

Calcutta High Court (Appellete Side)
Unknown vs Union Of India on 17 March, 2015
Author: Subhro Kamal Mukherjee

C.R.M. 10595 of 2014

Hussain and another
...Petitioners
Versus
Union of India,
represented by Shri Arnab Chakraborty, Intelligence Officer,
Narcotics Control Bureau
...Respondent.

For the petitioner: Mr. Sekhar Basu,
Mr. Kazi Safiulla,
Mr. Debabrata Banerjee.

For the NDPS authority: Mr. Sanjoy Bardhan.

Judgment on: March 17, 2015.

Subhro Kamal Mukherjee, J.:

Acting on specific information on August 4, 2013 at about 7 a.m., a batch of officers of Narcotics Control Bureau (hereinafter referred to as 'NCB') reached Netaji Subhas Chandra Bose International Airport at about 8.30 a.m. The petitioners were located. The officers of NCB informed the petitioners about their intention to search them.

Two onlookers, namely, Ravi Das and Uttam Chowdhury, were requested to act as independent witnesses.

The petitioners were searched in presence of the Superintendent of Kolkata Zonal Unit, accompanying the NCB party. The petitioners and their luggage were searched.

From the luggage of petitioner no. 1 five packets containing blue capsules were recovered. The capsules were found to contain "Dextropropoxyphene". Chemical analysis of the capsules indicate that they contain Dextropropoxyphene, Acetaminophen (Paracetamol), and Dicyclomine. These are substances used as medicine for a long time.

Dicyclomine and Acetaminophen are not Narcotic Drugs or Psychotropic Substances.

On May 23, 2013 the Government of India, by a notification issued under section 26A of the Drugs and Cosmetics Act, 1940, has prohibited the manufacture for sale, sale and distribution of Dextropropoxyphene.

Possession of Dextropropoxyphene simplicitor has not been prohibited.

It would appear from paragraph 1 of the complaint that the Superintendent, Kolkata Zonal Unit, led the team of NCB officers and staff. The complaint shows that the apprehended persons were informed that the team of officers of NCB consists of the Superintendent of Kolkata Zonal Unit. There was a body search of the apprehended persons and their respective baggage was, also, searched.

Sub-section (1) of Section 50 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'NDPS Act') contains that "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."

This shows that the Gazetted Officer of the departments mentioned in Section 42 or the nearest Magistrate can never be a member of the raiding party; the apprehended person has to be taken before such Gazetted Officer or Magistrate, if the person opts to be taken before such functionary, for a decision to be taken on whether search will be made or not. Moreover, Sections 41, 42 and 43 of the NDPS Act deal with different situations for search of a person and other things like building, conveyance, place etc. Sub-section (1) of Section 41 of the NDPS Act deals with magisterial order for arrest of a person or search of a building, conveyance or place. Sub-section (2) of Section 41 of the NDPS Act, enumerates law with regard to search of any building, conveyance, place by any officer authorised by the empowered officer. Section 42 of the NDPS Act delineates powers of officers empowered by the Central Government or by the State Government to enter into and search any building, conveyance or place, and to seize drugs or other substances.

Section 43 of the NDPS Act provides for power of search and seizure in public place or transit by any officer of the departments mentioned in Section 42 of the NDPS Act. Sub-section (4) of Section 43 of the NDPS Act authorises such officer to detain a person, to search the person and if such person has Narcotic Drug in his possession to arrest him. Section 43 of the NDPS Act, also, explains the word "public place" which includes any public conveyance, hotel, shop or other place intended for use by or accessible to the public.

My reading of Section 50 (1) of NDPS Act and that of Sections 41, 42 and 43 of the NDPS Act is that search of the body of the person concerned can be followed by search of building, conveyance, place, etc. and in acting under the provisions of Sections 41, 42 and 43 of the NDPS Act, the authorised officer is bound to follow requirement of informing the detained person his right to be taken before a Gazetted Officer of any of the departments mentioned in Section 42

of the NDPS Act or before a Magistrate.

Sub-sections (2) and (3), especially, (3) of Section 50 of the NDPS Act are of immense value with regard to the protection of the liberty of an apprehended person. The Gazetted Officer or the Magistrate, before the search takes place, acts in the role of a decision maker to find out whether there is reasonable ground for search or not. Such decision making process is amplified by use of the expression "if he sees no reasonable ground for search, forthwith, discharge the person, otherwise shall direct the search be made". The discharge here means discharge from detention. This decision is not subject to judicial review in the form of appeal, revision or the like under any provision of law - It is final and final for all times to come.

When the functionary, be it a Gazetted Officer or a Magistrate, acts on the parameter of, "sees no reasonable grounds for search" he is acting independently having no stake involved in the search and the consequential arrest of the person concerned. It is for this reason the Supreme Court of India in the case of State of Rajasthan versus Parmanand and another reported in 2014 (5) Supreme Court Cases 345, had analysed the law to the effect that the Gazetted Officer must be an independent officer and must not be one, who is officially involved in the process of detention, search and arrest.

The word "independence" ought to be understood, regard being had to the spirit of the law, as the "independence of thought and expression of views", resplendently, worded as "sees no reasonable ground for search".

A Gazetted Officer, who is a part of the raiding party and moves out in pursuit of a specific information, about commission of offence under the NDPS Act by person or persons, cannot be said to be independent inasmuch as he is "dependent" on the pursuit of information, and the "success" of such information into the apprehension, search and arrest of such offender.

Dependence on official success strips or denudes him of the apparel of "independent officer".

If we take into account the spirit of the law in understanding the procedural safeguard provided to a detained person with pointed reference to the words, "if he sees no reasonable ground for search" (emphasis supplied), an accompanying Gazetted Officer can never arrive at such "reasonable ground", since, he is "party" to the "ground" of pursuit of the information, apprehension of the person concerned and the resultant search and arrest.

No law should be oppressive, unjust and opposed to the concept of fairness as enshrined in Article 21 of the Constitution of India. Criminal law must have its application tested on the touchstone of fairness.

If the fairness in the procedure, as enumerated in Sub-section (3) of Section 50 of the NDPS Act, is to be achieved, the Gazetted Officer accompanying a team of officers, be it of any of the Investigating Agencies acting under the NDPS Act, can never be an independent decision maker to conclude, "no reasonable ground for search".

The spirit of the law is the manifestation of the words of the law and law, specially criminal law, should not be stretched to an extent where it impairs/abrogates the rights of the people rather than protecting it.

Before the rendition of the judgment of the Supreme Court of India in the case of Parmanand (supra), the Supreme Court of India had to consider and express these views on the same issues, that is, presence of a Gazetted Officer as a member of a raiding party and whether such presence complies with the provisions of Section 50 of the NDPS or not. The Supreme Court of India answered the question in negative in the case of Ritesh Chakarvarti versus State of M.P. reported in (2006) 12 SCC 321 and upheld the view of this Court expressed in the case of Jadunandan Roy versus the State of W.B. reported

in 1999 (2) CHN 759.

