

**IN THE COURT OF SH. AJAY KUMAR JAIN : SPECIAL JUDGE NDPS: PATIALA
HOUSE COURTS: NEW DELHI**

Case No. SC/9435/16
ID No. 02403R0159882016

Narcotics Control Bureau
Through: Sh. Arvind Kumar Ojha,
Intelligence Officer,
Narcotics Control Bureau, New Delhi

Versus

1. **Anuj Gosain**
S/o Sh. Somnath Gosain
R/o B-139, B.K. Dutt Colony,
Lodhi Road, New Delhi

2. **Lokesh Chadha**
S/o Sh. Gulshan Chadha
R/o RZ-117-B, Top Floor,
Speed Parcel Services,
Dabri Extension (East),
New Delhi

Date of Institution : 03.08.2016
Judgment reserved on : 18.01.2020
Date of pronouncement : 12.02.2020

JUDGMENT

1. Facts in brief as per the complaint filed are that on 02.12.2015 IO Deepak Attri received a telephonic information from DHL that parcels having airway bill no. 4555208195 and 4555208206 were lying in the office suspected to be containing narcotic drugs. Thereafter on the direction of Superintendent R.S. Joshi, IO A.K. Ojha constituted a team consisting of himself, IO Deepak Attri, Sepoy Vishwender Singh, Driver N.P. Singh and alongwith the necessary items reached DHL office where met Virender Singh, Security Incharge, DHL who produced the parcels found to be in the name of consignor Anuj Gosain thereafter in presence of Pankaj Gund, the airway bill no. 4555208195 parcel was opened and found to contain sweaters, slippers, shoes, carry bags, etc. On minute examination of carry bags, it was observed that some heavy item was affixed with them, then the

upper portion of carry bag was cut open and found to conceal one paper pouch wrapped with brown colour tape. When the said pouch was opened it was found to have contained white colour crystalline powder. Then the recovered substance was tested with the help of field testing kit and found positive for ketamine. The second carry bag was also examined found to be containing similar type of packing and recovered substance found positive for ketamine. As the substance recovered from both carry bags was of similar nature and found positive for ketamine therefore collected in plastic polythene weighing around 390 gm, then samples were taken and seizure proceedings were completed.

2. Thereafter, the second parcel booked under AWB no. 4555208206 was examined and it was observed to be made of plastic bag which was having words DHL Express. On opening found to contain four paper box hair bands. Paper box found to have hair clips and three remaining boxes found with plastic kangans. Total 27 kangans were recovered from three boxes however the designs of said kangans were not common therefore, upper design of one kangan was removed and it was observed that some brown tape was affixed therein. On being cut open, the said brown tape, it was found concealing cream colour powder substance which tested positive for heroin. Remaining 26 kangans were also tested and found concealing similar type of substance i.e. heroin. All the substances recovered from each kangan was tested individually and found positive for heroin thereafter collected in a plastic polythene and total weight was found to be 325 gm thereafter, the samples of 5 gm each were drawn and after seizure proceedings, the panchnama was prepared signed by sealing officer and independent witness Pankaj Gund. Test memo was also prepared. The consignment documents were also taken into possession after signed by Pankaj Gund.
3. The samples were sent to CFSL. As per CFSL report, sample mark A1 found positive for pseudoephedrine and sample mark C1 found positive for heroin. Formalities u/s 57 NDPS Act also completed. Accused Lokesh Chadha appeared on notice u/s 67 NDPS Act and tendered his voluntary statement on 16.02.2016, and disclosed that parcel in question was directed to be booked by Anuj Gosain

with ID of Anuj Gosain. He stated that said parcels were originally belongs to some foreign national however he instructed Anuj Gosain to book the same with his own ID. He also disclosed that previously also he booked parcels for foreign nationals. Accused Anuj Gosain in his statement u/s 67 dated 16.02.2016 also disclosed that he booked the parcel under instructions of Lokesh Chadha. He also disclosed that said parcels originally belongs to some foreign national however he was instructed by Lokesh chadha to book them from his ID. He also disclosed that he previously also booked parcels for foreign nationals.

4. During investigation, security officer of TNT Pvt. Ltd. Courier company asked to provide the detailed procedure of booking the parcel and in response to same, Manager TNT vide letter dated 31.05.2016 provided the detail about the procedure of booking the parcel and informed that at the time of booking the parcel KYC norms were to be fulfilled. Similar type of information is also provided by Fedex Express courier company and DHL courier company. Vide summon dated 06.06.2016 Vipin Kumar, Proprietor of KVC Logistics joined investigation and disclosed about the booking of parcels in question. On 07.06.2016 Durgesh Gautam of Deep Blue Courier Company was summoned for queries and also disclosed about the booking of parcel. The statement of Pankaj Gund, independent witness u/s 67 was recorded. The search of residences of both the accused was conducted however nothing recovered. During investigation DHL Express provided documents by which Anuj Gosain booked a parcel previously on 20.11.2015 to Melbourne which was destroyed during transit.
5. The mobile phones of both accused were found to be connected with mobile of one foreigner who contacted Lokesh Chadha for sending the parcel in question. The mobile no. 8800483095 used by the foreigner found to be in the name of one Satya Narayana who however on being summoned in his reply stated that he has not purchased the same. During investigation name of one Anila Batra was also noticed as a consignor alongwith name of Anuj Gosain. Accused Anuj Gosain disclosed that foreginer also provided ID documents of Anila Batra on whatsapp who was resident of South Africa however, FRRO on inquiry provided the report

that no such details of arrival or departure of that person is available with them. On completion of investigation complaint was filed.

6. Vide order dated 06.09.2016, charges u/s 29 and, 25A and 23(c) r/w section 28 NDPS Act were framed against both accused to which they pleaded not guilty and claimed trial.
7. Prosecution for substantiating its case examined 15 witnesses. The summary details of their depositions is as follows:

PW1 Arvind Kumar Ojha, IO stated that on 02.12.2015 at around 01.30 PM Superintendent R.S. Joshi called him and discussed the secret information regarding two parcels thereafter marked the information to him to take necessary action as per law. Then he constituted a team and alongwith kit reached the DHL Express Company where Virender Singh, Security Incharge produced two parcels. Then, the said parcels were searched in presence of one Pankaj Gund of the said company and on search of the parcels contraband was recovered, panchnama was prepared and documents alongwith parcels were taken into possession. During investigation on 16.02.2016, he issued notice u/s 67 to Lokesh Chadha who in his statement disclosed that besides the said parcel, he also sent other parcels. He also recorded the statement of accused Anuj Gosain u/s 67 who disclosed that parcels were booked by him on the instructions of Lokesh Chadha. Both the accused were arrested, arrest report was prepared.

