

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 5 | Issue 4**

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**2022**

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# Right to Demand Production of Documents withheld by the Empowered Officer/Department under the Provisions of Narcotic Drugs And Psychotropic Substances Act, 1985 – Use of Section 91 of Criminal Procedure Code, 1973 – When, How and at What Stage the Demand of Production of Withheld Documents can be Made? – An Analysis

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## ABSTRACT

*Cases have been decided by the Hon'ble Courts wherein it has been held that the empowered departments/empowered officers have mis-used or rather abused their position and power and have planted cases on innocent persons to achieve what they could not achieve otherwise through normal legal proceedings. The planting of the narcotic or psychotropic substances are not new and some of the cases have reached the Hon'ble Supreme Court too on the issue. Cases have been fought on the ground that the accused was not arrested from the scene of crime and they have been lifted from elsewhere and the substance in question planted on them. Here, the use of location of the empowered officers during the course of search, seizure and arrest using the CDR details comes in handy for the accused.*

*This Article gives a wholistic view of the use of Section 91 of the Criminal Procedure Code, 1973 by the accused to get hold of the withheld documents and the rulings of the Hon'ble Supreme Court, Hon'ble High Courts, Ld. Trial Courts have been lucidly discussed to drive home the point that this section is a beneficial power used not only by the Hon'ble Courts but also empowered departments and the accused.*

1. The provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the Act”) provide for stringent punishment for various offences under the Act. The stringent provisions, in case of commercial quantity of narcotic drugs or psychotropic substances, cannot be less than 10 years. To illustrate, we may look at the “small quantity” and “commercial quantity” notified *vide* notification S.O. 1055 (E) dated 19<sup>th</sup> October, 2001 published in the Gazette of India, Extra., Pt. II sec. 3(ii) dated 19<sup>th</sup> October, 2001, as amended,

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for some of the substances notified for the purpose of this article.

SL. NO.	Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Other non-proprietary name	Chemical Name	Small Quantity (in gm.)	Commercial Quantity (in gm./kg.
1	Acetyl-alpha-methylfentanyl		N-[-(alpha-methylphenethyl)-4-piperidyl] acetanilide	0.005	0.1 gm.
2	Alfentanil		N-[1-[2-(4-ethyl-4,5-dihydro-5-oxo-1H-tetrazol-1-yl) ethyl]-4-(methoxymethyl)-4-piperidiny] -N phenylpropanamide	0.005	0.1 gm.
3	(+) LYSERGIDE	LSD, LSD-25	9, 10-didehydro-N, N-diethyl-6-methylergoline-8 Beta-carboxamide	0.002	0.1 gm.
4	Alpha-methylthiofentanyl		N-[1-[1-methyl-2-(2-thienyl) ethyl]-4-piperidyl] propionanilide	0.005	0.01 gm.
5		MDMA, Ecstasy	(+)-N, alpha-dimethyl-3,4-(methylene-dioxy)phenethylamine	0.5	10 gm.

		MMDA, Ecstasy	2-methoxy-alpha- methyl-4,5- (methylenedioxy) phenethylamine	0.5	10 gm.
<b>NB: The concept of “small quantity” and “commercial quantity” is not applicable to controlled substances.</b>					

### **Punishment for small and commercial quantity**

2. A cursory look at the Table above appended would reveal the small and commercial quantities of the substances mentioned in the Table can be easily transported on the person and once the recovery and seizure of the substance is made out involving commercial quantity and on conviction, it would entail a minimum punishment for a term which shall not be less than 10 years but at the same time can be in excess of 10 years but up to 20 years and the accused shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Section 21 (c) and Section 22 (c) of the Act refers. In respect of small quantity, on conviction, the punishment envisaged under Section 21(a) and Section 22(a) of the Act is one year or with fine which may extend to ten thousand rupees or with both.

### **Presumption of guilt under the Act**

3. Under the provisions of the Act, guilt of the accused is presumed in terms of Sections 35 and 54 of the Act, which brings complete responsibility and liability of proving the innocence on the accused. The illustration, in the Table in *para supra*, only attempts to bring out the fact that the accused indulging in illicit drug trafficking would, on his conviction, be inflicted with the punishment as above.

### **Mis-use of powers under the Act**

4. Cases have been decided by the Hon'ble Courts wherein it has been held that the empowered departments/empowered officers have mis-used or rather abused their position and power and have planted cases on innocent persons to achieve what they could not achieve otherwise through normal legal proceedings. Needless to mention here that the commercial quantities mentioned against each of the substance mentioned in the Table in *para supra*, can be easily planted on an innocent person [see Vicky S/o Jaipaldas Pariyani for further details; *para 11.3 infra* refers] and thereafter be proceeded under the Act.

## Use of Section 91 of the Criminal Procedure Code, 1973 to prove innocence

5. This Act has been subject to misuse and abuse and many a times, we often see the accused files an application under Section 91 of the Criminal Procedure Code, 1973 (hereinafter referred to as “the Code”) to obtain certain documents to prove his innocence or the Call Detail Records (CDR) to drive home the point that he was picked up from a different location or that the officers of the raiding team were never there at the crime scene, to which references have been made in para *infra*.

6. This article deals with the use of Section 91 of the Code to prove the innocence of the person accused of offences under the Act or any other Acts. In order to understand the issue in proper perspective, it is necessary to extract the provisions of Section 91 of the Code, which is as under:

***“Section 91- Summons to produce document or other thing.***

*(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order*

*(2) Any person required under this Section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.*

*(3) Nothing in this Section shall be deemed*

*(a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872 ), or the Bankers' Books Evidence Act, 1891 (13 of 1891 ) or*

*(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”*

### **Emphasis applied**

#### **“Document and other things” - Explained**

6.1 A reading of Section 91 of the Code reveals that this Section empowers the Court to

direct production of any "**document or other things**".

**6.1.1** We find that the term "Document" has not been defined under the Code. In terms of Section 2(y) of the Code, the words and expressions used in the Code and not defined but defined under the Indian Penal Code, 1860 (hereinafter referred to as "the IPC, 1860") have the meaning respectively assigned to them in the Code.

**6.2** Accordingly, we find that the term "document" has been defined under Section 29 of the IPC, 1860 as under:

*29. "Document".—The word "document" denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, **as evidence of that matter.***

*Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.*

*Illustrations A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document. A cheque upon a banker is a document.*

*A power-of-attorney is a document.*

*A map or plan which is intended to be used or which may be used as evidence, is a document.*

*A writing containing directions or instructions is a document.*

*Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this Section, although the same may not be actually expressed.*

*Illustration A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature*

**6.3** The term "document" **has also been defined** under Section 3 of the Indian Evidence Act, 1872 as under:

“ Document ” means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

*Illustrations A writing is a document;*

*Words printed, lithographed or photographed are documents;*

*A map or plan is a document;*

*An inscription on a metal plate or stone is a document;*

*A caricature is a document.*

**6.4** A combined reading of both the definitions would reveal that by the term/expression “document” we mean any matter expressed upon any substance by means of letters intended **to be used as evidence of that matter**. When, documents including electronic records, being produced for inspection of the Court, such documents are called 'documentary evidence' within the meaning of expression "Evidence" under the Indian Evidence Act, 1872.

**6.4.1** Having understood the meaning of the term “documents”, it is necessary for us to know the scope of the words “other things”. The expression “other things” would cover the material items used for commission of the crime and recovery of the same from the person accused of an offence viz. seized goods (in the context of the article it would be narcotic drugs, psychotropic substances say hidden in a vehicle, cash against sale of narcotic drugs or psychotropic substances, etc.).

