

THESE CRIMINAL PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT OF **ORDER ON REFERENCE** THIS DAY, **B.VEERAPPA J.**, MADE THE FOLLOWING:

## **ORDER ON REFERENCE**

### **I. Brief facts of the case**

Criminal Revision Petition No.623/2020 is arising out of the order passed by the trial Court dated 14.1.2020 rejecting the application filed by the petitioner under Section 451 r/w Section 457 of the Code of Criminal Procedure for release of the vehicle belonging to him, which was seized for the offence punishable under the provisions of Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('**NDPS Act**' for short). The learned Single Judge of this Court by the order dated 12.11.2020, has allowed the Criminal Revision Petition and set aside the order dated 14.1.2020 and directed the trial Court to release the seized vehicle to the interim custody of the petitioner on obtaining indemnity bond and two sureties and in accordance with law.

2. Subsequently another learned Single Judge of this Court in the case of **Zubaida -vs- State of Intelligence Officer, NCB** in Criminal Petition No.4792/2020 by the order dated 24.11.2020 has taken a different view holding that in view of the amended provisions of 52A of the NDPS Act, The Magistrate or Special Court has no jurisdiction to consider an application under Section 451, 452 or 457 of the Code of Criminal Procedure for granting interim custody or otherwise of the seized article to an applicant when such seizure has been made under the provisions of the NDPS Act and it is the duty of the DDC, which is the authority to grant interim custody of the seized vehicle, in view of the dictum of the Hon'ble Supreme Court in the case of **Union of India -vs- Mohanlal and another reported in (2016)3 SCC 379**.

3. In view of the order passed by the learned Single Judge of this Court in **Zubaida's case (supra)**, the learned HCGP filed I.A. No. 1/2020 in CrI.RP No.623/2020 under the provisions of Section 482 of the Code of Criminal Procedure to recall the order dated 12.11.2020, on the ground that the provisions of Section 52A of the NDPS Act and the notification issued by the Central Government in

January 2015 empower the Drug Disposal Committee ('DDC' for short) to dispose off seized narcotic drugs and psychotropic substances and conveyances under the NDPS Act. The learned Single Judge while rejecting the said application for recalling, has observed that Clause (2) of paragraph-4 of the notification issued by the Central Government runs counter to Sections 60 and 63 of the NDPS Act and further having regard to the provisions of the NDPS Act, the DDC has no independent power to entertain any application for release of the seized vehicle to the interim custody nor has it been entrusted with the jurisdiction to adjudicate the claim of the owner for release of the vehicle either under Section 52A of the NDPS Act or under the notification issued by the Central Government and these questions have to be decided by the Larger Bench.

4. In view of the conflicting orders by two learned Judges of this Court, the Hon'ble Chief Justice by a special order dated 13.1.2020, has referred this matter along with connected cases to this Bench for adjudication of the reference.

5. We have heard the learned counsel for the parties.

**II. Arguments advanced by Sri Sandesh J. Chouta, learned senior counsel for Sri Sunil, Kumar .S, learned counsel for the petitioner in CrI.P No.9778/2021**

6. Learned senior counsel for the petitioner contended that Criminal Petition No.9778/2021 is arising out of the order dated 5.5.2021 passed by the trial Court and by the impugned order, the trial Court relying upon the order passed by the learned Single Judge of this Court in **Zubaida's case (supra)**, has rejected the application filed under Section 451 r/w 457 of the Code of Criminal Procedure for release of interim custody of the vehicle to the lawful owner and the same is erroneous and contrary to the material on record and cannot be sustained. He would further contend that from the date of seizure, vehicle has been in custody of the Police and the vehicle is parked outside the Police Station, which is getting hampered by heavy rain and sunlight causing huge damage and if the same is continued, no purpose would be served and the applicant will suffer loss. He further contended that the trial Court rejected the application mainly relying upon the order passed by the learned Single Judge of this Court in **Zubaida's case (supra)**, but the provisions of Section 52A of the NDPS Act or the notification

issued by the Central Government dated 16.1.2015, has not restricted the Court to exercise its powers under Section 451 and 457 of the Code of Criminal Procedure to consider the application for interim custody of the vehicle. He would further contend that the provisions of Section 451 Code of Criminal Procedure deals with order for custody and disposal of property pending trial in certain cases. When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of. Section 457 of the Code of Criminal Procedure deals with procedure by Police upon seizure of property. Section 52A of the NDPS Act amended w.e.f. 29.5.1989 only deals with disposal of seized narcotic drugs and psychotropic substances.

7. The learned senior counsel for the petitioner further brought to the notice of the Court that by the Standing Order

No.1/89, the Central Government considered it necessary and expedient to determine the manner in which the narcotic drugs and psychotropic substances, as specified in the Notification No.4/89 dated 29.5.1989, which shall, as soon as may be after their seizure, be disposed of. Clause I of the standing order deals with drugs meant for disposal; Clause II deals with general procedure for sampling, storage etc.,; Clause III deals with receipt of drugs in godowns and procedure; Clause IV deals with action to be taken by Police and other empowered officers for pre-trial disposal; and Clause V deals with constitution and function of Drug Disposal Committee. Clause 5.6 prescribes that the Committee shall be empowered to order destruction of certain seized drugs. But, it does not deal with power of the DDC for interim custody of the vehicle.

8. The learned senior Counsel for petitioner would contend that in exercise of the powers conferred by the provisions of Section 52A of the NDPS Act, the Central Government issued the notification dated 16<sup>th</sup> January 2015 specifying as to how the narcotic drugs, psychotropic substances, controlled substances and

conveyances which shall, as soon as may be after their seizure, be disposed of, the officers who shall dispose them and the manner of their disposal. Clause-2 of the notification deals with items to be disposed of; Clause-3 relates to officers who shall initiate action for disposal; Clause-4 deals with manner of disposal; and Clause-5 relates to Drug Disposal Committee. As per Clause-6 of the notification, the functions of the DDC shall be to – (a) meet as frequently as possible and necessary; (b) conduct a detailed review of seized items pending disposal; (c) order disposal of seized items; and advise the respective investigation officers or supervisory officers on the steps to be initiated for expeditious disposal. Clause-7 of the notification deals with procedure to be followed by DDC with regard to disposal of seized items; Clause-8 deals with power of DDC for disposal of seized items mentioned therein; Clause-9 relates to mode of disposal of drugs; Clause-10 relates to intimation to Head of Department on destruction; Clause-11 relates preparation of certificate of destruction; Clause-12 relates to details of sale to be entered in godown register; and Clause-13 relates to communication of details of disposal of narcotic drugs etc., to Narcotics Control Bureau. Annexure 1 of the notification

refers to Inventory of seized Narcotic drugs, psychotropic substances, controlled substances and conveyances; Annexure 2 relates to application for disposal of seized narcotic drugs, psychotropic substances, controlled substances and conveyances under Section 52A(2) of the NDPS Act, 1985; and Annexure 3 relates to certificate by the Magistrate under sub-section (3) of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985. The notification does not empower the DDC to consider the application for interim release of the vehicle.

9. He further contended that very reading of Section 36C of the NDPS Act clearly depicts that the said section is applicable to the entire NDPS Act and not to Chapter IV alone, thereby any provision which is not specifically covered under the NDPS Act will then be covered under the provisions of the Code of Criminal Procedure. He would contend that Chapter V relates to procedure and Section 51 NDPS Act prescribes that the provisions of the Code of Criminal Procedure shall apply, in so far as they are not inconsistent with the provisions of the NDPS Act, to all warrants issued and arrests, searches and seizures made under the NDPS



Act. Section 52 of the NDPS Act deals with disposal of persons arrested and articles seized. He would further contend that section 52A concerns only with the disposal and not with the custody of articles. It only concerns the disposal of articles after drawing necessary inventories, photographs and list of samples that are duly certified by the Magistrate. This is for the purpose of treating the inventory, photographs & samples as primary evidence while trying the offences under the Act. Therefore, it is clear from the reading of Section 52A that it does not cover interim custody of any article. Since the provisions of Section 52A or any other provision under NDPS Act does not concern interim custody, then as per the provisions of Section 36C of the Act, the provisions of the Code of Criminal Procedure are made applicable and therefore whenever any person seeks interim custody of articles, then the same will have to be under Section 451/457 of the Code of Criminal Procedure.

10. He further contended that whenever the Legislature has not given any power to the Government to determine the procedure for considering applications for interim custody of the conveyances,

then the provisions of section 451/457 of the Code of Criminal Procedure would prevail since it is not inconsistent with the provisions of the NDPS Act and there is no provision in the NDPS Act to restrict the power of the Magistrate and Special court to release a vehicle to the interim custody. He further draw the attention of the Court as to how the word, 'disposal' used in Section 52A of the NDPS Act to be construed. A reading of Section 52A would clearly disclose that the object behind the section is for destruction or disposal. Destruction takes place when a Narcotic/Psychotropic substance is destroyed by incineration (by burning) or by way of disposal i.e, selling the same through the tender or auction.

