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judge nor jury – Real function to place before the Court all materials together with reasons for the conclusion. It would allow the Court, which may not have the necessary expertise, to form its own judgment by its own observation of those materials placed and the reasons and conclusion provided by an expert.

Sushil Sharma* v. *State of Sikkim ***1499-H***

Indian Evidence Act, 1872 – S. 45 – Opinions of Experts – An expert opinion is an opinion. Opinion which reflects the expertise on the subject of an expert and provides the necessary scientific criteria for testing accuracy of conclusions arrived at would inspire confidence upon the Court to rely upon the same and come to its independent judgment. The scientific opinion must therefore necessarily be intelligible and convincing. The credibility of expert's opinion would depend on the reasons stated in support of conclusions and the data and material furnished which form the basis of the conclusion. Mere assertion without material cannot be considered evidence even if it is stated by an expert. When an expert gives no real data in support of what they call their expert opinion, the evidence even though admissible, may be excluded from consideration as it would provide no assistance to the Court to form its judgment.

Sushil Sharma* v. *State of Sikkim ***1499-I***

Narcotic Drugs and Psychotropic Substances Act, 1985 – Sikkim Anti Drugs Act, 2006 –Fair Investigation and Trial –If informant Police Officer in cases carrying a reverse burden of proof makes the allegation and is himself asked to investigate, serious doubt would arise with regard to his fairness and impartiality and in such cases it is not necessary that bias must actually be proved – The informant and the investigator must not be the same person – Justice must not only be done, but must appear to be done as well – Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.

Sushil Sharma* v. *State of Sikkim ***1499-A***

Sikkim Anti Drugs Act, 2006 – Narcotic Drugs and Psychotropic Substances Act, 1985 – Investigation – In order to meet the challenges faced by society, the investigation of the offences both under the NDPS Act, 1985 and under SADA, 2006 should be focused and the conclusion of the investigation must be arrived at with clinching evidence for the Court to

arrive at a decision as how best to deal with the offender. The prosecution and the trial that follows must be done keeping paramount the intention of the legislative in enacting the NDPS Act, 1985 and SADA, 2006 – Only because it is a menace it does not permit the enforcement agencies, the prosecution as well as the judiciary to overlook the stringent requirements of the procedural laws both under NDPS Act, 1985 and SADA, 2006. Securing a conviction by leading cogent evidence proved in the manner provided would help the judiciary to impose the correct sentence focussed on the problem. Accurate identification whether the suspect is a onetime or an occasional consumer, addict or a peddler trafficking drugs, psychotropic substances or controlled substances with certainty is crucial to the resolution of the problem. Otherwise even securing a conviction may not serve the purpose of SADA, 2006. The State is bound to ensure that the addicts and consumers are detoxified, rehabilitated, kept under observation and reintegrated into the society they belong. When SADA, 2006 provides for compulsory detoxification, rehabilitation and observation without adequate and proper detoxification, rehabilitation and observation centres for consumers and addicts, the State enforcement agencies would not be in a position to enforce the mandate of the law. This would amount to failure of the State to implement the SADA, 2006. The Peddlers and the traffickers on the other hand must be dealt with swiftly and sternly. Their proper identification, focused prosecution and if found guilty imposition of the correct and adequate sentence would help meet the need of the society grappling with the menace today.

Sushil Sharma* v. *State of Sikkim ***1499-M***

Sikkim Anti Drugs Act, 2006 – S.16 – SADA, 2006 carries a reverse burden of proof under S. 16 thereof. This cannot however be understood to mean that the moment an allegation is made and the F.I.R recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption under S. 16 of SADA, 2006 is rebuttable. Only if proof *"beyond reasonable doubt"* after investigation as provided in S. 16 is established *prima facie* by the prosecution would shift the burden to the accused.

Sushil Sharma* v. *State of Sikkim ***1499-K***

Sikkim Anti Drugs Act, 2006 – S. 9 – Object – S. 9 (b) of SADA, 2006 deals with consumption of controlled substance more as a disease and

less as a crime. It provides for compulsory detoxification, rehabilitation and also to remain under observation/probation – The object is to ensure that a person who consumes controlled substance is compulsorily detoxified, rehabilitated and kept under observation to ensure that he does not get back into the habit. The role of the investigating agency in such circumstances is vital. Fair and focused investigation would result in critical evaluation of the person who is alleged to have consumed controlled substance whether he is a onetime consumer or an occasional consumer, addict or a peddler trafficking drugs, psychotropic substance or controlled substance. An addict has been defined under S. 2 (ii) of SADA, 2006 to mean a person who has dependence in any drug having abuse potential and consumes the said drug. The certainty of purpose of the investigating agencies will only ensure that the object for which the provision has been made would be achieved.

Sushil Sharma* v. *State of Sikkim ***1499-L***

Sikkim Anti Drugs Rules, 2007 – Rule 17 – Possession of Controlled Substances – To establish a charge of possession of controlled substance two ingredients are essential. It must be established that the Appellant was in possession of the controlled substances. It must also be established that the articles seized were controlled substances. In that event unless he is lawfully authorised to possess such controlled substances for any of the said provisions in the Rules, the possession would attract the punishment prescribed by S. 14 of SADA, 2006. Failure to establish either of the two ingredients by the prosecution would result in the charge not being proved.

Sushil Sharma* v. *State of Sikkim ***1499-J***

Sikkim Anti Drugs Act, 2006 –S. 22 – Seizure and Arrest in Public Place – Empowers the authorised officer to detain the suspect, search and seize on his reason to believe that an offence punishable under SADA, 2006 has been committed in any public place – Can also arrest him or any other person in his company if the suspect is in possession of controlled substance which is unlawful – S. 22 does not mandate a search warrant or authorisation. It does not also require recording of the grounds for his belief that if he does not act in haste, enter, seize and arrest the suspect would have concealed the evidence or escaped – Does not require the authorised officer to forward written grounds of his belief to his immediate superior within seventy-two hours – S. 22 of SADA, 2006 is analogues to S. 43 of the NDPS Act, 1985.

Sushil Sharma* v. *State of Sikkim ***1499-B***

Sikkim Anti Drugs Act, 2006 – S. 24 – Search of Persons – Conditions – Before searching any person the authorised officer, ***"if possible",*** take such person to the nearest Gazetted Officer of any of the Departments mentioned in S. 21 or to the nearest Magistrate. Therefore, unless it is not possible the authorised officer before searching any person must take such person to the nearest Gazetted Officer or to the nearest Magistrate. If it is not possible the authorised officer must record reasons in writing and forward the same within 72 hours to his immediate superior – S. 50 of the NDPS Act, 1985 however, provides that when any officer duly authorised is about to search any person he shall, ***"if such person so requires"***take such person without unnecessary delay to the nearest Gazetted Officer of any of the Departments mentioned in S. 42 or to the nearest Magistrate – Under S. 50 of the NDPS Act, 1985 option must be given to the person to be searched – Option given to the accused is only to choose whether he would like to be searched by the Officer making the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the Officer making the search and not by the accused – There is no requirement for serving a notice under S. 50 of the NDPS Act, 1985 or S. 24 of the SADA, 2006.
Sushil Sharma* v. *State of Sikkim ***1499-D***

Sikkim Anti Drugs Act, 2006 – S. 24 – Under S. 50 of the NDPS Act, 1985 and S. 24 of SADA, 2006 the Gazetted Officer or the Magistrate before whom the accused is produced must be neutral, appear to be neutral and the act of conducting the search must be meaningful and not an empty formality – Vital to draw a distinction of a case in which search was conducted on the basis of prior information and search conducted on a chance recovery.
Sushil Sharma* v. *State of Sikkim ***1499-E***

Sikkim Anti Drugs Act, 2006 – S. 28 – Keeping the Seized Articles in Safe Custody – The submission of the prosecution that the defence had not raised the objection of the failure of the prosecution to prove the mandatory provisions of search, seizure and safe custody of the seized articles during trial and was thus precluded from raising them at the Appellate stage cannot be accepted – Firstly, the impugned judgment itself records that the learned Special Judge would examine whether the recovery and seizure were done in accordance with the mandatory provisions – Secondly, when the said enactments provide for reverse burden of proof it is imperative that the prosecution establish with cogent evidence the compliance of the mandatory provisions – When the NDPS Act, 1985 and SADA, 2006 requires certain

things to be done in a particular manner it must also be shown that it was done in the said manner. Failure to do so would lead to the conclusion that the seized articles were not kept in safe custody.
Sushil Sharma v. State of Sikkim **1499-F**

Sikkim Anti Drugs Act, 2006 –S. 30 – Report of Arrest and Seizure – S. 30 of SADA, 2006 is in *parimateria* with S. 57 of the NDPS Act, 1985 – By itself not mandatory and if there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case – Prosecution case cannot be thrown out on the failure of the prosecution to comply with the provisions of S. 57 of the NDPS Act, 1985 and S. 30 of SADA, 2006 alone.
Sushil Sharma* v. *State of Sikkim ***1499-C***

Sikkim High Court (Practice and Procedure) Rules 2011 – Rule 13 – Calculation of the Period of Limitation – Once the petition/appeal is filed in the Registry of the High Court and the Registry has made endorsement about the filing of appeal/petition, then it becomes the record of the Registry – Petitions/appeals/documents once filed in the Registry cannot be permitted to be returned to the party. Handing over a petition/appeal/ document to the Counsel for the party for removing defects does not mean that the same is returned permanently. In fact, same is given temporarily to the Counsel for the party to cure the defects in the Office itself. The concerned party/ Advocate has to remove or cure the defects within the time provided in the P.P. Rules and for that purpose necessary application can be filed in the Registry or necessary Court fee etc. be supplied in the Registry but petition/ appeal once filed in the Registry cannot be given back to the party/ Advocate – The date when the petition/appeal/application is filed in the Registry and endorsement is made by the Registry about filing of the case, in that event, that particular date shall be taken as the crucial date for calculating the limitation – I am not in agreement with the view taken by the Hon'ble Judge in the matter of *Tara Kumar Pradhan's* case – The matter is fit to be referred to a larger bench for giving its opinion on the following question: "Whether the date of filing of the appeal in the Registry of the High Court is the crucial date for the calculation of limitation or the date when the defects are cured and appeal is resubmitted in the Registry?"
Old Rumtek Monastery and Others* v. *Lama Karma Dorjee and Others ***1565-A***

SLR (2018) SIKKIM 1499

(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 08 of 2018

Sushil Sharma ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mrs. Puja Lamichaney, Legal Aid Counsel.

For the Respondent: Mr. Karma Thinlay, Additional Public Prosecutor, with Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor, Mr. S.K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 1st December 2018

A. Narcotic Drugs and Psychotropic Substances Act, 1985 – Sikkim Anti Drugs Act, 2006 – Fair Investigation and Trial – If informant Police Officer in cases carrying a reverse burden of proof makes the allegation and is himself asked to investigate, serious doubt would arise with regard to his fairness and impartiality and in such cases it is not necessary that bias must actually be proved – The informant and the investigator must not be the same person – Justice must not only be done, but must appear to be done as well – Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.

(Para 22)

B. Sikkim Anti Drugs Act, 2006 – S. 22 – Seizure and Arrest in Public Place – Empowers the authorised officer to detain the suspect, search and seize on his reason to believe that an offence punishable under SADA, 2006 has been committed in any public place – Can also arrest him or any other person in his company if the suspect is in possession of controlled substance which is unlawful – S. 22 does not mandate a search

warrant or authorisation. It does not also require recording of the grounds for his belief that if he does not act in haste, enter, seize and arrest the suspect would have concealed the evidence or escaped – Does not require the authorised officer to forward written grounds of his belief to his immediate superior within seventy-two hours – S. 22 of SADA, 2006 is analogues to S. 43 of the NDPS Act, 1985.

(Para 31)

C. Sikkim Anti Drugs Act, 2006 – S. 30 – Report of Arrest and Seizure – S. 30 of SADA, 2006 is in *pari materia* with S. 57 of the NDPS Act, 1985 – By itself not mandatory and if there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case – Prosecution case cannot be thrown out on the failure of the prosecution to comply with the provisions of S. 57 of the NDPS Act, 1985 and S. 30 of SADA, 2006 alone.

(Paras 35 and 36)

D. Sikkim Anti Drugs Act, 2006 – S. 24 – Search of Persons – Conditions – Before searching any person the authorised officer, ***"if possible",*** take such person to the nearest Gazetted Officer of any of the Departments mentioned in S. 21 or to the nearest Magistrate. Therefore, unless it is not possible the authorised officer before searching any person must take such person to the nearest Gazetted Officer or to the nearest Magistrate. If it is not possible the authorised officer must record reasons in writing and forward the same within 72 hours to his immediate superior – S. 50 of the NDPS Act, 1985 however, provides that when any officer duly authorised is about to search any person he shall, ***"if such person so requires"*** take such person without unnecessary delay to the nearest Gazetted Officer of any of the Departments mentioned in S. 42 or to the nearest Magistrate – Under S. 50 of the NDPS Act, 1985 option must be given to the person to be searched – Option given to the accused is only to choose whether he would like to be searched by the Officer making the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the Officer making the search and

not by the accused – There is no requirement for serving a notice under S. 50 of the NDPS Act, 1985 or S. 24 of the SADA, 2006.

(Paras 43, 44, 49 and 50)

E. Sikkim Anti Drugs Act, 2006 – S. 24 – Under S. 50 of the NDPS Act, 1985 and S. 24 of SADA, 2006 the Gazetted Officer or the Magistrate before whom the accused is produced must be neutral, appear to be neutral and the act of conducting the search must be meaningful and not an empty formality – Vital to draw a distinction of a case in which search was conducted on the basis of prior information and search conducted on a chance recovery.

(Paras 53 and 54)

F. Sikkim Anti Drugs Act, 2006 – S. 28 – Keeping the Seized Articles in Safe Custody – The submission of the prosecution that the defence had not raised the objection of the failure of the prosecution to prove the mandatory provisions of search, seizure and safe custody of the seized articles during trial and was thus precluded from raising them at the Appellate stage cannot be accepted – Firstly, the impugned judgment itself records that the learned Special Judge would examine whether the recovery and seizure were done in accordance with the mandatory provisions – Secondly, when the said enactments provide for reverse burden of proof it is imperative that the prosecution establish with cogent evidence the compliance of the mandatory provisions – When the NDPS Act, 1985 and SADA, 2006 requires certain things to be done in a particular manner it must also be shown that it was done in the said manner. Failure to do so would lead to the conclusion that the seized articles were not kept in safe custody.

