

**HIGH COURT OF ALLAHABAD****Bench: Karunesh Singh Pawar, J.****Date of Decision: 23.1.2024**

CRIMINAL APPEAL No. – 1828 of 2013

**Lavkesh Singh And Pawan Kumar .....Appellant****Versus****Union Of India Thru. Sri Ravindra Kumar Tiwari Intelligence****.....Respondent****Legislation:**

Sections 20 (b) II (c), 25, 29, 42, 43, 52, 55, 313 of Narcotic Drugs and Psychotropic Substances Act, 1985

Section 313 of Cr.P.C.

**Subject:**

The appeal challenges the conviction and sentencing of the appellants under sections 20 (b) II (c), 25, 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 for the offense of transporting narcotics.

**Headnotes:**

Conviction and Sentencing Under NDPS Act – Lavkesh Singh and Pawan Kumar convicted under Sections 20(b) II(c), 25, 29 of NDPS Act for narcotics transport – Sentenced to 14 years' rigorous imprisonment and fine for Section 20(b) II(c), and 10 years for Sections 25 and 29 [Para 1].

Raid and Recovery of Narcotics – Intelligence Officer R.K. Tiwari received information about transportation of narcotics in a train – A raid conducted, resulting in the recovery of 124 kg charas and 77 kg ganja, valued at Rs. 38,74,000 [Paras 3-6].

Non-Compliance with NDPS Act Provisions – Violation of Sections 42(1), 42(2), and 55 of NDPS Act – Failure to reduce information into writing, lack of search warrant, and improper handling and custody of recovered narcotics [Paras 12-16, 19-21].

Absence of Independent Witnesses and Link Evidence – Independent witnesses not produced in court, and no explanation given – Missing link evidence for custody of narcotics from seizure to deposition in malkhana [Paras 26, 27].

Appeal Allowed – Given the non-compliance with NDPS Act, procedural lapses, and absence of independent witnesses, the appeal was allowed, setting aside the lower court's conviction and sentencing [Para 30].

### **Referred Cases:**

- State of Punjab vs. Balbeer Singh (1994 SCC (Criminal) 634)
- Karnail Singh vs. State of Haryana (2009(8) SCC 539)
- Directorate of Revenue vs. Mohd. Nisar Holiya (2008(2) SCC 370)
- State of Rajasthan vs. Jagraj Singh alias Hansa (AIR 2016 SC 3041)
- Boota Singh and others vs. State of Haryana (Criminal Appeal No.421 of 2021 SC)
- Sukhdev Singh vs. State of Haryana (2013(2) SCC 21)
- Gurbux Singh vs. State of Haryana (2001(3) SCC 28)
- Valsala vs. State of Kerala (AIR 1994 SC 117)
- Ritesh Chakravarty vs. State of M.P. (2006 SCC 12 page 21)
- Jagdish vs. State of M.P. (2002 AIR SC 2540)
- Noor Aga vs. State of Punjab and others (2008 AIR SCW 5964)
- Vadivelu Thevar vs. State of Madras (AIR 1957 614 SC)
- Avtar Singh vs. State of Punjab (2002(7) SCC 419)
- State of Punjab vs. Hari Singh and others (SLP (Crl) No.1508 of 2006)
- Harbhajan Singh vs. State of Haryana (Crl. Appeal No. 1480 of 2011 SC)
- Mukesh Singh vs. State (Narcotic Branch of Delhi) (2020)10 SCC 120
- Rajesh Dhiman vs. State of Himanchal Pradesh (2020)10 SCC 740)
- Harjeet Singh vs. State of Punjab (2008)8 SCC 557
- Babu Bhai Odhavji Patel and others vs. State of Gujarat (2005)8 SCC 725
- State of Punjab vs. Lakhvindar Singh (2010)4 SCC 402

- State of Rajasthan vs. Daul alias Daulat Giri (2009)14 SCC 387
- Gurmel Singh vs. State of Rajasthan (2005(3) SCC 59)
- Union of India vs. Bal Mukund (2009(2) EFR page 208)
- Rajender Singh vs. State of Haryana [2011(3) JIC 477 (SC)]
- State of West Bengal vs. Babu Chakraborty (Criminal Appeal No.426 of 1998)
- State of Rajasthan vs. Babu Lal [2010(1) EFR 442]

Representing Advocates:

Ajay Kumar for petitioner

Vijay Kumar for respondents

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Hon'ble Karunesh Singh Pawar,J.

1.Present criminal appeal has been preferred against the judgment and order dated 24.10.2013 passed by Addl. District & Sessions Judge, Court No.8, Lucknow in Criminal Case No.128 of 2010 Union of India versus Lavkesh Singh and another convicting the appellants under section 20 (b) II (c) of Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing them to undergo fourteen years' rigorous imprisonment and to pay fine of Rs. 2,00,000/- by each of them and in the event of default in payment of fine to undergo further simple imprisonment of one year, further convicting the appellants under section 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing them to undergo ten years rigorous imprisonment and to pay fine of Rs.1,00,000/- by each of them and in the event of default in payment of fine to further undergo nine month' simple imprisonment and further convicting the appellants under section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing them to undergo ten years' rigorous imprisonment and to pay fine of Rs.1,00,000/- by each of them and in the event of default in payment of fine to further undergo nine month' simple imprisonment. All the sentences have been directed to run concurrently.