8. In cross-examination stated that he cannot say whether Virender Singh of DHL had passed on the information to Deepak Attri or not. He also stated that Anuj Gosain was found employee of Lokesh Chadha. He also denied suggestion that parcels were tampered by employees of courier company or parcels in question were not examined at DHL Courier company, and that the same were examined at NCB office. In cross-examination on behalf of accused Lokesh Chadha stated that he do not know how DHL came to know about the information in question. Except seal movement register, no register is maintained for abovesaid articles. He also stated that he do not know whether the parcels in question were already examined/checked by DHL officers or not. However, it is correct that recovered contraband was in the form of concealment. It is also apparently not possible to

detect the concealment except on opening of the bag. No X-ray machine found installed at the office of Lokesh Chadha or KVS Logistics. He further stated that they took two field testing kit one meant for testing narcotic drugs and second was for testing medicines. He further stated he do not remember as to what colour came for positive test for ketamine. He also do not remember if the same machine showed positive result for ketamine and heroin or not. He further stated he do not know if there is any official correspondence register maintained in NCB office for the purpose of maintaining reports u/s 57 NDPS Act.

9. This witness was again recalled for cross-examination on application u/s 311 Cr.PC. In further cross-examination stated that both the accused came to office in the morning hours of 16.02.2016 and statement of both accused were recorded simultaneously and then again on 17.02.2016 the statement of both the accused were recorded. He further stated he cannot say whether the statement of Lokesh Chadha was exculpatory. He also stated it is correct that Lokesh Chadha disclosed that he received a call on 12.11.2015 from a foreigner, and thereafter 2-3 days the said foreigner came with ID proof. He however did not put any question to Lokesh Chadha that the parcel seized by them on 02.12.2015 is the same parcel whose reference is given in his statement recorded u/s 67. He denied suggestion that accused were kept illegally in NCB office in the intervening night of 16-17.02.2016.
10. **PW2 IO Deepak Attri** stated that he got the secret information from DHL regarding lying of two parcels suspecting concealing narcotic substance. He reduced the information in writing and put up before Superintendent R.S. Joshi thereafter accompanied raiding team to DHL office and in presence of Pankaj Gund, employee of DHL parcel was searched found to contain contraband. He recorded the statement of panch witness Pankaj Gund u/s 67 and also of one Gopal Singh Negi. In cross-examination stated that informer called him on landline and he did not know the informer prior to present case. He did not ask informer as to how the drug has been concealed in parcel in question. The said information was not recorded in any register. There is no register in NCB office for issuance of drug detection kit. It is correct that recovered contraband was

concealed in parcel in question and the same could not be detected from naked eye. The substance recovered from both the parcel was tested from the same kit and denied suggestion that both the parcels could not be tested from the same kit. He denied suggestion that contraband were not tested in his presence.

11. **PW3 Virender Singh**, Security Field Officer, DHL stated that he provided the requisite information to NCB through letter dated 23.05.2016. **PW4 Virender Singh**, Security Manager, TNT also provided necessary information to NCB. **PW5 Vipin Kumar** of KVS Logistics stated two parcels in question were received from the company of Lokesh Chadha and accordingly the said parcels were booked with M/s Deep Blue, both the parcels were finally destined to DHL. In cross-examination stated that the said parcels were not brought by accused Lokesh Chadha in his presence but the same were produced by him before the Operations staff of his company (Note-accused Lokesh Chadha in his cross-examination as DW1 admitted that he booked parcels with KVS Logistics). They do not have any apparatus to discover any concealed item in parcel. He denied suggestion that he had deposed falsely in his statement u/s 67 NDPS Act.
12. **PW6 Saurabh Aggarwal**, Nodal Officer exhibited the CDRs and CAF of mobile no. 8447990070 (in the name of Neeru, mother of accused Lokesh Chadha) and 9999538240 (in the name of accused Anuj Gosain). **PW7 Chandra Shekhar**, Nodal Officer exhibited the CDR and CAF of mobile no. 8800483095 (alleged to be used by foreigner). **PW8 Hem Lata** is the witness to search of house of accused Lokesh Chadha. **PW9 R.S. Joshi**, Superintendent who stated that IO Deepak Attri gave him an information received on telephonic information from DHL courier company regarding lying of two parcels thereafter, he directed Arvind Kumar Ojha to take action as per law. He issued seal of narcotics to IO A.K. Ojha, made entry in seal movement register. On 03.12.2015 IO A.K. Ojha put up before him the seizure report u/s 57. On 03.12.2015, he sent Sepoy Yogesh Kumar to deposit samples at CFSL, CBI.
13. **PW10 Yogesh Kumar Sharma**, Sepoy deposited the sample and also collected the report of both samples. **PW11 Abid Ali**, Manager of Fedex courier company stated that he had provided the information vide letter dated 25.05.2016. **PW12**

Durgesh Kumar Gautam stated that he was working at Deep Blue Express as Manager and also described the procedure of booking the courier and connection with load, etc. He also stated that he has business relations with accused Anuj Gosain. **PW13 Mithilesh Jha**, Senior Scientific Officer who opened the two sealed parcels and made endorsement on the forwarding letter. **PW14 Dipti Bhargav** examined sample Ex.A1 and C1 and prepared the test report. **PW15 Satya Narayan** subscriber of mobile number 8800483095 alleged to be used by foreigner.

14. Accused Lokesh Chadha in his statement u/s 313 Cr.PC denied all the incriminating circumstances however stated that he was called in NCB office on various dates and wrote the statement on the dictation of NCB officials. He also stated that as per his knowledge, no parcel was ever booked containing any contraband and informed NCB specifically that they have no knowledge about the contraband in parcel however, on 12.11.2016 received a call from foreign national for booking of parcel but as he could not understand the language, he gave the number of his office to communicate and also retracted his statement. Accused Anuj Gosain also denied all the incriminating circumstances put to him u/s 313 Cr.PC and stated that he is employee of company of Lokesh Chadha and specifically informed NCB that he has no knowledge of contraband in the parcel booked.
15. Accused Lokesh Chadha on application u/s 315 Cr.PC examined himself as DW1 in which he alleged that the courier parcel was sent through KVS Logistics through DHL and they were asked to collect the KYC of sender, and in case of foreign national they used to collect the photocopy of passport and visa. On 12.11.2015, he received a call from foreign national however unable to understand the communication as his English is not good, thereafter, forwarded his address and number of his colleague to him. Then Anuj Gosain had spoken to him and called at the office. In the afternoon Anuj Gosain informed that the foreign national came and wanted to send two parcels to Australia and Netherlands and he was informed that parcel contained some bangles and children clothes. Then, he asked Anuj Gosain to obtain his two identification

documents. Then Anuj Gosain had obtained photocopy of passport and visa, and booked the said parcel. On 02.12.2015 at DHL office, he told that parcels were booked by Anuj Gosain and showed them the passport and visa of the person who booked the said parcels. They have also provided the mobile number of foreign national to NCB officials, and after two months again they were called in NCB office and they also told them that foreign national could not be apprehended then asked them to write the statement. He further submitted that they were not aware that parcel containing some contraband as even from physical appearance or from naked eye nobody can say it contained contraband.

