

(1993) 05 MAD CK 0003
In the Madras High Court
Case No : C.O. No. 3841 of 1993

Sundaresan alias Meganathan alias Mega APPELLANT
Vs
State RESPONDENT

Date of Decision : 18-05-1993

Acts Referred:

Constitution of India, 1950 — Article 19, 21, 22, 226
Criminal Procedure Code, 1973 (CrPC) — Section 165, 167, 248, 309, 42
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 17, 18, 20, 21, 22
Penal Code, 1860 (IPC) — Section 20, 302, 37

Citation : (1993) CriLJ 3342

Hon'ble Judges : K. Venkataswami, J; K. Swamidurai, J

Bench : Division Bench

Advocate : Prof. S. Krishnaswamy, for the Appellant; Mr. I. Subramaniam, APP, for the Respondent

Judgement

Swamidurai, J.—The accused in Crime No. 211 of 1993 on the file of the Inspector of Police, R4 Pondy Bassar Police Station, Madras has

filed this petition for grant of bail u/s 439 of the Code of Criminal Procedure.

2. The petitioner stands charged for on offence punishable u/s 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter

referred to as NDPS Act). The respondent is stated to have seized one kilo and 50 grams of Ganja from the petitioner on 5-3-1993 at about 9.30

p.m. and remanded to judicial custody on 6-3-93 at about 9.00 a.m. for fifteen days. The petitioner submits that the order of remand is illegal and

that the entire story of the prosecution is false and fabricated. The case of the petitioner is that after the arrest on 5-3-93 at 9.30 p.m. he was

confined in a hotel room and that the petitioner was not informed of the grounds of arrest, nor was he permitted to inform his people or to consult

his legal practitioner of his choice. According to the petitioner, all the mandatory procedures prescribed in the NDPS Act were not followed and the petitioner was subjected to untold sorrow. No case has been made out against the petitioner. The petitioner is an upright man with honest means and he has no previous bad antecedents. He had not committed any offence at any time, much less any offence under the NDPS Act. The petitioner is a law abiding citizen and he will not flee from justice. The petitioner will abide by any conditions that may be imposed if he is released on bail.

3. The petitioner has filed a typed set in which he has filed a copy of the F.I.R. in Cr. No. 211/93 on the file on the respondent-police, copy of remand order dated 6-3-93, supporting affidavit of Vijayalakshmi, w/o. J. Jayakumar filed in CrI.M.P. No. 1098 of 1993, copy of telegram sent by Vijayalakshmi Jayakumar to the President of India, New Delhi affidavit of Sundaresan alias Meganathan alias Mega, the petitioner herein filed in CrI.M.P. No. 1098/93 and supporting affidavit of Shanmugham alias Shyam filed in CrI.M.P. No. 1098/93. A copy of the typed set was also furnished to the learned Additional Public Prosecutor in this case. There is no opposition for receiving this typed set containing the abovesaid affidavits etc.

4. Vijayalakshmi in her supporting affidavit has stated as follows :- She is the wife of J. Jayakumar, the brother of Hon"ble Chief Minister Dr. Selvi Jayalalitha. Vijayalakshmi is having a son and a daughter. The petitioner and his family are living with them, assisting her and her husband. The petitioner is with their family for over fifteen years and is also having certain properties - the petitioner is a well-informed person. The petitioner used to go to the house of the Hon"ble Chief Minister as and when they would ask him to go there on some work or other. The petitioner was very much interested in bringing their family and the family of the Hon"ble Chief Minister closer than ever before. It was disliked by Mrs. Sasikala, who is a good friend of the Hon"ble Chief Minister. Mrs. Sasikala had an intent that the petitioner should be driven away from their family so as to make their family helpless and to keep their family at a distance from the family of the Hon"ble Chief Minister. Perhaps it might not have reached the knowledge of the Hon"ble Chief Minister. Mrs. Sasikala has been acting

against them with malicious intent for mischievous ends. Mrs.

Vijayalakshmi suspects that as a part of game, the petitioner was arrested and kept in custody, for no fault of his. The petitioner was away from

Madras and attending to the work at the Farm at Sunguvarchatram on 3-3-93, 4-3-93 and 5-3-93 as per their direction. He is also one of the

Directors of the Company called J. J. Marine Products Private Limited which runs the Farm at Sunguvarchatram. The petitioner returned to their

house at 8.45 p.m. on 5-3-93. At about 9.00 p.m. on 5-3-93 a phone call came from the respondent, Inspector of Police and her son Deepak

aged about 12 years attended the phone. The respondent is known to them. The respondent informed over phone that he wanted to meet the

petitioner and that he would come shortly. This was conveyed by their son to them. The respondent came to their house in a jeep. The respondent

asked the petitioner to go along with him in the police jeep. But the petitioner told him that he would go with the respondent in his new Hero-

Honda Motor cycle. The respondent and the petitioner went out of the house at about 9.30 p.m. on 5-3-1993. The petitioner was wearing a gold

Bracelet, Diamond ring and gold chain. The petitioner had not returned home in the night between 5-3-93 and 6-3-93. The wife of the petitioner

also phoned up to her and when he contacted the higher police officials about the whereabouts of the petitioner, she could not get any information.

