

(2011) 08 BOM CK 0133
In the Bombay High Court
Case No : Criminal Appeal No. 31 of 2001

Satnamsingh Gurudayal Singh Sodi	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100, 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 41, 42, 42(1), 42(2)

Citation : (2011) 08 BOM CK 0133

Hon'ble Judges : Davare Shrihari P., J

Bench : Single Bench

Advocate : A.H. Kapadia, for the Appellant; Y.M. Kshirsagar, A.P.P, for the Respondent

Final Decision : Allowed

Judgement

Davare Shrihari P., J.—Heard learned Counsel for the parties. Challenge in the present appeal is to the conviction and sentence imposed upon the appellant (original accused), by way of judgment and order dated 27th December 2000, rendered by the learned Sessions Judge & Special Judge, Nanded, in Special Case (NDPS) No. 24/1998, thereby convicting the appellant for the offence punishable u/s 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985, for the alleged unlawful possession of 685 gms. opium, and sentencing him to undergo rigorous imprisonment for term of 12 years and to pay a fine of Rs. 1,00,000/-, in default of payment of fine, to suffer rigorous imprisonment for two years more.

2. The factual matrix of the prosecution case is, that Police Constable Sudhir Khodve (PW 1), B. No. 1807, who was attached to Vajirabad Police Station, Nanded, at the relevant time, received a secret information on 13th May 1998, that the accused, namely, Satnamsing Sodi, was dealing in sale of contraband article i.e. opium at his residential house which was situated at Sainagar,

Naginaghat Road, at Nanded. Accordingly, he submitted written report to that effect to Home Deputy Superintendent of Police, Shri Kadam, briefly giving nature of the information received by him and requested to grant permission to carry out raid at the house of the accused. Accordingly, in pursuance of the said report, Home Dy. S.P., Shri Kadam, directed Probationer Dy. S.P. Shri Sanjay Bannerjee (PW 2) to attend the raid and to accompany with the Police party for the search and seizure, as well as, he directed Police Constable Surjeetsingh to attend and participate in the raid. Accordingly, Probationer Dy. S.P. Shri Sanjay Bannerjee (PW 2), along with Police Constable Sudhir Khodve (PW 1) and Police Constable Surjeetsingh arrived at Vajirabad Police Station and handed over the letter of permission issued by Home Dy. S.P. Shri Kadam, to Police Station Officer and requested him to give more staff and also asked him to call panch. Accordingly, two panchas were called and they were informed about purpose of the raid.

3. Thereafter, at about 15.00 hours, Police Constable Surjeetsingh Bongai, Sudhir Khodve (PW 1), Dy. S.P. Sanjay Bannerjee, and other Police staff along with 2 panchas proceeded to Naginaghat area towards house of the accused by Police jeep and reached there at about 15.15 hours, since Sudhir Khodve (PW 1) was knowing the said residential house due to his previous information and since he was attached to Vajirabad Police Station since last 4-5 years. After reaching the said house, they found that there was a small iron gate which was opened by them and called the accused by his name, who arrived in front of the house. Accordingly, the Police personnel apprised him about their purpose of the visit and to conduct the search of his house in pursuance of secret information regarding unlawful possession of opium which he used to sell. The Police personnel also asked him, whether presence of Special Executive Magistrate was required for the search, but thereto he replied that it was not necessary. Accordingly, members of the raiding party and Panchas offered their personal searches to the accused, if he wanted, but he declined to take personal searches of the members of the raiding party. Thereafter, members of the raiding party and panchas entered into his house and found that there was one wooden almira, in the front room which was one of the parts of that house and in the side rooms, his father used to reside. In the front room, wooden almira was kept close to the wall and it was chained without having any lock. Accordingly, the said almira was opened in the presence of panchas and it was searched and in the lower compartment thereof, there was polythene bag containing 47 small packets, and each of them contained small quantity of opium, as well as, two other sachets having more quantity in each of them of opium. The small quantity in each of the 47 packets was approximately of 9 gms. and one of the sachets contained 82 gms and another sachet contained 180 gms of opium, thus totalling 685 gms. opium was found in the said almira, since the said opium was weighed by calling a shopkeeper, namely, Shri Mange, along with weighing scale and weights. Thereafter, three samples of 10 gms. each were separated and were packed in three separate packets, and the said sample packets were affixed with

the Lakh seals of the Police Station and the said sample packets were labelled with the signatures of panchas. Accordingly, Dy. S.P. Sanjay Bannerjee (PW 2) prepared the detail seizure panchanama and seized the same sample packets, as well as, remaining stock of opium thereunder, and the accused was taken into custody and the Police personnel and panchas returned back to Vajirabad Police Station along with the accused and seized articles. Police Constable Surjitsingh Boongai lodged FIR under Crime No. 6029/98, at the Police Station, which is" at Exhibit 55, and the Muddemal property including sealed sample packets were handed over to the Muddemal Clerk who deposited the same in Muddemal store room.