In *Jadunandan Roy* (supra) it was held by S. B. Sinha, J, (as His Lordship then was) that a decision about search has to be taken by an independent officer and not an officer who is, already, a member of a raiding party and, thus, a biased person. Debi Prasad Sengupta, J. in His Lordship's separate, but concurring judgment held that a Gazetted Officer, who is, already, there in the raiding party is not merely a companion Gazetted Officer, but an official companion in achieving the object of search and seizure. Neutrality in such a situation is hard to expect. If neutrality has to be maintained, fairness is to be imposed and the right of a person under section 50 of the NDPS Act is not to be rendered illusory or redundant, no accompanying Gazetted Officer of any of the departments under Section 42 of the NDPS Act should be allowed the authority to take a decision under Sub-section (3) of Section 50 of the NDPS Act.

The view so expressed was the majority view and the minority view was expressed by G.R. Bhattacharjee, J.

As discussed earlier, the majority view received concurrence in the case of *Ritesh Chakarvarti* (supra).

In a large number of cases this Court as also various High Courts have emphasized the need of conducting search in presence of independent persons. The Law requires that such search should normally be conducted by a Magistrate or a Gazetted Officer. Even presence of a Gazetted Officer in the raiding team would not sub-serve the requirements of Section 50 of the Act.

In the case of *Gurjant Singh alias Janta versus State of Punjab* reported in (2014) 13 SCC 603 the accused was found driving a tractor trolley. The Police Officer suspected the bags to contain incriminating substance. He was informed about the option to be searched in presence of a Gazetted Officer or a Magistrate. On the option being taken by the accused, the Deputy Superintendent of Police arrived and the search was conducted. It was argued before the Supreme Court of India that Section 50 the NDPS Act will not apply as it was a seizure of contraband article from a conveyance. The Supreme Court of India repelled such argument observing that when the Station House Officer took upon himself to comply with the requirements of Section 50 of the NDPS Act, such compliance cannot be abandoned on the plea that contraband was recovered from a conveyance. The Supreme Court of India, however, did not accept the official status of the Deputy Superintendent of Police, who acted as the Gazetted Officer, on the evidence adduced in the case, but the view that clearly

emanates is that even in respect of a search of a conveyance, if the accused opts for compliance of Section 50 of the NDPS Act, such procedure must be complied with.

In arriving at such conclusion Their Lordships referred to the earlier two decisions of the Supreme Court of India in the cases of State of Punjab versus Baldev Singh reported in (1999) 6 SCC 172 and Balbir Singh versus State of Punjab reported in 1994 Supp (2) SCC 26.

In none of the judgments of the Supreme Court of India where the presence of a Gazetted Officer being a member of the raiding party was considered to be not an infraction of the law contained in Section 50 of the NDPS Act, the expression "...he shall, if such person so requires, take such person..." as contained in Sub-section (1) of Section 50 of the NDPS Act had been taken into account and analysed except in the case of State of Punjab versus Balbir Singh (supra), where such requirement was significantly taken notice of and held that the empowered officer or authorised officer while acting under Section 41(2) or 42 of the NDPS Act should comply with the provisions of Section 50 of the NDPS Act before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 of the NDPS Act, which is mandatory. Thus, it would affect the prosecution case and vitiate the trial.

In the case of State of H.P. versus Pawan Kumar reported in (2005) 4 SCC 350, it was not brought to the notice of the Court the different situations enumerated in Sections 41, 42 and 43 of the NDPS Act, which deals with situations like search of a person or other things like building, conveyance or place, etc. Section 41(1) of the NDPS Act deals with Magisterial order for arrest of a person or search of a building, conveyance or place. Section 41(2) of the NDPS Act enumerates law with regard to search of any building conveyance, place by any officer authorised by the empowered officer. Section 42 of the NDPS Act delineates powers of officers empowered by the Central Government or by the State Government to enter into and search any building, conveyance or place and to seize drugs or other substances.

Section 43 of the NDPS Act provides for power of search and seizure in public place or transit by any officer of the departments mentioned in Section

42. Sub-section (4) of Section 43 authorises such officer to detain a person, to search the person and if such person has narcotic drug in his possession to arrest him. Section 43, also, explains the word "public place", which includes any public conveyance, hotel, shop or other place intended for use by or accessible to the public.

From a combined reading of Section 50(1) of NDPS Act and that of Sections 41, 42 and 43 of the NDPS Act, it appears that search of the body of the person concerned can be followed by search of building, conveyance, place etc., and in acting under the provisions of Sections 41, 42 and 43 of the NDPS Act the authorised officer is bound to follow requirement of informing the detained person of his right to be taken before a Gazetted Officer of any of the department mentioned in Section 42 of

the NDPS Act or before a Magistrate.

The facts in Ahmed versus State of Gujarat reported in (2000) 7 SCC 477 are that on receipt of information that the accused was dealing with narcotics, the empowered officer called the panch witnesses and raided the house of the accused. While the accused was sitting on a cot, the person of the accused was searched and from his pant pocket, 9 gm. of charas was recovered. The fact of recovery of charas from the pants of the accused was established through the panch witness and the seizure list, but the said witness in cross-examination candidly stated that the accused himself had requested for being taken to the Magistrate for being searched, but the police had declared that it was not necessary. Prosecution's Witness no. 2, the senior police officer, also, was examined and he gave out the details about the raid and seizure as well as drawing of the panchnama. The learned Additional Sessions Judge convicted the accused/appellant under Section 20(b)(ii) of the NDPS Act and sentenced him to undergo rigorous imprisonment for 10 years and imposed a fine of Rs. 1,00,000/- ((Rupees one lakh) only. On appeal by the accused, the High Court affirmed the conviction and sentence. In assailing the conviction, it was contended on behalf of the appellant that the mandatory requirements of Section 50 of the NDPS Act had not been complied with inasmuch as notwithstanding the fact that the accused himself requested for being taken to the Magistrate for the purpose of search, the police did not accede to the same and, therefore, the conviction is null and void.

On the other hand, it was contended on behalf of the respondent- State that it is only when a search is made by an authorised officer under Section 41(2) of the NDPS Act, Section 50 of the NDPS Act can be attracted, but when a search is made by an officer of gazetted rank of the department of central excise, who is empowered under Section 41(2), then Section 50 of the NDPS Act is not required to be complied with inasmuch as the empowered officer himself is a gazetted officer.