(Para 60)

G. Code of Criminal Procedure, 1973 – Charge – Substance of accusation framed against the Appellant under S. 20(A) of NDPS Act, 1985 lacked clarity. Firstly, it was incumbent upon the learned Special Judge to have framed a separate charge for the offence under S. 20(b) (ii) (A) of the NDPS Act, 1985, separate from the charges under the SADA, 2006. It was also incumbent upon the learned Special Judge to have specified precisely the contravention of any provision of the NDPS Act, 1985 or any

Rule or any order made or condition of license granted by possessing the *"ganja"* – Charge framing is a vital aspect of criminal trial and the provisions of Ss. 211 to 224 Cr.P.C. must be carefully complied with. Merely because S. 464 CrPC exist in the statute book does not warrant the Trial Court to frame a charge incorrectly. Clarity in framing the charge has a dual purpose. A properly framed charge would guide the trial to establish the ingredients of the offence. It would also assist the defence to understand the charge correctly and lead their evidence.

(Para 68)

H. Indian Evidence Act, 1872 – S. 45 – Opinions of Experts – For the admissibility of experts' evidence, an expert must be within the recognised field of expertise. The evidence given by an expert must be based on reliable principles and must be qualified in that discipline – Expert is neither judge nor jury – Real function to place before the Court all materials together with reasons for the conclusion. It would allow the Court, which may not have the necessary expertise, to form its own judgment by its own observation of those materials placed and the reasons and conclusion provided by an expert.

(Para 77)

I. Indian Evidence Act, 1872 – S. 45 – Opinions of Experts – An expert opinion is an opinion. Opinion which reflects the expertise on the subject of an expert and provides the necessary scientific criteria for testing accuracy of conclusions arrived at would inspire confidence upon the Court to rely upon the same and come to its independent judgment. The scientific opinion must therefore necessarily be intelligible and convincing. The credibility of expert's opinion would depend on the reasons stated in support of conclusions and the data and material furnished which form the basis of the conclusion. Mere assertion without material cannot be considered evidence even if it is stated by an expert. When an expert gives no real data in support of what they call their expert opinion, the evidence even though admissible, may be excluded from consideration as it would provide no assistance to the Court to form its judgment.

(Para 78)

J. Sikkim Anti Drugs Rules, 2007 – Rule 17 – Possession of Controlled Substances – To establish a charge of possession of controlled substance two ingredients are essential. It must be established that the Appellant was in possession of the controlled substances. It must also be established that the articles seized were controlled substances. In that event unless he is lawfully authorised to possess such controlled substances for any of the said provisions in the Rules, the possession would attract the punishment prescribed by S. 14 of SADA, 2006. Failure to establish either of the two ingredients by the prosecution would result in the charge not being proved.

(Para 95)

K. Sikkim Anti Drugs Act, 2006 – S.16 – SADA, 2006 carries a reverse burden of proof under S. 16 thereof. This cannot however be understood to mean that the moment an allegation is made and the F.I.R recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption under S. 16 of SADA, 2006 is rebuttable. Only if proof *"beyond reasonable doubt"* after investigation as provided in S. 16 is established *prima facie* by the prosecution would shift the burden to the accused.

(Para 114)

L. Sikkim Anti Drugs Act, 2006 – S. 9 – Object – S. 9 (b) of SADA, 2006 deals with consumption of controlled substance more as a disease and less as a crime. It provides for compulsory detoxification, rehabilitation and also to remain under observation/probation – The object is to ensure that a person who consumes controlled substance is compulsorily detoxified, rehabilitated and kept under observation to ensure that he does not get back into the habit. The role of the investigating agency in such circumstances is vital. Fair and focused investigation would result in critical evaluation of the person who is alleged to have consumed controlled substance whether he is a onetime consumer or an occasional consumer, addict or a peddler trafficking drugs, psychotropic substance or controlled substance. An addict has been defined under S. 2 (ii) of SADA, 2006 to mean a person who has dependence in any drug having abuse potential and consumes the said drug. The certainty of purpose of the investigating agencies will only ensure that the object for which the provision has been made would be achieved.

(Para 119)

M. Sikkim Anti Drugs Act, 2006 – Narcotic Drugs and Psychotropic Substances Act, 1985 – Investigation – In order to meet the challenges faced by society, the investigation of the offences both under the NDPS Act, 1985 and under SADA, 2006 should be focused and the conclusion of the investigation must be arrived at with clinching evidence for the Court to arrive at a decision as how best to deal with the offender. The prosecution and the trial that follows must be done keeping paramount the intention of the legislative in enacting the NDPS Act, 1985 and SADA, 2006 – Only because it is a menace it does not permit the enforcement agencies, the prosecution as well as the judiciary to overlook the stringent requirements of the procedural laws both under NDPS Act, 1985 and SADA, 2006. Securing a conviction by leading cogent evidence proved in the manner provided would help the judiciary to impose the correct sentence focussed on the problem. Accurate identification whether the suspect is a onetime or an occasional consumer, addict or a peddler trafficking drugs, psychotropic substances or controlled substances with certainty is crucial to the resolution of the problem. Otherwise even securing a conviction may not serve the purpose of SADA, 2006. The State is bound to ensure that the addicts and consumers are detoxified, rehabilitated, kept under observation and reintegrated into the society they belong. When SADA, 2006 provides for compulsory detoxification, rehabilitation and observation without adequate and proper detoxification, rehabilitation and observation centres for consumers and addicts, the State enforcement agencies would not be in a position to enforce the mandate of the law. This would amount to failure of the State to implement the SADA, 2006. The Peddlers and the traffickers on the other hand must be dealt with swiftly and sternly. Their proper identification, focused prosecution and if found guilty imposition of the correct and adequate sentence would help meet the need of the society grappling with the menace today.

(Paras 120 and 121)

Appeal allowed.

Chronological list of cases cited:

1. State of Rajasthan v. Ram Chandra, (2005) 5 SCC 151.

2. Khet Singh v. Union of India, (2002) 4 SCC 380.

3. Dehal Singh v. State of H.P., (2010) 9 SCC 85.
4. Abdul Sayeed v. State of M.P., (2010) 10 SCC 259.
5. Rafiq Ahmad v. State of U.P., (2011) 8 SCC 300.
6. Gian Chand v. State of Haryana, (2013) 14 SCC 420.
7. Mohan Lal v. State of Punjab, 2018 SCC OnLine SC 974.
8. Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609.
9. State of Punjab v. Balbir Singh, (1994) 3 SCC 299.
10. Jarnail Singh v. State of Punjab, (2011) 3 SCC 521.
11. State of Punjab v. Baldev Singh, (1999) 6 SCC 172.
12. Beckodan Abdul Rahiman v. State of Kerala, (2002) 4 SCC 229.
13. Saiyad Mohd. Saiyad Umar Saiyad & Others v. State of Gujarat, (1995) 3 SCC 610.
14. State of Punjab v. Balbir Singh, (1994) 3 SCC 299.
15. State of Rajasthan v. Ram Chandra, (2005) 5 SCC 151.
16. Raghbir Singh v. State of Haryana, (1996) 2 SCC 201.
17. Mohan Lal v. The State of Punjab, 2018 SCC OnLine SC 974.
18. Ramesh Chandra Agrawal v. Regency Hospital Limited & Others, (2009) 9 SCC 709.
19. Anish Rai v. State of Sikkim, 2018 SCC OnLine Sikk 141.
20. Central Bureau of Investigation v. Nar Bahadur Bhandari, Criminal Appeal No. 4 of 2007
21. Sultan Singh v. State of Haryana, (2014) 14 SCC 664.
22. Madan Gopak Kakkad v. Naval Dubey, (1992) 3 SCC 204.
23. Durand Didier v. Chief Secretary, Union Territory of Goa, (1990) 1 SCC 95.
24. Mohinder Singh v. The State of Punjab, 2018 SCC OnLine SC 973.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The NDPS Act, 1985 has been enacted to consolidate and amend the law relating to narcotic drugs; to make stringent provisions for control and regulations of operations relating to narcotic drugs and psychotropic substances; to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.

2. Although the NDPS Act, 1985 was applicable in Sikkim; the State however faced further challenges of abuse of prescription drugs and other substances which do not fall within the definition of drugs like eraz-ex, polish etc. As per the statement of object and reasons of the Sikkim Anti Drugs Bill, 2006:

> **"***The Sikkim Anti Drugs Bill, 2006 has been framed to tackle the problem of drug abuse and other controlled substances that are being abused in the State. The drug abuse scenario in the State is increasing day by day and the unique problem is the abuse of prescription drugs that are sold by the licensed pharmacies/ medical stores on the prescription by registered medical practitioners and abuse of other substances that are not drugs like eraz-ex, polish etc. There is no law that could deal with these problems specifically, in the absence of which the menace of abuse and trafficking is going unabated. Because of this, it is necessary to have a law that could deal with these kind of offences. Hence the Sikkim Anti Drugs Bill 2006, has been framed under which stringent penalties have been prescribed for offences under this Act.***"**

3. The Sikkim Anti Drugs Act, 2006 (SADA, 2006) sought to:

> **"***control, regulate and prevent the abuse of drugs and control substances with abuse potential*

*being misused by addicts and traffickers, to make stringent provisions to deal with the ever increasing phenomenon of abuse of medicinal preparations and matters connected therewith***"**.

4. The Sikkim Anti Drugs Bill, 2006 having received the assent of the Governor on 25.03.2006 was published in the Sikkim Government Gazette on 17.04.2006 from which date the SADA 2006 came into force in Sikkim.

5. Both the NDPS Act, 1985 as well as the SADA 2006 makes stringent provisions for control and regulations of operations relating to narcotic drugs or psychotropic substances or controlled substances. The enactments seek to meet the problems facing society today. The SADA 2006 sought to deal with the problems faced by Sikkim for which, as per the objects and reasons, there was no law. It deals with the menace of abuse and trafficking. Both the enactments seek to deal with specific operations and addiction.

The prosecution story and the trial.

6. On 04.01.2017, at around 1030 hours "*credible source information"* that the Appellant was suspected to be in possession of contraband substances and was in the process of selling it to prospective buyers at Gyalshing Bazar, near the taxi stand, West Sikkim was received. The place was visited in the presence of the Sub-Divisional Magistrate, Gyalshing (SDM) and two witnesses. The Appellant was searched and was found in possession of one blue bag containing one black *"fastrack"* container with 59 capsules of Spasmo Proxyvon, 29 capsules of *"N-10"* and one pouch of *"ganja"*. The recovered articles were photographed, seized, packed and sealed in presence of independent witnesses and the SDM. Thereafter, the Appellant was medically examined at the District Hospital Gyalshing and his urine sample preserved by the Medical Officer for chemical examination. The Appellant was then brought to the police station along with the seized articles for further legal action. Stating the above facts, Police Inspector-Mahindra Pradhan, Station House Officer (SHO), Gyalshing Police Station (P.W.6) would lodge the First Information Report (FIR) (exhibit-1) as the informant under Section 9/14 of SADA, 2006 and endorse the case for investigation to the Investigating Officer-Naresh Chettri (P.W.9) as the Station House Officer (SHO).

7. On completion of the investigation a charge-sheet and a supplementary charge-sheet were filed. Although the charge-sheet alleged that the Appellant was a Government servant; the learned Special Judge did not frame a charge under Section 9(c) of SADA, 2006. No evidence of trafficking was produced.

8. On 28.03.2017 the learned Special Judge framed a singular substance of accusation as under:

> ***"****That you on 04.01.2017, at around 10:30 hours, Gyalshing Bazar near the taxi stand, West Sikkim, were found in possession of contraband substances i.e. 59 numbers of loose Spasmoproxyvon Capsules, 29 numbers of loose Nitrosun-10 tablets and one pouch of Ganja (Marijuana) without any valid medical prescriptions/documents and you thereby committed an offence punishable under Section 9(b) and 14 of SADA, 2006 r/w Section 20(A) of Narcotic Drugs and Psychotropic Substances, 1985 within the cognizance of this Court.****"***

9. The Appellant pleaded not guilty. The learned Special Judge sent him to trial on the singular charge with two indictments. The Learned Special Judge, in spite of the accusation made in the charge-sheet, did not frame a charge for consumption of controlled substance without valid prescription against the Appellant.

10. On 11.08.2017 after examining 9 witnesses the Appellant was questioned under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) and his statement recorded. The Appellant did not deny the seizures. He stated that he did not know how the said articles got into his bag which he had kept in the taxi stand while going to Gangtok. He also stated that he was framed by the Informant.

11. No evidence was lead by the prosecution to establish that the Appellant was a Government servant. Evidence of the fact would have been relevant as Section 9(c) of SADA, 2006 as it existed dealt with contravention of the law by a Government employee. It also provided a

sentence of a fixed term as against Section 9(b) of SADA, 2006 which did not provide for a jail term.

12. The learned Special Judge held the Appellant guilty of possession of controlled substances. The Learned Special Judge also held that the Appellant had consumed Spasmo Proxyvon which was a controlled substance. The Learned Special Judge thus held the Appellant guilty of commission of the offences punishable under Section 9(b) and 14 of SADA, 2006. The learned Special Judge also found the Appellant guilty for possession of 1.94 gms of *"ganja"* as well and liable under Section 20(A) of the NDPS Act, 1985.

13. However, the learned Special Judge held that the Appellant had been found guilty of commission of offence under Section 9(b) punishable under Section 14 of SADA, 2006. Accordingly, the Appellant was sentenced to undergo simple imprisonment for a term of 6 months and to pay a fine of Rs.10,000/- and in default to further undergo simple imprisonment for two months under Section 14 of SADA, 2006. The Appellant was also sentenced to undergo rigorous imprisonment for a term of eight months and to pay a fine of Rs.10,000/- and in default to further undergo simple imprisonment for a term of two months under Section 20(A) of NDPS Act, 1985. Both the sentences were directed to run concurrently. It was ordered that the Appellant shall undergo compulsorily detoxification and rehabilitation.

14. The Appellant preferred the present Criminal Appeal on 05.04.2018. On 06.04.2018 a delay of 57 days for preferring the appeal was condoned by this Court and the appeal admitted for hearing. The Appellant served eight months of sentence and was released on 20.05.2018. This was during the pendency of the present appeal.

The Arguments

15. Heard Mrs. Puja Lamichaney, learned Legal Aid Counsel for the Appellant and Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor for the State-Respondent.

