
(1998) 02 GUJ CK 0006
In the Gujarat High Court

Sumarkhan Sidiqkhan Sindhi

APPELLANT

Vs

Collector of Customs (Preventive)

RESPONDENT

Date of Decision : 06-02-1998

Acts Referred:

Bombay Prohibition Act, 1949 — Section 103, 104
Criminal Procedure Code, 1973 (CrPC) — Section 173, 190, 374(2)
Evidence Act, 1872 — Section 25, 53
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 36A, 36A(1)(d), 41

Citation : (1999) 1 GLR 863

Hon'ble Judges : R.M. Doshit, J; M.R. Calla, J

Bench : Division Bench

Judgement

M.R. Calla, J.—This Criminal Appeal u/s 374(2) of the Cr. P.C. is directed against the judgment and order of conviction and sentence passed against the present appellant by the Addl. Sessions Judge, District Kheda at Nadiad in Sessions Case No. 156 of 1989 whereby the appellant-Sumarkhan Sidiqkhan Sindhi, resident of Dentami (Rajasthan) has been convicted u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (which will be hereinafter referred to as "the N.D.P.S. Act") and sentenced to 10 years R. I. with a fine of Rs. 1,00,000/- on 8-8-1990. It is pointed out by the learned Counsel for the appellant that the appellant was in jail during the course of trial from 24-2-1989, i.e., the date of his arrest and is serving the sentence at present in Sabarmati Jail of Ahmedabad. On 23-9-1997 an order was passed in Misc. Application No. 5276 of 1997 that this Appeal is to be heard with Criminal Appeal No. 1037 of 1990 and accordingly this Criminal Appeal No. 828 of 1990 was listed for final hearing in the Board before us on 2-2-1998 at item No. 24. On the request of the learned Counsel for the appellant, the matter was taken out of turn. However, the record of the Criminal Appeal No. 1037 of 1990 shows that it is not a ready matter. The Criminal Appeal No. 1037 of 1990, which is directed against the acquittal of other co-accused persons, cannot be heard unless the service is complete. The learned Counsel for the appellant submits that since the present appellant is serving the

sentence since long, this Appeal may be heard. Accordingly the matter was taken up for final hearing.

2. The facts leading to the present Appeal may be succinctly and briefly narrated as under:

(1) The Central Excise Department received an information on 23-2-1989 that the present appellant residing at village Ramnagar of Taluka Nadiad was in possession of brown sugar at his residence. He had procured the brown sugar from Barmer, which is a town in the State of Rajasthan near Indo-Pak border and that he was trying to dispose of the same.

(2) On receipt of this information a raid was arranged at the house of the appellant on 25-2-1989 and the house was searched in presence of Panchas. When the Central Excise Officers went to the house of the appellant along with Panchas, the appellant and three other persons, who were accused Nos. 1, 2, 3 and 4 in the trial, were present on the spot. On an inquiry, accused No. 1 said that he had 3 packets of brown sugar. A yellow bag was shown hanging against the wall. On the search of this yellow bag, a Khakhi bag was found inside it. The Khakhi bag contained 3 small cloth bags and each cloth bag contained plastic bags and each of these three plastics bags contained brown sugar, details of which are as under:

Plastic bag No. 1

(Cloth bag containing plastic bag contained net 900 gr. of brown sugar)

Plastic bag No. 2

(Cloth bag containing plastic bag contained net 800 gr. of brown sugar)

Plastic bag No. 3

(Cloth bag containing plastic bag contained net 1 kg. brown sugar.)

The net total weight of brown sugar contained in all the 3 packets was 2.70 kg., the value of which was assessed to be worth Rs. 1.35 lakh.

(3) From each packet three samples, each of 10 gr. of brown sugar, were taken and in all 9 samples, each containing 10 gr. of brown sugar were taken out. All these samples were seized in presence of the four accused persons including the appellant as also the Panchas. The full particulars of the packets have been mentioned in the Panchanama. Each sample was sealed and all the four accused and four Panchas, besides the Superintendent, Central Excise, signed on it. The remaining brown sugar was kept in each plastic bag, which was kept in cloth bag, from which the samples were taken out. Each cloth bag was put in polythene bag separately and each was sealed. All the polythene bags were kept in the Khakhi bag and the Khakhi bag was put in a tin, which was also sealed with the Government seal. On the tin a slip containing signatures of the four accused persons including the appellant, the Panchas and Superintendent of

Central Excise was affixed. The tin was tied with the strings on all the sides and, thereafter, the seal was affixed on it. The Panchanama was prepared in the house of the appellant, which was signed by all the four Panchas and the four accused including the appellant.

(4) The accused Nos. 1 to 4 were summoned and they came to the office of the Central Excise Department at Nadiad where they were interrogated and the disclosure made by each of the four accused persons was separately recorded u/s 67 of the Act.

