

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

CRA 97 of 2020

Login Das @ Login Rabi Das

-Vs-

The State of West Bengal

With

CRA 236 of 2020

Narayan Yadav @ Jadab

-Vs-

The State of West Bengal

For the Appellant
(In CRA 97/2020)

: Mr. Sekhar Basu, Sr. Adv.,
Mr. Sujoy Mondal, Adv.
Mr. Abhijit Ganguly, Adv.
Mr. L R Mondal, Adv.
Mr. S Ghosh, Adv.
Mrs. Mitul Hajra, Adv.

For the Appellant
(In CRA 236/2020)

: Mr. Kaushik Chaudhury, Adv.,
Ms. Busra Khatun, Adv.

For the State

: Mr. S Bardhan, Adv.
Mr. Saryati Dutta, Adv.

Heard on

: 19.03.2024 & 20.03.2024

Judgment on

: 05.04.2024

Joymalya Bagchi, J.:-

1. Appeals are directed against the judgment and order of conviction and sentence dated 09.01.2020 and 10.01.2020 passed by learned Additional District and Sessions Judge, 3rd Court, Special Court under NDPS Act, Balurghat at Dakshin Dinajpur in Trial No. 52 of 2018 arising out of Special Case No. 24 of 2018 convicting the appellants for commission of offence punishable under Sections 21(c) and 27A of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing them to suffer rigorous imprisonment for a term of ten years each and to pay fine of Rs. 1,00,000/- each, in default, to suffer rigorous imprisonment for two years more for the offence punishable under Sections 21(c) of the NDPS Act and to suffer rigorous imprisonment for a term of ten years each and to pay fine of Rs. 1,00,000/- each, in default, to suffer rigorous imprisonment for two years more for the offence punishable under Sections 27A of the NDPS Act. Both the sentences shall run concurrently.

Prosecution case:-

2. Prosecution case as alleged against the appellants is as follows:-

On 09.06.2018 at 13:55 hours Inspector Sanjay Ghosh (P.W. 5), Inspector in-Charge of Balurghat Police Station received source information that illegal narcotics trade was being carried out at

Balurghat Sadar Ghat in the house of one Narayan Yadav, son of Morabba Yadav. He intimidated his superiors, namely, Binod Chettri, DSP (DEB), (P.W. 4) and Dhiman Mitra, DSP (Headquarter), (P.W. 2). Thereafter, SI Pritam Singh (P.W. 3) along with ASI Soumendra Nath Das (P.W. 11) and Constable Biplab Sarkar (P.W. 1) under the leadership of DSP (DEB) Binod Chettri, (P.W. 4) proceeded to the spot to work out the information. Prior to leaving the station P.W. 1 recorded a general diary being Balurghat PS General Diary Entry No. 493 dated 09.06.2018 (Exhibit – 3). At 14:25 hours DSP (Headquarter) Dhiman Mitra, (P.W. 2) and DSP (DEB) Binod Chettri, (P.W. 4) arrived at Sadar Ghat. The raiding party found appellant Narayan Yadav in his house. They disclosed their identity and issued notice upon Narayan Yadav, expressing their intention to search the house. They searched for witnesses but nobody was willing to get involved in a police matter. In the presence of DSPs, IC Sanjay Ghosh (P.W. 5) conducted search in the house of Narayan Yadav and recovered 10 cartons of phensedyl cough syrup concealed in his bedroom. Each carton contained 100 bottles measuring 100 ml. each at the rate of Rs. 127.50/- each totalling to Rs. 1,27,500/- bearing batch Nos. PHB8019 and PHB8020.

3. Narayan Yadav was called upon to produce licence or any document for storage of phensedyl cough syrup but failed to do so. On interrogation Narayan Yadav admitted he had purchased the

consignment from one Login Das, son of Gobinda Das of Bongi, PS – Balurghat, Dist. – Dakshin Dinajpur.

4. Narayan Yadav was arrested. Consignment of 1000 bottles of phensedyl cough syrup in 10 carton boxes were seized and labelled. Two sets of sample, that is, two bottles of phensedyl cough syrup were drawn from each carton bearing batch Nos. PHB8019 and PHB8020 respectively, i.e., 20 bottles in all. Narayan Yadav and the consignment were brought to the police station and the matter was diarized as GD Entry No. 520 marked as Exhibit – 4. P.W. 5 submitted written complaint which was registered against Narayan Yadav and Login Das which was registered as Balurghat PS Case No. 194 of 2018.