16. Mrs. Puja Lamichaney would assail the impugned judgment and the order on sentence on several grounds. She would submit that the

prosecution had failed to establish the charges beyond reasonable doubt. She would submit that the charge as framed was erroneous as Section 218 Cr.P.C. would require separate charges for distinct offences. It was submitted that the learned Special Judge had not even framed a charge for consumption of controlled substance and therefore the conviction was not called for. She would submit that the mandatory provisions of Section 50 and 55 of the NDPS Act, 1985 as well as Section 21, 24, 28 and 30 of SADA, 2006 have not been complied with rendering the alleged recovery of suspect. It was submitted that as required under the mandatory provision of Section 21 of SADA, 2006 no information was taken in writing or given to the immediate superior officer. It was submitted that the prosecution has failed to prove the seizure as well as the fact that the said seized item were controlled substances. She would submit that there was no record of what transpired to the alleged seized articles after it was handed over to the Investigating Officer and whether the same seized articles were in fact examined by the forensic laboratory. She would also submit that there is no evidence brought forth by the prosecution to prove that the said seized articles were kept in the *"malkhana"* in safe custody. It was submitted that the difference between the quantity of seized articles and what was received at the forensic laboratory would reflect that the said seized articles were tampered with. She would also submit that Sonam Zangmoo Bhutia (P.W.8) the Junior Scientific Officer, RFSL Saramsa neither proved that she was an expert nor proved that the purported forensic examination report (exhibit-8) given by her was based on sound reasons to persuade the Court to rely upon it.

17. *Per contra* Mr. Karma Thinlay Namgyal would submit that the conviction of the Appellant was based on cogent evidence. He would submit that Section 21 of SADA, 2006 was not applicable. He would also submit that Section 24 of SADA, 2006 and Section 50 of NDPS Act, 1985 was complied with. He would rely upon the depositions of Bharani Kumaar (P.W.1), Zangpo Sherpa (P.W.4) and Namgyal Bhutia (P.W.5) and Mahindra Pradhan (P.W.6) to show compliance thereof. In support of his submissions he would rely upon: ***State of Rajasthan* v. *Ram Chandra***[1] and ***Khet Singh* v. *Union of India***[2].

18. Mr. Karma Thinlay Namgyal would rely upon the deposition of Mahindra Pradhan (P.W.6) and Naresh Chettri (P.W.9) to show compliance

[1] (2005) 5 SCC 151
[2] (2002) 4 SCC 380

of Section 28 of SADA, 2006. He would refer to the judgment of the Supreme Court in re: ***Dehal Singh* v. *State of H.P.***[3] and submit that small discrepancies in the quantity should be ignored. This was to meet the argument of the Appellant about the discrepancies in the number of capsules and tablets seized and examined forensically. He would insist that Sonam Zangmoo Bhutia (P.W.8) was in fact an expert which is evident from the fact that she was a junior scientific officer of a forensic science laboratory**.** He would also submit that although a composite charge had been framed for possession of controlled substances and the charge as framed during trial was clear and there was no confusion on the mind of the Appellant about it. To augment his submission he would rely upon: ***Abdul Sayeed* v. *State of M.P.***[4]***; Rafiq Ahmad* v. *State of U.P.***[5]***; Gian Chand* v. *State of Haryana***[6].

19. Mr. Karma Thinlay Namgyal would also submit that the Appellant was also not confused that he had been indicted for consumption of controlled substances. He would thus submit that neither the composite framing of charge for the offences under Section 9 (b) and Section 14 of SADA, 2006 and Section 20(A) of NDPS Act, 1985 nor the failure to frame a charge for consumption of controlled substances would have prejudiced the Appellant. He would submit that in such circumstances the Appellant's failure to show prejudice would protect the trial and it would not be vitiated.

CONSIDERATION

Section 9(b) and Section 14 of SADA, 2006 provides punishment for different offences.

20. The learned Special Judges' finding that the offence under Section 9(b) of SADA, 2006 is punishable under Section 14 of SADA, 2006 is incorrect. Both Section 9(b) and Section 14 of SADA, 2006 comes under Chapter IV under the head *"Offences and Penalties"*. Contravention of any provision of SADA, 2006 or the rules or order thereunder which involves use or consumption of controlled substances without valid medical prescription is punishable under 9(b) of SADA, 2006. Section 14 of

[3] (2010) 9 SCC 85
[4] (2010) 10 SCC 259
[5] (2011) 8 SCC 300
[6] (2013) 14 SCC 420

SADA, 2006 is a residuary provision which provides punishment for contraventions for which no punishment is separately provided. The two provisions seek to deal with two different situations.

Investigation must not only be fair but also on the face of it appear to be so.

21. In spite of receipt of the credible source information no FIR was registered or General Diary (GD) entry made. The FIR is numbered 01/2017. The seizure memo (exhibit 2) however records the number as FIR No./GD entry No.16/2017 and not FIR No.1/2017. No explanation is forthcoming. This anomaly remains unexplained. If it was a GD entry number the GD entry has not been proved. Otherwise it reflects a discrepancy of two FIRs'.

22. In re: ***Mohan Lal* v. *State of Punjab***[7] the Supreme Court, while examining a criminal prosecution under the NDPS Act, 1985, would hold that in criminal prosecution there is an obligation cast on the investigator not only to be fair, judicious and just but also that the investigation on the very face of it must appear to be so. The Supreme Court would hold that if informant Police Officer in cases carrying a reverse burden of proof makes the allegation and is himself asked to investigate, serious doubt would arise with regard to his fairness and impartiality and in such cases it is not necessary that bias must actually be proved. In view of conflicting opinions, the larger bench of the Supreme Court would lay down that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.

23. The prosecution evidence reflects that the Mahindra Pradhan (P.W.6) had apprehended the Appellant. He had called the Sub-Divisional Magistrate to carry out the search and seizure in his presence. He had also called witnesses for the search and seizure. He had searched the Appellant and seized the alleged *"ganja"* and controlled substances. He had packed and sealed the seized items. He had sent the Appellant for medical examination

[7] 2018 SCC Online SC 974

and had his urine sample collected. Thereafter he had headed back to the Police Station and lodged the FIR as the first informant. As the Officer incharge of the Gyalshing Police Station he had also endorsed the case for investigation to Naresh Chettri (P.W.9). He had therefore, substantially investigated the case. In the circumstances it is evident that the investigation had not been fair. The prosecution was under the NDPS Act, 1985 and SADA, 2006. Both the Acts carry a reverse burden of proof.

The evidence of search and seizure.

24. Bharani Kumaar (P.W.1) the Sub-Divisional Magistrate deposed that he was on duty on 04.01.2017. He was requested by Mahindra Pradhan (P.W.6) to be present as the Appellant was suspected to be in possession of contraband substances and his presence was required as per SADA, 2006. On reaching the taxi stand, he found two witnesses present. The notice (exhibit-1) was read out to the Appellant. The Appellant consented to be searched in his presence and signed the notice (exhibit-1). The Appellant was searched. The police recovered the controlled substances and a small pouch of *"ganja"*. In cross-examination Bharani Kumaar (P.W.1) admitted that the consent of the Appellant had not been recorded in the notice (exhibit-1). He also admitted that he could not recollect the exact quantity of the controlled substances recovered from the Appellant.

25. Lance Naik-Deo Prakash Pradhan (P.W.2) was posted at the Gyalshing Police Station. On 04.01.2017 Mahindra Pradhan (PW 6) telephoned and informed him that the Appellant was suspected to be moving around Gyalshing Bazar with contraband substances. He proceeded to the market and began looking out for the Appellant. He saw the Appellant near the taxi stand and so he followed him. As they reached the main bazaar, Mahindra Pradhan (PW 6) and other police personnel also arrived. The Appellant was apprehended on the stairs of the main bazaar. Mahindra Pradhan (PW 6) recovered 59 numbers of blue SP capsules, 29 N-10 tablets and a small pouch *"ganja"* from the Appellant. He would admit, in cross-examination, that the search was not conducted at the Gyalshing taxi stand.

26. Constable-Dipesh Subba (P.W.3) deposed that on 04.01.2017 Deo Prakash Pradhan (P.W.2) informed him that one person was roaming within the Gyalshing bazaar with contraband substances. Bharani Kumaar (PW 1),

Mahindra Pradhan (PW 6), Deo Prakash Pradhan (P.W.2) along with him searched the body of the said suspect and recovered the controlled substances and one pouch of *"ganja"* from him. He admitted that he had not mentioned whether the seized articles were recovered from any bag or the pocket of the Appellant.

27. Zangpo Sherpa (P.W.4) deposed that on 04.01.2017 he was present with Namgyal Bhutia (P.W.5) when the police recovered small amount of *"ganja"*, 59 blue capsules and 29 white tablets from the Appellant near the Gyalshing taxi stand. He identified his signature on the notice (exhibit-1). He had signed it on the request of the police. In crossexamination he admitted that he did not know the contents of the notice (exhibit-1).

28. Namgyal Bhutia (P.W.5) deposed that on 04.01.2017 Mahindra Pradhan (P.W.6) telephonically called him to Gyalshing taxi stand. He was told that he was apprehending one suspect with contraband substances. He went to Gyalshing taxi stand where the Sub-Divisional Magistrate, Zangpo Sherpa (P.W.4) and the Police Inspector were already present. The Police Inspector asked the Appellant whether he wanted his body searched before the Gazetted Officer or Magistrate. The Appellant consented to be searched before the Magistrate. The Police Inspector conducted the body search of the Appellant. They recovered 59 numbers of blue capsules (S.P.), 29 numbers of white tablets (N-10) and one pouch of *"Ganja"* from the bag of the Appellant and seized them.

Safeguards provided under the NDPS Act, 1985 must be observed strictly.

29. The Constitutional Bench of the Supreme Court in re: ***Vijaysinh Chandubha Jadeja v. State of Gujarat***[8] would hold that in order to prevent abuse of the provisions of the NDPS Act, which confer wide powers on the empowered officers, the safeguards provided by the legislature have to be observed strictly.

Procedure for search and seizure under Section 21 and 22 of SADA, 2006.

[8] (2011) 1 SCC 609

30. Section 22 of SADA, 2006 is analogues to Section 43 of the NDPS Act, 1985. They provide:

THE NARCOTIC DRUGS PSYCHOTROPIC SUBSTANCE ACT, 1985	**SIKKIM ANTI DRUG ACT, 2006**
Section 43. Power of seizure and arrest in public place.—Any officer of any of the departments mentioned in Section 42 may—	**Section 22. Power of seizure and arrest in public place**.— Any officer of any of the departments mentioned in Section 21 may—
(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act 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 V-A of this Act;	(a) seize in any public place or in transit, any controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act;
(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his	(b) detain and search any person whom he has, reason to believe to have committed an offence punishable under this Act, and if such person has any controlled substance in his possession and such possession appease (sic

possession and such possession appears to him to be unlawful, arrest him and any other person in his company.	appears) to him to be unlawful, arrest him and any other person in his company.
Explanation.—For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public. in Section 21 may—	***Explanation***: For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

31. Section 21 of SADA, 2006 provides the power and procedure for entry, search and seizure of any building, conveyance or place. As the search and seizure was affected in a public place i.e. Gyalshing bazaar Section 22 would apply rather than Section 21. Section 22 empowers the authorised officer to detain the suspect, search and seize on his reason to believe that an offence punishable under SADA, 2006 has been committed in any public place. If the suspect is in possession of controlled substance which is unlawful, the authorised officer can also arrest him or any other person in his company. Section 22 does not mandate a search warrant or authorisation. It does not also require recording of the grounds for his belief that if he does not act in haste, enter, seize and arrest the suspect would have concealed the evidence or escaped. Section 22 does not require the authorised officer to forward the written grounds of his belief to his immediate superior within seventy-two hours. All the aforesaid are requirements under Section 21. Section 22 of SADA, 2006 is analogues to Section 43 of the NDPS Act, 1985. As such the submission made by Mrs. Puja Lamichaney of non-compliance of Section 21 must be rejected.

Report of arrest and seizure under Section 57 of NDPS Act, 1985 and Section 30 of SADA, 2006.

32. Section 30 of SADA, 2006 provides that whenever any person makes any arrest or seizure he *"shall"* within fortyeight hours of the arrest and seizure, make a full report of all the particulars of such arrest or seizure to his immediate superior. Section 30 of SADA, 2006 and Section 57 of NDPS Act, 1985 are identically worded. They provide:

THE NARCOTIC DRUGS PSYCHOTROPIC SUBSTANCE ACT, 1985	SIKKIM ANTI DRUG ACT, 2006
Section 57. Report of arrest and seizure.— Whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.	**Section 30. Report of arrest and seizure.—** Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours of the arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate superior official.

33. The Arrest memo (exhibit 10) dated 04.01.2016 records the time of arrest as 1230 hours. Naresh Chettri (P.W.9) deposed that the Appellant was thoroughly interrogated and arrested after which the arrest memo (exhibit-10) was signed by him. He deposed that intimation was given to the Superintendent of Police as per the provisions of Section 30 of SADA, 2006. He exhibited the intimation letter (exhibit-11). The intimation letter (exhibit-11) dated 06.01.2017 is addressed to the Superintendent of Police. As required by Section 30 of SADA, 2006 it makes a report of the particulars of the arrest. Naresh Chettri (P.W.9) has thus complied with Section 30 of SADA, 2006 by informing his superior-the Superintendent of Police-about the arrest.

34. The prosecution has sought to prove the seizure through property seizure memo (exhibit-2). The said memo is dated 04.01.2017 and records the time of seizure as 1130 hours. The seizure was admittedly done by Mahindra Pradhan (P.W.6). He did not depose about intimating his immediate superior official about the seizure. There is also no document which reflects that he had done so. Naresh Chettri (P.W.9) in the intimation letter (exhibit-11) has stated about the seizure of the alleged controlled substances and *"ganja"* from the possession of the Appellant. There is no evidence that Naresh Chettri (P.W.9) was present at the time of seizure. The contents of the intimation letter (exhibit-11) and the evidence of Naresh Chettri (P.W.9) regarding the search would only be hearsay. Mahindra Pradhan (P.W.6) has failed to comply with the provisions of Section 30 of SADA, 2006.

35. Section 30 of SADA, 2006 is in *pari materia* with Section 57 of the NDPS Act, 1985.

36. In re: ***State of Punjab v. Balbir Singh***[9] the Supreme Court would hold that the provision of Section 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 is by itself not mandatory and if there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case. Thus it is essential to examine the case and see whether any prejudice was caused to the Appellant. The prosecution case cannot be thrown out on the failure of the prosecution to comply with the provisions of Section 57 of the NDPS Act, 1985 and Section 30 of SADA, 2006 alone. The learned Special Judge has not examined the compliance of the said provisions.

Compliance of Section 50 of NDPS Act, 1985 and Section 24 of SADA, 2006.

37. In re: ***Jarnail Singh v. State of Punjab***[10] the Supreme Court would have occasioned to examine the ambit and scope of Section 50 of the NDPS Act, 1985. It would hold that Section 50 would not be applicable if recovery was made from bag and not from the body of a suspect. Section 50 of the NDPS Act, 1985 can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused.