4. Moreover, P.S.I. Shankar Mali (PW 10) was attached to Vajirabad Police Station at the relevant time and who was on duty on 13-5-1998 and he took entry in the station diary in respect of search and seizure and assumed investigation of the said matter. Accordingly, he recorded statements of Police Constable Sudhir Khodve (PW 1) and other members of the raiding party including Dharamsingh Mange (PW 4) who had weighed the said opium. He also deputed Police Constable Rathod (B. No. 1620) i.e. carrier, and the sealed sample packets were handed over to him who carried the same and delivered to Assistant Chemical Analyser at Aurangabad, along with the forwarding letter Exhibit 53, dated 13-5-1998, on the same day. Accused was put under the arrest, and P.S.I. Shankar Mali (PW 10) also prepared the report in respect of search, seizure and arrest of the accused and forwarded the same to the Superintendent of Police, Nanded, on the day of raid itself and office copy thereof is produced at Exhibit 61. Pursuant to the said forwarding letter, Chemical Analyser's report was received, dated 13-7-1998, which disclosed opium containing 4.40% morphine, which is produced at Exhibit 62. Accordingly, after completion of investigation, charge-sheet was filed against the accused for the offence punishable u/s 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985.

5. Thereafter, learned Sessions Judge & Special Judge, Nanded, framed charge against the accused on 20-8-1999 at Exhibit 17, for the offence punishable u/s 18 of the Narcotic Drugs & Psychotropic Substances Act, but the accused pleaded not guilty to the said charge and claimed to be tried.

6. To substantiate the charge levelled against the accused, the prosecution examined as many as 10 witnesses, as mentioned below:

(1) P.C., Sudhir Khodve (PW 1)

- To whom authorization was given for the raid

(2) Dy. S.P. Sanjay Bannerjee (PW 2)

- Probationer Dy. S.P. who prepared seizure panchanama Exhibit 34.

(3) Satwantsingh Hundal (PW 3)

- panch to seizure panchanama (Turned hostile)

(4) Dharamsingh Mange (PW 4)

- Shopkeeper who brought weighing scale and weights.

(5) PHC Kanthiram Bokare (PW 5)

- Muddemal Clerk.

(6) Dy. S.P. Rajaram Kadam (PW 6) and Exhibit 50)

- Who granted permission to effect raid (Exhibit 32

(7) Diwansingh Ladad (PW 7)

- panch to seizure panchanama (Turned hostile)

(8) PC, Sudhakar Rathod (PW 8)

- Carrier.

(9) PHC, Surjeetsingh (PW 9)

- Who accompanied with the Boongai raiding party and lodged FIR Exhibit 55

(10) PSI, Shankar Mali (PW 10)

- Investigating Officer

7. The defence of the accused was of total denial and the main pivot of his defence is that he used to reside in the premises owned by Gurudwara because he is an employee of Gurudwara, and that he was not residing at the house in question. He categorically denied that he was in conscious possession of contraband opium. He also denied his presence in the house during the course of search and seizure. Accordingly, he claimed to be innocent contending that he has been implicated in the present case falsely.

8. After considering the oral and documentary evidence, as well as evidence of Chemical Analyser's office, and after considering rival submissions advanced by the learned Counsel for parties, learned trial Court convicted and sentenced the appellant as afore stated.

9. Being aggrieved and dissatisfied by the said order of conviction and sentence, the appellant (original accused) has preferred the present appeal challenging the same and prayed for quashment thereof.

10. Before advertng to the submissions advanced by the learned Counsel for parties, it is necessary to deal with the material evidence adduced and produced by the prosecution, and coming to the evidence of prime witness of the prosecution i.e. Sudhir Khodve (PW 1), who has stated that he was attached to Vajirabad Police Station at Nanded in May 1998, and on 13-5-1998, he had received secret information to the effect that one Satnamsing Gurudayalsing Sodi was dealing in sale of contraband opium at his residential house, and he came to know that the said house is situated at Sainagar, Naginaghat Road, Nanded.

Accordingly, he gave the said information to Home Dy. S.P. Shri Kadam i.e. PW 6 in writing and also gave a report requesting permission to effect raid on the house of the said accused. Thus, permission to carry out the raid was accorded to him by Rajaram Kadam (PW 6) and he also directed the Probationer Dy. S.P. Sanjay Bannerjee (PW 2) to attend the said raid by accompanying with the raiding party, and the said report is produced at Exhibit 32. Thereafter, he himself, Dy. S.P. Sanjay Bannerjee (PW 2) and Police Constable Surjeetsingh came to Vajirabad Police Station and showed the permission to Police Station Officer i.e. P.S.I. Shankar Mali (PW 10), and requested him to give staff members for the raid. Moreover, two panchas were called and accordingly, at about 15.00 hours, Police Head Constable Surjeetsingh Bongai (PW 9), he himself, Probationer Dy. S.P. Sanjay Bannerjee (PW 2) and other Police staff along with panchas proceeded to Naginaghat area by jeep, and they reached at the house of the accused at about 15.15 hours, since Sudhir Khodve (PW 1) was knowing his residential house due to his previous information and as he was attached to Vajirabad Police Station for the last about 4-5 years. He has stated that, after reaching the said house, there was a small iron gate to the house, and they opened the same and called the accused by name, and in response, he came in front of the house. Probationer Dy. S.P. Sanjay Bannerjee (PW 2) disclosed him about the purpose of their visit, that they desired to search his house in pursuance of receipt of secret information about possession of opium which he used to sell. Moreover, the accused was also asked whether Special Executive Magistrate was needed for the search, but the accused declined therefore. Thereafter, members of the raiding party offered their personal searches to the accused, but he declined to take the same. Thereafter, members of the raiding party and panchas entered into his house and found one wooden almira in front of the room and it was chained without having any lock. The Police personnel opened the said almira in the presence of panchas and found polythene bag containing 47 small packets in the lower compartment thereof, and each of the said packets contained small quantity of opium, as well as, there were two other sachets having more quantity in each of them of opium. The small quantity in each of the 47 packets was approximately 9 gms. and one of the sachets contained 82 gms of opium, while another sachet contained 180 gms of opium, thus, totalling 685 gms of opium was found stored in the said almira.