#### **Whether statement recorded by a police officer is a “document”?**

**6.5** However, readers may note at this stage that the statement recorded by a police officer (*all empowered officers are “police officers” as held by the Larger Bench of the Hon’ble Supreme Court in Tofan Singh<sup>1</sup>*) is not admissible as evidence in the Court of Law. The purpose of such a statement is only to contradict witness as provided under Section 145 of the Indian Evidence Act, 1872. Since “document” is intended to be **used as evidence of that matter**, the statement recorded by a police officer (be it under Section 67 of the Act or under Section 161 of the Code) would **not fall** within the **scope of the term “document”** as defined under Section 29 of IPC, 1860.

#### **Right to the production of documents – at what stage of the trial?**

**7** Having understood the provisions of Section 91 of the Code, the next question that arises is as to at what stage would an accused be entitled to invoke the provisions of Section 91 of Code? Put it simply, at what stage if an accused has the right to the production of all

documents, which are with the empowered department/officer but do not form part of the chargesheet filed under Section 173 of the Code?

**7.1** The issue raised in para 7 *supra* came up for consideration before the Hon'ble Supreme Court in the case of **Debendra Nath Padhi**<sup>2</sup>, while considering the provisions of Section 91 of the Code. The Hon'ble Supreme Court observed as under:-

*“25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. **The first and foremost requirement of the Section is about the document being necessary or desirable.** The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. **If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage.** When the Section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the Section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the Section. In so far as the accused is concerned, **his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence.** When the Section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of police station can also direct production thereof. **Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.**”*

**Emphasis applied**

**7.1.1** We further find that in the case of **Manu Sharma**<sup>3</sup>, the Hon'ble Supreme Court held that, the right of accused with regard to disclosure of document is **a limited right, but is codified** and is the **very foundation of fair investigation and trial**. The Hon'ble Supreme Court further held that, on such matters, the accused cannot claim an indefeasible legal right to claim every document, but certain rights of the accused flow from both the codified law as well as from equitable concepts of the constitutional jurisdiction.

#### **Emphasis applied**

**7.1.2** Moving further, we find that in the case of **V.K.Sashikala**<sup>4</sup>, the Hon'ble Supreme Court held as under:

*“17. The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 Cr .P.C. and would travel beyond the confines of the strict language of the provisions of the Cr .P.C. and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. **What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the Court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to in the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belatedly. This is how the scales of justice in our Criminal Jurisprudence have to be balanced.”***

#### **Emphasis applied**

**7.1.3** However, moving a step forward, we see that in the case of **Nitya Dharmananda and Anr**<sup>5</sup>, after referring to the judgment in the case of **Debendra Nath Padhy (Supra)**, the

Hon'ble Supreme Court held as under:

*"While ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge, **but if the Court is satisfied that there is material of sterling quality, which has been withheld by the Investigator, the Court is not debarred from summoning or relying upon the same even if such document is not part of the charge-sheet. It does not mean that the defence has a right to invoke Section 91 Cr. P.C. de hors the satisfaction of the court, at the stage of charge.**"*

**Emphasis applied**

**What is material of sterling quality?**

**7.1.4** The question stood answered *vide* Order dated 30<sup>th</sup> January 2020 decided by the Ld. ASJ/Special Judge (PC Act) (CBI) 09, (MP/MLA Cases), RADC, New Delhi in the case of **Dr. Shashi Tharoor**<sup>6</sup> in SC No.05/2019 as under:

*"25.A document of sterling quality, however, has not been defined in the Nitya Dharmananda and Anr<sup>5</sup>. However, some guidance can be taken from the observation of the Hon'ble Supreme Court in the case of Rukmani Narvekar<sup>7</sup> where the Court was considering whether document of accused where the Court was considered at the stage of charge and it had observed can be considered at the stage of charge and it had observed that in rare cases document of the accused can be seen, which could convincingly demonstrate that the whole prosecution case is totally absurd, preposterous and totally concocted. So .... that a document of sterling quality referred to in the judgment of Nitya Dharmananda has to be of the same quality."*

**Emphasis applied**

**7.2** A plain reading of the extracted judgments rendered by the Hon'ble Supreme Court reveal that Section 91 of the Code can be put into use if the evidences/materials are of superlative or sterling in quality and **duly withheld** by the empowered officer, the Court can rely on the same even when not forming part of the charge sheet. It also further flows from the judgments, especially **Nitya Dharmananda (supra)** that the defence, with the satisfaction of the court has the right to invoke Section 91 of Code at the stage of charge.

**Is the prosecution liable to procure the document and then supply to the accused?**

**7.3** Is a duty cast upon the prosecution to procure the document and then supply to an

accused under Section 91 of the Code? A careful reading of the Section 91 of the Code would reveal that no such duty has been cast. The Ld. Additional Sessions Judge had an occasion to examine this issue in the case of **Dr. Shashi Tharoor**<sup>6</sup> and it was held by the Ld. Additional Sessions Judge as under:

*“31. ....By resorting to Section 91 Cr. P.C., the applicant / accused cannot insist on a direction to the Prosecution to first obtain the document and then supply it to him. .... The Court will not venture into this exercise of procuring document for the accused which may possibly contain his defence. It goes without saying that at the stage of charge such a roving inquiry by the Court is not expected and the Court has to look into the documents of the Prosecution to ascertain whether a prima facie case is made out or not.”*

#### **Emphasis applied**

**8** Having understood the broad contours of Section 91 of the Code, we now turn to the main aspect of this article. It is a settled law that the investigation should be free, fair, just and there should be no colourable exercise of power. At the cost of repetition, it is emphasized, the powers conferred upon the empowered officer/department should not be misused against innocent citizens.

**9** This article assumes significance for the reason that a number of cases have come to be filed in the Court of Law suggesting that the persons accused of the offences have no connection to the case. It has been argued vehemently that the cases have been foisted on them and they have pleaded innocence.

**10** To understand the issue in proper perspective in the context of the cases being booked under the Act, we may in the first instance refer to the case of **Baggu Khan**<sup>8</sup> wherein a petition came to be filed under Section 482 of the Code praying thereunder that investigation pursuant to FIR No.109 dated 27.11.2014, registered under Section 22, 61 & 85 of the Act at Police Station City-2, Abohar, District Fazilka, be handed over to some independent agency like Central Bureau of Investigation. During pendency of investigation, an application was submitted by father of the petitioner seeking an inquiry into the matter. This inquiry was entrusted to Superintendent of Police, Abohar. After conducting a detailed enquiry, he submitted report Annexure P-3 and **arrived at a conclusion that Baggu Khan was innocent.** Operative part of the report reads as under:-

*“From my open and secret enquiry one thing come to light that on 27.11.14,*

two persons from the village took Baggu Khan in an allurement of drugs and it take confirmed from the statements of villagers namely Allah Ditta and Mohammad Aslam, who have specifically stated that two boys of village on the pretext of delivery of articles for marriage purpose for alongwith them, Sohan Lal, Birbal and Bhanwar Lal also gave their statements recorded that on 27.11.14 Baggu Khan met them standing on Abohar Bye Pass in the evening and he told them that two boys of village took him at Abohar for delivery of articles for marriage. From my enquiry, it is clear that Baggu Khan was brought from village by two boys of village by keeping him in dark for supply of Drugs and Baggu Khan was having no knowledge about keeping by them any Narcotic substance because he was addict of drugs due to this he accompanied them. Although, he is not indulging in any business of selling of drugs.”