The whereabouts of the petitioner were not known on 6-3-93 and 7-3-93 and she got information from some investigative journalists on 8-3-93

that the petitioner had been kept in Central Prison, Madras. Vijayalakshmi got full information only on 9-3-93 from several sources and from the

persons who interviewed the petitioner. Vijayalakshmi came to know that the petitioner was arrested u/s 20(b) of NDPS Act. The petitioner in

innocent and he has been arrested and kept in prison without the authority of law on a false case by a mischief manager with the help of State

officials. The petitioner has been arrested just because he is helping their family.

5. The petitioner has filed an affidavit in CrI.M.P. No. 1098/93 before the learned Principal Sessions Judge, Madras and a copy of which is filed

herein. The petitioner has submitted in that affidavit as follows :-

The petitioner has been in the family of J. Jayakumar since his childhood and the petitioner has been assisting J. Jayakumar and his family in all

matters. The petitioner is one of the Directors of Marine Products Private Limited which runs a Farm at Sunguvarchatram. Jayakumar is the Managing Director of that company. But the petitioner has been looking after all the affairs of the said company. The petitioner and his family are living with the family of J. Jayakumar in the same house at No. 9, Sivagananam Road, T. Nagar, Madras-17, the said Jayakumar is the brother of the Hon"ble Chief Minister of Tamil Nadu. Babu, Inspector of Police, Pondy Bazaar Police Station, T. Nagar had come to their house on several occasions for some help or other and he had also taken the petitioner out as friend on some occasions. The petitioner wanted to bring the families of Jayakumar and the Hon"ble Chief Minister closer and closer. It appears that it was disliked by Mrs. Sasikala and that she was interested to see that the petitioner was away from the family of Jayakumar. Mrs. Sasikala is a close associate of the Hon"ble Chief Minister and the petitioner was really made a scape goat for no fault of his. The petitioner was in the Farm at Sunguvarchatram on 3-3-93, 4-3-93 and 5-3-93 and he returned to his house at about 8.45 p.m. on 5-3-93. At about 9.00 p.m. a phone call from Babu, the Inspector of Police was received under which Babu informed that he would come to meet the petitioner immediately. Accordingly, Babu came and asked the petitioner to go along with him. The petitioner thought that Babu wanted to take him to the club for amusement or for some help. Babu asked the petitioner to go with him in the police jeep. The petitioner told him that he would go in his new Honda Motor Cycle. At that time, the petitioner was wearing a gold bracelet (3 1/2 soverings), a diamond gold ring (Three diamonds) and a gold chain (two soverings) and also a cash of about Rs. 200/- and he followed Babu in his motor cycle. At G. N. Chetty Road near a Mechanic shop Babu stopped the police jeep and also asked the petitioner to stop the motor cycle and the petitioner obliged him and the Inspector of Police asked him to leave the motor cycle in the mechanic shop and to board the police jeep. The petitioner hesitated and the Inspector compelled him and later used force against the petitioner. The petitioner boarded the jeep and the jeep reached Ganpet Hotel in Nungambakkam High Road at about 10.00 p.m. on 5-3-1993. The petitioner was taken to a room in the fourth floor of the hotel. In the room one Kannan, Sub-Inspector of Police, one Mani, Writer and a constable were there. Babu, the Inspector of Police handed

over the petitioner to the above said three persons and the Inspector of Police asked the petitioner to deliver to Babu all valuables in his

possession. The petitioner refused at first and Babu started checking his dress - The petitioner told him that if he wanted to search his body for

anything he would do so in the presence of a Magistrate or a responsible Government official of a higher rank. Babu and other police persons

forced the petitioner to deliver him gold bracelet, gold diamond ring, gold chain and cash of about Rs. 200/-. All these were taken by Babu, the

Inspector of Police. After taking all those the Inspector of Police left the room saying that he would make arrangement for Ganja the next day. The

petitioner was afraid and he tried to get away from the room. Then he was forcibly pushed down in the room and the room was kept locked from

inside. Not even water was given to the petitioner. On the next day i.e. 6-3-1993 at about 9.00 p.m., Babu Inspector of Police came with a bag

containing a bundle and took me to Saidapet Court in a jeep. The other police persons also came in the jeep.