(5) It was disclosed by the appellant that one Lala Patel alias Rajnikant Bhogilal Patel, who was made accused No. 5, was dealing in brown sugar and he wanted to purchase. The said Lala Patel approached the appellant to get him brown sugar and the appellant told him that he was trying to get it. Thereafter, Lala Patel, i.e., accused No. 5 went to the house of the appellant and inquired about the brown sugar. By that time accused No. 2 Haji Kadar Manji had brought 3 packets of brown sugar which were kept in the house of the appellant. The appellant told accused No. 5 Lala Patel that he had brown sugar and the aforesaid 3 packets were shown to him and samples were also given. The accused No. 5 Lala Patel took the appellant on his bullet motor cycle to his house at Baroda and asked the appellant to wait in his house. He went along with sample outside and returned after an hour with one person named Lalu Maratha (Maharashtrian) and told the appellant that Lalu Maratha had approved the sample and Lalu Maratha said that he would purchase the brown sugar at the rate of Rs. 25,000/- per kg. The said Lalu Maratha then left saying that he would come and take delivery of the brown sugar.

(6) It was disclosed by accused No. 2 Haji Kadar Manji that said Lalu Maratha, who was arrayed as accused No. 6 was dealing in brown sugar and was purchasing and disposing the same. Accused No. 2, i.e., Haji Kadar Manji then went to meet accused No. 6 Lalu Maratha but could not meet him and he was told to stay in a hotel opposite Vapi Railway Station where he was to be contacted. One person went to accused No. 2 and told him that he was a man of Lalu Jogi, whom he had shown the sample of brown sugar. He approved the sample and went back saying that he was agreeable to purchase the same at the rate of Rs. 35,000/- per kg. Accused No. 2 then went to Barmer and from there he went to Pakistan. He brought 2.750 kg. brown sugar and carried the same to the house of accused No. 1 in village Ramnagar. The accused No. 1, i.e., the present appellant told him that it would be disposed of there and there is no use taking to any other place and the brown sugar then remained in the house of the present appellant.

(7) The accused No. 2 Haji Kadar Manji thus imported brown sugar to India after the deal was finalised that Lallu Jogi would take the delivery of the brown sugar imported from Pakistan. Lallu Jogi deals in brown sugar and facilitates import of brown sugar to India. Thus, accused No. 2 imported brown sugar from Pakistan at the instance of Lallu Jogi-accused No. 6, who was to take the delivery. It is

alleged that the accused Nos. 1 to 4 were jointly in possession of the brown sugar, which was recovered from the house of the appellant and thereby committed an offence u/s 21 of the Act. It is also alleged that all the accused had entered into a criminal conspiracy to purchase and sell brown sugar and to abate each other in doing so and they had thereby committed the offence punishable u/s 29 of the Act. It is also alleged that accused Haji Kadar Manji was previously found in possession of 2 kg., of opium and a case in that respect was pending against him. The samples were later on sent to the Forensic Science Laboratory, Ahmedabad.

3. Based on the aforesaid allegations, Complaint No. 1414 of 1989 was presented by one Shri M.S. Shah, Superintendent, Central Excise (Preventive), H.Q., Ahmedabad on 25-4-1989 in the Court of Chief Judicial Magistrate at Nadiad and the Chief Judicial Magistrate, Nadiad registered the complaint on the very same date, i.e., 25-4-1989 under Sections 21 and 29 of the Act. The complaint enlisted 16 witnesses in all including Senior Scientific Assistant of F.S.L., Ahmedabad and the list of documents in the case of the seizure of the brown sugar seized on 24-2-1989 at Ramnagar, Taluka Nadiad, the list of the documents described 19 documents.

4. The learned Chief Judicial Magistrate at Nadiad committed the case to the Court of the learned Addl. Sessions Judge, District Kheda at Nadiad, who discharged accused No. 6 on 11-5-1990 and the appellant and 4 other accused persons were charged to face the trial as they denied the charge in Sessions Case No. 156 of 1989. All the 5 accused persons were charged for the offences under Sections 21 and 29 of the Act. Whereas the other four accused persons, i.e., Haji Kadar Manji, Anwar Salim Sindhi, Hejam Hamla and Rajnikant Bhogilal Patel have been acquitted, reference is being made to the charge which was framed against the present appellant on 31-5-1990 under Sections 21 and 29 of the Act. In the trial, following 11 witnesses in all were examined by the trial Court:

P.W. No. 1 Shri M. S. Shah, Superintendent, Central Excise at Ahmedabad.

P.W. No. 2 Shri Yogeshkumar, a Panch witness.

P.W. No. 3 Shri Kiritkumar, a Panch witness.

P.W. No. 4 Shri Kashibhai, a Panch witness.

P.W. No. 5 Shri Chhotabhai, again a Panch witness.

P.W. No. 6 Shri Hiteshbhai, who is the son of the owner of the premises where from the alleged contraband substance was recovered.

P.W. No. 7 Shri Krishnvadan, an Inspector, Central Excise.

P.W. No. 8 Shri Yakubhai, Inspector, Customs.

P.W. No. 9 Shri Mahendra Balchandra Tripathi, Inspector from Central Excise

Inspectorate (Preventive).

P.W. No. 10 Shri Mahendrakumar Ambalal Shah, Excise Superintendent.