**10.1** The Hon’ble Punjab and Haryana High Court, after hearing the rival submissions and while transferring the case to the Central Bureau of Investigation, held as under:

***“False implication as alleged in this petition is a serious matter which needs thorough probe. Fair investigation is a prime requisite to instil confidence in the public. Their voice needs to be heard so that the truth comes out. If there are basic faults in the investigation, it may give a reason to this court to direct independent and impartial investigation by another agency. In the instant case, foundation of this issue is based on the fact that Superintendent of Police himself found that petitioner had been falsely implicated and discharge of the accused was sought on this ground. Plea for discharge having been rejected, the police decided to present a challan against him. It is inexplicable why this course of action was adopted. Petitioner alleges that SHO was bribed by Alla Bux and Husain to implicate him in the instant case. Needless to observe false implication of a citizen in a criminal case can ruin him, particularly in a special statute like NDPS Act which contains stringent provisions. Right for a citizen under Article 21 of the Constitution cannot be trampled by a shoddy, improper or biased investigation. Accused can expect a fair trial only if it is preceded by a fair investigation. Though this court does not intend to express any opinion on the merits of the case, further investigation of the case is handed-over to Central Bureau of Investigation which may look into all aspects of the matter***

*including false implication, if any. In case it finds that petitioner has been falsely implicated it shall be at liberty to initiate action against concerned officials as per law. Entire record be furnished to said agency within ten days from receipt of copy of this order. Petition is allowed in these terms. Till the investigation is finalized by the CBI, trial Judge shall not proceed with the trial.”*

### **Emphasis applied**

**10.2** In the case of **Rajbir Singh and Another<sup>9</sup>**, it is evident that there was colourable exercise of power as recorded in the Order *ibid*, which is extracted herein for ease of reference:

*“2. The case in hand has a chequered history. Appellant No.1 herein was Sub Inspector Rajbir Singh of P.S. Sadar, Dabwali and appellant No.2 - Satbir Singh, was the then Tehsildar of Dabwali, District Sirsa, Haryana. They were both prosecution witnesses in connection with a case registered as FIR No.149 dated 7.8.2002 under Section 17 & 18 of the NDPS Act against one Hanuman son of Net Ram, on the ground that the said Hanuman was in possession of opium in contravention of the aforesaid provisions.*

*3. Appellant No.1 Rajbir Singh investigated the aforesaid case and filed a charge-sheet against said Hanuman, on the basis of which the trial started. After the trial was concluded, the learned Trial Court not only found that the accused was not guilty of the charge and consequently acquitted him, but also found that the aforesaid initiation and registration of the case against Hanuman was the result and outcome of a conspiracy hatched by S.I. Rajbir Singh and Satbir Singh (PW-2), who was the then Tehsildar of Dabwali, District Sirsa, for putting pressure upon Satpal son of accused Hanuman, to abandon his rights over 75 Kanals of land under his tenancy. The Trial Court held that due to the aforesaid conspiracy for putting pressure upon Satpal, it was decided by the Investigating Officer Rajbir Singh in collusion with the then Tehsildar Satbir Singh, to implicate Hanuman, the father of Satpal in a false case. The Trial Court has referred to the aforesaid conspiracy in its findings in the following manner:*

*“It is evident from the case discussion that a conspiracy was hatched by SI Rajbir Singh, then SHO, Police Station Sadar Dabwali and PW Satbir Singh, then Tehsildar-cum-Executive Magistrate,*

*Dabwali for putting pressure upon Shri Satpal son of accused Hanuman Bishnoi to abandon his rights over 75 Kanals of and under his tenancy. It was decided to implicate his father in a totally false case. They perhaps wanted independent corroboration to the official version and hence began the search for the convenient man. The choice naturally fell on PW Duli Chand, the old warhorse who had participated in many a legal battle in the Courts of law and had come to believe by then that he could walk into the Court-room, depose the tutored version and then walk out without remorse, **he decided as usual to oblige the SHO of his area and so was implicated a poor, hapless and innocent man in a case under the NDPS Act. A huge quantity of 5 kgs. of opium was planted upon him so that the Court would not ever grant him bail and that the sword of minimum imprisonment of The (sic Ten) Years and a huge fine of Rs. One Lac would continue hanging over his head for many many years. But mysterious are the ways of nature. The trial concluded in less than six months time and overwhelming evidence appeared on record not only to prove the innocence of a hapless victim of brute conspiracy but also the pre-arranged plan crafted by SI Rajbir Singh, SHO, Police Station Sadar, Dabwali and Satbir Singh, Tehsildar-cum-Executive Magistrate, Dabwali, whose primary duty is to check injustice being done to the people. It is a fit case to attract the provisions of Section 58 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The players in the conspiracy must have the feel of the noose which they had so skillfully created and they must taste the portion which they had so thoughtfully prepared for innocent Shri Hanuman Bishnoi. SI Rajbir Singh, then SHO, Police Station Sadar, Dabwali and Satbir Singh, Tehsildar-cum-Executive Magistrate, Dabwali are hereby convicted for the commission of an offence punishable under Section 58(1)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985. They shall be heard on the quantum of sentence as and when they are produced before this Court.***

**Emphasis applied**

**10.2.1** It can be gleaned that a free and fair trial ensured that the hapless victim of conspiracy, as in the case of Rajbir Singh, was acquitted of the charges inflicted upon him by the prosecution.

**11** False implication of innocent persons is not new to the empowered department, especially the Police under the Act. This is done for a variety of reasons by the empowered departments and when false implication has been done by officer from the Indian Police Service. To illustrate this point, we take note of the fact that Sanjiv R Bhat, an ex-IPS officer was the main person, in association with his juniors, who had got planted heroin to implicate innocent person and now is facing trial under the very Act (of course in conjunction with the provisions of IPC, 1860) he used to implement and this is evident from the following:

**11.1** Sanjiv R Bhat, now in judicial custody, facing trial for under Sections 120(b), 117, 167, 204, 343, 465, 471 of IPC, 1860 read with Section 120(b) of IPC, 1860 and Sections 17, 18, 21, 27(a), 29, 58(1) and 58(2) of the Act, has been using the provision of Section 91 of the Code for summoning and production of documents which were not part of the chargesheet.

**11.1.1** The facts of the case as recorded in **R/CR.RA/301/2021**<sup>10</sup> are as under:

*“(i)In the year 1996, when the applicant was posted as District Superintendent of Police, Banaskantha at Palanpur, he and other co-accused have hatched the conspiracy to frame one Sumer Singh Rajpurohit, resident of Pali, Rajasthan State, in a false case of opium, punishable under the provisions of the NDPS Act. It is further alleged that, the applicant being a District Superintendent of Police by influencing his subordinate officer had involved them in the alleged criminal conspiracy. As a part of conspiracy, a false verdhi was being transmitted to control room on 30.04.1996 inter alia stating that, information received by the control room that, at about 06:10 a.m, Sumer Singh Rajpurohit is doing business of Opium and yesterday he brought 5 kgs opium and stayed at Hotel Lajvanti, Palanpur and delivery of the opium has to be given in Palanpur. It is alleged that, prior to the alleged verdhi, the applicant had knowledge that, the verdhi was bogus and false and had made conversation with his subordinate officer i.e. Mr. I.B.Vyas, Police Inspector, Local Crime Branch that, case of NDPS is required to be investigated. It is alleged that, Mr. Sanjeev Bhatt i.e. applicant herein directed the concerned to send the verdhi to LCB office and directed Mr. Vyas to investigate the case. Mr. Vyas had raided the Hotel Lajvanti and seized*