Allowing the accused's appeal, it was held by the Supreme Court of India that the accused himself having wanted to be searched before a gazetted officer or a magistrate and the same having been denied, failure on the part of the prosecution in complying with the provisions of Section 50 of the NDPS Act vitiates the conviction and sentence of the accused, since the conviction was based solely on the alleged possession of charas, which was recovered from his person during a search conducted in violation of the provisions of Section 50 of the NDPS Act.

A combined reading of Sections 42 and 50 of the NDPS Act makes it clear that whenever a search of a person is about to be made on the basis of personal knowledge or information received in that behalf, then if the person to be searched requires to be taken to a gazetted officer or the nearest magistrate, the same must be complied with and failure to comply with the same would constitute an infraction of the requirements of Section 50 of the NDPS Act.

In State of H.P. versus Pawan Kumar (supra), G.P. Mathur, J., while delivering the judgment on behalf of the Bench, had referred to Beckodan Abdul Rahiman versus State of Kerala reported in (2002) 4 SCC 229. The principle laid down in the judgment goes entirely against the arrest and search of the petitioners.

Beckodan Abdul Rahiman's case (supra) is an authority for the proposition that mere giving of an option as to whether the apprehended persons wants to be searched in the presence of a Gazetted Officer or a Magistrate is not enough, rather it is not compliance with law. It was held that "the accused was required to be apprised of his right conferred under Section 50 giving him the option to search being made in the presence of a Gazetted Officer or a Magistrate. The accused is not shown to have been apprised of his right or any option offered to him for search being conducted in presence of a Magistrate."

In State of H.P. versus Pawan Kumar (supra) it was observed: "There is another aspect of the matter, which requires consideration. Criminal law should be absolutely certain and clear and there should be no ambiguity or confusion in its application The same principle should apply in the case of search or seizure, which come in the domain of detection of crime. The position of such bags or articles is not static and the person carrying them often changes the manner in which they are carried. People waiting at a bus stand or railway platform sometimes keep their baggage on the ground and sometimes keep in their hand, shoulder or back. The change of position from ground to hand or shoulder will take a fraction of a second but on the argument advanced by learned counsel for the accused that search of bag so carried would be search of a person, it will make a sharp difference in the applicability of Section 50 of the Act. After receiving information, an officer empowered under Section 42 of the Act, may proceed to search this kind of baggage of a person which may have been placed on the ground, but if at that very moment when he may be about to open it, the person lifts the bag or keeps it on his shoulder or some other place on his body, Section 50 may get attracted. The same baggage often, keeps changing hands if more than one person are moving together in a group. Such transfer of baggage in the nick of time when it is about to be searched would again create practical problem. Who in such a case would be informed of the right that he is entitled in law to be searched before a Magistrate or a Gazetted Officer? This may lead to many practical difficulties. A statute should be so interpreted as to avoid unworkable or impracticable results. In Statutory Interpretation by Francis Bennion (Third edition) para 313, the principle has been stated in the following manner :

"The court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. Sometimes, however, there are overriding reasons for applying such a construction, for example where it appears that Parliament really intended it or the literal meaning is too strong.

"The learned author has referred to Sheffield City Council versus Yorkshire Water Services Limited reported in (1991) 1 WLR 58 at 71, where it was held as under:

"Parliament is taken not to intend the carrying out of its enactments to be unworkable or impracticable, so the court will be slow to find in favour of a construction that leads to these consequences This follows the path taken by judges in developing the common law. ' the common law of England has not always developed on strictly logical lines, and where the logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society."

We may note that Their Lordships expressed the view while dealing with situation of a person, who carries a bag or keeps it on his shoulder or some other place of his body. The law is an ongoing science; it is not static or stationery. What was observed "may get attracted" in State of H.P. versus Pawan Kumar (supra) donned with the jurisprudential complexion of "should get attracted" in the subsequent decisions.

The subsequent decisions of the Supreme Court of India on the application of Section 50 of the NDPS Act, amplify the extension of law with regard to protection afforded to an apprehended person under section 50 of the NDPS Act. The protection is to the effect that if the search of the bag or container is preceded by search of the body, Section 50 of the NDPS Act would get attracted and such extension of law and /or interpretation of law is definitely in conformity with the requirement of Sub-section (1) of Section 50 of the said Act, which contains the duty to be performed by an authorised officer under Section 50 when he is about to search a person under the provisions of sections 41, 42, or 43 of the NDPS Act.

In the case of Gurjant Singh @ Janta (supra), an option was given to the accused, who was the driver of a tractor trolley to be searched in the presence of a Gazetted Officer or Magistrate, and on the option being availed of by the accused, the Deputy Superintendent of Police arrived and the search was conducted. It was held that when the officer intercepting the accused person had given an option to be searched in presence of a Gazetted officer or Magistrate, requirement of section 50 of the NDPS Act must be complied with. This decision lays down the law to the effect that if the arresting police officer or the authorized police officer takes it upon himself to comply with the provisions of Section 50 of the NDPS Act and does not comply with the same, he cannot turn around at a latter point of time claiming that Section 50 of the NDPS Act has no manner of application.

In State of Rajasthan versus Parmanand (supra), we would find that in order to maintain fairness and credibility to search and arrest, the Supreme Court of India had added a prefix before the word "Gazetted Officer". The prefix is "independent". "Independence" is amplified if we consider the importance thereof used with reference to sub-section (3) of Section 50 of the NDPS Act, which reads as follows-

"(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".

The contraband article involved is "Dextropropoxyphene". It appears as item no. 33 in the list of the schedule appended to the NDPS Act. It, also, appears as item number 146 in Schedule H appended to the Drugs and Cosmetics Act, 1940.

The Drugs and Cosmetics Act 1940 is an earlier statute. The NDPS Act came to be enacted in 1985. The same lawmaker, that is, the Parliament, has enacted both the Acts. It is an established principle of interpretation of statutes that when two statutes, one earlier and other subsequent, deals with the same subject matter substantially, the law maker is supposed to be aware of the provisions of the earlier statute.

Section 80 of the NDPS Act reads as follows: - "Application of the Drugs and Cosmetics Act, 1940 not barred. The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act (23 of 1940) or the rules made thereunder."

Section 80 of the NDPS Act, as quoted above, is an unfailing example of such awareness of law contained in the earlier statute by the Parliament when it enacted and enforced the NDPS Act.

The notification dated May 23, 2013, issued by the Central Government, suspends the manufacture for sale, sale and distribution of the contraband article in question and such notification had been issued by the Central Government in exercise of powers conferred by Section 26A of the Drugs and Cosmetics Act, 1940. The notification has the force of law issued by the Central Government, that is, issued by the Hon'ble President of India. The "Central Government " is defined as the "President of India" in the General Clauses Act.

