
(2015) 07 TP CK 0020
In the Tripura High Court
Case No : A.B. No. 39 of 2015

Sujit Dhar

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 09-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21(c), 41, 41(1), 42, 42 (1)

Citation : (2015) 07 TP CK 0020

Hon'ble Judges : Deepak Gupta, C.J

Bench : Single Bench

Advocate : P.K. Biswas, Senior Advocate, P. Majumder and C. Bhowmik, for the Appellant; R.C. Debnath, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Deepak Gupta, C.J—This bail petition by the petitioner has been filed in respect of West Agartala P.S. Case No. 47 of 2015 (re-numbered as Special NDPS Case No. 13/2015) registered against the petitioner under Section 21(c) of the NDPS Act, 1985, hereinafter referred to as the Act.

2. The prosecution story briefly stated is that the Officer-in-Charge of the West Agartala police station received secret information in the morning of 24.04.2015 that large amount of codeine based cough syrup was illegally stored in the house of the petitioner. The matter was brought to the notice of the Superintendent of Police concerned. Thereafter the informant along with other staff went to Lankamura, identified the house of the petitioner and on conducting raid recovered 975 bottles of phynsidol, 150 bottles reco-dex and 160 bottles of Es-kup from the hut of the petitioner. The petitioner was thereafter arrested and the bail petition filed before the trial Court was rejected. Hence the present bail application.

3. Sri P.K. Biswas, learned senior counsel appearing for the petitioner has raised

two contentions before this Court. The first contention is that the provision of Section 42 of the Act have been violated and the second contention that the provision of Section 52A have been violated. It is the contention of Sri Biswas that Section 42 of the Act has been violated because the Investigating Officer has not recorded the reasons of his belief in writing. With regard to Section 52A the contention is that the samples have been drawn by the police officer at the spot and this is violative of the provision of Section 52A of the Act.

4. Section 42 of the Act reads as follows:

"42. Power of entry, search, seizure and arrest without warrant or authorisation.-----

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

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

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

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

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

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this

Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

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

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

5. Sri Biswas learned senior counsel has relied upon the judgment of the Apex Court in *Sarija Banu alias Janarthani alias Janani and another Vrs. State through Inspector of Police*: (2014) SCC 266 wherein it is held that compliance of Section 42 is mandatory and this factor can be taken into consideration even at the time of grant of bail. There can be no quarrel with this proposition of the law that even at the stage of grant of bail if it is shown that section 42 has not been complied with this Court is not powerless to grant bail.

6. Sri P.K. Biswas also placed reliance on the judgment of the Apex Court in *Directorate of Revenue and Another Vs. Mohammed Nisar Holia*, (2008) CLT 352 : (2007) 13 JT 408 : (2008) 2 SCC 370 : (2007) 12 SCR 906 wherein the Apex Court held that the Officer who received the information must record the same in writing. In para-19 the Apex court held as follows:

"In the instant case, the statutory requirements had not been complied with as the person who had received the first information did not reduce the same in writing. An officer who received such information was bound to reduce the same in writing and not for the person who hears thereabout. Furthermore, in this case, apart from proving the fax and the copy of a challan nothing else has been proved.*****"

7. Section 42 has been the subject of judicial interpretation by a Constitution Bench of the Apex Court in *Karnail Singh Vs. State of Haryana*, (2009) 108 CLT 681 : (2009) CriLJ 4299 : (2009) 10 JT 360 : (2009) 10 SCALE 255 : (2009) 8 SCC 539 : (2009) 11 SCR 470 and after discussing the entire law on the subject and making reference to various provisions of the NDPS Act the Apex Court held as follows:

"21) Sub-section (1) of Section 42 of the NDPS Act lays down that the empowered officer, if has a prior information given by any person, should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his

reasons of belief. The proviso to sub-section (1) of Section 42 lays down that if the empowered officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief.