6. The petitioner apprehended foulplay and asked the Inspector of Police the reasons or grounds for his arrest and detention and for taking to

Saidapet Magistrates' Court. Babu and others in the jeep asked the petitioner to keep quiet. The petitioner was produced before the IV

Metropolitan Magistrate Saidapet. The petitioner cried that he was not informed of the purpose nor the reasons for which he was brought to the

court. The lady Magistrate had not listened to him. She mechanically got the papers from the police and remanded the petitioner to custody for 15

days immediately. She had not asked the petitioner about the case. The petitioner was then taken to Central Prison, Madras where he was now

lodged as an under trial prisoner. The petitioner was not permitted to contact anybody from the moment he was taken custody till 8-3-93. The

petitioner was not able to inform his family about his whereabouts till 8-3-93 and he was not permitted to contact his counsel till 8-3-93. He was

not informed of the grounds of arrest and detention. The petitioner saw his counsel on 8-3-1993 at about 4.30 p.m. and narrated the facts to him.

Only at that time, he came to know for the first time that a case has been registered against him by Baby u/s 20(b) of NDPS Act. The petitioner

was shocked when he heard about it. The case has been fabricated against the petitioner falsely. According to the respondent, the petitioner was

keeping Ganja, on the carrier of a Bicycle in a bag, that he was checked and arrested at 7.15 p.m. on 5-3-93 in the presence of two mahazar

witnesses in the junction between Prakasam Street and Bashyam Street, half kilo metre from R. 4 Pondy Bazaar Police Station and that he was

produced before the IV Metropolitan Magistrate, Saidapet, at 9.00 a.m. on 6-3-93. According to the petitioner, this is totally a concocted case.

The petitioner was not at all kept in any lock up. The petitioner submits that he had not touched Ganja in his lifetime and he has not committed any

offence.

7. Shanmugham alias Shyam has filed a supporting affidavit in CrI.M.P. No. 1098 of 1993 before the learned Principal Sessions Judge, Madras in

his affidavit, it is stated as follows : Shanmugham alias Shyam is an Editor, Printer and Publisher of Arasiyal Tharasu, a political and social weekly.

He was returning to his house after his press work through Nungambakkam High Road in his car on 5-3-93 at about 9.45 p.m. His car was going

slowly near Ganpat Hotel due to some traffic disturbances. He saw the petitioner and Babu, Inspector of Police entering Ganpat Hotel. A police

jeep was also found parked near the hotel. He had no reason to suspect anything at that time. He knows the petitioner for about five years and the

petitioner was in the family of J. Jayakumar, the brother of Hon''ble Chief Minister. He also knew Babu, the Inspector of Police for quite some

time. He got information of 6-3-93 that the petitioner had not returned home after he was taken by Babu, Inspector of Police, from the house of J.

Jayakumar on 5-3-93 at about 9.30 p.m. Then he recalled to his mind that he had seen the petitioner with Babu, Inspector of Police near Ganpat

Hotel at Nungambakkam at about 10.00 p.m. on 5-3-93 while he was returning to his house in his car after his press work. He told his reporters

to investigate the matter and find out the truth. Then by repeated investigation found out the truth and located the petitioner at Central Prison,

Madras on 7-3-93 and the information was passed on to the family of J. Jayakumar. He submits that he is in no way connected with the petitioner,

nor he intends to interfere with the course of justice.

8. Renuka Devi, wife of the petitioner has also filed H.C.P. No. 481/93 under Article 226 of the Constitution of India against Babu, Inspector of

Police, Pondy Bazaar Police Station, T. Nagar, Madras - 17 for a Writ of Habeas

Corpus directing the respondent to produce the petitioner who is confined in Central Prison, Madras before this Court and to set him at liberty. But we are now taking up Crl.O.P. No. 3841/93 for bail which has to be disposed at an early date. We have admitted H.C.P. No. 481/93 on 17-3-93 and the learned Additional Public Prosecutor has taken notice. In H.C.P. No. 481/93 the respondent Babu, Inspector of Police has filed a counter affidavit. Even though we are not now deciding H.C.P. No. 481/93, the averments made in the counter affidavit filed by the respondent in H.C.P. No. 481/93 will be useful for disposing of the bail petition Crl.O.P. No. 3841/93. In the counter-affidavit filed by Babu, the Inspector of Police in H.C.P. No. 481/93 it is stated as follows : The petitioner is in custody pursuant to a valid order of remand passed by the Court of competent jurisdiction and set the Habeas Corpus Petition has to be dismissed in limini. It is not correct to state that he used to go over to the house of the petitioner or that he requested him for any help. It is also not true to say that the petitioner had taken him out for entertainment on some occasions. It is not true that he went to the house of the petitioner on 5-3-93 at about 9-00 p.m. and that he telephoned to him earlier as stated by the petitioner. It is not true to say that while he proceeded to the house of the petitioner in a jeep, he asked him to come along with him in the jeep. It is not true that the petitioner declined to come in the jeep but preferred to follow him in Honda Motor Cycle. It is also not true that the petitioner was wearing any jewellery at that time. It is not true that he asked the petitioner to leave the motor cycle in the mechanical shop at G. N. Chetty Road and forced him to get into the jeep. It is not true that the petitioner was taken to a room at Ganpat Hotel where he was relieved of his jewellery by him. It is not true that he went over to the said room with a bag containing a bundle and thereafter took the petitioner to Saidapet Court in a jeep. The petitioner was arrested on 5-3-93 at 7.30 p.m. while he was coming on his bi-cycle near the junction of Prakasam Road and Bashyam Road near Panagal Park. T. Nagar. On interception, he was found in possession of one kilo and 50 grams of ganja for which a case in R. 4 Pondy Bazaar Police Station Cr. No. 211/93 for an offence u/s 20(b) of NDPS Act was registered. It is not correct to say that the grounds of arrest were not explained to the petitioner; but on