16. In cross-examination stated that he did not collect any copy of passport and visa of foreign national however Anuj Gosain had taken the same and he did not see the copy of passport and visa which was taken by Anuj Gosain. He did not tell Anuj Gosain to use his identification documents to book the parcel in question. When confronted with his statement u/s 67 he stated that he wrote the statement whatever he was asked to write. He denied suggestion that parcel was booked on his instructions on the ID of co-accused Anuj Gosain. On being cross-examined on behalf of Anuj Gosain stated that he went to KVS Logistics to get these two parcels booked. The amount received by Anuj Gosain was handed over to him and he alongwith Anuj Gosain was called by NCB officials and they both went there when they called them. He further stated that Nigerian who booked the parcel was called by NCB officials over speaker phone and Nigerian admitted that it belonged to him.

17. Material exhibits-

Ex.PW1/A is secret information. **Ex.PW1/B** is the panchnama. **Ex.PW1/C** (colly) is the way bill number, invoices, Aadhar card, driving license in the name of Anuj Gosain. **Ex.PW1/D (colly)** is also way bill number of second parcel, invoices, Aadhar card and driving license of Anuj Gosain. **Ex.PW9/A** is the forwarding letter of examination of sample. **Ex.PW14/A** is the chemical examination report. **Ex.PW1/E** is the seizure report u/s 57 NDPS Act. **Ex.PW1/M** and **PW1/M2** is the arrest memo of accused. **Ex.PW1/M8** and **PW1/M9** is the arrest report u/s 57. **Ex.PW1/M11 (colly)** is the letter dated 31.05.2016 of TNT Express showing

the booking of courier by accused Lokesh Chadha. **Ex.PW1/15 (colly)** is the letter of Durgesh Gautam of Deep Blue Seas Courier. **Ex.PW1/M17 (colly)** is the statement of Vipin Kumar of KVS Logistics u/s 67. **Ex.PW1/19 (colly)** is the statement of Durgesh Kumar Gautam u/s 67. **Ex.PW1/G** is the statement of Pankaj Gund u/s 67. **Ex.PW1/M** is the panchnama of search conducted at the office of accused Lokesh Chadha. **Ex.PW1/N** is the panchnama of search of house of accused Anuj Gosain. **Ex.PW1/N6 and Ex.PW1/N8** is the statement of Dinesh Singh Rana and Gopal Singh Negi, witness to the search of house of Lokesh Chadha. **Ex.PW1/Q (colly)** is the CAF, CDR, certificate u/s 65B relating to mobile no. 8447990070 and 9999538240. **Ex.PW1/R1 (colly)** is the CAF and CDR of mobile no. 8800483095. **Ex.PW1/U** is seal movement register. **Ex.PW9/C** is malkhana register. **Ex.PW7/A** is the certificate u/s 65B of mobile no. 8800483095. **Ex.PW1/R1** is the statement of Satya Narayan Sharma u/s 67 NDPS Act. **Ex.PW1/S** is the letter to FRRO by IO A.K. Ojha regarding the identity of Mr. Anila Batra. **Ex.PW1/S1** is the reply of the FRRO showing as per available record no departure or arrival entry found for Mr. Anila Batra. **Ex.PW1/U** is the copy of seal movement register. **Ex.PW9/C** is the copy of godown register. **Ex.PW1/J (colly)** is the statement u/s 67 of Lokesh alongwith invoices and copy of passport, etc. of some other foreign nationals of previous bookings. Accused Lokesh Chadha in his statement u/s 67 recorded on 16.02.2016 and 17.02.2016 stated that on 12.11.2015, he received a call from foreigner however he could not understand the language thereafter he messaged the office address then called Anuj Gosain that one person appears foreigner will come with the parcel and ask to take two IDs, and the said parcel will go to DHL however the said foreigner did not come on that day but came after 2-3 days and handed over the parcel with one ID proof and other ID proof whatsapped on the mobile of Anuj Gosain. Anuj Gosain disclosed him that he checked the parcel containing clothes and he packed the parcel and made the invoice. Anuj Gosain attached his own ID but it was not clear, thereafter, he took both the parcels attaching the ID of Anuj Gosain and booked it with KVS Logistics. DHL, Fedex, TNT had the direction of Indian ID proof therefore they used to take IDs of foreigners and used to book the

articles on their own ID and in this regard he had sent around 5-6 parcels and also booked 2-3 parcels on the ID of Anuj Gosain. He also disclosed that he has a business of sending parcel to the foreign country and used his ID for sending 5-6 parcels. He also handed over documents of one invoice of a foreigner sent on his own ID. He further stated that he can provide the ID of foreigner whose parcels were sent. He also stated he can show the IDs and invoice by which he sent the parcels. He also stated that he knew that to attach our ID is offence however he used to send the parcel with his own ID. He further stated Anuj Gosain first checked the parcel thereafter he checked the parcel. Alongwith his statement, he also supplied invoice of one foreigner of Germany, copy of his passport and also foreigner of USA, invoice, airway bill. **Ex.PW1/L** is the statement of accused Anuj Gosain u/s 67 alongwith copy of passport and invoice of other foreign nationals. Accused Anuj Gosain in his statement u/s 67 recorded on 16.02.2016 and 17.02.2016 stated that he received a call from Lokesh Chadha that one of his customers who is a foreigner will come and take the packet from him thereafter he had taken the packet and ID from him, and he has given the ID however the said ID was not clear and when he asked another ID then stated that he will give in evening and in the evening he dispatched one ID of one Anila Batra which is not clear. In the evening he disclosed this fact to Lokesh Chadha and told him that ID is not clear, thereafter he checked the articles and packed the same and told to send the packets with his ID and invoice. However on that day, the printer was not working therefore Lokesh Chadha took both the parcels to KVS and took out the printout of invoice and also took out his two IDs i.e. Aadhar card and DL from the mail. He also handed over Rs. 10,000/- given by foreigner customer to Lokesh Chadha. He also stated that he has not used his ID anytime prior to this. He also produced the copy of passport, invoice of some other parcels which were booked through Lokesh Chadha. He stated that he has used his own ID on the directions of his owner Lokesh Chadha.

