

(2016) 01 CAL CK 0018
In the Calcutta High Court
Case No : CRA 790 of 2013

Anil Kumar and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 15-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 215, Section 313, Section 428, Section 464
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(b), Section 20(b)(ii)(B), Section 20(b)(ii)(C), Section 42, Section 43, Section

Citation : (2016) 3 AICLR 193 : (2016) 2 CalCriLR 121 : (2016) 1 CalLT 485

Hon'ble Judges : Debasish Kar Gupta and Md. Mumtaz Khan, JJ.

Bench : Division Bench

Advocate : Soubhik Mitter, Avishek De and Aindrila De, for the Appellant; Manjit Singh and Sanjoy Bardhan, for the Respondent

Final Decision : Allowed

Judgement

Md. Mumtaz Khan, J

1. This appeal has been preferred by the appellants assailing the judgment and order of conviction dated August 29, 2013 as also the sentence dated August 30, 2013 passed by the learned Judge, Special Court under NDPS Act, Howrah in T.R. No. 8 of 2012. By the virtue of the impugned judgement appellant No. 1, Anil Kumar has been convicted and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 1,00,000/- in default to suffer rigorous imprisonment of one year more for the offence punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substance Act, 1985 and the appellant No. 2, Meherunnessa has been convicted and sentenced to suffer rigorous imprisonment for 4 years and to pay fine of Rs. 25,000/- in default to suffer rigorous imprisonment of six months for the offence punishable under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as the NDPS Act) and the period of detention already undergone by them was directed to be set off under Section 428 of the Criminal

Procedure Code (hereinafter referred to as the Cr. P.C.). The prosecution case, in brief, is as follows:--

"On February 18, 2012 P.W.1 along with C-10283, K.C. Naskar and LC-12461, Aparna Kaity (P.W.4) under supervision of IC/RPF/Asst-Booth No. -9/Howrah, kept a secret watch near the entrance of gate No. 4 & 5. At about 15.40 hours CCTV staff C-10967, B. Mukherjee informed about the presence of two suspected persons (one lady and one gent) in between gate No. 3 & 4 beside the ticket vending machine of Old Complex Howrah Railway Station. On reaching at the spot they found the appellants with 3 number of luggages outside gate No. 3 & 4. On being asked appellants disclosed their identity and admitted that the bags in their possession contained ganja. A requisition was sent to Sri Anil Bhalerao, ASC/Howrah, Gazetted Officer, (P.W.5) to attend the place of occurrence who came there. Appellants were then apprised about the search of their luggages in presence of the Gazetted Officer and search of the bags were conducted and 23 kgs. of ganja contained in two different bags were found from the possession of appellant No. 1 and 6.70 kgs. of ganja leaves wrapped in poly pack contained in olive colour big bag was found from the possession of appellant No. 2. Those articles were then seized at the spot under seizure list after taking their weighment in presence of two independent witnesses (P.W.2 & P.W.3) and ASC/HWH-1 (P.W.5) and were labeled. Samples were also collected from the seized bags and those were also labeled and the appellants were taken into custody and a complaint was lodged at Howrah GRPS by P.W.1."

2. On the basis of that complaint, P.W.7 started Howrah GRPS case No. 36/12 dated 18.2.2012 against the appellants under Section 20(b) of the NDPS Act and endorsed the case to P.W.8 for investigation who then after completion of investigation submitted charge sheet No. 49 of 2012 dated April 15, 2012 against the appellants under Section 20(b) of the NDPS Act.

3. Charges were framed on August 7, 2012 under section 20(b)(ii)(C) of the NDPS Act against the appellant No. 1 and under section 20(b)(ii)(B) of the NDPS Act against the appellant No. 2 and after they denied their involvement in the crime, trial commenced. Prosecution examined 08 witnesses and produced certain documents and articles which were marked as Exts. 1 to 11 and Mat. Exts. I to XII for the prosecution while on the other hand one seizure list and a zimmanama were marked as Exts. A and B for the defence. Thereafter on completion of trial and after examining the appellants under Section 313 Cr.P.C. learned court below passed the impugned judgment and order.

