



Crl.A.No.379 of 2002

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on: 21.09.2022

Pronounced on: 11.10.2022

CORAM:

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Crl.A.No.379 of 2002

1. Yusuf @ Asif,
2. Balbir Singh,
3. Harbajhan Singh,
4. Ganesh Ram.

... Appellants

-vs-

State Rep. by,
Intelligence Officer,
Narcotic Control Bureau,
South Zone, Chennai.

... Respondent

PRAYER: Criminal Appeal is filed under Section 374 of Cr.P.C., to set aside the judgment passed by the Additional Special Court NDPS cases at Chennai in C.C.No.113 of 2000 dated 15.03.2002 of conviction of 10 years R.I and also to pay a fine of Rs.1,00,000/- in default to undergo one year imprisonment for the charges under Section 8 (c) r/w 21, 25 & 29 of NDPS Act against all the appellants.



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For 1st Appellant : Mr.B.Kumar, Senior Counsel, for
Mr.R.C.Paul Kanagaraj

For 2nd & 3rd Appellant : Mr.R.C.Paul Kanagaraj

For 4th Respondent : died

For Respondent : Mr.N.P.Kumar,
Spl.Public Prosecutor (NDPS cases)

J U D G M E N T

The appellants being aggrieved by the conviction and sentence passed by the Additional Special Court for NDPS Act cases, Chennai in C.C.No.113 of 2000, *vide* judgment dated 15/03/2002, had preferred this appeal. Pending appeal, the 4th appellant Ganesh Ram died and appeal against him got abated and same taken on record *vide* order dated 15/07/2022.

2. The gist of the prosecution case:

On 27/03/2000, at 10.30 pm, Mr.F.Rajasekar (P.W.1), the Intelligence Officer of NCB, South Zone Unit, Chennai, got a secret information through his informant that one Yusuf @ Asif of Mansur, Madhya Pradesh is involved in smuggling heroin from Madhya Pradesh to Chennai. He has presently transported about 20 kgs of heroin to Chennai, in a lorry bearing registration No.MP-14-G-



6424. The said lorry will be parked near Puzhal Central Jail on 28/03/2000 early morning. At that time, Asif along with the lorry drivers will be present. If the said lorry is intercepted, the contraband can be seized.

3. Based on this information, (P.W.1) Rajasekar along with the team of Officers went to the place mentioned by the informant and kept surveillance. At about 3.00 a.m, the lorry was intercepted and found 4 persons in the lorry. After introducing and disclosing their intention, the occupants were questioned whether they are in possession of any narcotic drug. The 1st accused Yusuf @ Asif took two jute bags and gave it to Rajasekar saying it contains 20 kgs of heroin. On opening those two jute bags, 14 big and 12 small polythene packets containing light brown powder was found. The powder when tested with the test kit, answered positive for heroin. After drawing samples from each packets, they were seized under mahazar. All the four persons were arrested and after getting the analyst report confirming the seized substance is Diacetylmorphine (heroin), complaint under Sections 8 (c) r/w 21, 25 and 29 of NDPS Act was lodged.

4. To prove the charges, the complainant examined 9 Witnesses. 43



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Exhibits and 30 Material Objects marked. On the side of the defence, 6 documents were marked.

5. The Trial Court held all the four accused guilty of the charges framed against them and convicted as below:-

<i>Petitioner/ Accused</i>	<i>Conviction</i>	<i>Sentence</i>
A1	Convicted for the offence under Section 8 (c) r/w Section 21 and 29 of NDPS Act.	To undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-, in default to undergo rigorous imprisonment for one year.
A2	Convicted for the offence under Section 8 (c) r/w. Section 21, 25 and 29 of NDPS Act.	To undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-, in default to undergo rigorous imprisonment for one year.
A3	Convicted for the offence under Section 8 (c) r/w. Section 21, 25 and 29 of NDPS Act.	To undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-, in default to undergo rigorous imprisonment for one year.
A4	Convicted for the offence under Section 8 (c) r/w Section 21 and 29 of NDPS Act.	To undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-, in default to undergo rigorous imprisonment for one year.