11. He would contend that the notification dated 16.1.2015 issued by the Central Government, in exercise of the powers under Section 52A of the NDPS Act, does not contain any provision that concerns interim custody of conveyances. The notification contains in all 13 clauses. Clauses 1 to 4 are with regard to the procedure and power of the investigating agency with regard to disposal of articles and clauses 5 to 12 relate to procedure and power of the

DDC with regard to disposal/destruction of articles. Clause 13 is the need to inform the Narcotic Control Bureau the details of articles disposed. There are three annexures to the notification which stipulate the inventory to be drawn, the application to be filed before the Magistrate and the certificate of destruction. The entire object of the notification is to either dispose or destroy the drugs. Clause 9(1)(2)(4)(5)(a)(c)(d) concern disposal, while clause 9(5)(b)(6)(7) concern destruction. The only clause which has relevance to conveyances is clause 9(5)(e), which depicts that seized conveyances shall be sold off by way of tender or auction as determined by the DDC. The said clause does not concern interim custody and it only concerns disposal which is akin to Section 452 of the Code of Criminal Procedure. Needless to emphasize that this sale is post trial. Thereby, the notification dated 16.1.2015 or section 52A of the NDPS Act does not deal with interim custody of articles or conveyances.

12. The learned Senior Counsel for the petitioner further contended that in view of the provisions of Sections 36C and 52A of the NDPS Act and the notification dated 16.1.2015 issued by the

Central Government, it is only the provisions of the Code of Criminal Procedure, particularly Section 451 that apply when it comes to considering the interim custody of conveyances. The Legislature has intentionally not used the word, 'custody' under section 52A of the NDPS Act, as can be seen under Sections 451 and 457 of the Code of Criminal Procedure. Therefore, it is not desirable to afford an interpretation of including the word custody (interim or final) into the word disposal as contemplated under section 52A of the NDPS Act. He would further contend if the Legislature really has intention of granting power to an Officer (DDC), then such power would have been explicitly conferred in the section itself. Therefore, the power or jurisdiction cannot be conferred to an authority/officer, who is not vested with the same by the statute. He would further contend that the Hon'ble Supreme Court in the case of ***Union of India -vs- Mohan Lal*** reported in (2016)3 SCC 379, has reiterated the contents of the notification dated 16.1.2015 and has not recognized or conferred any power to any officer to consider interim custody of conveyances. Paragraphs 30 and 31 of the judgment is in conformity with the notification dated 16.1.2015 and the said

judgment has no application for the interim custody of the conveyances/vehicles.

13. He would further contend that Section 60 of the NDPS Act deals with liability of illicit drugs, substances, plants, articles and conveyances to confiscation; Section 61 deals with confiscation of goods used for concealing illicit drugs or substances; Section 62 deals with confiscation of sale proceeds of illicit drugs or substances; and Section 63 relates to procedure in making confiscations. The Drug Disposal Committee came into force in the year 1989 and admittedly, the Central Government has not produced any document before the Court as to how many applications were disposed of by the Drug Disposal Committee relating to release of the vehicles throughout India till today. Lastly, learned counsel would contend that Drug Disposal Committee has no independent power to entertain any application for release of the seized vehicle to the interim custody nor has it been entrusted with the jurisdiction to adjudicate the claim of the owner for release of the vehicle either under Section 52A of the NDPS Act or under the notification issued by the Central

Government. Therefore, he sought to answer the reference in favour of the petitioner holding that in the cases arising out of NDPS Act, the Magistrate/Special Court is conferred power/jurisdiction to consider the application for interim custody of conveyances/vehicle under Section 451 r/w Section 457 of the Code of Criminal Procedure and not the Drug Disposal Committee.

14. In support of his arguments, learned senior counsel for the petitioner referred to the following judgments:

1. Ashok Kumar -vs- State of Bihar and others – (2001)9 SCC 718 (para 2), with regard to release of vehicle during trial, in exercise of powers under Section 451 of the Code of Criminal Procedure by the Magistrate.
2. Sunderbhai Ambalal Desai -vs- State of Gujarat – (2002)10 SCC 283 (paragraphs 4,5,7,10, 15,16, 17 and 19), with regard to powers of the Magistrate under sections 451 and 457 of the Code of Criminal Procedure
3. Union of India -vs- Mohanlal and another - (2016)3 SCC 379, (paras 1,2,4), wherein at para 4 discussed with regard to seizure, storage, disposal/destruction etc., of drugs and the said judgment not considered with regard to interim custody of the vehicle.

4. Order passed by the learned Single Judge of this Court in Zubaida -vs- State of Intelligence Officer, NCB in Criminal Petition No.4792/2020 dated 24.11.2020, wherein the learned Single Judge of this Court has not considered the applicability of the provisions of the Code of Criminal Procedure, in view of the provisions of Section 36C of the NDPS Act etc.,
5. Order passed by the learned Single Judge of this Court in Crl.RP No.623/2020 dated 5.1.2021, rejecting the application for recalling holding that Magistrate/special court is the authority to release the interim custody and not DDC and the learned Single Judge has disagreed with the view taken in Zubaida's case.

**III. Arguments advanced by Sri P.P. Hegde, learned senior counsel for Smt. Rajeshwari .M, learned counsel for the petitioner in Crl.RP 824/2021**

15. Sri P.P. Hegde learned senior counsel for the petitioner while adopting the arguments of Sri Sandesh J. Chouta, learned senior counsel, has contended that the provisions of Section 451 of the Code of Criminal Procedure are applicable for the interim custody/release of vehicle by the learned Magistrate/Special Court

and not the Drug Disposal Committee. He would further contend that in view of the provisions of sub-section (2) of Section 52A of the NDPS Act, an application can be filed before the Magistrate and under sub-section (3), the Magistrate shall consider the application and pass appropriate orders in accordance with law. Therefore, the Magistrate/Special Court is conferred power/jurisdiction to release the vehicle under Section 451/457 of the Code of Criminal Procedure. He would further contend that Section 60 of the NDPS Act deals with liability of illicit drugs, substances, plants, articles and conveyances to confiscation and Section 61 of the NDPS Act deals with confiscation of goods used for concealing illicit drugs or substances. He further contended that Section 457 of the Code of Criminal Procedure relates to procedure by Police upon seizure of property and in view of the said provisions, the Magistrate only can consider the application for interim custody. He further contended that the provisions of Section 52A of the NDPS Act does not deal with interim custody of the vehicle and it only refers to disposal of seized narcotic drugs and psychotropic substances and therefore either under the provisions of Section 52A of the NDPS Act or the notification dated 16.1.2015 issued by the Central Government, in



exercise of the powers under Section 52A of the NDPS Act, Drug Disposal Committee is not empowered to release the vehicle and it is only the Magistrate/Special Court is conferred power/jurisdiction to consider the application for interim custody of the vehicle. Therefore, he sought to answer the reference holding that in the cases arising out of NDPS Act, the Magistrate/Special Court is conferred power/jurisdiction to consider the application for interim custody of conveyances/vehicle under Section 451 r/w Section 457 of the Code of Criminal Procedure and not the DDC.

16. In support of his contentions, learned senior counsel relied upon the following judgments:

- i) State of M.P. and others -vs- Madhukar Rao – (2008)14 SCC 624 (paras 16, 17, 18 and 22)
- ii) Order dated 5.1.2021 passed by the learned Single Judge of this Court in Crl.RP No.623/2020

**IV. Arguments advanced by Sri Maskoor Hashmi M.D.,  
learned counsel for the petitioner in Crl.RP No.824/2021**

17. Sri Maskoor Hashmi, learned counsel for petitioner while adopting the arguments of Sri Sandesh J. Chouta, learned senior

counsel, has contended that Section 4 of the Code of Criminal Procedure deals with trial of offences under the IPC and other laws and sub-section (1) prescribes that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained and as per sub-section (2), all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place or investigating, inquiring into, trying or otherwise dealing with such offences, which includes NDPS Act. He would further contend that there is no expression to release the seized vehicle to the interim custody by excluding the provisions of the Code of Criminal Procedure, in view of the provisions of Section 36C and 51 of the NDPS Act. He would further contend that the Hon'ble Supreme Court in the case of Union of India -vs- Mohanlal reported in (2016)3 SCC 379 has no occasion to consider the provisions of Section 60(3) and Section 63 of the NDPS Act, thereby the said judgment has no application to the facts and circumstances of the present reference. Therefore, he sought to answer the reference holding that the Magistrate/Special

Court is conferred power/jurisdiction to consider the application for interim custody of conveyances/vehicle under Section 451 r/w Section 457 of the Code of Criminal Procedure and not the DDC.