2.Heard Mr. Ayodhya Prasad Mishra, Advocate, assisted by Mr. Shesh Ram Verma, Ms. Jaylaxmi Upadhyay and Mr. Rituraj Mishra, learned counsel for

the appellants and Mr. Digvijay Nath Dubey, learned counsel for the respondent.

3. Brief facts are that Mr. R.K. Tiwari, Intelligence Officer on receiving specific information on 7.9.2009 that TCO Goods and Narcotics in huge commercial quantity smuggled from Nepal are being transported by lease van No.93835 of Saptakranti Exp (2557) which is arriving at Lucknow Junction (NER) Railway station in the night. The approximate value of contraband being transported is Rs.40 lacs.

4. A team was constituted comprising of Ravindra Tiwari, I.O., Karunesh Shrivastava, I.O., Anil Pandey, I.O. and C.P. Pandey, I.O. by Mr. S.K. Singh, Deputy Director, DRI, Lucknow on the same day, i.e. 7.9.2009. The team on the way took two public witnesses Pawnesh Kumar son of Shri Dayaram and Sanjay son of Ramnath. They were approached by R.K. Tiwari and C.P. Pandey near City Montessori School, Gomti Nagar, Lucknow and they were told about the information and requested to accompany the team of officers to witness the proposed action of interception of train and recovery of the contraband to which they agreed. The team along with the two independent witnesses rushed to Lucknow Junction Railway Station.

5. Mr. R.K. Tiwari, Inspector (Intelligence Officer), DRI served a memo dated 7.9.2009 to the Chief Parcel Supervisor, Station Manager and RPF for assistance in search operation. The train arrived at platform No.4 at around 08.30p.m.. The lease van was found placed just behind the engine. On the off side two gates of the lease van, two big locks were found and in the presence of independent witnesses, RPF and Parcel Staff, the locks were broken to get access inside the lease van. Large quantity of bags inside the lease van were found, mostly containing makhana. Besides that, large number of jute bags and some cartons covered with jute bags were found placed on the floor space. The goods found at the floor space appeared to be suspected and thus, the officers started examining those bags. Apart from the goods, such as betel nut, small cardamoms and copper scrap, cartons wrapped with jute bags were found to contain apparently charas and ganja. Inventory was prepared.

6. The recovered goods were brought to Parcel office where estimated gross weight of the packets were taken at the manual weigh scale of parcel office and the recovered goods were taken in the custody of DRI officers vide recovery memo dated 7.9.2009. The goods were brought to DRI office for detailed examination, exact weighment and counting. In the morning of

8.9.2009, detailed examination of recovered goods was started in DRI office. Apart from other materials, such as betel nut, charas weighing 124kg, market value of which was estimated at Rs.37,20,000/- was also found. Charas was scratched with the help of knife from different packets and mixed and then four representative samples, each weighing approximately 25-25 gms each were prepared for chemical analysis. They were sealed with DRI seal. On each packet, the DRI officer and witnesses put their signatures with dates. Likewise, two cartons wrapped with jute bags were found to be containing apparently ganja weighing 77kg. The estimated market value of ganja was 1,54,000/-. Four representative samples, each weighing approximately 25-25 gm each were prepared for chemical analysis. The samples were sealed with DRI seal and signatures of officers and the witnesses were made on the samples. Mixed sample of charas and ganja was tested with drug detection kit. The recovered contraband, i.e. 124 kg charas and 77 kg ganja cumulatively valued at Rs.38,74,000/- which are liable for confiscation under section 60 of the NDPS Act, 1985 were placed under seizure under section 43 of NDPS Act, 1985 vide panchnama dated 7/8.9.2009. The DRI, Muzaffarpur in a follow-up action forwarded copy of the lease van agreement dated 5.9.2007 executed between Shri Lawkesh Singh, the lease van owner and the Railway Administration (East Central Railway), through Chief Commercial Manager, Muzaffarpur and photocopy of manifest dated 7.9.2009 vide another follow up action report dated 30.10.2009, the SIO, DRI, MSRU forwarded another photocopy set of lease agreement dated 5.9.2007 executed between Lavkesh Singh, the lease van owner and the Railway administration E.C. Railway)through Chief Commercial Manager, Muzaffarpur in respect of leasing work related to train No.2557/2558 bearing signature of both Lawkesh Singh and Pawan Kumar in English. Formalities were completed by the DRI team. Several summons were issued. Lease van owner Lavkesh Singh failed to turn up for examination in response to summon issued under section 67 of NDPS Act. Likewise, lease van owner employee and authorised representative Pawan Kumar failed to turn up for examination. The lease van owner employee at New Delhi Mahesh Kumar also did not turn up. The seizing officer R.K. Tiwari vide letter dated 9.9.2009 forwarded the representative sample of charas to Govt. Opium and Alkaloid Works, Ghazipur with test memo dated 9.9.2009. The government opium and Alkaloid Works, Ghazipur vide their report No.12 dated 14.11.2009 and vide another report No. 13 dated 14.11.2009 confirmed that the samples were charas and ganja within the meaning of NDPS Act. The independent

witnesses Pavnesh and Sanjay confirmed the prosecution case. The place, timing and facts of interception and recovery is mentioned in the panchnama dated 8.9.2009. The statements of other prosecution witnesses were taken and complaint case was filed by the complainant R.K. Tiwari.

