesh and Dharmesh. The trial Court also observed that Mr. Tomar received additional information from Mr. Magnesh which he reduced into writing and sent it to superior and Mr. Ratnoo corroborated evidence of Mr. Tomar on additional information. The entire case is based on the premise that the contraband Charas belonged to Mr. Bankim. The source of additional information is Mr. Mangesh. The theory of conscious possession of Bankim is also based on version of Mr. Dharmesh. They are not examined by prosecution but their version reflected in statements is accepted for convicting the appellant. The statement of those persons could not be relied upon for want of sanctity of law. The case of prosecution that appellant was in conscious possession of Charas suffers from doubt. The trial Court also relied on statement of appellant recorded under Section 67 of N.D.P.S. Act. Thus, the conviction is based on inadmissible statement. The trial Court has also considered statement of Gheesubhai (Ex.162) to believe that he supports the order placed by accused Bankim about preparation of tea kettles. Gheesubhai is not examined by prosecution.

20. The prosecution case is that information that Bankim Shah is

in possession of Charas was received on 12th February, 2002. On 16th February, 2002, the team left for Silvassa. On 17th February they reached at Plot No.53, 54 of Masat Industrial Estate. Search was conducted. Nothing incriminating was seized. Mangesh Shah gave information about Godown at Demni, Instructions were given to trace Bankim Shah. The team went to Demni Godown. On search kettles containing Charas were found. The articles were found. The articles were taken to factory. Charas was seized. Charge-sheet was filed. appellant was tried and convicted. This appeal was preferred in 2005. Interim application No.1238 of 2022 is filed on 16th April, 2022 seeking permission to adduce additional evidence as per Section 391 of Cr.PC. According to respondents, during course of investigation, the investigating officers has recorded statements of witnesses, viz. Mangesh Shah (brother of appellant) who showed Godown where Charas was found, Dharmesh Shah who produced the lease deed between his father and appellant about Godown from where Charas was recovered, Ghesubhai Purushottamji Mehta from whom appellant had purchased tea kettles for stashing the Charas, Jayantibhai Kharabhai who introduced appellant to Ghesubhai Mehta and Hasmukhbhai Patel, who is the person who introduced appellant to Jayantibhai on request of appellant for purchase of tea kettles.

During trial statements of Mangesh Shah, Dharmesh Shah, Ghesubhai Mehta and Jayantibhai Kachrabhai were exhibited being admissible under Section 67 of N.D.P.S. Act. The trial Court passed order that statements are admissible in evidence. It is further contended that, in view of decision in the case of Tofan Singh Vs. Union of India (Supra) statements recorded under Section 67 are not admissible in evidence. Hence, prosecution proposed to examine those witnesses. Assuming that the aforesaid decision was delivered during pendency of appeal, the trial Court had relied upon the contents of the said statements by exhibiting the statements under the belief that such statements are admissible in evidence. The prosecution had an opportunity to examine those witnesses and at this stage the prosecution cannot be permitted to examine them. The trial Court ought to have appreciated that substantive evidence of witnesses was necessary to convict the accused. The prosecution is now trying to fill up lacuna by adducing evidence of those witnesses. In the case of Zahira Sheikh and Another (Supra) relied upon by respondent it was observed that, Section 391 Cr.P.C. is salutary provision which clothes the Courts with the power to effectively decide an appeal. Section 391 is one such exception to the ordinary rule and if the appellant court considers additional evidence to be necessary, the provisions in

Section 386 and 391 have to be harmoniously considered, to enable the appeal to be considered and disposed of in the light of additional evidence as well for this purpose it is open to the appellate Court to call for further evidence before appeal is disposed off. In Brig. Sukhjeet Singh (Retd), Mv vs The State Of Uttar Pradesh (supra) it is observed that, power to take additional evidence under Section 391 is with an object to decide the appeal by the appellate Court to secure ends of Justice. Learned Counsel for the appellant has also relied upon decisions in support of submission that application under Section 391 of Cr.PC. is devoid of merits. In Rajaswar Prasad Misra Vs. State of West Bengal (supra) it is observed that the power to adduce additional evidence must be exercised sparingly. The evidence must not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against accused. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of Justice dictate otherwise. In the case of Rambhau and Another Vs. State of Maharashtra (supra) it is held that Section 391 of Cr.PC. is not intended to fill up gap in the prosecution and the cause prejudice to accused. In the case of Rajvinder Singh Vs. State of Haryana (supra) it is held that, it was