22) Sub-section (2) of Section 42 as it originally stood mandated that the empowered officer who have taken down information in writing or records the grounds of his belief under the proviso to subsection (1), should send a copy of the same to his immediate official superior forthwith. But after the amendment in the year 2001, the period within which such report has to be sent was specified to be 72 hours. Section 43 deals with the power of seizure and arrest of the suspect in a public place."

The concluding portion of the judgment reads as follows:

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

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

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

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

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being

destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

8. On behalf of the State reliance has been placed on *Kuldeep Singh Vs. State of Punjab*, (2011) 111 CLT 274 : (2011) CriLJ 2672 : (2010) 10 SCC 219 wherein the Apex Court held that if an Investigating Officer received secret information that the accused is dealing in contraband while he was on patrol duty, it was not necessary for him to take down the information in writing there and then. In that case the officer after receipt of the information proceeded to conduct the search and make the seizure and thereafter the information was recorded on his return to the police station. The Apex Court held that provisions of Section 42 had been substantially complied with.

9. When the Constitution Bench has decided a particular matter one need not look into other judgments at all. What the Apex Court held in *Karnail Singh's* case is that in case the empowered officer has prior information given by any person about an offence having been committed under the NDPS Act he should forthwith take it down in writing. The second part of the requirement is that in case the officer has reasons to believe from his personal knowledge that any offence under Chapter IV has been committed or that a material which may furnish evidence of commission of such offences are concealed in any building he may carry out the arrest or search without warrant between sunrise and sunset even without recording his reasons of belief. However, if the search has to be carried out after sunset and before sunrise then the empowered officer must record his reasons to believe that a search warrant or authorization cannot be obtained without affording an adequate opportunity to enter and search the building. The Apex Court has also held that when the officer receives information of the commission of an offence as referred to Sub Section (1) of Section 42 the same should be recorded in writing in the register concerned and a copy of the same shall be sent to the superior official before taking further actions.

10. At the stage of grant of bail this Court is not to look into the detailed issue as to whether there has been strict compliance to the provision of Section 42 of the Act or not. In case there is substantial compliance that is sufficient and the trial Court shall decide after recording evidence in the trial whether that compliance is sufficient or the non-compliance has resulted in vitiating the trial. I had called for

the case diary and found that an Entry No. 512 has been made in which it was mentioned that on the basis of secret information received huge quantity of codeine was likely to be recovered from the house of the petitioner at Lankamura. It was stated that if E.B. staff will conduct raid/search at above noted location under leadership of the S.P (E.B) certain action could be taken. This in my opinion is sufficient compliance with Section 42.

11. As far as Section 42(1) of the Act is concerned the raid was conducted between 12.30 to 14.10 hours i.e. after sunrise and before sunset. Therefore, it was not necessary for the empowered officer to comply with the first proviso to Section 42(1) of the Act. There are two types of reasons of belief contemplated under Section 42 of the Act. In case the investigation is not initiated on the basis of secret information received then the empowered officer is required to record the reasons of his belief as to why a raid should be conducted. In case the raid is being conducted under Section 42 of the Act on the basis of secret information received which itself discloses the commission of offence then no reasons of belief of the investigating officer are to be recorded. If however the investigating officer himself wants to search any premises under Section 42 and there is no secret information which has been recorded then he must record the reasons of his belief as to why he believes that an offence has been committed and a search should be conducted. However such raid can be conducted only between sunrise and sunset and if such raid has to be conducted after sunset and before sunrise then either warrant or authorization should be obtained or the officer should record his ground of belief as to why it was not possible to obtain warrants or authorization. This position is made clear from Sub Section (2) of Section 42 which clearly lays down that where an officer takes down any information in writing under Sub Section (1) or records grounds for his belief under the proviso thereto he shall within 72 hours sent a copy thereof to his immediate superior officials.

12. The present case is one of prior secret information received and on going through the record I find that the information has been recorded in the G. D Entry and appears to be sent to senior officials also. There was no requirement to record any belief at this stage especially when the raid was conducted after sunrise and before sunset.

13. The next contention of learned senior counsel is that the prosecution has violated the provision of Section 52A of the NDPS Act in as much as the inventory has not been certified by the Magistrate on that day or subsequent thereto. Section 52A reads as follows:

"52A. Disposal of seized narcotic drugs and psychotropic substances.