4. It is submitted by the learned advocate appearing on behalf of the appellants that the impugned judgement, order of conviction and sentence cannot be sustained in law for the following reasons:--

"(i). There was defect in framing of charge against the appellants as details of occurrence had not been mentioned therein and even the time and place of occurrence mentioned therein was not correct.

(ii). There was non compliance of the provisions of Section 42 of the Narcotic Drugs and Psychotropic Substance Act as the information received was neither taken down in writing nor the same was sent to the immediate superior officer.

(iii). There was also non compliance of the provisions of section 50 of the Narcotic Drugs and Psychotropic Substance Act. The notice, Ext. 1, given to the appellants prior to conducting search was defective as it was a joint notice not permissible under the law.

(iv). Procedure relating to search and seizure as well as seal and label of the contraband articles had not been properly adhered to.

(v). There was delay in sending the sample to the Drug Control for chemical analysis which had not been explained nor the prosecution explained where those articles were kept after seizure. Even the Malkhna register was not produced nor the Malkhna-in-charge was examined. The person who weighed the contraband articles was also not examined.

(vi).The provisions of Section 52A of the Narcotic Drugs and Psychotropic Substance Act had also not been followed in the instant case.

(vii). Prosecution case had been based only on the evidence of police personnel as the independent witnesses did not support the case of the prosecution and the prosecution even did not declare them hostile."

5. According to learned advocate appearing on behalf of the appellants, the learned Court below did not take into consideration the aforesaid aspects of the matter while passing the impugned judgment, order of conviction and sentence.

6. Reliance is placed by the learned advocate for the appellants on the decisions of Karnail Singh v. State of Haryana, reported in , (2009)3 SCC (Cri) 887, State of Rajasthan v. Parmanand and Anr., reported in , (2014) 5 SCC 345, Raja Ram v. State of Rajasthan, reported in (2005) 5 SCC 272, Ashok @ Dangra Jaiswal v. State of Madhya Pradesh, reported in , (2011)5 SCC 123, Vijay Jain v. State of Madhya Pradesh, reported in , (2013)14 SCC 527, Noor Aga v. State of Punjab and Anr., reported in , (2008)16 SCC 417, Tej Bahadur Singh and Anr. v. Narcotic Control Bureau and Anr., reported in 2000(1) CHN 803 and two unreported judgments of this court, one in the matter of Haniph Seikh v. The State of West Bengal delivered on November 26, 2014 (in re: C.R.A. No. 236 of 2010), Shyamal Barman and Anr. v. The State of West Bengal (in re: C.R.A No. 24 of 2008) with the matter of Gobinda Rao v. The State of West Bengal (in re: C.R.A No. 25 of 2008) with the matter of Krishna Gupta v. The State of West Bengal (in re: C.R.A No. 90 of 2008) delivered on August 21, 2014, in support of his submissions.

7. Learned advocate representing the State submitted that there was no irregularity and/or defect in the framing of charge against the appellants as the time, place and quantity of ganja seized from the appellants have been specifically mentioned in the charge. According to him time of occurrence is when

search and seizure was made and not when it was detected by CCTV footage and further that it is a procedural matter and there was also no defence by the appellants that the error has caused any miscarriage of justice or any prejudice to them. He has also drawn our attention to the provisions of section 215 and section 464 of the Criminal Procedure Code.

8. According to Learned advocate representing the State search and seizure was made at a public place namely at Howrah Rly. Stn., hence provisions of section 43 of the N.D.P.S. Act and not under section 42 of the said Act will apply and there was also no requirement of the officer conducting search to record the information and send the same to his superior officer.

9. Learned advocate representing the State also submitted that search was made in a public place and only bags were searched and ganja was recovered there from and there was no personal search of the appellants nor any recovery was made from person and as such section 50 of the N.D.P.S. Act has no application.