possible for prosecution to examine forensic expert at trial stage and High Court rightly rejected prayer for additional evidence at appellate stage. In the case of Brig. Sukhjeet Singh (Retd), Mv vs The State Of Uttar Pradesh (supra) it is held that though appellate Court has power to take additional evidence in a suitable case yet the discretion showed not be exercised to fill up gaps or lacuna in the prosecution evidence. It is pertinent to note that the prosecution is trying to fill up the gap by examining the additional witnesses.

21. PW-6 Pawan Tomar claimed that he received specific information on 12th February, 2002 that the appellant is resident of Mumbai and possessing huge Charas in the steel factory at Silvassa. He claims having sent copy of information to superior officer under Section 42(2) of N.D.P.S. Act on 12th February, 2002. Photocopy of documents purportedly forwarding letter submitted without the copy of actual information claimed to have been written down by him without proof either its actual dispatch to superior officer. There is no cogent evidence to show connection between the Godown and the appellant. The Godown was allegedly shown by Mr. Mangesh (brother of appellant). There is no cogent evidence to establish that, the Charas recovered from the kettles was stored by the appellant. The owner of the Godown was not

examined. It is not established beyond doubt that, the Godown was in possession of the appellant. The search had commenced in the absence of the appellant. There is no evidence to establish that, from where the appellant has received the Charas. The other accused were discharged and acquitted.

22. According to witnesses information about possession of Charas by Bankim Shah at Silvassa was received by PW-6 on 12th February, 2002. The team proceeded to plot No. 53, 54 at Silvassa. Search was conducted at factory. Nothing incriminating found. Mangesh Shah was residing in premises. Information about him was received from workers in factory. Apparently their statements were not recorded and if recorded they were not examined. Photographs not taken, Mangesh than disclosed that Bankim is in possession of Godown at Demni. He did not state that Charas is stored in said Godown. His statement was recorded. He is not examined. He took the raiding team to Demni Godown. Charas was found concealed in kettles. Statements of son of owner of Godownkeeper Dharmesh Shah, Ghesubhai Mehta from whom kettles were purchased, Jayantibhai who introduced appellant to Ghesubhai and Hasmukh Patel who introduced appellant to Jayantibhai were recorded but not examined, statements were exhibited. There is no strong evidence to establish that Godown

was in possession of appellant and he was in conscious possession of Charas.

23. PW-4 stated that information was received from Mangesh Shah that appellant is having another Godown at Demni road, Dadra. He reduced it in writing and sent it to superior officer. Photocopy of forwarding letter without actual information was produced. PW-4 stated that first panchanama was drawn on 17th February, 2002 at Silvassa factory. No contraband was found. appellant was not present. There is no evidence to show that appellant is residing in the said factory premises. Second panchanama was drawn. Mangesh did not disclose about storage of Charas at Godown at Demni road. However, search panchanama records appellant is in possession of Godown at Demni and Charas stored in Godown. Before proceeding to Demni, it was decided to show that Charas is found in Godown at Dadra. No Photographs were taken.

24. The prosecution case is that no contraband was found on person of appellant, the contraband was seized from kettles allegedly concealed and stored allegedly by appellant in his presence. The defense has contended that there is no compliance of Section 50. The appellant was not informed that he has right to be searched before Gazetted officer. The communication made to