the contrary, the petitioner who was carrying a Narcotic substance was fully aware of the fact and circumstances under which he was apprehended by the police. It is not true to say that the petitioner was produced before a lady Magistrate who mechanically got the papers from the police and remanded the petitioner to custody for fifteen days. The order of the learned XVII Metropolitan Magistrate would clearly show that the petitioner was produced before him at 9.00 a.m. with the request for remand and other material documents based upon which the petitioner was remanded to the judicial custody for 15 days. At the time of remand, the learned XVII Metropolitan Magistrate explained to the petitioner the circumstances under which he was produced before him and he was also informed about his being remanded to police custody. It is not true to say that the petitioner was not allowed to contact any one including the members of his family. The petitioner was informed of the grounds of arrest at the earliest point of time. The petitioner was apprehended while he was found carrying Ganja. The petitioner is fully aware that he is concerned in an offence u/s 20(b) of NDPS Act. The recovery of Ganja was done in the presence of independent witnesses and a seizure mahazar was prepared at the scene and it would clearly show the involvement of the petitioner with the offence. The contraband seized from the petitioner was duly produced before the XVII Metropolitan Magistrate under Form 95 and the same was taken into custody by the Court. The relief, as claimed in the Habeas Corpus petition is not available to an accused person who is in custody pursuant to a valid order of remand.

9. Along with the typed set, the petitioner has also filed a Xerox Copy of the order of ramand dated 6-3-93. Learned XVII Metropolitan

Magistrate, Saidapet, Madras after receiving the remand report filed on 6-3-1993 by the Inspector of Police, R. 4 Pondy Bazaar Police Station

has passed an order as follows :

Accused produced at 9.00 a.m. No complaint of ill treatment by police. Remanded u/s 167 Cr.P.C. till 19-3-1993. To be produced before

Sessions Judge, Madras on 19-3-1993 at 10.00 a.m.

10. The point for consideration in this case is whether the petitioner is entitled to be released on bail.

11. The petitioner is charged for an offence punishable u/s 20(b)(i) of NDPS Act.

Section 20(b)(i) of NDPS Act reads as follows :

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, -

(a) Cultivates any cannabis plant; or

(b) Produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable, -

(i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five

years and shall also be liable to fine which may extend to fifty thousand rupees

Section 37 of the NDPS Act reads as follows :

37. Offences to be Cognizable and non-bailable :- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

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(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his

own bond unless -

(i) The Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) Where the Public Prosecutor opposes the application, 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.

(2) The limitations on granting of bail specified in Clauses (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal

Procedure, 1973 (2 of 1974) or any other law for the time in force on granting of bail".

The contention of the learned counsel for the petitioner is that the petitioner is innocent and that a false case has been registered against him at the

instance of Mrs. Sasikala, a close associate of the Hon'ble Chief Minister of Tamil Nadu. At this stage, we are not considering about the truth or

otherwise of the prosecution case. The only point we are going to consider at this stage is whether the petitioner is entitled to be released on bail

pending disposal of the criminal case.

12. Learned counsel for the petitioner submitted that since the petitioner has been charged for an offence punishable u/s 20(b)(i) of the NDPS Act, if the case is proved, then the petitioner shall be punishable with imprisonment for a term of imprisonment of five years and also liable to fine which may extend to rupees fifty thousand, as according to the prosecution the contravention relates to Ganja. The case of the prosecution as per the F.I.R. is that the petitioner was carrying one and half a kilo of Ganja in the earner of his bi-cycle. Learned counsel for the petitioner submitted that section 20(b)(ii) provides where the said provision relates to cannabis other than Ganja, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees. Similarly Section 21 of the NDPS Act imposes punishment with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend two lakh rupees if any person committed any contravention in relation to manufactured drugs and preparations. Section 22 of the NDPS Act deals with punishment for contravention in relation to psychotropic substances where such persons shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Section 23 of the NDPS Act deals with punishment for illegal import into India, export from India or transshipment of narcotic drug and psychotropic substances and the punishment shall not be less than ten years rigorous imprisonment but which may extend to twenty years and shall also be liable to fine which shall not be less than rupees one lakh but which may extend to rupees two lakhs; provided for the reasons to be recorded in the judgment, the court may impose a fine exceeding two lakh rupees. Similarly Sections 24, 25, 25A, 26, 27, 27A, 28, 29, 30, 31, 31A and 32 deal with punishment for contravention of various acts as has been provided in the abovesaid sections of NDPS Act. So, learned counsel for the petitioner submits that since the petitioner is accused of an offence punishable u/s 20(b)(i) of NDPS Act for alleged contravention relating to Ganja, he shall be punishable with rigorous imprisonment for a term

which may extend to five years and shall also be liable to which may extend to Rs. 50,000/-, and the provisions of Sections 37 of NDPS Act

cannot be invoked as against the petitioner. It is admitted that every offence punishable under the Act is cognizable as enumerated u/s 37(a) of