18. In support of his contentions, he relied upon the judgment of High Court of Chhattisgarh in the case of Tikeshwar Singh -vs- State of Chhattisgarh reported in 2020 SCC OnLine Chh 2473.

**V. Arguments advanced by Sri Mallanagouda H, learned counsel for the petitioner in Crl.P No.3627/2021**

19. Sri Mallanagouda, learned counsel while adopting the arguments of Sri Sandesh J. Chouta and Sri P.P. Hegde, learned senior counsel for the petitioner in the connected matters, has contended that the Hon'ble Supreme Court in the case of Union of India -vs- Mohanlal reported in (2016)3 SCC 379, has issued guidelines under paragraph 31.2 to take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs, conveyances etc., but till today the Central Government has not issued notification in that regard. He further contended that either

the provisions of section 52A of the NDPS Act or the notification issued thereunder dated 16.1.2015 does not provide any mechanism for grant of interim custody of the vehicle and same does not prohibit to entertain the application under sections 451 and 457 of the Code of Criminal Procedure for interim custody of the vehicle. Therefore, he sought to answer the reference holding that the Magistrate/Special Court is conferred power/jurisdiction to consider the application for interim custody of conveyances/vehicle under Section 451 r/w Section 457 of the Code of Criminal Procedure and not the DDC.

**VI. Arguments advanced by learned counsel for the petitioner/s in CrI.RP No.623/2020, CrI.P No.3571/2021 and CrI.P No.25/2021**

20. Sri Sagar G. Nahar, learned counsel for the petitioner in CrI.RP No.623/2020; Sri Gopal K.B., learned counsel for the petitioner in CrI.P No.3571/2021; and Sri Umesh for Sri R.B. Deshpande, learned counsel for the petitioner in CrI.P No.25/2021, while adopting the arguments of Sri Sandesh J. Chouta, learned senior counsel for the petitioner in the connected matter, has

contended that either the provisions of section 52A of the NDPS Act or the notification issued thereunder dated 16.1.2015 does not provide any mechanism for grant of interim custody of the vehicle and same does not prohibit to entertain the application under sections 451 and 457 of the Code of Criminal Procedure for interim custody of the vehicle. Therefore, they sought to answer the reference holding that the Magistrate/Special Court is conferred power/jurisdiction to consider the application for interim custody of conveyances/vehicle under Section 451 r/w Section 457 of the Code of Criminal Procedure and not the DDC.

**VII. Arguments advanced by Sri Madhukar Deshpande, learned counsel for the respondent in Criminal Petition No.2296/2021**

21. Per contra, Sri Madhukar Deshpande, learned counsel for respondent in Criminal Petition No.2296/2021 on behalf of Narcotics Control Bureau assisted the Court on the point of reference and contended that section 52-A of the NDPS Act came to be inserted by Act 2 of 1989 w.e.f. 29.5.1989. In the statement of objects and reasons of Amendment Act 2 of 1989, it is specifically mentioned that amendment inter alia provides for pre-trial disposal. He would

further contend that the word, 'conveyance' is defined under Section 2(viii) of the NDPS Act and it means, a conveyance of any description whatsoever and includes any aircraft, vehicle or vessel.

22. He would further contend that in the notification dated 16.1.2015, clause-4 relates to manner of disposal. Sub-clause (i) of Clause-4 prescribes that where any narcotic drug, psychotropic substance, controlled substance or conveyance has been seized and forwarded to the officer-in-charge of the nearest Police Station or to the Officer empowered under Section 53 of the said Act or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances as per Annexure 1 to the notification and apply to any Magistrate under sub-section (2) of Section 52-A of the said Act as per Annexure 2 to the notification within thirty days from the date of receipt of chemical analysis report of seized narcotic drugs, psychotropic substances or controlled substances. The sub-clause (ii) of Clause-4 of the notification depicts that after the Magistrate allows the application under sub-section (3) of Section 52A of the said Act, the Officer mentioned in sub-paragraph (1) shall preserve

the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the seized items to the Chairman of the DDC for a decision by the Committee on the disposal, and the aforesaid officer shall send a copy of the details along with the items seized to the officer-in-charge of the godown.

23. He further contended that in terms of Section 52A of the NDPS Act any disposal of any seized items would have to be done by DDC. He further submits that though initially there was no provision under the NDPS Act for disposal of the seized item, Section 52A was introduced in the year 1989 by way of amendment which was further amended in the year 2014 by including the word, 'conveyance', thereby making applicable the said provisions to the conveyance seized on account of any offence committed under the NDPS Act.

24. Learned counsel relying on the judgment of the Hon'ble Supreme Court in the case of **Union of India -vs- Mohanlal and another** [(2016)3 SCC 379] (paragraphs - 15, 20 22 27 28 29 and 30) submits that all disposal rights are vested with the DDC. He

also relied on the judgment of Division Bench of Kerala High Court in the case of **Shajahan -vs- Inspector of Excise and others** reported in 2019 SCC OnLine Ker 3685, wherein Kerala High Court relying on the judgment in the case of **Mohanlal stated supra**, has categorically held that in view of the said decision, the jurisdiction of the Magistrate to consider an application under Section 451 of Cr.PC stands denied. Therefore, no such application could be considered by the Magistrate or by the Special Court and jurisdiction is vested solely and exclusively with the DDC. Thus, he contended that in view of the amended provisions of Section 52A of the NDPS Act and the notification dated 16.1.2015, DDC is empowered to consider the application for release of the conveyance/vehicle for interim custody and not the Magistrate/Special Court under section 451/457 of the Code of Criminal Procedure. Thereby, he supported the judgment of the learned Single Judge of this Court in the case of *Zubaida* in CrI.P No.4792/20. Therefore, he sought to answer the reference holding that Drug Disposal Committee constituted under the notification dated 16<sup>th</sup> January 2015 issued by the Central Government under Section 52-A of the NDPS Act, is conferred power/jurisdiction to



consider the application for interim custody of conveyances/vehicle and not the Magistrate/Special Court under *Section 451 r/w Section 457* of the Code of Criminal Procedure.

25. In support of his contentions, learned counsel relied upon the following judgments:

- i) Union of India and another -vs- Paras laminates (P) Ltd., reported in (1990) 4 SCC 453 para 8;
- ii) Savitri -vs- Govind Singh Rawat reported in (1985)4 SCC 337 para 8 ;
- iii) Directorate of Revenue Intelligence -vs- PRK Diamonds Pvt. Ltd. and Another reported in 2019 SCC OnLine Del. 8226 paras 32, 47 and 55; and
- iv) Subair S. -vs- M.S. Manoharan reported in 2020 SCC online Kerala 1994

**VIII. Arguments advanced by Sri V.S. Hegde, learned SPP-II along with Smt. K.C. Yashoda, learned HCGP in CrI.P No.3571/2021 and connected matters**

26. Sri V.S. Hegde, learned SPP -II along with Smt. K.C. Yashoda, learned HCGP contended that NDPS Act is a special

enactment and it prevails over the Code of Criminal Procedure, which is a general Act. In view of the amendment of Section 52A of the NDPS Act, all the drugs and vehicles are included. He would further contend that Section 2(viii) of the NDPS Act refers to conveyance and it means a conveyance of any description whatsoever and includes any aircraft, vehicle or vessel. He would further contend that in terms of Section 52A of the NDPS Act any disposal of any seized items would have to be done by DDC. He further contended that though initially there was no provision under the NDPS Act for disposal of the seized item, Section 52A was introduced in the year 1989 by way of amendment which was further amended in the year 2014 by including the word, 'conveyance', thereby making applicable the said provisions to the conveyance seized on account of any offence committed under the NDPS Act.

27. He would further contend that the dictum of the Hon'ble Supreme Court in the case of **Mohanlal** stated supra (paras 27, 28 29 and 30) is silent about the interim order. He would further contend that as per the judgment in the case of **Zubaida** stated

supra, Magistrate/Special Court has no power to receive any application under Sections 451, 452 or 457 of Cr.PC and release any item seized under the NDPS Act and the said application would have to be filed before the DDC, which shall consider the application. But, in CrI.RP No.623/2020, the learned Single Judge of this Court observed that the notification issued under Section 52A of the NDPS Act cannot take away the jurisdiction of the Magistrate or the Special Court to decide the question as to the entitlement of the claimant for the interim custody of the vehicle. The only point to be decided in the present reference is which of the two judgments of the learned single Judges to be followed.