P.W. No. 11 Shri Suresh Balkrishan Sud, Customs Inspector.

Three, out of the four Panchas, i.e., P.W. Nos. 2, 3 and 4 were declared hostile. The other prosecution witnesses have supported the story of the prosecution but it is pointed out by the learned Counsel for the appellant that P.W. No. 5, who was a Panch witness, has not supported the prosecution story. However, he has not been declared hostile.

5. On the basis of the appreciation of the evidence and other records and material, the trial Court found the present appellant to be guilty for the offence u/s 21 of the Act only and, therefore, the appellant has been convicted u/s 21 of the Act and whereas the other four accused persons have been acquitted, there was no question of the conviction of the appellant u/s 29. On the basis of the conviction of the present appellant u/s 21 of the Act, he has been sentenced to 10 years R. I. and a fine of Rs. 1,00,000/- and in case of default of paying the fine, the appellant has to further undergo 2 years R. I.

6. As has already been pointed out earlier, the Appeal No. 1037 of 1990 against the acquittal of the four accused persons, namely, Haji Kadar Manji, Anwar Salim Sindhi, Hejam Hamla and Rajnikant Bhogilal Patel is pending in which the service is still incomplete and through this Appeal, the appellant has challenged his conviction and sentence on more than one grounds.

Dt. 9-3-1998 (After 6-2-1998 this D. B. met today on 9-3-1998).

7. Learned Counsel for the appellant has first of all argued that this is a case of violation of Section 50 of the N.D.P.S. Act inasmuch as the appellant was not taken to the Gazetted Officer of any of the Departments mentioned in Section 42 or to the Magistrate. He has placed reliance on Sub-sections (3) of Section 50 in support of the above argument that such Gazetted Officer or the Magistrate could have passed an order of discharge. In the facts of the present case, it is very clear that it was not the case of the search of the "person" as such. The information was that the contraband was kept in a particular premises belonging to the appellant and it was this premises, which was searched and as such there was no question of taking the appellant before any Gazetted Officer or a nearest Magistrate. No doubt, reference is made to Sections 41, 42 and 43, in Section 50(1) but the provisions of Section 50 cannot be read in isolation. Section 41 deals with the power to issue warrant and authorisation, Section 42 deals with the power of entry, search, seizure and arrest without warrant or authorisation and Section 43 deals with the power of seizure and arrest in public places. In the facts of the present case, it is not in dispute that it was a case in which a raid had been arranged at the house of the appellant and upon search contraband was found in the premises as stated in para 2. At the time when the premises was searched the appellant was also present. P.W. 1 M.S. Shah, i.e.,

Superintendent, Central Excise has stated that it was the Collector, who had given this search warrant and the Collector had the power to give search warrant and it was duly signed by Shri C.C. Brahmbhatt, i.e., the Collector. The raid was conducted under the supervision of Shri Brahmbhatt. In the facts of the present case, therefore, it is clear that the search was conducted on the basis of the warrant issued by the Collector, Central Excise. Collector, Central Excise himself had supervised the raid and, therefore, there is no question of taking the appellant to any Gazetted Officer, more particularly when it was not a case of search of any person as such but the search of the premises. In the case of Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, , the Court analysed the failure on the part of the Police Officer to inform the accused that he had a right to be searched in presence of Gazetted Officer or Magistrate. Therefore, when the premises is raided in presence of the appellant, there is no occasion to violate Section 50. Mohinder Kumar Vs. The State, Panaji, Goa, was a case in which the Supreme Court was concerned with the search and seizure and the provisions of Section 42 and Section 50. No doubt, the provisions were held to be mandatory, but it was a case in which the Police Officer had accidentally reached the house of the accused while on patrol duty. The search and seizure was made without recording grounds and the copy of the grounds were not sent to the superior officer as required u/s 42(2) and when the provisions of Section 50 were not adhered to and the person to be searched was not informed as to whether he would like to be taken to a Gazetted Officer or a Magistrate, the accused was held to be entitled to be acquitted. This case, therefore, does not apply to the facts of the present case in which the raid was conducted on the basis of a warrant issued by the concerned Collector. In the unreported decision of this Court dated 9-2-1995 whereby several Criminal Appeals were decided by a common order a grievance was raised with regard to non-compliance of mandatory provisions, viz., Sections 41, 42 and 50. The Court observed that he was an authorised officer and not an empowered officer and, therefore, he was required to follow the requirements of Section 50 before carrying out the search and it was admitted that none of the accused was asked before their search as to whether they would like to be searched before Gazetted Officer or a Magistrate and thus he has committed breach of Section 50. The Court also found that to what extent the authority was given was not made clear by P.W. No. 1 or by examining Mr. Bhargav who authorised P.W. 1. Therefore, it was not known as to whether P.W. 1 was authorised to carry out search at night. On the facts, this judgment also, therefore, does not help the argument raised by Mr. Saiyad. In Dhanpalsingh Barunsingh Thakur and Others Vs. State of Gujarat, the Division Bench of this Court while dealing with the question of non-compliance of Section 50 has categorically made it clear that for the officers, referred to in Section 41(2), who are carrying out the search, provisions of Section 50 are not attracted. When a Gazetted Officer is carrying out the search and if a provision requires that he should inquire from the persons to be searched as to whether they would like to be searched in presence of Gazetted Officer, is travesty of Section 50(1). Section 50(1) contemplates faith in a Gazetted Officer or a