NDPS Act. But according to the learned counsel for the petitioner Section 37(b)(i) and (ii) sub-clause (2) of Section 37 of NDPS Act are not at

all applicable to the petitioners. There is some difference between Section 20(b) (i) and Section 37(b) of NDPS Act. Section 20(b)(i) states that

the person for contravention of Section 20(b) shall be punishable with rigorous imprisonment for a term which may extend to five years and shall

also be liable to fine which may extend to fifty thousand rupees, whereas u/s 37(b) of NDPS Act no person accused of an offence punishable for a

term of imprisonment of five years or more under this Act shall be released on bail or on his own bond. Therefore, learned counsel for the

petitioner contended that the provisions u/s 37(b) of NDPS Act is not at all attracted. In support of the above contention, he relied upon a

judgment of Karnataka High Court reported in A.V. Dharmasingh and others Vs. The State of Karnataka, where the learned Single Judges of

Karnataka High Court has observed as follows :

Section 37 of the Act, dealing with non-bailable offences will be applicable to the offences under the Act only if they are punishable with the

imprisonment of five years or more and if an offence is punishable with imprisonment which can extend up to 5 years only, Section 37 of the Act

will not be applicable. Therefore in such cases the accused will be entitled to be released on bail. The expression "punishable for a term of

imprisonment for five years or more" occurring in clause (b) of Section 37(1) of the Act means that the offence should be punishable with minimum

of 5 years or more. The words "or more" are to be read with reference to "5 years" in their grammatical meaning. "5 years or more" mean that the

basis is 5 years and "or more" is the period that has to be considered with reference to the basis of "5 years". If the intention of the legislature was

to make Section 37 of the Act applicable to the offences which are punishable even up to 5 years or less, then the legislature would not have used

the expression "5 years or more". It could have simply said for any offences. It could not have qualified the words offence in Section 37 with the

expression "punishable for a term of imprisonment for 5 years or more". Therefore, the expression means that the offence must be punishable with the punishment which shall be not less than 5 years, but it can be more.

The Karnataka High Court in the abovesaid decision had also held as follows :-

Where the offence alleged against the accused is punishable u/s 20 of the Act with a term which may extend to 5 years, the provisions of Section 37 of the Act would not be attracted and the accused was entitled to be released on bail"".

The learned single Judge has also considered the impact of the Judgment of the Supreme Court reported in Narcotics Control Bureau Vs. Kishan

Lal and others, which the Supreme Court has observed as follows -

Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Criminal P.C., 1973, no person

accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The N.D.P.S. Act is a

special enactment and it was enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs

and psychotropic substances. That being the underlying object and particularly when the provisions of S. 37 of N.D.P.S. Act are in negative terms

limiting the scope of the applicability of the provisions of Cr.P.C. regarding bail, it cannot be said that the High Court's powers to grant bail u/s

439, Cr.P.C. are not subject to the limitation mentioned u/s 37 of the NDPS Act. The non obstante clause with which the section starts should be

given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between Section 439, Cr.P.C. and

Section 37 of the NDPS Act, Section 37 prevails. The provisions of S. 48 Cr.P.C. also make it clear that when there is an enactment in force

relating to the manner of investigation, enquiry of otherwise dealing with such offences, the other powers under Cr.P.C. should be subject to such

special enactment. In interpreting the scope of such a statute the dominant purpose underlying the statute has to be borne in mind. Consequently

the power to grant bail under any of the provisions of Cr.P.C. should necessarily be subject to the conditions mentioned in Section 37 of the

NDPS Act.

After discussing the provisions of Sections 20, 37, 42, 50 of NDPS Act, learned

single Judge of the Karnataka High Court observed that a reading of the judgment of the Supreme Court reported in Narcotics Control Bureau Vs. Kishan Lal and others, can be distinguished on the ground that the Supreme Court has not considered distinction of Section 20(b)(i) and Section 37 of the NDPS Act. The Karnataka High Court has also found that the provisions of Sections 42, 50, and 57 of N.D.P.S. Act regarding search of the contraband are mandatory and that the non-compliance with the provisions of Sections 42 and 50, the accused being prejudiced is entitled to be released on bail. Learned counsel for the petitioner also submitted that the provisions of Sections 42, 50, 52 etc. of N.D.P.S. Act are mandatory and the non-compliance of the same would prejudice the accused and consequently, he is entitled to bail. Learned single Judge of Karnataka High Court has also followed the decision of the Supreme Court reported in Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, . There is a discussion in that judgment on the contention raised by the learned Government Pleader wherein the learned Government Pleader relied on the judgment reported in State of Maharashtra Vs. Natwarlal Damodardas Soni, . The Supreme Court in that judgment observed as follows (at page 432 of Cri LJ) :-

Assuming arguendo, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which followed on the complaint of the Assistant Collector of Customs.