10. According to learned advocate representing the State option was given to the appellants for their search either before the Magistrate or before the Gazetted Officer and they gave their consent to be searched before the Gazetted Officer. According to him there is no specific form of notice and the information need not be in writing.

11. Learned advocate representing the State also submitted that proper procedure has been followed in the search and seizure and there was no procedural irregularity in the same.

12. According to learned advocate representing the State seizure list had been proved and so also the signatures of the witnesses and the appellants appearing therein which has been corroborated by P.W.1, P.W.4, P.W.5 and P.W.8 and the independent witnesses have also not denied their signatures on the seizure list. According to him even, if there was any procedural illegality or irregularity in conducting search and seizure, the evidence collected thereby will not become inadmissible.

13. Learned advocate representing the State also submitted that it is immaterial whether independent witnesses supported the prosecution case or not and whether they were declared hostile or not but when the evidence of official/police witnesses were trustworthy, reliable and credible there was no reason to disbelieve their evidence especially when there was no evidence to show the animosity between the appellants and the official/police witnesses.

14. According to learned advocate representing the State ganja was seized on February 18, 2012 from the possession of the appellants and after taking weighment of the contraband articles from the weighing machine at platform No. 9 and after drawing of samples therefrom in presence of the witnesses those were properly sealed and labelled and were kept in Malkhana and was sent to the FSL for analysis only on February 21, 2012 as February 19, 2012 and February

20, 2012 were holidays on account of Sunday and Shivaratri and there was no delay at all.

15. According to learned advocate representing the State compliance of section 52A of the NDPS Act is not required in the present case and further that section 52A of the NDPS Act is not mandatory rather directory and non compliance of the same will not vitiate the trial or the conviction.

16. Reliance is placed by learned advocate representing the State on the decisions of State of Haryana v. Jarnail Singh and Ors., reported in , (2004) 5 SCC 188, Ravindran @ John v. Superintendent of Customs, reported in , (2007) 6 SCC 410, State, NCT of Delhi v. Malvinder Singh, reported in , (2007) 11 SCC 314, Union of India v. Major Singh and Ors., reported in , (2006) 9 SCC 170, Mohan Lal v. State of Rajasthan, reported in 2015 (Criminal) SC 770, M. Prabhulal v. Assistant Director, DRI, reported in , (2003) 8 SCC 449, Union of India v. Shatroghan, reported in , (2008) 8 SCC 313, Madan Lal and another v. State of Himachal Pradesh, reported in , 2003 CRI L.J(SC)3868, State of Himachal Pradesh v. Pawan Kumar, reported in , 2005 CRI L.J (SC) 2208, Kulwinder Singh and Anr. v. State of Punjab, reported in , 2015 SAR (Criminal) S.C. 597, Krishan Kumar v. State of Haryana, reported in , 2014 CRI L.J (SC) 3147, Yasihey Yobin and Anr. v. The Department of Customs, Shillong, reported in , 2014 CRI L.J (SC) 1617, State of Rajasthan v. Ram Chandra, reported in , 2005 CRI L.J (SC) 2201, State of Rajasthan v. Babu Ram, reported in , (2007) 6 SCC 55, Manohar Lal v. State of Rajasthan, reported in , JT 1996(I) 480, Raghbir Singh v. State of Haryana, reported in , A.I.R. 1996 SC 2926, Jarnail Singh v. State of Punjab, reported in , (2011) 3 SCC 521, Khet Singh v. Union of India, reported in , (2002)4 SCC 380, Rajkishore Jha v. State of Bihar and Ors., reported in 2004 SCC (Criminal) 212, Gurubax Singh v. State of Haryana, reported in A.I.R. 2001 SC 100, State of Punjab v. Makhan Chand, reported in , (2004)3 SCC 453, Nasir Ganibhai Shaik and Anr. v. State of Gujrat, reported in 2004 CRI L.J. 5049, Abdul Kader Jusab Sandhi and Anr. v. State of Gujrat, reported in , 2002 (2) GLR 1212, unreported judgment passed in the matter of Pal Singh and Anr. v. State of Punjab, on February 25, 2014 in Special Leave petition (CRI) No. 191 Of 2014 and the unreported decision of this court in the matter of Govinda Prasad Verma v. State delivered on December 3, 2003 (in re: Cr.A. No. 256 of 2001) in support of his above submissions.

