

(1998) 02 SHI CK 0002

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 248 of 1991

State of Himachal Pradesh

APPELLANT

Vs

Soran Singh

RESPONDENT

Date of Decision : 24-02-1998

Acts Referred:

Criminal Attempts Act, 1981 — Section 1(1)
Criminal Procedure Code, 1973 (CrPC) — Section 293
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 10, 11, 12, 13, 14
Narcotic Drugs and Psychotropic Substances Rules, 1985 — Rule 12, 13, 14, 15, 16
Opium Act, 1857 — Section 3, 82(1)
Penal Code, 1860 (IPC) — Section 489A

Citation : (1998) CriLJ 1829 : (1998) 2 ShimLC 46

Hon'ble Judges : M.N. Rao, C.J.; R.L. Khurana, J.; Lokeshwar Singh Panta, J

Bench : Full Bench

Advocate : Inder Singh, General, for the Appellant; Kuldip Singh, for the Respondent

Judgement

M.N. Rao, C.J.—This appeal was brought by the State assailing the judgment of the learned Additional Sessions Judge, Sirmaur District at Nahan in Session Trial No. 11 -N/7 of 1990 dated 23-4-1991 acquitting the respondent-accused for the offence u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act"). This was listed for hearing before a Division Bench comprising two of us (Chief Justice and Justice Lokeshwar Singh, Panta) on 19-12-1997. After hearing both sides for some time, the Division Bench expressed the view that the case needs to be heard by a Full Bench of the Court and directed that it should be listed before this Full Bench on 24th December, 1997. The order of reference reads :

A Division Bench of this Court in Criminal Appeal No. 2 of 1995 dated 26th August, 1996 expressed the opinion that "the appointment of the Public Analyst, Food and Drugs Laboratory, Kandaghat as Chemical Examiner for the State of Himachal Pradesh does not cover the cases under the Act (The Narcotic Drugs

and Psychotropic Substances Act, 1985). Under Rule 2(c) of the Narcotic Drugs and Psychotropic Substances Rules, 1985, "Chemical Examiner" has been defined as the Chemical Examiner, Government Opium and Alkaloid Works, Neemuch or as the case may be, Gazipur. Rule 17 occurring in Chapter-III of the Rules deals with procedure for sending opium delivered by a cultivator and suspected to be adulterated. As per Rule 22 if it is found to be adulterated on examination by the Chemical Examiner in the Government Opium Factory, the same may be liable to confiscation by the General Manager.

2. Prima facie, we are of the view that since Chapter-III speaks of Opium poppy cultivation and production of opium, the Chemical Examiner referred to in the Rules to examine the opium supplied by an authorised cultivator is the Chemical Examiner, Government Opium and Alkaloid Works., Neemuch or Ghazipur. The Rules are silent as to who should chemically examine a contraband seized under the Act. Prima facie, we agree with the learned Assistant Advocate General that if every contraband seized under the N.D.P.S. Act has to be sent to the Chemical Examiner at Neemuch or Ghazipur, it would result in avoidable delay and render the Act unworkable. He also says that it could not be the intention of the rule-making authority that in every case of seizure of contraband, the examination must be conducted by the Chemical Examiner at Neemuch or Ghazipur. This view is supported by a decision of the Full Bench of the Madhya Pradesh High Court reported in Ram Dayal Vs. Central Narcotic Bureau,

3. One other aspect" relates to the question whether mandatorily the provisions of the Narcotic Drugs and Psychotropic Substances Act have to be complied with in cases of accidental seizure of contraband. A Full Bench of this Court in State Vs. Vidya Devi and etc., expressed the view that (at p. 3564 of Cri LJ):

...in a chance recovery compliance of Sections 41, 42 and 50 of the Act may not be possible, however, in order to succeed on this plea, the prosecution will have to satisfy the conscious 7 (conscience) of the Court that in the facts and circumstances of the case, it could not comply with the requirements of these provisions and that by the non-compliance thereof, no prejudice or miscarriage of justice was caused to the accused.