In the decision Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, relied upon by the learned single Judge of Karnataka High Court it has been held as follows :-

The procedure prescribed by law for the deprivation of the right conferred by Art. 21 must be fair, just and reasonable. Just as a mala fide act has no existence in the eye of law so unreasonableness vitiates law and procedure like. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform to the norms of justice and fairplay. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested

with statutory powers has, therefore, to be tested by the application of two standards the action must be reasonable. If any action, within the scope of the authority conferred by law is found to be unreasonable, it must mean that the procedure established by law under which that action is taken itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how fair is the procedure prescribed by it. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down.

The Karnataka High Court observed that the action taken by a public authority which is invested with statutory powers is to be tested by the application of two standards. Firstly the action must be within the scope of the authority conferred by law and secondly it must be reasonable and that the substance of law cannot be de horsed from the procedure which it prescribes.

13. Section 42 of N.D.P.S. Act deals with power of entry, search, seizure and arrest without warrant or authorisation. Learned Additional Public

Prosecutor submitted that the petitioner was carrying Ganja in the carrier of his cycle and therefore there is no question of search of the person of

the petitioner involved in this case. In the counter filed by the respondent in H.C.P. No. 481/93 it is not stated specifically that ganja was taken in

the carrier of the bi-cycle of the petitioner; but in the F.I.R. it is stated that ganja was taken in the carrier of the bicycle. We are not dealing with the

criminal case. Section 42 of the N.D.P.S. Act reads as follows :-

42. Power of entry, search-seizure and arrest without warrant or authorisation :-

(1) Any such officer (being an officer superior in rank to a peon,

sepoy, or constable) of the departments of Central Excise, Narcotics, customs revenue, intelligence or any other department of the Central

Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such

officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a

State Government as is empowered in this behalf by general or special order of the State Government, if he reasons to believe from personal

knowledge or information given by any person any taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an

offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such

offence is kept or concealed in any conveyance or enclosed place, may, between sunrise and sunset -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) Seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has

reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence

of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under

Chapter IV relating to such drug or substance :

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the

concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time

between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he

shall forthwith sent a copy thereof of his immediate official superior.

Section 43 of N.D.P.S. Act reads as follows :-

43. Power of seizure and arrest in public places :- Any officer of any of the departments mentioned in Section 42 may -

(a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence

punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article liable to

confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence

punishable under Chapter IV relating to such drug or substance;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV and, if such person

has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other

person on his company.

Explanation :- For the purpose of this Section, the expression, "public place" includes any public conveyance, hotel, shop, or other place intended

for use by, or accessible to the public.

Section 49 of N.D.P.S. Act reads as follows :-

49. Power to stop and search conveyance :- Any officer authorised under S. 42, may, if he has reason to suspect that any animal or conveyance is,

or is about to be used for the transport of any narcotic drug or psychotropic substance, in respect of which, he suspects that any provision of this

Act has been, or is being, or is about to be, contravened at any time, stop such animal or conveyance, or, in the case of an aircraft, compel it to

land and -

(a) rummage and search the conveyance or part thereof,

(b) examine and search any goods on the animal or the conveyance;

(c) if it becomes necessary to stop the animal or the conveyance, he may use all lawful means for stopping it, and where such means fail, the animal

or the conveyance may be fired upon.

Section 50 of NDPS Act reads as follows :-

50. Conditions under which search of persons shall be conducted :- (1) When any officer duly authorised u/s 42 is about to search any person

under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to

the nearest Gazetted Officer of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in

sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall if he sees no reasonable ground for search, forthwith

discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

Section 52 of NDPS Act reads as follows :-

52. Disposal of persons arrested and articles seized - (1) Any officer arresting a person u/s 41, Section 42, Section 43, or Section 44 shall, as

may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary

delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without

unnecessary delay to -

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered u/s 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall with all convenient despatch,

take such measures as may be necessary for the disposal according to law of such person or article.

