

(1991) 12 OHC CK 0015

In the Orissa High Court

Case No : Criminal Miscellaneous Case No's. 1052 and 1227 of 1991

Bidyadhar Dolai

APPELLANT

Vs

The State
 Ghanashyam Behera Vs State of Orissa

RESPONDENT

Date of Decision : 20-12-1991

Acts Referred:

Constitution of India, 1950 — Article 21, 22

Criminal Procedure Code, 1973 (CrPC) — Section 482

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 37(1), 42, 50

Citation : (1993) CriLJ 260 : (1992) 1 OLR 108

Hon'ble Judges : L. Rath, J

Bench : Single Bench

Advocate : Manoj Mishra, in Criminal Misc. Case No. 1052/91 and A. Routray, in Criminal Misc. Case No. 1227/91, for the Appellant; Debasis Das, A.S.C., for the Respondent

Final Decision : Allowed

Judgement

L. Rath, J.—Both these Criminal Miscellaneous Cases raise the same question of law as to whether non-compliance with the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") relating to search and arrest ipso facto entitles the accused to be enlarged on bail, and hence are disposed of by this common judgment.

2. The facts traversed in Criminal Misc. Case No. 1052/91 are that the Officer-in-charge, Orkel Police Station in the district of Koraput received a telephonic message on 17-7-1991 at about 11.30 a.m. of the petitioner selling opium and being in possession of the same. The message was entered by him in the station diary and he proceeded at 12 15 p.m. to the Orkel market with two other officers. At the market he found the accused petitioner in the grocery shop and upon search in presence of witnesses, recovered 10 grams of opium from his left side trouser pocket. The opium was seized in the presence of witnesses. The seizure list was prepared and since the petitioner could not produce relevant

papers relating to the opium he was arrested. After due investigation charge-sheet has been submitted on 28-7-1991.

So far as the Criminal Misc. Case No. 1227/91 is concerned, the facts are that while the Sub-Inspector of Excise, Deogarh was patrolling with his staff, he searched the petitioner at about 1.30 p.m. and recovered three polythene packets each containing 250 grams of Ganja kept inside a bag. The Ganja was seized and the petitioner was arrested. He moved for bail before the learned Sessions Judge, Sambalpur but it having been refused he has approached this Court.

3. The submissions on behalf of the petitioners were mainly advanced by Mr. Misra. It is contended that as the petitioners were not produced before a gazetted officer or a Magistrate the arrest was vitiated. The arrest is also vitiated because the mandatory provisions of Sections 42, 43 and 44 were not observed. The very questions at present were urged in Criminal Misc. Case No.1196 of 1991 before a learned Single Judge of this Court, Hon"ble Mr. Justice K. C. Jagadeb Roy, who on a detailed discussion of the law on the subject accepted the contentions as are advanced by the petitioner in the light of Article 21 of the Constitution of India. But the questions have been elaborately agitated again before me by the learned Additional Standing Counsel on behalf of the State urging to take another look at the matter so as to persuade me to take a different view and refer the question to a larger Bench for decision and the attempt has also been strenuously resisted on behalf of the petitioners. Though after hearing the learned counsel, I have reached the same conclusions as Hon"ble Mr. Justice K.C. Jagadeb Roy, yet I have thought it better, in the circumstances, to record independently the reasons for the decision.

4. Developing the submissions, it is the submission of Mr. Misra that in view of requirement u/s 50 that before any search is made, the person to be searched, on his requisition, is to be afforded the opportunity to be searched before a gazetted officer or a Magistrate, such provision read with Section 43(b) would invariably mean as being mandatorily required of the officer wishing to conduct the search to inform the person to be searched of his right u/s 50 and if the person on his being informed of his right expresses his desire to be taken before a gazetted officer or a Magistrate, it is the duty of the officer to act accordingly. On such premises he submits that if there is no contemporaneous records of the person to be searched of having been so informed of his right, there is an infraction of the provisions of Section 50 and that the search made u/s 43(b) without complying with the provisions of Section 50 and the consequential arrest made thereunder are illegal actions having the necessary effect of making the arrest unlawful. This, according to him, entitles the person so arrested to be enlarged on bail without the fetters of Section 37(b) under which bail is to be refused unless the Public Prosecutor has been given opportunity to oppose the move for bail and where the application for bail is objected to, the Court further certifies of it being satisfied that there are reasonable grounds of the person