11. Sudhir Khodve (PW 1) has further stated that the Probationer Dy. S.P. Sanjay Bannerjee (PW 2) deputed a Police Constable and called shopkeeper, namely, Dharamsingh Mange (PW 4) along with the weighing scale and weights, and thereafter opium contained in each packet was weighed by Dharamsingh Mange (PW 4). Moreover, samples of 10 gms. each were collected in three separate sample packets and those sample packets were sealed and were signed by panchas. So also, Probationer Dy. S.P. Sanjay Bannerjee (PW 2) prepared seizure panchanama and got sealed the stock of opium. Accordingly, accused was taken into custody and thereafter members of the raiding party returned to the Police Station along with the panchas, accused and seized articles, and after arriving at

the Police Station, Police Head Constable Surjeetsingh Boongai (PW 9) lodged complaint against the accused which was treated as FIR marked as Exhibit 55.

12. During cross examination, Sudhir Khodve (PW 1) has admitted that he did not note down in writing the information received by him for his personal record, as well as, in application Exhibit 32, he did not mention date due to inadvertence. He also admitted that he did not disclose the information to P.S.I. or P.I. of Vajirabad Police Station i.e. his immediate official superiors, before permission was granted. He has also stated that the accused was having 4-5 brothers and there were not 6-7 rooms adjacent to the entrance gate on southern side, and at that time, excluding the front room, there were other two rooms on either side of the front room. He has further stated that the accused came out of the house from the middle i.e. front room when he was called. He has also stated that he did not see whether the room was given any number. He has also stated that he does not know whether brothers of the accused were residing in the same room. He has further stated that the women members and children were also present in the said house when the members of the raiding party visited the said house.

13. Moreover, case of the accused was put up before Sudhir Khodve (PW 1) during cross examination, and he stated that he does not know whether accused is "Jatthedar" of Chaoni. He has also stated that he does not know whether he resides in that Chaoni due to his position as "Jatthedar", and he did not talk with the accused during last four years and prior to the incident. He has further stated that he personally went and called Dharamsingh Mange (PW 4), shopkeeper, along with weighing scale, who runs General Stores at Vajirabad, and to cover the distance between Naginaghat and his shop, 5 - 10 minutes are required, and to cover the distance between Police Station and his shop, 2 minutes are required. He has further stated that there were shops and houses around the place where the raid was effected. He has also stated that He did not try to collect weighing scale from nearby shop because he was not sure that traders in that locality would help him, and he was knowing Shri Munge since he used to purchase articles from him on account of proximity. A suggestion was given to him, that the accused was not concerned with the house which was searched on the relevant day, but the same was denied by him. It was also suggested to him that raid was carried out without legal authority, but the same also was denied by him. A suggestion was also given to him, that the Police party members fabricated false case against him, but the same was denied by him.

15. Coming to the evidence of Sanjay Bannerjee (PW 2), Probationer Dy. S.P., who has stated that he was Probationer Dy. S.P. at Nanded in the month of May 1998 and on 13-5-1998, he was directed by Home Dy. S.P., Nanded, to accompany the members of the raiding party to conduct the raid on the basis of the report submitted by Sudhir Khodve (PW 1), and he was also directed to carry out the search and seizure of the house situated at Naginaghat Road, Nanded i.e. the house of the accused, namely, Satnamsingh, as per said information.

Accordingly, he stated that he along with Police Constables went to Vajirabad Police Station, and the station diary entry was made regarding the permission granted by Home Dy. S.P. for the search. The panchas were called and they were informed the purpose to carry out the raid, and at about 3.00 p.m., he along with members of raiding party proceeded from Vajirabad Police Station towards Naginaghat by jeep and reached there by 3.15 p.m. He has also stated that after reaching the said place, they found that entrance of the house was of iron gate and same was opened and thereafter knocked door of the front room, and thereupon, accused Satnamsingh came out of the room. Sanjay Bannerjee (PW 2) was in civil dress and he disclosed his identity to the accused and informed that they intended to carry out search of the house. He also informed him that if he so desire, then presence of Special Executive Magistrate can be secured, but he declined to exercise the said option. Thereafter, Sanjay Bannerjee (PW 2) offered his personal search, as well as, personal searches of the members of the raiding party, but he refused to take the said searches.