28. He would further contend that the Hon'ble Supreme Court in the case of **Sarabjeet Singh Mokha -vs- District Magistrate, Jabalpur and others** reported in 2021 SCC OnLine SC 1019 (para 21), has held that Article 22(5) of the Constitution mandates that (i) the authority making the order shall "as soon as may be" communicate the grounds on which the order has been made to the person detained; and (ii) the detaining authority shall afford to the person detained "the earliest opportunity of making a

representation against the order". Clause 5 of Article 22 incorporates a dual requirement: first of requiring the detaining authority to communicate the grounds of detention as soon as may be; and second, of affording to the detenu "an earliest opportunity" of making a representation. The expression, "as soon as may be, of the grounds of detention is intended to inform the detenu of the basis on which the order of detention has been made. The expression "as soon as may be" imports a requirement of immediately.

29. He would further contend that Annexure-2 of the notification dated 16.1.2015 relates to application for disposal of seized narcotic drugs, psychotropic substances, controlled substances and conveyances under Section 52A(2) of the NDPS Act. He contended that in view of the amended provisions of Section 52A of the NDPS and the notification dated 16.1.2015, DDC is empowered to consider the application for release of the conveyance/vehicle for interim custody and not the Magistrate/ Special Court under *Section 451 r/w Section 457* of the Code of Criminal Procedure.

30. In support of his contentions, he relied upon the following judgments:

- i) Sarabjeet Singh Mokha -vs- District Magistrate, Jabalpur and others - 2021 SCC OnLine SC 1019 (para 21) (para 21),
- ii) Suresh Nanda -vs- Central Bureau of Investigation - (2008)3 SCC 674 .. paras 9,10, 11 and 18
- iii) Chief Information Commissioner and another -vs- State of Nanipur and Another - (2011)15 SCC 1 .. paras 40, 44, 45, 46 and 47.

**IX - Point for determination in the reference**

31. In view of the aforesaid rival contentions, the only point that would arise for our consideration in the present reference is:

*"Whether the learned Magistrate/Special Court is conferred power/jurisdiction in cases arising out of NDPS Act to consider the application for interim custody of conveyance/vehicle under Section 451 r/w 457 of the Code of Criminal Procedure?*

*or*

*Whether such powers are conferred on the Drug Disposal Committee (DDC) constituted under the*

*Notification dated 16<sup>th</sup> January 2015 issued by the Central Government under Section 52A of the NDPS Act, 1985 ?"*

**X - Consideration**

32. We have given our thoughtful consideration to the arguments advanced by the learned Counsel for the parties and perused the entire material on record including the reference made by the Hon'ble Chief Justice carefully.

33. The main contention of the learned Counsel for the petitioners in these petitions is that in view of the provisions of Section 36C, 51, 52, 52A, 60(3) and 63 of the NDPS Act, who is only the learned Magistrate or the Special Court under the NDPS Act, who has the authority to consider the application for interim custody of conveyance/vehicle under the provisions of Sections 451 and 457 of Cr.P.C., and there is no provision in the NDPS Act specifying to consider the application for interim custody during the pendency, as the trial was pending disposal of the case and it is also their contention that there is no provision under the NDPS Act to restrict the power of the learned Magistrate or Special Court to release the vehicle for interim custody. But it is the contention of

the respondents that in view of the provisions of Section 52A of the NDPS Act which came to be inserted by Act No.2 of 1989 with effect from 29.5.1989; and the statement of objects and reasons for amendment Act 2 of 1989 and the Notification, dated 16.1.2015 issued by the Central Government, it is only the Drug Disposal Committee, who has to take a decision to dispose of the seized Narcotic Drugs and Psychotropic and Controlled Substances and Conveyances as per Annexure-1 of the Notification and the learned Magistrate or Special Court has no power to consider the application for release of interim custody of the vehicle, which aspect has been considered by the Hon'ble Supreme Court in the case of ***Union of India -vs- Mohanlal and Another reported in (2016) 3 SCC 379.***

34. The only question that arises in the present petitions is that in view of the provisions of Section 52A of the NDPS Act and the Notification dated 16.1.2015, whether the learned Magistrate/Special Court has the authority under the provisions of Sections 451 and 457 of Cr.P.C., or Drug Disposal Committee to release the vehicle to consider the application for interim custody of the vehicle/conveyance. In view of the intention of amendment of

Section 52A of the NDPS Act to finally dispose of the seized items including conveyances, question of filing representation or application before the Drug Disposal Committee would not arise. If we analyse the amendment in true spirit, power given to the Drug Disposal Committee either under the provisions of Section 52A of the NDPS Act or issuance of Notification, dated 16<sup>th</sup> January, 2015 for disposal of items seized finally, the power of the learned Magistrate/Special Court to consider the application for release of the vehicle for interim custody would be subject to merits of the case to be decided by the Drug Disposal Committee and the amendment of Section 52A of the NDPS Act or the issuance of notification stated supra does not take away the power of the learned Magistrate.

35. Considering the provisions of Sections 451, 452 and 475 of Cr.P.C., and Sections 36, 51, 60(3) and 63 of the NDPS Act, we find no distinction between the vehicles seized either under the Scheme of Cr.P.C., or NDPS Act. Even the NDPS Act, does not provide a provision debarring the release of interim custody of the vehicle. As already stated supra, the provisions of Section 451



Cr.P.C., is not in consistent with the provisions of NDPS Act applicable to the vehicle seized under the NDPS Act as well. Thereby the vehicle used for transporting the Narcotic Drugs and Psychotropic Substances can also be released for interim custody invoking the provisions of Section 451 of Cr.P.C.

36. The notification, dated 16.1.2015, issued under Section 52A of the NDPS Act, categorically provides the manner in which the drug has to be disposed of by the officer in-charge, who shall after preparation of the inventory of seized narcotic drugs and psychotropic substances, controlled substances or conveyances as per Annexure-1 and shall apply to the Magistrate under Section 52A of the NDPS Act as per Clause (2) to the said notification, within 30 days from the date of receipt of chemical analysis report of seized substances. Thereby Clause-4 of the said notification provides manner of disposal of drugs as under:

*"4. Manner of disposal.-(1) Where any narcotic drug, psychotropic substance, controlled substance or conveyance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under*

*section 53 of the said Act or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances as per Annexure 1 to this notification and apply to any Magistrate under sub-section (2) of section 52A of the said Act as per Annexure 2 to this notification within thirty days from the date of receipt of chemical analysis report of seized narcotic drugs, psychotropic substances or controlled substances.*

*(2) After the Magistrate allows the application under sub-section (3) of section 52A of the said Act, the officer mentioned in sub-paragraph (1) shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the seized items to the Chairman of the Drugs Disposal Committee for a decision by the Committee on the disposal, and the aforesaid officer shall send a copy of the details along with the items seized to the officer-in-charge of the godown.*

37. Initially, the Central Government by Standing Order No.1 of 1989 dated 13.6.1989 in exercise of powers conferred under the

provisions of Section 52A of the NDPS Act specified disposal of drugs having regard to their hazardous nature, vulnerability to theft, substitution and constraints of proper storage space. In the very notification, apart from declaring Drugs means for Disposal, it has also prescribed General Procedure for Sampling, Storage, Receipt of Drugs in Godowns and Procedure thereof, Actions to be taken by Police and other Empowered Officers for Pre-trial disposal, Constitution and Functions of Drug Disposal Committee, etc. Subsequently, the Central Government superseding the said notification issued another notification dated 10.5.2007 under the provisions of Section 52A of the NDPS Act partly modifying the earlier notification stating that 'except as respects things done or omitted to be done before such super session the Central Government, having regard to the hazardous nature of narcotic drugs or psychotropic substances, their the vulnerability to theft, substitution, and constraints of proper storage space hereby, specified the narcotic drugs and psychotropic substances which can, as soon as may be after their seizure, be disposed of, the officers, who can so dispose them of and the manner in which they can be

disposed of. Clause-4, 4.1, 4.2, 4.3, 4.4 of the said Notification reads as under:

*"4. Manner of disposal.-(1) Where any narcotic drug, or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53 of the Act or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs, psychotropic substances, as per Annexure 1 to this notification and apply to any Magistrate under sub-section (2) of section 52A of the said Act as per Annexure 2 to this notification.*

*(2) After the Magistrate allows the application under sub-section (3) of section 52A the officer mentioned in clause (1) above shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the Drug consignments to the Chairman of the Drug Disposal Committee for a decision by the Committee on the disposal. The officer shall send a copy of the details along with the Drug*

*consignments to the officer-in-charge of the godown.*

*4.1. Drug Disposal Committee.- The Head of the Department of each Central and State drug law enforcement agency shall constitute one or more Drug Disposal Committees comprising three Members each. Each such committee shall be headed by an officer not below the rank of Superintendent of Police, Joint Commissioner of Customs and Central Excise, Joint Director of Directorate of Revenue Intelligence or officers of equal lent rank. The Committee shall be directly responsible to the Head of the Department.*