appellant is misleading and violates Section 50 of N.D.P.S. Act. PW-1 Manish Bhalla has stated that, Vikram Ratnoo (PW-4) was in-charge of proceedings. PW-4 informed the appellant that his personal search is to be carried in the presence of Gazetted officer if he so desires. PW-4 also informed accused that there were three Gazetted officers present there. One Mr. Pawan Singh Tomar (PW-6), Mr. P. N. Pandey, Commissioner, Customs and Mr. C. I. Mathew, Superintendent, Excise and Customs. appellant gave option that he would like to be searched before Mr. P. N. Pandey. Accordingly he was searched. Nothing incriminating found on person. Charas was recovered from kettles in his presence which according to prosecution, were in possession of appellant. PW-2 Pradip Malik, panch witness deposed that PW-4 told appellant that his personal search was to be taken in the presence of Gazetted officer. Mr. Tomar, Mr. Pandey and Mr. Mathew are Gazetted officers and they are present. The appellant gave option of search before Mr. Pandey, PW-4 Vikram Ratnoo stated that he explained Section 50 to appellant and gave him option for his personal search before Magistrate or Gazetted officer. He also told accused that Mr. Tomar, Mr. Pandey and Mr. Mathew are Gazetted officers. The accused opted for search before Mr. Pandey, PW-6 Mr. Tomar stated that PW-4 explained the provisions of Section 50 to appellant and the

appellant told him that his personal search can be taken before Mr. Pande who was one of the Gazetted officer present with the team.

25. In the case of Sanjeev and Another Vs. State of Himachal Pradesh (supra) it is observed that although the personal search did not result in recovery of any contraband material but the non compliance of requirement of affording an option was one of the reasons which weighed the trial Court in disbelieving case of the prosecution. In the case of Vijaysingh Chandubha Jadeja Vs. State of Gujarat (supra) it is held that failure to inform the suspect about the existence of his said right would cause prejudice to him. Failure to comply with Section 50 would render recovery of illicit article suspect and vitiate conviction. In the case of SK. Raju @ Abdul Haque @ Jagga (supra) it is observed that the principle which emerges from Vijayshingh's case is that the concept of 'substantial compliance' with requirement of Section 50 is neither in accordance with law laid down in State of Punjab Vs. Baldev Singh (1999) 6 SCC 172, nor can it be construed from its language. Therefore, strict compliance with Section 50(1) by the empowered officer is mandatory. The Court considered question whether Section 50(1) was required to be complied when Charas was recovered only from the bag and no Charas was found on his person. The facts of the case indicated that search of bag of accused

as well as of person was conducted. Nothing incriminating was found on person but the contraband was found in bag. It was held that since the search of the person of accused was also involved, Section 50 would be attracted. As soon as search of a person takes place. The requirement of mandatory compliance of Section 50 is attracted irrespective of whether contraband is recovered from the person of accused or not. It was imperative for witness to inform the accused of his legal rights to be searched in the presence of either Gazetted officer or a Magistrate. In the case of State of Rajasthan Vs. Parmanand and Another (supra) on a search of person of accused no substance was found. However, opium was recovered from bag of accused. It was held that the empowered officer was required to comply with the requirement of Section 50(1) as the person of accused was also searched. In addition of the option being searched by the Gazetted officer or the Magistrate, the accused was given a third alternative by the empowered officer which was to be searched by an officer who was found contrary to intent of Section 50(1). The Constitution Bench in State of Punjab Vs. Baldev Singh (supra) has considered various aspects of the compliance of Section 50 of the Act. It was held that when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to

inform the person of his right under sub-section (1) of Section 50 of being taken to the nearest Gazetted officer or the nearest Magistrate for making the search. In the case of *K. Mohanan Vs. State of Kerala* (supra) it was held that, if the accused, who was subjected to search was merely asked whether he required to be searched in the presence of Gazetted officer or a Magistrate it cannot be treated as communicating to him that he had a right under law to be searched so. The witness in that case sought opinion of the accused whether wanted it or not. If he was told that he had a right under law to have it himself searched what would have been the answer given by the accused cannot be gauged by the Court. However, in *State of Punjab Vs. Baljindar Singh and Another* (supra), the personal search of the accused did not result in recovery of any contraband. It was held that even if there was any such recovery the same could not be relied upon for want of compliance of Section 50 of the Act. But search of vehicle and recovery being proved for non compliance of Section 50 no benefit can be given. This decision is contrary to decision in the case of *SK. Raju @ Jagga* (supra). Subsequently in the case of *Than Kunwar vs The State Of Haryana* decided by apex Court vide Criminal Appeal No.2172 of 2011 considered the decision in the case of *SK. Raju @ Jagga* (supra) and *Baljinder Singh* (supra) and observed that the