5. Investigation of the case was taken up by Sk. Ziaul Kader (P.W. 13). During investigation, an application was made for certifying the correctness of inventory of narcotics under section 52A of NDPS Act (Exhibit – 10). Somnath Kundu, Judicial Magistrate (P.W. 14) certified the correctness of inventory (Exhibit – 12) and the photographs and videography taken of the seized consignment. Seized consignments (980 bottles in 4 lots) were taken by P.W. 6 to CFSL. CFSL report was collected by the investigating officer (P.W. 13) and produced in Court (Exhibit – 13). Login Das had absconded and warrant of arrest was issued to apprehend him. Suvankar Chakraborty (P.W. 10) arrested Login Das in execution of the warrant of arrest.

6. Charges were framed against Narayan Yadav and Login Das under sections 21/22/27A of NDPS Act. They pleaded not guilty and claimed to be tried.

Arguments at the Bar:-

7. Learned counsel for the appellant Narayan Yadav submitted recovery of narcotics from his residence has not been proved beyond doubt. No independent witness was examined to prove the recovery. There is nothing on record to show Narayan Yadav was the owner of the house. Prior information received by P.W.5 had not been sent in writing to the superior police officer. There is no compliance of section 42(2) of NDPS Act. Section 52A of NDPS Act had not been complied with. Representative samples were drawn at the spot and not in presence of Magistrate. Magistrate noted in Exhibit – 12 that representative samples had not been drawn in his presence. Hence, chemical examiner's report based on analysis of the samples is inadmissible and his client is entitled to an order of acquittal.

8. Learned Senior Counsel for Login Das argued no narcotics had been recovered from his client. Prosecution relies on a pocket diary purportedly recovered from Login Das showing sale of phensedyl cough syrup to Narayan Yadav. There is no legally admissible evidence to prove recovery of pocket diary from Login Das. During arguments prosecution produced certified copies of the seizure list and disclosure statement of Login Das (exhibited in another case) to prove the

recovery. Production of certified copy of a document by itself does not prove the truth of its contents. Sanjay Ghosh (P.W. 5) who is said to have prepared the seizure list is completely silent on this aspect. Trial Judge incorrectly relied on sections 53-A and 56 of NDPS Act to hold the contents of the documents have been proved. Prosecution did not adduce evidence that the pocket diary was written by Login Das. Accordingly, the appellant is entitled to an order of acquittal.

Evidence on record:-

9. P.Ws. 1 to 5 and 11 are members of the raiding party.
10. P.W. 5, Sanjay Ghosh was the inspector in-charge of Balurghat PS. On 09.06.2018 at 13:55 hours he received information that one Narayan Yadav had stocked phensedyl cough syrup in his house. He informed the matter to his superior officers. After recording the prior information in General Diary No. 493 dated 09.06.2018 (Exhibit – 3), he proceeded to the spot with SI Pritam Singh (P.W. 3) along with ASI Soumendra Nath Das (P.W. 11) and Constable Biplab Sarkar (P.W. 1). Superior officers, namely, Binod Chettri, DSP (DEB) (P.W. 4) and Dhiman Mitra, DSP (Headquarter) (P.W. 2) also joined the raiding party. They arrived at the house of Narayan Yadav. They issued a notice (Exhibit – 2) written by SI Pritam Singh (P.W. 3) and signed by IC Sanjay Ghosh (P.W. 5) upon Narayan Yadav expressing his desire to search his house.

11. During search, they recovered 10 cartons each containing 100 bottles of phensedyl cough linctus syrup of 100 ml. bearing batch Nos. PHB8019 and PHB8020 kept concealed under the bed in his bedroom. The consignment was seized. Seizure list was prepared (Exhibit – 1). Narayan Yadav was arrested.

12. On interrogation, he stated he had received the consignment from Login Das. Narayan Yadav was brought to the police station with the consignment. After reaching the police station P.W. 5 recorded a general diary being General Diary Entry No. 520 (Exhibit – 4). He lodged written complaint which was registered as Balurghat PS Case No. 194 of 2018 dated 09.06.2018. He proved the formal part of the FIR. The case was endorsed to Sk. Ziaul Kader, Inspector, DEB (P.W. 13). During cross-examination, he admitted that the prior information was not communicated in writing to the DSP.