being not guilty of the offence and that he is not likely to commit the offence while on bail. It is the further submission of Mr. Misra that as the provisions of Sections 52 and 57, are also not complied with inasmuch as the grounds of arrest were not immediately supplied to the petitioner or there is no record to show that the report of arrest and seizure had been made in compliance with Section 57, the arrest of the petitioner becomes illegal, such submissions are countered by the learned Additional Standing Counsel contending that merely because the provisions of Sections 50, 52 or 57 are not followed, the person arrested has no automatic right of being enlarged on bail and that in view of the mandatory bar u/s 37(b), the bail cannot be granted unless the conditions thereunder are satisfied. Since there is already a pronouncement of this Court upholding similar contentions as that are now raised by the petitioners, I wish to take up the submissions raised by the learned Additional Standing Counsel and analyse; them first.

5. Reliance was placed on behalf of the State on 1939 CriLJ. 430 (Abdul Sattar v. State), a decision of the Panaji Bench of the Bombay High Court. The Court considering an appeal against the conviction and sentence under the Act, held that even if the provisions of Sections 41 to 58 of the Act are mandatory but are not complied with, the procedural infirmity would not by itself vitiate the conviction of the accused when the recovery of narcotics from him is proved to be genuine and no prejudice could be said to have been caused to the accused by such infirmity. The Court was not considering in the case the effect of non-compliance of the mandatory provisions relating to search, seizure and arrest on the arrest and detention and was solely concerned with the legality of the conviction. There is no gainsaying the fact that an illegal arrest or detention would not itself make a conviction ipso facto void. Arrest and conviction are different incidents independent of each other without necessarily having a casual link and hence there is no automatic process of invalidation of a conviction merely because an arrest is found to be without the sanction of law. The next authority cited by the learned Additional Standing Counsel is of the Gujarat High Court reported in 1991 Cri.L.J. 1433 (Surajmal Kanaiyalal Soni v. The State of Gujarat) which was also a case dealing with conviction and the appeal therefrom. The Court was considering the non-compliance of the provisions of Sections 41 and 42 due to the failure of the authorised police officer to reduce the information received by him into writing and came to the conclusion, disagreeing with the views expressed by the Punjab and Haryana High Court in Hakam Singh Vs. Union Territory, that in the absence of the writing there would be no chance to cross-examine the officer with regard to the factum and contents of the information received and that it would cause prejudice to the accused, that it is always a question of fact required to be considered in the light of the circumstances and the relevant provisions to ascertain as to whether prejudice was caused to the accused and that merely because a particular provision was not strictly complied with, the necessary implication may not always be that prejudice was caused. In conning to such view, a decision of the Delhi High Court

1989 Drug Cases 97 : 1989 (1) FAC 133 (Richpal v. State -Delhi Administration), was inter alia, quoted with approval. The conclusions were reached in that case on the authority of Radhakishan Vs. State of U.P., and AIR 1972 SC 953 (Kandu Sonu Dhobi v. The State of Maharashtra) that even if certain statutory provisions are not complied with before effecting the seizure, the seizure does not become invalid on that score alone. It was the view of the learned Judge that the provisions of Sections 41 to 55 are not to be obviously ignored by the Courts or by the prosecution, but these provisions are to be kept in view only to see whether the prosecution case set up is truthful or not or there arises any doubt in respect of the prosecution case for non-compliance of any of the provisions of the Act. This view was agreed to by the Gujarat High Court. Another case from which support was claimed was David R. Hall Vs. State (Delhi Administration), , a decision of the same learned Single Judge who decided the Richpal Singh's case. This was also a case of appeal from conviction in which the validity of the conviction was challenged on the ground of non-compliance with Section. GO and for the purpose reliance was placed on a case of the same High Court (1989) (i) DL 157 (Jayapalan v. State) where the police had prior information about the accused that he would be having some contraband in his possession and still no offer was made u/s 50 to have him searched before a Magistrate or a gazetted officer of the described departments. The Court had held on the facts and circumstances of the case and certain infirmities appearing in the prosecution evidence that the charge against the accused had not been proved beyond reasonable doubt. In David R. Hall Vs. State (Delhi Administration), the learned Judge held that the non-compliance of the provisions of Section 50 was examined in the earlier case in the context of other infirmities appearing in the prosecution version, but however in the case before him, where the accused had appeared as a passenger before the investigating officer in the routine chocking of passengers and the police had no secret information that any person would come carrying with him on his person any contraband material, the question of joining any public witness or to give the accused a choice of being produced before a Magistrate or a gazetted officer for taking his search did not arise as the recovery of charas was made from his person in a totally unexpected and sudden manner, and the conviction of the appellant could not be set aside on the ground of violation of Sections 41 and 50 of the Act. From the judgment it would appear of the view having been reached that the provisions of Sections 41 and 50 are mandatory but however their non-observance in the facts and circumstances of a case may be justified and would not necessarily vitiate the trial. Another decision of the same learned Judge reported in the same volume Santokh Singh Vs. State, was also relied upon by the State. The conviction of the appellant there had been challenged for non-compliance of the provisions of Section 42 as the secret information received by the police officer had not been incorporated in the daily diary and even though there were residential houses from where public witnesses could have been taken along on the way to the spot, yet no efforts were made for calling any such witnesses. The learned Judge distinguishing a decision cited before him (1937) 1 Crimes 29 (Ratan Lal v. State), held that if in