decision in the case of SK. Raju (supra) was not brought to the notice of Court in Baljinder Singh's case. However, the latter decision draws inspiration from the Constitution Bench decision in Baldev Singh (supra). It was observed that nothing was recovered from personal search and recovery was effected from bag.

26. Photographs of seizure of contraband were not taken, although there are instructions in manual to take photographs if possible. No reason is given for not taking photographs. The prosecution did not produce seized contraband before trial Court save and except samples. The N.C.B. officer Shailendra Lodha to whom the custody of Charas and tea kettles were given and allegedly deposited Charas in customs Godown at Valsad and Ahmedabad Zonal office is not examined. The carrier of samples of Charas to Forensic Laboratory was not examined. PW-1 had allegedly traced appellant at Ladol. PW-1 went to Ladol with ATS officer and other sepoy as directed by PW-6. Summons was served upon appellant under Section 67 of N.D.P.S. Act on 17th February, 2002 directing him to reach Silvassa on 18th February, 2002. The prosecution case is upon not finding Charas at Masat, Silvassa, the team was leaving to Demni road Godown at Dadra and they were not aware what is lying in Godown. In the summons it was stated that enquiry in connection with search of factory premises at 53, 54

at Masat belonging to appellant is conducted and appellant was summoned to appear before I.O. on the next day i.e. 18th February, 2002 at Masat, Silvassa but not at Dadra Godown where they were proceeding for search. The visit of PW-1 to Ladol speaks volumes of doubt. It is surprising how beforehand it was presumed that Charas would be found at Dadra concealed in kettles which would become impossible for them to cut all the tea kettles there at Demni road, Dadra and Mangesh will offer them to take entire tea kettles to factory at Masat, Silvassa and cut them there using lathe machine and that process shall continue till next day i.e. 18th February, 2002 and accordingly appellant was summoned to Masat instead of Demni road Godown. It is also stated that appellant was requested to remain present at Silvassa on 18th February, 2002, but he volunteered to join PW-1 immediately leaving his wife alone.

27. The learned Judge did not appreciate the submission of the defence with its proper spirit in respect of finding out Plot No.53, 54. If Mr. Tomar was not aware of as to the Plot Number of the industry of the accused at Masat Industrial Estate then it becomes important aspect for consideration as to the sources from where the Plot Number were collected. Even if the plot numbers were known to Mr. Tomar, even then it is not brought on record as to what steps were taken to locate these plot numbers. It is in the evidence that

from Masat Out Post the team directly reached to Plot No. 53, 54. The learned Judge ought to have given proper consideration that none of the persons from the team was knowing about the factory premises. This aspect is important which the learned Judge ought to have considered that there is a manipulation on record of mentioning of plot No.53, 54 in the panchanama Exh. 103. It is in the evidence of PW-1 Mr. Bhalla that the seized kettles, which were taken in possession after removing the bottoms, were two truckloads. So in such circumstances that much quantity of the kettles could not have been brought from Demni to Masat in one mini Tempo Tata 407.

28. The learned Judge failed to appreciate that PW-4 Ratnoo has no where whispered in the evidence that PW-6 Tomar was the person in whose custody the property was handed over by him at Silvassa. However according to him it was Mr. Shailendra Lodha who carried the property from Silvassa to Valsad and thereafter up to Ahmedabad. The learned Judge ought to have drawn the adverse inference for not examining Shailendra Lodha and the prosecution has made a feeble attempt by putting the words in the mouth of PW-6 Tomar that he was with Shailendra Lodha when the property was carried. According to PW-6 Tomar on 19th February, 2002 at 11 PM they went to Valsad and Superintendent of incharge