13. P.W. 1, Biplab Sarkar deposed he accompanied P.W. 5 to Sadar Ghat. House of Narayan Yadav was searched and 10 cartons of phensedyl syrup were recovered. He put his signature on the seizure list. During cross-examination, he admitted he was standing outside the house when the search was conducted.

14. P.W. 3, Pritam Singh, SI of Police deposed he accompanied Sanjay Ghosh (P.W. 5) to Sadar Ghat. House of Narayan Yadav was searched and 10 cartons of phensedyl syrup each containing 100 bottles of 100 ml. each were recovered. P.W. 3 signed the seizure list

(Exhibit – 1/2). During cross-examination, he stated in the house of Narayan Yadav there are one bedroom, one kitchen and one toilet. Narayan was known to him and P.W. 5 prior to the incident.

15. P.W. 11, ASI Soumendra Nath Das also accompanied P.W. 5. He corroborated the evidence of the members of the raiding party. He proved his signature on the seizure list (Exhibit – 1/4).

16. P.W. 2, Dhiman Mitra, DSP (Headquarter) and P.W. 4, Binod Chettri, DSP (DEB), Balurghat are superior officers who were present during the raid. P.W. 2 deposed at about 13:55 hours he received a telephonic call from Sanjay Ghosh, the then IC, Balurghat PS that the latter had received secret information and requested him to come to Sadar Ghat. He went to the spot and accompanied the raiding party to the house of Narayan Yadav. Narayan was present in his house. A notice was served upon him. He consented to the search of his house. Raiding party unsuccessfully contacted local witnesses. Upon search 10 cartons each containing 100 bottles of phensedyl syrup were recovered. Consignment was seized. He signed the seizure list. He further deposed application for certifying inventory was prepared in his office. He signed on the application (Exhibit – 10/2). He also endorsed the certificate of correctness given by the Judicial Magistrate, 2nd Court, Balurghat at Dakshin Dinajpur under section 52A of NDPS Act.

17. P.W. 4, Binod Chettri is another superior officer. He was posted as DSP (DEB), Balurghat. He also accompanied the raiding

party and proved the recovery of 10 cartons of phensedyl syrup from the house of Narayan Yadav. He proved his signature on the seizure list.

18. P.W. 7, Partha Halder and P.W. 8, Debananda Basfore are the local witnesses. P.W. 7 stated Narayan Yadav was a co-villager and used to stay at Sadar Ghat.

19. P.W. 13, Sk. Ziaul Kader is the investigating officer. He deposed he went to the place of occurrence. He prepared sketch map with index (Exhibit – 9). He tried to apprehend Login Das but failed. He collected information that Login Das had criminal records. He issued look out notice. He prayed for issuance of warrant of arrest against Login Das. Warrant of arrest was issued against the said accused. P.W. 2, Dhiman Mitra made application before learned Judicial Magistrate, 2nd Court, Balurghat for certifying the correctness of inventory and the same was allowed (Exhibit – 10). Judicial Magistrate (P.W. 14) examined the consignment and endorsed the certificate of correctness of inventory (Exhibit – 12). Photographs and compact discs of the consignment were taken in his presence. He resealed the pocket diary which had been seized in connection with Balurghat P.S. Case No. 238 dated 20.07.2018 from A.S.I. Manik Ghosh (P.W. 9). He proved the seizure list (Exhibit – 7). Seized consignment was sent through P.W. 6 for chemical examination. He collected the chemical examiner's report and forwarded it to court. He proved the report (Exhibit – 13). During

investigation S.I. Suvankar Chakarborty (P.W. 10) arrested Login Das. He interrogated Login Das in police custody. No incriminating evidence was collected. From BL&LRO he found the place of occurrence was situated on the land of irrigation department.