*the contraband opium of 1.15 Kgs. from Room No.305 of the Hotel which was booked in the name of Sumer Singh in the register maintained by the hotel. It is alleged that, after seizure of the opium and upon further inquiry, it was found that, Sumer Singh had left the hotel without informing anybody. Mr. Vyas being a complainant lodged the FIR being Prohibition C.R.No.216/1996 at Palanpur Police Station and investigation was entrusted to Mr. Vyas and during the course of investigation, he had arrested Sumer Singh and produced before the Court and sought his remand.*

*It is alleged that, during investigation, the applicant Mr. Bhatt had directed Mr. Vyas to inquire about the rented shop of Sumer Singh and Mr. Bhatt had also made conversation with Sumer Singh about his shop and threatened him to vacate the same. It is alleged that at the instance of the applicant Mr. Bhatt, report under Section 169 of the Code had been filed by the respondent No.2 Mr. I.B.Vyas, inter alia, stating that, the person occupying the room at hotel was not Sumer Singh and accordingly, Sumer Singh was discharged by the Court and finally, 'A' summary report was filed.*

*(ii) Two petitions were filed before the Gujarat High Court for further investigation by the State CBI in the matter and this Court vide order dated 03.04.2018 directed the State to form a special investigation team and accordingly, SIT was constituted and investigation was entrusted to Mr. Virendrasinh Yadav, who had recorded the statements of the witnesses, collected the material evidence, arrested the applicant and Mr. Vyas, PI of Local Crime Branch under the charges as referred to above and finally, on 02.11.2018, chargesheet came to be filed before the Special Court and charges came to be framed by the Special Court on 18.09.2019 at Exh:59 under Sections 120(b), 117, 167, 204, 343, 465, 471 read with Section 120(b) and Sections 17, 18, 21, 27(a), 29, 58(1) and 58(2) of the NDPS Act alleging that, the applicant and co-accused have hatched conspiracy to frame Sumer Singh in the alleged offence under the provisions of the NDPS Act. It is also alleged that, in order to achieve the object of conspiracy, the applicant financed to procure the opium, fabricated the contents of verdhi, allegedly forged the entry in the hotel register, conspired to plant the opium as alleged, for which, the applicant and respondent No.2 are facing the trial for the offence as referred to above.”*

**11.1.2** The Hon'ble High Court of Gujarat, after hearing the rival submissions, held, *vide* Order dated 4<sup>th</sup> October 2021, as under:

*“25. In view of the aforesaid, this Court is of the view that, the investigating agency being a part and parcel of the State is legally required to be fair, just and reasonable. It is no doubt true that, since from his arrest in the alleged crime, the applicant had filed many applications either before this or trial Court under various provisions of the Code, as a result, trial could not commence. However, the Court being a guardian of fundamental rights enshrined under the Constitution of India, keeping the larger interest and rights of the fair trial and defence of the accused, should have decided the issue accordingly.*

*26. The applicant accused has claimed the case papers of Human Right inquiry conducted by the then DIG, Bhuj Range, Mr. Dhagal. The reason behind is that, while recording the statement of witness Summersingh by the IO, he made a reference with regard to his application filed with the Human Rights Commission. This Court is of the considered view that, Investigating Agency has not cited Mr. Dhagal as witness nor any documents with regard to alleged inquiry being collected during the course of investigation. The trial Court while dealing with this issue recorded that the documents of the inquiry are not necessary for adjudication of trial as well as to defend the case. The prosecution's stand is that no such papers are available with the authority and therefore, it cannot be provided as of right to the applicant. This Court is of considered view that, reference subject of Human Right Application and enquiry thereof are not necessary and for the adjudication of trial as well as right to defend the case. However, the trial Court granted liberty to the applicant to revive his claim at appropriate stage if need be arise. This Court is in complete agreement with the view taken by the trial Court and therefore, so far alleged enquiry made by the then DIG Mr. Dhagal is concerned, at this stage, the applicant is not entitled for the documents.*

*27. For the foregoing reasons, applications at Exhs:58 & 63 under Section 91 of the Code of Criminal Procedure deserve to be partly allowed. In the result, prosecution is hereby directed to produce and provide the copies of documents at Item No.8 of the application at Exh:58. The prosecution further directed to provide and produce the copies of documents at Item*

***No.1 of the application at Exh:63. The prosecution shall comply the order within 15 days from the date of receipt of this order.”***

### **Emphasis applied**

**11.2** At this stage, esteemed readers may refer to the latest judgment rendered by the Hon’ble Supreme Court in the case of **Zakia Ahsan Jafri<sup>11</sup>** for knowing the conduct of Sanjiv Bhat during his tenure as an IPS Officer.

**11.3** On the issue of false implication, we may usefully refer to a case booked by the Madhya Pradesh Police where we see the effective use of Section 91 of the Code to drive home the point that the said person (i.e. accused) was not at the scene of crime, as alleged. To be precise, we see in in the case of **Vicky S/o Jaipaldas Pariyani<sup>12</sup>** the allegation against the applicant is that he was found in possession of 50 grams of MDMA drug (which is a commercial quantity) along with co-accused Kapil Patni on 7<sup>th</sup> December 2020. It was argued by the learned counsel for the applicant that the co-accused Kapil Patni has already been granted bail application by the Indore Bench of the Hon’ble Madhya Pradesh High Court in M. Cr. C. No.19744/2021 on 13<sup>th</sup> May 2021 **taking note of the CCTV footage furnished by him to demonstrate that he was not present on the spot when the incident took place and in fact, he was taken by the police from his girlfriend’s house to the police station and subsequently implicated in the offence.** The learned counsel for the applicant submitted as under:

*“4] Counsel for the applicant has submitted that so far as the present applicant is concerned, he has also been falsely implicated in the case as he was not arrested on 07/12/2020 and infact he was called by the police in the police station and was arrested in connection with the aforesaid offence. It is further submitted that to demonstrate that he was called by the police prior to the incident, the applicant has also applied for CCTV footage under Section 91 of the Cr. P.C. of the police station Vijay Nagar, Indore, however, it was informed by the police station Vijay Nagar on 05/06/2021 that the CCTV footage cannot be provided to the applicant as the same is kept saved only for 6-7 days, hence, it has already been deleted, however, the learned Judge again directed the SHO of the police station Vijay Nagar, Indore to submit a specific reply in this regard and pursuant thereto, on 23/06/2021, it was informed to the learned Judge of the trial Court that since the CCTV footages were saved only for 6-7 days in the police station but its copies are saved in the record room, hence, further time was sought and*

thereafter again the matter came up before the Court on 25/06/2021, wherein it was informed that the CCTV footage are available only for 15 days and thereafter they are automatically deleted. Hence, due to efflux of time, the footages as sought by the applicant cannot be provided.

5. Shri Gupta, counsel for the applicant has submitted that the aforesaid stand taken by the police is contrary to their own stand which was taken by them in respect of CCTV footage of the same date in another case which was registered at crime No.1052/2020 which relates to an offence under Section 376(2)(n), 450, 366 and 34 of the IPC and in that case also when the application was filed under Section 91 of Cr .P.C. for obtaining the CCTV footage from 18/12/2020 till 23/12/2020, the reply of the police station Vijay Nagar was that their CCTV camera is not working since 07/12/2020. Thus, it is submitted that the stand taken by the State in the present case that the CCTV footage of 07.12.2020 cannot be supplied on account of its automatic deletion from the record is contrary to the stand taken by the police station Vijay Nagar, Indore in crime No.1052/2020.