6. Mr.B.Kumar, Senior Counsel appearing for the appellants assails the trial Court judgment on three folds:-



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i). The trial Court failed to consider the violation of mandatory provisions under NDPS Act.

ii). The trial Court failed to consider the factual contradictions regarding prior information for recovery and of drawing samples and place of arrest.

iii). The statements of the accused persons recorded under Section 67 of the NDPS Act has been heavily relied upon to convict the accused persons though it is not admissible in the light of the recent Supreme Court judgment in Tofan Singh Case.

7. The Learned Senior Counsel for the appellants submitted that Section 43 would be applicable only against any seizure in a public place or in transit; as stationed lorry was neither in transit nor is a public place, instead of Section 43 the other provisions under Section 41 and 42 alone would be applicable. The lorry bearing Reg. No.MP-14-G-6424 the contraband transported



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and seized, is a public carrier falling within the meaning of Public Conveyance; but by virtue of an agreement of contract, it becomes a contract carriage and nobody else, excepting the lessee have right of entry thereto and thus soon after the erstwhile public carrier being converted into a contract carriage upon agreement of lease by a particular individual, none else than the latter will be entitled for an entry thereto; and so it loses the character of public conveyance; therefore, simultaneously it ceases to become a public place in order to invoke Section 43 of the Act.

8. If, section 43 of the Act is found not applicable, then naturally Section 41(1) and 42 (2) will apply. Section 41(1) of the NDPS Act deals with issuance of warrant for the arrest of any person by the Magistrate whom he has reason to believe to have committed any offence under this Act or for the search of any building, conveyance or place in which any narcotic drug in committing offence and any document evidencing thereof is kept or concealed. Section 41(2) deals with authorization by any such officer of Gazetted Rank to any officer subordinate to him to arrest an offender or search a building, conveyance or place as against keeping of narcotic drug for the offence or any document evidencing



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such offence.

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9. While Section 41 of the Act deals with empowerment for issuance of a warrant or authorising the subordinate officers by a Gazetted Rank Officer for arrest and search; Section 42 empowers the actual entry, search and seizure and arrest without warrant or without the above mentioned authorisation, and what is important among the facts of the present case on hand is the proviso to Section 42 which provides that if search officer has reason to believe that the search warrant or the authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape by an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording grounds of his belief; and according to Section 42(2) of the Act, if any information in writing under sub-section (1) was taken or recording of grounds for his belief under the proviso occur, then the officer shall within 72 hours send copy thereof to his immediate official superior.

10. As the seizure in this case occur during night time, the recording of the grounds of the belief that offender may escape or evidence may be



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concealed in case if time is given for search warrant or authorisation shall have to be made and the same should be sent to the superior officer within 72 hours. Again according to Section 42(2) of the Act, the information in writing also should reach the superior officer in time. In the instant case both these conditions are apparently not complied. Further, Ex. P1 is not the original of the information, but only a copy and that was received at 10.30 A.M. on 27.3.2000, but it was sent to Court as per evidence of P.W.8 on 29.3.2000. The grounds of belief has not been recorded. Thus according to the learned Senior Counsel appearing for the appellants argued for violation of Section 41 (1) and 42(2).

11. Further, referring the ocular evidence of the witnesses regarding the information received and search leading to recovery of the alleged contraband, the Learned Senior Counsel for the appellants would submit that there is contradiction in the prosecution case about the fact whether the vehicle in moving was intercepted or found parked at the place mentioned in the information Ex.P.1.