20. P.W. 14, Somnath Kundu, Judicial Magistrate, 2nd Court, Balurghat at Dakshin Dinajpur, deposed on 26.07.2018 he allowed prayer for certifying entry made by P.W. 2, Dhiman Mitra. He proved his endorsement (Exhibit – 10/1). He also proved the certificate of correctness (Exhibit – 12) issued by him. Photographs and videography stored in compact discs were made in his presence. He handed over a sealed cover containing the certificate of inventory, photographs and compact discs under covering letter dated 09.08.2018 (Exhibit – 11). During cross-examination he stated as follows:-

“it is noted here that no representative samples were drawn in my presence though I allowed the application u/s. 52A of NDPS Act and therefore, no question of certification of correctness of the list of samples drawn arose.”

(i) Recovery of narcotics from Narayan Yadav – whether proved:-

21. P.W. 5, IC Sanjay Ghosh deposed, on 09.06.2018 he was the inspector in-charge of Balurghat Police Station. At 13:55 hours he received information that Narayan Yadav of Sadar Ghat had kept phensedyl cough syrup in his house. He intimidated the matter to his superior officers, namely, DSP (Headquarter) Dhiman Mitra (P.W. 2)

and DSP (DEB) Binod Chettri (P.W. 4). He recorded the information in the general diary (Exhibit – 3). Thereafter, he left the police station with constable Biplab Sarkar (P.W. 1), SI Pritam Singh (P.W. 3) and ASI Soumendra Nath Das (P.W. 11) to work out the information. Superior police officers, namely, DSP (Headquarter) Dhiman Mitra (P.W. 2) and DSP (DEB) Binod Chettri (P.W. 4) also joined the raiding party. They proceeded to the house of Narayan Yadav. He was present in his house. They served notice upon Narayan Yadav expressing their desire to search the house (Exhibit – 2). He consented to the search. Upon search, 10 cartons of phensedyl syrup each carton containing 100 bottles of 100 ml. each bearing batch Nos. PHB8019 and PHB8020 were found. Narayan Yadav was unable to show valid licence for possession of cough syrup containing codeine phosphate, a narcotic substance. Possession of phensedyl syrup for non-medicinal purposes attracts provisions of NDPS Act.¹

22. Accordingly, the consignment was seized under seizure list (Exhibit – 1). Narayan Yadav signed on the seizure list. Official witnesses also signed on the seizure list. Depositions of official witnesses are consistent with one another and prove beyond doubt recovery of 100 bottles of phensedyl syrup in 10 cartons containing 100 ml. each from Narayan Yadav's house.

¹ Mohd. Sahabuddin And Another vs. State of Assam, (2012) 13 SCC 491

23. Defence has assailed the prosecution case relating to the aforesaid recovery from the house of Narayan Yadav on various scores which are set out in seriatim: -

a) Prosecution has failed to prove the place of occurrence as the house of Narayan Yadav: -

24. Evidence on record shows P.W. 5 had received prior information that phensedyl syrup was illegally stored in the house of Narayan Yadav of Sadar Ghat. He informed his superior officers and diarized the prior information (Exhibit – 3). Thereafter, he and the police party under the leadership of his superiors went to the house of Narayan Yadav. P.W. 3 deposed Narayan Yadav was known to them prior to the incident. Hence, P.W. 5 and other members of the raiding party were aware of the house of Narayan Yadav and in order to workout the prior information proceeded to his residence and seized the contraband in his presence. Depositions of official witnesses are corroborated by a resident of Sadar Ghat neighbourhood (P.W. 7) who stated Narayan Yadav was a co-villager. Presence of Narayan Yadav at the place of occurrence is proved through the evidence of official witnesses which is corroborated by his signature on the seizure list (Exhibit – 1).

25. Learned Counsel for Narayan Yadav argued investigating officer, Sk. Ziaul Kader (P.W. 13) deposed the place of occurrence is a land of irrigation department. Very little turns on this piece of evidence.