Magistrate. If the enquiring officer himself is a Gazetted Officer, can it be said that faith reposed in a Gazetted Officer referred to in Section 50(1) is taken away. The Division Bench has then observed that it is improper to say that a Gazetted Officer, if he is carrying out the search, becomes less trustworthy and is required to take the accused person to some other Gazetted Officer or a Magistrate. Section 50(1) makes it clear that said provisions are attracted when officer duly authorised u/s 42 had to inquire from the accused to exercise his option to be searched in presence of a Gazetted Officer or a Magistrate. Section 42(1) makes it clear that the officers duly empowered thereunder are not necessarily Gazetted Officers. For the empowered officers referred to in Section 41(2) provisions of Section 50 are not attracted and the reason is that such empowered officers are exercising power of search and seizure u/s 41(2) itself. On the authority of this Division Bench decision it can be safely concluded that in the facts of the present case, it cannot be said that there was any violation of Section 50 as the officer who conducted the raid was having a warrant from the concerned Collector and was himself a Gazetted Officer, i.e., an officer empowered as referred in Section 41(2) and the raid was conducted under the supervision of the author of the warrant itself.

8. The learned Counsel has also argued that there was a delay in depositing the muddamal in the concerned Court. While referring to Exh. 7 at page 31 of the paper-book, the learned Counsel has submitted that there is a delay for the period from 24-2-1989 to 30-4-1990. The delay in sending the muddamal to the Laboratory has also been argued, while making reference to Exh. 45, Exh. 46, Exh. 47 and Exh. 48 at page Nos. 123, 124, 125, 126 to 129 and 130 respectively. The contraband material was seized on 24-2-1989. The letter Exh. 48, which was sent to the Director of Forensic Science Laboratory, is dated 27-2-1989 and the samples had been received in the Laboratory on 28-2-1989 and it is recorded in the judgment of the trial Court that investigation was going on, on 25-2-1989 and there were two public holidays in between. Thus, it cannot be said that there was any delay in sending the samples to the Laboratory. So far as the grievance that the muddamal was produced before the Court on 30-4-1990 is concerned, it may be pointed out that what is important is that the representative samples must be sent to the Forensic Science Laboratory or Chemical Analyser at the earliest possible opportunity without any delay, but the depositing of the muddamal with the Court is concerned, the same cannot be placed at the same footing, more particularly when it has come on record that immediately after the recovery, representative samples were taken and the samples as well as the remaining material were sealed and there is no allegation that there was any tampering of any of the seals while the muddamal was produced before the Court. In such cases, any lapse of time in producing the muddamal before the Court cannot be fatal. The learned Counsel has relied upon the case of Valsala Vs. State of Kerala, . In the facts of this case, the Supreme Court noticed that the seized article was produced in the Court on 14-1-1988, i.e., after a period of more than three months and there was no evidence whatsoever at all to show

with whom the article was lying and even assuming that it was under the custody of P.W. 6 -- the Officer-in-charge of the Police Station who seized it, there was again nothing to show whether it was sealed and kept there. The Supreme Court observed that the article seized appears to have been not kept in proper custody and proper form so that the Court can be sure that what was seized only was sent to the Chemical Examiner. The Supreme Court found that the evidence adduced was wholly insufficient to conclude that what was seized alone was sent to the Chemical Examiner. In the case at hand, no one has said that the seals were tampered. The contents of the Panchanama give full details with regard to the putting of the seal on the representative samples and the remainders. The contents of Exh. 11 show that there were 3 packets kept in tin box duly sealed, these samples of brown sugar each weighed 10 gr., duly sealed and remnants of samples received back from Forensic Science Laboratory duly sealed. Thus, the seals have remained intact and the delay in depositing the muddamal and its samples in the Court in the facts of the present case is of no consequence. *State of Rajasthan v. Daulat Ram* reported in 1980 Cri.LC 170 was a case in which it was an admitted case of the prosecution that the samples changed several hands before reaching the Public Analyst, the samples remained in the custody of more than one Sub-Inspectors and none of them were examined by the prosecution to prove that while in their custody the seals were not tampered with. The Supreme Court upheld the High Court decision that the prosecution has not proved beyond reasonable doubt that the opium seized was the opium which was sent to the Public Analyst and in fact the prosecution realised its mistake and at the fag end of the trial an application was made u/s 540 Cr. P.C. to examine the concerned Sub-Inspectors. Such application had been rejected by the Magistrate. The Supreme Court further held that in the facts of that case the prosecution has failed to prove that right from the stage of seizure of the opium upto the time when the samples were handed over to the Public Analyst, the seals remained intact. There is no such factual foundation in the present case and, therefore, while it is held that there is no delay in sending the representative samples to the Chemical Analyser and in absence of anything to show that the seals over the remaining material were tampered with, it cannot be said that any prejudice has been caused to the appellant or the delay in producing the muddamal before the Court has entailed any fatal consequence.