17. We have given our thoughtful consideration to the submissions made by the learned Counsels appearing for the respective parties and gone through the evidence of the prosecution witnesses, the materials on record including the written complaint, formal F.I.R., seizure list, notice, chemical analysis report, charge sheet, charges framed amongst other materials for examining propriety of the impugned judgment, order of conviction and sentence.

18. The learned Court below took into consideration the evidences of P.W. 1 to P.W. 5 who proved the search, recovery and seizure of "ganja" kept in three bags from the possession of the appellants and also took into consideration Ext. 11,

the chemical analysis report where the expert had opined that the sample sent for analysis to contain "ganja to arrive at the conclusion that prosecution has been able to prove the charges against the accused/appellants beyond all reasonable doubt.

19. With regard to the submission of the learned advocate for the appellants relating to defect in framing of charge, we find that date, time, place and the total quantity of ganja recovered from each of the appellants has been clearly mentioned therein. But taking into account the F.I.R. (Ext. 7) and the seizure list (Ext. 3) there appears some error relating to the timing of occurrence and omission to mention the bags which contained ganja. The mere omission, error or irregularity in framing the charge against the accused, does not vitiate the trial, unless some prejudice is caused to the accused. Section 215 of the Code of Criminal Procedure states as follows:-- "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice".

20. Section 464 of the Code of Criminal Procedure also provides that no finding sentence or order by a competent Court shall be deemed to be invalid merely on the ground that no charge has been framed or that there are some errors, omission or irregularity in the charge unless some failure of justice has occurred on that ground.

21. Charge is an accusation made against a person in respect of an offence alleged to have been committed by him and the basic requirement is that it must be so framed as to give the accused person a fairly reasonable idea of the case which he has to face. In order to take the benefit of the same appellants must establish that failure of justice has occasioned by an error or defect in stating the particulars in the charge. No such plea of any prejudice and/or any defect in framing of charge was taken by the appellants before the learned court below and even no evidence was adduced by them suggesting failure of justice due to such defect in framing of charge. There was also nothing on record to show that any prejudice had been caused to the appellants due to such error of timing and omission in mentioning the bags and details of weight therein. On the other hand Ext. 3, the seizure list, in which signatures of the appellants appear clearly shows the details of recovery and seizure of "ganja" which means appellants were quite aware about the accusation made against them. Under such circumstances such error in the charge did not vitiate the trial.

22. There is no scope to interfere with the impugned judgment on the above ground.

23. With regard to the submission of the learned advocate for the appellants in non compliance of the provisions of Section 42 as well as section 50 of the NDPS Act, we find from the evidence, both oral and documentary, on record that

search was made at a public place in presence of a gazetted officer and "ganja" in question was recovered and seized from the bags only. So provisions of section 43 of the Narcotic Drugs and Psychotropic Substance Act will apply and not section 42 of the said Act and as such there was no requirement of the officer conducting search to record the grounds of his belief as contemplated by the proviso to section 42. This issue has already been decided by us in the matter of Biswajit Das & Anr. v. State of West Bengal reported in , (2015) 3 Cal LT 359 (HC) relying upon the decision of State of Haryana v. Jarnail Singh and others reported in , (2004) 5 SCC 188.