12. In Ex.P.17 report of P.W.2 submitted to Superintendent, Narcotics Control Bureau, Chennai, in compliance with Section 57 of NDPS Act and in



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Ex.P.27, the report of P.W.6 under Section 57 of NDPS submitted to the Superintendent, Narcotics Control Bureau, Chennai, it is stated that they intercepted the lorry bearing registration No.MP-14-G-6424. Whereas contrary to these two reports given under Section 57 the information Ex.P.1 as well as the evidence of the prosecution witnesses indicates that the vehicle was found parked opposite to Puzhal. Further, the evidence of P.W.1, P.W.2 and P.W.6 all indicates that it was A1 who climbed over the lorry cabin and removed two jute bags kept above the driver's cabin and handed over to them and in those two jute bags they found 26 cloth packets stitched on all sides. On opening those bags, they found polythene cover containing light brown colour powder which tested positive for heroin. While so, the other occupants namely A2 to A4 cannot be held liable for offence under NDPS Act. Section 35 & 54 of NDPS Act, have no application. As far as A2 to A4 is concerned. However, based on the confession statement given by the accused persons recorded under Section 67 of NDPS Act, they were convicted. In view of the judgment rendered by the Hon'ble Supreme Court in *Tofan Singh case*, Ex.P.13, Ex.P.14, Ex.P.23 and Ex.P.24 are not admissible in evidence. If, those evidence are eschewed, there is no other incriminating evidence against these accused persons to convict them under the NDPS Act.



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13. The Learned Senior Counsel appearing for the appellant also submitted that the original information given by the informant has not seen the light of the day. Ex.P.1 is the extract of the information and not the original information. Therefore, there is grave violation of Section 42(2) of the Act more particularly, when the seizure been conducted between sunset and sunrise. The stationed lorry engaged under contract should not to be treated as a public place but a enclosed place, since the occupant have the right of privacy and no public can have access to it.

14. The Learned Senior Counsel appearing for the appellants would also submit that there is grave doubt about the samples sent for analysis. Whether Seal No.11 or Seal No.12 affixed on the actual contraband seized is doubtful in view of the fact that in the seizure mahazar Ex.P.6 it is stated that NCB Seal No.12 been affixed on all the properties. Whereas, the godown receipts marked as Ex.D.1, it is stated that Seal No.11 found on the properties handed over for custody. When there is doubt about the samples sent for analysis, the trial Court ought not to have convicted the accused persons.



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15. The Learned Senior Counsel appearing for the appellants relied upon the following judgments:-

(i). *State of Rajasthan -vs- Jagraj Singh alias Hansa* reported in (2016) 11 SCC 687, wherein it has held as below:-

“18. The Explanation to Section 43 defines the expression “public place” which includes any public conveyance. The word “public conveyance” as used in the Act has to be understood as a conveyance which can be used by the public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public motor vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers.

19. In the present case, it is not the case of the prosecution that the jeep HR 24 4057 had any permit for transporting the passengers. The High Court has looked into



the evidence and come to the conclusion that there was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court has further held that even Kartara Ram who as per the owner of the vehicle, Vira Ram, was using the vehicle, does not support that the jeep was used as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle.

.....

29.....The present is not a case where insofar as compliance with Section 42(1) proviso even an argument based on substantial compliance is raised there is total non-compliance with Section 42(1) proviso. As observed above, Section 43 being not attracted, search was to be conducted after complying with the provisions of Section 42. We thus, conclude that the High Court has rightly held that non-compliance with Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.”

(ii). Directorate of Revenue and another -vs- Mohammed Nisar

Holia reported in (2008) 2 SCC 370, wherein it has held as below:-



“13. Requirements of Section 42 was read into Section 43 of the NDPS Act. A somewhat different view, however, was taken subsequently. Decisions were rendered opining that in conducting search and seizure in public place or a moving vehicle, provisions appended to sub-section (1) of Section 42 would not be attracted. Decisions were also rendered that in such a case even sub-section (2) of Section 42 need not be complied with.

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. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance with Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance with the said provision would not render the search a nullity. A distinction therefore must be borne in mind between a search



conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. It is also possible to hold that rigours of the law need not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance therewith is insisted upon. 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. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private



place and public place is of some significance. An authority cannot be given an untrammelled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right to privacy deals with persons and not places.”