4. This observation appears to be at variance with the view taken by a three-Judge Bench of the Supreme Court in Mohinder Kumar Vs. The State, Panaji, Goa,

5. In the circumstances, we are of the view that this case needs to be heard by a Full Bench of this Court....

2. On 19-9-1988 at about 11.00 a.m., when the accused was proceeding in a Rickshaw at Paonta Sahib, he was searched and from his possession a bag was seized, which was found to contain two packets of poppy husk, each weighing 1 1/2 Kg. PW-1 Haseem is the Rickshaw puller, Satish Kumar, PW-2 is the Constable, who along with PW-7 Balbir Singh, Head Constable claimed to have stopped the Rickshaw and after enquiring about the contents of the bag subjected the accused to search after obtaining his consent. Ex. PA is the

recovery memo. The samples were sent to the Government Chemical Laboratory, Kandaghat, which on examination by the Chemical Examiner were found to be poppy husk. The accused was, therefore, charged with the offence u/s 15 of the Act. Seven witnesses in all were examined by the prosecution in support of the accusation. The plea of the accused was one of total denial. The learned Judge was of the opinion that the prosecution story bristled with inconsistencies. According to PW-1, Rickshaw Puller, there were two passengers in his Rickshaw - accused and another one and the Rickshaw was stopped by one Sunder Singh, Homeguard Constable, who seized the bag, which contained two packets of poppy husk. PW-2 Constable Satish Kumar's evidence showed that the accused alone was travelling in the Rickshaw and it was stopped by Head Constable Balbir Singh, PW-7. The evidence of PW-7 was to the effect that the accused alone was travelling in the Rickshaw and that the Homeguard Sunder Singh after apprehending the accused called him. When the accused was asked to disclose his name he voluntarily stated that he may be searched. The learned Judge found it difficult to believe the prosecution story. What happened to the other passenger, there was no evidence, who stopped and conducted the search, whether it was the Homeguard Sundar Singh, as stated by PW-1 or it was the Head Constable, PW-7, as asserted by himself and PW-2 Constable Satish Kumar, the prosecution version is inconsistent. The learned Judge also based his conclusion for acquitting the accused on the ground that within 48 hours of the arrest, the report was not Submitted to the superior officers. Contravention of Sections 50, 52(1) and 57 of the Act which are mandatory provisions "render the prosecution case doubtful", the learned Judge concluded.

3. The learned Advocate General appearing for the State has argued that the Chemical Examiner referred to in Rule 22 and defined in Rule 2(c) has no role to play so far as offences under Chapter IV of the Rules are concerned. The Chemical Examiner referred to in the Rules is the one concerned with the offences falling under Chapter-III, which deals with production and cultivation of opium and the regulatory powers of the Government in that regard. As to the second aspect concerning the opinion of the Full Bench of this Court in State Vs. Vidya Devi and etc., that in a chance recovery, compliance of the provisions of Sections 41, 42 and 50 of the Act may not be possible, the learned Advocate General has stated that the Full Bench of this Court has overruled the view taken by the Division Bench of this Court in State Vs. Vidya Devi and etc., but as the latter was approved by the Supreme Court in State of Punjab Vs. Balbir Singh, the Full Bench's view no longer is good law.

4. Mr. Kuldeep Singh, learned Counsel for the accused-respondent has argued that the Laboratory of the State Government at Kandaghat is not the one prescribed under the Act. Unless the prosecution proves the report of the Chemical Examiner of the Government Opium and Alkaloid Works, Neemuch or Ghazipur to the effect that the sample of the contraband was a narcotic drug as defined by Clause (xiv) of Section 2, no Court can record a conviction and pass an order of sentence under the Act. He has endeavoured to draw support for this contention

from the fact that no Rules have been framed under the Act prescribing the State Government Laboratory at Kandaghat for the purpose of chemical analysis of any sample of alleged contraband seized under the Act.