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(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant

considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

This section was inserted into the NDPS Act by the Amendment Act 2 of 1989 w.e.f. 29.5.1989. The heading of the Section is "disposal of seized narcotic drugs and psychotropic substances." This section has nothing to do with search and seizure operations or the sealing of the contraband or drawing of samples at the time of search. Sub Section (1) of Section 52A empowers the Central Government to specify certain narcotic drugs, psychotropic substances, controlled substances etc. which should soon after the seizure be disposed of by such officer in a manner specified by the Government. Sub Section (2) of Section 52A clearly lays down that where any contraband substances i.e. narcotic drug, psychotropic substance, controlled substances or conveyances has been seized and forwarded to the Officer-in-charge of the nearest police station or to the

officer empowered under Section 53, the officer referred to in Sub Section (1) of Section 52A is required to prepare an inventory of such substance. The manner of preparation of the inventory is given. Thereafter an application can be made to the Magistrate for certifying the correctness of the inventory prepared by the officer. In the presence of the Magistrate photographs of such drugs, substances, conveyances can be taken and the Magistrate shall certify such photograph to be true. The Magistrate shall permit drawing of representative samples of such drugs and shall certify the correctness of the list of samples so drawn. Sub Section (4) of Section 52A overrides the provisions of the Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973 and where any trial under the NDPS Act is going on the Presiding Officer is to treat the inventory, the photographs and list of samples as certified by the Magistrate to be primary evidence of such offence.

14. In the State of Tripura there is some misconception that the inventory has to be prepared by the Magistrate and that the entire sealing has to be done in presence of the Magistrate at the first instance. This is wholly incorrect.

15. Of late, the menace of narcotic drugs and psychotropic substances has assumed such alarming proportions in the country that the elected representatives of the people could not but take note of it. Those who use these drugs become their slaves and slowly but almost irretrievably push themselves into graves of their own making. Trafficking in drugs meant to amass illegal wealth in a matter of days is an act of perfidy no society can condone. This compulsion has resulted in enacting of the NDPS Act in order to curb and, if possible, eradicate the evil so much so that severe deterrent minimum punishments have been prescribed for those found guilty. The laudable object enunciated above cannot and should not be permitted to be defeated through imparting non-existent, meaning to some mere technicality found here and there in the Act or rules. Simultaneously care and caution has to be observed to bestow rightful place to such provisions which the legislature has enacted, in its wisdom, to ensure that in no case, an innocent is convicted, for the minimum sentence laid down for most of the offences are rigorous imprisonment for ten years extending up to twenty years besides very heavy fine.

16. Though the Act is a Special Act under Section 51 the provision of the Code of Criminal Procedure are applicable in so far as they are not inconsistent with the provisions of the Act in respect of all warrants issued and arrests, searches and seizures made under this Act. Therefore, any search or seizure made under the Act should comply with the provisions of the Code of Criminal Procedure unless the Act has made some specific provision in this regard. Till 1989 Section 52A was not even a part of the Act. Sections 51 and 52 of the Act reads as follows:

"51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures.--The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) 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.

52. Disposal of persons arrested and articles seized.--

(1) Any officer arresting a person under section 41, section 42 section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to--

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or subsection (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article."

A bare perusal of sub section (2) of Section 52 of the Act shows that whenever any article has been seized the same shall be forwarded without any unnecessary delay to the Magistrate by whom warrant was issued. This will only apply when the seizure has taken place pursuant to a warrant issued by a Magistrate and sub section (2) has no applicability in cases of search and seizures which take place under Sections 41,42,43 and 44 of the Act. In those cases sub section (3) of the Act applies and therefore, it is the duty of the officer concerned to ensure that the person arrested and the article seized are forwarded without unnecessary delay to the Officer-in-Charge of the nearest police station or to the officers empowered under Section 53 of the Act. Such an officer is required to take action for disposal of the material in accordance with law.