15. Sanjay Bannerjee (PW 2) has further stated that thereafter they entered into the room and found that there was one wooden cupboard on the right side of the room and the same was in open condition. There was a polythene bag in the said cupboard which contained small packets and there were two other sachets in the same. The small packets contained approximately 9 gms of opium, whereas one of the larger sachets contained 180 gms. of opium and another packet contained 82 gms. of opium. Sanjay Bannerjee (PW 2) deputed one Police Constable and brought weighing scale from Dharamsingh Mange (PW 4). Accordingly, detail seizure panchanama was prepared by Sanjay Bannerjee (PW 2) which is at Exhibit 34. Moreover, he prepared 3 sample packets by removing 10 gms. of opium each, one from the larger sachet, second from another sachet and third from small packets (Pudis), and the said sample packets were sealed by affixing Lakh and the same were labelled with the signature of panchas. Thereafter, members of the raiding party along with Sanjay Bannerjee (PW 2) returned to Vajirabad Police Station together with the accused and Muddemal articles. Accordingly, Police Head Constable Surjeetsingh Boongai (PW 9) lodged FIR which is at Exhibit 55, and Muddemal articles were deposited in Muddemal store room.

16. In the cross-examination, Sanjay Bannerjee (PW 2) had admitted that panchanama was scribed by Police Constable and not by him, and also stated that he does not remember name of the said Police Constable. He has admitted that the panchanama does not disclose that he personally informed the accused about intention to search the house. He has also stated that at the relevant period, no special charge was given to him for any particular assignment at the Police Station. He has further admitted that he did not obtain any written acknowledgment from the accused regarding option given to him in respect of presence of Special Executive Magistrate or personal searches offered by them. He has also admitted that he was not having seal because he was under training. He has further stated that he did not call panchas personally, but they were

already called at the Police Station.

17. That takes me to the testimony of Rajaram Kadam (PW 6), Retired Dy. S.P., who has deposed in his deposition that he was attached to Police headquarter at Nanded as Home Dy. S.P. at the relevant time and on 13-5-1998, and while he was on duty at his office, Sanjay Khodve (PW 1) came to the office and gave him an application seeking permission to carry out raid at the house of accused Santnamsingh Gurudayalsingh because a secret information was received to the effect that he was deling in contraband substances of narcotic, and hence, he directed him to carry out raid, and deputed Probationer Dy. S.P. Sanjay Bannerjee (PW 2) along with Police Head Constable Surjeetsingh Boongai (PW 9) and others. He has also stated that he gave such directions in writing and produced the letter to that effect at Exhibit 32. He has also stated that he gave written directions in his own writing and which is produced at Exhibit 50. He has further stated that he took necessary action orally about purpose of the raid and he satisfied himself for giving such permission.

18. During cross-examination, Rajaram Kadam (PW 6) has admitted that the application of Police Constable Sudhir Khodve (PW 1) does not bear the date on top or below his signature, but it bears the date of receipt by him. He has also stated that on their own, Police Constable carried out raid of the house, and therefore, permission was given. He has further stated that he gave permission on the same letter and did not give any separate sanction order. A suggestion was given to him that he was not having authority to give permission, but the same was denied by him. It was also suggested to him that he did not properly appreciate the request letter and gave the permission, but same was also denied by him.

19. Turning to the deposition of Sudhakar Rathod (PW 8), carrier, who has stated that he was attached to Vajirabad Police Station, Nanded, at the relevant time and was on duty on 14-5-1998, and he was given sealed sample packet in Crime No. 602/1998, for taking the same to the office of Assistant Chemical Analyser, Aurangabad. Accordingly, he took the said sealed packet from Head Constable Bokare along with forwarding letter in duplicate. Thereafter, he carried the said letter and sealed sample packet to the office of Assistant Chemical Analyser at Aurangabad, on 14-5-1998, and obtained acknowledgment of the concerned Clerk of the said office on O.C. and thereafter handed over said office copy to the P.S.O., and said O.C. is produced at Exhibit 53.

20. In the cross-examination, Sudhakar Rathod (PW 8) has stated that there is seal on the forwarding letter, which also bears stamp of outward number. He has further stated that the acknowledgment was obtained on the same receipt of letter and no separate letter was received. A suggestion was given to him that he did not carry the sealed sample packet and handed over to Chemical Analyser's office at Aurangabad, but the same was denied by him.

21. That takes me to the testimony of complainant Police Head Constable

Surjeetsingh Boongai (PW 9), who has stated that he was attached to Vajirabad Police Station at the relevant time and was on duty on 13-5-1998, on which day, Sudhir Khodve (PW 1) received a secret information to the effect that accused was dealing with business of contraband opium and was keeping narcotic substance at his house situated at Naginaghat Road at Nanded. He has stated that accordingly, Sudhir Khodve (PW 1) discussed with him and thereafter both of them went to the office of Home Dy. S.P. at Police Headquarter and submitted written application to carry out the raid. In response, Dy. S.P. Shri Kadam, granted permission in writing and also directed him to accompany with the raiding party along with Probationer Dy. S.P. Sanjay Bannerjee (PW 2). He has also stated that thereafter they came to Vajirabad Police Station and gave permission letter to P.S.I. Shri Mali and took entry in station diary, and as per directions of P.S.O., called two panchas, namely, Satwantsingh and Diwansingh and P.S.I. Mali informed them the purpose of their calling and requested them to accompany the police party, to act as panch, for search and seizure. Accordingly, they consented therefor.