16. Per contra, the Learned Special Public Prosecutor for NCB appearing for the respondent submitted that, the search and seizure operation was based on the prior information duly recorded by Mr.E.Rajasekar (P.W.1) and forwarded to immediate superior Mr.Ragavan (P.W.8), Superintendent of Police, on the same day. Only after discussion to immediate superior, they have proceeded to the spot mentioned in the information. The goods transport lorry by no stretch of imagination can be treated as a private place whether in transit or stationed. Ex.P.1 is the extract of the information recorded. Since the identity of the



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informant has to be screened, the original information cannot be produced and this has been explained by the witnesses during the examination. Ex.P.1 contain the information as well as the request of the informant to give incentive for his information. While so, the accused cannot force the department to disclose the name of the informant by producing the original information and expose the informant to danger.

17. Section 42 (2) of NDPS Act contemplates any information received should be reduced into writing and same to be forwarded to the immediate superior within 72 hours. In this case, the information Ex.P.1 received at 10.30 a.m., on 27.03.2000 and same was reduced into writing by P.W.1 and submitted to the Superior Officer P.W.8 immediately. On perusing the information P.W.8 has not seen and to take action as discussed. Hence, there is no violation of the mandatory requirements.

18. Section 43 of NDPS Act clearly explains that the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public. Therefore, it is not relevant



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whether the conveyance was in transit or stationed. If it is a public conveyance and intended for use by the public that is sufficient to attract Section 43 of the NDPS Act. Once Section 43 of the Act applies, the restriction under Sections 41 and 42 of the Act regarding search of enclosed place during between sunset and sunrise will not get attracted.

19. Regarding the recovery, the Learned Special Public Prosecutor for NCB, submitted that, after disclosing their identity, the accused persons were informed about their right under Section 50 of NDPS Act. After obtaining their consent in writing in the presence of P.W.8, Superintendent of Police, NCB, is the Gazetted Officer the search was done. A1 admitted voluntarily that the Narcotic Drug is transported in the lorry when confronted about the information. He climbed the cabin and took two gunny bags containing 26 Kgs of Heroine in 14 + 12 packets. After seizure, two samples from each packet was drawn and packed separately. All the properties were sealed and NCB Seal No.12 was affixed on it. Only, by inadvertence in the godown receipts seal, it is mentioned as Seal No.11 and in rest of the documents including the mahazar, the correct Seal No.12 been mentioned and error has been reconciled through P.W.9 Srinivas, who has



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admitted that, he inadvertently while writing the godown receipts, he has mentioned Seal No.11 instead of Seal No.12.

20. Heard the Learned Counsel for the appellants and the Learned Counsel for the respondent. Records perused.

21. At the outset, it is to be recorded that in so far as the submission of the Learned Senior Counsel appearing for the appellant that the stationed lorry will not fall within the ambit of Section 43 of NDPS Act. The said argument is apparently a misconceived argument which has to be rejected outrightly in view of the explanation to Section 43 of NDPS Act. For convenient sake, Section 43 of NDPS Act with explanation is extracted below:-

43. Power of seizure and arrest in public place. Any officer of any of the departments mentioned in section 42 may
(a) seize in any public place or in transit, any narcotic drug



or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation. For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.



22. The transport lorry having permit to transport goods by no stretch of imagination can be treated as enclosed place or a private place not access to public, just because it has been under contract with the goods owner. The spirit behind Sections 41, 42 and 43 of the NDPS Act which distinguished search of private place, public place and search between sunset and sunrise is predominately to protect the privacy of a person who lives or stay in an enclosed place. Precisely that is the reason why earlier when the issue came up for consideration before the Hon'ble Supreme Court in ***Ganga Bahadur Thapa vs- State of Goa*** reported in ***2000 (10) SCC 312***, the Hon'ble Supreme Court held that hotel room occupied by a person should not be considered as a public place though the hotel is access to public. Since hotel room booked and occupied by a person cannot be accessed by any other person except the person who has booked the room. Whereas, the lorry is a conveyance intended for transporting goods. The explanation to Section 43 of the Act clearly mentions that any conveyance intended for use of public or accessible to the public is a public place. Therefore, the rigor of search between sunset and sunrise of a private enclosure will not apply to a lorry which is meant for transporting goods. By searching a lorry, privacy of a person is not infringed and even if a person temporarily converts a public transport vehicle into a place of