38. The prosecution's evidence regarding the recovery of the *"ganja"* and controlled substances is not clear as to whether the same were recovered from the body or the bag. Only Namgyal Bhutia (P.W.5) deposed that the said articles were recovered from the bag of the Appellant. Bharani Kumaar (P.W.1) did not specify the details. Deo Prakash Pradhan (P.W.2) stated that the articles were seized. No further details were given. Dipesh Subba (P.W.3) deposed that the articles were seized from the body of the Appellant. Zangpo Sherpa (P.W.4) stated that the articles were recovered from the Appellant. All of them are prosecution witnesses. Even

[9] (1994) 3 SCC 299
[10] (2011) 3 SCC 521

the property seizure memo (exhibit-2) does not reflect that the controlled substances and *"ganja"* was seized from the bag. The prosecution had however, on its own thought it fit to issue a notice under Section 24 of SADA, 2006. Therefore, this Court shall consider compliance of Section 24 of SADA, 2006. As the conviction of the Appellant is also under Section 20 of NDPS Act, 1985 it is necessary to consider compliance of Section 50 of the NDPS Act, 1985 as well.

39. Section 50 of the NDPS Act, 1985 and Section 24 of the SADA, 2006 are reproduced below:

THE NARCOTIC DRUGS PSYCHOTROPIC SUBSTANCE ACT, 1985	**SIKKIM ANTI DRUG ACT, 2006**
Section 50. Conditions under which search of persons shall be conducted.—	**Section 24. Conditions under which search of persons shall be conducted.—**
(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.	(1) When any officer duly authorized under Section 21 is about to search any person under the provisions of Section 20, Section 21 or Section 22, he shall, if possible, take such person to the nearest gazetted officer of any of the departments mentioned in Section 21 or to the nearest Magistrate.
(2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).	(2) When an officer duly authorized under Section 19 has reason to believe that it is not possible to take the person to be searched to the nearest gazetted officer or Magistrate without the possibility of the person to be searched parting with possession of any controlled substance or article or document, he may, instead of
(3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search,	

forthwith discharge the person but otherwise shall direct that search be made. (4) No female shall be searched by anyone excepting a female. (5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974). (6) After a search is conducted under subsection (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.	taking such person to the nearest gazetted officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973. (3) After a search is conducted under subsection (2), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior. (4) No female shall be searched by anyone except female or in presence of a female.

40. The ingredients of Section 24 of SADA, 2006 are:

(i) The officer conducting the search must be an authorised officer under Section 21.

(ii) When such authorised officer is about to search any person he shall, *"if possible"* take him to the nearest gazetted

officer of any of the Department mentioned in Section 21 or to the nearest Magistrate.

(iii) When such authorised officer *"has reason to believe"* that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate *"without the possibility of the person to be searched partying with possession of any controlled substance or article or document"* he may, instead, proceed to search as provided under Section 100 Cr.P.C. In such circumstances it is incumbent upon the authorised officer to record the reasons for such belief within 72 hours and send a copy of the same to his immediate Superior.

(iv) A female must be searched either by a female or in the presence of a female.

41. The ingredients of Section 50 of the NDPS Act, 1985 are:

(i) The officer conducting the search must be an authorised officer under Section 42 of the NDPS Act, 1985.

(ii) When such authorised officer is about to search *any person* he shall, *"if such persons so requires"* take such person without any unnecessary delay to the nearest Gazetted Officer of any of the departments mention in Section 42 or to the nearest Magistrate.

(iii) When such a requisition is made the authorised officer has the power to detain the said person until he can bring him before the Gazetted Officer or the Magistrate.

(iv) The Gazetted Officer or the Magistrate before whom such a person is brought *"if he sees no reasonable ground for search"; has* has the power to forthwith discharge the person or otherwise direct the search be made.

(v) No female shall be searched by anyone except a female.

(vi) The authorised officer, if he has reason to believe that it is not possible to take the person to be searched to the

nearest Gazetted Officer or Magistrate without the possibility of the person to be searched partying with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 Cr.P.C.

(vii) If the authorised officers proceeds to search as provided under Section 100 Cr.P.C then. In that case the said authorised officer must record the reasons for such belief and within 72 hours sent a copy thereof to his immediate official superior.

42. Section 24 of SADA, 2006 and Section 50 of the NDPS Act, 1985 deals with condition under which search of persons shall be conducted. However, there is a slight difference.

43. Section 24 of SADA, 2006 mandates that before searching any person the authorised officer, *"if possible"*, take such person to the nearest Gazetted Officer of any of the Departments mentioned in Section 21 or to the nearest Magistrate. Therefore unless it is not possible the authorised officer before searching any person must take such person to the nearest Gazetted Officer or to the nearest Magistrate. If it is not possible the authorised officer must record reasons in writing and forward the same within 72 hours to his immediate superior.

44. Section 50 of the NDPS Act, 1985 however, provides that when any officer duly authorised is about to search any person he shall, *"if such person so requires"* take such person without unnecessary delay to the nearest Gazetted Officer of any of the Departments mentioned in Section 42 or to the nearest Magistrate. Thus, under Section 50 of the NDPS Act, 1985 option must be given to the person to be searched.

45. In re***: State of Punjab v. Baldev Singh***[11] the Supreme Court would hold that there is unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior

[11] (1999) 6 SCC 172

information, to inform the suspect that he has the right to require his search being conducted in the presence of a Gazetted Officer or a Magistrate. The failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a Gazetted Officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad. The Supreme Court would further hold that the right of the accused to be searched before a Gazetted Officer or a Magistrate, if the suspect so requires, is extremely valuable. This has been given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It was held that the search before a Gazetted Officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It is, therefore, necessary that the safeguards provided in Section 50 of the NDPS Act, 1985 are observed scrupulously. The failure to conduct the search of the suspect before a Gazetted Officer or a Magistrate would render the recovery of the illicit articles suspect and vitiate the conviction and sentence.

46. In re: ***Beckodan Abdul Rahiman v. State of Kerala***[12] the Supreme Court would come to the finding that there has been a violation of the mandatory provisions of Section 42 and 50 of the NDPS Act, 1985 rendering the case as not established and therefore the Appellant's therein entitled to an acquittal.

47. In re: ***Vijaysinh Chandubha Jadeja (supra)*** the Supreme Court would hold that the object of Section 50 of the NDPS Act, 1985 is to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies. The Supreme Court would hold that the mandate of Section 50 is precise and clear viz. If the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, *"he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so."* The Supreme Court would then hold:

[12] (2002) 4 SCC 229

> ***"24.*** *Although the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of subsection (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.***"***

48. In re: ***Saiyad Mohd. Saiyad Umar Saiyad & Ors. v. State of Gujarat***[13] the Supreme Court would endorse the finding in re: ***State of Punjab v. Balbir Singh***[14] that the provisions of Section 50 of the NDPS Act, 1985 is mandatory it would hold that the language thereof obliges the

[13] (1995) 3 SCC 610
[14] (1994) 3 SCC 299

officer concerned to inform the person to be search of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate. The Supreme Court would further hold that having regard to the object for which the provisions of Section 50 had been introduced into the NDPS Act, 1985 there is no room for drawing a presumption under Section 114, illustration (e) of the Indian Evidence Act, 1872 because the possession of illicit articles under the NDPS Act, 1985 has to be satisfactorily established before the Court. The fact of seizure after a search has to be proved. When evidence of search is given all that transpired in its connection must also be stated. The Supreme Court would hold:

> *"**7.** ..... Very relevant in this behalf is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitled to demand that the search be carried out in the presence of a Gazetted Officer or a Magistrate and that the person had not chosen to so demand. If no evidence to this effect is given the court must assume that the person to be searched was not informed of the protection the law gave him and must find that the possession of illicit articles under the NDPS Act was not established.*
>
> ***8.** We are unable to share the High Court's view that in cases under the NDPS Act it is the duty of the court to raise a presumption, when the officer concerned has not deposed that he had followed the procedure mandated by Section 50, that he had in fact done so. When the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the court is duty-bound to conclude that the accused had not had the benefit of the protection that Section 50 affords; that, therefore, his possession of articles which are illicit under the NDPS Act is not established; that the precondition for his having satisfactorily accounted for such possession has not been met; and to acquit the accused.*

9. *The High Court relied upon the fact that the argument that Section 50 had not been complied with had not been made before the trial court and held that a point of fact could not be taken for the first time in appeal. The protection that Section 50 gives to those accused of being in possession of illicit articles under the NDPS Act is sacrosanct and cannot be disregarded on the technicality that the point was not taken in the court of first instance.*

10. *Finding a person to be in possession of articles which are illicit under the provisions of the NDPS Act has, as we have said, the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to punishment which can extend to 20 years' rigorous imprisonment and a fine of Rupees two lakhs or more. It is necessary, therefore, that courts dealing with offences under the NDPS Act should be very careful to see that it is established to their satisfaction that the accused has been informed by the officer concerned that he had a right to choose to be searched before a Gazetted Officer or a Magistrate. It need hardly be emphasised that the accused must be made aware of this right or protection granted by the statute and unless cogent evidence is produced to show that he was made aware of such right or protection, there would be no question of presuming that the requirements of Section 50 were complied with. Instructions in this behalf need to be issued so that investigation officers take care to comply with the statutory requirement and drug-pedlars do not go scot-free due to non-compliance thereof. Such instructions would be of great value in the effort to curb drug trafficking. At the same time, those accused of possessing drugs should,*

*however heinous their offence may appear to be, have the safeguard that the law prescribes.***"**
[emphasis supplied]

49. In re: ***State of Rajasthan v. Ram Chandra***[15] the Supreme Court would reiterate the essence of Section 50 of the NDPS Act, 1985 referring to its judgment in re: ***Raghbir Singh v. State of Haryana***[16] it would hold that the option given to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused.

50. Under Section 50 of the NDPS Act, 1985 and Section 24 of the SADA, 2006 there is no requirement for serving a notice.

51. Even before the Appellant was apprehended Mahindra Pradhan (P.W.6) had telephonically called Bharani Kumaar (P.W.1) the Sub-Divisional Magistrate who accompanied the police team and apprehend the Appellant. The notice marked (exhibit-1) was thereafter read out to the Appellant. The Appellant consented to be searched in his presence. Bharani Kumaar (P.W.1) therefore was made a part of the search team of Mahindra Pradhan (P.W.6)-the Station Housing Officer who apprehended the Appellant at the Gyalshing bazaar. The requirement under Section 50 of the NDPS Act, 1985 as well as Section 24 of the SADA, 2006 is to provide an opportunity as a right of the accused to be searched in the presence of a neutral Magistrate or a Gazetted Officer. In fact *he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so.* Bharani Kumaar (P.W.1) who accompanied Mahindra Pradhan (P.W.6) would depose nothing about granting permission authorising the Police Officer to conduct the search. Notice (exhibit-1) admittedly does not reflect the exercise of the option by the Appellant even though it records in writing that the Appellant was asked whether in exercise of his legal right he required the presence of any Magistrate or Gazetted Officer during the search. All that was obtained was the Appellant's purported signature on it. Section 50 of the NDPS Act, 1985 requires that the said option must be given to the suspect. Even before the said option

[15] (2005) 5 SCC 151
[16] (1996) 2 SCC 201

was exercised by the Appellant Bharani Kumaar (P.W.1) was brought in front of the Appellant. Dipesh Subba (P.W.3) the Constable who was part of the Police team deposed that the Sub-Divisional Magistrate, the Station House Officer and Deo Prakash Pradhan (P.W.2) searched the body of the Appellant and recovered the seized articles. The evidence of Dipesh Subba (P.W.3) is binding on the prosecution. Zangpo Sherpa (P.W.4) would depose nothing about the option being given to the Appellant. In fact he would also not depose about the signing of the said notice (exhibit-1) by the Appellant. Although the other witness to the notice (exhibit-1) Namgyal Bhutia (P.W.5) did depose that the Appellant was asked by the Police Inspector and he gave his consent he also did not identify the Appellant's signature in the notice (exhibit-1).

52. The option to be given under the NDPS Act, 1985 must be meaningful and not an empty formality.

53. Under Section 50 of the NDPS Act, 1985 and Section 24 of SADA, 2006 the Gazetted Officer or the Magistrate before whom the accused is produced must be neutral, appear to be neutral and the act of conducting the search must be meaningful and not an empty formality.

54. In the situation as described with the presence of Sub-Divisional Magistrate, Station House Officer and other Police Officers even the assertion by Mahindra Pradhan (P.W.6) of signing of a previously prepared notice (exhibit-1) by the Appellant under Section 24 (1) of SADA, 2006 may not satisfy the Court that the requirement of the provisions of Section 50 of the NDPS Act, 1985 and Section 24 of the SADA, 2006 in its essence and spirit had been complied with contrary to what has been held by the learned Special Judge. This situation is more aggravated by the fact that the Mahindra Pradhan (PW 6) who conducted the investigation partially was also the informant. It is vital to draw a distinction of a case in which search was conducted on the basis of prior information and search conducted on a chance recovery. The prosecution's case is that of prior information and not of chance recovery and therefore strict compliance of the aforesaid provision was required.

Keeping the seized articles in safe custody - Compliance of Section 55 of NDPS Act, 1985 and Section 28 of SADA, 2006.

55. Both the NDPS Act, 1985 and the SADA, 2006 mandates a strict compliance of the procedure. On the seizure of the narcotic drug or controlled substances certain precautions are absolutely necessary to ensure that no false implication is made. The learned Special Judge did not examine the compliance of the mandate of Section 55 of NDPS Act, 1985 or Section 28 of SADA, 2006.

56. Section 28 of SADA, 2006 deals with safe custody of seized articles. The said section is almost identical to Section 55 of the NDPS Act, 1985. The said provisions provide:

THE NARCOTIC DRUGS PSYCHOTROPIC SUBSTANCE ACT, 1985	**SIKKIM ANTI DRUG ACT, 2006**
Section 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.	**Section 28. 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.

57. Both under Section 28 of SADA, 2006 and Section 55 of the NDPS Act, 1985 an Officer In-charge of the Police Station *"shall"* take charge of and *"keep in safe custody"* pending the orders of the Magistrate, all articles seized under the said Acts within the local area of that Police station and which may be delivered to him. In addition under

Section 55 of the NDPS Act, 1985 the officer-in-charge of the Police Station taking charge and keeping in safe custody the articles seized 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. Both provisions are to be strictly complied with.

58. In re: ***Mohan Lal v. The State of Punjab***[17] the Supreme Court would have been occasion to examine the provision of Section 55 of the NDPS Act, 1985 and hold that a plain reading of the provision makes it manifest that it is the duty of the police officer to deposit the seized material in the police station *"malkhana"*.