- 18.Ld. Counsel for accused Lokesh Chadha submits that on 12.11.2015 accused Lokesh Chadha received a call from a person who appeared foreign national wanted to send some parcel however, as the English of accused is not good

therefore, he forwarded the office address and mobile number of his colleague Anuj Gosain. Then the foreign national booked the said parcel and handed over his identification documents with Rs 10.000/- to Anuj Gosain. The ID documents of foreigner were not clear and as such sent ID documents of one Anila Batra. Thereafter both the parcels were booked and forwarded to KVS Logistics with ID documents of foreign national and other ID of Indian national who in turn forwarded to Deep Blue Courier and further forwarded to DHL. Ld. Counsel submits that on 02.12.2015 accused Lokesh Chadha received a call from KVS Logistics thereafter, he alongwith co-accused reached DHL office where they were informed about the recovery of contraband then the mobile number of said foreign national given to NCB official then one of NCB official talked with the foreign national with the mobile of Anuj Gosain thereafter, both were allowed to go from there and then number of times they were called in NCB office however relieved, thereafter on 16.02.2016 they were kept illegally and both of them were forced to write the statement and kept in office on the intervening night of 16-17.02.2016 and thereafter arrested. Ld. Counsel submits that both the parcels do not belong to accused persons. It was booked with their firm by a foreign national. As per the CDR also accused Anuj Gosain had a talk with the foreign national on 02.12.2015 at around 15:35:09 and 18:48:28. PW9 R.S. Joshi also in cross-examination stated that some documents were called by IO in which name of some foreign national may be there and the said documents were collected from some courier company and accused persons. Ld. Counsel submits that summons were not issued to accused persons till 15.02.2016. PW1 stated that he has to take permission and approval of superior officer for issuance of summon however PW9 R.S. Joshi, Superintendent stated that no such permission is required. Ld. Counsel submits that both PW1 and PW2 in cross-examination categorically admitted that it was not possible to detect the concealed contraband without opening the bag. Ld. Counsel submits that both the statements u/s 67 cannot be recorded simultaneously and the inference could be drawn that they were dictated to write their statement and were illegally kept in the office of NCB. Ld. Counsel submits that statement of both accused u/s 67 were

exculpatory furthermore no document i.e. manifest and documents forwarded by KVS Logistics to Deep Blue and from Deep Blue to DHL were seized. PW12 Durgesh Kumar in his cross-examination stated that as per verbal instructions, the parcels of foreign nationals cannot be sent without identification document of Indian national. Ld. Counsel submits that accused Lokesh Chadha in his statement as DW1 categorically disclosed that true facts and his testimony remained unimpeached in cross-examination. The allegations that statements were recorded under duress remain uncross-examined. Ld. Counsel submits that mere possession is not offence but conscious possession is offence and statutory presumptions u/s 35 and 54 of NDPS Act can be invoked only when the ingredients of offence of conscious possession are proved beyond reasonable doubt. Ld. Counsel submits that prosecution is not able to prove the foundational facts before raising of presumption (relied upon *Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat 2000(1) Crime 187 SC*, *Bhola Singh Vs. State of Punjab 2011(11) SCC 653*, *Noor Aga Vs. State of Punjab 2008(3) JCC Narcotics 135 SC* and *Naresh Kumar @ Nitu Vs. State of HP 2017(3) JCC Narcotics 137*). Ld. Counsel submits that accused Lokesh Chadha as DW1 categorically made detailed statement explaining each and every circumstance including no knowledge of contraband in the parcel however no question was asked to him about the recovery of contraband from the parcel in question. Ld. Counsel submits therefore, the statement of DW1 remained uncontroverted and to be relied upon fully (relied upon *Uttam Kumar Vs. State 2010 (3) JCC 1926*, *Muddasani Venkata Vs. Muddasani Sarojana 2016 (12) SCC 288*). Ld. Counsels besides oral arguments also filed written submissions.

19. Ld. SPP for NCB submits that from the appreciation of prosecution evidence it is clear that accused persons had booked the parcels and they unable to provide any identity document of the foreign national which categorically suggests that they were having conspiracy with the said foreign national. The parcels in question containing contraband is confirmed through CRCL report. The prosecution able to prove the initial burden and there is a presumption u/s 35 and 54 NDPS Act against accused persons and accused unable to rebut the said presumption.

Accordingly, the prosecution is able to prove its case beyond reasonable doubt and accused are liable to be convicted for the offences charged.

20. Arguments heard. Record perused.
21. Apex court in "*Mohan Singh Vs. State of MP, AIR 1999 SC 883*", held that effort should be made to find the truth, this is the very object for which courts are created. One has to comprehend the totality of the facts and circumstances as spelled out through the evidence depending upon the facts of each case.
22. In appreciating the evidence, the approach of the court must be integrated and not truncated or isolated meaning thereby inferences should not be drawn by picking up an isolated statement from here and there; rather the evidence on a particular point should be examined in the background of the total statement of said witness or other witnesses as well as other evidence. The finding should be on the basis of objective assessment of the evidence and not on the conjunctures and surmises. In "*Dalbir Singh and Ors. Vs. State of Punjab, AIR 1987 SC 1328*", no hard and fast rule can be laid down about the appreciation of evidence and every case has to be judged on the basis of its own facts. While appreciating the evidence of the witness, the approach must be whether the evidence of a witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly, necessary for the court to scrutinize the evidence more particularly, keeping in view the deficiency, drawbacks and the infirmities pointed out in the evidence as a whole, and evaluate them to find out whether it is against the general tenor of evidence given by the witness as to render it unworthy of belief. In '*Bhagwan Tana Patil Vs. state of Maharashtra, AIR 1974 SC 21*', the apex court ordained that the function of the court is to disengage the truth from the falsehood and to accept what it finds the truth and rejects the rest. It is only where the truth and falsehood are inextricably mixed up, polluted beyond refinement down the core, the entire fabric of the narration given by a witness then the court might be justified in rejecting the same. This legal position was further elaborated in '*State of UP Vs. Shankar, AIR 1981 SC 897*', wherein the Apex court observed that mere fact that the witness has not told the truth in regard to a peripheral matter would not justify whole sole rejection of his

evidence. In this country, it is rare to come across the testimony of a witness which does not have a fringe or an embroidery of untruth although his evidence may be true in the main. It is only where the testimony is tainted to the core, the falsehood and the truth being inextricably intertwined, that the court should discard the evidence. Therefore, the duty is cast over this court to dispassionately disengage the truth from the falsehood and accept the truth and reject the same. This court is not meant to reject the testimony of a witness on slightest deflection, however has a bounden duty to search the truth. Apex court in case titled "*Gangadhar Behera & Ors. Vs. State of Orissa (2002) 8 SCC 381*", held that the principle *falsus in uno falsus in omnibus* is not applicable in India and it is only a rule of caution. Even if major portion of the evidence is found to be deficient, *in case residue is sufficient* to prove the guilt of the accused. The conviction can be maintained. It is the duty of the court to separate the grain from chaff.

23. Hon'ble Apex Court in *State of UP Vs. M.K. Anthony 1985 (1) SCC 505* held that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole.

24. Apex court in '*Smt. Shamim Vs. State, Crl. Appeal No. 56/2016 dated 19.09.2018*', in para 12 observed

"while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires confidence. Once that impression is formed. It is undoubtedly necessary

for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error without going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof.....”.

