

3. The appellant was held to be the owner of the House in question from which the *ganja* was recovered, relying upon the voters list of 2008 rejecting his defence that he had sold the house to co-accused Gokul Dangi on 12.06.2009. Gokul Dangi has been acquitted in trial.

4. Shri Puneet Jain, learned counsel for the appellant submitted that the conviction based on a mere presumption of ownership of the house, without any finding of conscious possession was unsustainable. Reliance was placed on ***Gopal vs. State of Madhya Pradesh***, (2002) 9 SCC 595. The police had received information that Gokul Dangi had kept contraband in his house. The appellant and Ghasiram, the village chowkidar had identified the house of the accused to the police when it came to the village for search and seizure. Both of them were witness to the *panchnama* for breaking open the lock to the house when the contraband was recovered. It stands to reason why the appellant would take the police to his own house, have the lock broken to recover the contraband and implicate himself. Ghasiram and P.W.11,

were both witnesses to the sale agreement dated 12.06.2009, Exhibit P-28 executed by the appellant in favour of Gokul Dangi. It was produced before the police by the appellant the very next day but was never investigated, Ghasiram has not been examined for no explicable reasons. The entries in the village panchayat records with regard to ownership of the house had not been investigated. The appellant was subsequently made an accused during investigation because of the failure of the police to investigate properly.

5. Ms. Swarupama Chaturvedi, learned Addl. Advocate General for the State, submitted that P.W.11 had denied being a witness to the sale agreement alleging that his thumb impression had been impersonated. The deed was therefore rightly held to be a forged and fabricated document confirmed by the voter list entry of 2008 that the house belonged to the appellant. The village panchayat records also mentioned the ownership of the appellant.

6. We have considered the submissions on behalf of the parties and have carefully perused the evidence on record also. P.W. 6, the first investigation officer deposed that secret information had been received of Gokul Dangi having stored contraband in his house. The appellant and Ghasiram along with other villagers identified the house as belonging to Gokul Dangi on 11.08.2009 leading to recovery after the lock was broken open. The witness admitted that on 12.08.2009 itself the appellant had submitted the sale agreement dated 12.06.2009 Ex. P-28 to him but that it was never investigated by him. Acknowledging that ownership details are mentioned in the gram panchayat records, the witness stated that he did not investigate the same. P.W. 16, who took over the investigation after transfer of the former recorded the statements of Ghasiram and P.W. 11 as also of other witnesses. The appellant was then made an accused on basis of his name being entered in the voters list of 2008. Contrary to the evidence of P.W.6, the witness stated that the gram panchayat records had been looked into by the former. No explanation was offered for not investigating the sale

agreement. The appellant was acknowledged not to be living in the house from where the contraband was recovered, but was alleged to be using it as a store room on basis of no evidence whatsoever.

7. P.W. 3 and P.W.7, the police constable who had accompanied P.W. 6, deposed that the appellant and Ghasiram had identified the house as belonging to Gokul Dangi which was corroborated by the panchayat records.

8. Ghasiram, as the village chowkidar was the best person in the know of the ownership and possession of the house. He was one of the two witnesses to the sale agreement Exhibit P-28. The prosecution for inexplicable reasons has not examined him. P.W. 11 denied his thumb impression on the sale document contending that it was a fabricated document. No forensic report was obtained by the prosecution. The witness acknowledged that the appellant did not visit his own house and lived in his new house for the last 15 years denying any knowledge who the owner was. Yet

his statement was accepted as gospel truth without any further investigation.

9. The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. That the right of the accused to a fair trial could not be whittled down under the Act was considered in **Noor**

Aga vs. State of Punjab, (2008) 16 SCC 417 observing:

“58. ... 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.”

10. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of 10 years, absence of any provision for remission do not dispense with the requirements of prosecution to establish a prima facie case beyond reasonable doubt after investigation, only where after which the burden of proof shall shift to the accused. The gravity of the sentence and the stringency of the provisions will therefore call for a heightened scrutiny of the evidence for establishment of foundational facts by the prosecution.

11. It is apparent that the police being in a quandary with regard to the ownership and possession of the house in question due to a flawed, defective and incomplete

investigation found it convenient to implicate the appellant also, sanguine that at least one of the two would be convicted. Sri Jain is right in the submission that according to normal human prudence, it stands to reason why the appellant who was residing in his new house for the last 15 years would identify his own erstwhile house as that of the accused Gokul Dangi, be a witness to the breaking of the lock and recovery to implicate himself.

12. The appellant had produced the sale agreement, Exhibit P.28 with promptness the very next day. It was never investigated for its genuineness by the police and neither were the panchayat records verified. The panchayat records are public documents and would have been the best evidence to establish the ownership and possession of the house. Despite the best evidence being available the police considered it sufficient to obtain a certificate Exhibit P-37 signed by P.W. 14 who acknowledged her signature but denied knowledge of the contents of the certificate. The voters

list entry of 2008 being prior to the sale is of no consequence. It is not without reason that the co-accused had absconded.

13. The appellant was held guilty and convicted in view of his name being recorded as the owner of the house in the voters list 2008, ignoring the fact that sale agreement was subsequent to the same on 12.06.2009. The prosecution cannot be held to have proved that Exhibit P-18 was a fabricated and fictitious document. No appeal has been preferred by the prosecution against the acquittal of the co accused.

14. In view of the nature of evidence available it is not possible to hold that the prosecution had established conscious possession of the house with the appellant so as to attribute the presumption under the NDPS Act against him with regard to recovery of the contraband. Conviction could not be based on a foundation of conjectures and surmises to conclude on a preponderance of probabilities, the guilt of the

appellant without establishing the same beyond reasonable doubt.

15. The police investigation was very extremely casual, perfunctory and shoddy in nature. The appellant has been denied the right to a fair investigation, which is but a facet of a fair trial guaranteed to every accused under Article 21 of the Constitution. The consideration of evidence by the Trial Court, affirmed by the High Court, borders on perversity to arrive at conclusions for which there was no evidence. Gross misappreciation of evidence by two courts, let alone poor investigation by the police, has resulted in the appellant having to suffer incarceration for an offence he had never committed.

16. Normally this Court in exercise of its jurisdiction under Article 136 of the Constitution does not interfere with concurrent findings of facts delving into appreciation of evidence. But in a given case, concerning the liberty of the individual, if the Court is satisfied that the prosecution had

failed to establish a prima facie case, the evidence led was wholly insufficient and there has been gross misappreciation of evidence by the courts below bordering on perversity, this Court shall not be inhibited in protecting the liberty of the individual.

17. The conviction of the appellant is held to be unsustainable and is set aside. The appellant is acquitted. He is directed to be set at liberty forthwith unless wanted in any other case.

18. The appeal is allowed.

.....**J.**
[R.F. NARIMAN]

.....**J.**
[NAVIN SINHA]

NEW DELHI
AUGUST 05, 2020.