59. Naresh Chettri (P.W.9) the Investigating Officer as per his deposition was posted at the Gyalshing Police Station as a sub-Inspector. He was not therefore, Officer In-charge of the Gyalshing Police Station. Mahindra Pradhan (P.W.6) as per his deposition was the Station House Officer and therefore the Officer In-charge of the Gyalshing Police Station. Mahindra Pradhan (P.W.6) who as Officer In-charge of the Police Station ought to have kept the alleged seized items in safe custody as required by both the enactments however, handed over the same to Naresh Chettri (P.W.9). The evidence that even Naresh Chettri (P.W.9) kept the seized item in safe custody is lacking. There is no evidence put forth by the prosecution as to what transpired with the seized articles after it was seized on 04.01.2017 till it was sent for forensic examination on 17.01.2017. The fact that the forensic examination report (exhibit 8) records receipt of lesser number of the alleged controlled substances makes it further doubtful as to whether the sized articles were actually kept in safe custody. If the seized articles had infact been seized, packed and sealed by Mahindra Pradhan (PW 6) and kept in safe custody then there was no reason for shortage of the seized articles. Prosecution witnesses have not deposed that the seized articles were secured at the *"malkhana"* of the Police Station. There is non-compliance of the mandate of Section 28 of SADA, 2006 as well as Section 55 of NDPS Act, 1985.

60. The submission of the prosecution that the defence had not raised the objection of the failure of the prosecution to prove the mandatory

[17] 2018 SCC OnLine SC 974

provisions of search, seizure and safe custody of the seized articles under the NDPS Act, 1985 and SADA, 2006 during trial and was thus precluded from raising them at the Appellate stage cannot be accepted. Firstly, the impugned judgment itself records that the learned Special Judge would examine whether the recovery and seizure were done in accordance with the mandatory provisions of the two enactments and goes on to examine the compliance of Section 50 of the NDPS Act, 1985 and Section 24 of SADA, 2006. Secondly when the said enactments provide for reverse burden of proof it is imperative that the prosecution establish with cogent evidence the compliance of the mandatory provisions. Further when the NDPS Act, 1985 and SADA, 2006 requires certain things to be done in a particular manner it must also be shown that it was done in the said manner. Failure to do so would lead to the conclusion that the seized articles were not kept in safe custody.

Possession of "Ganja" in contravention of the laws.

61. Section 2(iii) of NDPS Act, 1985 defines *"cannabis (hemp)"*. It provides:

> ***"2****. Definitions.—In this Act, unless the context otherwise requires,-*
>
> *(iii)* ***""cannabis (hemp)"*** *means-—*
>
> *(a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;*
>
> *(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and*
>
> *(c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;***"**

62. Section 2(xiv) of NDPS Act, 1985 defines *"narcotic drug"*. It provides:

> ***"(xiv) "narcotic drug"** means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured goods;"*

63. Section 2(xxiii) of NDPS Act, 1985 defines *"psychotropic substance"*. It provides:

> ***"(xxiii) "psychotropic substance"** means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;"*

64. The Appellant was convicted under Section 20(A) of the NDPS Act, 1985. Section 20 of the NDPS Act, 1985 provide:

> ***"20. Punishment for contravention in relation to cannabis plant and cannabis**.-Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder,-*
>
> *(a) cultivates any cannabis plant; or*
>
> *(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable,-*
>
> *(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and*
>
> *(ii) where such contravention relates to clause (b),-—*
>
> *(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine, which may extend to ten thousand rupees, or with both;*
>
> *(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous*

imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.]

65. Section 20 of the NDPS Act, 1985 deals with two operations relating to cannabis plant and cannabis. These two operations are cultivation of cannabis plant and production, manufacture, possession, sale, purchase, transportation, inter-State imports, inter-State exports and use of cannabis. Both these operations are made an offence if it is in contravention of any provisions of the NDPS Act, 1985, of any rule or order made or condition of license granted thereunder.

66. The learned Special Judge has convicted the Appellant under Section 20(A) of the NDPS Act, 1985. There is no such provision. The learned Special Judge has also not stated which provision of the NDPS Act, 1985 or rule or order made or condition of license granted thereunder was contravened by the Appellant.

67. The learned Special Judge had charged the Appellant for possession of one pouch *"ganja"* without any valid medical prescription/documents. Thus, the prosecution was required to prove that the Appellant was guilty of violation of Section 20(b)(ii) of the NDPS Act, 1985 which prescribes punishment for the *"possession"* of *"ganja"* in contravention of the provisions of clause (b) of Section 20 of the NDPS Act, 1985. The ingredient of Section 20(b)(ii) of the NDPS Act, 1985 is possessing cannabis in contravention of any provisions of the NDPS Act, 1985 or any rule or order made or conditions of license granted.

68. The substance of accusation thus framed against the Appellant under Section 20(A) of NDPS Act, 1985 lacked clarity. Firstly, it was incumbent upon the learned Special Judge to have framed a separate charge for the

offence under Section 20(b) (ii) (A) of the NDPS Act, 1985, separate from the charges under the SADA, 2006. It was also incumbent upon the learned Special Judge to have specified precisely the contravention of any provision of the NDPS Act, 1985 or any rule or any order made or condition of license granted by possessing the *"ganja"*. Charge framing is a vital aspect of criminal trial and the provisions of Sections 211 to 224 Cr.P.C. must be carefully complied with. Merely because Section 464 CrPC exist in the statute book does not warrant the trial court to frame a charge incorrectly. Clarity in framing the charge has a dual purpose. A properly framed charge would guide the trial to establish the ingredients of the offence. It would also assist the defence to understand the charge correctly and lead their evidence.

69. Section 8 of the NDPS Act, 1985 provides:

> ***"8. Prohibition of certain operations***.-— *No person shall-*
>
> *(a) cultivate any coca plant or gather any portion of coca plant; or*
>
> *(b) cultivate the opium poppy or any cannabis plant; or*
>
> *(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance,*
>
> *except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:*

> *Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:*
>
> *Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.***"**

70. Notification No. 12/89-OPIUM dated 30-5-1989 published in the Gazette of India, Extraordinary, of even date provides:

> **"***In exercise of the powers conferred by the first proviso to Section 8 of the Narcotic Drugs and Psychotropic Substance Act, 1986 (61 of 1986), the Central Government hereby specifies the 13th December 1989 as the date from which the prohibition against the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of Ganja for any purpose other than medical and scientific purpose shall take effect.***"**

71. Thus in view of the provision of Section 20(b) (ii) and Section 8 of the NDPS Act, 1985 read with Notification No. 12/89-OPIUM dated 30-05-1989 issued by the Central Government under Section 8 of the NDPS Act, 1985 the possession of *"ganja"* for any purpose other than medical and scientific purpose has been made an offence. Unlike the charge framed against the Appellant for possession of one pouch of *"ganja"* without medical prescription the charge which was required to be framed and proved by the prosecution was for possession of *"ganja"* for any purpose other than medical and scientific purpose in contravention of

Section 8 of the NDPS Act, 1985 read with Notification No.12/89-OPIUM dated 30.05.1989.

Vital to power the seized article was cannabis.

72. To secure a conviction under Section 20(b) (ii) of the NDPS Act, 1985 it is also vital for the prosecution to prove that the alleged substance seized was *"cannabis (hemp)"* i.e. *"ganja"*, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated as defined under Section 2 (iii) (b) of the NDPS Act, 1985.

73. The learned Special Judge would rely upon the evidence of Sonam Zangmoo Bhutia (P.W.8) the Junior Scientific Officer of RFSL Saramsa, Ranipool and her report (exhibit-8) to hold that the seized pouch of *"ganja"* was in fact cannabis.

In the description of exhibits received in the forensic examination report it is recorded that one sealed cloth covered box containing *"3. a paper packed containing a plastic pouch containing brown dried plant material, weighing 1.94 gms, marked as exhibit (C)-marked here as exhibit number Chem-781 (C)"* was also received. The said forensic examination report (exhibit-8) records that the articles were examined by chemical analysis using Colour Test, Spectrophotometric and Chromatographic techniques and based on this examination *"the exhibit number Chem-781(C) gave positive test for Cannabis (Ganja), which is a psychotropic substance."*

74. Section 2 (xxiii) of the NDPS Act, 1985 defines *"psychotropic substance"* to mean any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of *"psychotropic substances"* specified in the Schedule. The schedule lists various *"psychotropic substances"*. The schedule does not list cannabis as psychotropic substance. In her deposition Sonam Zangmoo Bhutia (P.W.8) reiterated that as per her examination the said item tested positive for cannabis (*ganja*) *"which is a psychotropic substance"*.

75. As per the definitions cannabis is a *"narcotic drug"* under Section 2 (xiv) of the NDPS Act, 1985.

76. Sonam Zangmoo Bhutia (P.W.8) states in her deposition that she is a Junior Scientific Officer, Chemistry Division posted at RFSL, Saramsa. She does not elucidate further on her expertise. Whilst Ms. Puja Lamichaney would submit that the evidence of Sonam Zangmoo Bhutia (P.W.8) fall short of proving that she was an expert and that her opinion was based on sound reason to inspire confidence to rely upon the same, Mr. Karma Thinlay would submit that the defence had not even raised an issue about her expertise during the trial. Ms. Puja Lamichaney would rely upon ***Ramesh Chandra Agrawal v. Regency Hospital Limited & Ors.***[18]***; Anish Rai v. State of Sikkim***[19]***; Central Bureau of Investigation v. Nar Bahadur Bhandari***[20]**.**

77. For the admissibility of the experts' evidence the expert must be within the recognised field of expertise. The evidence given by the expert must be based on reliable principles and the expert must be qualified in that discipline. Section 45 of the Indian Evidence Act, 1872 provides that when the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts. Thus, in order to bring the evidence of Sonam Zangmoo Bhutia (P.W.8) as that of an expert it is necessarily to be shown that she had made a special study of the subject and acquired special experience thereby gaining expertise and adequate knowledge of the subject. It is well settled that the expert is neither judge nor jury and thus Sonam Zangmoo Bhutia's (P.W.8) real function was to place before the Court all materials together with reasons which made her come to the conclusion. It would allow the Court, which may not have the necessary expertise, to form its own judgment by its own observation of those materials placed by her and the reasons and conclusion provided by her.

78. An expert opinion is an opinion. The opinion which reflects the expertise on the subject of the expert and provides the necessary scientific criteria for testing the accuracy of the conclusions arrived at would inspire confidence upon the Court to rely upon the same and come to its independent judgment. The scientific opinion must therefore necessarily be intelligible and convincing. The credibility of the expert's opinion would

[18] (2009) 9 SCC 709
[19] 2018 SCC OnLine Sikk 141
[20] Criminal Appeal No. 4 of 2007

depend on the reasons stated in support of her conclusions and the data and material furnished which form the basis of the conclusion. Mere assertion without material cannot be considered evidence even if it is stated by an expert. When an expert gives no real data in support of what they call their expert opinion, the evidence even though admissible, may be excluded from consideration as it would provide no assistance to the Court to form its judgment.

79. In re: ***Sultan Singh v. State of Haryana***[21] it has been held by the Supreme Court that the opinion of an expert on technical aspect has relevance but the opinion has to be based on specialised knowledge and the data on which it is based has to be found acceptable by the Court. In re: ***Madan Gopak Kakkad v. Naval Dubey***[22] the Supreme Court would hold that a medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the Medical Officer is of an advisory character given on the basis of symptoms found on examination. The expert witness is therefore, expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion. The expert is required to enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials. Once the expert opinion is accepted, it is not the opinion of the Medical Officer but that of the Court.

80. The deposition of Sonam Zangmoo Bhutia (P.W.8) is lacking in all these aspects. No evidence has been placed before the Court to satisfy that she is an expert. No data or material whatsoever is placed either in the forensic examination report (exhibit-8) or in her deposition save stating that the items were examined by chemical analysis using Colour Test, Spectrophotometric and Chromatographic techniques. The details of these tests have also not been revealed. In the circumstances the very fact that Sonam Zangmoo Bhutia (P.W.8) opines that on her examination of the brown dried plant material it tested positive for cannabis (Ganja) *"which is a psychotropic substance"* troubles this Court to consider her opinion, the sole evidence, to fasten a verdict of guilt upon the Appellant in a prosecution under the NDPS Act, 1985 and SADA, 2006. At this juncture Mr. Karma Thinlay Namgyal would rely upon the judgment of the Supreme

[21] (2014) 14 SCC 664
[22] (1992) 3 SCC 204

Court in re: ***Durand Didier v. Chief Secretary, Union Territory of Goa***[23] in which it was observed that:

> ***"12.*** *The criticism levelled by the learned defence counsel is that the evidence of PW 6 is not worthy of acceptance since she has admitted that she does not know the difference between the narcotic drugs and psychotropic substances. This attack, in our view, does not assume any significance because as rightly pointed out by Mr. Anil Dev Singh, the learned senior advocate for the respondent, the Medical Officer is not expected to know the differences in the legal parlance as defined in Section 2(xiv) and (xxii) and specified under Schedules I to III in accordance with the concerned Narcotic Drugs and Psychotropic Substances Rules, 1985 made under the Act and so this ground by itself, in our view, is no ground for ruling out the evidence of PW 6.****"***

81. However, in re: ***Durand Didier (supra)*** the Supreme Court had categorically held that the testimony of the expert was *"unimpeachable"*. The opinion rendered by Sonam Zangmoo Bhutia (P.W.8) is a mere statement and not an opinion. It is definitely not unimpeachable and therefore the facts before the Supreme Court in re: ***Durand Dodier (Supra)*** is distinguishable from the facts of the present prosecution.

82. It was the duty of the prosecution to establish that the seized item was *"ganja"* and therefore a *"narcotic drug"*. The burden was upon the prosecution. The failure of the defence to demolish the evidence if the prosecution had at the first instance established Sonam Zangmoo Bhutia's (P.W.8) expertise and her reasoned opinion may have led the Court to rely upon the forensic examination report (Exhibit 8). However, when the prosecution fails to establish the essential requirements of an expert opinion the Court would have little choice but to discard the same. This Court is afraid that the finding of the learned Special Judge that the testimony of Sonam Zangmoo Bhutia (P.W.8) could not be demolished under cross-

[23] (1990) 1 SCC 95

examination and that her testimony clearly establishes the facts stated therein does not reflect the correct analysis of the relevant facts and of the laws. An opinion is but an opinion and the Court may or may not accept it. If however, the opinion is a reasoned opinion the Court would be persuaded to rely upon the opinion. Merely because the defence failed to demolish the cryptic statements without adequate reasons made by Sonam Zangmoo Bhutia (P.W.8) it would not be enough to accept the forensic examination report (exhibit 8).