24. Similarly section 50 of Narcotic Drugs and Psychotropic Substance Act applies in case of a personal search of a person and it does not extend to search of a bag. The scope and ambit of section 50 of the Act was examined in considerable detail by the Constitution Bench of the Hon"ble Apex Court in State of Punjab v. Baldev Singh reported in , JT 1999(4)SC 595,(1999) 6 SCC 391 and para 12 of the reports is being reproduced below:

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

25. The Bench recorded its conclusion in para 57 of the report and sub-paras (1), (2), (3), (6) and (7) are being reproduce below:

"57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his

person, during a search conducted in violation of the provisions of Section 50 of the Act;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

(emphasis in original)

26. The same view has been reiterated in several decisions of the Hon"ble Apex Court including *Kalema Tumba v. State of Maharashtra* reported in , (1999)8 SCC 257, *Gurbax Singh v. State of Haryana* reported in , (2001)3 SCC 28, *Madan Lal and Anr. v. State of Himachal Pradesh* reported in , (2003)7 SCC 465, *Birakishore Kar v. State of Orissa* reported in , (2000)6 SCC 541, *Saikou Jabbi v. State of Maharashtra* reported in , (2004)2 SCC 186, *State of Punjab v. Makhan Chand* reported in , (2004)3 SCC 453 and *State of Haryana v. Jarnail Singh and others* reported in , (2004) SCC 188.

27. The meaning of the words "search any person" occurring in sub-section (1) of section 50 of the NDPS Act. came in for consideration before the Hon"ble Apex Court and the three-Judge Bench of the Hon"ble Supreme Court in *State of Himachal Pradesh v. Pawan Kumar* reported in , (2005)4 SCC 350 held that a "person" would mean a human being with appropriate coverings and clothings and also footwear. A bag, briefcase or any such article or container, etc. can under no circumstances be treated as a body of a human being. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in section 50 of the NDPS Act. The ratio laid down in *Baldev Singh's* case (supra) was also considered. The scope and ambit of section 50 was also examined in several decisions of the Hon"ble Supreme Court including *Dilip v. State of M.P.*, reported in , (2007)1 SCC 450, *State of Rajasthan v. Babu Ram* reported in , (2007) 6 SCC 55, *Union of India v. Shah Alam* reported in , (2009)16 SCC 644, *Dehal Singh v. State of H.P.* reported in , (2010)9 SCC 85, *Vijaysinh Chandubha Jadeja v. State of Gujrat* reported in , (2011)1 SCC 609, *Jarnail Singh v. State of Punjab* reported in , (2011)3 SCC 521, *Narcotic Control Bureau v. Sukh Dev Singh* reported in , (2011)6 SCC 392, *Ram Swaroop v. State(Government of NCT of Delhi)* reported in , (2014)14 SCC 235 and

Kulwinder Singh & Anr. v. State of Punjab reported in 2015 SAR (Criminal) 597. The constitution Bench of the Hon'ble Supreme Court in Vijaysinh Chandubha Jadeja v. State of Gujrat reported in , (2011)1 SCC 609 has held that requirement of section 50 of the NDPS Act is mandatory requirement and the provisions of section 50 must be very strictly construed. In para 32, the Constitution Bench made it clear that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer.

28. With regard to the notice, it is not in dispute that there is no specific form prescribed or intended for conveying the information required to be given under section 50 but the said information about the existence of the right to be searched in presence of a Gazetted Officer or a Magistrate must be clear and unambiguous and must be conveyed to the person concerned. In this case, it appears that a written notice (Ext. 1) was given to the appellants by P.W.1. We find from Ext. 1, that it was a joint communication to the appellants on which appellant No. 1 reported to have signed and respondent No. 2 put her LTI without there being any such endorsement that the contents of the said notice was at all read over and explained to them. The contents of the notice in question did not suggest that appellants were at all apprised and/or given any option about the existence of their right to be searched in presence of a Gazetted Officer or a Magistrate, so as to enable them to avail of that right. There was no clear communication of the said right which also got fortified from the evidence of P.W.1. So, the notice in question is not at all in consonance with the strict compliance of the provision of section 50(1) of the NDPS Act.