7.The prosecution to prove its case has examined P.W.1 Chandrapati Pandey, Inspector who was part of the raiding team, P.W.2 Ravindra Kumar Tiwari, Inspector and the complainant, P.W.3 Awdhesh Kumar Verma who produced the malkhana register, P.W.4 Devendra Singh, Intelligence officer, DRI, P.W.5 Ram Pal Singh, Assistant Sub Inspector, Railway Protection Force, Lucknow.

8.The defence has produced D.W.1 Jawahar Lal Chaudhary, who was posted as Commercial Superintendent First Parcel Transit Office, Muzaffarpur and D.W.2 Rohit Kumar who was posted as Mate at Muzaffarpur Railway Station.

9.P.W.1 Chandrapati Pandey in his examination in chief has stated that after the order received by the Deputy Director, DRI at 7.00p.m., he went with Ravindra Tiwari, Intelligence Officer to City Montessori School, Vishal Khand, Gomti Nagar, Lucknow. There, two persons met whose names were Pavnesh and Sanjay and informing them about their purpose took their consent as independent witnesses. Along with the raiding team and independent witnesses, he reached at Lucknow Junction station, gave memo to Chief Parcel Supervisor for investigation of lease van No.9385 of Train No.2557 and went platform No.4. The train reached at about 8.30p.m. at platform No.4. The Wagon No.9385 was found just behind the engine. Two locks were found on both gates on off side. On the spot, call was made regarding the concerned person of the lease wagon. After 2-3 minutes, when no response had come, they broke the lock of the lease wagon and entered into it for search in lease van.

In the preliminary investigation, foreign beetle nut, cardamom, copper scrap, charas and ganja were found. Total 13 packets of beetle nuts, 15 bags of cardamom, three bags of copper scrap, two packets of ganja and three packets of charas were found and since the train was about to leave, other items could not be counted and investigated. After that, along with independent witnesses, they came to DRI office at Gomti Nagar and by that time, it was 2.00a.m. on 8.9.2009. The recovered items such as beetle nut, cardamom, copper scrap were seized under The Customs Act, 1962. Charas and ganja were recovered. After weighing, 124 kg. Charas and 77kg ganja was found. Representative sample, four each was prepared of 25-25 gms.

Samples were sealed and signed by all the team members. Recovery memo was prepared on the spot. Inventory was prepared.

In cross, he has stated that when they inspected the lease van, on the side of the platform, the doors were locked from inside. The lock was found on off side. He stated that Ext.Ka.2 was prepared in DRI office and not at the place of recovery. Then he stated that in the recovery memo, there is no mention of seal over the locks. If the seal would have been seen by him, he would have definitely mentioned in the recovery memo.

He denied the suggestion that off side locks were broken so that the person standing on the platform may not know how the goods have been recovered from lease van. He further denied the suggestion that for this reason, the representative of lease wagon was not called and the entire search and seizure has been done without there being signature of any railway staff on the recovery memo.

He stated that in the lease wagon, he did not find the manifest and railway money receipt put by the representative of the lease wagon holder. He could not tell as to how the second manifest reached at Delhi instead of the manifest put by the lease holder representative in the train. He stated that sampling of the contraband was done in front of him. He stated that sample is sealed so that there is no tampering. He further stated that if the seal is broken, then it means that there can be a tampering in the sample. He then said that when the train started from Lucknow to Delhi, the doors of lease van were sealed without putting the lock. They did not take into possession the lock broken of the lease van. He stated that Pawnesh and Sanjay are the independent witnesses. He did not know that they had served in the department earlier.