The words "not in derogation of" came to be analysed and interpreted by the Supreme Court of India in the case of KSL and Industries Limited versus Arihant Threads Limited and others reported in (2008) 9 SCC

763. A three Judges bench of the Supreme Court of India interpreted Sections 32 and 22 of the Sick Industrial Companies (Special Provisions) Act (hereinafter referred to as 'SICA'), 1985 and Section 34 (1) of the Recovery of Debts Due to Banks and Financial Institution Act, (hereinafter referred to as 'RDDB Act') 1993.

After analysing Section 34 (2) of the RDDB Act, the Supreme Court of India held that Sub-section (2) of Section 34 of the RDDB Act has been in the nature of an exception to the overriding effect and that the RDDB Act shall be in addition to and not in abrogation to SICA. It has been held that the provisions of the RDDB Act should be given priority and primacy over SICA. It may be conceded that both the Acts are "Special Acts" in the sense that they have been enacted for a specific purpose and object in view. The RDDB Act is a subsequent Act in the point of time being a 1993 Act. It must, therefore, be presumed that even in absence of any specific provision in the 1993 Act the Parliament was aware of all statutes, which had been enacted prior to 1993 including SICA of 1985. In spite of that, in Section 34(1) of the RDDB Act, non obstante clause has been inserted so as to ensure expeditious adjudication and recovery of debts due to banks and financial institutions.

Section 34(2) of the RDDB Act declares that the provisions of the said Act are in addition to and not in derogation of, certain enactments referred to in that Section. SICA has been expressly mentioned in the said Section. All other laws, therefore, whether general or special, prior or subsequent, must be interpreted and applied keeping in view the object of enacting the 1993 Act. Therefore, it has to be held that even though both the conflicting statutes, that is, SICA of 1985 and the RDDB Act of 1993 contain non obstante clause as stated in the preamble to the Act, in case of conflict, the RDDB Act, 1993 would prevail over SICA, 1985 so far as recovery of public revenue is concerned.

Applying the principles to the present case, Section 80 of the NDPS Act read with the notification issued by the Central Government under exercise of powers of Section 26A of the Drugs and

Cosmetics Act, 1940, which limit the acts constituting an offence to manufacture, manufacture for sale, sale and distribution of Dextropropoxyphene, must override the provisions of the NDPS Act, where mere possession constitutes the offence.

The conflict between the NDPS Act and the Drugs and Cosmetics Act is not in any way resolved by the decision of the Supreme Court of India in the case of Union of India and another versus Sanjeev V. Deshpande reported in (2014) 13 SCC 1.

If we analyse the decision of the Supreme Court of India with reference to the facts of the case and the issue, which cropped up, we would definitely conclude that the said decision is wholly inapplicable in the case at hand. Before we analyze the law, let us first of all discuss the principle of precedential binding. Way back in 1968, the Supreme Court of India observed in the case of State of Orissa versus Sudhansu Sekhar Misra and others reported in AIR 1968 SC 647 and emphasised the law of precedential binding to the effect that a decision is not an authority for a proposition that may logically follow from it. Their Lordships made it clear that if a proposition was not discussed or debated and no decision was rendered on that decision, it would have no precedential binding.

This principle had been emphatically followed by our Court in the case of Godrej Soap Limited versus State reported in 1990 Calcutta Criminal Law Reporter 56. It was held as follows-

"In M.P. Sharma (supra, AIR 1954 SC 300), however, some of the petitioners who moved the Supreme Court under Article 32 of the Constitution of India were no doubt incorporated companies. But the question as to whether such body corporate can or do come within the expressions "person" and "witness" as used in Article 20(3) to enable them to invoke the protection was not even remotely raised, as would appear from the judgment itself (supra, at 304). The decision, therefore, can be no authority at all on the question before us. If in that case, the Supreme Court afforded the protection under Article 20(3) to body corporate also, that was obviously binding on the parties as something *res judicata*. But what binds and can bind others, not parties to that *lis*, as precedent under Article 141 is the declaration on a question of law and if no question was raised on the point and there is no decision or declaration of law on that question, the decision is obviously no authority on that question. We do not think that it can reasonably be contended with any semblance of plausibility that since the Supreme Court allowed Article 20(3) to operate in a case where the accused happened to be body corporates without any advertence to the question as to whether body corporates can at all invoke that article, it must still logically follow that according to the Supreme Court the provisions of Article 20(3) are available to them. And even assuming *arguendo* that it may so follow, we have the authority of Lord Halsbury in *Quinn versus Leathem* (1901 Appeal Cases 495), followed by the Supreme Court in *Sudhansu Sekhar Misra* (AIR 1968 SC 647 at 652), that a decision is no authority "for a proposition that may seem to follow logically from it."

The notification issued under Section 26 A of the Drugs and Cosmetics Act in exercise of its powers limits the commission of offence to manufacture, manufacture for sale and sale and distribution of the contraband article. The article, namely, Dextropropoxyphene falls within the ambit of both the Acts. If there is a provision constituting an offence with regard to the article in question in the NDPS Act, there is, also, a provision in the Drugs and Cosmetics Act delineating the offence with regard to

the same article in the Drugs and Cosmetics Act. The notification issued under Section 26 A of the Drugs and Cosmetics Act mollifies the rigours of criminal law with regard to offence concerning Dextropropoxyphene and by the mandate of law does not make the mere possession an offence and, consequently, a punishable act; the NDPS Act, on the contrary, does so.

Now, the question is if there are two provisions, with regard to the same subject matter in both the Acts, which of the provisions will apply to the exclusion of the other.

Section 80 of the NDPS Act makes it abundantly clear that the provisions enumerated in the NDPS Act will not be in derogation of the Drugs and Cosmetics Act. In view of the pronouncement of the Supreme Court of India in case of KSL Industries Limited (supra) the provisions of the NDPS Act cannot derogate the provisions of the Drugs and Cosmetics Act and the notification issued thereof to an ineffective provision of law.

Now, there is an indication in the case of Union of India and another versus Sanjeev V. Deshpande (supra), that Section 80 of the NDPS Act had not been analysed. When the issue was referred to a larger bench it was observed by the Hon'ble Judges that "In our opinion, in view of the fact that the effect of Section 80 requires to be considered we grant leave and direct the Registry to place the papers before the Hon'ble the Chief Justice for placing the matter before a three Judge Bench."

Nowhere in Union of India and another versus Sanjeev V. Deshpande (supra) Section 80 of the NDPS Act had been interpreted, instead it was observed as follows: -

"In view of our conclusion the complete analysis of the implications of Section 80 of NDPS Act is not really called for in the instant case."

It had no where been laid down that the proposition in case of conflict of Drugs and Cosmetics Act and the NDPS Act, Section 80 of the NDPS Act will not protect the provisions of Drugs and Cosmetics Act, specifically, when the notification issued by Central Government mollifies the rigours of criminal law with regard to ingredients of the offence and evidently different from the ingredients in respect of the same article in the NDPS Act.