6] Counsel has submitted that the conduct of the respondent clearly demonstrates that the applicant has been falsely implicated in the case as there is material suppression of facts on the part of the respondent/State in not providing the CCTV footage of the applicant which could have been pivotal in proving the innocence of the applicant. Thus, it is submitted that the non-furnishing of the CCTV footage is in clear violation of the order passed by the Supreme Court passed in SLP No.3543/2020 on 02/12/2020 *Paramvir Singh Soni (sic Saini) v. Baljit Singh and others.*”

**11.3.1** The Hon’ble High Court, after hearing the rival submissions, held as under:

“11] Testing on the anvil of the aforesaid dictum of the Supreme Court, this Court finds force with the contentions raised by the counsel for the applicant and thus, the false implication of the applicant cannot be ruled out at this stage despite the fact that from his possession, the contraband is alleged to have been recovered. It is rather interesting to note that due to technical advancement, the police, nowadays relies heavily upon the digital information viz., tower locations, call details, CCTV footages, whatsapp chats, emails etc. to connect the accused persons with the offence, but when

*it comes to their own working, it shies of from divulging the details, and that is done only when you have something to hide. Under such facts and circumstances of the case, when the police has two diametrically opposite stands in respect of the CCTV camera installed in the police station and same is also contrary to the decision rendered by the Supreme Court in the case of Paramvir Singh (supra), in the considered opinion of this Court, the applicant's application deserves to be allowed by giving him the benefit of doubt.”*

### **Emphasis applied**

**11.4** In the case of **Suresh Kumar**<sup>13</sup>, the impugned petition for SLP came to be filed before the Hon’ble Supreme Court for the reason as recorded as under:

*“This appeal arise out of an order dated 28.01.2014 passed by the High Court of Madhya Pradesh at Indore whereby Criminal Revision No. 98 of 2014 filed by the appellant against an order dated 24.12.2013 passed by the Special Judge, NDPS, Indore has been dismissed. The appellant is being prosecuted before the Special Judge, NDPS, Indore for offences punishable under Sections 8, 21, 22, 29 read with 8(c) of the NDPS Act, 1985. The prosecution case it appears is that the appellant was nabbed in front of Yashica Palace hotel near Gangwal bus stand at Indore between 1800 and 1900 hrs. on 24.02.2013 by the Intelligence Officer of the Narcotics Control Bureau carrying 610 gms of heroin and 40 gms. of Alprazolam in a bag which was seized by the Officer effecting the arrest. A mobile phone Sim No. 90395020407 was also according to the prosecution, seized from the possession of the appellant. While the trial has yet to commence on the charge sheet filed against the appellant, an application was filed on his behalf before the Special Judge, NDPS, Indore praying for a direction summoning call details that would indicate the locations of three different mobile telephone numbers mentioned in paras 3 and 5 of the said application. Out of these numbers one of the mobile phones admittedly belongs to the appellant-accused while the other two telephone numbers bearing Sim No. 9165077714 issued by the Airtel Company and Sim No. 7145593902 issued by the Tata Docomo Company are said to be of the Officers who are alleged to have*

*arrested the appellant on the date, time and place, mentioned above. The appellant's case before the Trial Court and so also before the High Court was that the prosecution story that he was arrested from near about the hotel, mentioned above, was factually incorrect which fact could according to the appellant be proved by the call details of the mobile numbers held by the officers who are alleged to have arrested the appellant. The appellant contended that the telephone numbers of the Officer effecting the arrest and making the seizure would show that the officers concerned were at some other locations during the time the appellant's arrest and resultant seizures are alleged to have been made. The Trial Court and the High Court have declined that prayer as noticed above."*

**11.4.1** The Division Bench of the Hon'ble Supreme Court after hearing the rival submissions, held as under:

*".....That electronic records are admissible evidence in criminal trials is not in dispute. Sections 65A and 65B of the Indian Evidence Act make such records admissible subject to the fulfilment of the requirements stipulated therein which includes a certificate in terms of Section 65B(4) of the said Act. To that extent the appellant has every right to summon whatever is relevant and admissible in his defence including electronic record relevant to finding out the location of the officers effecting the arrest. Be that as it may we do not at this stage wish to pre-judge the issue which would eventually fall for the consideration of the Trial Court. All that we are concerned with is whether call details which the appellant is demanding can be denied to him on the ground that such details are likely to prejudice the case of the prosecution by exposing their activities in relation to similar other cases and individuals. It is not however in dispute that the call details are being summoned only for purposes of determining the exact location of the officers concerned at the time of the alleged arrest of the appellant from Yashica Palace hotel near the bus stand. Ms. Makhija made a candid concession that any other information contained in the call details will be of no use to the appellant and that the appellant would not insist upon disclosure of such information. That in our opinion simplifies the matter inasmuch as while the call details demanded by the appellant can be summoned in terms of Section 65B of the Indian Evidence Act such details being relevant only to the extent of determining the*

*location of officers concerned need not contain other information concerning such calls received or made from the telephone numbers concerned. In other words if the mobile telephone numbers called or details of the callers are blacked out of the information summoned from the companies concerned it will protect the respondent against any possible prejudice in terms of exposure of sources of information available to the Bureau. Interest of justice would in our opinion be sufficiently served if we direct the Trial Court to summon from the Companies concerned call details of Sim telephone No. 9039520407 and 7415593902 of Tata Docomo company and in regard to Sim No. 9165077714 of Airtel company for the period 24.02.2013 between 4.30 to 8.30 p.m.. We further direct that calling numbers and the numbers called from the said mobile phone shall be blacked out by the companies while furnishing such details.*

*We accordingly set aside the order impugned and allow this appeal to the extent indicated above.”*

#### ***Emphasis supplied***

**11.5** A lot of applications under Section 91 of the Code have come to be filed before the Trial Courts or High Courts, post the rendering of decision in the case of **Suresh Kumar**<sup>13</sup> (*supra*). To illustrate some of the cases, it would be useful to refer to some of the decisions rendered in this regard:

**11.6** In the case of **Obi Ogochukwu Stephen**<sup>14</sup>, the facts of the case are that the petitioner, arrayed as an accused in relation to FIR No.127/2021, PS Tilak Nagar, New Delhi under Section 21 of the Act in which he is custody since 24.02.2021, are to the effect that as per allegations levelled against him, he was nabbed by the Investigating Officer, ASI Rajender Singh, PSI No. 550/W at **9.30 AM at the park near MBS Nagar** near the MCD Primary School on 24.02.2021, **whereas in fact he (the applicant) had been taken away from his house in the early hours of the morning of 24.02.2021 much prior to receipt of the alleged secret information** also and the affidavit of the landlady of the petitioner was placed on record and in order to that in order to unearth the truth, the petitioner had moved an application under Section 91 of the Code to have the CDR containing the tower location of the mobile No.9540095100 of the IO, ASI Rajender Singh, which was declined by the learned Trial Court vide Order dated 20.11.2021. Reliance was placed on the reported decisions **Kapil**<sup>12</sup> and

**Nizamuddin**<sup>16</sup> for calling for the CDR details with the cell ID location of mobile No.9540095100 of the Investigating Officer from 11.30 PM of 23.02.2021 to 1.00 AM of 25.02.2021 be obtained and the CDR details of the said mobile be preserved. This was opposed by the State and reliance was placed on **Attar Singh**<sup>17</sup> and **Puneet Arora**<sup>18</sup>.

**11.6.1** The Hon'ble High Court after hearing the rival submissions and relying upon the judgment of the Hon'ble Supreme Court in the case **Suresh Kumar**<sup>13</sup> and taking into account the observations made *vide* verdict of the Coordinate Bench of the Hon'ble High Court of Delhi in **Nizamuddin**<sup>16</sup> in which reference *inter alia* to the observation of Hon'ble High Court of Delhi in **Gaurav Kumar**<sup>19</sup> was made and Hon'ble Supreme Court's specific observations in paragraph 24 in **Suresh Kalmadi**<sup>20</sup>, the service provider i.e. Jio Prepaid was directed to preserve the CDR details of mobile No.9540095100 of the date 24.02.2021 from 4.30 AM till 11.30 AM. It was further directed that the calling numbers and the numbers from the said mobile phone of that date and period shall be blacked out by the service provider.