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stay will not get the character of enclosed place as long as the said vehicle is used for transporting goods or on its run. The word “in transit” found in Section 43 of the Act has to be purposeful meaning. In this case the lorry been in move from Madhya Pradesh to Chennai. A temporary halt near Puzhal will not take away the character of conveyance in transit. Therefore, the submission of the Learned Senior Counsel that Section 43 of the Act will not apply to the case in hand is rejected outrightly.

23. From the evidence, it is apparent that the secret information received duly reduced into writing and forwarded to the immediate superior and on his instruction, the team has proceeded to the spot mentioned in the information. Search, seizure and arrest been done in the presence of Gazetted Officer as contemplated under Section 41(2) of NDPS Act. Subsequent to seizure and arrest, the Intelligence Officers involved in seizure and arrest have submitted their report under Section 57 of NDPS Act and same were marked as Ex.P.12, Ex.P.17, Ex.P.27 and Ex.P.40. In all the documents except the godown receipts given by P.W.9, the seal found on the property seized is mentioned as Seal No.12. Only in the godown receipt, it is mentioned as Seal No.12. The person who has



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given the godown receipts is P.W.9 Srinivas. He has mounted the witness box and explained the error crept dire to his inadvertence and his evidence stands unimpeached. Therefore, the plea regarding difference in Seal number pales to insignificance in the light of overwhelming evidence found in exhibits and ocular evidence, besides the reconciliatory evidence of P.W.9.

24. The last limb of the agrument placed by the Learned Senior Counsel for the appellants is that if the statement of the accused recorded under Section 67 of NDPS Act is eschewed in the light of *Tofan Singh case* being inadmissible, there is no other incriminating evidence against these accused persons.

25. In response to the above submission, the Learned Special Public Prosecutor for NCB appearing for the respondents submitted that even if the statements recorded under Section 67 of NDPS Act is ignored their presence in the cabin of the lorry travelled all along from Madhya Pradesh to Chennai, carrying the contraband in the cabin of the lorry proved their conscious possession. The culpable mental state has to be presumed since they have not rebutted the



presumption. A2 to A4 being the owner of the lorry, driver and cleaner respectively are liable to be punished in the light of Sections 35 and 54 of NDPS Act.

26. To buttress his submission, the following judgments relied by the Learned Special Public Prosecutor for the respondent.

(i). ***Gian Chand and Ors -vs- State of Haryana*** reported in **2013 (14) SCC 420**, wherein it has held as below:-

19. From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.

20. Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is



established, the burden shifts on the accused to establish that he had no knowledge of the same.”

27. The case of the prosecution is that, A1 is the owner of the contraband and transported it from Madhya Pradesh to Chennai with the help of A2 to A4. After the contraband reached Chennai, A1 who came to Chennai ahead of the goods and stayed in a hotel, went to Puzhal for collecting the contraband as per arranged. A1 has contacted the other accused and after ascertaining the place where they have parked the vehicle, he has gone to the spot for collecting the contraband. On the personal search of A1, the passport of the absconding accused (A5) was recovered and A1 has explained how the passport of the absconding accused came in his possession. The absconding accused is the person for whom the contraband was meant to be supplied. Unless and until, the other accused namely the owner of the lorry, driver and cleaner had conscious about the fact that they are carrying something owned by A1, they need not have allowed A1 to climb over the lorry cabin and produce two gunny bags to NCB Officials. It is not the case of the appellants that A1 is also the owner of the other goods namely cycle tyre found in the lorry. In such circumstances, as pointed out by the Learned



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Special Public Prosecutor the existence of mental state for the commission of the offence has to be presumed under Section 35 of the Act and the accused persons have not produced any document to prove the contrary.