Neither was it discussed in Union of India and another versus Sanjeev V. Deshpande (supra) about the implication of Article 13 (3) (b) of the Constitution of India, which gives a notification the status of law. In this case the law was enforced by the Central Government, which means the Hon'ble President of India. By no means in case of Union of India and another versus Sanjeev V. Deshpande (supra) this proposition of law or issues were discussed and decided.

Having considered the case diary and materials on record and in view of my discussion herein above, although, commercial quantity of contraband articles are involved in this case, I am of the opinion that further detention of the petitioners will be against interest of justice. Therefore, they should be released on bail.

The petitioners are residents of the State of Manipur. Therefore, I am of the opinion that their movement should be restricted.

As such, the petitioner No. 1, namely, Hussain and the petitioner No. 2, namely, Md. Hafijuddin Khan, should be released on bail upon furnishing a bond of Rs.1,00,000/- (Rupees one lakh) only each with four sureties of Rs.25,000/- (Rupees twenty five thousand) only each, two of whom must be local, to the satisfaction of the learned Judge, Special Court, Narcotics Drugs, at Barasat, District - 24 Parganas (North), on conditions that the petitioners shall not leave the territorial jurisdiction of Kolkata and District - 24 Parganas (North). They shall, also, disclose their whereabouts where they will be residing after their release on bail to the Intelligence Officer, Narcotics Control Bureau, Kolkata Zonal Unit and they shall meet the holding Investigating Officer once in a week till completion of the trial. Further, they shall attend the trial court regularly on each and every hearing unless prevented by sufficient cause.

The application for bail is, thus, allowed.

(Subhro Kamal Mukherjee, J.) C.R.M. NO. 10595 of 2014 In re: An application for bail under Section 439 of the Code of Criminal Procedure filed on August 19, 2014 in connection with NDPS Case No.130/2013 corresponding to NCB crime No.14/NCB/KOL/2013 under Section 21 (c) of the Narcotics Drugs and Psychotropic Substances Act; 1985. Now pending before the Learned Special Judge NDPS Act at Barasat, North 24 Parganas.

And In the matter of: Hussain & Md. HafijuddinPetitioners Vs.

Union of India, Represented by Shri Arnab Chakraborty Intelligence Officer, Narcotics Control BureauOpposite Party.

For the Petitioner : Mr. Sekhar Basu,
Mr. Kazi Safiulla,
Mr. Debabrata Banerjee.

For the Opposite Party : Mr. Sanjoy Bardhan.

Judgement on : 17th day of March, 2015.

Indrajit Chatterjee, J. : With utmost respect to my elder brother the Hon'ble Mr. Justice Subhro Kamal Mukherjee I differ from His Lordship's view for the reasons stated herein below.

This is an application for bail under Section 439 of the Code of Criminal Procedure, 1973 as filed by the accused petitioners namely Hussain & Md. Hafijuddin Khan, praying for their release on bail in connection with NDPS Case No.130/2013 corresponding to NCB crime No.14/NCB/KOL/2013 under Section 21 (c) of the Narcotics Drugs and Psychotropic Substances Act; 1985 (hereinafter called as the 1985 Act). The case now pending before the Learned Special Judge NDPS Act at

Barasat, North 24 Parganas. It has been admitted by the petitioners that this is a renewal of prayer for bail under Section 439 of the Code of Criminal Procedure as a similar application being CRM No.4456/2014 was rejected by this Hon'ble Court on 16.04.2014. It is also the case of the petitioner that they are in custody since 04.08.2013. The prosecution case as we get from the complaint can be stated in brief thus:

Acting on a tip of which was reduced into writing and after intimating the same to the superior officer and subsequently after obtaining permission from the competent authority a team of NCB Officers and staff led by the Superintendent-Kolkata Zonal Unit reached Netaji Subhas Chandra Bose International Airport at Calcutta at about 8.00 hrs. on 04.08.2013 and at about 08.30 hrs. two persons were located as per the specific information. The NCB Officers approached those two and disclosed their identity. One person was carrying two pieces of luggage and other was carrying one piece of luggage. On being asked those persons disclosed their names as that of the present petitioners. The petitioner no.1 was carrying one backpack and the petitioner no.2 was carrying one military bag and a kit bag. They were informed about the information which the team gathered and two onlookers were requested to act as independent public witnesses during the search to which they agreed. Written notice was given under Section 50 of the 1985 Act that they had legal right to have their search before any Magistrate or Gazetted Officer and regarding other formalities. They were also informed that the NCB team had already with them one Superintendent rank official. The petitioners replied in writing their unwillingness to be searched before any other Gazetted Officer or Magistrate, nor did they want to search the NCB team and the two independent public witnesses.

Both the petitioners were searched in person and their baggage were also searched. From the backpack of petitioner no.1, 5 double packed packets were recovered wherefrom several blue capsules suspected to be containing Dextropropoxyphene were recovered. Similarly, from the baggage of petitioner no.2, 5 similar packets were found containing blue capsules suspected to be containing Dextropropoxyphene from one (baggage) and from that military bag two such packets were found. They could not account for their valid possession. Thus, from the possession of the petitioner no.1 15 kgs of such contraband articles were recovered and from the possession of the petitioner no.2, 19.36 kgs of such articles were recovered. The gross weight was 34.36 kgs. Air tickets were seized (Flight no.AI 729 Kolkata to Guwahati and Flight no.AI 889 Guwahati to Imphal) from the possession of the present petitioners. Some personal articles were also seized from them.

After completion of other formalities a seizure list was prepared at the spot in the presence of the two local witnesses. Notices under Section 67 were issued to the independent witnesses and their statements were recorded. The statements of the petitioners were also recorded after giving notice and they were arrested later on in respect of the offence punishable under Section 21 (c) of the 1985 Act, arrest memos were served on due acknowledgment. The samples taken from the seized items were tested and as per the report of the chemical laboratory the seized items contained 1. Dextropropoxyphene,

2. Acetaminophene and 3. Dicyclomine. The item no.1 is one prohibited item as per the 1985 Act whereas the item nos. 2 and 3 are not. There is also a claim in the complaint that the petitioner no.2 had been arrested on 21.01.2013 in connection with a case of under Section 21/22 of the 1985 Act

and Section 13 (b) of the Drugs and Cosmetics Act, 1940; and that the complaint was filed before the Learned Special Judge NDPS Court Barasat, North 24 Parganas by Arnab Chakraborty an Intelligence officer of the said unit.

Thus, it is a case of personal search which yielded no result and thereafter there was bag search from which contraband articles were recovered as stated earlier.