5. Before considering the rival contentions, we think it necessary to examine the question whether on the evidence adduced by the prosecution before the Court below, the conclusion follows that the accused is guilty of the offence u/s 15 of the Act, which concerns punishment for contravention in relation to poppy straw. Our answer is in the negative. Two persons, according to Rickshaw puller, PW-1, were travelling in the Rickshaw and one of them was the accused. What happened to the other passenger, there is no evidence. The Rickshaw was stopped in a public place when the accused was allegedly subjected to search. Clause (b) of Section 43 lays down the mandatory requirement that any officer of the department can detain and search any person in a public place, if he has reason to believe that the person committed an offence punishable under Chapter IV and has in his possession unlawfully any narcotic drug and psychotropic substance. It is the duty of the officer to arrest not only the one in unlawful possession of the contraband, but also "any other person in his company". This mandatory requirement has been breached in the case on hand. The presence of the second passenger in the Rickshaw was not spoken to by PW-2, Constable Satish Kumar, whose evidence was to the effect that the accused was travelling in the Rickshaw and it was stopped by PW-7 Head Constable. That there was only one passenger, namely, the accused, travelling in the Rickshaw was the evidence of PW-7. Inconsistency in this regard is irreconcilable. As to who stopped the Rickshaw and conducted the search, there is no cogent evidence. According to Rickshaw puller, PW-1, it was the Homeguard Sunder Singh, who stopped the Rickshaw, while PW-7, Head Constable asserted that he and PW-2 Constable Satish Kumar conducted the search. The presence of PW-2 Constable Satish Kumar was not spoken to by the Rickshaw puller, PW-1. The accused volunteered, according to PW-7 Head Constable, for the search to be conducted in the presence of the witnesses. This has not been recorded, nor was the accused taken to the nearest Gazetted Officer of any of the departments mentioned in Section 42 of the Act or nearest Magistrate.

6. The alleged recovery of the narcotic drug in question was not the result of a chance occurrence. It was only in cases where the police while conducting investigation in a criminal offence and if a search conducted in connection with that offence had resulted in the seizure of a narcotic drug or psychotropic substance, compliance of Section 50, Sub-section (1) becomes impossible, as by then search had already been over. In the present case, the alleged search was under the provisions of the Act and, therefore, compliance with Section 50 was mandatory. Whenever an arrest was made or seizure effected under the Act, the officer doing so shall, within 48 hours after the search or seizure, submit a full report of the same to his immediate official superior is the mandatory requirement of Section 57 and this has not been complied with by the prosecution. The acquittal of the accused by the learned Sessions Judge both in

regard to appreciation of evidence and compliance with the mandatory requirements of the provisions of the Act was fully justified warranting no interference by this Court.

7. The reference to the Full Bench had arisen because of the contention advanced by Mr. Kuldip Singh, learned Counsel that the report of the Chemical Analyst of the Government Laboratory at Kandaghat that the sample of the contraband seized was a narcotic drug was inadmissible in evidence since the authorised Chemical Examiner under the Act is one either at Neemuch or Ghazipur. We must state that this contention was neither raised by the defence nor considered by the Court below. As it is a pure question of law, we have allowed the learned Counsel to raise this question. If this Court were to hold on consideration of the evidence that the prosecution had succeeded beyond reasonable doubt in proving the guilt of the accused, this contention concerning a pure question of law might go in favour of the accused perhaps propelled the learned Counsel to raise this plea drawing support from the decision of a Division Bench of this Court in Criminal Appeal No. 2/95. The other aspect concerning the directory nature of the provisions of Sections 41, 42 and 50 of the Act in respect of chance recovery was incidentally noticed by the Division Bench.

8. As these two aspects surface frequently in cases arising under the N.D.P.S. Act, we feel it necessary to deal with them although on merits the appeal of the State fails.

9. The first aspect for consideration is whether it is obligatory on the part of the prosecution in every case arising under the Act to produce the report of the Chemical Examiner, Government Opium and Alkaloid Works, Neemuch or Ghazipur relating to the sample of the contraband seized? In other words, whether the report submitted by the Chemical Analyst of the Government Laboratory at Kandaghat, district Solan that the sample sent to it is a narcotic drug is liable to be excluded in judging the guilt of the accused under the Act?