28. To sum up, the search of the lorry will fall under Section 43 of NDPS Act. Whether the lorry is in movement or stationed, it will fall only under Section 43 of the Act, being a 'public place' as per the explanation to this Section. Further, in the case in hand, the search has been conducted at 3.00 a.m in the presence of Gazetted Officer and therefore, the provisions of Section 42 of Act will not get attracted.

29. The above conclusion of this Court is fortified the judgment of the Hon'ble Supreme Court in ***Yasihey Yobin and another -vs- The Department of Customs, Shillong*** reported in ***2014 (13) SCC 344***, which clearly explains about the application of provisions regarding search and seizure of enclosed place, private place between sunset and sunrise, in the following words:-

“14. A perusal of Section 42 contemplates two



situations. It contemplates entry into and search of any building, conveyance or enclosed place at any time between sunrise and sunset by an officer authorised under the Act with a reason to believe that any narcotic substance or any other controlled substance is kept or concealed in such premises; and secondly, if the search is made between the sunset and sunrise, the requirement of the proviso to Section 42 is to be complied with under which the officer authorised under the Act is to record the grounds of his belief. But if the search is made by an officer authorised under Section 41(2) of the Act then the said officer is said to be acting under Section 41(2) and therefore compliance under Section 42 is not necessary at all. This principle is reiterated in M. Prabhulal v. Directorate of Revenue Intelligence [(2003) 8 SCC 449 : 2003 SCC (Cri) 2024] and in Mohd. Hussain Farah v. Union of India [(2000) 1 SCC 329 : 2000 SCC (Cri) 191] , wherein it is observed that a gazetted officer is an empowered officer and so when a search is carried out in his presence and under his supervision, the provision of Section 42 has no application.”

30. Section 35 of NDPS Act cast upon the burden on the accused to rebut the presumption of existence of culpable mental state, which reads as below:-



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“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 □ulpable 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.”

31. In this case, to infer innocence of A2 to A4, there must be some evidence which probablises that they do not have the culpable mental state. In this case, the contraband been transported by A2 to A4 all along from Madhya Pradesh to Chennai. There is no error to infer that they had no knowledge about the concealment of contraband on the cabin top, provided the said contraband was part



and parcel of the cycle tyre or concealed along with the cycle tyre and the cycle tyre was booked by A1. But, in the instant case, A1 is not the owner of the cycle tyre transported from Ludiyana, Punjab to be delivered at Chennai. He is owner of contraband alone and the said contraband was loaded at Mandsaur and kept on the top of the lorry cabin in two gunny bags. Without the knowledge of the lorry owner, driver and cleaner who were transporting tyre from Ludiyana, the said contraband from Madhya Pradesh, could not have been loaded and if it was loaded stealthily, they should have come out with explanation how the contraband found in the lorry and why they allowed A1 to be with them when NCB team came to search the lorry and why A1 was allowed to climb the cabin and bring down the contraband concealed in two gunny bags. In the absence of any explanation, Section 35 of NDPS Act will squarely attracts for the Court to presume the culpable mental state of the accused persons. It is the burden of the lorry owner, driver and cleaner who have transported to explain the presence of contraband along with the cycle tyres booked at Ludhiana and how the contraband loaded on the cabin and why it was transported along with the tyres. In the absence of any explanation, the finding of the trial Court even after eschewing the confession statements recorded under Section 67 of the Act holds good in the light of the



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Section 35 of NDPS Act.

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32. In the result, this Court finds no error in the finding of the trial Court which has found the appellants guilty for offence under Section 8 (c) r/w 21, 25 and 29 of NDPS Act. As a result, this ***Criminal Appeal is dismissed.*** The judgment passed by the Learned Additional Special Court NDPS case, Chennai in C.C.No.113 of 2000, dated 15.03.2002 is confirmed. The appellants shall be secured to under the remaining period of sentence. The period of imprisonment already undergo shall be set off under Section 428 of Cr.P.C.

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