any particular case it is evident that the investigating agency deliberately fails to comply with certain salutary provisions of the Act the case of the prosecution would have to be examined with little bit more care and caution before placing reliance on it. It may be that in peculiar facts of a particular case non-compliance of such salutary provisions may lead the Court to doubt the prosecution case. It would depend upon facts of each case to see whether there has been deliberate attempt of the investigating agency to avoid compliance of the salutary provisions of the Act or the compliance has not been made due to some valid reasons. In the case before him, the secret information had been received at 6.00 p.m. that at 7.00 p.m. the suspect would be coming with the contraband for supplying the drugs to some customers near Tirath Ram Hospital. The Court found that the police was not to lose time and was to organise a raiding party immediately so that the culprits could be apprehended. It is also to be kept in view that if at such a time the secret information would have been reduced to writing and recorded in the daily diary maintained by the Duty Officer, the possibility of the secret information leaking out immediately which could have resulted in the raid becoming abortive could not have been overruled. So far as the non-joining of the available witnesses was concerned, the Court found no merit in the contention as some sense of urgency must have been weighing with the police officials when they were organising the raiding party and were proceeding to the spot and they could not have wasted precious time in making efforts to call witnesses from the residential houses. There was no reason to disbelieve the police officials when they say that efforts were made to join some five or six passers-by but on their refusal the police officials were helpless except to proceed with the apprehension of the culprits. The plea of the police officials was accepted by the learned Judge holding that no wise police official could have taken such unwise step to cause unnecessary commotion at the spot. From this it will appear the learned Judge to have taken the view that though the provisions are mandatory, yet a justifiable departure from the same is possible and that the departure from the compliance of the provisions should not be deliberate but should arise out of the necessities of the situation. In a decision of the Kerala High Court in *Ismail and etc. Vs. State of Kerala*, similar view was taken that non-compliance of the provisions of Sections 42, 50(1), 52(1) and 57 of the Act is not ipso facto fatal to the prosecution without looking into the merits and that the provisions are intended as safeguards against unmerited prosecutions. Non-compliance or delayed compliance or insufficient compliance could vitiate the prosecution only if it resulted in prejudice and failure of justice and that normally an irregularity or illegality in the collection of materials cannot affect the trial and conviction unless prejudice or failure of justice is the result though there may be cases where the violations themselves will prove fatal and prejudice or failure of justice has to be presumed.

6. Some authorities relied upon by the learned counsel for the petitioner may also be noticed. The Punjab and Haryana High Court in 1988 CriLJ. 523 (*Hakam Singh v. Union Territory, Chandigarh*) which decision was considered and not