It merely shows Narayan Yadav had illegally constructed a house on the land of irrigation department and was carrying on narcotics trade therefrom. Hence, prosecution case that the consignment of phensedyl syrup was recovered from the house of Narayan Yadav has been proved beyond doubt.

b) Non-examination of independent witnesses: -

26. P.Ws. 2 and 4, superior officers present at the place of raid deposed no independent witnesses were found. In the written complaint (Exhibit – 6), lodged by P.W. 5, he stated he searched for independent witnesses but nobody wanted to get involved in a police matter. This explains why the police party was unable to persuade local people to join the search operation and sign on the seizure list. It is trite law when depositions of official witnesses are trustworthy and explanation is offered why independent witnesses to the seizure could not be procured, absence of independent witnesses does not improbabilise the seizure.²

c) Non-compliance of section 42(2) of NDPS Act – whether vitiates recovery: -

27. Learned Counsels for the appellants submitted prior information recorded by P.W. 5 had not been communicated in writing to the superior police officer in terms of section 42(2) of NDPS Act. Oral

² Baldev Singh vs. State of Haryana, (2015) 17 SCC 554 (para 10) and Surinder Kumar vs. State of Punjab, (2020) 2 SCC 563 (para 14 and 15)

communication is not sufficient. P.W. 5 deposed on 09.06.2018 he received prior information at 01:55 p.m. that phensedyl syrup was illegally stored in the house of Narayan Yadav. He intimated the prior information to his superiors, DSP (Headquarter) Dhiman Mitra (P.W. 2) and DSP (DEB) Binod Chettri (P.W. 4). He recorded the prior information in the general diary register being GDE No. 493 dated 09.06.2018 (Exhibit – 3). Superior officers proceeded to the spot and joined the search operation in the house of Narayan Yadav. Admittedly, the superior officers (P.Ws. 2 and 4) are officers of gazetted rank. When a gazetted officer is present at the spot and joins the search, power to search is relatable to sections 41(2) and 42 of NDPS Act. In *Yasihey Yobin And Another vs. Department of Customs, Shillong*³, the Apex Court held:-

“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] and in Mohd. Hussain Farah v. Union of India [(2000) 1 SCC 329], 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.”

(Emphasis supplied)

³ (2014) 13 SCC 344

28. Similar view was reiterated in *Sekhar Suman Verma vs. Superintendent of Narcotics Control Bureau And Another*⁴.

29. In the present case, gazetted officers (P.Ws. 2 and 4) upon being informed about the prior information joined the search along with other officers. Under such circumstances, section 42(2) of NDPS Act is not attracted and its non-compliance shall not vitiate the search.

d) Chain of custody – compliance of section 52A of NDPS Act:-

30. P.W. 2, Dhiman Mitra, DSP (Headquarter) deposed an application for certification of inventory (Exhibit – 10) was prepared in his office. He proved his signature (Exhibit – 10/2) thereon. He also proved his endorsement on certification of correctness issued by the Judicial Magistrate, 2nd Court, Balurghat at Dakshin Dinajpur.

31. P.W. 13, Sk. Ziaul Kader, investigating officer corroborated P.W. 2 with regard to the preparation of inventory and certification of correctness by the Magistrate.

32. P.W. 14, Somnath Kundu, Judicial Magistrate, 2nd Court, Balurghat deposed, on 26.07.2018 he allowed the prayer made by P.W. 2 for certifying the correctness of inventory (Exhibit – 10/1). On 09.08.2018, he certified the correctness of the inventory along with

⁴ (2016) 11 SCC 368 (para 12 and 13)

photographs and compact discs (Exhibit – 12). Photographs and compact discs were marked as Mat Exhibits – II/1, II/2 and II/3.

33. Exhibit – 12 notes on 08.08.2018 P.W. 14 went to Balurghat Police Station. P.W. 5, IC Sanjay Ghosh and P.W. 9, ASI Manik Ghosh, Malkhana in-charge showed him 980 bottles of phensedyl cough linctus syrup in 4 sacks. P.W. 14 checked the 4 polythene sacks and found them as per inventory. He was informed 2 bottles from each carton, i.e., 20 bottles in all have been set apart as samples. He compared the seizure list with the Malkhana register at PS. He found the inventory prepared by P.W. 2 as correct. 4 sacks were opened in his presence and reissued. Photographs and videography of the samples were taken in his presence. He noted no representative samples were drawn in his presence and therefore question of certification of the correctness of the list of samples does not arise.

34. Referring to the noting that no representative samples were drawn in the presence of P.W. 14 and he had not certified the correctness of the samples, learned Counsel for the appellants argued there is non-compliance of section 52A(c) of NDPS Act and the chemical examiner's report cannot be relied upon. They relied on *Union of India v. Mohanlal And Another*⁵, *Bothilal vs. The Intelligence Officer Narcotics*

⁵ (2016) 3 SCC 379

*Control Bureau*⁶ and *Mohammed Khalid And Another vs. State of Telangana*⁷.