9. The learned Counsel has then argued that it was a case in which the contraband material had been recovered from the joint possession of the present appellant and other accused persons, who have been acquitted and whereas the other accused have been acquitted, the appellant too should be acquitted and he has also argued that the recovery cannot be said to be proved. In this regard, reference may be made to the statement made by P.W. 6 - Hiteshbhai, who has stated that there were 4 Oradis (Rooms) belonging to him. On 24-2-1989 officers of Central Excise had come to his village and the Officers of the Central Excise Department suspected the presence of contraband material. He had given out the Oradis to the villagers or friends and the villagers gave out the same to

accused Nos. 1 and 3. In the Oradi, in which accused No. 1, i.e., the appellant was living, there was one entrance and no windows. There are tin sheds and there is no other entry. The recovery had of course been made in the presence of the appellant and the Oradi from which the recovery had been made was in effective possession of the appellant. The presence of the other accused persons or the validity of their acquittal is to be considered in the Appeals which are pending before this Court wherein their acquittal has been challenged. Thus, the presence of the appellant, at the time of recovery from room, which was in his possession, is established. There is no room for doubt that it was recovered from a room which was in possession of the appellant and as such there is no force in the argument of the learned Counsel for the appellant that the appellant could not be held liable. The whole chain and series of the facts and the circumstances in which the brown sugar was found from the room in the possession of the appellant is sufficient to show that it was recovered from the possession of the appellant and the appellant cannot escape the liability and consequences of the same, notwithstanding as to what is going to be the fate of the acquittal of the other accused persons, who were also present on the spot at the time and against whose acquittal the State Appeal is pending. In fact, the appellant had admitted the possession in the disclosure, which was made by him u/s 67. Whether the contents of such disclosure will be admissible or not will be considered separately at the time of consideration of Section 67 of the Act and other relevant provisions read with the presumption to be raised u/s 54 of the N.D.P.S. Act and as to whether the Excise Officers, who investigate such offences, are to be treated as Police Officers or not.

10. The learned Counsel then raised the controversy with regard to the seizure and submitted that there was no separate Panch slip and only the names were there. Exh. 57 at page 148 of the paper-book at page 150 gives details as to how the samples were seized and how the signatures of the Panchas were taken. There is no doubt that the samples as well as the muddamal had been seized. Now, so far as the controversy, that the Panchanama speaks only of the Government seal and therefore, it is not clear as to what was the actual seal which was used, is concerned, the learned Counsel for the appellant has referred to the Forensic Science Laboratory Report dated 16-3-1989 wherein it has been mentioned that "Three sealed paper-packets sealed as "Supdt. C.E.P. & I. Ahmedabad Division No. 4" and on this it has been contended that it was the seal of the Superintendent and not Government seal. It would have been better had the sample and seal itself been retained on the Panchanama. But that by itself would not show that the samples had not been sealed or that the seal of the Supdt. C.E.P. & I. Ahmedabad Division No. 4 was not a Government seal. The Officer, who had prepared the Panchanama, may have used the word "Government seal" because the Superintendent is a Government Officer. This contention, therefore, does not lend strength so as to create any suspicion as to whether the samples had been sealed or not. The Seal of the Superintendent, C.E.P. & I. Ahmedabad, Division No. 4 is definitely a Government seal and the

same was found to be intact and hence there is no room for doubt. In the Forensic Science Laboratory Report at the bottom it has been mentioned that there was no separate Panch slip, but the names of the Panchas were given on the label of the paper-packet marked A, B and C. At Page 150 of Exh. 57 it has been clearly mentioned that each sample was sealed and the signatures of all, meaning thereby the 4 accused and 4 Panchas, were obtained and the same were rounded by a thread and the Government office seal of lac was put thereon and such seal could not be removed or opened without tampering with the same. In this view of the matter, when the seals were found to be intact, whether there was any separate Panch slip on the paper-packets or not has lost importance because the signatures were already there and on the ultimate containers, which were marked as A, B and C containing the sealed packets, it was not necessary that there should have been signatures of Panchas. Writing of the names of the Panchas on the ultimate cover, which contained the sealed packets, was enough to meet the requirements and there should not be any chance of the seal being tampered in the facts of the present case. Therefore, on the basis of the contents of the Forensic Science Laboratory Report itself, it is very clear that the seals were there on samples, it was Government seal of Superintendent, Central Excise, P & I, Ahmedabad Division No. 4 and the argument of the learned Counsel in this regard, as has been referred above, cannot be sustained. We may also deal with the ancillary contention raised by the learned Counsel in this regard to the effect that the Forensic Science Laboratory Report has not been exhibited. While examining this contention, we may refer to Item No. 48 of the list Exh. 9 (Page No. 28) which reads as under:

Test Result Report received from Forensic Science Laboratory, Ahmedabad issued under their letter F. No. FSL/TAPAN/89/NC/27/1268, dated 7-3-1989 addressed to Assistant Collector (Prev.), C. E., Ahmedabad along with its enclosures.