agreed to in 1991 CriLJ 1433 (supra) held Section 43 of the Act, so far as it requires the information received to be recorded in writing, to be mandatory and that its contravention would certainly cause prejudice to the accused. Similarly, the provision of Section 50, interpreting the same as casting a duty upon the officer about to search to ask the person to be searched if he wanted to be taken to the nearest gazetted officer or to the Magistrate, was held to be mandatory. The Court also held Sections 52 and 55 of the Act as mandatory. Because of the non-compliance of all such provisions, the conviction for an offence u/s 18 of the Act was held not sustainable. 1982 Cri.L.J. 1412 (State of H. P. v. Sudarshan Kumar) 1990 (1) Crimes 246 (Chhoteylal v. State of Rajasthan) and Smt. Zubeda Khatoon, Bangalore City Vs. The Assistant Collector of Customs, Legal, Bangalore, are all cases of convictions being set aside for non-compliance of the provisions. The first is a decision of the Himachal Pradesh High Court which took the same view regarding non-observance of Sections 50(1), 52(1) and 57 holding that there is no conceivable reason as to why the designated officer should shirk from informing the person to be searched of his right to be searched before a gazetted officer or a Magistrate and that rather the designated officer should as far as practicable make the offer in question to the person in presence of two independent and respectable witnesses of the locality and if he fails to do so, onus would be on the prosecution to prove that association of such witnesses was not possible on the facts and circumstances of a particular case. Similarly, the Court held that failure to observe the provisions of Sections 52(1) and 57 would certainly prejudice the defence and that if the provisions are not strictly complied with, the prosecution must fail. However, so far as Section 55 is concerned, it was held to be directory in nature. The second case, also an appeal from the conviction, is of the Rajasthan High Court holding the provisions of Sections 50, 52 and 55 to be mandatory and violation thereof to vitiate a conviction. The third case was a decision of the Karnataka High Court holding Section, 57 of the Act to be mandatory Md. Jainulabdin alias Nahamacha and etc. Vs. State of Manipur and etc., is a case decided by the Gauhati High Court which held the requirements of Sections 41 and 42 as to authorisation by the Central or State Governments, the requirement of Section 41(2) as to authorisation by a gazetted officer to the subordinate officer and recording of the information received, the requirement of Section 50 for being informed by the officer to conduct the search of one's right to be searched before a gazetted officer or a Magistrate, the provisions of Section 55 that the Officer-in-charge of the police station is to take charge of the articles seized, to be all mandatory and that because of violation of the provisions, the conviction for offences under the Act to be illegal. In Raju Pershad Gupta Vs. State, , a learned Single Judge of the Delhi High Court took the view that non-compliance with Section 50 of the Act has to be construed to have prejudiced the accused which may in circumstances warrant his acquittal and also held Sections 42 to 55 as mandatory in nature so that non-compliance and non-observance of those provisions would be enough to vitiate the prosecution case. While all such authorities relied upon on behalf of the petitioner considered the effect of non-compliance with the provisions on

convictions under the Act *Salamat Ali Vs. The State*, a Single Judge decision of the Madhya Pradesh High Court, on which much reliance has been placed, also considered the effect of such non-compliance on the arrest and detention in the background of Articles 21 and 22(1) of the Constitution. The learned Judge held referring to the decision of the Supreme Court in *Suk Das Vs. Union Territory of Arunachal Pradesh*, that Section 50 is to be interpreted in the light of Article 21 of the Constitution so as to create a duty in the officer to conduct the search to inform before the search of the man's right regarding the search. So far as Section 52 is concerned, the learned Judge held that though Section 52 was in consonance with Article 22(1) of the Constitution, yet non-compliance with it may affect the reliability of the prosecution case but cannot certainly invalidate the entire prosecution case. It was in that context held that the only effect of non-compliance with Section 52 could be that the subsequent detention in consequence of arrest and not the initial arrest would be invalid furnishing the accused a valid ground for bail. Reliance for the purpose was placed on *Ahmedhussain Shaikh Hussain @ Ahmed Kalio Vs. Commissioner of Police, Ahmedabad and Another*,), a decision of the apex Court in a preventive detention case, that the Court frowns upon any deviation or infraction of the procedural requirements which in fact is the only guarantee to the citizens against the State's action of preventive detention. The learned Judge also held Section 57 (wrongly printed as Section 52) to be directory taking the view that deviation from it may affect the reliability of the prosecution case but cannot certainly have the effect of throwing the prosecution case overboard.