25. To sum up, the art of appreciation of evidence is to separate the credible and non credible portion of evidence.
26. The brief sequence of facts that on receiving telephonic information from DHL regarding lying of two parcels suspected to contain narcotic drugs, raiding team was constituted headed by PW1 IO A.K. Ojha. Thereafter at the DHL office on checking of the said parcels the contraband was recovered. Alongwith the said parcels, the airway bill, invoice and ID proof in the name of accused Anuj Gosain were also seized. The said parcel was found to be booked by accused Lokesh Chadha with KVS Logistics on the IDs of his employee accused Anuj Gosain and thereafter the said parcels were sent by the KVS Logistics to Deep Blue Sea then from Deep Blue Sea those parcels were sent to DHL. At DHL office the parcels were intercepted. Both the accused were called during investigation and their statements u/s 67 were recorded. The accused Lokesh Chadha in his statement u/s 67 disclosed that he had received a call from a foreign national on 12.11.2015 for sending the parcel pursuant to which he had given the number of Anuj Gosain. Accused Anuj Gosain also stated in his statement that on the direction of Lokesh Chadha the foreigner came and thereafter handed over him

the packet alongwith an ID but the ID was not clear and when he asked for another ID then he provided it of one Anila Batra in the evening. Thereafter the accused Lokesh Chadha packed the articles and took both the articles to KVS Logistics where he took out the printout of invoice and two of his IDs i.e. Aadhar Card and DL. He also handed over the charges of Rs. 10,000/- to Lokesh Chadha as collected from said foreign customer. The booking of parcel is confirmed by PW5 Vipin Kumar of KVS Logistics from accused Lokesh Chadha and thereafter from KVS Logistics from Deep Blue Seas by PW12Durgesh Kumar Gautam and thereafter finally it reached DHL office which is confirmed through PW3 Virender Singh, Security Field officer of DHL. Accused Lokesh Chadha in his statement u/s 67 also disclosed that he had previously also sent the parcels of foreign nationals which also contains the similar kind of articles i.e. ladies items including bangles, etc. The said fact is also confirmed during investigation from TNT Express which provided details of items sent by accused Lokesh Chadha. In the statement u/s 67 accused also disclosed their mobile numbers and mobile phones of the said foreign national. However the foreign national mobile phone found to be in the name of PW15 who stated that it do not belong to him. Accused Lokesh Chadha in his statement u/s 67 disclosed that the foreign national had handed over the parcel alongwith one ID proof and thereafter also whatsapp one ID proof to accused Anuj Gosain. Accused Anuj Gosain in his statement u/s 67 also disclosed that foreign national had given one ID while booking of parcel, and in the evening sent the ID of Anila Batra and he handed over the parcels to Lokesh Chadha who checked and booked with KVS Logistics. Both these accused though stated that the said foreign national had handed over the ID but neither disclosed his name nor handed over the foreginer's ID to NCB except his mobile number and the said mobile number was also not found to be in the name of said foreign national but both accused are found to be interacting with said mobile number as clear from the CDR details of 12.11.2015, 13.11.2015, 17.11.2015, 01.12.2015, 02.12.2015 and 03.12.2015. NCB could not locate the foreign national and arrested accused persons on the basis of their statement, and the documents found annexed with the said parcel.

Information, raid and recovery

27. PW2 IO Deepak Attri received information (Ex.PW1/A) from DHL office regarding lying of the parcels suspected to contain narcotic drugs thereafter, forwarded the same to the Superintendent R.S. Joshi (PW9) who directed PW1 IO A.K. Ojha to take action as per law. Thereafter PW1 IO A.K. Ojha constituted a team consisting of himself, IO Deepak Attri and other officials and reached the office of the DHL where in presence of the employee of DHL Pankaj Gund, both the parcels were opened and found to be concealing the contraband Ketamine (weighing around 390 gm) and heroin (325 gm). The respective samples were drawn, panchnama was prepared and alongwith panchnama the invoice, airway bill, ID proofs i.e. DL and Aadhar card of accused Anuj Gosain was seized. The prosecution proved the factum of receiving of information, constituting raiding party through the statement of PW1 and PW9 and there is nothing in their cross-examination to disbelieve these witnesses on the said fact. The recovery of contraband took place in presence of PW1, PW2 and independent witness PW Pankaj Gund however PW Pankaj Gund could not be examined as not traceable and was dropped vide order dated 30.09.2019. The testimony of PW1 or PW2 over the recovery of contraband found credible and reliable. Even otherwise, as per the defence of the accused, the said parcels were booked through them, though took plea, they have no knowledge that contraband was concealed in the said parcels. Accordingly, the prosecution able to prove credibly the factum of information, search of parcels and recovery of contraband from the said parcels.

Booking of parcels

28. The airway bill, invoices, ID cards alongwith the parcels (Ex.PW1/C (colly) and Ex.PW1/D (colly)) shows that these were booked on the ID and invoice of accused Anuj Gosain. The invoice and airway bill also showing the name of of one Anila which as per the statement of accused Anuj Gosain is the person whose ID was sent on Whatsapp by the said foreign national however during investigation, no such Anila was found. The said Anila was not the foreigner who booked parcel as also clear from the statement of accused u/s 67 NDPS Act and their defence.

29. Accused Anuj Gosain in his statement u/s 67 stated that he received the packet on the instructions of Lokesh Chadha from the foreigner. This accused also stated that the foreigner had given one ID but neither Anuj Gosain nor the co-accused Lokesh Chadha produced any ID of the foreigner before the NCB. It also not appears to be the defence of accused in the evidence before the court or through their statements u/s 67 that the said Anila was infact the foreigner in question. Accused Lokesh Chadha in his statement as DW1 stated that co-accused Anuj Gosain had obtained photocopy of passport and visa of the said foreigner however the said copy of passport or visa was not at all supplied to NCB. This accused in cross-examination on the contrary stated that accused Anuj Gosain had taken the same but he had not seen the copy of said passport or visa. This accused in cross-examination on behalf of co-accused Anuj Gosain stated that he went to KVS Logistics to get both these parcels booked and also stated that he had received the entire amount from accused Anuj Gosain. PW5 Vipin Kumar of KVS Logistics deposed before the court that said two parcels were received from company of Lokesh Chadha but in cross-examination, it appears to be suggested to him that these were not brought by accused Lokesh Chadha, and this fact is contrary to the cross-examination of Lokesh Chadha (as DW1) in which he categorically stated that he had taken the said parcels to KVS Logistics and that part is also corroborated through statement of both accused u/s 67.
30. Ld. counsel for the accused submitted that PW12 in his cross-examination categorically stated there were no guidelines or rules issued by the Ministry for booking the parcel of consignment abroad and they used to receive the parcels only with proper identification documents and their company did not receive any parcel from foreign national even if he was carrying the original identification documents. Ld. Counsel submits that this suggests that parcel cannot be sent without the ID of Indian national. Accused Lokesh Chadha as DW1 also deposed that accused Anuj Gosain obtained passport and visa however nowhere stated that he booked the parcel on the ID of Anuj Gosain as the parcel could not be sent on the ID of foreign national. Even otherwise there is no occasion for the accused to book the parcels without any express plea that they had sent the

parcel on their ID as requested by the foreign national. Furthermore, the ID i.e. passport and visa of foreigner is neither produced during investigation before NCB nor before the court during evidence. The accused even not disclosed the name of the said foreign national. The foreign national remained 'ghost' as per their version.