Mr. Basu, the learned Senior Advocate appearing on behalf of the petitioners has submitted that in the present scenario it is not that the 1985 Act but the Drugs and Cosmetics Act, 1940 will apply to this case. He further submitted that under the 1940 Act punishment prescribed is three years; and that hence the case is triable as a Magistrate triable one. He has submitted, by taking us through Section 80 of the 1985 Act, to convince the Court that the provisions of the 1985 Act and the rules made thereunder shall be in addition to and not in derogation of the Drugs and Cosmetics Act, 1940 and the rules made thereunder. On this point he has relied on the decision of the Apex Court in KSL and Industries Limited vs. Arihant Threads Limited and Others reported at (2015)1SCC 166. That the Apex Court has explained the term "In derogation of" by quoting from the Black's Law Dictionary:-

"Derogation"-The partial repeal or abrogation of a law by a later Act that limits its scope or impairs its utility or force."

Mr. Basu has further argued that in this case there being personal search as well as bag search the trial will be vitiated as per the judgment of the Apex Court as delivered in State of Rajasthan vs. Paramanand and Anr. as reported in 2014 (2) Calcutta Criminal Law reporter (SC) Page 319 : 2014 (5) SCC 345 for non-compliance with Section 50 of the 1985 Act. He has further submitted by taking this bench to Annexure P-1 of the application that since by notification No. GSR 332 (E) dated 23.05.2013 issued under Section 26A of the Drugs and Cosmetics Act, 1940, the Central Government has suspended the manufacture, sale and distribution of Dextropropoxyphene with immediate effect, the fact of the case cannot constitute any offence under 1985 Act.

In counter to all these Mr. Sanjay Bardhan Ld. Advocate appearing on behalf of the NCB has submitted that in the present case Section 21 (c) of the said Act will very much apply, and that there is no question of application of the Drugs and Cosmetics Act, 1940. Regarding the notification it is his argument that it has no application to the case, because it was issued under the Drugs and Cosmetics Act, 1940 for prohibiting manufacture, sale, etc. of Dextropropoxyphene. Mr. Bardhan has submitted further that the case as made out in the complaint is very much covered under the provisions of the 1985 Act.

Mr. Bardhan has cited the judgment of the Apex Court reported in 2014 Cri.L.J. 4329 (Union of India & Anr. vs. Sanjeeb V. Deshpande), a three judge bench decision, wherein the Apex Court held (Para 35), on complete analysis of the implications of Section 80 of the said Act, that the Drugs and Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase, etc. of drugs generally whereas the said Act of 1985 deals with a most specific class of drug and, therefore, a special law on the subject. The Apex Court has further held that the provisions of the Act (Act of

1985) will operate in addition to the provisions of the 1940 Act. In that decision the Apex Court did not agree with the decision in Rajesh Kumar Gupta's case (2007) 1 SCC 355: 2006 AIR SCW 5666 that the prohibition contained in Rule 63 of the 1985 rules is applicable only to those Narcotics Drugs and Psychotropic Substances which are mentioned in scheduled I to the rules and not to the psychotropic substances enumerated in the schedule to the Act. In Rajesh Kumar Gupta's case the Apex Court reached to the conclusion on the understanding that Rule 53 prohibiting the import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule I to the Rules is the source of the authority for such prohibition and in Sanjeeb V. Despande's Case the Apex Court held that in the earlier decision referred to above the judges ignored the mandate of Section 8 (c) which inter alia prohibits in absolute term import into India and export out of India any narcotic drugs and psychotropic substance. The Apex Court in the decision referred to above held that Section 8 (c) Act of 1985 is the main source.

Mr. Bardhan has submitted that the decision of the Apex Court in K.S.L. and Industries Limited (supra) as cited by Mr. Basu will not apply to the present case. He took us through Paragraph 36 of the judgement to say that the Apex Court candidly held ".....there is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall co-exist along with the other Acts. It is clearly not the intention of the legislature, in such a case, to annul or detract from the provision of other laws.....".

Regarding the personal search he has submitted that Paramanand's case will not apply to this case as there was personal search as well as bag search and nothing was recovered through the personal search, but the articles were recovered from the searched bags.

Mr. Bardhan ended his argument by saying that this is not a second application as stated in Paragraph 1 of the petition, and that in fact this is the third application, the first application was rejected on 3rd October, 2013 in CRM no.13385 of 2013 and the second one has been stated in Paragraph 1.

I have gone through the Case Diary and also taken into consideration the statements made by the accused persons and also the seizure list witnesses. Under Section 67 of the said Act of 1985 any statement is admissible in evidence. It is apparent from the Case Diary that nothing was recovered through personal search of the accused petitioners. I am not unmindful of the decision of the Apex Court cited by Mr. Basu (Paramanand and Anr. supra) which has relied upon the decisions of the Apex Court reported in (2007) 1 SCC 450 (Dilip & Anr. Vs. State of Madhya Pradesh and Union of India vs. Shah Alam as reported in (2009) 16 SCC 644).

I am also not unmindful of the decision of the Apex Court as reported in (2005) 4 Supreme Court Cases 350 (State of H.P. vs. Pawan Kumar along with State of Rajasthan vs. Bhanwarlal), a three judge bench decision. There the Apex Court (in Para 11 at Page 360) held that "A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may

carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act".

Although the Supreme Court has examined Section 50 of the 1985 Act in many more cases (referred to in Pawan Kumar), only a few of them including Pawan Kumar have been cited before us for understanding the principles I have perused the decision referred in Pawan Kumar and I have understood them in the manner stated herein below, (even though I think Pawan Kumar is sufficient to decide this case). I have also taken into consideration some other decisions of the Apex Court to let the readers know regarding the view of the Apex Court on this Subject.

In another decision of the Apex Court as reported in 2011 (3) SCC 521 (Jarnail Singh vs. State of Punjab) this Apex Court held in a case where 1kg 750 grams of narcotic/opium was recovered from a bag after search which was being carried by the accused/appellant that in such circumstances Section 50 would not be applicable (Para 12). The Apex Court further proceeded to say that aforesaid section can be invoked only in cases where narcotic drugs and psychotropic substance is recovered as a consequence of the body search of the accused.

In another case, Kalema Tumba vs. State of Maharashtra and Another (1999) 8 SCC 257 discussed the provision pertaining to personal search under Section 50 of the said Act of 1985 and held ".....if a person is carrying a bag or some other articles with him and narcotic drugs or psychotropic substance is found from it, it cannot be said that it was found from his person". We can also cite here the decision of the Apex Court as reported in (2003) 8 SCC Page 666 (Megh Singh vs. State of Punjab) wherein the Apex Court held "a bare reading of Section 50 shows that it applies in case of personal search of a person it does not extend to a search of a vehicle or container or a bag or premises".