7. While considering whether certain provisions of a statute are mandatory or directory, the prime question arising for decision is the legislative intention behind the statute as a whole and of the provisions concerned. The Court when seized with such question is to interpret the provisions in a manner which advances the intention of the statute rather than retard it, it is far too well-settled in law that a provision is not mandatory merely because the word "shall" is used in connection with it nor does it become directory if the word "may" is used instead. The meaning of the provision has to be gathered from the context in which it is used. Generally speaking, when the statute creates public duties to be performed, the provision is directory in nature though it is not directory in the sense that the authorities charged with performance of the duties can avoid the same at their discretion. While such provisions are required to be mandatorily observed by the authority who is charged with the responsibility to carry them out, yet the outcome of the non-compliance of the provisions would not necessarily nullify the action or the result of it in an unqualified manner and that there may be circumstances which may be pleaded in defence of the deviation. To that extent a provision may, while be of limited mandatory nature, yet be directory. When such is the case, an act done in contravention of the mandatory provisions would ordinarily be illegal unless sustainable reasons can be advanced to justify the departure before judicial scrutiny. There may still be also cases where even if the provisions are regarded as mandatory and the public servant

must necessarily be compelled to observe the same, yet it will be directory in the sense that the violation of the provisions would not ipso facto vitiate the proceeding unless either prejudice or failure of justice is shown to have been caused as a result of the violations. There however may be also cases, where the provision is of absolute mandatory nature so that its violation is irremediable or is per se prejudicial to the person for whose benefit it is made. In such cases the action has to be struck down irrespective of the question of justification or prejudice.

8. The Act is comparatively a recent statute enacted with the object of meeting the unprecedented challenge of illicit traffic in narcotic drugs and psychotropic substances. Drug abuses have been recognised as the single most powerful social offender in recent times creating unimaginable extent of damages on frighteningly large sections of the society. Its effect on the people addicted to it is catastrophic for which international conventions as to traffic on such drugs and substances have come into existence. Keeping such measures in view, the measures in the statute have been made specially rigorous with provisions for minimum sentences which are often very harsh, as also compulsory-fines. Most of the offences are punishable with a minimum sentence of imprisonment for ten years which may extend to twenty years and the minimum fine Rs. 1 lakh which may extend to Rs. 2 lakhs or more. Section 31A even provides for death penalty. Such provisions in the statute communicate the message of the legislature in no uncertain terms that the Act is intended to be very severe in its application. While such is the mission of the statute, yet adequate safeguards have been made in the statute itself to prevent abuses of the provisions so that innocent people are protected from harassment either as a mala fide move or as the action of a zealous public servant. So far as search, seizure and arrest are concerned, Chapter V makes provisions for these safeguards laying down the code of procedure for them. The provisions require that whenever any Search, seizure or arrest is to be undertaken on the basis of any information received, the information has to be recorded in writing. Even where the act of such seizure or arrest is undertaken because of entertainment of belief by the public servant including a police public officer, the law though does not require expressly such reason for belief to be recorded, yet it is wholesome that the grounds for such belief are recorded in a contemporaneous record or if that is not possible, the officer concerned must be in a position to show, when the question is agitated, that he had in fact reasons to believe of the offence to have been committed or was about to be committed. Section 50 read with Section 43(b) is again another such protection available to the person to be searched. The arrest which the officer is authorised to make u/s 43(b) is not possible until the person has been detained and searched and drugs or psychotropic substances are recovered from his possession. Section 50 gives the person about to be searched the right to demand the search to be made before a gazetted officer of the departments mentioned in Section 42 or before the nearest Magistrate. When such a right is to be exercised, obviously the search u/s 43(b) cannot be carried out until the