P.W.2 Ravindra Kumar Tiwari, Superintendent, Customs, Lucknow in his chief has stated that he was posted as Intelligence Officer, DRI, Jonal Unit, Lucknow. Information was received that in Saptkranti Express coming from Muzaffarpur to Lucknow in lease van No.93835, smuggled goods such as foreign cardamom, beetle nut, charas and ganja are being transported. He then said that the information was recorded and was brought to the knowledge of the higher officers. A team was constituted which consisted P.W.2 himself, Anil Pandey, Intelligence Officer, Karunesh Srivastava, and Ajeet Kumar and C.P. Pandey. On the way, the team took two independent witnesses Karunesh and Sanjai near C.M.S. They reached at Lucknow Junction NER and gave memo to Chief Parcel Supervisor, Railway and R.P.F., Lucknow. Their representative also joined them. After some time, the

train came at platform No.4 and behind the engine, the lease van was found. On the off side of the lease yan, on each of the two gates, lock was found. Call was made for the representative of the lease yan but no one came. They broke the locks. He repeated the same story of search and seizure as P.W.1. He prepared the inventory, which is ext.Ka-3, of the seized articles. On 9.9.2009, both charas and ganja were sent for examination. After completing the formalities and ample evidence against the accused, he filed the complaint. In the cross, he has stated that information regarding illegal narcotics drugs was received by him on 9.9.2009. He does not remember the information. He received it through phone which he reduced it into writing. He did not take search warrant as it was not needed. In the memo given to the Chief Parcel Supervisor, there is no mention of narcotic drugs. Off side door was opened because the on side, it was locked from inside. Due to night, he did not notice the seal. There is no mention of seal in the recovery memo. When the van left, it was again sealed by the railway and no lock was put. In case the DRI, Delhi did not find seal, then it may be possible that it could be broken on the way. After showing the narcotics drugs to the court, it was put in the malkhana. Samples were not drawn in front of the Magistrate because it was not required. The recovery memo was not prepared on the spot; rather was prepared in the office. Raiding team was constituted by the Deputy Commissioner, DRI. During raid, there was no gazetted officer. He was leading the team. He denied the suggestion that the appellants have been falsely implicated. He further denied the suggestion that the accused are not having the knowledge regarding the contraband put in the lease wagon.

P.W.3 Avdhesh Kumar Verma in his examination-in-chief has stated that on 14.9.2009 as Incharge Custom, Mr. R.A. Verma was posted. He died on 25.1.2011. He produced the register of the go-down (malkhana register), in which at serial No.243 on 14.9.2009, there is entry which shows that the recovered contraband was deposited in five packets. In the cross-examination, he admitted that on the register at serial No.243, the person depositing the contraband has not signed. He further admitted that by seeing the register entry 243, he cannot tell as to how many packets of charas and how many packets of ganja were there. He cannot tell as to why after seven days of the recovery, the contraband was deposited in the malkhana. He also could not tell that during these seven days, where these contraband were placed.

P.W.4 Devendra Singh, Intelligence Officer, DRI has stated that on the instructions of the higher officers to inspect the parcel of wagon 93835 train



No.2557 Saptkranti Express along with two independent witnesses, he reached Lahauri Gate, New Delhi. The door of the wagon was opened in the presence of the parcel supervisor Krishna Murari and Mahesh Kumar. Nothing objectionable was found.

In the cross, he stated that during the investigation, no seal was found on the four doors of lease wagon.

P.W.5 Ram Pal Singh, Assistant Sub Inspector, Railway Protection Force has stated that he was only accompanying the raiding team. He could not tell what was recovered.

10.D.W.1 Jawahar Lal Chaudhari, Commercial Superintendent, First, Parcel Transit Office, Muzaffarpur has stated that in his presence, the transit parcel Clerk according to commercial manual after putting the locks on the four doors of the lease wagon has put the seal as per rules. Before the seal was put, the representative of the lease holder inspected all the packets. Giving reference to the commercial manual Volume 1 and Volume 2, he has stated that without sealing the leased wagon, the wagon cannot move. He proved Ext.Kha.1, i.e. letter written by him where he has clearly written that all the four doors were locked and thereafter, sealed by TPC (Transit Parcel Clerk). He admitted the suggestion that the broken seal found at Charbagh Railway Station on the leased wagon shows that at some intermediate station, the lease wagon has been tampered.

D.W.2 Rohit Kumar, who loaded the goods as Mate in the lease wagon has stated that on his direction, the goods were loaded on the lease wagon and 230 packets of goods were loaded on that day. After the goods were loaded, Pawan put four locks and immediately after that, the TPC sealed the locks.

11.The statement of the accused Lavkesh Singh and Pawan Kumar were recorded under section 313 CrPC.

12.Learned counsel for the appellants submits that proviso 2 of section 42 (1) and section 42 (2) of The Narcotic Drugs and Psychotropic Substances Act 1985 (in short, 1985 Act) have been violated. The information received in writing has not been sent to the superior officer. Search and seizure proceedings were conducted between sunset and sunrise. No search warrant or authorisation from the officer empowered under section 41 (1) or sub section (2) of 1985 Act was obtained. It is submitted that lease agreement was executed between the railway authority at Muzaffarpur and the appellant Lavkesh Singh for three years for transportation of goods. The keys were with

the lessee and the drug was found inside the area of lease van. Therefore, section 42 applies and section 43 will not apply. In support of his contention, learned counsel has relied on judgments in State of Punjab versus Balbeer Singh 1994 SCC (Criminal) 634 (para 25(2-C) and 9, Karnail Singh versus State of Haryana 2009(8) SCC 539 (para 35), Directorate of Revenue and another versus Mohd. Nisar Holiya 2008(2) SCC 370 (para 14), State of Rajasthan versus Jagraj Singh alias Hansa AIR 2016 SC 3041, Boota Singh and others versus State of Haryana Criminal Appeal No.421 of 2021 SC, Sukhdev Singh versus State of Haryana 2013(2) SCC 21.