Ascertaining the quantity is vital to a prosecution under Section 20 of NDPS Act, 1985.

83. Section 20(b)(ii) of the NDPS Act, 1985 prescribes different degrees of punishment depending upon the quantity of cannabis.

84. Under Section 20 (b) (ii) (A) of the NDPS Act, 1985 where such contravention relates to sub-clause (b) and involves *"small quantity"* the punishment prescribed is rigorous imprisonment for a term which may extend to six months, or with fine, which may extend to Rs.10,000/- or with both.

85. Under Section 20 (b) (ii) (B) of the NDPS Act, 1985 where such contravention relates to sub-clause (b) and involves *"quantity lesser than commercial quantity but greater than small quantity"* the punishment prescribed is rigorous imprisonment for a term which may extend to 10 years, and with fine, which may extend to Rs.1,00,000/-.

86. Under Section 20 (b) (ii) (C) of the NDPS Act, 1985 where such contravention relates to sub-clause (b) and involves *"commercial quantity"* the punishment prescribed is rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and shall also be liable to fine which shall not be less than Rs.1,00,000/- and which may extend to Rs.2,00,000/- provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding Rs.2,00,000/-.

87. Reading Section 20 (b) (ii) (A), (B) and (C) of the NDPS Act, 1985 there is no room to doubt that to secure a conviction under Section 20 of the NDPS Act, 1985 the prosecution must determine and establish the quantity of cannabis in possession of the accused.

88. Under Section 2 (xxiiia) of the NDPS Act, 1985 *"small quantity"* in relation to narcotic drugs means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette.

89. The learned Special Judge would hold that the prosecution case all along was that one pouch of *"ganja"* was recovered from the Appellant however, nowhere was the amount/weight of the said *"ganja"* indicated both in documentary as well as in oral testimony. The learned Special Judge would also hold that it is also not in the evidence that the said pouch of *"ganja"* was ever weighed at any point of time after the seizure, to ascertain whether it fell within either of the quantities specified in the table of the NDPS Act, 1985. The learned Special Judge would however, rely upon the deposition of Sonam Zangmoo Bhutia (P.W.8) whereby she would state that she had examined *"a paper packet containing a plastic pouch with brown dried material, weighing 1.94 gms."* On such evidence the learned Special Judge would come to the conclusion that the weight of the *"ganja"* seized was in fact 1.94 gms and sentence the Appellant accordingly.

90. Under Section 20 of the NDPS Act, 1985 quantity of cannabis alleged to be in possession of the Appellant would determine the quantum of punishment. The Supreme Court in re: ***Mohinder Singh v. The State of Punjab***[24] would hold that for proving the offence under the NDPS Act, it is necessary for the prosecution to establish the quantity of the contraband goods allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the *"malkhana"* or the document showing destruction of the contraband.

91. The quantity of cannabis is a vital ingredient of the offence punishable under Section 20 of the NDPS Act, 1985 which is required to be proved by the prosecution. On the determination thereof the quantum of punishment is required to be decided. It is clear that the prosecution has not even bothered to prove the quantity of *"ganja"* allegedly seized on 04.01.2017. The evidence of Sonam Zangmoo Bhutia (P.W.8) which merely describes the articles received for forensic examination cannot convince this Court about the weight of the *"ganja"* allegedly seized on 04.01.2017 which was not kept in safe custody by the Officer-In-charge of the Police

[24] 2018 SCC OnLine SC 973

Station as required under the law and sent for forensic examination only on 17.01.2017 after 13 days along with the alleged controlled substances the quantity of which also would not tally with the alleged seizure.

Possession of controlled substances.

92. Possession of controlled substances is an offence under Rule 17 of the Sikkim Anti Drugs Rules, 2006 which provides:-

> *"17. (1) No person shall possess any controlled substance, unless he is lawfully authorised to possess such substance for any of the said provisions in the rules.*
>
> *(2) Notwithstanding anything contained in sub-rule*
>
> *(1), any person who is not so authorised under clause (c) of rule 2 of the Rules, may possess a quantity of such controlled substance that is commensurate with his personal need, and shall carry with him the valid prescription of a registered medical practitioner, or hospital, or an institution authorised to prescribe the same, and the quantity of the controlled substance in his possession shall not exceed the quantity so prescribed:*
>
> *Provided that a person, who is carrying the controlled substance for another person, shall carry with him a valid prescription for such person, and the quantity so possessed shall not exceed the quantity so prescribed.*
>
> *(3). The provision of sub-rule (1) shall not apply to –*
>
> *(i) common carriers or warehouseman while engaged in lawfully transporting or storing such substances or to any employee of the same acting within the scope of his employment.*

> *(ii) public officers or the employees in the lawful performance of their official duties requiring possession of controlled substances; or*
>
> *(iii) temporary incidental possession or by persons whose possession is for lawfully entitled to possession or by persons whose possession is for the purpose of aiding public officers in performing their official duties."*

93. The possession of controlled substances in contravention of Rule 17 of the Sikkim Anti Drugs Rules, 2006 is punishable under Section 14 of SADA, 2006. It provides:

> ***"Section 14. Punishment for offence for which no punishment is provided**.— Whoever contravenes any provisions of this Act or any rule or order made thereunder for which no punishment is separately provided in this chapter, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to twenty thousand rupees, or with both."*

94. The learned Special Judge would also convict the Appellant for possession of controlled substances.

95. To establish a charge of possession of controlled substance two ingredients are essential. It must be established that the Appellant was in possession of the controlled substances. It must also be established that the articles seized were controlled substances. In that event unless he is lawfully authorised to possess such controlled substances for any of the said provisions in the rules the possession would attract the punishment prescribed by Section 14 of SADA, 2006. Failure to establish either of the two ingredients by the prosecution would result in the charge not being proved.

96. The learned Special Judge has framed the charge for possession of controlled substances without specifying violation of Rule 17 of Sikkim Anti Drug Rules 2007. She did not also examine the said provision.

97. The only evidence available on the record that the seized articles were controlled substances is the evidence of Sonam Zangmoo Bhutia (P.W.8) and forensic examination report (exhibit-8). The said evidence has been examined in detail while considering the conviction of the Appellant for possession of *"ganja"*. In view of the said findings on her expertise and the cryptic statement in the forensic examination report (exhibit-8) this Court is unable to accept the conclusion of the learned Special Court that the prosecution has been able to prove that the seized items were controlled substances. The seizure is of 59 loose capsules of *"Spasmoproxyvion"* and 29 tablets of *"N-10"*. Sonam Zangmoo Bhutia (P.W.8) and the forensic examination report (exhibit-8) records receipt of 57 capsules marked *"SPM-PRX+" "WOCKHARDT"* and 28 tablets without any details. The forensic examination report (exhibit 8) merely states that the said capsules tested positive for Tramadol Hydrochloride and the tablets tested positive for Nitrozapen which accordingly to Sonam Zamgmoo Bhutia (PW 8) are controlled substances. No scientific data has been provided by Sonam Zangmoo Bhutia (P.W.8) in support of her findings. The evidence led by the prosecution falls short of establishing beyond all reasonable doubt that what was seized from the Appellant were actually the same which were sent for forensic examination. The evidence led by the prosecution does not rule out the possibility of tampering with the seized articles. No evidence has been led by the prosecution of the safe custody of the seized articles.

98. In exercise of the powers conferred by clause (iii) of Section 2 of SADA, 2006 the State Government vide Notification No.16/HC-HS & FW dated 06.06.2007 declared certain substances to be controlled substances namely:

> "(2). medicines containing the following Psychotropic Substances namely:
>
> *(kk) 1,3-Dihydro-7-nitro-5-phenyl-2H-1-4-benzodiazepine-2-one (commonly known as "Nitrazepam"); its salts, its esters and salts of its esters and preparations, admixtures, extracts or other substances containing any of these drugs, in any dosage form or quantity or combination."*

99. The said Notification dated 06.06.2007 was amended vide

Notification No. 16/HC. HS & FW dated 01.06.2015 and inserted the following:

> "(1) medicines containing the following namely;
>
> *(w) 2-{(dimethylamino) methyl}-1-(3-methoxyphenyl) cyclohexanol (commonly known as TRAMADOL"); its salts, its esters and salts of esters and preparations, admixtures, extracts or other substances containing any of these drugs in any dosage form or quantity or combination***".**

100. The prosecution was required to therefore prove that the alleged seized Spasmo proxyvon capsules were medicines which contained the chemical specified in clause (1) and item (w) of the Notification dated 06.06.2007 as amended by Notification dated 01.06.2015 which is commonly known as TRAMADOL its salts, its esters and salts of esters and preparations, admixtures, extracts or other substances containing any of these drugs in any dosage form or quantity or combination.

101. Similarly, the prosecution was also required to prove that the N-10 or Nitrosun 10 tablets seized were medicines containing the Psychotrophic substances as specified in clause (2) (kk) of the Notification dated 06.06.2007 which is commonly known as *"Nitrazepam";* its salts, its esters and salts of its esters and preparations, admixtures, extracts or other substances containing any of these drugs, in any dosage form or quantity or combination.

102. The testimony of Sonam Zangmoo Bhutia (P.W.8) however, merely states that the Spasmo Proxyvon capsules tested positive for Tramadol Hydrochloride and the tablets tested positive for Nitrazepam and both are controlled substances.

103. The evidence led by the prosecution does not establish beyond reasonable doubt that the seized articles were controlled substances. Therefore, the charge of possession of controlled substances stands not proved by the prosecution.

Consumption of controlled substance.

104. The learned Special Judge would also convict the Appellant for consumption of controlled substances under Section 9(b) of SADA, 2006. Consumption of controlled substance is an offence under Rule 18 of the Sikkim Anti Drugs Rules 2007 which provides:

> *"18. (1) No person shall use or consume any controlled substance unless he is lawfully authorised to do so for any of the said purposes in the rules.*
>
> *(2) Notwithstanding anything contained in sub-rule (1), a controlled substance may be used for-*
>
> *(i) therapeutic requirement by a person who has been prescribed the medicine by a registered medical practitioner, a hospital or an institution for the possible cure of ailment, or amelioration of symptoms.*
>
> *(ii) Scientific requirement including analytical requirements of any Government laboratory or research institution; or*
>
> *(iii) the purpose of de-addition of drug addicts by the Government or by an approved charity or by such other institution as may be approved by the government."*

105. Consumption of controlled substances is prohibited unless it is lawful. The Learned Special Judge has framed no charge for consumption of controlled substances. She has also not examined the provisions of Rule 18 of the Sikkim Anti Drug Rules 2007. Violation of Rule 18 of the Sikkim Anti Drug Rules 2007 is punishable under Section 9(b) of SADA, 2006.

106. The learned Special Judge has reproduced, examined, convicted and sentenced the Appellant under Section 9 (b) of SADA, 2006 as it existed prior to the amendment made by the Sikkim Anti Drug (Amendment) Act, 2011 which was enforced on 18.11.2011. The alleged offence having been committed on 04.01.2017 the amended Section 9 (b) of SADA, 2006 was applicable. The amended Section 9 (b) of SADA, 2006 reads as under:

> ***"9.*** *Whoever, contravenes any provisions of this Act or any rule or any order made there under shall be punishable-*
>
> *[(a) .....*
>
> *(b) where the contravention involves use or consumption of the controlled substances, without valid medical prescription by any means/route of intake, in any chemical form, such person shall undergo with compulsory detoxification, and to be followed by rehabilitation and also will remain under observation/probation, and such person shall also be liable to pay a fine which may extend to (fifty thousand)25 rupees (*).*
>
> *(c) .....*
>
> *(d) .....*
>
> *(e) .....*
>
> *(f) .....*

107. Section 9 provides for punishment for contravention of the provisions of SADA, 2006 or any rule or any order made thereunder. Section 9(b) of SADA, 2006 relates to the contravention involving use or consumption of controlled substances without valid medical prescription by any means/route of intake in any chemical form.

108. The learned Special Judge relied upon the deposition of Dr. Suman Gurung (P.W.7). He deposed that the Appellant confessed to having consumed three Spasmo Proxyvon capsules at 9.30 a.m. on the same day. The learned Special Judge also examined the deposition of Sonam Zangmoo Bhutia (P.W.8) who deposed that Tramadol which is a *"controlled substance"* was found in the urine sample of the Appellant collected by

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25 **The words "ten thousand rupees" was substituted with the words "fifty thousand rupees" and the words "if the users is young, unmarried or unemployed" was (*) omitted vide Section 2(2) of the Sikkim Anti Drugs (Amendment) Act, 2011.**

Dr. Suman Gurung (P.W.7). The learned Special Judge thus convicted the Appellant for consumption of controlled substances under Section 14 of SADA, 2006.

109. On 04.01.2017 Dr. Suman Gurung (P.W.7) examined the Appellant, took his urine sample and handed over the same to the police as requested. The confession made by the Appellant to Dr. Suman Gurung (P.W.7) of having consumed three Spasmo Proxyvon capsules cannot be relied upon by the prosecution as the same is hit by the provision of Section 25 and 26 of the Indian Evidence Act, 1872. At the time of forwarding the Appellant for medical examination he was already in police custody. From the evidence of Dr. Suman Gurung (P.W.7) it is clear that the urine sample was taken from the Appellant on 04.01.2017 itself. The handing/taking memo (exhibit-6) reflects that a bottle of urine which was handed over by Dr. Suman Gurung (P.W.7) was taken over from Mahindra Pradhan (P.W.6) by Naresh Chettri (P.W.9) on 04.01.2017. Mahindra Pradhan (P.W.6) and Naresh Chettri (P.W.9) both deposed that the Appellant was taken to the District Hospital and medically examined and the urine sample was preserved by the Medical Officer in order to send for forensic analysis. The handing/taking memo (exhibit-6) clearly establishes that the urine sample was in the custody of Mahindra Pradhan (P.W.6) and thereafter Naresh Chettri (P.W.9) on 04.01.2017 itself and not preserved by the Medical Officer Dr. Suman Gurung (P.W.7) as stated by them. In fact Dr. Suman Gurung's (P.W.7) report (exhibit-7) dated 04.01.2017 clearly records the handing over of the urine sample to the police on the said date. The evidence of Mahindra Pradhan (PW 6) and Naresh Chhetri (PW 9) which states that the urine sample was preserved by the Medical Officer is falsified by the evidence of Dr. Suman Gurung (P.W.7) and his report (exhibit-7). The said sample was forwarded for forensic examination only on 17.01.2017 after 13 days of collection. Neither Mahindra Pradhan (P.W.6) nor Naresh Chettri (P.W.9) would depose under what conditions the urine sample was kept in their custody for the period of 13 days. Sonam Zangmoo Bhutia (P.W.8) deposed about receipt of one sealed cloth covered box on 17.01.2017 for forensic examination which included a paper packet containing a glass vial with approximately 11ml of urine. She deposed that the said exhibits were *"examined by chemical analysis using colour test, spectrophotometric and chromatographic techniques"* and based on the said examinations the urine sample tested positive to Tramadol which is a controlled substances.