*4.1.1. Functions.- The functions of the Drug Disposal Committee will be to-*

- (a) meet as frequently as possible and necessary;*
- (b) conduct a detailed review of Drug pending disposal;*
- (c) order disposal of Drug; and*
- (d) advise the respective investigation officers /supervisory officers on the steps to be initiated for expeditious disposal.*

*4.1.2. Procedure to be followed by the Committee with regard to the disposal of Drugs.- (1) The officer-in-charge of godown shall prepare a list of all Drug consignments that have been certified under section 52A of the Act to having become ripe for disposal and submit it to the Chairman of the concerned Drug Disposal Committee. After examining the list and satisfying that the drugs mentioned therein are fit for disposal and are no longer required for legal proceedings and that the approval of the Court has been obtained for the purpose the members of the respective Drug Disposal Committee shall endorse necessary certificates to this effect. The Committee shall thereafter physically examine and verify the weight and other details of each of the Drug consignments with reference to the seizure report, report of chemical analysis and any other documents, and record its findings in each case.*

*4.1.3. Power of Committee for disposal of seized Drugs- The Committee can order disposal of Drug consignments up to the quantity or value indicated in the Table 1 below-*

*Table1: Quantities and values up to which Drug Disposal Committees can order disposal of drug consignments.*

<i>Name of Drug</i>	<i>Quantity per consignment</i>
<i>1.Heroin</i>	<i>5 kg</i>
<i>2. Hashish (Charas)</i>	<i>100 kg</i>
<i>3. Hashish Oil</i>	<i>20 kg</i>
<i>4. Ganja</i>	<i>1000 kg</i>
<i>5.Cocaine</i>	<i>2 kg</i>
<i>6. Mandrax</i>	<i>3000 kg</i>
<i>7.Poppystraw</i>	<i>Up to 10 MT.</i>
<i>8.Other drugs</i>	<i>Up to value of Rs. 5 lakhs.</i>

*Provided that if the consignments are larger in quantity or higher value than those indicated in the Table. 1, the Drug Disposal Committee shall send its recommendations to the Head of the Department who can order their disposal by a high level Drug Disposal Committee specially constituted for this purpose.*

#### *4.2. Mode of disposal of drugs.-*

*(i) Opium, morphine, codeine and the baine shall be disposed of by transferring to the Government Opium and Alkaloid Works under the Chief Controller of Factories.*

*(ii) In case of drugs other than the drugs mentioned in Clause (i), the Chief Controller of Factories shall be intimated by the fastest means of communication available, the details of the drug consignments that are ready for disposal.*

*(iii) The Chief Controller of Factories shall indicate within fifteen days of the date of receipt of the communication, the quantities of drugs, if any, that are required by him to supply as samples under rule 67B.*

*(iv) Such quantities of drugs if any, as required by the Chief Controller of Factories under Clause (iii) shall be transferred to him and the remaining quantities of drugs shall be destroyed as per the procedure outlines in para 4.1.2.*

*(v) Destruction shall be by incineration in incinerators fitted with appropriate air pollution control devices, which comply with emission standards. Such incineration may only be done in places where adequate facilities and security arrangements exist. In order to ensure that such incineration may not be a health hazard or polluting, consent of the State Pollution Control Board or Pollution Control Committee, as the case*



*may be, should be obtained. Destruction shall be carried out at the presence of the Members of the Drug Disposal Committee.*

*4.3 Intimation to Head of Department on destruction.- The Disposal Committee shall intimate the Head of the Department regarding the programme of destruction at least fifteen days in advance so that, in case he deems fit, he may either himself conduct surprise checks or depute an officer for conducting such surprise checks. After every destruction operation, the Drug Disposal Committee shall submit to the Head of the Department a report giving details of destruction.*

*4.4 Certificate of destruction.- A certificate of destruction (in triplicate) containing all the relevant data like godown entry number, gross and net weight of the items seized, etc., shall be prepared and signed by the Chairman and Members of the Drug Disposal Committee as per format at Annexure 3. The original copy shall be pasted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy shall be kept by the Drug Disposal*

*Committee. Details of disposal of drugs shall be reported to the Narcotics Control Bureau in the Monthly Master Reports."*

The said provision also makes it clear that no direct authority is given to the Magistrate and the duty of the Drug Disposal Committee is only to dispose of any Narcotic Drugs, Psychotropic Substances and Conveyances seized, but there is no specific reference available for disposal of conveyance (vehicle) except to include the word 'conveyance'. That perhaps be the reason why the Special Court has refused to release the vehicle in the present petitions which is impugned before the learned Single Judges.

38. On careful reading of the notification dated 16.1.2015, it would appear that the Drug Disposal Committee has no other power except to act in the mode as prescribed for disposal in Clause-9(5)(e) which reads as under:

*"(e) seized conveyances shall be sold off by way of tender or auction as determined by the Drug Disposal Committee."*

which means, such disposal only be possible after the confiscation proceeding is complete and without confiscation, the disposal of the seized conveyance within the scheme of the NDPS Act, 1985 cannot be visualized and as such, the ancillary question that emerges is that whether the said notification, has provided a mechanism for disposal without confiscation in view of the provisions of Section 60 (1), (2) and (3) of the NDPS Act. The provision of Section 60(3) of the said Act was introduced by the Legislature in order to ensure protection of interest of an innocent owner before confiscating his vehicle. The procedure of confiscation has been made under Section 60(3) of the said Act which provides that in the trial of offences under the NDPS Act, whether the accused is convicted or acquitted or discharged, the Special Court shall decide whether any article or thing seized under this act is liable for confiscation under Sections 60, 61 or 62 of the NDPS Act and if it decides that the seized articles or things are liable to be confiscated, it may order confiscation accordingly. The procedure for confiscation has been further elaborated under sub-Section (2) of Section 63 of the NDPS Act. A substantive reading of Section 63 read with Section 60(3) of the NDPS Act would provide that, until the trial is over, the

confiscation proceeding cannot be initiated. A conjoint reading of provisos of Sub-sections (1), (2) and (3) of Section 63 would certainly allow a prudent person to infer that immediate disposal would mean the disposal after expiry of one month and that would apply to articles or things other than the narcotic drugs, psychotropic substance, controlled substances, the opium poppy, coca plant or cannabis plant which are liable to speedy and natural decay. If the Court is of the opinion that, sale would be beneficial for its owner it may any time direct it to be sold. In that event, the Drug Disposal Committee shall make all arrangements for sale of those things or articles.

39. Though the learned Counsel for the respondents contended that the issue under reference is no more *res integra* in view of the dictum of the Hon'ble Supreme Court in the case of ***Union of India -vs- Mohanlal and Another reported in (2016)3 SCC 379 decided on 28<sup>th</sup> January, 2016,*** on going through the judgment, it clearly indicates that the Hon'ble Supreme Court has nodoubt approved the procedure as contemplated in the Notification dated 16.1.2015, but had no occasion either to deal with the

provisions of Sections 36, 51, 60(3) and 63 of the NDPS Act or to consider the application for release of the interim custody of the vehicle seized. Though it was held that no sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, for seizure and sampling. However, under the provisions of Section 52-A or Notification dated 16.1.2015, the Legislature has not given any power to the Drug Disposal Committee to decide the claim of a person, who claims conveyances (vehicle) seized under the NDPS Act for illegal transportation of any Narcotic drugs and psychotropic and controlled substances as has been given by the Legislature to the Special Court under Sections 60 and 63 of the NDPS Act where a person claims for release of interim custody of the vehicle seized under the provisions of NDPS Act, no provision is provided in the notification to decide the claim. Thereby the provisions of Sections

60 and 63 of the NDPS Act would prevail only on the provisions of the notification issued by the Central Government under Section 52-A of the NDPS Act. The provisions of Sections 60 and 63 of the said Act envisages that seized conveyance cannot be disposed of without deciding the claim of the person, who claims that conveyance and the power to decide the claim of such person is only given by the Legislature to the Special Court. Under the provisions of Sections 52 and 52-A of the NDPS Act, the word 'confiscation' is not used because the trial is yet to come and it is discretion of the trial Court to confiscate or not to confiscate the conveyance seized under the NDPS Act as per the legal provisions. Thereby the Drug Disposal Committee cannot dispose of the vehicle seized unless the claim of the person is decided by the concerned Magistrate or Special Court and disposal of the conveyance in terms of Clause-9(5)(e) of the notification as already stated supra by the Committee is only possible after confiscation proceeding is completed and thereby, the contention raised by the learned Counsel for the respondents with regard to dictum of the Hon'ble Supreme Court in the case of *Mohan Lal* has no application to the facts and circumstances of the present petitions.