22. Surjeetsingh Boongai (PW 9) has further stated that the members of raiding party including Police Constable Alewad and panchas proceeded towards Naginaghat by Police jeep and reached there by 3.00 p.m. and found that there was a small compound and gate in front of the house. Hence, they opened the gate of the house, entered into the Courtyard and knocked the door. Thereafter, one person came out of the house and his name was asked. He gave his name as Satnamsingh i.e. accused herein. Thereupon, Sanjay Bannerjee (PW 2) informed the accused about nature of secret information received by them and told him their intention to search his house. He also asked the accused, whether presence of Special Executive Magistrate was needed, but the accused gave no objection for the search in the presence of Probationer Dy. S.P. Sanjay Bannerjee (PW 2). Accordingly, members of raiding party and panchas entered into the house and took the search. There was one wooden almira in the drawing room of the said house and in the lower drawer thereof, they found one small polythene bag containing 47 paper packets of opium, and also found one white polythene bag containing 82 gms. of opium. There was one more packet containing 180 gms. of opium. Hence, Probationer Dy. S.P. Sanjay Bannerjee (PW 2) deputed Police Constable Sudhir Khodve (PW 1) and brought weighing scale through Dharamsingh Mange (PW 4). Accordingly, the contraband of opium was weighed and its total weight was found to be 685 gms. Thereafter, each of the small packets out of 47 packets was found to contain 9 gms. of opium, and out of the said opium collected, 10 gms. of quantity was separated for the purpose of sampling which was kept in separate polythene bag and which was kept in a paper packet, and the same was sealed by putting Lakh seal thereon. Moreover, remaining opium packets were also kept together in plastic bag in separate packet which was also sealed. Moreover, Probationer Dy. S.P. Bannerjee (PW 2) and panchas signed on the labels affixed thereon. Accordingly Sanjay Bannerjee (PW 2) drew panchanama of the said seizure and accused was taken into custody

and all of them returned to the Police Station along with the Muddemal property and sample packets. Surjeetsingh Boongai (PW 9) lodged the FIR which is produced at Exhibit 55.

23. During the cross-examination, Surjeetsingh Boongai (PW 9) has stated that he had no meeting with Police Constable Sudhir Khodve (PW 1) when he considered the application submitted by him, and he had no talk with him about the information. He has also stated that he was attached to Vajirabad Police Station, but was deputed to work with Sanjay Bannerjee (PW 2). He has also stated that he was born and educated at Nanded. He knew the accused personally about 5-7 years, and hence, a suggestion was given to him that accused was Jatthedar of Chaoni, but he denied the same. In the said context, he has stated that Jatthedar was an old man, but he does not remember his name. He has further stated that he does not know whether the accused used to reside in Chaoni behind Gurudwara. However, he has categorically stated that he was knowing the accused since before the raid. Moreover, he has also stated that when they reached house of the accused, there were no family members present in the house, which is contrary to the testimony of Sudhir Khodve (PW 1).

24. As regards house of the accused, Surjeetsingh Boongai (PW 9) has stated that it comprises of 3 - 4 rooms. He has also admitted that no arrest panchanama was prepared at the time of raid. He has further stated that he does not know how Sudhir Khodve (PW 1) received the information and he does not give any reasons in his FIR Exhibit 55. He has further stated that he does not know why it is not shown in the FIR that both panchas were disclosed purpose of the raid. He has further stated that he does not know why it is not shown in the FIR that Dy. S.P. Bannerjee personally informed the accused that his house was to be searched. However, nothing was obtained in writing from the accused regarding his consent for search of the house by Sanjay Bannerjee (PW 2). As regards sampling, he has stated that sample was taken out from 180 gms. of opium, but he does not remember whether separate samples were collected from other packets. Hence, suggestion was given to him that he did not accompany with the raiding party for search of house of the accused and did not raid on 13-5-1998, but the same was denied by him. It was also suggested to him that no contraband articles were recovered from the cupboard in the house of the accused, but the same was also denied by him. A suggestion was also given to him that the accused was not concerned with the said house, but the same was also denied by him. It was further suggested to him that the panchanama and other writing was done at the Police Station, but the same was denied by him. A suggestion was also given to him that the accused did not reside in the said house where search was carried, but the same was also denied by him.

25. On the background of the aforesaid material evidence adduced and produced by the prosecution, Mr. A.H. Kapadia, learned Counsel for the appellant, canvassed that the prosecution has failed to comply mandatory provisions of sections 41 and 42 of the Nartotic Drugs and Psychotropic Substances Act, 1985