10. Sections 9 and 76 of the Act confer on the Central Government power to make Rules.

11. A reading of these provisions will - show that the extent of the rule making power conferred under each of the two Sections is distinct and separate and conjointly both the Sections cover a very wide field. The rule making power u/s 9 excludes the matters covered by Section 8, which prohibits, except for medical or scientific purposes, cultivation of coca plant, opium, poppy, cannabis plant and also production, manufacture, possession, sale, purchase, transport, use, consumption, export, import of any narcotic drug or psychotropic substance.

12. In exercise of the powers u/s 9 read with Section 76 of the Act, the Central Government made the N.D.P.S. Rules 1985 G.S.R. 837 (E) dated 14th November, 1985. They contain 68 Rules and three schedules. Although in the Preamble of the Rules, it is mentioned that the source of the power is Sections 9 and 76, they do not concern or relate to in any manner, "Drawing of samples and testing and

analysis of such samples", one of the matters specifically provided for in Section 76(2)(df). Other than 1985 Rules, the Government of India have not made any Rules so far. We cannot assume that in respect of the entire gamut of rule making power comprehended by Sections 9 and 76 of the Act, the extant 1985 Rules occupy, or must be deemed to have occupied the whole field with respect to all the aspects covered by the Act, even if the context does not warrant.

13. An analysis of the Rules leads us to the conclusion that in respect of narcotic drugs seized from illegal possession of individuals they do not contain any provision as to the method and manner of taking samples, testing and analysing the same for proving the guilt of the accused. This factual position being uncontroversial, the learned counsel for the accused-respondent not having disputed this, could it be; said that the Chemical Examiner, as defined in Rule 2(c) of the Rules is the competent analyst to examine and submit his opinion as to whether the samples sent to him is a narcotic drug?

14. It was contended by Mr. Kuldip Singh, learned counsel for the accused that the provisions of the Code of Criminal Procedure have no application for sending the samples of contraband seized under the Act. Section 51 of the Act lays down that the provisions of the Code of Criminal Procedure shall apply in so far as "they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act". Since the 1985 Rules specifically designate the Chemical Examiner, the provisions of the Code of Criminal Procedure contained in Section 293 to the effect that the reports of experts specified in Sub-section (4) thereof shall constitute evidence in any enquiry, trial or other proceedings under the Code, have no application in regard to trials under the N.D.P.S. Act, according to the learned counsel. We do not agree. For the purpose of treating as evidence the report of Chemical Examiner as defined in Rule 2(c) of a necessary pre-condition for a successful prosecution only in respect of matters governed by 1985 Rules, but not in other" cases. No prosecution under the Act can succeed, absent the opinion of the chemical analyst. The prosecution must establish with reference to the evidence of expert that what was seized from the accused was a narcotic drug or psychotropic substance.

15. Rule 2 of the 1985 Rules deals with definitions. It begins with the words: "In these rules, unless the context otherwise requires...". It is therefore, plain that the definitions incorporated in the rules do not apply to all situations irrespective of the fact whether or not the context requires. Clauses (c) and (d) of Rule 2 define "Chemical Examiner" and "Chief controller Factories", respectively in the following terms:

(c) "Chemical Examiner" means the Chemical Examiner, Government Opium and Alkaloid Works, Neemuch or, as the case may be, Ghazipur; (d) "Chief Controller Factories" means the Chief Controller of Government Opium and Alkaloid Factories.

16. Chapter III of the Rules comprising Sections 5 to 30, which is relevant, bears the heading "Opium poppy cultivation and production of opium and poppy straw". All these Rules speak of opium cultivation and its regulation by the Government. Illustratively, we may refer to some of the rules.

17. Rule 5 says that opium or poppy straw shall not be cultivated except on account of the Central Government and in the tracts notified and in accordance with the conditions of a licence issued by the District Opium Officer under Rule 8. The procedure concerning the measurement of land cultivated with opium poppy and the preliminary weighment of the produce is governed by Rules 12 and 13, respectively. All opium produced by the authorised cultivator shall be delivered to the District Opium Officer by Rule 14. The opium so delivered shall be weighed, examined and classified by the District Opium Officer, who shall send the same to the Government Opium factory, as per Rule 15. Rule 16 deals with the procedure where cultivator is dissatisfied with the classification of the opium. Rule 17 says that if the opium delivered by the cultivator is suspected of being adulterated with any foreign substance, it shall be forwarded to the Government Opium factory separately. Rule 18 says that the opium received in accordance with Rules 16 and 17 shall be opened and sample drawn in the presence of the cultivator. Rule 21 says that the opium forwarded by the District Opium Officer shall be weighed, examined and classified in the Government Opium factory. Rule 22 relates to confiscation of adulterated opium, which reads:

22. Confiscation of adulterated opium - All such opium received separately under Rule 17, if found to be adulterated on examination by the Chemical Examiner in the Government Opium Factory may be liable to confiscation by the General Manager.

18. Rule 24 says that the final price to be payable to the cultivator shall be determined "by the General Manager on the basis of analysis report of the Chemical Examiner or such other officer, as may be authorised in this behalf by the Chief Controller of Factories and communicated to the concerned District Opium Officer".

19. Sub-rule (2) of Rule 24 says that in respect of opium delivered to the District Opium Officer by a cultivator, which was not initially suspected to be adulterated, but found later on to be adulterated on examination by the Government Opium Factory, shall be paid at the reduced rates, as specified by the Government.

20. In the rest of the Rules, there is no reference to Chemical Examiner. But in Rules 31, 33, 36 and 54, Government Opium Factories are mentioned. Rule 31 says that opium shall not be manufactured except by the Central Government Opium Factory at Ghazipur and Neemuch. The sale of opium shall be only from the Government Opium Factory, Ghazipur, as per Rule 33. Manufacture of certain drugs specified in Sub-rule (2) of Rule 36 is prohibited except by the Government Opium Factory and import of opium and certain other drugs by Rule 54 is prohibited except by the Government Opium Factory.

21. It is, therefore, clear that the Rules speak of Chemical Examiner and Government Opium Factory only in the context of cultivation of opium, its classification, payment of remuneration to the authorised cultivator, confiscation of the same if found to be adulterated on examination by the Chemical Examiner, manufacture of opium and its sale and manufacture of certain other drugs specified in Sub-rule (2) of Rule 36 and import of opium and certain other narcotic drugs and psychotropic substances referred to in Rule 54. There is absolutely no reference in the Rules to drawing of sample testing and analysis of such samples of any narcotic, drug seized from the possession of an individual, who is not a cultivator or manufacturer. There is no requirement under the Rules obligating the prosecution to send the samples of suspected contraband seized from the possession of an individual, who is not a manufacturer or cultivator for analysis to the Chemical Examiner, Government Opium and Alkaloid Works, Neemuch or Ghazipur.

22. It is the duty of the Court while interpreting a penal provision not to give extended meaning to the words contained therein on the ground that a principle recognised in respect of certain other provisions of law requires that the provision under consideration also should be interpreted in the same way. *State of Andhra Pradesh and Another Vs. Andhra Provincial Potteries Ltd. and Others*,

23. In cases arising under the N.D.P.S. Act concerning seizure of suspected narcotic drugs from the possession of an individual, who is not a manufacturer or a cultivator, the samples must be sent for analysis to the authorised Chemical Examiner (not the one defined in Rule 2(c) of the Rules) and his opinion brought on record as is the requirement in all cases where evidence of the Chemical Examiner is necessary to bring home the guilt of the accused. The report of such an expert constitutes valid evidence u/s 293 of the Code of Criminal Procedure.

24. In the State of Himachal Pradesh, a notification was already issued on 9th April, 1984 by "the State Government setting up "a Composite Testing Laboratory at Kandaghat, District Solan for analysing and testing the samples taken by the various departments under the various Acts/Rules with immediate effect. The Excise and Taxation department and the Police department are the fourteen departments specified in the notification. The functions of the Laboratory, inter alia, are :

(i) Testing of samples sent by the above departments under relevant Acts/Rules....

25. This notification was preceded by another notification issued on 14th April, 1982 by the Government of Himachal Pradesh in HFW-B(F)4-1/81 appointing the Public Analyst of Himachal Pradesh Food and Drugs Laboratory, Kandaghat, District Solan as Chemical Examiner for the whole State of Himachal Pradesh with immediate effect in the public interest. We, therefore, hold that the samples in respect of cases not falling under the 1985 Rules must invariably be sent to the Government Laboratory at Kandaghat.