29. But, the instant case relates to recovery and seizure of the contraband articles (Ganja) from the bags only found in possession of the appellants. According to P.W.1, he searched the bags and recovered the contraband articles therefrom. Interestingly, he was not challenged by the defence on this score. Both P.W.4 and P.W.5 have also corroborated the above statements of P.W.1 and during cross-examination P.W.4 even denied that person of the lady accused was searched. According to P.W.5 (Gazette Officer), P.W.1 searched the male person's bag while lady constable searched the lady suspect who was having one olive colour bag which contained ganja. He had clearly stated during cross-examination that person of the lady accused was not searched in his presence and only her luggage was searched. Admittedly no contraband articles was seized from the person of any of the appellants. Ext. 6, referred to on behalf of the appellants, relates to the seizure of the personal properties found in the possession of the accused and were not at all the alamsats of the case. We have already discussed herein above that section 50 of NDPS Act applies in case of a personal search of a person and it does not extend to search of a bag.

30. The language of section 50 of the NDPS Act is clear and unambiguous and the law so well settled that it is not possible to take a different view. The cardinal rules to follow the procedure prescribed in Sub-Section (1) of Section 50 of the NDPS Act has been discussed in details hereinabove. After due consideration of the facts and circumstances involved in this appeal following the well settled cardinal rules. We must, therefore, hold that section 50 of the NDPS Act did not apply to the facts of this case, where on search of the bags, Ganja was recovered. This not being a case of personal search, section 50 was not applicable. Above being the position, the contention regarding non-compliance with section 50 of the Act is without any substance. Therefore, there is no scope to interfere with the impugned judgment on the above ground.

31. With regard to the submission made by the learned advocate appearing on behalf of the appellants that the investigating officer did not follow the procedure laid down in Section 52A of the Narcotic Drugs and Psychotropic Substance Act. On perusal of Section 52-A of the said Act, it is very clear that it relates to the disposal of seized narcotic drugs and psychotropic substances. So this provision will come into play and the procedure enunciated therein will be required to be followed, if the contraband article is required to be disposed of before the conclusion of the trial. If the said contraband article is required to be preserved or is not required to be disposed before the conclusion of the trial, then the procedure laid down in Section 52-A of the Code is not required to be followed. Therefore, it cannot be said that the prosecution or I.O. has committed a serious lapse by not following the procedure laid down in Section 52-A of the Act. Indisputably, seized article in question had not been disposed of at the stage of investigation in the present case. Therefore, there was no question of following the said procedure.

32. Moreover, the applicability of section 52A of the NDPS Act has been elaborately discussed by us in a judgement dated September 22, 2015 delivered in the matter of Kalimuddin Mia v. The State of West Bengal (in re: CRA 548 of 2007) with the matter of Mahesh Barman v. The State of West Bengal (in re: CRA 544 of 2007). In the above judgment we arrived at the above conclusion taking into consideration the proposition of law settled by the Hon"ble Supreme Court in this regard in the matter of the decision of State of Punjab v. Makhan Chand, reported in , (2004) 3 SCC 453 and the relevant portion of the above decision is quoted below:--

"10. This contention too has no substance for two reasons. Firstly, Section 52-A, as the marginal note indicates, deals with "disposal of seized narcotic drugs and psychotropic substances". Under sub-section (1), the Central Government by a notification in Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substance, having regard to the hazardous nature, vulnerability of theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-

sections (2) and (3). If the procedure prescribed in sub-sections (2) and (3) of Section 52-A is complied with and upon an application, the Magistrate issues the certificate contemplated by sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) or Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances."

(Emphasis supplied)

Therefore, we do not find any substance in the submissions made on behalf of the appellants in this regard for the purpose of interfering with the impugned judgment.