It is further submitted that there is also violation of section 52 of 1985 Act as well as section 55. Reliance has been placed on the judgment in Gurbux Singh versus State of Haryana 2001(3) SCC 28 (para 9), Valsala versus State of Kerala AIR 1994 SC 117 (para 4).

It is submitted that independent witnesses introduced were not so independent. They have been withheld and have not been produced for examination before the court by the prosecution. If such an independent witness is not proved before the court by the prosecution, the prosecution story itself becomes doubtful. In this context learned counsel has relied on Ritesh Chakravarty versus State of M.P. 2006 SCC 12 page 21 and Jagdish versus State of M.P. 2002 AIR SC 2540.

The alleged lock hanged in gate of lease van which is allegedly broken was not produced before the court nor any recovery memo in that regard was prepared. In this context, learned counsel has relied on Noor Aga versus State of Punjab and others 2008 AIR SCW 5964 and Vadivelu Thevar versus State of Madras AIR 1957 614 SC.

Link evident is missing. Malkhana register was not signed, hence not proved. No seal was found on the lease van in Lucknow nor seal was found in Delhi although as per prosecution, it was sealed again while the train was departing from Lucknow.

13. Per contra, Mr. Digvijay Nath, learned counsel for DRI has opposed the contention. He submits that the lease van was a conveyance and was at the railway station which is a public place and therefore, section 43 of 1985 Act will apply. There was no need to record information in writing or to send it to the superior officer. It is a huge quantity of narcotics seized from the lease van. There is no case of false implication or tampering. There is no illegality in the order passed by the trial court.

He further submits that the information reduced into writing was placed before the superior officer S.K. Singh who was present in the office of DRI and therefore, section 42 of 1985 Act was complied. He further submits that the delay in sample collection is not fatal to prosecution case. In case the seized articles are not kept in proper custody, it will not vitiate the trial. It is not mandatory to keep the recovered narcotic drugs in proper custody; rather it is directory.

14.To appreciate argument, it would be appropriate to have a glance to section 42 of 1985 Act which is reproduced as under :

Section 42 in The Narcotic Drugs and Psychotropic Substances Act, 1985

1[42. Power of entry, search, seizure and arrest without warrant or authorisation.

(1)Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property 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 is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has

reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]

According to section 42(1) any specific prior information received by the concerned officer has to be reduced into writing. The second proviso to sub section (1) of section 42 further provides that if such officer has reason to believe that a search warrant or autorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. Further sub section (2) of section 42 provides that when such information is reduced into writing under sub section (1) of section 42 or grounds for his belief under the proviso II of section 42 (1) are recorded, then the concerned officer shall within seventy two hours send a copy of the order to his immediate official superior.

15. In the case in hand, search and seizure proceedings were initiated on the basis of specific information received by P.W.2. This information was in respect of search and seizure proceedings between sunset and sunrise. Hence, according to sub section (1) of Section 42, this specific prior

information so received by the officer concerned should have been reduced into writing and in case of search and seizure between sunset and sunrise, then under second proviso to section 42(1), search warrant or authorisation should have been obtained from the officer as empowered under section 41(1) or section 41(2) of the 1985 Act. Further, in case he had reason to believe that it is not practicable to do so for instances provided under second proviso to section 42(1), grounds of belief have to be recorded and that ground of belief or information reduced into writing according to sub section (2) of section 42 has to be sent within 72 hours to the superior official of the concerned officer.

P.W.2 has admitted in his cross examination at page 71 that there was no gazetted officer in the team of search and seizure proceedings and he was heading the raiding team. Specific information received by P.W.2 was regarding transport of narcotics drugs in the lease van of Saptkranti Express train.

The lease agreement was executed between railway department at Muzaffarpur and the appellant Lavkesh Singh on 5.9.2007 for three years regarding transportation of goods through railway. The alleged recovery has been made from inside of the lease van which was under the lease agreement between the railway and the appellant Lavkesh Singh. As per agreement, the keys of the lease van was only with Lavkesh Singh and after the lock was put on the lease van at Muzaffarpur by railway authority, they were sealed also by the defence witnesses. Therefore, it was not accessible to the public nor it was a place intended for use by public. It was exclusively to be used by the parties to the lease agreement. Hence, section 42 will apply. Since the seizure proceedings were conducted between sunset and sunrise, the search warrant under section 42 of 1985 Act was necessary which has not been obtained by P.W.2 as has been admitted by him in his cross examination at page 69 of the paper book where he has stated that he did not obtain search warrant because there was no need. He further deposed that there was 4-5 hours time for taking action after receiving information. Thus, the search and seizing officer has neither obtained search warrant nor taken any authorisation according to second proviso of section 42(1) from the officer empowered or authorised for taking action regarding search and seizure proceedings nor there is any explanation for not taking search warrant or authorisation from the concerned authority which was mandatory for the searching and seizing officer.