17. Under Section 53 of the Act the Central Government may notify certain officers of other departments such as Excise, Narcotic, Custom, Revenue, Intelligence etc..

18. Section 55 of the Act reads as follows:

"55. Police to take charge of articles seized and delivered.--An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

This section provides that the Officer-in-Charge of the police station with whom the seized article has been deposited shall take charge of the same and keep the same in safe custody pending the orders of the Magistrate. He also has been given to the power to affix his seal to such articles or to take samples of and from them. All of the samples so taken shall be sealed with the seal of the Officer-in-Charge of police station.

19. To sum up Chapter V of the Narcotic Act lays down the procedure to be followed after the search and arrest of the accused. According to Section 52(1), the person arrested is to be informed, as soon as may be, about the grounds of arrest. Section 52(2) says that the person arrested and articles seized are to be forwarded to the Magistrate who issued the warrant under Section 41(1), However, in cases other than warrants, the person arrested and articles seized are to be forwarded to the Officer-in-Charge of the nearest Police Station or the Officer invested with powers of Officer-in-Charge of a Police Station for the investigation of offence under the Act (sub-section (3) of Section 52). Section 55 casts a duty on the Officer-in-Charge to keep articles in safe custody and allow any officer, who may be accompanying such articles, to put his seal or take sample. Then comes Section 57 which postulates that any person making arrest or seizure shall make full report to his immediate superior officer within 48 hours."

20. The Central Government has issued a standing order No. 01 of 1989 dated 13.06.1989 laying down the procedure for sampling, storage etc. Reference may be made to Section IV of this standing order which reads as follows:

"4.0 Where any narcotic drug or psychotropic substance has been seized and forwarded the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer, referred to in paragraph No. 3.3 of the order shall prepare an inventory of such narcotic drugs or psychotropic substances containing arch details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars or the narcotic drugs or psychotropic substances or the packing in which they are packed, Country of origin and such other particulars as may be considered relevant to the identity of the aforesaid drugs in any proceedings under the Act and make an application to any Magistrate for the purpose of- Application to Magistrate for pre-trial disposal

(a) Certifying the correctness and of the inventory so prepared: or

(b) Taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs.

(c) Allowing to 4mw representative samples of such drugs of substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. Magistrate to allow application."

21. In Noor Aga Vs. State of Punjab and Another, (2008) 7 JT 409 : (2008) 16

SCC 417 after referring to the standing order the Apex Court held as follows:

"Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution."

22. Section 52A of the Act has been enacted for disposal of drugs and it is not the job of the Magistrate to certify the inventory at the stage of seizure. Section 52A of the Act comes into play only when an application is made to the Magistrate that the drugs specified are to be destroyed. In cases of prior information where the Investigating Officer proceed to search the premises or a person on the basis of information received or on the basis of his own belief then it is obvious that the authorized officer/empowered officer or police officer should carry investigation kit with him containing all necessary material such as weighing scales and material to seal the contraband material at the spot.

23. One of the most important aspects of any case under the NDPS Act is that once possession of the accused is proved the burden shifts upon him to explain his possession. Therefore a heavy burden lies upon the prosecution to link the report issued by the Forensic Science Laboratory to the material which was seized at the time of the search operation being carried out. The chain has to be complete and it is the duty of the prosecution to prove before the Court that the sample which was taken at the spot was kept in such a condition that the same could not be tampered with or opened till it reached the laboratory.

24. Therefore, under Section 51 of the Act the procedure under the code of criminal procedure will be followed in respect of search, seizure and arrest. This procedure is laid down and as far as possible independent witnesses should be associated with the search and seizure operations especially when the search is conducted on the basis of prior information.

25. Section 100 of the Cr. P.C. deals with this aspect of the matter and the provision of Section 100 Cr. P.C. must be followed even in the cases of NDPS Act. However, in cases of chance recovery or where the information is received at such a place that it is not possible for the police officials to collect all the necessary materials and paraphernalia which should be part of the investigation kit then the investigating kit need not be carried.