Effect of non disclosure of particulars of foreign national and factum of concealment of contraband inside the parcels

31. Admittedly on search of the parcels the contraband were found concealed in the items. It was categorically suggested to the witnesses that the contraband could not be detected except opening. PW1 and PW2 also stated that it is correct that contraband was concealed and could not be detected from naked eye, however the said parcels were found booked by both accused. The said parcels were deposited at KVS Logistics by accused Lokesh Chadha. From KVS Logistics these were sent to Deep Blue Express and from Deep Blue Express they were sent to DHL. This sequence is proved through the statement of PW5, PW12 and PW3 Virender Singh, security field officer, DHL. The contraband were found concealed and initially booked by present accused therefore, in view of the presumption u/s 35, burden is over them to prove that they have no knowledge of concealment of contraband in the parcel. The accused persons could easily discharge the said burden by providing particulars of foreigners who had booked the said parcels but accused persons could not provide any particular of said foreigner only provided the mobile number which was not found in his name. Nothing could be gathered from the testimony of PW1 and PW2 that both accused had provided particulars of foreigner. It is pertinent to note that name of Anila used in documents suggest that accused are deliberately concealing the name and particulars of the culprit foreigner.
32. Accused Lokesh Chadha in his testimony as DW1 stated that accused Anuj Gosain took the copy of passport and visa from the foreign national but not even able to disclose the name of foreigner during investigation or before the court despite the fact he had produced the documents of other foreign nationals of whom he has booked the parcels previously. This fact of retention of passport and visa by the

accused Anuj Gosain was not suggested to any of the PWs nor pleaded by the accused persons in their statement u/s 313 Cr.PC. Therefore, this part of the testimony do not appear to be at all credible.

33. It is pertinent at this stage to see the cross-examination of DW1 accused Lokesh Chadha. In the said cross-examination it was suggested by co-accused Anuj Gosain that they both were called by NCB time and again and the Nigerian who booked the parcel was called by IO on speaker phone and Nigerian admitted that the packet belonged to him only. But this fact was not suggested to IO PW1 in cross-examination. A cursory suggestion was given to superintendent PW9 R.S. Joshi that during investigation after 02.12.2015 some documents were called by IO in which the name of foreign national may be there and the said documents were collected from courier company. The accused during cross-examination of PW9 tried to point out that they have given the description of foreign national to the IO however the documents which they had given to IO during investigation were of the other foreign nationals of whom previously the parcels were booked by the accused, and those documents not at all related to the foreign national who booked the parcels in question. This suggest that accused trying to distract the court by showing that they had provided particulars of foreign national who had booked the parcel. Accused persons during their statement u/s 313 or in defence evidence not given name or particulars of foreign national who booked the said parcel with them. Accused remained evasive over the identity of foreign national who booked the said parcel. It cannot be held that they do not have identity of said foreign national because it is duly admitted by them in their statement u/s 67 as well as clear from the defence evidence of accused Lokesh Chadha as DW1. The concealment of particulars of foreign national raises adverse inference against the accused and it can be inferred that they are deliberately not disclosing his name, and thus the culpable mental state is to be presumed against accused persons.

Previous conduct of accused sending the parcels of foreign nationals on their ID.

34. PW1 IO A.K. Ojha in his testimony stated that accused during recording of his

testimony on 17.02.2016 produced two invoices and passport of one Luis, invoice in the name of John Mills, copy of passport, airway bill, another invoice in the name of Fred Raphael, copy of passport of Makotoko Rorisang Rosemary and told them he had previously also sent the other parcels besides these parcels. Accused Anuj Gosain also during recording of his statement produced two invoices, copy of passport of Marath Bokels, invoice in the name of John Mills and copy of passport and then another invoice in the name of Fred Raphael and copy of passport of Makotoko Rorisang Rosemary. The said fact is also corroborated through the statement of accused u/s 67 NDPS Act. The testimony of PW1 remained unimpeached on this aspect of production of the invoices and other documents for sending the previous parcels of the foreigners.

35. Both the accused in their statements u/s 67 disclosed that they had booked previously also the parcels of foreign nationals. In this regard PW1 also made inquiry from DHL courier and it was informed vide Ex.PW1/N13 (colly) that accused Anuj Gosain had booked the parcel in the past on 20.11.2015 for Melbourne on his own ID however the said parcel could not reach its destination and destroyed on the way. Accused Lokesh chadha also booked the parcels of foreign nationals on his ID and in this regard the intimation was received from the TNT Express (Ex.PW1/M11) showing the accused Lokesh Chadha booked the parcel to one Raphael containing art bangle and ladies kuti alongwith ID of Lokesh Chadha. Accused Lokesh Chadha while recording his statement u/s 67 also produced the invoices of his name, copy of passport of foreign nationals (Ex.PW1/J (colly)) showing that he had previously also sent the parcels of foreign nationals of similar nature. Accused Anuj Gosain also produced documents showing accused Lokesh Chadha sent the parcels abroad of similar nature of foreign nationals. There is nothing in cross-examination of PW1 that the said parcels were not sent by present accused persons. The statement of accused u/s 67 also corroborates the said fact. One thing pertinent to notice that accused persons deliberately not producing the identity documents of present foreign national before NCB and this clearly suggest culpable mental state of accused persons.

36. Accused Lokesh Chadha in his statement u/s 67 NDPS Act stated that he runs a speed parcel courier company and he asked Anuj Gosain to take the parcel of the foreigner. He also handed over the documents of previous parcel sent for other foreign nationals. Accused Anuj Gosain further stated in his statement u/s 67 NDPS Act that he has started working in the said speed parcel service from 10.04.2015 and the office of the said courier company is at the house of accused i.e. at RZ-117 BB, Top Floor, Dabri Extension, but as the work is more of South Delhi therefore, accused Lokesh Chadha told him to use his own house South Delhi as pickup center. The accused Lokesh Chadha could not produce in his defence any document to show that he was regularly indulging in the courier activity and only able to produce during investigation the parcel of some foreign national. Accused not tried to bring before the court the genuineness of this business by producing proper documents despite the fact he examined himself as DW1.