of Godown was not there. PW-6 Mr. Tomar has not given the name of anybody or the designation with whom he had a talk and who were “they”. Who were that person with whom the property was lying at Valsad is not named by the prosecution anywhere. From evidence of Mr. Tomar they left the property at Valsad at midnight of 19th February, 2002 and proceeded to Ahmedabad. According to PW-1 Bhalla, Mr. Shailendra Lodha deposited the property at Valsad Customs Godown on 20th February, 2002. The receipt allegedly issued by the Customs authority of Valsad is not placed on record by the prosecution. However PW-4 Mr. Tomar had accepted that the said receipt bears the seal impression of N.C.B. It clearly indicates that the seal of N.C.B. by which property was alleged to have been sealed was all the while moving with the property. The seal was not properly kept away from the property to avoid the misuse of the same and ought to have rejected the evidence of the proper sealing and transport. PW-4 Ratnoo has nowhere said that after reaching at Ahmedabad he received the property back from the custody of PW-6 Tomar. He has nowhere explained the custody of the property. The prosecution has also not produced on record the record maintained in the office of the N.C.B. Ahmedabad after receipt of the property in the office till the samples were dispatched to the Laboratory.

29. The trial Court has committed error in concluding that the prosecution has proved that appellant was in conscious possession of Charas. The evidence is full of discrepancies. The version of witnesses does not inspire confidence. The information that appellant is in possession of Charas at factory was found to be false. The prosecution has relied on statement of Mangesh who has disclosed that appellant is in possession of Godown at Demni road, Dadra. There is no substantive evidence of Mangesh Shah. The owner of Godown was not examined. Statement of owner's son was recorded. He referred to leave and license agreement. Owner's son was not examined. The author of leave and license agreement was not traced. His statement was not recorded. There is no evidence to establish that possession of premises i.e. Godown is with appellant.

30. In the case of Omprakash @ Baba Vs. State of Rajasthan (supra) the accused was convicted for the offences under N.D.P.S. Act on a finding that ownership and possession of contraband in question had been proved beyond doubt in the light of the fact that the witnesses had deposed that the recovery had been made from the house belonging to and in possession of accused. The appellant/accused contended before Hon'ble Supreme Court that if a doubt is created on the aspect of possession of contraband, the prosecution story must fail. The Hon'ble Supreme Court analyzed

the evidence and observed that, ownership and possession of the house and the place of recovery is uncertain. There is no evidence to exclusive possession of accused in Mohammed Aslam Khan Vs. N.C.B. and Another (supra) it was observed that prosecution did not produce any independent evidence to establish that the accused was owner of the flat in question by providing documents from Registrars office or by examining the neighbors. In the case of Avatar Singh and Others Vs. State of Punjab (supra) it was observed that the persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. A case of drawing presumption under Section 114 of the Evidence Act could perhaps be made out then to prove the possession of the accused but the fact remains in the course of examination under Section 313 Cr.P.C. not even a question was asked that they were the persons in possession if poppy, husk placed in vehicle. The only question put to them was that as per the prosecution evidence, they were sitting on the bags of poppy husk. No question was asked about possession of goods. It was not proper to raise presumption under Section 114 of Evidence Act. The trial Court resorted to presumption under Section 35 without considering aspect of possession. The trial Court invoked presumption under Section 54 of the Act without addressing itself

to the question of possession. The approach of both Courts was erroneous. In the case of Abdul Aziz Vs. Central Narcotic Bureau (supra) it was observed that when a person is found in possession of the contraband, it can be presumed that he was in conscious possession of the same and the burden shifts on the accused to prove otherwise. The facts of case indicate that accused sitting in vehicle in which contraband was found. In the case of Jagdish Purohit Vs. State of Maharashtra (supra) it was contended by accused that he was not in exclusive possession of factory from where contraband was seized. It was held that the factory was closed and accused absconded. In his statement under Section 313 Cr.PC. he had not stated that he had not closed the factory or that he was not present at that time or the key of factory had remained with someone else. The factory belonged to accused. He was sole proprietor. In these circumstances it was for accused to explain how articles came to be found from his factory. In the case of Megh Singh Vs. State of Punjab (supra) it was observed that Section 20(b) makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence for possession of such articles. In order to make the possession illicit there must be a conscious possession. The word 'conscious' means awareness about a particular fact. It is state of mind which is

deliberate or intended. The word possession means the legal right to possession. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where presumption is available to be drawn from possession of illicit articles.