26. Section 51 of the Act only says that the provisions of the Code of Criminal Procedure apply to all warrants, arrests, searches and seizures under the Act in so far as they are not inconsistent with the provisions of the Act. We could not discern any provision in the Act, which is inconsistent with the Code of Criminal Procedure as regards cases of the present nature. As we have already held that the role of the Chemical Examiner under Rule 2(c) is strictly confined to matters covered by the Rules, we find no inconsistency between the Act and the provisions of the Code of Criminal Procedure in regard to the application of Section 293 for the purpose of receiving as evidence, the opinion of experts appointed by the Government.

27. The question may be tested from a different angle. Section 74 incorporates transitional provisions, and it reads:

74. Transitional provisions - Every officer or other employee of the Government exercising or performing, immediately before the commencement of this Act, any powers or duties with respect to any matters provided for in this Act, shall, on such commencement, be deemed to have been appointed under the relevant provisions of this Act to the same post and with the same designation as he was holding immediately before such commencement.

28. The Act came into force on 16th September, 1985. By Sub-section (1) of Section 82, the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 are repealed. Sub-section (2) which provides for saving, lays down :

Notwithstanding such repeal, anything done or any action taken or purported to have been done or taken under any of the enactments repealed by Sub-section (1) shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

29. From a reading of Sections 74 and 82 of the Act, the conclusion is inescapable that the Chemical Examiner, Government Laboratory at Kandaghat is competent to analyse and submit his opinion in respect of any sample of a suspected narcotic drug or psychotropic substance not covered by the Rules. The notification was issued by the State Government prior to the coming into force of the present Act and the source of power in this regard is clearly traceable to Opium Act, 1878, which by Section 9, inter alia, makes possession and sale of opium, an offence punishable with imprisonment which may extend to three years with or without fine. Section 3 of that Act defines opium. It was, therefore, imperative under the old Act to send the samples to the Government Laboratory at Kandaghat. The aforesaid notification not being inconsistent with the provisions of the present Act it continues to have validity by virtue of Sub-section (2) of Section 82. What all powers the Chemical Analyst at Government Laboratory, Kandaghat had been exercising by virtue of the aforesaid notification he shall continue to exercise the same and the Laboratory shall be deemed to have been the properly constituted Laboratory in respect of matters other than

those strictly comprehended by the 1985 Rules by virtue of the transitional provisions of Section 74 of the Act. The lawful authority of the Government Laboratory at Kandaghat is thus ensured by Section 74 read with Section 82(2) of the Act notwithstanding the repeal of the Opium Act, 1878.

30. It is an established principle of statutory interpretation that although penal statutes should be construed strictly unlike remedial statutes, which should receive liberal construction, nonetheless, penal provisions must receive fair construction according to the legislative intent. (See: Craies on Statute Law 1971 Edition, Pages 531-533).

31. All Statutes including penal Statutes should receive purposive construction was recognised by the British Courts. Lord Roskill expounded the proposition in his speech in *Anderton v. Ryan* 1985 AC 560 (HL), a case concerning interpretation of Section 1(1) of the Criminal Attempts Act, 1981 :

...the question of construction should be approached" by reference to well known principles, ignoring that which is irrelevant however interesting, but remembering that statutes should be given what has become known as a purposive construction, that is to say that the Courts should where possible identify "the mischief which existed before the passing of the statute and then if more than one construction is possible, favour that which will eliminate "the mischief" so identified.

32. Our Supreme Court has adopted the same approach in the construction of penal statutes. In *State of Kerala Vs. Mathai Verghese and Others*, the question that fell for consideration was whether the embargo contained in Section 489-A of the Indian Penal Code in respect of "currency notes" is restricted to Indian Currency notes or extends to foreign currency also. Emphasising the aspect that the Court should resort to purposive interpretation in order to effectuate the intention of the legislature, the Supreme Court ruled that (para 1):

The embargo is not restricted to "Indian" currency notes. The legislature could have, but has not, employed the expression "Indian currency note". If the legislative intent was to restrict the parameters of prohibition to "Indian currency" only, the legislature could have said so unhesitatingly. The expression "currency note" is large enough in its amplitude to cover the currency notes of "any" country. When the legislature does not speak of currency notes of India the Court interpreting the relevant provision of law cannot substitute the expression "Indian currency note" in place of the expression "currency note" as has been done by the High Court.