(For short, hereinafter referred to as "NDPS Act"), and Dy. S.P. (Rural) has no power to issue authorization to Sudhir Khodve (PW 1) and Sudhir Khodve (PW 1) was not authorized person as per section 42 of the NDPS Act, since he was a Police Constable. The alleged authorization Exhibit 50 does not disclose house number of the accused and the Panchanama was drawn by Probationer Dy. S.P. Sanjay Khodve (PW 2) which hamper case of the prosecution. Moreover, signature of the appellant was not obtained on the panchanama and copy thereof was not supplied to the accused, and therefore, said panchanama is defective. It is further submitted that both the panchas have turned hostile and, therefore, prosecution has failed to prove the seizure panchanama through panch witness. Moreover, it is submitted that the prosecution has failed to prove any notification issued by the Central Government or State Government empowering Dy. S.P. (Rural), Nanded, to issue authorization to Sudhir Khodve (PW 1) in respect of search and seizure of the alleged contraband from the house of the accused, and therefore, it is submitted that the alleged search conducted by Sudhir Khodve (PW 1) of the house of the accused is illegal. Moreover, it is submitted that Sanjay Bannerjee (PW 2) was admittedly probationer and trainee officer and he was not authorized to conduct search, seizure and arrest of the accused, and therefore, the alleged raid conducted under the supervision of Probationer Dy. S.P. Sanjay Bannerjee (PW 2) was also illegal and liability of alleged recovery of the contraband therein cannot be fastened with the accused. In the context of the said search of the house of the accused and alleged recovery of the contraband from the almira therein, it is submitted that the provision of section 100 of the Code of Criminal Procedure was not followed scrupulously by the members of the raiding party, and the said almira in the house was open and there was no lock and key to the said almira.

26. Learned Counsel for the appellant has further canvassed that there is no cogent evidence produced by the prosecution to prove and establish that the said house from where allegedly contraband opium was recovered belonged to the accused. According to the learned Counsel for the appellant, the appellant was Jatthedar of Gurudwara and he was given residence there and the house in question was not owned/possessed by the accused and even he has categorically stated in his statement u/s 313 of Cr.P.C., that the house in question was not owned by him. Moreover, it is submitted that the prosecution has not given the specification i.e. number and any other description of the house except boundaries in the panchanama. It is submitted that the appellant's father and brother used to reside there and the appellant was not at all in exclusive possession of the said house, and therefore, liability in respect of allegedly recovery of contraband opium from the open cupboard in the said house cannot be fastened with the appellant. Moreover, it is also submitted that the prosecution has failed to prove that the accused had knowledge about the contraband in the said cupboard in the house in question. Accordingly, it is canvassed that the accused was not at all in conscious possession of the contraband opium which was allegedly recovered from the open cupboard in the

house of father and brothers of the accused.

27. Learned Counsel for the appellant has further canvassed that there is non-compliance of mandatory provisions of sections 42(1) and 42(2) of the NDPS Act, since Sudhir Khodve (PW 1) has not reduced the information in writing as contemplated u/s 42(1) of the NDPS Act, and has not recorded grounds for his belief under proviso thereto, as well as, he has not sent copy thereof to immediate official superior within 74 hours as envisaged u/s 42(2) of the NDPS Act, and therefore, it is submitted that due to non-compliance of mandatory provisions of sections 42(1) and 42(2) of the NDPS Act, trial of the present case vitiates and accused is entitled for the acquittal.

28. Learned Counsel for the appellant has also argued that the personal search of the accused was conducted by the members of the raiding party and while conducting personal search, he was asked whether presence of Special Executive Magistrate was needed for his search and no offer was given to him that whether his search be conducted before Gazetted Officer, and accordingly, it is submitted that there was part compliance of mandatory provisions of section 50 of the NDPS Act, and part compliance of the said section and part non-compliance of the said section also vitiates the trial, and accordingly, accused is entitled for the acquittal from the charges levelled against him.

29. It is also canvassed by the learned Counsel for the appellant, that the prosecution has failed to comply with the provision of section 52 of the NDPS Act, and immediately after arrest of the accused, he was not informed the grounds of his arrest and the seal of the nearest Police Station was not affixed on the Muddemal articles i.e. sample packets, as contemplated u/s 52(3) of the NDPS Act. It is further submitted by the learned Counsel for the appellant, that the full report containing all particulars of search, seizure and arrest of the accused was not sent to the immediate official superior within 48 hours next after such arrest or seizure of the accused, and there is non-compliance of section 57 of the NDPS Act.

30. Besides, it is submitted by the learned Counsel for the appellant, that sealing of the Muddemal packets and sample packets of the contraband opium is under suspicion since it is under doldrums that who brought the said seal to the house of the accused at the time of seizure since it has not come in evidence of any of the prosecution witness, that who brought the seal to the spot of incident and hence, possibility of sealing Muddemal packets and sample packets at the Police Station after the search and seizure cannot be ruled out and possibility of preparation of seizure panchanama at the Police Station also cannot be ruled out. Moreover, it is also canvassed that even the quantity of sample was not collected from each of the packets, and therefore, the sampling itself is faulty and such faulty sampling and consequent C.A. report thereof cannot be the basis for the conviction against the accused, and hence, it is submitted that the accused is entitled for the acquittal. Accordingly, learned Counsel for the appellant asserted that there are discrepancies, deformities and infirmities in the prosecution case

and there are numerous lacunae and flaws in the prosecution case, and therefore, accused cannot be convicted upon such inconsistent evidence, and hence, it is urged that the conviction and sentence imposed upon the appellant deserves to be quashed and set aside by allowing the present appeal.