26. When on search of a person or search of a place any contraband substance is recovered it is the duty of the empowered officer/police official to ensure that the same is sealed at the spot. The empowered officer is also authorized to draw samples at the spot itself. In the seizure memo he must clearly mention the identifying mark on the seal affixed on the seized material and/or the samples, if any, drawn on the spot. The weight of the seized material as well as weight of

the samples should be clearly mentioned in the seizure memo. In cases of bottles etc. it is not necessary to mention the weight but the number of bottles, the volume of material stated to be in each bottle along with other identifying marks such as name of manufacturer, batch number etc. should be clearly mentioned in the seizure report. After preparing the inventory the material should be sealed at the spot itself. However, in case where the Investigating Officer does not have investigation kit or in case of chance recovery or sometimes when the place of seizure is so remote that there is chance of the accused escaping if this exercise cannot be done at the spot then the material can be taken to the police station. Even in such cases firstly an attempt should be made that the entire seized material is sealed in one packet and then taken to the police station or to the empowered officer along with the person arrested, if any under Section 52A of the Act. The material has to be produced before the Magistrate only where the search has been conducted pursuant to search warrant issued by a Magistrate.

27. Thereafter when the contraband material is produced in the police station the officer-in-charge of the police station must also ensure that the material is resealed. In case the investigating officer has sealed the material and drawn the samples at the spot then the Investigating Officer can either reseal the entire material without opening the seals and he can affix his own seals also on the sealed package prepared by the Investigating Officer. In such an event the officer-in-charge of the police station shall prepare the inventory on the basis of the seizure report prepared by the Investigating Officer at the spot.

28. In case however, Investigating Officer has not prepared seizure report at the spot and has brought the entire material to the police station then the Officer-in-Charge of the police station should ensure that the same is weighed and properly identified as discussed hereinabove and at least two representative samples are drawn out in accordance with law. Thereafter, the entire material should be sealed and a memo should be prepared in this regard. As far as possible independent witness should be associated with this process.

29. Thereafter the police officer is required to deposit the seized material i.e. the bulk seized material as well as the samples with the police official, in-charge of the Malkhana who shall make an entry in the Malkhana register giving the time and date and receipt of samples along with other details such as the number of packages, number of seals, identifying mark of the seals etc.

30. Thereafter, the Investigating Officer or any other empowered officer can send one of the samples drawn to the Forensic Science Laboratory. The identity of the police officials who is deputed should be clearly established. The Malkhana in-charge should hand over the sample along with a certificate (sometime referred to as road certificate) giving details of the packet containing the sample including number of seals, identification mark of the seals, case No. etc. The police official who takes the sample to the Forensic Science Laboratory must deposit the same with the FSL against proper receipt. The FSL in its report should mention the weight of the sample, the identification marks of the seized articles etc. During

trial it is the duty of the prosecution to examine each one of the officials that is the officer who carried out the raid, the officer-in-charge of the police station, the officer-in-charge of the Malkhana, the official who carried the sample to the laboratory to prove that the sample was not tampered with and could not be tampered with during this period. Only the report of the Forensic Science Laboratory is per se admissible and it is not necessary to examine any official from the Forensic Science Laboratory.

31. In Tripura there is some misconception that the first inventory of seizure has to be prepared by the Magistrate. This is totally incorrect. In all cases as far as possible the sealing and sampling should be done at the spot and if it cannot be done at the spot then before the police officer or the officer empowered under Section 53. Only in those cases where the Magistrate has issued the warrant is the seized material to be produced before the Magistrate. The role of the Magistrate comes in only at the stage when the police officials take a conscious decision that the contraband material should be disposed of at the pre-trial stage. Normally all case property has to be produced at the stage of trial. This led to problem being faced where such dangerous material were liable to be stolen or misused either in the police Malkhanas or in the Malkhanas attached to the Courts. Therefore, Section 52A was incorporated with the Act.