**11.7** Similarly, we find that in the case of **Dinesh Kumar @ Dina**<sup>21</sup> the petitioner challenged the Order dated 15<sup>th</sup> April 2021 passed by the learned Special Judge - 02 (NDPS), Tis Hazari Courts, New Delhi, dismissing the application filed by him under Section 91 of the Code for summoning the call detail records (CDRs) and location chart and timeline of SI Mukesh Tyagi, Constable Ashish Kumar, SI Priyanka, Head Constable Rohit Solanki and Constable/Head Constable Ravinder (who were not part of the raiding team).

**11.7.1** The Trial Court, on the basis of an application filed under Section 91 of the Code had **already directed that the CDRs of the raiding party be preserved along with the CCTV footages.**

**11.7.1.1** The Hon'ble High Court, while upholding the rejection of the request for the CDR details of the officers not forming the raiding team observed and held as under:

*'15. This Court does not find any infirmity with the order of the Trial Court in refusing the CDRs of SI Mukesh Tyagi, Constable Ashish Kumar, SI Priyanka, Head Constable Rohit Solanki and Constable/Head Constable Ravinder since they were not a part of the raiding team. Other than the mere ipse dixit there is no material to show that the petitioner was picked up from some other place. The CDRs of the raiding team and the accused and the CCTV footages have been preserved. As stated earlier, in order to ensure the safety of the officers and their informers, the CDRs of officers of STF should*

***not be made public unless it is necessary for the case.’’***

**Emphasis applied**

**11.8** Moving further we find that in the case of **Puneet Arora**<sup>18</sup>, the use of Section 91 of the Code came to be used wherein the petitioner had preferred the application before the learned Trial Court seeking preservation of the phone location records of the concerned police officials and the witnesses so that the record does not become non-existent due to passage of time. The details of the witnesses of whom the applicant has sought the preservation of call records of 8 persons – the police officers of Special Cell, Delhi Police and witnesses. The learned Trial Court did not think fit to call their location chart and the CDR details of the police officers.

**11.8.1** Aggrieved by the Order of the learned Trial Court, the matter was carried forward to the Hon’ble High Court of Delhi by filing a petition, which was numbered as CRL.M.C. 2477/2020, wherein the petitioner, *inter alia*, sought setting aside of the learned Trial Court’s Order dated 24<sup>th</sup> September 2020 in FIR No.50/2020 Police Station Special Cell as detailed in paragraph 6 of the petition.

**11.8.2** The Hon’ble High Court of Delhi, after hearing the rival submissions in the matter, passed an Order dated 9<sup>th</sup> December 2021 as under:

*“In view of the verdict relied upon on behalf of the petitioner and the submissions made on behalf of the State, the call details of all the witnesses mentioned in paragraph 6 of the petition are directed to be preserved specifically to ascertain the location of witnesses as mentioned at Sr. Nos. 1 to 8 in paragraph 6 of the application of the petitioner referred to hereinabove. However, the same shall be preserved in relation to the location of these witnesses only and in terms of the verdict of the Hon’ble Supreme Court in Suresh Kumar V. Union of India (supra), the calling numbers and the numbers called from the said mobile phones shall be blacked out by the companies Airtel, Vodafone, Idea and Jio also are thus directed to ensure that the call detail records of the persons mentioned at in paragraph 6 herein above in the petition are retained and preserved, if presently available.”*

**Emphasis applied**

**11.9** On the lines of **Puneet Arora (supra)**, we see the Hon’ble High Court was dealing with an identical matter in the case of **Chirag Jain**<sup>22</sup> wherein the petition came to be filed on account of the following reason:

*“Allow the present application and may set aside the Impugned Order dated 22.07.2021 passed by Sh. Reetesh Singh, Ld. ASJ in respect of the FIR No.0094/2021 was registered at P.S. Kalyanpuri under Section 20/25/29 NDPS ACT, 1985 registered on 18.03.2021 whereby Ld. Trial Court had declined to provide the call location details of the Petitioner and the Reading (sic raiding) Team members including the IO of Dated 18.03.2021 from time 08:00 am to 12:00 PM / mid-night.”*

**11.9.1** The Hon’ble High Court, in this case, held as under:

*“5. The learned APP for the State fairly concedes the mobile location chart of the raiding team members and petitioner herein, without disclosing their mobile numbers, can be provided to the petitioner after obtaining it from the service provider. Be provided by the State to the petitioner for the time duration and date as mentioned above within four weeks from today. Needless to say, CDR and other details be sufficiently safeguarded prior to supply of the information to the petitioner.*

*6. In view of above, the petition stands disposed of. Pending application, if any, also stands disposed of.”*

#### **Emphasis applied**

**11.10.** Moving further, we find that the Jodhpur Bench of Hon'ble High Court of Rajasthan had dealt with the provision of Section 91 of the Code in the case of **Kapil**<sup>15</sup>. A miscellaneous criminal petition came to be filed Section 482 of the Code against the Order dated 1<sup>st</sup> March 2021 passed by learned Special Judge, NDPS Cases, Jodhpur in Criminal Misc. Case No. 32/2021 (Sessions Case No. 10/2021), whereby the application filed by the petitioner under Section 91 of the Code was rejected. The Ld. Counsel for the petitioner relied upon case laws **Shrawan Singh @ Baba**<sup>23</sup>, **Narendra Singh**<sup>24</sup>, **Jasveer**<sup>25</sup>, **Sheru @ Surajnath**<sup>26</sup>, **Smt. Manju Devi**<sup>27</sup> & **Ghewar Ram @ Ghewar Chand**<sup>28</sup> in support of his contention.

**11.10.1** The Hon’ble High Court, after hearing the rival submissions, held as under:

*“12. After hearing learned counsel for the parties as well as perusing the record of the case, alongwith the judgments cited at the Bar, this Court deems it appropriate to direct the learned court below to summon the necessary call details and tower locations, in the best interest of fair trial and proper opportunity to the accused-petitioner to defend his case. Such call details shall be summoned by the learned court below, only in relation to those*

*officers, who are said to have been present at the site of recovery in question. The service provider of the mobile service shall provide such call details and tower locations to the learned court below, if they are stored in the database and the accused-petitioner shall be at liberty to use such call details and tower locations at the appropriate stage of trial to defend his case.*

*13. With the aforesaid observations and directions, the present petition is allowed and the impugned order dated 01.03.2021 passed by the learned court below is quashed and set aside. All pending applications stand disposed of accordingly.”*

### **Emphasis applied**

**11.11** In S.B. Criminal Misc (Pet.) No. 3399/2018 decided by the Jodhpur Bench of the Hon’ble Rajasthan High Court on 14<sup>th</sup> December 2018 in the case of Niku Khan<sup>29</sup>, the petitioner preferred the miscellaneous petition under Section 482 of the Code for allowing the petition and quashing the Order dated 4<sup>th</sup> July 2018 passed by the learned Special Judge, NDPS Act Cases, Hanumangarh and allow the application under Section 91 of the Code. The Ld. Counsel for the petitioner relied upon the judgment of the Hon’ble Rajasthan High Court rendered in the case of Jasveer<sup>30</sup>