Mobile call records

37. As per the CAF, the mobile number 9999538240 is issued in the name of accused Anuj Kumar Gosain. The mobile no. 8447990070 as per CAF is in the name of Neeru, mother of accused Lokesh Chadha. The prosecution able to prove that both these mobile phones were used by accused. Both the accused also not dispute that these mobile numbers were not used by them. Their only plea is that they have already provided the mobile of foreign national to whom the NCB officials also had a talk however the said fact is not even suggested to PW1 or any other prosecution witness. As per CDR Ex.PW1/R1 (colly) the accused persons were in connection with the foreigners. Ld. Counsel for accused submitted that there is a mobile call between the mobile of accused Anuj Gosain and foreigner on 02.12.2015 at 15:35:09 and 18:48:28 showing the talktime of 58 seconds and 308 seconds. Ld. Defence counsel submits that panchnama is also found to have prepared between 03.00PM to 05.00 PM suggesting that accused had cooperated the NCB official in talking with foreign national. However this submission cannot be accepted because it was not put to NCB officials but from this at best, it can be inferred that accused during investigation must have told about the foreigner

however merely disclosing the mobile number is not sufficient. Accused persons had to disclose the identity of foreigner which they did not disclose during investigation as well as during the evidence led before this court.

Delay in arrest of accused malafide or bonafide

38. Ld. Defence counsels submit that NCB came into the knowledge of involvement of present accused persons on 02.12.2015 itself, however not apprehended them till 17.02.2016 and the said delay is due to the fact because investigating agency knows that present accused is not involved, and only foreign national is involved, however when they could not apprehend the foreign national, therefore, falsely involved the accused in the present case. Though, this suggestion was not put to IO PW1 and PW2 but from the sequence of facts it can be inferred that the IO must have made inquiries from the accused prior to recording of their statement u/s 67 and their apprehension, but this delay on the other hand shows that the NCB believed the version of accused that one foreign national is involved however when they could not trace the said foreign national and the accused also not provided the documents or other particulars of foreign national except the phone number which was also found in the name of some other person (PW15). Accused Lokesh Chadha as DW1 deposed that they have collected the passport and visa of the foreign national however nowhere suggested to the relevant witnesses that they have given the copy of passport and visa to the IO during investigation or thereafter. Even not disclosed the particulars of said foreign national in his testimony. It is also not the case of the accused that NCB deliberately concealed the said passport and visa. The NCB has taken its own time in verifying the facts and when they could not locate the foreign national having no other option to assume the culpable mental state of accused and apprehended them. The delay in arrest of accused is noway appears to be prejudicial to accused however showing bonafide investigation by NCB.

Testing of sample and FSL report

39. At the time of conducting raid and search of parcel, the contraband found to be tested ketamine and heroin, however when the samples were examined by chemical examiner PW14, as per report the contraband was found to be positive

for pseudoephedrine and diacetylmorphine (heroin). However this inconsistency is not material because there is nothing in cross-examination of PW1 and PW2 that contraband was not recovered. The testing by IO at the spot is provisional and final testing which is to be taken into consideration is CFSL report. As per that report the contraband were found positive for pseudoephedrine and heroin. There is nothing in cross-examination of PW14 Dipti Bhargav, chemical examiner to have doubt over manner of examination and chemical examination report (Ex.PW14/A).

Effect of the statement of accused u/s 67 NDPS Act

40. It is settled law that the statement u/s 67 NDPS Act is admissible. The court has to only look whether it is voluntary, truthful or not. Ld. Counsel for accused submitted that statements are exculpatory in nature therefore cannot be read against the accused. However, the exculpatory nature of the statements u/s 67 itself suggest that they are voluntary and the accused were not forced to make any confession over their express knowledge of concealment of contraband in the parcel.

Presumption u/s 35 and 54 of NDPS Act

41. It is settled law once the possession is established, the person who claims that it was not a conscious possession or have no knowledge of concealment has to establish it. Section 35 of the Act gives statutory recognition of this proposition because of the presumption available in law. Similar is the position in terms of section 54 where also presumption is also be drawn from the possession of illicit articles. It is for the accused to prove that he has no knowledge or not in conscious possession of contraband. Apex Court in *Mohan Lal Vs. State of Rajasthan Crl. Appeal No. 139 of 2010 dated 17.04.2015, (2015) 6SCC 222* dealt this aspect in detail and held as under:

12. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. The said provision reads as follows:-

"35. Presumption of culpable mental state. - (1) In any prosecution for

an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. - In this section "culpable mental state" includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

On a perusal of the aforesaid provision, it is plain as day that it includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression "possess or possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act.

13. In *Noor Aga v. State of Punjab and Anr.*[17], the Court noted Section 35 of the NDPS Act which provides for presumption of culpable mental state and further noted that it also provides that the accused may prove that he had no such mental state with respect to the act charged as an offence under the prosecution. The Court also referred to Section 54 of the NDPS Act which places the burden to prove on the accused as regards possession of the contraband articles on account of the same satisfactorily. Dealing with the constitutional validity of Section 35 and 54 of the NDPS Act, the Court ruled thus:-

"The provisions of Section 35 of the Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be *ex facie* unconstitutional. We would, however, keeping in view the principles noticed hereinbefore, examine the effect thereof vis--vis the question as to whether the prosecution has been able to discharge its burden hereinafter."

And thereafter proceeded to state that:-

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the

accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

14. In *Bhola Singh v. State of Punjab*[18], the Court, after referring to the pronouncement in *Noor Aga* (supra), concurred with the observation that only after the prosecution has discharged the initial burden to prove the foundational facts, then only Section 35 would come into play. While dislodging the conviction, the Court stated:-

" it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond [pic]reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him with the knowledge of its misuse by the driver and others."

15. Having noted the approach in the aforesaid two cases, we may take note of the decision in *Dharampal Singh v. State of Punja*[19], when the Court was referring to the expression "possession" in the context of Section 18 of the NDPS Act. In the said case opium was found in the dicky of the car when the appellant was driving himself and the contention was canvassed that the said act would not establish conscious possession. In support of the said submission, reliance was placed on *Avtar Singh v. State of Punjab*[20] and *Sorabkhan Gandhkhan Pathan v. State of Gujarat*[21]. The Court, repelling the argument, opined thus:-

"12. We do not find any substance in this submission of the learned counsel. The appellant Dharampal Singh was found driving the car whereas [pic]appellant Major Singh was travelling with him and from the dicky of the car 65 kg of opium was recovered. The vehicle driven by the appellant Dharampal Singh and occupied by the appellant

Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

13. It needs no emphasis that the expression "possession" is not capable of precise and completely logical definition of universal application in the context of all the statutes. "Possession" is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge.

xxx xxx xxx xxx

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium.