35. In rebuttal, learned Counsel for the State contended P.W. 14 had, during inspection, noted the mother consignment comprising of 980 bottles of phensedyl cough linctus syrup kept in 4 polythene sacks. He found it was as per inventory. Accordingly, he certified the correctness of the inventory prepared. Chemical examiner's report (Exhibit – 13) shows that the mother consignment of 980 bottles of phensedyl cough linctus syrup in 4 sacks duly certified by the Magistrate had been sent for chemical examination. Batch numbers noted in the seizure list, namely, PHB8019 and PHB8020 also matched with the batch numbers noted in the chemical examiner's report. It may be pertinent to note samples which have been drawn from the mother consignment at the spot had not been sent for chemical examination. Hence, absence of certification with regard to the said samples by the Magistrate does not break the chain of custody. The mother consignment of 980 bottles (after segregating 20 samples) in 4 sacks bearing the batch Nos. PHB8019 and PHB8020 and being duly certified by Magistrate had been sent to the chemical examiner prior to its disposal. He relies on *Balwinder Singh (Binda) vs. Narcotics Control Bureau*⁸ in support of his contention.

⁶ 2023 SCC OnLine SC 498

⁷ 2024 SCC OnLine SC 213

⁸ 2023 SCC OnLine SC 1213

36. Moot issue which falls for decision is whether the chain of custody between the consignment of phensedyl syrup seized from Narayan Yadav and the samples examined by the chemical examiner has been proved or not.

37. Section 52-A (2) of the NDPS Act, inter alia, provides after the seized drugs have been forwarded to the police station, the officer concerned shall prepare an inventory of the said drugs and make an application before Magistrate for certification of its correctness, taking photographs, drawing representative samples in presence of the Magistrate and certifying the correctness of samples so drawn. Sub-section (4) of the said section states inventory, photographs and the list of samples prepared duly certified by the Magistrate shall be treated as primary evidence during trial.

38. Exhibit – 12 shows Magistrate had certified the correctness of the inventory prepared with regard to the mother consignment comprising of 980 bottles. 20 bottles had been segregated earlier from the mother consignment. The report also notes as the samples had been segregated earlier, their correctness was not been certified by the Magistrate.

39. Chemical examiner's report shows a consignment of 980 bottles in 4 lots had been examined. This clarifies the position that the mother consignment of 980 bottles in 4 lots as per inventory duly certified by the Magistrate had been sent for chemical examination and

not the representative samples comprising of 20 bottles which had been segregated earlier. Moreover, the batch numbers of the bottles noted in the chemical examiner's report (Exhibit – 13) matched with the batch numbers of the seized consignment as per seizure list.

40. P.W. 14 also noted he had compared the seizure list with the Malkhana register and, thereafter, certified the correctness of the inventory. This constitutes primary evidence with regard to the consignment comprising of 980 bottles of phensedyl cough linctus syrup bearing batch Nos. PHB8019 and PHB8020 recovered from the house of Narayan Yadav and stored in the Malkhana. P.W. 6 deposed he carried the consignment for chemical examination. P.W. 13, investigating officer collected the chemical examiner's report (Exhibit – 13) and produced it in Court. Chain of custody of the consignment seized from the place of occurrence and that examined by the chemical examiner is established beyond doubt.

41. Cases cited on behalf of the defence are factually distinguishable.

42. Relying on *Mohanlal* (supra) the Apex Court in *Bothilal* (supra) and *Mohammed Khalid* (supra) held if the representative samples sent for chemical examination were not taken in the presence of the Magistrate, chemical examiner's report is rendered highly doubtful and is a waste paper.

43. In the present case, samples drawn at the spot had not been sent for chemical examination. On the other hand, the mother consignment comprising of 980 bottles of phensedyl cough linctus syrup (after the samples had been segregated) which was duly inventorized and certified by the Magistrate (Exhibit – 12) was sent for chemical examination. Hence, failure to draw samples in presence of Magistrate does not breach the chain of custody. It is trite law judgments cannot be read as statute. One additional fact or different fact may make a world of difference between conclusions in two cases.⁹ As the mother consignment whose inventory had been duly certified by the Magistrate had been sent for chemical examination and not the samples which had been drawn prior to arrival of the Magistrate, the chain of custody in the present case unlike the cited cases is not breached and the factual matrix in the present case is factually distinguishable from the cited cases.