33. The Full Bench of the Madhya Pradesh High Court in *Ram Dayal Vs. Central Narcotic Bureau*, dealing with an identical question, after considering the 1985 Rules, held that the definition of "Chemical Examiner" "is meant for the purpose of Chapter III of the said Rules for analysis of samples of lawfully cultivated and produced opium, as contemplated under Rule 22. There is no provision in the said Rules or in the Act debarring chemical analysis of unlawfully possessed

opium seized in connection with an offence elsewhere in any other Laboratory in the country as would expedite investigation and trial, as is rightly contended by Shri Mittal." We respectfully agree with this view.

34. This being the correct legal position in our opinion, the contra view taken by this Court earlier in Criminal Appeal No. 2/95 dated 26-8-1996 relying upon (1995) 2 Sim L Cases 335 (State of Himachal Pradesh v. Bhikho Ram), Criminal Appeal No. 401 of 1987 (State of H.P. v. Singh) dated 30-6-1995, Criminal Appeal No. 363 of 1987 (State of Himachal Pradesh v. Krishan Kumar) dated 24-5-1996 to the effect that the opinion of the Chemical Examiner of the Government Laboratory at Kandaghat cannot be considered the opinion of the Chemical Examiner, as defined under the Act as well as the Rules do not reflect the correct legal position and accordingly we overrule all these decisions with due respect to the learned Judges.

35. We now come to the second aspect, namely, whether in case of a chance recovery of contraband under the Act, the provisions of Sections 41, 42 and 50 should be complied with. A Full Bench of this Court in State Vs. Vidya Devi and etc., expressed the view that in a chance recovery compliance of Sections 41, 42 and 50 of the Act may not be possible but, however, the prosecution will have to satisfy the conscience of the Court that in the facts and circumstances of the case, it was not possible to comply with the requirement and that non-compliance has not resulted in any prejudice or mis-carriage of justice. The Full Bench also declared that the "opinion of the Division Bench in State Vs. Vidya Devi and etc., that in chance recovery where there is no compliance of Sections 41 and 42 of the Act, the matter can be investigated under the provisions of the Code is, with respect, wrong and is, therefore, overruled to this extent.

36. While dealing with the merits of the present case, we have already held supra that the seizure of the contraband was not the result of a chance recovery. Thus, *stricto sensu*, the question concerning the mandatory or directory nature of the aforesaid provisions of the Act in respect of a chance recovery does not arise for consideration by this Full Bench. And so we decline to go into this aspect. However, we would like to mention in passing that in the State of Punjab Vs. Balbir Singh, the Supreme Court after elaborately considering the provisions of Sections 41, 42, 43, 44, 49, 50, 51, 52 and 57 in paragraph 26 has stated its conclusion under nine different heads, in very clear terms. Sub-para (1) of paragraph 26 concerns the legal position relating to both chance recovery and non-chance recovery of a contraband under the Act. In Mohinder Kumar Vs. The State, Panaji, Goa, it was further re-iterated that in respect of accidental recoveries :

from the stage he had reason to believe that the accused persons were in custody of narcotic drugs and sent for panchas, he was under an obligation to proceed further in the matter in (accordance with the provisions of the Act.

37. For these reasons, while dismissing the appeal on the ground that the

evidence brought on record by the prosecution fell short of the required degree of proof, we declare that in respect of all cases arising under the N.D.P.S. Act in the State of Himachal Pradesh, other than those covered by the 1985 N.D.P.S. Rules made by the Central Government in G.S.R. 837 (E) dated 14-11-1985, the Public Analyst of the Government Laboratory at Kandaghat in district Solan is the authorised Chemical Examiner.