110. In *"A textbook of Medical Jurisprudence and Toxicology"*- 25th Edition published by LexisNexis under the chapter *"examination of biological stains and hair"* by Jaising P Modi it is stated:

> **"Biological samples of toxicological analysis in medicolegal autopsy cases**.-
>
> *Urine: Urine specimen is of great value even in small amount expecially in screening of unknown drug or poison, particularly substance of abuse since the concentrations are generally higher than in blood and a number of metaboliltes may also be present. Urine specimen is also valuable in the quantitative analysis of alcohol where there is uncertainty over their validity of a blood specimen. Before conducting the autopsy, urine can be collected by catheter or suprapubic puncture with 5-10 ml syringe and needle (22 gauge 3 inch). It has to be preserved in sodium fluoride (10 mg/ml) in a 30 ml glass container with a screw cap.***"**

111. The evidence led by the prosecution does not reflect that the urine sample was preserved in the manner required. It does question the dexterity of the investigating agency to preserve the urine sample which is vital evidence in the required controlled conditions and send it for forensic examination without any delay.

112. The cryptic opinion given by Sonam Zangmoo Bhutia (P.W.8) does not help this Court to arrive at a firm conclusion that the opinion regarding the urine sample testing positive to Tramadol even after the period of 13 days is acceptable. The fact that the prosecution has failed to establish that the seized articles as well as the urine sample were kept in safe and controlled conditions further aggravates the situation making it impossible to fasten the guilt upon the Appellant.

113. In re: ***Mohan Lal (supra)*** the Supreme Court would also hold:

> ***"13.*** *Unlike the general principle of criminal jurisprudence that an accused is presumed*

innocent unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the F.I.R. recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities.

14. *A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary powers in the police which may well lead to false implication also. Investigation in*

*such a case would then become an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.***"**

114. SADA, 2006 also carried a reverse burden of proof under Section 16 thereof. This cannot however be understood to mean that the moment an allegation is made and the FIR recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption under Section 16 of SADA, 2006 is rebuttable. Only if proof *"beyond reasonable doubt"* after investigation as provided in Section 16 of SADA, 2006 is established *prima facie* by the prosecution would shift the burden to the accused.

115. In the circumstance the conviction of the Appellant for consumption of controlled substances without even framing a charge by the learned Special Judge is required to be set aside.

116. In view of the pronouncement of the Supreme Court in re: ***Mohan Lal (supra)*** as quoted above there is also no room but to hold that the investigation in the present case conducted by Mahindra Pradhan (P.W.6), although partially, cannot be held to be free from unfairness and bias. The Appellant is entitled to the benefit of a doubt due to the failure of compliance of Section 50 and 55 of the NDPS Act, 1985 as well as Section 24 and 28 of the SADA, 2006 by the prosecution as well. The fairness of the investigation done by the investigating agency being doubtful the non compliance of the provision of Section 57 of the NDPS Act, 1985 of SADA, 2006 by Mahendra Pradhan (P.W.6) who conducted the search would further strengthen the doubt. Unfairness of investigation would directly prejudice the accused.

117. This Court is unable to agree with the conclusions arrived at by the learned Special Judge convicting the Appellant for possession of *"ganja"*, controlled substances and for consumption of *"controlled substances"*. When the entire prosecution against the Appellant is dependent upon the prosecution establishing the seized items to be a narcotic drug under the NDPS Act, 1985 and controlled substances under the SADA, 2006 which in turn is dependent upon an expert opinion the said opinion must inspire confidence. The Appellant is entitled to the benefit of doubt due to the

failure of the prosecution to establish this case in the manner required while dealing with cases under the NDPS Act, 1985 and SADA, 2006.

118. A person who has been found to have consumed controlled substance may not be an addict. However, a person who consumes controlled substance is liable under Rule 18 of the Sikkim Anti Drug Rules, 2006 and punishable under Section 9(b) of SADA, 2006. The provision of Section 9(b) of SADA, 2006 makes it clear that the legislature intended to deal with consumption of controlled substances differently. It must be noted that for an offence of consumption of controlled substances as it existed prior to the Sikkim Anti Drug (Amendment) Act, 2017 notified vide Notification No.21/LD/17 dated 19.09.2017 and published in the Sikkim Government Gazette on 19.09.2017 on which date the said amendments to the SADA, 2006 came into force no sentence of a jail term was prescribed.

119. Section 9 (b) of SADA, 2006 deals with consumption of controlled substance more as a disease and less as a crime. It provides for compulsory detoxification, rehabilitation and also to remain under observation/probation. A sentence a fine of Rs. 50,000/- was prescribed. This is more as deterrence. The object of the provision clearly is to ensure that a person who consumes controlled substance is compulsorily detoxified, rehabilitated and kept under observation to ensure that he does not get back into the habit. The role of the investigating agency in such circumstances is vital. Fair and focused investigation would result in critical evaluation of the person who is alleged to have consumed controlled substance as to whether he is a onetime consumer or an occasional consumer, addict or a peddler trafficking drugs, psychotropic substance or controlled substance. An addict has been defined under Section 2 (ii) of SADA, 2006 to mean a person who has dependence in any drug having abuse potential and consumes the said drug. The certainty of purpose of the investigating agencies will only ensure that the object for which the provision has been made would be achieved.

120. This Court is of the view that in order to meet the challenges faced by Society the investigation of the offences both under the NDPS Act, 1985 as well as under SADA, 2006 should be focused and the conclusion of the investigation must be arrived at with clinching evidence for the Court to arrive at a decision as how best to deal with the offender. The prosecution and the trial that follows must be done keeping paramount the intention of

the legislative in enacting the NDPS Act, 1985 and SADA, 2006. When in spite of the investigation it is difficult to come to the conclusion as to whether the offender was a peddler of narcotic drug and controlled substances who is needed to be punished severely or an *"addict"* or a consumer who needs immediate detoxification and rehabilitation the object and purpose of the enactment cannot be achieved.

121. Only because it is a menace it does not permit the enforcement agencies, the prosecution as well as the judiciary to overlook the stringent requirements of the procedural laws both under NDPS Act, 1985 and SADA, 2006. Securing a conviction by leading cogent evidence proved in the manner provided would help the judiciary to impose the correct sentence focussed on the problem. Accurate identification whether the suspect is a onetime or an occasional consumer, addict or a peddler trafficking drugs, psychotropic substances or controlled substances with certainty is crucial to the resolution of the problem. Otherwise even securing a conviction may not serve the purpose of SADA, 2006. The State is bound to ensure that the addicts and consumers are detoxified, rehabilitated, kept under observation and reintegrated into the society they belong. When SADA, 2006 provides for compulsory detoxification, rehabilitation and observation without adequate and proper detoxification, rehabilitation and observation centres for consumers and addicts the State enforcement agencies would not be in a position to enforce the mandate of the law. This would amount to failure of the State to implement the SADA, 2006. The Peddlers and the traffickers on the other hand must be dealt with swiftly and sternly. Their proper identification, focused prosecution and if found guilty imposition of the correct and adequate sentence would help meet the need of the society grappling with the menace today.

122. The impugned judgment dated 02.11.2017 as well as the order on sentence dated 07.11.2017 passed by the learned Special Judge (SADA), West Sikkim at Gyalshing in Sessions Trial (SADA) Case No. 01 of 2017 are set aside. If the Appellant has paid the fine imposed the same shall be returned. The Appeal is allowed.

123. A copy of the judgment be sent forthwith to the Court of the learned Special Judge (SADA), West Sikkim at Gyalshing.

SLR (2018) SIKKIM 1554
(Before Hon'ble the Acting Chief Justice)

I.A. No. 11 of 2018
IN
W.P (C) No. 49 of 2017

Sri Guru Singh Sabha and Another ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For Petitioner No.1: Dr. Navin Barik, Mr. Sandip Majumdar, Mr. Ritesh Khatri and Mr. Deepu Prasad, Advocates.

Petitioner No. 2 in person.

For Respondent 1-3: Mr. Karma Thinlay, Senior Government Advocate with Mr. Thinlay Dorjee Bhutia, Government Advocate.

For Respondent No. 4: Mr. Jorgay Namka, Ms. Panila Theengh, Ms. Tashi Doma Sherpa and Mr. Karma Sonam Lhendup, Advocates.

Date of Order: 1st November 2018

A. Code of Civil Procedure, 1908 – Order 1 Rule 10 (2) – Merely because the applicant is impleaded and heard in the present proceedings would not, as apprehended by the petitioner, give the applicant a fresh cause of action if the action which may be taken by the applicant is barred by limitation. It is true that the petitioner is the *dominus litis* and may choose the parties against whom it wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. However, the Court may at any stage of the proceedings order the name of any party who ought to have been joined, whose presence before the Court

may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the writ petition, be added. This is the essence of Order 1 Rule 10 (2) of the Code of Civil Procedure, 1908 which is also reflected in Rule 101 of the Sikkim High Court (Practice & Procedure) Rules, 2011.

(Para 16)

Application allowed.

Chronological list of cases cited:

1. Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and Others, (1992) 2 SCC 524.
2. Kasturi v. Iyyamperumal and Others, (2005) 6 SCC 733.
3. Mumbai International Airport Private Limited v. Regency Convention Centre & Hotels Private Ltd. and Others, (2010) 7 SCC 417.
4. Baluram v. P. Chellathangam and Others, AIR 2015 SC 1264.
5. Pankajbhai Rameshbhai Zalavadiya v. Jethabhai Kalabhai Zalavadiya and Others, (2017) 9 SCC 700.

ORDER

Bhaskar Raj Pradhan, J

1. Sri Guru Singh Sabha, a Society, registered under the West Bengal Societies Registration Act, 1961 having its office in West Bengal has filed the Writ Petition against the State of Sikkim through the Secretary, Ecclesiastical Department, the District Collector and the Sub-Divisional Magistrate, North Sikkim and the Lachen Dzumsa.

2. The Petitioner contends that in the mid eighties Sikhs in the Indian Army and Members of other professionals collected funds and built a Gurudwara at Gurudongmar Lake and placed the Nishan Sahib there. Since then the Gurudwara has been open for public to offer regular prayers and the Government of Sikkim has always issued permission to pilgrims wanting to visit. It is alleged that on 16.08.2017 the *"Dzumsa"* with the help and assistance of the local administration and more particularly the Sub-Divisional

Magistrate removed the holy Guru Granth Sahib Ji, uprooted the Nishan Sahib, dismantled all internal furniture's and removed the holy items from the Gurudwara premises and placed it on the road. Being aggrieved by the said act and the failure of the State in taking any steps against the conduct of the Sub-Divisional Magistrate and the *"Dzumsa"* the present Writ Petition under Article 226 of the Constitution has been preferred. The Writ Petition seeks the restoration of the Guru Granth Sahib Ji, the Nishan Sahib and a direction to fix all internal furniture and other holy items in the Gurudwara as it was prior to 16.08.2017. The Petitioner seeks a further direction upon the State-Respondents particularly the State of Sikkim through the Ecclesiastical Department and the District Collector to refrain from dismantling the Gurudwara. The Writ Petition also seeks a direction upon the Respondents to certify and transmit all records pertaining to the instant case. A writ of prohibition is also prayed for prohibiting the State of Sikkim through the Ecclesiastical Department, the District Collector and the Sub-Divisional Magistrate their servants, agents and/or assigns from taking any steps to dismantle the Gurudwara.

3. An additional affidavit has also been filed by the Petitioner. In the said affidavit it is stated that the State-Respondent has plans to build a *"Gumpa"* at the site as has been reported in local newspapers and thus the Petitioner apprehends that the Gurudwara would be demolished.

4. The impleaded Respondents have filed their counteraffidavits. The District Collector has denied the involvement of the District administration in the alleged removal. The State of Sikkim through the Ecclesiastical Department has provided the background of the dispute regarding the construction of the Gurudwara near the Gurudongmar Lake on reserved forest land. The *"Dzumsa"* opposes the building of the Gurudwara by the Army.

5. On 24.03.2018 an application for impleadment of PCCF-Secretary, Forest, Environment and Wildlife Management Department of the Government of Sikkim has been filed. In the said application reference is made to a report by the Wildlife Circle of the Forest, Environment and Wildlife Management Department of a survey conducted at Chho Lhamu, Gurudongmar Tso, Gyamtsona and other areas of the plateau during 2nd to 6th December 1997 pointing out about a newly constructed Gurudwara. The application for impleadment also refers to exchanges between the

Department and the army regarding the construction of the Gurudwara in the reserved forest. It is the case of the Applicant that the army activities within the Gurudongmar Lake and its surrounding areas violate the forest (Conservation Act, 1980) and prior permission has not been obtained under Section 2 of the said Act. It is pointed out that in the counter-affidavit filed by the State-Respondent a preliminary objection of non-joinder of the Applicant as a necessary party had been taken. A topo-sheet map showing the location of the Gurudongmar Lake in the reserved forest area is also filed therewith. The Applicant pleads that the Applicant is a necessary party, the application is bonafide and the impleadment of the Applicant would not change the nature and character of the Writ Petition and no prejudice would be caused to the Petitioner as well as the private Respondent.

6. The Petitioner has filed a reply dated 18.04.2018 to the said application. In the said reply the Petitioner pleads that the Writ Petition has been filed for a limited purpose of complaining about the gross violation of Article 25 of the Constitution of India by the State-Respondents regarding the illegal acts committed on 16.08.2017. The said reply also states that the Gurudwara at the Gurudongmar Lake has been present for more than 20 years and it was well within the knowledge of the State-Respondents.

7. Heard the Applicant, the Petitioner as well as the Respondents. Mr. Karma Thinlay Namgyal, learned Senior Government Advocate for the Applicant drew the attention of this Court to the very first prayer to the Writ Petition seeking a direction upon the State-Respondents from refraining or from doing any act and conduct to dismantle the structure of the Gurudwara at Gurudongmar Lake and submit that since admittedly the Gurudwara is constructed on reserved forest land the Applicant was both a necessary and a proper party. Dr. Navin Barik the learned Counsel for the Petitioner on the other hand would contest the application and submit that the present Writ Petition is limited to the controversy over the incident of 16.08.2017 and the Applicant was seeking to place unnecessary facts before this Court in order to expand its scope and derail the purpose of the Writ Petition. He would also submit that the Applicant was in fact trying to get over the period of limitation on their inaction to dismantle the Gurudwara which has been inexistence for more than 20 years. The Petitioner would submit that in the circumstances the Applicant was neither a necessary party nor a proper party. The Petitioner would also rely upon various judgment of the Supreme Court for the said purpose which shall be examined now.