31. Learned APP Smt. Y.M. Kshirsagar, for the respondent, countered the said arguments and opposed the appeal vehemently, and submitted that the prosecution has examined as many as 10 witnesses to substantiate the charges levelled against the appellant, and Sudhir Khodve (PW 1) and Sanjay Bannerjee (PW 2) have narrated the search, seizure and arrest of the accused meticulously and observed compliance of mandatory provisions of the NDPS Act, and accordingly, opium being 685 gms. was recovered from the house which is in possession of the accused, and consequently, accused is very well connected with the crime, and hence, conviction and sentence imposed upon him by the learned Sessions Judge is proper and legal and no interference is warranted in the present appeal. Besides, it is canvassed by the learned A.P.P., that the prosecution has made compliance of mandatory provisions of sections 41, 42 and 50, as well as, section 57 of the NDPS Act, and there is no flaw therein, and the C.A. report discloses that 4.40 % morphine was found in the opium seized from the possession of the accused and the said C.A. report connects the accused with the crime, and accordingly, prosecution inspires confidence, and the prosecution has proved and established the charges levelled against the accused beyond reasonable doubt, and therefore, it is submitted that the learned trial Court has rightly convicted and sentenced the accused. Moreover, it is further canvassed that after scrutinizing and assessing the evidence on record, learned trial Court has arrived at the conclusion that the accused is guilty for the charges levelled against him, and there is no glaring defect therein, and accordingly, learned APP supported the impugned judgment and urged that present appeal bears no substance and same is devoid of any merits, and therefore, same be dismissed.

32. I have perused the oral and documentary evidence adduced and produced by the prosecution. I have also perused the impugned judgment dated 27-12-2000, rendered by the learned trial Court and the submissions advanced by the learned Counsel for the parties, anxiously, and I am inclined to accept the submissions advanced by the learned Counsel for the appellant, and as regards the alleged compliance of section 42(1) and (2) i.e. mandatory provisions of NDPS Act, at the outset, admittedly, Sudhir Khodve (PW 1) was the Police Constable at the relevant time and was not such officer as contemplated u/s 42(1) of NDPS Act, and therefore, he could not have been authorized by Home Dy. S.P. Rajaram Kadam (PW 6) to enter into the house of the accused for the search and seizure of contrabands therefrom. Moreover, Sudhir Khodve (PW 1) has categorically admitted in his cross examination that he did not reduce into writing the information received by him for his personal record, and therefore, it is apparently clear that there is non-compliance of section 42(1) of NDPS Act in that respect also.

33. As regards the compliance of section 42(2) of the Act, it is contemplated that such officer who reduces the information into writing, under sub-clause (1) of section 42 or records grounds for his belief under the proviso thereto, he shall within 72 hours send copy thereof to his immediate official superior. The immediate official superior of Sudhir Khodve (PW 1) may be Jamadar/Head Constable/P.S.I. OR P.I. But Sudhir Khodve (PW 1) admitted in his cross-examination that he did not disclose the information to P.S.I. or P.I. of Vajirabad Police Station who, in fact, were the immediate official superior of Sudhir Khodve (PW 1), amounting to non-compliance of section 42(2) of the NDPS Act. It appears that as per Exhibit 32, Sudhir Khodve (PW 1) sent the communication to Home Dy. S.P., Nanded, conveying the information and seeking permission to conduct the raid at the house of the accused. However, he admitted in the cross-examination that he did not put date on the said Exhibit 32, and therefore, it is not clear from Exhibit 32, on which date the said communication was sent by Sudhir Khodve (PW 1) to Home Dy. S.P. Apart from that, Exhibit 50 discloses in pursuance of the said communication Home Dy. S.P. granted permission to him to conduct the raid at the house of the accused for the search and seizure of the contrabands on 13-5-1998. However, significantly, prosecution has not produced any documentary record, such as State Government notification or Central Government notification, to prove and establish that Home Dy. S.P. i.e. Rajaram Kadam (PW 6) was empowered to issue authorization to Sudhir Khodve (PW 1) to conduct the raid at the house of the accused for the search and seizure of the contrabands, and therefore, there is apparent non-compliance of section 41 of the NDPS Act. Moreover, it is also pertinent to note that the alleged authorization Exhibit 50 does not disclose number and other particulars of the house of the accused, and even the said so called authorization Exhibit 50 is also not full proof and is not in consonance with section 41 of the NDPS Act.

34. As regards the alleged search of the house conducted by Sudhir Khodve (PW 1) and Probationer Dy. S.P. Sanjay Bannerjee and alleged seizure of the contrabands therefrom, admittedly, Sanjay Bannerjee (PW 2) was a Probationer Dy. S.P. i.e. trainee officer and there is nothing on record to show that he was authorized to conduct the search, seizure and arrest of the accused and hence, there is substance in the submission made by the learned Counsel for the appellant, that the alleged raid conducted under Probationer Dy. S.P. Sanjay Bannerjee (PW 2) was not lawful and consequent liability of alleged recovery of contrabands therein cannot be fastened with the accused. Moreover, the seizure panchanama was drawn by Sanjay Bannerjee (PW 2) and such seizure panchanama drawn by trainee Probationer Dy. S.P. also comes under doldrums. Besides, both the panchas of seizure panchanama have turned hostile and contents thereof have not been proved through them. So also, signature of the appellant/accused was not obtained on the said panchanama and copy thereof was not supplied to the accused, and therefore, there is substance in the submission canvassed by the learned Counsel for the appellant, that the said panchanama is defective and consequent recovery of contrabands allegedly from

the house of the accused also comes under suspicion.