The same has been marked as Exh. 53. Thus, the covering letter dated 17-3-1989 sent by the Director, Forensic Science Laboratory (P), Central Excise, Ahmedabad was marked as Exh. 53 along with its enclosures. At Item No. 1 in this letter dated 17-3-1989 it is clearly mentioned that the report dated 16-3-1989 was being sent. It is, therefore, clear that the Forensic Science Laboratory report along with the covering letter was marked as Exh. 53. Merely because Exh. 53 has not been written on the enclosure, i.e., report dated 16-3-1989 and Exh. 53 has been mentioned only on the covering letter, it cannot lead to the conclusion that the Forensic Science Laboratory Report had not been exhibited. We find that it has been exhibited, but the exhibit mark has been written only on the covering letter, which refers to the enclosed report. Merely because the trial Court chose to write Exh. 53 on the covering letter and considered it sufficient to treat the Forensic Science Laboratory Report itself as duly exhibited because it was enclosed with the covering letter, it cannot be said that this course of action and procedure adopted by the Presiding Officer can be used to raise the argument that the Forensic Science Laboratory Report has not been exhibited. The contents of Item No. 48 in Exh. 9 read with the contents of

Forensic Science Laboratory's letter dated 17-3-1989 and the Exh. 53 mentioned on this covering letter dated 17-3-1989 with which Forensic Science Laboratory Report was enclosed clearly goes to show that Forensic Science Laboratory Report stood exhibited along with the covering letter dated 17-3-1989 and such a jejune and hyper-technical argument raised on the basis of the procedure adopted by the trial Court in writing exhibit, by no stretch of imagination can lead to the conclusion that Forensic Science Laboratory Report was not exhibited and it could not be made use of. Even otherwise, the Forensic Science Laboratory Report was received with the covering letter from the Forensic Science Laboratory. It has come from proper custody, it is a public document and this document cannot be discarded merely because Exh. 53 has been mentioned on the covering letter and not written on the Forensic Science Laboratory Report itself. The learned Counsel for the appellant failed to point out any provision of the Indian Evidence Act under which the Forensic Science Laboratory Report could have been discarded merely because Exhibit was not written on the Forensic Science Laboratory Report and it was written only on the document with which it was enclosed. Further P.W. 1 has categorically stated at Item No. 15 of his statement that the original Report received from the Forensic Science Laboratory mark 9/48 is tendered in evidence as Exh. 53. Thus, the argument of the learned Counsel that the Forensic Science Laboratory Report was not exhibited fails.

11. The learned Counsel of the appellant has also submitted that the author of the Report of Forensic Science Laboratory had not conducted any scientific test. We have gone through the Forensic Science Laboratory Report dated 16-3-1989 part of Exh. 53 which shows that there was physical examination as well as chemical analysis and while chemically analysing the sample, he has applied the following tests:

- (1) Marquis test
- (2) Mayer test
- (3) Zernik's test
- (4) Meckes test
- (5) Koppanyi test
- (6) P-Dimethyl amino Benzaldehyde test, And
- (7) Thin-layer chromatography pattern.

All the above tests have been found to be positive and against Thin-layer chromatography pattern test, it has been mentioned that it was comparable with control Heroin, Morphine, Papaverine, Narcotine, Phenobarbitone and Methaqualone. On the basis of the aforesaid test applied in chemical analysis, the opinion has been given by the Forensic Science Laboratory and it cannot be said that the Report has been given without applying any scientific test. The author of

the Report has referred to the aforesaid tests and the opinion had been rendered only on the basis of the result of the tests, as aforesaid applied in the course of analysis. The learned Counsel in this regard has cited our own High Court decision reported in Mahmad Hanif Shaikh Ibrahim Vs. State of Gujarat, , but we find that in this case the Division Bench found that the Public Analyst had not mentioned the details of the scientific test/experiment and that it was a case of remissness on the part of the public analyst that the scientific tests were not mentioned in the report. As against it, in the facts of the present case, reference has been made to the physical examination and the 7 tests, which were applied for the purpose of chemical analysis. Therefore, the aforesaid authority is of no avail to the present appellant.