8. In re: ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay & Ors.***[1] the Supreme Court would hold:

> ***"6.*** *Sub-rule (2) of Rule 10 gives a wide discretion to the Court to meet every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. The question of impleadment of a party has to be decided on the touchstone of Order 1 Rule 10 which provides that only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case.***"**
>
> *xxxxxxxxxxxx*
>
> ***"8.*** *The case really turns on the true construction of the rule in particular the meaning of the words "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit". The Court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the rule direct the addition of a person whose presence is not necessary for that purpose. If the inter-vener has a cause of action against the plaintiff relating to the subject matter of the existing action, the Court has power to join the intervener so as to give effect to the primary object of the order which is to avoid multiplicity of actions.***"**

[1] (1992) 2 SCC 524

9. In re: ***Kasturi v. Iyyamperumal & Ors.***[2] the Supreme Court would hold:

> ***"16.*** *That apart, from a plain reading of the expression used in subrule (2) Order 1 Rule 10 CPC "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiffappellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff-appellant on one hand and Respondents 2 and 3 and Respondents 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of Respondents 1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion made hereinearlier, Respondents 1 and 4 to 11 would not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale.****"***

10. In re: ***Mumbai International Airport Private Limited v. Regency Convention Centre & Hotels Private Limited & Ors.***[3] the Supreme Court would hold:

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[2] (2005) 6 SCC 733
[3] (2010) 7 SCC 417

"13. *The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of the Code of Civil Procedure ("the Code", for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:*

"10. (2) Court may strike out or add parties.—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

14. *The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate*

upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

***15**. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."*

11. In re: ***Baluram v. P. Chellathangam & Ors.***[4] the Supreme Court would rely upon its judgment in re: ***Mumbai International Airport (Supra)*** and hold that the Appellant therein could not be held to be a stranger being beneficiary of the trust property and thus the Trial Court was justified in impleading him as a party.

12. In re: ***Pankajbhai Rameshbhai Zalavadiya v. Jethabhai Kalabhai Zalavadiya & Ors.***[5] ***the Supreme Court*** would hold:

"10. Order 1 Rule 10 of the Code enables the court to add any person as a party at any

[4] AIR 2015 SC 1264
[5] (2017) 9 SCC 700

*stage of the proceedings, if the person whose presence in court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision. Order 1 Rule 10 of the Code empowers the court to substitute a party in the suit who is a wrong person with a right person. If the court is satisfied that the suit has been instituted through a bona fide mistake, and also that it is necessary for the determination of the real matter in controversy to substitute a party in the suit, it may direct it to be done. When the court finds that in the absence of the persons sought to be impleaded as a party to the suit, the controversy raised in the suit cannot be effectively and completely settled, the court would do justice by impleading such persons. Order 1 Rule 10(2) of the Code gives wide discretion to the court to deal with such a situation which may result in prejudicing the interests of the affected party if not impleaded in the suit, and where the impleadment of the said party is necessary and vital for the decision of the suit.***"***

13. Rule 101 of the Sikkim High Court (Practice & Procedure) Rules, 2011 (the P.P. Rules) provides:

> ***"101. Joinder of respondents-*** *Every person who is likely to be affected in any manner by the result of a petition shall be joined as a respondent thereto. Any petition in which a necessary party is not imp leaded shall be liable to be dismissed.***"**

14. Rule 101 of the P.P. Rules provides that every person likely to be affected in any manner by the result of the petition shall be joined as a Respondent thereto and any petition in which a necessary party is not impleaded is liable to be dismissed.

15. It is not in dispute that the Gurudwara has been built by the army near the Gurudongmar Lake. As per the State-Respondents as well as the Applicant the Gurudwara has been built by the army on reserved forest land. The Applicant seeks a prayer of prohibition upon the State of Sikkim through the Ecclesiastical Department, the District Collector and the Sub-Divisional Magistrate of the North District not to dismantle the Gurudwara. Any activity if in a reserved forest area would necessarily need the permission and involvement of the Applicant. To be able to issue an effective writ of prohibition commanding the State-Respondents to refrain from dismantling the Gurudwara it is necessary to hear the Applicant since it is stated that the army had constructed the Gurudwara on reserved forest land. There is a dispute between the contesting parties regarding the length of time the Gurudwara has been in existence at the Gurudongmar Lake. It would be essential to get the version of the Applicant on whose land, as pleaded, the Gurudwara has been constructed by the army. It is also necessary to implead the Applicant to enable this Court to effectively and completely adjudicate upon and settle all the questions involved in the present Writ Petition. Writ of prohibition upon the State through the Ecclesiastical Department, District Collector and the Sub-Divisional Magistrate only may not suffice to give complete relief to the Petitioner, if found to be desirable, without a writ against the Applicant on whose land the Gurudwara is said to have been constructed by the army as well.

16. This is a Writ Petition filed by the Petitioner. Merely because the Applicant is impleaded and heard in the present proceedings would not, as apprehended by the Petitioner, give the Applicant a fresh cause of action if the action which may be taken by the Applicant is barred by limitation. It is true that the Petitioner is the *dominus litis* and may choose the parties against whom it wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. However, the Court may at any stage of the proceedings order the name of any party who ought to have been joined, whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the writ petition, be added. This is the essence of Order 1 Rule 10(2) of the Code of Civil Procedure, 1908 which is also reflected in Rule 101 of the P.P. Rules, 2011.

17. In the circumstances, the Application for impleadment of the PCCF-Secretary, Forest Environment & Wildlife Management Department, Government of Sikkim as a respondent is allowed. Consequently the array of the Respondents may be amended accordingly and the Applicant is permitted to file a counteraffidavit if so desired.

SLR (2018) SIKKIM 1565

(Before Hon'ble the Chief Justice)

RSA No. 02 of 2018

Old Rumtek Monastery and Others ….. APPELLANTS

Versus

Lama Karma Dorjee and Others ….. RESPONDENTS

For the Appellants: Mr. B. Sharma, Senior Advocate with Mr. B.N. Sharma, Advocate.

For Respondent 1 and 4: Mr. Jorgay Namka, Mr. Karma Sonam Lhendup, Ms. Panila Theengh and Ms. Tashi Doma Sherpa, Advocates.

For Respondent 2 and 3: Ms. Kunzang Choden Lepcha, Advocate.

For Respondent No. 5: Mr. Thinlay Dorjee Bhutia, Government Advocate.

For Respondent No. 6: None.

Date of Order: 7th December 2018

A. Sikkim High Court (Practice and Procedure) Rules 2011 – Rule 13 – Calculation of the Period of Limitation – Once the petition/ appeal is filed in the Registry of the High Court and the Registry has made endorsement about the filing of appeal/petition, then it becomes the record of the Registry – Petitions/appeals/documents once filed in the Registry cannot be permitted to be returned to the party. Handing over a petition/ appeal/ document to the Counsel for the party for removing defects does not mean that the same is returned permanently. In fact, same is given temporarily to the Counsel for the party to cure the defects in the Office itself. The concerned party/Advocate has to remove or cure the defects within the time provided in the P.P. Rules and for that purpose necessary

application can be filed in the Registry or necessary Court fee etc. be supplied in the Registry but petition/appeal once filed in the Registry cannot be given back to the party/Advocate – The date when the petition/appeal/ application is filed in the Registry and endorsement is made by the Registry about filing of the case, in that event, that particular date shall be taken as the crucial date for calculating the limitation – I am not in agreement with the view taken by the Hon'ble Judge in the matter of *Tara Kumar Pradhan's* case – The matter is fit to be referred to a larger bench for giving its opinion on the following question: "Whether the date of filing of the appeal in the Registry of the High Court is the crucial date for the calculation of limitation or the date when the defects are cured and appeal is resubmitted in the Registry?"

(Paras 8, 9 and 10)

Case cited:

1. Tara Kumar Pradhan v. Yuba Kr. Pradhan, I.A No. 01 of 2016 in RFA No. 16 of 2016.

ORDER

Vijai Kumar Bist, CJ

This Regular Second Appeal has been filed by the appellants against the judgment dated 31.03.2018 passed by the District Judge, Special Division-II, Sikkim at Gangtok in Title Appeal No. 06 of 2017 – Old Rumtek Monastery & Others versus Lama Karma Dorjee & Others, whereby the first appeal of the appellants/ plaintiffs was partly allowed. Along with the appeal, an application for condonation of delay has also been filed.

2. The office has reported that there is three days delay in filing the appeal. The ground taken by the applicants/ appellants is that the applicant/ appellant No. 2 remained ill and the doctor advised him to take rest for one week and as such the applicants/appellants could not file the appeal on the last day i.e. 09.07.2018. The appeal was presented on 11.07.2018 at 04.00 pm and resubmitted on 07.08.2018 at 04.00 pm. The matter was heard on 16.08.2018 and notice was issued to the respondents on condonation of delay application.

3. The respondents appeared and filed objection against the said condonation of delay application. Mr. Jorgay Namka, the learned counsel for the respondents submitted that the Registry has wrongly calculated the delay as three days in filing the memo of appeal. He submitted that in fact there is forty two days delay in filing the memo of appeal. Learned counsel for the respondents submitted that in view of the judgment passed by this Court in the matter of *Tara Kumar Pradhan versus Yuba Kr. Pradhan (IA No. 01 of 2016 in RFA No. 16 of 2016),* the date of filing will be the date when petition is placed before the Registry, after curing all the defects. In *Tara Kumar Pradhan* (supra) the coordinate bench of this Court has held as follows: -

> "(8) …… It has been argued that the RFA was initially filed within the period of limitation, i.e. 62, but the defects unearthed by the Registry led to the delay. This, I am afraid is no ground, as an application or RFA cannot be deemed to be filed until all defects are cured. The date of filing will be the date when the petition is placed before the Registry sans defects and not prior to that. ……"

4. While hearing the objection raised by the learned counsel for the respondents, this Court directed the Registry to submit a detailed report in the present matter. The Registry submitted its report in the following manner:

> "
>
> RSA No. 2 of 2018
> Old Rumtek Monastery & Ors.
> Vs.
> Lama Karma Dorjee & Ors.
>
> Report of the Stamp Reporter in terms of the order dated 26/11/2018 passed in the above cited Appeal.
>
> The appeal was filed on 11/7/2018. In the certified copy of the impugned judgment, date of the application for certified copy is mentioned as 31/3/2018, and the date when the certified copy was made ready is mentioned as 9/4/2018. Applying the

formula prescribed by Hon'ble the then Chief Justice Shri N.K. Jain for computation of delay, number of days delayed has been calculated in the following manner:

1. Date of the impugned judgment, i.e. 31.03.2018
2. Date of application for certified copy: 31.3.2018
3. Date when certified copy was made ready: 09.04.2018
4. Date of filing the appeal: 11.07.2018
5. Limitation period: 90 days
6. Time required for obtaining certified copy: 9 days
7. Limitation period commenced from: 02.04.2018
7. Total number of days delayed in filing the appeal, i.e. from 01.04.2018 to 11.07.2018: 102 days
8. Total number of days delayed – limitation period,i.e. 102-90=12 days
9. Substracting (*sic. 'subtracting'*) further the period of 9 days as time requisite for obtaining certified copy=12-9=3 days.
10. Therefore, the total number of days delayed in filing the appeal
= 3 days.

Sd/-
27/11/2018
Stamp Reporter"

5. Considered the submissions of learned counsel for the parties.

6. Sikkim High Court (Practice and Procedure) Rules 2011 (hereinafter referred to as "P.P. Rules") provides procedure regarding Judicial Business. Rule 3 of the P.P. Rules provides that all Petitions/ Appeals/Applications/ Counter/Objections etc. to be filed in the High Court shall be filed at the

Filing Counter on every day which is not a Court holiday. Any Advocate/ Petitioner who files Petitions/Appeals/ Applications/Counter/ Objections etc. shall check the Notice Board of the High Court on the next day of filing, to ascertain if any defects were detected. The defect/defects so detected shall be rectified by the advocate/petitioner and the petition/application shall be resubmitted as per Rule 7 of the P.P. Rules at the Filing Counter. Rule 13 of the P.P. Rules provides that the date of presentation to the Registrar or Deputy Registrar or such other officer as provided under the rules shall be deemed to be the date of presentation for the purpose of limitation. Rule 7 of the P.P. Rules further provides that where the memorandum of appeal or any petition or application is not drawn up in the manner prescribed in the P.P. Rules or in the Code of Civil Procedure, 1908 the Registrar may allow the same to be amended within a time not exceeding ten days at a time and forty days in the aggregate to be fixed by him. Where the party fails to take any step for removal of the defects within the time fixed for the same, the Registrar may for reason to be recorded in writing, decline to register the document.

7. From the perusal of the paper-book, I find that the present appeal was filed on 11.07.2018 at 04.00 pm. The filing clerk made endorsement about the date and time of filing of the appeal and application for condonation of delay i.e. on 11.07.2018 at 04.00 pm. It is also written by the filing clerk that the appeal and application for condonation of delay was resubmitted on 07.08.2018 at 04.00 pm.

8. Once the petition/appeal is filed in the Registry of the High Court and the Registry put its endorsement about the filing of appeal/petition, then it becomes the record of the Registry. The petitions/appeals/documents once filed in the Registry cannot be permitted to be returned to the party. Handing over a petition/appeal/ document to the counsel for the party for removing defects does not mean that the same is returned permanently. In fact, same is given temporarily to the counsel for the party to cure the defects in the office itself. The concerned party/advocate has to remove or cure the defects within the time provided in the P.P. Rules and for that purpose necessary application can be filed in the Registry or necessary court fee etc. be supplied in the Registry but petition/appeal once filed in the Registry cannot be given back to the party/advocate. In the present case, appeal was filed on 11.07.2018 and the Registry rightly calculated the limitation till that date.

9. In my view, the date when the petition/appeal/ application is filed in the Registry and endorsement is made by the Registry about filing of the case, in that event, that particular date shall be taken as the crucial date for calculating the limitation. With due respect, I am not in agreement with the view taken by the Hon'ble Judge in the matter of *Tara Kumar Pradhan's* case.

10. Therefore, I am of the view that the matter is fit to be referred to a larger bench for giving its opinion on the following question:

> "Whether the date of filing of the appeal in the Registry of the High Court is the crucial date for the calculation of limitation or the date when the defects are cured and appeal is resubmitted in the Registry?"

11. Let the matter be placed before the Chief Justice on administrative side for passing appropriate order.

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