32. Section 52A has nothing to do with search and seizure. The purpose of Section 52A is to ensure that the contraband substance is disposed of under the supervision of a Magistrate and if the Magistrate follows the mandate of Section 52A then the certificate issued by him is per se admissible in evidence and it is not necessary for the police or the investigating agency to produce the bulk seized material which is the case property before the Court. The intention behind Section 52A is to ensure destruction of such harmful material at the pre trial stage.

33. Even when Section 52A has been resorted to the inventory produced must be the inventory prepared by an officer empowered to do so under sub Section (1) of Section 52A. The duty of the Magistrate is to verify the inventory and in this regard we are clarifying the position further. In case section 52A is not complied with and the seized material is not destroyed then it is the duty of the prosecution to produce the same before the trial Court during trial.

34. Section 52A is a very important provision. Narcotic Drugs and Psychotropic Substances are vulnerable to misuse. When huge quantities of contraband are seized it is not possible to keep them safely in the Malkhanas and there may be a chance of pilferage or the narcotic substances falling in wrong hands. Therefore, the aforesaid Section was inserted in the NDPS Act. Under sub-section (2) of the aforesaid Section after the contraband has been produced before the empowered officer under Section 53 of the Act the said officer is required to prepare a inventory of the alleged Narcotic Drugs and Psychotropic Substances containing details relating to their description, quality, quantity, mode of packing, marks, numbers and other identifying particulars on the packing in which they are

packed. The country of origin and other particulars as referred to in sub section (1) may also be considered relevant to identify the narcotic drugs. Thereafter, the empowered officer can apply to any Magistrate under Section 52A for the purpose of; certifying the correctness of the inventory so prepared; or taking in the presence of the Magistrate, photographs of such drugs or substances and certifying such photographs as true and lastly allowing to draw representative sample of such drugs or substances in the presence of the Magistrate and certifying the correctness of any list of samples so drawn. The Magistrate is required to deal with this application forthwith. Under sub section (4) the inventories, photographs and list of samples certified by the Magistrate are to be treated as primary evidence by the Court trying the offence.

35. Thus, it is apparent that an onerous and important duty is cast on the Magistrate. The Magistrate must ensure that the inventory prepared by the Officer is proper. We would like to reiterate that this job must be performed by the Magistrate himself and he cannot issue the certificate merely on the asking of the police officer. The Magistrate must personally and by himself verify the correctness of the inventory. Therefore, a duty is cast upon the Magistrate to verify the number of seals, the seal impression and he should tally the same with the sample seal impression. The Magistrate should not blindly copy what is stated in the application filed under Section 52A but it is his duty to ensure that he records the exact number of seals, the seal impression, the other special markings or identification marks on the parcels. He must ensure and write down whether the seals are broken or intact. He must also clearly observe whether the parcel appears to be tampered with or not. He must ensure that the Narcotic Drugs and Psychotropic Substances are weighed in his presence and thereafter he should certify the inventory.

36. In case samples have to be drawn the Magistrate must ensure that if there are more one packet then separate samples are drawn from each packet. Obviously, he need not draw samples from the parcels stated to be parcels of samples if drawn by the police but in case of a plurality of bulk parcels he must ensure that separate samples are drawn from each packet. The Magistrate should also ensure that before drawing the parcels he makes the substance homogenous. We are not going into the details as to how the substance has to be made homogenous but all Magistrates have received training whereby it has been explained to them how material is made homogenous so that a representative sample of the whole is drawn. This is normally done by cutting the bulk into a number of smaller units usually four, re-uniting them then cutting them again and then re-uniting them. The Magistrate then must ensure that the samples and the bulk drugs are again resealed in a proper manner. The order sheet of the proceedings should reflect each and every action taken by the Magistrate. In case photographs are taken then the Magistrate must ensure that the same are taken in his presence. We must again reiterate that this job has to be done by the Magistrate himself and cannot be delegated to any member of the Court staff.

37. In view of the above discussion, I am clearly of the view that Section 42 has been complied with and Section 52A was not required to be complied with in this case. Therefore, I find no merit in the bail application. Accordingly the same is rejected.

Copy of this judgment be circulated to all judicial officers in the State of Tripura.