33. With regard to the search and seizure of the contraband articles, it appears that seizure of the alleged narcotic substance (ganja) was shown to have made on 18.02.2012 in between 15.45 hrs. to 16.20 hrs. in between Gate No. 03 and 04 of Howrah Railway Station in presence of two independent witnesses, P.W.2 & P.W.3 and R.P.F. constables P.W.4 and one Kartik Chandra Naskar though according to P.W.4 it was outside the gate Nos. 4/5 near ticket vending machine. Both P.W.2. and P.W.3 save and except identifying their signatures on the seizure lists have not identified any of the appellants nor stated anything against them or about seizure of any such contraband articles in their presence and even declared that they do not know anything. P.W.3 even admitted that he signed on a blank paper while P.W.2 did not deny the defence suggestion that he signed on a blank paper. Surprisingly neither of them was declared hostile by the prosecution and as such the evidences of P.W.2.and P.W.3 are binding on the prosecution. P.W.4 declared that she was not interrogated by the investigating officer while Kartik Chandra Naskar was not examined by the prosecution. The other witnesses relied on by the prosecution towards search and seizure are the R.P.F Inspector (P.W.1) namely the defacto-complainant who made search and seizure and ASC/R.P.F. (P.W.5) who acted as Gazetted Officer. According to P.W.1, weights of the baggages were taken in railway weighing machine, seizure list was prepared, samples were taken and thereafter it was sealed and labeled in presence of the witnesses. But none of the independent witness, as discussed herein above, has supported the above claim of P.W.1. Even no such narcotic substance (Ganja) allegedly recovered and seized from the possession of the appellants and sealed and labeled in their presence was shown to them during trial. According to P.W.5, Gazetted Officer, alamatt ganja and sample ganja were all seized under a seizure list and they were packed, sealed and labeled and he signed on the seizure list as well as in the labels of the alamatt and sample packets but during cross-examination, when his attention was drawn towards the

alamats, he admitted that the same did not bear any label. There was even no such explanation to that effect from the side of the prosecution. None of the witnesses has said that accused persons also signed on the seizure list nor any signature of the accused/appellants on the seizure list was proved by the prosecution. As per the seizure list, seizure was made in connection with RPF/Asstt. booth- 9 GDE No. 38 dated 18.2.12 but none of the witness nor even P.W.1 has stated about recording of any GDE nor the GDE in question was produced during trial for the reason best known to the prosecution. Other witnesses examined by the prosecution are P.W.6, an R.P.F. constable who took the sample to the Drug Control Office for examination and collected the report, P.W.7, a sub-inspector of G.R.P.S. who on receipt of the complaint merely started the case and drawn up the formal FIR and P.W.8, another sub-inspector of Howrah GRPS who conducted investigation and submitted charge-sheet against the appellants. P.W.6 and P.W.7 have not stated anything against the appellants while P.W.8 has failed to identify any of the appellants. The samples reportedly taken from the seized substance were sent to FSL by P.W.8 on 21.02.2012 by the forwarding challan (Exts. 8, 8/1, 8/2) through P.W.6 who also collected the report (Ext. 11) but there is contradiction in between the statements of P.W.6 and P.W.8 about the date of receipt of the report. Seized articles were reportedly handed over to the Malkhana -in-charge but neither the Malkhana register was seized and produced during trial nor Malkhana -in-charge was examined to prove that those were properly sealed, packed and labeled when received in Malkhana. There is also no explanation to that effect. Thus we find that procedure relating to search, seizure, seal and label of the contraband articles had not been properly adhered to which render the recovery of the illicit article suspect and vitiate the conviction and sentence. The learned trial court did not take into consideration the above facts and circumstances.

34. Therefore, considering the above circumstances we have no hesitation to conclude that the case against the appellants has not been proved beyond all reasonable doubt and as such appellants are entitled to get the benefit of doubt.

35. For the aforesaid reason, the appeal deserves to be allowed and is accordingly allowed. The order of conviction and sentence passed against the appellants by the learned Judge, Special Court under NDPS Act, Howrah in T.R. No. 8 of 2012 are, therefore, quashed and set aside. Appellants be released from custody forthwith, if not, detained in connection with any other case.

36. Copy of this judgement along with the lower court records be sent down to the trial court forthwith by special messenger for information and taking appropriate steps.

37. Urgent photostat certified copy of this judgement, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

Debasish Kar Gupta, J.—I agree.