In another decision as reported in 2014 Cr.L.J. 3147 (Kishan Kumar vs. State of Haryana) the Apex Court on the same terms held that Section 50 will apply only where search of a person is involved. In Ajmer Singh vs. State of Haryana as reported in (2010) 3 SCC 746 : AIR 2010 SC (supplementary) 582 the Apex Court relying on the constitution bench judgment held that when search and recovery was from a bag, briefcase, container etc. the provisions of Section 50 of the act are not attracted.

It is pertinent to quote here Section 50(1) of the 1985 Act.

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 Gazette Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

Thus, in the facts and circumstances of this case and in view of the decision referred to above, I am of the view that Section 50 of the 1985 Act will not apply to the present case as there was personal search as well as bag search and nothing was recovered through personal search. I am inclined to follow the principles stated in Pawan Kumar (Supra), Jarnail Singh (Supra), Kalema Tumba (Supra), Megh Singh (Supra), 2014 Cri.L.J 1617 (Yasihey Yobin & Anr. Vs. Department of Customs, Shillong), Madan Lal & Anr. vs. State of H.P. (2003) 7 SCC Page 465, Krishna Kumar (Supra) in preference to the ones in Dilip's case (Supra), Shah Alam (Supra), Ritesh Chakraborty (2006) 12 SCC 321, Gurjant Singh @ Janta (2014) 13 SCC Page 603 and in Paramanand's case (Supra).

In the present case the searches were conducted in the presence of one Superintendent of Narcotic Control Bureau (NCB) who is a Gazetted Officer. In this regard the decision of the Apex Court in Union of India vs. Satrohan (2008) 8 SCC 313 may be relied upon. Relying on this decision I cannot subscribe to the view that the Gazetted Officer of the departments mentioned in Section 42 of the said Act of 1985 can never be a member of the raiding party and that his evidence is to be viewed with suspicion. The Apex Court in its parent decision dated 19.09.2003 as reported in 2003 (8) SCC 449 (M. Prabhulal vs. Assistant Director, Directorate or Revenue Intelligence) held that the 1985 Act reposes more trust on a Gazetted Officer. In that case the Apex Court reversed the order of acquittal passed by the High Court in a case where the truck loaded with 66 kgs of heroin was searched in the Custom Office and not at the spot, the custom house being at a distant of 20 kms from the place where the truck was apprehended. The Apex Court accepted the search and seizure made by the empowered Gazetted Officer of the department and did not ask for any independent Gazetted Officer of other department. Relying on this decision the Apex Court gave two other decisions as reported in 2004 (5) SCC 188 (State of Haryana vs. Jarnail Singh and Others), 2005 (8) SCC 183 (G. Srinivas Goud vs. the State of A.P.) and the decision Satrahon (supra) as referred to above was given relying on the decision of the Apex Court M. Prabhulal (supra).

The decisions of the Apex Court in Paramanand, Dilip, Ritesh Chakraborty, Gurjant Singh's (supra) will not apply in the facts and circumstances of this case. In Ritesh Chakraborty's case the decision of the Apex Court as reported in Pawan Kumar (Supra) and Madanlal (supra) were not considered. The same is the case of Gurjant @ Janta (Supra). It may not be out of place to mention that Pawan Kumar's case is very vital in a decision as regards Section 50 when there was personal search as well as search of articles like bag, container etc. This is a decision of a three- judge bench, which had to be constituted because of difference of opinion between two Hon'ble Judges regarding the applicability of Section 50 of the 1985 Act. In the case of Gurjant @ Janta though there is passing reference of Pawan Kumar's case but there is nothing in the judgement to show why the principle of Pawan Kumar was not applicable to Gurjant @ Janta. In Gurjant @ Janta's case nothing was recovered from the person of Gurjant Singh. The tractor, stated to have been driven by his driver was carrying some contraband articles which were seized but this Gurjant was not there and as such there was no question of his personal search at that point of time.

In Shah Alam (Supra) there is reference of Dilip vs. State of M.P. (Supra) but the Court did not explain why the principle of Pawan Kumar's (Supra) was applicable. It was a case of 1994 prior to the Amendment Act of 2001 of the Act of 1985 and naturally this decision cannot apply to the present case. In Paramanand's case (Supra) there is just a reference of the decision of the Apex

Court in Pawan Kumar's case but the two judge bench did not state why the principle of Pawan Kumar's case was not applicable to that case. It is true that in Paramanand's case there was personal search and, thereafter, there was search of gunny bag.

A thin distinction was made in Paramanand's case as regards personal search and thereafter bag search. In Pawan Kumar's case there was personal search of the accused and thereafter the bag was searched. By the same judgement two Criminal Appeals being Criminal Appeal No. 222 of 1997 and Criminal Appeal No.75 of 2003 were disposed. In Criminal Appeal No. 75 of 2003 through notice the accused was communicated as to whether he wants to be searched by a Magistrate or Gazette Officer and the accused agreed to be searched by the police, like the present case before us. It may be reiterated that Pawan Kumar is a three judge bench decision and that in that decision (in Para 15) the Court considered nine judgments of the Apex Court apart from the decision of Baldev Singh (1999) 6 Supreme Court Cases 172, a Constitution Bench decision. In Pawan Kumar it was held (in Paragraph-16) that the observation of the Apex Court in Nandi Francis Nwazor vs. Union of India as reported in (1998) 8 SCC Page 534 (In paragraph-3) are mere obiter in nature. I am of the view that this decision in Francis Nwazor cannot override the three-bench decision of Pawan Kumar's case (supra).

Thus, I have practically covered most of the decisions of the Apex Court as regards Section 50. But before I go out of this paragraph I like to mention here the view expressed by the Apex Court in Baldev Singh case's (Supra) as I get from (Paragraph-10) of the judgment of the Apex Court in Yasihey Yobin vs. Department of Customs (Supra) wherein Megh Singh's case and Baldev Singh's case (both supra) was also relied upon. It was observed by the Court "where application of Section 50 is only in case of search of a person as contrasted to search of premises, vehicles or articles. But that in cases where the line of separation is thin and fine between search of a person and an artificial object, the test of inextricable connection is to be applied and then conclusion is to be reached as to whether the search was that of a person or not" (Paragraph 10). In that case it was also observed by the Apex Court, relying on another decision of the Apex Court as delivered in Nandi Francis Nwazor (Supra) "if the search is of a bag which is inextricably connected with the person, Section 50 of the Act will apply, and if it is no so connected, the provisions will not apply".

The next point is as to whether in view of the notification of 2013 the Act of 1985 cannot have its application or that the offence alleged is covered under the Drugs and Cosmetics Act 1940.

Section 8 (c) of the Act of 1985 runs thus " 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 authorization also in accordance with the terms and conditions of such licence, permit or authorization: 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]".