44. Chemical examiner's report (Exhibit – 13) records as follows:-

“The duly sealed and signed cloth packet related to Balurghat P.S. Case No. 194/18 dated 09.06.2018 and marked by the forwarding authority as ‘Exhibit marked “A” and “B” ’ contained a sealed cardboard box, both of which were marked here as Chem 244/18. The said cardboard box contained another two sealed cardboard boxes and marked by the forwarding authority as ‘EX – A’ and ‘Ex – B’, which were subsequently marked here as Chem 244/18/A and Chem 244/18/B respectively.

The cardboard box marked here as Chem 244/18/A contained five nos. of plastic bottles with metallic lid (in sealed condition) and printed a label as ‘PHENSEDYL ® NEW COUGH LINCTUS’ bearing ‘Batch

⁹ Megh Singh vs. State of Punjab, (2003) 8 SCC 666

No.: PHB 9019 Mfg. Date: JAN. 18 Exp. Date: JUN. 19' in each bottle, which were randomly marked here as Chem 244/1/A/1, Chem 244/18/A/2, Chem 244/18/A/3, Chem 244/18/A/4, Chem 244/18/A/5. Each bottle contained 100 ml yellowish brown coloured liquid substance.

Findings:- Codeine and chlorpheniramine were detected in the content of each of the exhibits marked here as Chem 244/18/A/1 to Chem 244/18/A/5 and Chem 244/18/B/1 to Chem 244/18/B/5."

This establishes recovery of phensedyl syrup containing codeine phosphate (a narcotic substance above commercial quantity) from Narayan Yadav.

(ii) Complicity of Login Das – whether proved:-

45. Prosecution has sought to establish the guilt of Login Das on the strength of a pocket diary purportedly recovered from him in course of investigation of another case, namely, Balurghat PS Case No. 238 of 2018 dated 20.07.2018 corresponding to Special Case No. 31/18. Login Das was an accused in the said case. P.W. 13, Sk. Ziaul Kader, investigating officer deposed he had re-seized the pocket diary in connection with the present case from the Malkhana in-charge, P.W. 9, ASI Manik Ghosh. To prove these facts, during arguments prosecution produced certified copies of the following documents exhibited in Special Case No. 31 of 2018 arising out of Balurghat PS Case No. 238 dated 20.07.2018.

*“Certified Copy of Exhibit – 1 : Seizure List dated 12.06.2018.
Certified Copy of Exhibit – 2 : Label dated 12.06.2018.*

- Certified Copy of Exhibit – 3 : Statement of Login Das made to police informing storage of bottles of phensedyl at his house.*
- Certified Copy of Exhibit – 4 : Statement of Login Das made prior to search of his house leading to discovery of bottles of phensedyl in pursuance of Exhibit 3 and seized as per Exhibit 1.*
- Certified Copy of Exhibit – 5 : Permission of Login Das allowing his house to be searched.”*

46. Learned Counsel for the State argues the seizure list (Exhibit – 1) shows recovery of phensedyl syrup from Login Das in the other case. The batch numbers noted in the seizure list matches with those recovered from Narayan Yadav’s house in this case. Moreover, pocket diary bears notings showing sale of phensedyl syrup to Narayan Yadav.

47. Mr. Basu submits Login Das has been acquitted in other case, i.e. Special Case No. 31/18. Mere production of a seizure list from Login Das exhibited in another case does not prove the truth of its contents.