man is taken before the gazetted officer or the Magistrate. Again, obviously the demand by the person that he be searched before a gazetted officer or a Magistrate cannot be expected to be by a written document. Even if a written requisition is made by the person concerned in some cases, the officer about to conduct the search may not receive the same if it is otherwise inconvenient to him. As a matter of fact, it has to be readily conceded, considering the level of legal consciousness of the ordinary citizens, that most of them would not be aware of such right being available to them. As such, to give full effect to the provisions of Section 50 read with Section 43(b), I find myself in agreement with the view that Section 50 casts a duty on the officer intending to conduct the search to inform the person to be searched of his right to be taken before a gazetted officer of the departments mentioned in Section 42 or to a nearest Magistrate and that there must be contemporaneous record to show such information to have been given to the person concerned and his acknowledgement obtained if it is not otherwise an impossibility. Even the view taken by the Himachal-Pradesh High Court in *State of Himachal Pradesh Vs. Sudarshan Kumar and etc.*, that as far as practicable the offer under Section, 50 is to be made in presence of two independent gentleman and respectable witnesses of the locality should be the practice to be followed, and in the event of any breach, the onus would be on the prosecution to prove that association of such witnesses was not possible in the facts and circumstances of a particular case. Similarly, the provisions of Section, 52 as also Section 57 are intended as protection against illegal arrest and continued detention. While all such provisions are mandatory, it is to be seen as to what is the effect of their non-compliance on convictions on the one hand and on arrest and detention on the other hand. So far as the first is concerned, it can be unhesitatingly said that merely because the provisions are not observed, the conviction would not fail as an automatic consequence as the conviction would be based upon evidence adduced during the trial as to the offence committed by the accused. The illegality in the search, seizure and arrest would not necessarily vitiate the conclusion reached regarding the culpable conduct of the accused unless it is shown that non-compliance with the provisions makes the very prosecution case untruthful or doubtful or that the accused has been seriously prejudiced in the trial by reason of such non-compliance. The law was declared by the Supreme Court in *H.N. Rishbud and Inder Singh Vs. The State of Delhi*, where the Court held that it does not necessarily follow that an invalid investigation nullifies the cognizance of the trial based thereon and that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. In *Radhakishan Vs. State of U.P.*, where the Court held that if the search is illegal it can be resisted by the person whose premises is to be searched and that because of the illegality of search, the Court may be inclined to examine carefully the evidence regarding seizure but beyond these two consequences no further consequence ensues and the seizure of the articles is not vitiated where the evidence of the prosecution regarding the fact of seizure is accepted. *Khandu Sonu Dhobi and Another Vs. State of Maharashtra*,

where the Court decided that where the trial of the case had proceeded to termination, the invalidity of the preceding investigation would not vitiate the conviction of the accused as a result of the trial unless the illegality in the investigation has caused prejudice to the accused, has settled the position of law in that regard.

9. The position is not the same so far as an arrest is made or detention is continued in contravention of the provisions. If the law requires and expressly mandates that certain steps are to be taken before an arrest is made or detention is continued, it must be ordinarily the rule that such steps are to be followed at the risk of arrest or the detention becoming illegal otherwise. To that extent the provisions must be regarded as mandatory as otherwise the protection afforded by the statute would become illusory which is not what the statute must have intended. If a departure is made either the arrest or the detention would become vulnerable with the onus squarely resting upon the authority making the arrest to establish that in the circumstances of the case the departure was unavoidable and was necessitated in the very exigencies of the situation. Hence when a complaint is made of the arrest and the detention to be illegal because of violations of the provisions of Sections 50, 52 and 57 or any of them, the arrested person, may become entitled to liberty, the arrest having been unauthorised or even if the arrest is valid the detention to be unauthorised, unless the contravention is otherwise justified.

10. The conclusions so reached are also inherent in Articles 21 and 22 of the Constitution of India. While the first article guarantees that nobody is to be deprived of his personal liberty except according to the procedure established by law, the second inter alia guarantees the person arrested not to be detained in custody without being informed soon after the arrest the grounds of the arrest and his right to consult and be defended by a legal practitioner of his choice. The provision further guarantees his production before the nearest Magistrate within twenty-four hours of the arrest, excluding the time necessary for the journey to the Court of the Magistrate, and prohibits his detention beyond twenty-four hours in custody without the authority of the Magistrate. Arrest of a person, even if it is made in pursuance of some powers under the statute, is yet deprivation of his personal liberty and hence must be effected in accordance with the procedure founded in the statute. The concept of personal liberty and procedure established by law came for consideration before the Supreme Court as early as in *A.K. Gopalan Vs. The State of Madras*, . Personal liberty was recognised even in its narrower sense as immunity from arrest and detention, as the antithesis of physical restraint, and as a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justifications. It was observed by B.K. Mukharjee, J. that on a plain reading of Article 21 the meaning seems to be that you cannot deprive a man of his personal liberty unless you follow and act according to the law which provides for deprivation of such liberty and that the expression "procedure" means the manner and form of enforcing the law. In the same case it was observed by S. R.

Das, J. that the word "procedure" in Article 21 must be taken to signify some step or method or manner of proceeding leading up to the deprivation of life or personal liberty. Krishna Iyer, J. in Babu Singh and Others Vs. State of U.P., observed that personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law.