40. On careful perusal of the provisions of the NDPS act and the notification dated 16.1.2015, there is no provision restricting the power of the Magistrate or the Special Court to release the vehicle for interim custody during the pendency of the trial. For the sake of arguments assuming that, if that was the intention of the Legislature while enacting the provisions of Section 52A of the NDPS Act with effect from 29.5.1989, either the Act or the Notification ought to have provided an Appellant Authority to the persons, who are aggrieved by any orders passed by the Drug Disposal Committee or for rejection of the application or allowing of the application for release of the vehicle. Thereby, it is clear that it is only the Court of Magistrate or Special Court, who is authorised to consider the application for release of interim custody of the vehicle (conveyance) and not the Drug Disposal Committee. If that is the case of the respondents, even though the first notification issued on 13.6.1989 introducing the provision of Section 52A of the NDPS Act, specified the drugs for disposal having regard to hazardous nature, vulnerability to threat substitution and constraints, etc., even after the lapse of 26 years of issuance of first notification and 7 years of the last notification dated

16.1.2015, introducing conveyance by amendment Act No.16 of 2014 with effect from 1.12.2014 even after eight years, the respondents have not produced any material before this Court as to how many applications for release of interim custody of the vehicles have been considered and disposed of by the Drug Disposal Committee throughout India. Only after the order is passed by the Hon'ble Supreme Court in the case of *Mohanlal* on 28<sup>th</sup> January, 2016 and after the decision taken by the learned Single Judges of this Court in the case of *Zubaida*, the learned Judges of the Special Courts have started rejecting the application for release of interim custody of the vehicle under the provisions of Sections 451 and 457 of Cr.P.C. All along, almost all the Courts in India were considering the applications for interim custody under the provisions of Section 451 of Cr.P.C., for release of the vehicles except the learned Single Judge of this Court in the case of *Zubaida* and the Division Bench of Kerala High Court in the case of *Shajahan reported in 2019 SCC Online Ker. 3685* and in the case of ***Smart Logistics -vs- State of Kerala reported in 2020 SCC Online Ker. 3760*** by the learned Single Judge holding that the Drug Disposal Committee is the authority to consider such application for interim custody of the



seized vehicle relying upon the dictum of the Hon'ble Supreme Court in the case of *Mohanlal*.

41. In order to determine the reference referred to this Court, it is relevant to consider the provision of Section 51 of the NDPS Act, which reads as under:

*"51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures:- The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."*

42. On careful perusal of the said provision it clearly indicates that seizures of any article or things, the provisions of the Code of Criminal Procedure shall apply , if they are not inconsistent with the provisions of the NDPS Act. As already stated supra, on thorough perusal of the various provisions of the NDPS Act, we find there is no specific provisions debarring the release of the vehicle seized under the Act for interim custody. When the provisions of Section 451 of Cr.P.C., is found not inconsistent with any specific

provisions of the NDPS Act, the same will have to be applied as mandated under Section 51 of the said Act.

43. The Hon'ble Supreme Court in the case of ***Sunderbhai Ambalal Desai -vs- State of Gujarath reported in (2002) 10 SCC 283*** where a vehicle used for committing rape and murder was being released in exercise of powers under Section 451 Cr.P.C., holding that it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time, which can be done pending hearing of applications for return of such vehicles and at paragraphs-19 and 20, it has been held as under:

*"19. For articles such as seized liquor also, prompt action should be taken in disposing of it after preparing necessary panchnama. If sample is required to be taken, sample may be kept properly after sending it to the Chemical Analyser, if required. But in no case, large quantity of liquor should be stored at the police station. No purpose is served by such storing.*

*20. Similarly for the narcotic drugs also, for its identification, procedure under Section 451 CrPC should be followed of recording evidence and disposal. Its identity could be on the basis of evidence recorded by the Magistrate. Samples also should be sent immediately to the Chemical Analyser so that subsequently, a contention may not be raised that the article which was seized was not the same."*

44. The provisions of Section 36(c) of the NDPS Act was inserted by Act No.2 of 1989 with effect from 29.5.1989 which reads as under:

*"Section 36A. Offences triable by Special Courts.*

*[36A. Offences triable by Special Courts.-- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),*

*(a) xxxxx*

*(b) xxxxx*

*(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under*

*section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;*

*(d) xxxx"*

On the same under the same Act, provisions of Section 52A of the NDPS Act came to be inserted.

45. On careful perusal of the said provision makes it clear that the provisions of the Code of Criminal Procedure shall apply to the proceedings before the Special Court, who shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor. 'Save as otherwise provided in this Act'.

46. Further the provisions of Sections 60(3) and 63 of the NDPS Act are relevant to determine the issue involved in the present petitions which read as follows:

*" 60(3) "Liability of illicit drugs, substance, plants, articles and conveyance to confiscation:*

(1) .....

(2) .....

(3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance (or controlled substance) or any article liable to confiscation under sub-section (1) or sub section (2) shall be liable to confiscation unless the owner of the animal or conveyance of the owner himself, his agent, if any, and the person in charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use.

63. Procedure in making confiscations.—

(1) In the trial of offences under this Act, whether the accused is convicted or acquitted or discharged, the court shall decide whether any article or thing seized under this Act is liable to confiscation under section 60 or section 61 or section 62 and, if it decides that the article is so liable, it may order confiscation accordingly.

(2) Where any article or thing seized under this Act appears to be liable to confiscation under section 60 or section 61 or section 62, but the

*person who committed the offence in connection therewith is not known or cannot be found, the court may inquire into and decide such liability, and may order confiscation accordingly: Provided that no order of confiscation of an article or thing shall be made until the expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence, if any, which he produces in respect of his claim: Provided further that if any such article or thing, other than a narcotic drug, psychotropic substance, 1[controlled substance,] the opium poppy, coca plant or cannabis plant is liable to speedy and natural decay, or if the court is of opinion that its sale would be for the benefit of its owner, it may at any time direct it to be sold; and the provisions of this sub-section shall, as nearly as may be practicable, apply to the net proceeds of the sale."*

On careful reading of the said Sections, it makes it clear that a conveyance (vehicle) seized under the NDPS Act shall be liable to confiscation only when the owner of the conveyance, who was given an opportunity by the Court could not prove that the conveyance was used without his knowledge or connivance. The Court will have

*to decide whether a vehicle seized under the NDPS Act is liable to confiscation only on conclusion of the trial. The trial Court or the Special Court has to take an independent decision on the question of confiscation irrespective of the conviction or acquittal or discharge recorded by it. But, at any rate, the trial Court/Special Court is not supposed to pass any order of confiscation before the expiry of one month from the date of seizure or without affording an opportunity to the claimant. Thereby the Special Court has to take a decision as to whether a vehicle is liable to confiscation only on conclusion of the trial. A vehicle seized under the NDPS Act cannot be kept idle to the disadvantage of everyone concerned, till the order of confiscation is passed on conclusion of trial.*

47. In the peculiar facts and circumstances of the present case, we are of the considered opinion, that we have no hesitation in holding that there is no provision under the NDPS Act debarring release of the vehicle for interim custody. The provisions of Section 451 of Cr.P.C., as already stated supra, is found not inconsistent with the provisions of the NDPS Act and is applicable to the vehicle seized under the NDPS Act as well. Thereby, the law

laid down by the Hon'ble Supreme Court in *Sunderbhai Ambalal Desai's* case stated supra will apply to the vehicles seized under the NDPS Act as well. Any contrary view taken by the Courts of law would be against the interest of the owner of the vehicles, the public at large and the State.

48. By virtue of Section 36-C of the NDPS Act, "Save as otherwise provided in this Act", the provisions of the Cr.P.C. have been made applicable to the Special Court constituted under the provisions of the NDPS Act by Amendment Act No.2 of 1989 with effect from 29.5.1989. "Save as otherwise provided in the Act", employed in Section 36-C of the NDPS Act, is indicative of/reflection of the word "exception" intended to exclude some provisions of the Cr.P.C. like Section 360 Cr.P.C. etc., which have been expressively excluded by the NDPS Act by Sections 32A and 33 of the NDPS Act. As such, the above stated phrase has qualified the operation of the Cr.P.C. in the proceedings before the Special Court to the extent provided in the NDPS Act. Once the Code of Criminal Procedure has been made applicable, the provisions of the Cr.P.C. contained in Sections 451 and 457 of the Cr.P.C. would automatically be



attracted. As such, with effect from 29.5.1989, the Cr.P.C. as a whole, subject to the exception craved out as noticed herein-above, has been made applicable to the proceeding before the Special Court (NDPS) and therefore, application under Sections 451 and 457 of the Cr.P.C. for interim custody of the vehicle seized in commission of offence punishable under the NDPS Act would be maintainable and the Special Judge (NDPS) is empowered to consider the application under Section 451/457 of the Cr.P.C. on merit.