48. In view of the rival submissions at the Bar it falls upon the Court to determine whether mere production of a seizure list exhibited in another case is proof of recovery of phensedyl syrup and a pocket diary from Login Das. It is trite law evidence in one case cannot be read into another.¹⁰ Moreover, Login Das has been acquitted in the case, namely, Special Case No. 31/18 where the seizure list had been exhibited. A seizure list is a document prepared by the seizing officer

¹⁰ Mitthulal And Another vs. State of Madhya Pradesh, (1975) 3 SCC 529

recording the factum of seizure of a thing from a person. Mere production of the said document is not the proof of recovery itself. It provides corroborative evidence to the oral evidence of the seizing officer and other witnesses who are present at the time of seizure. Perusal of the seizure list exhibited in Special Case No. 31/18 shows it was prepared by P.W. 5. He was examined as a prosecution witness in this case. During his deposition he is completely silent with regard to recovery of any incriminating article including the pocket diary from Login Das resulting in registration of the other case. In absence of direct evidence with regard to recovery of the pocket diary adduced during trial, the said fact cannot be said to be proved by mere production of certified copy of a seizure list which was exhibited in another case. Learned Counsel for the State erroneously referred to section 77 of the Evidence Act. Section 77 of the Evidence Act states production of certified copy is proof of the contents of the said copy. That is to say certified copy of the seizure list produced in this case is proof of the seizure list exhibited in Special Case No. 31/18. The said provision does not create any presumption with regard to the truth of the contents of the certified copy. To fill this lacuna, the trial Judge relied on sections 53A and 66 of the NDPS Act. Reliance on these provisions is wholly misplaced.

49. Section 53A of the NDPS Act, inter alia, provides that a statement made and signed by a person before a seizing officer

empowered under section 53 of the NDPS Act during investigation of an offence shall be relevant to prove the truth of the facts contained therein if,

- (i) the person who made the statement cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or whose presence cannot be procured without unreasonable delay or expense or;
- (ii) when the person is examined as witness and the Court considers in the circumstances of the case that the statement should be admitted in the interest of justice.

50. Section 53A of NDPS Act is attracted to prove the truth of the contents of a statement made and signed by a witness before a seizing officer under section 53 of NDPS Act when the said person cannot be examined as he has died or his attendance cannot be procured due to circumstances beyond the control of the prosecution or even when the said person is examined as a witness and the Court considers it prudent to admit the statement in the interest of justice. The last clause would apply to cases where the witness making the statement has turned hostile and has resiled from his earlier statement to the seizing officer. In such cases the Court may in the interest of justice admit the statement as proof of its contents. But a seizure list is a document prepared by the seizing officer himself. By no stretch of imagination, it can be treated as a statement made or signed by a

person before the seizing officer. Similarly, disclosure statements made by Login Das also do not attract section 53A as its maker, i.e., Login Das is an accused and not as a prosecution witness.

51. Section 66 of NDPS Act creates a presumption in respect of documents prepared, furnished or seized from an accused or produced from a place outside India.

52. As discussed earlier, no direct evidence with regard to the seizure of any incriminating article including the pocket diary has been adduced by the prosecution in this case. P.W. 5 is completely silent with regard to the subsequent recovery of phensedyl cough linctus syrup or pocket diary from Login Das. Mere production of certified copy of seizure list cannot constitute substantive evidence of recovery. When the primary fact with regard to recovery of pocket diary has not been established prosecution cannot be permitted to draw a presumption against Login Das by invoking section 66 of NDPS Act with regard to its contents. It is also relevant to note P.W. 13 admitted no effort was made to verify whether the notings in the pocket diary were by the hand of Login Das.

Conclusion:-

53. In view of the aforesaid discussion, I am of the opinion prosecution has failed to adduce legally admissible evidence to prove the recovery of any incriminating article including the pocket diary from

Login Das. Hence, prosecution case is not proved beyond reasonable doubt and he is entitled to the benefit of doubt.

54. Conviction and sentence of appellant Login Das under sections 21(c) and 27A are set aside.

55. Conviction and sentence of appellant Narayan Yadav under section 21(c) of NDPS Act are upheld.

56. There is no evidence that Narayan Yadav had indulged in financing the illegal possession of phensedyl cough linctus syrup containing codeine phosphate, a narcotic substance. His conviction and sentence under section 27A are set aside.

57. The appeal being CRA 236 of 2020 is partly allowed to the aforesaid extent.

58. The appeal being CRA 97 of 2020 is, accordingly, allowed.

59. Period of detention suffered by the appellant, namely, Narayan Yadav during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon them in terms of Section 428 of the Code of Criminal Procedure.

60. Appellant, namely, Login Das shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

61. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

62. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within a week from the date of putting in the requisites.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

PA