14. Learned counsel for the petitioner submitted that the petitioner was not informed of the grounds of arrest and that he was not informed of the

right to be taken without unnecessary delay to the nearest Gazetted officer of any of the departments mentioned in Section 42 or to the nearest

Magistrate. Learned Additional Public Prosecutor contended that the requirement of Section 50 of NDPS Act is first of all not all mandatory and

even assuming to be so without admitting it, the person of the petitioner was not searched and, therefore, the provisions of Section 50 of NDPS

Act is not attracted. But from the records available now in court it does not appear that the Inspector of Police had reason to believe from his

personal knowledge or information given by person and taken them in writing that any narcotic drug in respect of which an offence punishable u/s

20(b)(i) has been committed. It is the case of the prosecution that while the petitioner was going on his cycle with the ganja kept in the carrier of his

cycle, he was on suspicion intercepted by the Inspector of Police. That means, the Inspector of Police had reason to believe from his personal

knowledge about carrying of ganja by the accused. Even then, the same thing has to be reduced in writing as per Section 42 of the Act. From the affidavit filed by the petitioner it appears that the petitioner was taken to the Magistrate only on the next day i.e. on 6-3-92. According to the prosecution, the offence is stated to have been committed at about 9.00 p.m. on 5-3-1993. It has to be noted that the respondent has not filed a separate counter affidavit to the bail application. But the respondent has filed a counter to the H.C.P. filed by the petitioner for his release under Article 226 of the Constitution of India. Since both the matters are pending before us. We have taken the counter filed by the respondent in the H.C.P. for the sake of appreciating the case of the respondent even though no specific counter-affidavit was filed in the bail application.

15. Learned Additional Public Prosecutor rebutted the contention of the learned counsel for the petitioner with regard to meaning to the word

"punishable" as found in Section 20(b) of NDPS Act and relied upon the judgment of the Supreme Court reported in Sube Singh and Others Vs.

State of Haryana and Others, . The Supreme Court while dealing with the case under Punjab Borstal Act (11 of 1926) observed that the word

"punishable" carries a meaning "liable to be punished." Since the offence under S. 302 is punishable with death, the provisions of the Punjab

Borstal Act would not cover an offence u/s 302 of I.P.C. and the benefit would not, therefore, be available to an accused convicted for the offence

under S. 302, I.P.C. The Supreme Court in the decision cited supra has further observed as follows (at page 2236) :-

The word "punishable" is ordinarily defined as deserving of or capable or liable to punishment, punishable within statute providing that defendant

may have ten peremptory challenges if offence charged is "punishable" with death or by life imprisonment means deserving of or liable to

punishment; capable of being punished by law or right, may be punished. In the sense given to the word punishable, there can be no doubt that the

offence of murder is punishment awarded is not death but imprisonment for life.

Section 2(4) of the Punjab Borstal Act which defined "offence" to mean "an offence" punishable with transportation or rigorous imprisonment

under the Indian Penal Code other than (a) an offence punishable with death. The Punjab Borstal Act does not have application to an offence

punishable u/s 302, I.P.C. Simply because the punishment awarded in that case was transpiration of life, the petitioner is not entitled to the benefit

of Section 2(4) of the Punjab Borstal School Act since the offence is u/s 302, I.P.C. for which the accused shall be punishable with death or

imprisonment for life. In the decision reported in Subash Chand v. State of Haryana, AIR 1988 SC 584 which arose under Sections 5 and 2(4)(i)

(a) of the Punjab Borstal Act (11 of 1926) the Supreme Court has observed as follows :-

A person convicted for the offence of murder and sentenced to imprisonment for life cannot claim the benefit of the Punjab Borstal Act. The

definition of offence under S. 2(4) of the Punjab Borstal Act excludes an offence punishable with death. One of the punishments for the offence of

murder is death and, therefore, the offence of murder would be covered within S. 2(4)(i)(a) of the Punjab Act and to such a conviction the Punjab

Borstal Act would have no application.

The decision reported in State of Maharashtra Vs. Jugamander Lal, is a case under Suppression of Immoral Traffic in Women and Girls Act,

1956. The expression "shall be punishable" is interpreted in this case. The Supreme Court observed that the word "punishable" is used and not

word "punished" does not imply that court is given discretion to determine nature of sentences of be passed. The expression "shall be punishable

with imprisonment and also with fine" mean that Court is bound to award sentence consisting both of imprisonment and fine. Section 20(b) of

NDPS Act imposes punishment with rigorous imprisonment for a term which may extend to five years and also be liable to fine which may extend

to fifty thousand rupees; whereas Section 37(b) of the NDPS Act imposes a punishment for a term of five years or more under this Act. There is

some difference between the punishment u/s 20(b) and Section 37(b) of NDPS Act. Section 37(b) imposes a punishment for a term of five years

or more, whereas Section 20(b) of NDPS Act gives a punishment for a term which may extend to five years and not more. With respect to their

Lordships of the Supreme Court, this distinction has not been brought to their notice in the case reported in Narcotics Control Bureau Vs. Kishan

Lal and others, . The Supreme Court had held in that decision Narcotics Control Bureau Vs. Kishan Lal and others, that the powers of the High

Court to grant bail u/s 439, Cr.P.C. are subject to the limitations contained in the amended Section 37 of NDPS Act.