31. From the analysis of evidence, it is noted that the prosecution case suffers from serious infirmities. Exclusive possession of appellant is not proved. Key and lock of Godown were not attached. The witnesses did not make proper enquiry about mini truck in which kettles carrying Charas were transported from Godown to factory. Statement of driver of vehicle is not recorded. No proper enquiry was held with regards to ownership/possession of premises. Statements of workers were not recorded. Seizure from Godown is under clouds of suspicion. The version of witnesses create doubt about its Veracity. The accused is entitled for benefit of doubt. Compliance of Section 42 (2) of the Act is not established. Statements under Section 67 are not admissible in evidence.

32. In the case of Karnail Singh Vs. State of Haryana (supra) it is held that empowered officer under Section 42(1) is obliged to

reduce to writing information received by him when the offence under N.D.P.S. Act is committed in building, conveyance or enclosed place. In *State of Punjab Vs. Baldev Singh* (supra) it is observed that as per Section 42(2) empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non compliance of this provision it affects the prosecution case. Similar view was adopted in *Boota Singh and Others Vs. State of Harayana* (supra).

33. In the case of *Tofan Singh Vs. State of Tamil Nadu* (supra) it was held that officers empowered under Section 53 of the Act are police officers for the purpose of attracting bar under Section 25 of the Evidence Act against admissibility of any confession to a police officers. Hence any confessional statement made to officers empowered under Section 53 cannot be taken into account in order to convict an accused, except to the extent found 'relevant' under Section 53-A and when corroborated in accordance with law. Statement recorded under Section 67 is information gathered at antecedent stage prior to commencement of investigation and is thus not even in the nature of a confessional statement. Hence, question of it being admissible in trial as confessional statement against accused does not arise. Hence, the same cannot be taken

into account in order to convict an accused.

34. In the case of Naresh Kumar @ Nitu Vs. State of Himachal Pradesh (supra) it is held that the presumption against the accused of culpability under Section 35 and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof does not sanction conviction on the basis of preponderance of probability. Section 35(2) provides that a fact can be said to be proved if it is established beyond reasonable doubt and not on preponderance of probability. That the right of the accused to a fair trial could not be whittled down under the Act. In the case of Noor Aga Vs. State of Punjab and Another (2008) 16 SCC 417 it is observed that, 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 accused to prove his innocence is not as high as that of 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 rigorous of Section 35 of the Act, the *actus reus* which is possession of

contraband by the accused cannot be said to have been established with a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubts.

35. In the light of principles enunciated in various decisions, the discrepancies in evidence existence of doubt about version of witnesses. Suspicion about case of prosecution that Charas was stored at Demni road Godown by appellant, failure to establish beyond doubt that Godown and Charas, seized from Godown belongs to appellant and doubt about transportation of kettles from Godown to factory, etc. are sufficient to give benefit of doubt to appellant. Hence, the appellant deserves to be acquitted.

ORDER

- i. Criminal Appeal No.586 of 2005 is allowed.
- ii. Judgment and Order dated 27th April, 2005 passed by Special Judge, Dadra and Nagar Haveli, Silvassa in Special Case No.3 of 2002 convicting the appellant for the offences punishable under Sections 20(b)(ii)(c) of the N.D.P.S. Act and sentencing him to suffer fourteen years rigorous imprisonment and to pay a fine of

Rs.2,00,000/- is set aside and the appellant is acquitted of all the charges.

iii. The appellant be released from jail forthwith, unless required in any other case.

iv. Interim Application No.1238 of 2022 is rejected and disposed off.

v. Criminal Appeal No.586 of 2005 is disposed off.

vi. Parties including Jail authority to act on authenticated copy of this order.

(PRAKASH D. NAIK, J.)