16. According to section 42(2) of the 1985 Act, the reason of belief if any recorded for not taking search warrant or authorisation from the concerned authority, it was mandatory for the search and seizing officer and the investigating officer for sending the reason of belief recorded by them within 72 hours to his immediate superior officer. In this case, from perusal of the material on record, there is no explanation for not recording the reason of such belief by search and seizure officer and for sending the same to his superior officer along with the information which was reduced into writing as mandated under section 42 within 72 hours. Thus, there appears to be an absolute violation of section 42(2) of 1985 Act. The information reduced into writing has not been sent to the superior officer. Search and seizure was carried out between sunset and sunrise, still no search warrant and authorization was obtained as mandated under second proviso to section 42(1) of the 1985 Act, neither any ground of belief has been recorded as per aforesaid proviso and obviously copy of same has not been sent to superior officer.

Thus, neither the copy of information reduced into writing has been sent to superior officer nor ground of belief for not taking search warrant/authorization has been recorded nor its copy sent to superior officer as mandated under section 42(1) second proviso and section 42(2). Thus, there is complete violation of aforesaid provision, which is impermissible.

It was not a case of sudden or accidental chance recovery. The provisions of section 42 of 1985 Act are mandatory. There is no documentary evidence to show that the information reduced into writing was sent to the superior officer as provided under section 42(2). There was no gazetted officer in the raiding team. The alleged search and seizure proceeding has taken place in the night according to statement of P.W.2. He deposed that he has not taken search warrant which was not necessary. He further deposed that after information, 4-5 hours time was available to him (page 69 of the paper book). P.W.2 in his statement before the court nowhere has stated regarding compliance of section 42(1) second proviso as well as compliance of section 42(2) of 1985 Act.

17. The Supreme Court in a catena of judgments has held that compliance of section 42 of 1985 Act is mandatory and in absence thereof, conviction cannot be sustained.

18. In the case of Balbir Singh (supra), it was held that if the empowered officer makes search between sunset and sunrise, he must record the grounds of

his belief. To this extent, the provision of section 42 is mandatory and contravention thereof would affect the prosecution case and vitiate the trial. Relevant para 25(2C) and 3 are extracted below :

“25(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. He may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such 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 the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.”

In Karnail Singh’s case(supra), it was held in para 59 that total non compliance of sub sections (1) and (2) of section 42 is impermissible. Relevant para 35 is reproduced as under :

“35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Section 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section

42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate

action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Section 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42 . But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.”

In the case of Mohd. Nisar Holiya(supra), it has been held in para 14 that the place which is required to be searched if not open to public although it is situate in public place, section 42 will apply and section 43 will not apply.

In Jagraj Singh’s case (supra), it has been held that non compliance of requirement of section 42 is impermissible. Relevant para 25 is extracted below :



“25. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance of requirement of section 42 and 50 impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance of Section 42 . The Constitution Bench noted the effect of the aforesaid two decisions in paragraph 5. The present is not a case where insofar as compliance of section 42 (1) proviso even an arguments based on substantial compliance is raised there is total non- compliance of Section 42(1) proviso. As observed above, Section 43 being not attracted search was to be conducted after complying the provisions of Section 42. We thus, conclude that the High Court has rightly held that non compliance of 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.”

In Buta Singh’s case (supra) (relevant para 14), while relying on Karnail Singh’s case (supra) and Jagraj Singh alias Hansa’s case, total non compliance of section 42 was held to be impermissible. The said para 14 is extracted below :

“14.The decision of this court in Karnail Singh as followed in Jagraj Singh alias Hansa is absolutely clear. Total non-compliance of section 42 is impermissible. The rigor of Section 42 may get lessened in situations dealt with in the conclusion drawn by this court in Karnail Singh but in no case, total non-compliance of Section 42 can be accepted. “

In Rajender Singh versus State of Haryana [2011(3) JIC 477 (SC)], it was reiterated that total non-compliance of provisions of section 42 (1) and (2) is impermissible and which will vitiate the conviction. Relevant para 5 is extracted below :

“5. It is therefore clear that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced.. We have gone through the evidence of PW-6 Kuldip Singh. He clearly admitted in his cross-examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer Inspector Kuldip Singh. It is, therefore, clear that there has been complete non- compliance with the provisions of Section 42(2) of the Act which vitiates the conviction.”

In State of West Bengal and others versus Babu Chakraborty Criminal Appeal No.426 of 1998, it has been held that failure to comply section 42 will render entire case suspect and cause prejudice to the accused and the Supreme Court refused to interfere with the acquittal.

In State of Rajasthan versus Babu Lal [2010(1) EFR 442, considering various factual aspects including that provisions of section 42(2) were complied with, hence the conviction was held illegal and the order of the High court acquitting the accused was affirmed.