49. At this stage, it is relevant to consider the dictum of the Hon'ble Supreme Court with regard to Principles of Statutory Interpretation by Justice G.P. Singh, in the case of **Rajasthan State Road Transport Corporation -vs- Mohar Singh reported in (2008) 5 SCC 542** wherein at paragraph-21, it is held as under:

*"21. We may in this behalf profitably notice the following excerpts from Principles of Statutory Interpretation (11th Edn.) by Justice G.P. Singh:*

*"It is a principle by no means to be whittled down' and has been referred to as a 'fundamental rule'. As a necessary corollary of*

*this rule provisions excluding jurisdiction of civil courts and provisions conferring jurisdiction on authorities and tribunals other than civil courts are strictly construed. The existence of jurisdiction in civil courts to decide questions of civil nature being the general rule and exclusion being an exception, the burden of proof to show that jurisdiction is excluded in any particular case is on the party raising such a contention. The rule that the exclusion of jurisdiction of civil court is not to be readily inferred is based on the theory that civil courts are courts of general jurisdiction and the people have a right, unless expressly or impliedly debarred to insist for free access to the courts of general jurisdiction of the State. Indeed, the principle is not limited to civil courts alone, but applies to all courts of general jurisdiction including criminal courts. The rule as stated above relating to strict construction of provisions excluding jurisdiction of courts of general jurisdiction was recently expressly approved by the Supreme Court."*

50. Since the provisions of the Code of Criminal Procedure including Section 451/457 have been expressly made applicable by virtue of Sections 36-C and 51 of the NDPS Act to the proceedings

before the Special Court and there is no express bar contained in the NDPS Act for grant of interim custody as contained in Section 52C of the Indian Forest Act, 1927, therefore, merely on the ground that the vehicle is liable to confiscation under Section 60 of the NDPS Act, it cannot be held that once the vehicle is seized for commission of offence under the NDPS Act, interim custody cannot be granted, as jurisdiction of criminal court has to be construed strictly unless expressly excluded.

51. The very judgment of the Hon'ble Supreme Court in the case of ***Union of India -vs- Mohanlal and Another*** stated supra relied upon by the learned Counsel for the respondents, at paragraphs-29 and 31 it is held as under:

*"29. There are two other aspects that need to be noted at this stage. The first is that Notification dated 16-1-2015 does not in terms supersede Standing Order No. 1 of 1989 insofar as the said standing order also prescribes the procedure to be followed for disposal of narcotic drugs and psychotropic and controlled substances and conveyances. Specific overriding of the earlier standing order would have avoided a certain*

*amount of confusion which is evident on account of simultaneous presence of Standing Order No. 1 of 1989 and Notification dated 16-1-2015. For instance in Para 1 of Standing Order No. 1 of 1989 only certain narcotic drugs and psychotropic substances enumerated therein could be disposed of while Notification dated 16-1-2015 provides for disposal of all narcotic drugs and psychotropic and controlled substances and conveyances. Again in terms of Standing Order No. 1 of 1989 the procedure for making of application was marginally different from the one stipulated in Notification dated 16-1-2015 not only insofar as the procedure related to the officers who could make the application is concerned but also in relation to the procedure that the DDC would follow while directing disposal. In both the Notifications are prescribed the limits up to which the disposal could be directed. In case of excess quantity the disposal under Standing Order No. 1 of 1989 had to be done in the presence of the head of the department whereas according to Notification of 2015 in the event of excess quantity or value the disposal has to be by a high-level Drug Disposal Committee to be constituted by the head of the department. Again while*

*Standing Order No. 1 of 1989 specifically required the approval of the Court for disposal, Notification dated 16-1-2015 does not stipulate such approval as a specific condition. Be that as it may, to the extent the subsequent notification prescribes a different procedure, we treat the earlier Notification/Standing Order No. 1 of 1989 to have been superseded.*

31. To sum up we direct as under:

*31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.*

*31.2. The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs and psychotropic and controlled substances and conveyances duly equipped with vaults and double-locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1 of 1989 to ensure proper security against theft, pilferage or replacement of the seized drugs.*

*31.3. The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.*

*31.4. Disposal of the seized drugs currently lying in the Police Malkhanas and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us*

*in the body of this judgment under the heading "disposal of drugs".*

The Hon'ble Supreme Court in its finding has held that both the notifications of the year 1989 and 2007 prescribe limits up to which could be directed. In case of excess quantity, the disposal under Standing Order No.1 of 1989 had to be done in the presence of the Head of the Department, whereas according to Notification of 2015, in the event of excess quantity or value the disposal has to be by a High Level Drug Disposal Committee to be constituted by the Head of the Department. Again while Standing Order No.1 of 1989 specifically required the approval of the Court for disposal. Notification, dated 16.1.2015 does not stipulate such approval as a specific condition. Be that as it may, to the extent the subsequent notification prescribes a different procedure, and accordingly, the Hon'ble Supreme Court held that the earlier Notification/Standing Order No.1 of 1989 have to be superseded. In order to avoid any confusion arising out of the continued presence of two notifications on the same subject it was made clear that disposal of narcotic drugs and psychotropic and controlled substances and conveyances

shall be carried out in the manner prescribed, till such time the Government prescribed a different procedure for the same. Admittedly, in the present case, the respondents have not produced any procedure prescribed by the Central Government as directed by the Hon'ble Supreme Court.

52. Further the Hon'ble Supreme Court in the said *Mohanlal's* case held that in cases in which the proceedings are still pending before the Courts at the level of Trial Court, Appellate Court or before the Supreme Court. In such cases, the Heads of the Department concerned shall ensure that appropriate applications are moved by the officers competent to do so under Notification dated 16-1-2015 before the Drug Disposal Committees concerned and steps for disposal of such narcotic drugs and psychotropic and controlled substances and conveyances taken without any further loss of time. Accordingly, directed that no sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then



approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A of the NDPS Act.

53. On analyzing the provisions of NDPS Act, particularly the amended provisions of Section 52-A of the NDPS Act and the Notification dated 16.1.2015, it makes it clear that earlier in the Act, there was no provision regarding the pre-trial disposal of the seized narcotic drugs and psychotropic substances. The storage of seized narcotic drugs and psychotropic substances up to the final conclusion of the trial of the cases created many problems and thereby, Section 52-A of the NDPS Act, 1985 empowered the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of the drugs and psychotropic substances. So to counter the problems like vulnerability to theft, substitution, constraints of proper storage space and other relevant problems, the Central Government in exercise of that power has issued the said notification, which prescribes the procedure of pre-trial disposal and destruction of seized narcotic drugs, psychotropic substances and conveyance.

But the Legislature has not given any power to Drug Disposal Committee to decide the claim of a person, who claims conveyance (vehicle seized) under the NDPS Act for illegal transportation of any Narcotic drugs and psychotropic and controlled substances as has been given by the Legislature to the Special Court under Sections 60 and 63 of the NDPS Act, where a person claims for release of interim custody of the vehicle seized under the provisions of NDPS Act, no provision is provided in the notification to decide the interim claim. Thereby the provisions of Sections 60 and 63 of the NDPS Act would prevail only on the provisions of the notification issued by the Central Government under Section 52-A of the NDPS Act. The provisions of Sections 60 and 63 of the said Act envisages that seized conveyance cannot be disposed of without deciding the claim of the person, who claims that conveyance and the power to decide the claim of such person is only given by the Legislature to a Magistrate or Special Court. Under the provisions of Sections 52 and 52A of the NDPS Act, the word 'confiscation' is not used because the trial is yet to come and it is discretion of the trial Court to confiscate or not to confiscate the conveyance seized under the NDPS Act as per the legal provisions.

54. It is also relevant to consider the provisions of Section 4(2) of the Code of Criminal Procedure which is as under:

**"4. Trial of offences under the Indian Penal Code and other laws:**

(1) xxxx

(2) *All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."*

55. In view of the above, there is no expression to release the interim custody of the vehicle or exclude the provisions of the Code of Civil Procedure in view of the Section 36-C of the NDPS Act. It is also relevant to consider, at this stage, that either in the Notification dated 16.1.2015 or the amended provisions of Section 52-A of the NDPS Act, no mechanism is provided for consideration of application for grant of interim custody of the vehicle.