16. Once possession is established the court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in Madan Lal v. State of H.P.[22], wherein it has been held as follows: (SCC p. 472, paras 26-27) "26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

16. From the aforesaid exposition of law it is quite vivid that the term "**possession**" for the purpose of Section 18 of the NDPS Act **could mean physical possession with animus, custody or dominion over the**

prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others.

42. In view of the mandate of above judgment, section 35 raises a presumption as to the knowledge and culpable mental state from the possession of illicit articles. Possession also includes knowledge of a fact. It is the case of prosecution as well as of the defence that accused booked the said parcels on the ID of accused Anuj Gosain. Neither during investigation nor during the evidence before the court, accused provided the particulars of said foreign national despite their specific defence that they have already taken the copy of passport and visa. The previous practice of sending the parcels of foreign nationals on their own ID without any justifiable cause also reinforces presumption of culpable mental state.
43. Ld. counsel for the accused Lokesh Chadha submitted that Ld. SPP has not asked any question to DW1 accused Lokesh Chadha in his cross-examination that he has knowledge of the concealment of the contraband in the said parcel which itself suggests that the prosecution has the knowledge that accused do not have any knowledge of concealment of contraband in the said parcel. Admittedly, the said contrabands are in concealed position in the contraband which was booked by the accused persons. The accused persons unable to provide the particulars of foreign national. As discussed, it is apparent that accused persons deliberately not provided particulars of foreign national during investigation as well as not able to disclose the same in prosecution evidence or in their statements u/s 313 Cr.PC or in the defence evidence. For making out offence u/s 23(c) and 25A the prosecution has to prove factum of possession which is duly proved by the prosecution on the basis of presumption u/s 35 and 54 NDPS Act, thereafter the burden shifted over the accused to rebut the same. Prosecution able to prove that heroin in commercial quantity recovered from one of the parcels.

Mode of rebuttal of the presumption u/s 35 and 54 NDPS Act.

44. As discussed, the prosecution has proved the foundational facts i.e. booking of the parcels concealing the contraband of the foreign national by the present accused, the factum of non traceability of foreign national on the basis of mobile phone provided by accused which is found in the name of PW15, the non disclosure of particulars and identity of foreign national by accused. Therefore the presumption u/s 35 and 54 arose against the accused. However, Apex court in *Baldev Singh Vs. State of Haryana (2015) 17 SCC 554* described the mode of rebuttal of presumption, the relevant para reproduced as under-

“13. In Abdul Rashid Ibrahim Mansuri vs. State of Gujarat, AIR 2000 SC 821, this Court has clearly held that where an accused admits that narcotic drugs were recovered from bags that were found in his possession at the time of his apprehension, in terms of Section 35 of NDPS Act the burden of proof is then upon him to prove that he had no knowledge that the bags contained such a substance. This Court then went further on to explain as to the standard of proof that such an accused is expected to discharge and the modes vide which he can discharge the said burden. In paras (21) and (22) of the said judgment, this Court held as under:-

21. No doubt, when the appellant admitted that the narcotic drug was recovered from the gunny bags stacked in the auto rickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in sub-section (2) as “beyond a reasonable doubt”. If the court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of the substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the court entertains strong doubt regarding the accused’s awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt undisputed. Even so, it is for the accused to dispel any doubt in that regard.

22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that he can rely on the materials available in the prosecution evidence. Next is, in addition to that, he can elicit answers from prosecution witnesses through cross- examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances

appearing in the prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that the appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.”(Emphasis added)

45. As per mandate of this judgment, the accused persons can rebut presumption u/s 35 from the material of prosecution evidence, through the answers of prosecution witnesses and also from their defence. However, in present case, the appreciation of testimony of prosecution witnesses categorically suggests that the parcel in question from which the concealed contraband was recovered was booked on the IDs of Anuj Gosain which Anuj Gosain booked on the dictate of accused Lokesh Chadha, and accused Lokesh Chadha took the said parcel for sending abroad to the office of KVS Logistics and attached the IDs of the accused Anuj Gosain. Accused though provided the details of one Anila Batra of South Africa alleged to be sent by the said foreign national however the record of said Anila Batra was also not found (Ex.PW1/S1). Accused Lokesh Chadha in his testimony stated that they had retained the passport and visa of said foreign national however as discussed, not able to prove the said fact. The previous conduct of accused of sending the parcels of foreign national on their own ID reinforces presumption of culpable mental state. The 'factum of knowledge' of concealments in the parcels is explicit as the accused persons unable to clear the identity of foreign national.
46. However, accused Anuj Gosain found booked the parcel on the directions of accused Lokesh Chadha. Accused Anuj Gosain is the employee of Lokesh Chadha and collected the parcel from the foreign national on the dictate of accused Lokesh Chadha. Accused Lokesh Chadha in his cross-examination as DW1 also accepted the fact that the entire money of Rs. 10,000/- for booking was given by Anuj Gosain to him. From cross-examination of DW1, it is also clear that accused Lokesh Chadha had gone to KVS Logistics to book both the parcels. Considering the fact that the contraband was concealed in the parcel, and accused Anuj Gosain only acted on the dictate of Lokesh Chadha who primarily dealt with the foreign national and also got the entire charges of Rs. 10,000/-, further accused

Lokesh Chadha booked the said parcel in KVS Logistics himself, created doubt over accused Anuj Gosain having knowledge of concealment of contraband. He only found interacted with foreign national at the dictate of accused Lokesh Chadha being employee and not gained anything from the said transaction. It can be inferred that he might not have knowledge of concealment, thus entitled benefit of doubt.

47. Accused Lokesh Chadha on the other hand is the owner of the courier agency who has dealt primarily with the foreign national, received the charges and also booked the said parcels with KVS Logistics. Thus, on overall appreciation of evidence, accused Lokesh Chadha unable to rebut the presumption u/s 35 and 54 however accused Anuj Gosain appears to have rebutted the presumption thus entitled for benefit of doubt.

48. On overall appreciation of evidence, prosecution able to prove foundational facts beyond doubt. The presumption u/s 35 and 54 NDPS Act of culpable mental state and conscious possession arose in favour of the prosecution, however accused Lokesh Chadha unable to rebut the presumption thus, found guilty of offence u/s 25A and 23(c) r/w section 28 NDPS Act. The accused Anuj Gosain able to rebut the presumption, as discussed. Thus acquitted of the charge by granting benefit of doubt. Accused Lokesh Chadha is convicted for the offence punishable u/s 25A and 23(c) r/w section 28 NDPS Act. Accused Anuj Gosain is directed to furnish bail bond u/s 437A Cr.PC in the sum of Rs. 50,000/- to the satisfaction of this court. Accused Lokesh Chadha be heard on point of sentence.

**Announced in the open court
on this 12th day of February, 2020**

**(Ajay Kumar Jain)
Special Judge NDPS
Patiala House Courts
New Delhi**