In Sukhdev Singh versus State of Haryana (2013) 2 SCC 212, directions were issued to DGP of all the States to issue appropriate instructions directing investigating officers to duly comply with provisions of section 42 at the appropriate stage to avoid acquittals due to non-compliance with section 42 as was so occasioned in that case.

19.The next limb of argument of learned counsel for the appellants is that there is absolute violation of section 55 of the 1985 Act.

This Court has noted that the alleged seizure was made on 7.9.2009 and from perusal of the malkhana register at page 106 of the paper book, it appears that the same was deposited in the malkhana on 14.9.2009. There are no signatures on the malkhana register. The link evidence regarding handling of alleged recovered article about its sample and custody of the recovered drug after search and seizure has not been proved according to law by the prosecution, in the present case. The alleged recovery was affected on 7/8.9.2009. Neither the sample was drawn on the spot nor the alleged recovered article along with its memo was prepared on the spot, sample of seal or the original was also not deposited at nearest police station as mandated under section 55 of the 1985 Act. It was deposited in the malkhana of the department of DRI on 14.9.2009. There is no explanation given by the prosecution in this regard as to who was the person having custody of the alleged sample taken on spot and recovered article between 7/8.9.2009 till 14.9.2009.

P.W.3 Avdhesh Kumar Verma produced by the prosecution has deposed that there was no signature of depositing person on the entry made at page 243 which is copy of Malkhana register and exhibited as Ext. Ka.22. The prosecution has not proved the fact as to who was the authority who has taken custody of the alleged recovered narcotic drugs for keeping it in safe custody in the customs godown on 14.9.2009 as there was no signature on Ext. Ka.22 of any person. This creates serious doubt regarding recovery of

narcotic drug on the said date, place and time as alleged by the prosecution and also creates serious doubt whether alleged recovered narcotic drug was deposited in custom godown on 14.9.2009 or not. The prosecution has not explained this gap in handling and treatment of the safe custody of the article, if any so recovered from the alleged lease van. The argument of learned counsel is that nothing was recovered from the alleged lease van of Saptkranti Express and the entire prosecution case was planted and was based on false and concocted facts may be true. The sample does not appear to have been deposited in the malkhana along with the seized drugs.

Learned counsel has relied on State of Rajasthan versus Gurmel Singh 2005(3) SCC 59, Union of India versus Bal Mukund 2009(2) EFR page 208 (relevant paras 9, 15, 38) and Noor Aga versus State of Punjab and others 2008 AIR SCW 5964.

20. In Gurmel Singh's case (supra), it has been noticed by the Supreme Court that though the seized articles were said to have been kept in malkhana, however, malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by concerned prosecution witness. Finding such a loophole and after finding that there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles, the Supreme Court has affirmed the judgment of the High Court.

In the case of Bal Mukund (supra), it was held that the standing instructions 1/88 which has been issued under 1985 Act are requirement in law. Relevant para 38 is extracted below :

“38. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction No. 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW-7 had taken samples of 25 grams each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law.”

In Noor Aga's case (supra), where large quantity of heroin contained in cardboard container was seized, however, the said container was not produced, the Supreme Court held that the alleged recovery of contraband becomes doubtful. Physical evidence as to recovery of bulk quantity of heroin was not produced in court. No direction was shown to have been obtained from the court under section 52-A for destruction/disposal of drug. Further, physical evidence relating to three samples taken from bulk amount of heroin

were also not produced. Hence, it was held that negative inference can be drawn against the prosecution.

21. On the question of possession, learned counsel for the applicant submits that the question of conscious possession was not put under section 313 CrPC but the appellants have been convicted presuming conscious possession of the appellants of the narcotic drug with the aid of section 35 read with section 44 of 1985 Act which is against the provisions of law. In this context, learned counsel has relied on Avtar Singh versus State of Punjab 2002(7) SCC 419 (paras 3 and 6), State of Punjab versus Hari Singh and others SLP (Crl) No.1508 of 2006 (paras 9 to 17, 18, 29, 31, 32, 33 and 44) and Harbhajan Singh versus State of Haryana Crl. Appeal No. 1480 of 2011 (SC) (relevant paras 3, 4, 8, 9, 10, 11).

22. Mr. Digvijay Nath Dubey, learned counsel for Union of India while relying on the judgment in Mukesh Singh versus State (Narcotic Branch of Delhi) (2020)10 SCC 120 and Rajesh Dhiman versus State of Himanchal Pradesh (2020)10 SCC 740 has submitted that if the investigation is done by an officer who himself is an informant, it will not vitiate the trial.

Learned counsel for the respondent while relying on the judgment in Harjeet Singh versus State of Punjab (2008)8 SCC 557 has submitted that delay in the sample collection is not fatal to the prosecution case.

He has further relied on Babu Bhai Odhavji Patel and others versus State of Gujarat (2005)8 SCC 725 in support of his contention that non-compliance of sections 52, 55 and 57 of N.D.P.S. Act will not vitiate the prosecution case as the said provisions are only directory.