The answer to this question lies in the decision of the Apex Court in Union of India Vs. Sanjeeb v Deshpande, 2014 Cr.L.J. 4329. It is pertinent to mention here what is a psychotropic substance. It has been defined in Section 2 (xxiii) of the 1985 Act. Under that sub-section it 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.

Schedule to the Act of 1985 appended vide an
Amendment Act of 2001 has mentioned that

Dextropropoxyphene is a scheduled drug as per sub clauses (viiia) and (xxiiia) of Section 2 of the said Act of 1985. The commercial quantity of such drug is 500 grams. It may not be out of place to mention that the total recovery of such drug from the joint possession of these accused persons was 34.36 kgs., the breakup being from the petitioner no.1, 15 kg. and from petitioner no.2, 19.36 kg. which is grossly beyond the commercial quantity.

The preamble to Drugs and Cosmetics Act 1940 runs thus "An Act to regulate the import, manufacture, distribution and sale of drugs and cosmetics" whereas the preamble to Act of 1985 runs thus "An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances 1[to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances] and for matters connected therewith".

I like to quote Paragraph 35 of the decision of the Apex Court in Sanjeeb V. Deshpande (Supra) which runs thus "In view of our conclusion, the complete analysis of implication of Section 80 of the Act is not really called for in the instant case it is only required to be stated that essentially the drugs and cosmetics Act 1940 deals with various operations, manufacture, sale, purchase etc. of drugs generally whereas Narcotic Drugs and Psychotropic Substances Act of 1985 deals with a more specific class of drugs and, therefore, a special law on the subject. Further, the provision of the Act operate in addition to the provisions of 1940 Act".

I like to quote here Section 80 of the Act of 1985 which runs thus: "Application of the Drugs and Cosmetics Act, 1940, not barred-The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder". Taking the chance of repetition I like to say that, even if a person possesses the drug licence under the Drugs and Cosmetics Act 1940, there is no bar to prosecute him under 1985 Act when such huge quantity of narcotic drugs were found in his possession. The said Act specifically says that person possessing the drugs as mentioned in schedule and notifications cannot possess the same except according to the provisions of the said Act, rules and order 1993. Chapter

III of the said Act deals with prohibition, control and regulation it clearly says that no person shall produce, manufacture, possess, sale etc. except for medical or scientific purposes as we have already stated while quoting Section 8 (c) of the 1985 Act.

Thus, I am of the considered opinion that in view of Section 80 of the Act of 1985 a person can very well be prosecuted both under the said Act as well as under the Drugs and Cosmetics Act, 1940 simultaneously for violation of the provisions of those Acts. Merely because a person is prosecuted for violation of Drugs and Cosmetic Act that will not operate as a bar to prosecute him under the provision of the 1985 Act. The violation of one Act does not mean no violation of the other Act.

On reading and re-reading of Paragraph 36 of the decision of the Apex Court in KSL and Industries Limited (Supra) I am of the view that the Apex Court categorically held that there is no doubt that when an Act provides, as here, that its provision shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall coexist with other Acts. It is clearly not the intention of the legislature, in such a case, to anal or detract from the provisions of other laws. The decision cited above is not in conflict with the decision of Sanjeev V Deshpande (Supra), which is, however, just on the legislations as involved in this case.

Thus, to sum up, I am of the opinion that as in this case the personal search of the petitioners yielded no result but recoveries were made from the luggage of the petitioners there is no question of application of Section 50 of the said Act of 1985. It may also be mentioned that in the raiding team one officer in rank of Superintendent was present and everything was done in his presence and hence there was no question of non-compliance with Section 42 of the 1985 Act. Regarding the conflict between the Drugs and Cosmetics Act and this Act in question I am of the opinion that the Government Order in question cannot make the offence punishable under the Drugs and Cosmetics Act, 1940. I am also of the opinion that there is no conflict between the Drugs and Cosmetics Act 1940 and this Act of 1985 in view of Section 80 of this Act of 1985.

Thus, in view of the discussion so long made I am of the considered view that this is not a fit case to release the accused persons on bail in such a heinous case. I can safely conclude that there is no reasonable ground for believing that the accused persons are not guilty of such offence. Section 37 of the 1985 Act is a departure from the long established principle of innocence in favour of the accused until proved otherwise.

The ambit and scope of Section 37 of the 1985 Act was considered by the Hon'ble Apex Court in two decisions in Union of India Vs. Thamisharasi (1995 4SCC 190 : 1995 AIR SCW 2543) and Collector of Customs, New Delhi Vs. Ahmadalieva-Nodira (2004) 3SCC 549 : (AIR 2004 SC 3022).

Section 37 (1)(b)(ii) of the 1985 Act which is relevant for the purpose can be quoted thus:

"where the Public Prosecutor opposes the application, the Court is satisfied that there are

reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail".

The Apex Court held in the latter of the two judgments after taking note of the earlier decision (In paragraphs 6 and 7 of earlier decision) that the limitations on granting of bail come only when the question of granting bail arises on merit. The conditions as laid down in the Sub-section (1)(b)(ii) referred to above are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The Apex Court added the expression "Reasonable Grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence.

Unfortunately, this Petitioner No. 2 Md. Hafijuddin Khan was arrested on 21.01.2013 in connection with a case under Section 21/22 of the Act of 1985 and under Section 13 (b) of the Drugs and Cosmetics Act, 1940. Thus, such an accused who is in league with other petitioner has committed such an offence cannot be favoured with an order of bail.

Here both the accused persons are men of Manipur and chances of their absconsion cannot be ruled out. I do not like to take the chance of legal escape of the accused persons without facing the trial. It is a clear case for custody trial. I cannot ignore the legislative intent while granting bail in a case under the 1985 Act.

I am of further opinion that the defects in search and seizure and other technicalities in detection of the crime cannot be a ground for the release of the accused on bail. All these may be considered in a quashing proceeding and such issues are to be dealt with by the learned Trial Court on appreciation of evidence. All these cannot be a ground for release the accused on bail in an application under Section 439 of the Code of Criminal Procedure.

In this case the petitioners are also guilty of material suppression, which is itself sufficient to reject their bail prayer. They have stated in paragraph No. 1 of the petition that their prayer for bail was reject by this Hon'ble Court in CRM No. 4456 of 2014 as per order dated 16.04.2014, but their prayer for bail under Section 439 was also rejected in CRM No. 13385 of 2013.

In view of the discussion so long made I am of the opinion that the prayer for bail of both the accused persons is fit to be rejected and I do that by the exercising the discretion granted to this Court under Section 439 of the Code of Criminal Procedure.

However, the learned Trial Court is directed to expedite the trial.

(Indrajit Chatterjee, J.)