**11.11.1** The Jodhpur Bench of the Hon’ble Rajasthan High Court, after hearing the rival submissions, held as under:

*“4. After hearing counsel for the parties, this Court is of the opinion that call-details is a scientific evidence and if at all the accused wants to contradict presence of police personnel acting in relation to the earlier complaint against the police personnel on 20.1.2018 of an incident which allegedly happened on 19.1.2018, then opportunity need to be given to the petitioner. The call- details of police personnel summoned for the period 14.3.2018 to 15.3.2018 shall not prejudice case of either of the parties but rather shall be of great assistance to the court below to reach to a definite conclusion regarding presence/location of the police personnel subject to appropriate rebuttal by them.*

*5. Accordingly, this misc. petition is allowed. The order dated 04.7.2018 passed by the learned Special Judge, NDPS Act Cases, Hanumangarh in Sessions Case No.21/2018 is quashed and set aside and the application filed*

***by the petitioner under Section 91 Cr. P.C. is allowed for the prayers made therein.”***

### **Emphasis applied**

**11.12** In the case of **Nizamuddin<sup>16</sup>**, a revision petition was filed by the State challenging the Order dated 4<sup>th</sup> December 2017 whereunder, the learned Additional Sessions Judge, Karkardooma Courts, Delhi directed the Investigating Officer to procure the call detail records and location *via* mobile towers of all members of the raiding team and also of the secret informer and himself. The Investigating Officer was also directed to procure the mobile phone of the accused from the *malkhana*.

**11.12.1** The Hon’ble High Court of Delhi, after hearing the rival submissions, held as under:

*“7. A perusal of the above mentioned judgments shows that this Court can call for the call detail records of the Investigating Officer. The impugned order calling for the call detail records of the Investigating Officer and the raiding team and the direction to produce mobile phone of the accused from malkhana therefore does not require interference. The accused is entitled only to the call details of the Investigating Officer and the raiding team only for the purpose of this case and the order has to be restricted to the call details of the Investigating Officer for the present case only.*

*8. The details of the call records of the secret informer also cannot be revealed as, such an order, is likely to jeopardise the life of the secret informer. The order to provide for the call detail records of the secret informer cannot sustain.*

*9. A perusal of the Lower Court records shows that pursuant to the order impugned herein, charge-sheet has been filed and four prosecution witnesses have already been examined. At this juncture, directing the State to produce the call records of the Investigating Officer and the other members of the raiding team pertaining to the case will not cause any prejudice to the investigation.*

***10. In view of the above, the order dated 4.12.2017 is modified to the extent that the call detail records and location via mobile tower of all the members of raiding team, Investigating Officer and the mobile phone of the accused from malkhana be produced.”***

**Emphasis applied**

**Can an accused, using the provisions of Section 91 of the Code, demand to have the correct and all details with reference to use of all mobile numbers used (in their own names) and held (registered in others name but used by the officers) by the members of raiding team?**

**11.13** There are multiple empowered departments which deal with various sections of the people involved in smuggling, illicit drug trafficking, arms smuggling, Fake India Counterfeit Notes (all these illegal/illicit activities are cracked, *inter alia*, by the Customs Officers and DRI Officers, who are empowered officers under the Act).

**11.14** Similarly, the other empowered departments, especially the Police wherein Special Branch/Q Branch (in Tamil Nadu)/Special Cell (in Delhi Police, etc.), Anti-terrorism Squad (ATS), etc. function on matters of grave importance like terrorism, busting of syndicates involved in organized criminal activities, including illicit drug trafficking, etc. These activities are performed by specialized agency as a whole (Say DRI) or as a specialized cell within an empowered department (say Police). Would disclosing the mobile numbers used by the members of these specialized forces be proper?

**11.14.1** In the case of **Suresh Kumar** (para 11.4 *supra*), the Senior Counsel appearing for the appellant submitted as under:

*“We have heard Ms. Vibha Dutta Makhija, learned senior counsel for the appellant and Mr. Siddharth Luthra, learned ASG for the respondent-UOI. Ms. Makhija contended that the call details which the appellant seeks to summon under the orders of the court will be extremely vital for proving that the appellant was not arrested at the time and place alleged by the prosecution. The fact that the Officers who effected the arrest were during the relevant period at different locations would clearly belie the prosecution’s case in that regard. Inasmuch as the trial court and the High Court declined to summon the call details the orders passed by them have the effect of denying to the appellant the opportunity to prove his innocence thereby causing prejudice to him in his defence.”*

**11.14.2** The Ld. ASG, who appeared on behalf of the respondent-UOI submitted as under:

*“On behalf of the respondent it was argued by Mr. Luthra that while call*

*details were admissible in terms of Section 65 A and 65 B of the Indian Evidence Act subject to fulfilment of the requirements stipulated in the said provision such details are likely to prejudice the prosecution and in particular the Narcotic Control Bureau inasmuch as the details being summoned would not only indicate the location of the officers concerned but also bring other information into public domain. This would according to **Mr. Luthra hamper investigations and may result in exposing sources of information.** Once exposed the sources may according to the learned counsel completely dry up to the prejudice of the Bureau. It was submitted that the likely prejudice which the respondents apprehend is a good enough reason for this Court to decline the prayer made by the appellant. Insofar as the call details of the mobile connection held by the accused are concerned the same have according to Mr. Luthra already been produced at the trial clearly showing that the accused was at the relevant point of time at or around the place from where he was arrested. This according to the learned ASG obviates the necessity for proving whether the officers concerned were indeed present in the area from where the petitioner was allegedly arrested along with the narcotics.”*

**11.14.3** The Division Bench of the Hon’ble Supreme Court, after hearing the rival submissions, held as under:

*“.....Ms. Makhija made a candid concession that any other information contained in the call details will be of no use to the appellant and that the appellant would not insist upon disclosure of such information. That in our opinion simplifies the matter inasmuch as while the call details demanded by the appellant can be summoned in terms of Section 65B of the Indian Evidence Act **such details being relevant only to the extent of determining the location of officers concerned need not contain other information concerning such calls received or made from the telephone numbers concerned.** In other words if the **mobile telephone numbers called or details of the callers are blacked out of the information summoned from the companies concerned it will protect the respondent against any possible prejudice in terms of exposure of sources of information available to the Bureau. Interest of justice would in our***

*opinion be sufficiently served if we direct the Trial Court to summon from the Companies concerned.”*

### **Emphasis applied**

**11.14.4** It follows from the above that a balance has been struck between the accused and the respondent-empowered department (here NCB) and it has been ordered that mobile telephone numbers called or detail of the callers are to be **blacked out and only the tower locations are to be shared by the empowered department.**

**11.14.5** We find that issue, in para *supra*, was raised in W. P. (CRL) 2213/2020 & CRL. M.A. 18150-51/2020 and connected applications decided on 14<sup>th</sup> March 2022 in the case of Mohd Hashim<sup>31</sup>, where the petitioner, *inter alia*, prayed as under:

*“Be pleased to pass a writ of mandamus/ order or direction of like nature for summoning and production of location place and time of call record of mobile number of searching officer SI Nishant Suran respondent No. 2 from the spot at 12:15 A.M. on 14.10.2020 as claimed and by blocking rest of the details in sealed cover so as at least hon'ble court at least can peruse.”*

**11.14.5.1** The Ld. Trial Court, *inter alia*, in the subject case had held as under:

*“I also agree to the fact the police officials as set out in para no.6 of the petition belong to a specialized investigating agency which operates in the matter of national interest, terrorism, arms dealing, drug peddling and organized criminal activities by dreaded gangsters etc and the team members being continuously in touch with the secret informers, so preservation of the CDR of mobile phones of the raiding party shall obviously jeopardized the personal safety/security of the police officials as also it would cause exposure and identity of the secret informers concerned with this case.*