23. In the case of Babu Bhai (supra), the prosecution adduced ample evidence to show that these provisions have been substantially complied with. Therefore, the case of Babu Bhai (supra) is distinct from the present case.

24. In the next judgment relied on by respondent's counsel in State of Punjab versus Lakhvindar Singh (2010)4 SCC 402, it has been held that delay of seven days in sending samples to chemical examiner will not impact the trial.

In this context, it is significant to note that in the present case, this court is not adjudicating on this aspect.

25. Learned counsel has further relied on State of Rajasthan versus Daul alias Daulat Giri (2009)14 SCC 387 and submitted that if the sample was in transit custody, it will not vitiate the trial.

In the present case, it is not the case of the prosecution that sample was in transit custody and there is no explanation by the prosecution as to who was in the custody of the seized articles from 7/8.9.2009 to 14.9.2009. The prosecution is utterly silent on this vital aspect of the matter. Further, the Malkhana Register is not signed. It has not been proved by the prosecution as to who was the person who has deposited the seized goods in the Malkhana.

26. The NCB official who joined in search and seizure proceeding in the office of DRI, Lucknow has not been produced nor there is any proper explanation regarding the presence of the NCB official associating the team of DRI officials. The material witnesses like railway department officers were not produced for their examination before the court by the prosecution. Two independent witnesses were also not produced; rather withheld without giving any explanation for not producing them before the court in evidence. Right from receiving the information and thereafter the search and seizure proceedings, every document, original seal used in preparation of document during search and seizure proceeding till entire investigation was left on P.W.2 alone.

27. The prosecution has not proved as to who was the person who has deposited the seized narcotic drugs on 7/8.9.2009 in the malkhana on 14.9.2009. The prosecution has also failed to prove that after the seizure on 7/8.9.2009 and before depositing it on 14.9.2009 who was the person having custody of the alleged narcotic drugs and whether it was in safe custody of any person at all. P.W.3 produced by the prosecution who was godown incharge on that day has stated that the article was deposited according to its entry on 14.9.2009 but there was no signature on malkhana register of any person. In these circumstances, there is no evidence whether the actual narcotic contraband, if any recovered was ever deposited in the godown of custom department or false entry has been made in this regard on 14.9.2009.

Likewise, no sample of seal was deposited in the malkhana along with the seized contraband on 14.9.2009 and the sample so drawn on the spot as alleged by the prosecution was deposited in the malkhana along with the alleged recovered narcotic drugs. There is no explanation as to why S.K. Singh was not produced before the court by the prosecution. The other witnesses like Anil Pandey, Karunesh Srivastava, Constable Ajeet Kumar and Ashutosh Dixit were not produced for their examination before the court nor there is any explanation for the same. There is no signature of independent

witnesses on Ext.Ka.5 and 6 and likewise there is no signature of other searching and seizing team members on Ext. Ka.5 and 6. There is no entry of depositing the representative samples drawn from the alleged recovered narcotic drugs of ganja and charas on 8.9.2009, either original or duplicate or any copy of test memo or sample of seal or original seal affixed on the documents and on the material so seized by the searching and seizing officer along with the entry made on 14.9.2009 on the malkhana register with the recovered narcotic drug. The entry made in malkhana register on 14.9.2009 is without signature of the person who was incharge on that day of the malkhana. This creates serious doubt in the prosecution case.

28. There is one peculiar fact in this case. D.W.1 Jawahar Lal Chaudhary who is an officer of Indian Railway has proved that all the four gates were locked and seal was put as per commercial Manual. He has further stated that in case the seal was found broken, it shows tampering at the intermediate station.

D.W.2 Rohit Kumar who was posted as Mate at Muzaffarpur Railway Station has also affirmed statement of D.W.1 and has stated that the locks were sealed after putting card label. The seal was not found at Lucknow during search and seizure. No explanation regarding this broken seal found at Lucknow could be given by the prosecution which again creates suspicion on the prosecution story.

29. Thus, considering the fact that there is total non-compliance of section 42(2) of 1985 Act, the question of conscious possession was not put to the appellant, there are no signatures on the malkhana register, there is no explanation by the prosecution as to where the seized narcotic drugs were kept between 7/8.9.2009 and 14.9.2009 and who was having the custody of the alleged drugs during this time, deposit of drugs in malkhana is also not proved as malkhana register is not signed and thus the link evidence is missing, two independent witnesses have not been produced, no order of the court obtained under section 52A for disposal of seized narcotic drugs and psychotropic substance has been produced, thus there are ample lacunas in the prosecution case and, the prosecution has failed to prove its case beyond reasonable doubt as also keeping in view the judgments referred to above, the appeal is liable to be allowed.

30. The appeal is allowed and the judgment and order dated 24.10.2013 passed by Addl. District & Sessions Judge, Court No.8, Lucknow in Criminal Case No.128 of 2010 Union of India versus Lavkesh Singh and another

(supra) is set aside. The appellants are on bail. The bail bonds stand discharged.

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