56. The entire object of the Notification is to either dispose or destroy the drugs. Clause 9(1), (2), (4), (5)(a)(c)(d) of the Notification concerns with Disposal, while Clause 9(5)(b), (6), (7) concerns with Destruction. The only clause which has relevance to conveyances is Clause 9(5)(e) which depicts that seized conveyances shall be sold off by way of tender or auction as determined by the Drug Disposal Committee. The said Clause does not concern to interim custody and it only concerns with Disposal which is akin to Section 452 of the Cr.P.C. Needless to emphasize that this sale is post-trial. Thereby the Notification, dated 16.01.2015 or the Provisions of Section 52A of the NDPS Act does not deal with the interim custody of the seized Articles or Conveyances. The Legislature has intentionally not used the word "Custody" under Section 52A of the NDPS Act, as can be seen under Sections 451 and 457 of the Code of Criminal Procedure. Therefore, the power or jurisdiction cannot be conferred to authority/officer including the Drug Disposal Committee, who is not vested with the same by the Statute. The power under the

Notification issued cannot go beyond the statutory provisions of Section 52A of the NDPS Act.

57. The Full Bench of the High Court of Calcutta in the case of **Teru Majhi -vs- State of West Bengal reported in Laws (Cal) 2014-439** while considering the Provisions of Section 36 of the NDPS Act of the provisions of Section 438 of Cr.P.C. at paragraphs 8, 9 , 82, 83, 87, 95 to 97 held as under:-

**8.** *The question of law set out in the reference, is, namely:*

*Is a Special Court under Section 36 of the NDPS Act (deemed Sessions Court) competent to entertain the pre-arrest Bail Petition under Section 438 of Cr.P.C.?*

**9.** *Brother Debangshu Basak, J. in his Judgment opined that a Special Court constituted under Section 36 of the NDPS Act, 1985 is competent to entertain a pre-arrest Bail Petition under Section 438, Cr.P.C. I fully subscribe to such view and concur with his conclusion. At the same time, in the light of our unanimous opinion, in our answer*

*to the reference, it is also required to be clarified that such jurisdiction of the designated Judge to exercise power under Section 438, Cr.P.C. relating to offences punishable under the NDPS Act is exclusive and was never vested with the Sessions Judge.*

**82.** *Section 36-C of the NDPS Act, 1985 provided that the provisions of the Code of Criminal Procedure, 1973 including the provisions as to bails and bonds would apply to the proceedings before a Special Court save otherwise provided in the NDPS Act, 1985. For the purpose of the provisions of the Code of Criminal Procedure, 1973, which were made applicable under Section 36-C, the Special Court was deemed to be a Court of Session and the person conducting a prosecution before a Special Court was deemed to be a Public Prosecutor.*

**83.** *The entirety of Section 36-C and its interpretation were viewed from various angles by the appearing parties. The views of the Petitioners and the Amicus Curiae were the same on the interpretation of Section 36-C and such*

*interpretation varied from the one propounded on behalf of the State by the Public Prosecutor.*

**87.** *Much revolved around the interpretation of Section 36-C of the NDPS Act, 1985. Sri Jeyaram Educational Trust (supra) required us to find out whether the words used in Section 36-C of the NDPS Act, 1985 were clear and unambiguous or not. Section 36-C of the NDPS Act, 1985 was as follows:*

*"36-C. Application of Code to proceedings before a Special Court.— Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor. For the purpose of argument let us keep aside the words "Save as otherwise provided in this Act." used in Section 36-C for a moment. The moment those words were absent from Section 36-*

*C, it allowed the entirety of the Code of Criminal Procedure, 1973 to apply to a proceeding under the NDPS Act, 1985. These provisions of the Code of Criminal Procedure, 1973 obviously entailed within its fold Section 438. In absence of the words "Save as otherwise provided in this Act" a Special Court then had the jurisdiction to exercise powers under Section 438 of the Code of Criminal Procedure, 1973. For a better understanding, after deleting the words "Save as otherwise provided in this Act" from Section 36-C it read as follows:*

*"36-C. Application of Code to proceedings before a Special Court.— the provisions of the Code of Criminal procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor. If Section 36-C was*



*aforesaid, there was no debate that powers under Section 438 of the Code of Criminal Procedure, 1973 was available to a Special Court. We were not permitted to either delete considered or add the words from the statute. We were to consider the section as it stood in the statute book. The Section opened with the words "Save as otherwise provided in this Act."*

*Now came the question of interpreting "Save as otherwise provided in this Act.." used in Section 36-C. On a plain reading the words "Save as otherwise provided in this Act. " used in Section 36-C would mean that the NDPS Act, 1985 was required to provide specific exclusions of the Code of Criminal Procedure, 1973 expressly, for a provision of the Code of Criminal Procedure, 1973 to be inapplicable, in a proceeding under the NDPS Act, 1985. The provisions of the Code of Criminal Procedure, 1973 were not barred from their Application to a proceeding under the NDPS Act, 1985. Sections 32-A, 33, 36-A, 37, 51 & 52-A(4) of the NDPS Act, 1985 made either the*

*provisions of the Code of Criminal Procedure, 1973 inapplicable or incorporated into the NDPS Act, 1985 with modifications. "Save as otherwise provided in this Act" was required to be read in such perspective. Those words did not take away the jurisdiction of the Special Court constituted under the NDPS Act, 1985 to exercise powers of Section 438 of the Code.*

**95.** *There was unanimity at the bar as to the availability of Section 438 of the Code of Criminal Procedure, 1973 to an accused under the NDPS Act, 1985.*

**96.** *The same logic as that of Pijush Kanti Dey (supra) would apply in the case of the NDPS Act, 1985. NDPS Act, 1985 was a special enactment. It was an enactment which consolidated and amended the law relating to the Narcotic Drugs and Psychotropic Substances in India. It provided for speedy trial. It provided for the control and regulation of operations relating to Narcotic Drugs and Psychotropic Substances. The NDPS Act, 1985 provided for the forfeiture of property derived from, or used in, illicit traffic in*

*Narcotic Drugs and Psychotropic Substances. The NDPS Act, 1985 made provisions to be in tune with the International Convention on Narcotic Drugs and Psychotropic Substances that India were party to. On consideration of the various provisions of the NDPS Act, 1985 it could be safely said that the NDPS Act, 1985 was a self-contained Code. It conferred special jurisdiction and powers to the Special Court constituted under the NDPS Act, 1985 with regard to trial of offences committed under such Act. The NDPS Act, 1985 required trial of offences under such Act punishable with imprisonment for three years and above to be tried by Special Court constituted under such Act. The provisions of the Code of Criminal Procedure, 1973 save and except those provisions which were expressly excluded were applicable to a proceeding before the NDPS Act, 1985. The powers of Section 438 of the Code of Criminal Procedure, 1973 to be unavailable to a Special Court constituted under the NDPS Act, 1985 was required to be taken away expressly by the NDPS Act, 1985 itself. Such was not the position. Section 36-C of the NDPS Act, 1985 empowered the Special Court constituted under the NDPS Act, 1985 to exercise powers under*

*Section 438 of the Code of Criminal Procedure, 1973. These provisions of the Code of Criminal Procedure, 1973 were not taken away expressly or otherwise by the NDPS Act, 1985.*

*Answer*

*97. We would, therefore, answer the Reference by stating that a Special Court constituted under Section 36 of the NDPS Act, 1985 was competent to entertain a pre-arrest bail Petition under Section 438 of the Code of Criminal Procedure, 1973.*

58. In the judgments relied upon by the learned Counsel for the respondents in the case of ***Shajahan -vs- Inspector of Excise and Others reported in 2019 SCC OnLine Kerala 3685 (DB) (paragraph-3)*** and ***Union of India -vs- Mohanlal and Another reported in (2016)3 SCC 379***, there was no occasion to consider the application for release of the interim custody of the vehicle (conveyance) and in that view of the matter, the said judgment relied upon by the learned Counsel for the respondents to the effect that Drug Disposal Committee has power and not the Magistrate or

the Special Court under the NDPS Act, have no application to the facts and circumstances of the present petitions.

### **XI Conclusion**

59. For the reasons stated above, we answer the Reference as under:

- i) *The Magistrate or the Special Court is conferred with the power/jurisdiction to consider the application for interim custody of the conveyance/vehicle under the provisions of Sections 451 and 457 of the Code of Criminal Procedure in cases arising out of the provisions of NDPS Act; and*
- ii) *The Drug Disposal Committee constituted under the Notification dated 16.1.2015 issued by the Central Government under the provisions of Section 52A of the NDPS Act has no authority to consider the application for release of interim custody of the conveyance/vehicle;*

60. Place the matters before the learned Single Judge having roster to dispose of the same on merits and in accordance with law in the light of the decision on the reference made by this Court stated supra with prior approval from the Hon'ble Chief Justice.

**Sd/-  
Judge**

**Sd/-  
Judge**

Gss\*page-1 to para-30  
Nsu/-para-31 to end