11. While personal liberty is thus the most cherished of fundamental right. Article 21 itself recognises its limitation by providing that a person may be deprived of such liberty but that the deprivation must be in accordance with the procedure established by law. Hence, whenever deprivation of the liberty is made and complaint is raised before the Court that the denial thereof is not in accordance with the procedure laid down by law, it becomes the mandate for the Court to examine whether the fundamental right has been negated in violation of the guarantee of Article 21 and in cases where an affirmative conclusion is reached, and the non-compliance with the procedure is not justifiable in the sense as earlier, the arrest would become illegal and has to be declared so forthwith. Similarly where the complaint is made of the detention having become illegal for violation of the guarantees of Article 22, similar consequences are to follow.

12. Argument has been advanced by the learned Additional Standing Counsel that even though the provisions of Sections 50, 52 or 57 of the Act might have not been complied with, yet an accused is not entitled to be allowed bail unless the conditions of Section 37(1)(b) of the Act are satisfied, namely, that the public prosecutor had been given opportunity to oppose the application for bail and where the application is so opposed, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. I do not find any force in the submission since so far as non-compliance with the procedure in effecting the arrest or continuing the detention is concerned, the question is not one of bail but of the invalidity of the arrest and the detention and hence the person being set free and his liberty restored on the incorporation being declared void. It is a matter as to whether a person has been made to lose his liberty and is deprived of his fundamental right in contravention of the guarantees under Articles 21 and 22 in which event the arrest and detention become procedurally ultra vires calling upon the Court to declare the same to be so. A petition as such would lie to this Court either u/s 482 Cr.P.C. invoking the inherent powers of the Court to quash the arrest and detention because of perpetration of obvious injustice or under Article 226 of the Constitution of India to issue a writ nullifying the same. While such is the case, the judgment of the Court would not be fettered by the restraints of Section 37(1)(b) of the Act as the Court would not be considering

whether to release the petitioner on bail or not and instead would be deciding upon the validity of the arrest and detention.

13. Even so far as the provision of Section 37(1)(b) is concerned, it engaged the attention of Hon"ble K. C. Jagadeb Roy, J. in Criminal Misc. Case No. 1196/91 (Satyabrat a v. State) decided on 4-10-1991, to hold, with which views I agree, that the Court while considering the application for bail under the Act is not called upon to record a finding of not guilty with reference to the accused. It was held that the Section is not equated with Section 248 of the Cr.P.C. which makes provision for acquittal when the accused is not found guilty. The purpose of Section 37(1)(b) is limited to the extent that while releasing the accused on bail, the Court is called upon to see if there is reasonable ground for believing him not guilty of the offence to record its satisfaction about the same and that under the Section the Court is only to develop a belief and is not to make a finding of not guilty.

14. The provision of Section 37(1)(b)(ii) are very much similar to Section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "T.A.D.A."). The scope of that provision came to be considered by a Full Bench of the Punjab & Haryana High Court in Bimal Kaur Khalsa Vs. Union of India and Others, . The Court considering the provision of Section 20(8) held that the provision made an impossible demand on the Court. The provision of Section 20(8) of the T.A.D.A. was declared ultra vires as while such demand was made upon the Court, yet the Investigating Officer while releasing the accused on bail u/s 169. Cr.P.C. is not required to entertain any such belief regarding the future behaviour of the accused nor when the Designated Court decides to discharge the accused in terms of the provision of Section 227 of the Cr.P.C.

15. Coming to the facts of the cases of the petitioners, it is seen that both the petitions have been filed u/s 439 Cr.P.C. Specific grounds have been taken in Criminal Misc. Case No. 1052/91 alleging violation of Sections 50, 52(1) and 57 of the Act in arresting the petitioner and continuing his detention. Similarly, allegation has been made in Criminal Misc. Case No. 1227/91 of there having been violation of Sections 42 and 50 of the Act. Though the matters have been argued at length on behalf of the State, yet such allegations made by the respective petitioners have not been met nor any records have been produced to rebut the charges levelled. It is as such to be accepted that in fact the arrest of the petitioners had been done in violation of the provisions. Though the petitions have been made u/s 439 Cr.P.C., yet it having come to the notice of the Court that in effect the arrest and detention are illegal, I treat these applications as u/s 432 Cr.P.C. and set aside the petitioners' arrest and detention and direct that they be set at liberty forthwith. The petitions are allowed.