12. The learned Counsel for the appellant argued the question of joint possession and the want of exclusive conscious possession with vehemence and has cited Pabitar Singh Vs. State of Bihar, Nenchand Dhulabhai Vs. The State of Gujarat, Pabitar Singh's case (supra) was a case in which the gun was recovered from the room of a quarter which was in joint possession of two persons and one of them was not present at the time of the raid and since the prosecution failed to prove that he was in sole occupation of the room at the time of the raid and the gun was concealed in such a manner that it was not visible to the naked eyes, it could not be said that he was aware of the existence of the same. In Nenchand Dhulabhai's case (supra) a single Bench of this Court, while dealing with Section 104 of the Bombay Prohibition Act held that if the opium was in such joint possession of the accused along with the other adult members living in the house, the possession must be shown to be a conscious one on the part of the accused or at any rate, he must have guilty knowledge in respect thereof, before raising presumption u/s 103 of the Bombay Prohibition Act. The Court further held that the possession implies control over the article and, therefore, it contemplates exclusive or conscious possession before he can be called upon to explain the same under the Bombay Prohibition Act. With regard to these two decisions, it may be straightaway observed that these were cases under the Arms Act and Bombay Prohibition Act, where there is no such provision like that of Section 54 as there are under the N.D.P.S. Act. u/s 54 of the N.D.P.S. Act in trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect of any narcotic drug or psychotropic substance for the possession of which he fails to account satisfactorily. In the facts of the present case, the appellant had ample opportunity to explain the recovery of the contraband, which was recovered from the premises, which was under his control particularly when the recovery was effected in his presence. This Act is a special enactment, particularly dealing with cases of Narcotic Drugs and Psychotropic Substances, enacted by the Parliament with a pious object of taking care of public health so as to make stringent provisions of the control and regulation and operation relating to narcotic drugs and psychotropic substances and, therefore, cases in which any narcotic drug or psychotropic substance is, recovered from a premises under the control of the

person, presumption has to be drawn that it was under his possession unless the person concerned gives a satisfactory account to show that it was not in his conscious possession. In the present case, enough material has come on record to show that it could not be taken to be a case of unconscious possession or that the appellant did not know at all that the contraband material was there in the room in which he was living and as such the aforesaid decisions are not applicable to the facts of the present case. In this regard when the learned Counsel for the appellant was told that the appellant himself had made a disclosure before the officers of the Central Excise Department and had admitted that he was involved through out the process, why such disclosure, which had been made by himself, could not be made use of against him so as to take that it was in his conscious possession; the learned Counsel referred to the provisions of Section 25 of the Evidence Act and submitted that u/s 25 of the Evidence Act confession to police officer cannot be proved and the disclosure, which is said to have been made by the appellant in this regard, is hit by Section 25. He has taken the aid from the provisions of Section 53 of the N.D.P.S. Act and has submitted that the officers of the Central Excise Department are invested with the powers of an officer in-charge of a police station and, therefore, officers of the Central Excise Department are as good as police officers. Prima facie answer to this contention is found in the provisions of Section 53-A, and Section 67 of the N.D.P.S. Act. Section 25 of the Evidence Act, Section 53, Section 53-A and Section 67 of the N.D.P.S. Act are reproduced as under:

Section 25 of the Evidence Act:

Confession to police officer not to be proved:- No confession made to a police officer, shall be proved as against a person accused of any offence.

Section 53 of the N.D.P.S. Act:

Power to invest officers of certain departments with powers of an officer-in-charge of a police station:- (1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the department of central excise, narcotics, customs, revenue intelligence or Border Security Force or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act.

(2) The State Government may, by notification published in the Official Gazette, invest any officer of the department of drugs control, revenue or excise or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act.

Section 53-A of the N.D.P.S Act:

Relevancy of statements under certain circumstances:

(1) A statement made and signed by a person before any officer empowered u/s 53 for the investigation of offences, during the course of any inquiry or

proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains -

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) When the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of Sub-sections (1) shall, so far as may be, apply in relation to any proceedings under this Act or the rules or orders made thereunder, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.

Section 67 of the N.D.P.S. Act:

Power to call for information, etc :- Any officer referred to in Section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act -

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case.

13. No doubt in view of the provisions of Section 25 of the Evidence Act, any confession made to a police officer cannot be proved against the person accused of any offence on the principle that no self- incriminating statement can be used against the person concerned. It is based on the wholesome idea that no one is expected to make statement against himself and, therefore, any statement which is made before the police shall not be used against him and the prosecution has to stand on its own credibility based on the facts collected by it during the course of the investigation, rather than relying upon such confession made to the Police. True it is that, in the Scheme of N.D.P.S. Act, u/s 53 the power of the officer in-charge of a police station has been given to the officers of the Department of Central Excise, narcotics, customs, revenue intelligence or Border Security Force or any class of such officers for the investigation of offences under this Act, but as the section itself shows, he has the power for the investigation of the offences under the N.D.P.S. Act and for that purpose the officers of the Departments, as aforesaid, who embark upon the investigation in a case of this nature have been

entrusted with the powers of an officer in-charge of the Police Station so as to take the investigation effectively to its logical end. But merely because such power is invested, whether they had to be treated as Police Officers for the purpose of Section 25 of the Evidence Act is a question which has been considered by the Supreme Court as also our own High Court. Before dealing with the cases in this regard, it may be pointed out that u/s 67 any officer referred to in Section 42, who is authorised in this behalf by the Central Government or the State Government, during the course of any enquiry in connection with the contravention of any provision of this Act, may call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder; may require any person to produce or deliver any document or thing useful or relevant to the enquiry and also examine any person acquainted with the facts and circumstances of the case. These are special provisions contained in this special enactment and the argument, which has been raised by the learned Counsel, has to be considered in the light of the Scheme of the Act.