35. Moreover, it is also material to note that the prosecution has failed to produce any documentary evidence to prove and establish that the house in question where search was conducted by the raiding party, was owned by the accused and it was possessed by the accused exclusively since it has come in evidence that father and brothers of the accused were residing therein and hence, it is amply clear that the accused was not in exclusive possession of the said house, leave aside ownership thereof with the accused. Moreover, it is also pertinent from the evidence that the almira in the house from where allegedly contraband opium was recovered was in open condition and it had no lock and key and it was also not in exclusive possession of the accused, and hence, the contents of said almira including the alleged contraband therein were susceptible for handling by any person, and therefore, it cannot be construed that the alleged contraband i.e. opium of 685 gms. was in exclusive and conscious possession of the accused. Besides, it is evident from the evidence on record, that the prosecution has not complied with the provision of section 100 of the Code of Criminal Procedure. Moreover, it has also come in the evidence, that the accused was Jatthedar of Gurudwara and he was given residence there and even the accused has categorically stated in his statement u/s 313 of Cr.P.C., that the house in question was not owned and possessed by him. Moreover, the prosecution has not given specifications i.e. number and other description of the house except the boundaries in the seizure panchanama. Besides, it is important to note that the prosecution has failed to prove that the accused had knowledge about the contraband in the cupboard in the house in question which inevitably leads to the position that the accused was not in conscious possession of contraband opium which was allegedly recovered from the open cupboard in the house of the father and brothers of the accused.

36. Apart from that, it has come in the evidence that the members of the raiding party conducted personal search of the accused and while conducting the personal search, he was asked whether presence of "Special Executive Magistrate" was needed for his search and no offer was given to him, whether his search was to be conducted before "Gazetted Officer", and apparently, it is apparent that there is part compliance of mandatory provision of section 50 of NDPS Act and part non-compliance thereof, which also hampers the case of the prosecution.

37. Moreover, there appears to be substance in the submission canvassed by the learned Counsel for the appellant, that the prosecution has failed to comply with the provision of section 52 of the NDPS Act and immediately after arrest of the accused, he was not informed about grounds of his arrest and there is nothing on record in that respect, and even seal of the nearest Police Station was not affixed on Muddemal articles including sample packets, as contemplated u/s 52(3) of the NDPS Act. So also, there is substance in the submission advanced by the learned Counsel for the appellant, that the full report containing all particulars of search,

seizure and arrest was not sent to the immediate official superior within 48 hours next after such arrest or seizure of the accused, and apparently, there is non-compliance of section 57 of the NDPS Act. Although the prosecution has produced the report u/s 57 of the NDPS Act at Exhibit 61, it cannot be construed as full compliance u/s 57 of the NDPS Act.

38. As regards sealing of Muddemal articles and sample packets, since it is curious to note that none of the prosecution witnesses state that the seal was carried by any of the witnesses to the house of the accused and the prosecution evidence is silent in respect of very aspect that who brought the seal to the spot of incident and it is the disputed fact in question, and therefore, the question arises if the sealing was done at the house of the accused after seizure of contrabands on the Muddemal packets and sample packets, as stated by the witness in his evidence, the said sealing was done by the seal since nobody has stated that seal was carried to the house of the accused, and therefore, possibility of sealing Muddemal packets and sample packets at the Police Station, after the search and seizure cannot be ruled out, and consequently, the possibility of preparation of seizure panchanama at the Police Station also cannot be ruled out.

39. Moreover, it is also significant to note that it has not come in evidence that the quantity of sample was collected from each of the packets of the contrabands, and therefore, apparently, the sampling itself appears to be faulty and hence, such faulty sampling and consequent C.A. report thereof cannot be basis of conviction against the accused, and hence, the accused is entitled for acquittal.

40. Having comprehensive view of the matter and survey of the totality of evidence, it is amply clear that there are discrepancies, deformities and infirmities in the prosecution case, as well as, there are numerous lacunae and flaws therein and further there are non-compliances of mandatory provisions of sections 41, 42(1) and (2) of NDPS Act, and hence, accused cannot be convicted upon such inconsistent evidence, and therefore, accused is entitled to be acquitted from the charges levelled against him.

41. In the circumstances, having substratum of oral and documentary evidence, as well as, considering the non-compliances of mandatory and directory provisions of the NDPS Act, the prosecution case does not inspire confidence to fasten the liability of alleged contraband of opium with the accused since the prosecution evidence is short of connecting him with the said crime, as regards, exclusive and conscious possession of the alleged contraband with the accused, as discussed herein above, and hence, conviction and sentence recorded against the accused for the charges levelled against him deserves to be quashed and set aside, by allowing the present appeal. In the result, present appeal is allowed, and conviction and sentence imposed upon the appellant, by way of judgment and order dated 27-12-2000, by the learned Sessions Judge & Special Judge, Nanded, in Special Case (NDPS) No. 24/1998, stands quashed and set aside, and

the appellant is acquitted for the charge levelled against him, and the fine amount, if any, deposited by him, be refunded to him. The appellant is on bail and his bail bond stands cancelled.