**11.4.5.2** Aggrieved by the Order of the Ld. Trial Court, the matter was carried forward to the Hon'ble High Court of Delhi. The Hon'ble High Court, after hearing the rival submissions, while upholding Order of the Ld. Trial Court held as under:

*“20. After perusing the aforesaid order, the Court below has rightly taken the view that "there is no doubt the accused has constitutional right of fair investigation, however, this does not mean that prosecution has to*

*investigate the offence in terms of defence of the accused."*

**11.4.5.3** The Hon'ble High Court went on to hold as under:

*"21. Therefore, viewed from any angle, in considered opinion of this Court, learned Trial Court has not manifested any error of the law warranting interference by this Court. Apparently, there is no reason in the instant case, to exercise the powers under Article 226/227 of the Constitution of India. The order of the Court below is well reasoned and does not require any interference by this Court."*

*Emphasis applied*

**11.5.** We further find in W.P.(CRL) 1236/2022 decided on 3<sup>rd</sup> June 2022 by the Hon'ble High Court of Delhi in the case of Krishan Pawdia<sup>32</sup>, the petitioner made the following prayers:

A)- *To provide the correct details with regards to all mobile contact number/s of the members of raiding party, as stated in the above alleged case/FIR No.0489/2021, of police, which they were using from: 08/10/2021 to 10/10/2021.*

B)- *To preserve and supply a set of the location chart of all those mobile/contact numbers of the above-mentioned officials of raiding party, to the petitioner/ applicant, and of the mobile contact No's of the applicant/petitioner and all other co-accused person for the period of 08/10/2021 to 10/10/2021 in the interest of justice and for the sake of brevity.*

**11.5.1** The Hon'ble High Court after hearing the rival submissions, *vide* Order dated 3<sup>rd</sup> June 2022 held as under:

*"7. In the present case, the members of raiding party belong to a specialized investigating agency which carries investigation in the matter of national interest, terrorism, armed dealing, drug paddling and organized criminal activities and for said purpose the members of the raiding party have to remain in touch with the secret informers. It would not be in the interest of the functioning of the investigating agency to preserve CDR of mobile phone of the raiding party as it may cause prejudice to the personal safety/security of the police officials as well as may expose identity of the secret informers. The investigation is already*

completed.”

### Emphasis supplied

**11.6** On the basis of the aforesaid judgments, it can be concluded that the empowered departments are not required to disclose the mobile numbers of raiding team.

**12.** We further see that the Division Bench of the Hon’ble Madhya Pradesh High Court in **Umesh Tiwari and another**<sup>33</sup> laid down the following law in respect of Section 91 of Code:

1. An accused cannot invoke Section 91 of the Code during the pendency of the investigation.
2. However, an accused can invoke Section 91 of the Code on and after the filing of the charge sheet.
3. Section 91 of the Code can also be invoked by the other stakeholders i.e. victim and also the prosecution.
4. The court can also invoke Section 91 of the Code *suo moto*.
5. All the above invocation by any stakeholder is subject to satisfaction of the Court about desirability and necessity of the document sought to be produced.

**12.1** The Hon’ble High Court noted that the ultimate objective behind Section 91 of the Code is to confer power in the hands of the Hon’ble Court in case of pending investigation, inquiry, trial or other proceedings to produce a document or other things, which the Hon’ble Court deems relevant and cogent to the conduction of investigation, inquiry, trial or other proceedings and which are not already on record. Thus, the Hon’ble High Court held that Section 91 is a supplementary power available, *inter alia*, to the Court to do complete justice in investigation/inquiry/trial or other proceedings as the case may be and to prevent failure of justice.

**12.2** In view of the above, the Hon’ble Court concluded that it won't be proper to restrict the power to invoke Section 91 to only the Court and the Police Officer and that, the window of this Section remains open for all the stakeholders in an investigation, inquiry, trial, and other proceedings, be it the victim, accused, police, Court or any other stakeholders involved.

**13.** The use of Section 91 of the Code was effectively put to use by the respondent **Farooq**<sup>34</sup> in the following case to prove that the allegations against him are false and erroneous and the CDR will strike at the foundation of the prosecution’s case.

### Acquittal on account of use of Section 91 of the Code

**13.1** In the case of **Farooq**<sup>34</sup>, the facts of the case, in brief, are that on 10<sup>th</sup> February 2016,

ASI Devi Ram/IO (PW-3), HC Sardar Singh (PW-4) and Ct. Sunil (PW-2) were on patrolling duty and at about 3.30 pm, they reached at Peeli Mitti Ground near TLM Hospital where they saw the accused sitting by the side of the road on a white plastic sack. They went near the accused and felt smell of ganja coming out of plastic sack. The accused was intercepted and the information in this regard was conveyed to SHO, who gave direction to conduct the proceedings.

**13.2** The accused pleaded not guilty in the trial and also prayed to summon the call details and location of members of the raiding party to prove his innocence.

**13.3** The Hon'ble Additional Sessions Judge after hearing the rival submissions held as under:

*4.2. The accused further stated that he also moved an application at a very initial stage with the prayer to summon the call details and location of members of the raiding party. The call details and location of the members of the raiding party were filed by the respective service provider which shows that none of member of the raiding party was present at the spot on 10.02.2016.*

*21. Before parting with the judgment, **this court would be failing in its duty if this court does not express its anguish against the colourful exercise of power by the members of raiding team and misuse of legal position by them.** The aforesaid factors including changing tower location of mobile phone used by the members of raiding team during the investigation process shakes the conscience of the court. **The accused in present case has spent almost three years of his life in jail for no rhyme or reason. It is a glaring example where unscrupulous police officials while discharging their duties, abused their power as well as position and boast up the investigation. The members of raiding team curtailed the liberty of innocent citizen for the reasons best known to them.***

*23. It is not out of place to mention herein that NDPS Act, 1985 provide stringent punishment for the offenders to fight the nuisance associated with drugs. Under the NDPS Act, 1985, guilt of the accused is presumed which brings complete responsibility of proving an individual's innocence on him. In the considered opinion of this court, it's a high time when the entire proceedings should be impartial vis a vis right of the accused to fair*

**investigation. The investigation process should be so designed that the innocent persons are not roped in unnecessarily and the power should not be misused to the detriment of innocent citizens. ....**

*24. This court cannot shut its eye to the incarceration of innocent person in jail on false and frivolous accusations and also cannot be spectator to injustice being perpetrated at the hands of unscrupulous police officials.”*

***Emphasis applied***

### **Directions to DCP to hold an inquiry and fix responsibility of erring officers**

**13.4** The Hon’ble Additional Sessions Judge went on to order as under:

*....the DCP concerned is directed to hold an enquiry in the light of observations made in this judgment and fix responsibility of erring police official/s and file action taken report within six months from the date of this decision.”*

### **Conclusions**

**14.** On the basis of the extracted judgments herein, it categorically transpires that there have been many instances wherein innocent persons have been “**fixed**” and **put behind bars** using the provisions of the Act for no fault of theirs.

**14.1** Equally true is the fact that the accused under the Act have effectively put the provisions of Section 91 of the Code to use to nail the empowered officers/departments to the colourable exercise of power. But the power to call for the “documents” is limited to the ones in possession of the empowered officer/department and which has been withheld.

**14.2** It requires no emphasis at this stage that the empowered officers, who are found to have misused the provisions of the Act for “**trapping**” of innocent citizens can themselves be proceeded for vexatious entry, search, seizure or arrest under any of the three clauses of sub-Section (1) of Section 58 or under Section 58(2) of the Act.

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