14. Coming to the cases, which have been cited, we find that in 1991CriLJ97 Raj Kumar Karwal Vs. Union of India and others, the direct question which came up for consideration before the Supreme Court was the admissibility of self-incriminating statements made to the officials of Department of Revenue Intelligence (DRI) and as to whether such officers of the Department of Revenue Intelligence are "police officers" within the meaning of Section 25 of the Evidence Act read with the provisions of Section 173 of Cr. P.C. The Supreme Court in this case has relied upon the ratio of the earlier decision in Badku Joti Savant Vs. State of Mysore, and has observed that even if an officer is invested under any special law with powers analogous to those exercised by a police officer in charge of a police station investigating a cognizable offence, he does not thereby become a police officer u/s 25 of the Evidence Act unless he has the power to lodge a report u/s 173 of the Cr. P.C. In the unreported decision rendered by a Division Bench of this Court in Criminal Appeal No. 447 of 1989 decided on 20/21-1-1998 the Division Bench considered the question as to whether the statement which has been made by the accused before the Customs Officer was admissible in law and the Division Bench observed that it is well settled law that the Customs Officers are not police officers. The Division Bench has quoted para 10 of the Raj Kumar Karwal "s case (supra) in extenso and it has been ultimately held that the statements which had been made by the accused in that case to the Customs Officer were not hit by Section 25 of the Evidence Act. In Criminal Appeal No. 79 of 1991 decided on 13/15-1-1998 while referring to Raj Kumar Karwal"s case (supra) it was held by the Division Bench that under the provisions of the N.D.P.S. Act, the Customs Authorities are not the police authorities. On this aspect of the matter, in our considered opinion, the point stands fully concluded by Raj Kumar Karwal"s case (supra) decided by the Supreme Court wherein ultimately it is decided that the question, as to whether the officers of

the Customs or Central Excise Department are Police Officers or not, had to be decided on the touch-stone as to whether any person on whom power to investigate under Chapter XII is conferred, no matter by what name he is called, would depend upon not the power to investigate but the power to prosecute the offender by filing a report or charge-sheet u/s 173 of the Cr. P.C. It is the content of the power he exercises which is the determinative factor and unless an officer is invested under any special law with the powers of investigation under the Cr. P.C, including the power to submit a report u/s 173, he cannot be described to be a "police officer" u/s 25 of the Evidence Act. There is nothing in the provisions of the Act to show that the Legislature desired to vest in the officers appointed u/s 53 of the Act, all the powers of Chapter XII, including the power to submit a report u/s 173 of the Cr. P.C. Section 36A of the Act deals with the offences triable by a Special Court. u/s 36-A(1)(d) the Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government under the present Act can only file a complaint and they cannot file a charge-sheet against the offender. In case the investigation is conducted by police, it could conclude in a police report and if the investigation is made by an officer of any Department, including Central Excise Department, the Special Court Would take cognizance of the offence upon a formal complaint made by such authorised officer of the Department. This complaint can at the most be treated as if it is a complaint u/s 190 of the Cr. P.C. The right and duty of an investigating officer to file a police report or a charge-sheet on the conclusion of the investigation is the hall-mark of an investigation under the provisions of the Cr. P.C. As soon as the investigation is completed, the officer in-charge of the Police Station has to forward to the Magistrate empowered to take cognizance of the offence - a police report, i.e., a report in the form prescribed by the State Government. The officer acting under the provisions of the N.D.P.S. Act cannot initiate Court proceedings by filing a police report. If the Police Officer is of the opinion that there was sufficient evidence on the basis of the investigation made by him, he may initiate Court proceedings by filing a police report. In case of the "authorised officer" under the provisions of the N.D.P.S. Act, even if the Officer finds that there is sufficient evidence or reasonable ground or suspicion against the accused, he has to file a complaint u/s 36A(1)(d) of the N.D.P.S. Act, but he cannot initiate the proceedings by filing a charge-sheet. Thus, the argument of the learned Counsel for the appellant that the disclosure made by the appellant to the officers of the Central Excise Department should not be made use of and that same is hit by Section 25 of the Evidence Act is wholly misconceived and contrary to the law laid down by the Supreme Court as well as this Court.

15. On the facts of this case, the disclosure made by the present appellant is at Exh. 29 (mark 9/2) at page 83 to 90, in which he has categorically stated that on 24-2-1989 his house was searched and in this search 2.70 Kg. brown sugar contained in 3 bags were recovered when he himself was present at the time along with others, the Panchanama was prepared, the papers were seized and he

had also made voluntary disclosure of the details of such papers, which support the case of the prosecution. Identity of the appellant is fully established inasmuch as he has given left hand thumb-impression at the end of this statement before Mr. M.S. Shah, Superintendent (P), Central Excise and this disclosure made by him before the Superintendent (P), Central Excise could be taken into consideration and thus the case of conscious possession against the present appellant is fully established and we also find that the appellant had failed to account for the possession of this contraband material and, therefore, presumption u/s 54 of the N.D.P.S. Act could also be taken against him.

15.1 The upshot of the aforesaid discussion is that the conviction and sentence awarded to the appellant by the trial Court is sustained. We do not find any merit in the Appeal and the same is hereby dismissed.