16. In the decision reported in *Berlin Joseph alias Ravi v. State*, 1992 (1) Crimes 1221 a Full Bench of Kerala High Court has considered the

questions (1) whether the High Court can suspend the sentence passed on an accused convicted of an offence under NDPS Act during pendency

of his appeal before the High Court and (2) whether the conditions in Section 37 of the NDPS Act for granting bail have overriding effect on the

proviso to Section 167(2) of the Code of Criminal Procedure. The Full Bench of Kerala High Court held that High Court has no power to

suspend the sentence of a convicted person either during the pendency of his appeal or revision, unless it relates to the offence u/s 27 of the Act

and the conditions in Section 37 of NDPS Act for granting bail have overriding effect on the proviso to Section 167(2) Cr.P.C. In the decision

reported in *Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc.*, the Supreme Court has held that Article 22 of the Constitution of India

declares no person shall be deprived of his life or liberty except in accordance with the procedure prescribed by law. It is both in the interest of the

accused as well as the society that the criminal case is concluded soon. If the accused is guilty, he ought to be declared so. The Criminal Procedure

Code provides for early investigation and for a speedy and fair trial. It is sufficient to say that the constitutional guarantee of speedy trial emanating

from Article 21 is properly reflected in the provisions u/s 309, Cr.P.C. In the decision reported in *Bhagirathsinh Judeja Vs. State of Gujarat*, the

Supreme Court has enunciated the principles for grant of bail and for cancellation of bail. The Supreme Court observed that it is now well settled

by a catena of decisions of the Supreme Court that the power to grant bail is not to be exercised as if the punishment before trial is being imposed.

The only material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse

the discretion granted in his favour by tampering with evidence. If there is no prima facie case there is no question of considering other

circumstances. But even where a prima facie case is established, the approach of the court in the matter of bail is not that the accused should be

detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the

discretion granted in his favour by tampering with evidence.

17. A learned single Judge of Karnataka High Court observed in the case Shankar Krishnasa Habib and another Vs. State of Karnataka, as

follows :-

..... if the petitioners are released on bail, would they commit any offence during such bail period. The assurance given by the petitioners is that

they would not tamper the prosecution evidence and would not commit any offences. This is the only offence alleged against them. Apart from this,

if stringent conditions are imposed, the chances of petitioners making attempt to tamper with the evidence would be avoided. Further, in case, the

prosecution feels that in spite of release the petitioners, they have once again involved in similar activities, that itself is a good ground for seeking

cancellation or modification of bail. Hence, in my view, this is a fit case where the petitioners are entitled for bail.

That was a case which came to be registered for offences punishable under Sections 17, 18, 21 and 22 of NDPS Act read with Section 34 of the

Karnataka Excise Act. Learned single Judge of Karnataka High Court after considering the provisions of Section 37 of the NDPS Act has held as

stated above. Learned single Judge of Karnataka High Court has also considered the judgment reported in Narcotics Control Bureau Vs. Kishan

Lal and others, . Right to speedy trial has been emphasised in the judgment reported in Abdul Rehman Antulay Vs. R.S. Nayak and another etc.

etc., . In the decision reported in R.M.D. Chamarbaugwalla Vs. The Union of India (UOI), their Lordships of the Supreme Court sitting in the

Constitution Bench observed as follows (at page 631) :-

When a question arises as to the interpretation to be put on an enactment, what the court has to do is to ascertain "the intent of them that make it",

and that must of course be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a

literal interpretation of the words used in disregard of all other materials. The literal construction then was, in general, but prima facie preference.

To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act to consider (1) what

was the law before the Act was passed; (2) what was the mischief or defeat for which the law had not provided; (3) what remedy parliament has

appointed; and (4) the reason of the remedy.

The decision in *Narcotics Control Bureau Vs. Kishan Lal and others*, deals with the question of interpretation of the words used in Section 37 of

the NDPS Act while considering the question of bail. In the decision in *R.M.D. Chamarbaugwalla Vs. The Union of India (UOI)*, their Lordships

of Supreme Court observed that the decision should rest not on a literal interpretation of the words used in disregard of all the materials. That

means, while interpreting the words in a statute the personal liberty of a citizen as guaranteed under Articles 21 and 22 of the Constitution has to be

borne in mind.

18. In the decision reported in *State of Madhya Pradesh Vs. Azad Bharat Finance Co. and Another*, while considering the meaning of the word

"shall" in Section 11 of the Madhya Bharat Act, the Supreme Court observed that the word "shall" is not always mandatory, it depends upon the

context in which the word occurs and the other circumstances. Section 11 of the Opium Act (10 of 1878) as modified by the Opium (Madhya

Bharat Amendment) Act, 1955 deal with confiscation of the truck carrying opium. Section 11 of the said Act empowers the court to confiscate the

truck. The Supreme Court in the above decision observed as follows (at page 286 of Cri LJ) :-

Three considerations are relevant in construing S. 11. First it would be just to confiscate the truck of a person if he has no knowledge whatsoever

that the truck was being used for transporting the opium. Secondly it is a penal statute and it should if possible be construed in such a way that a

person who has not committed or abetted any offence should not be visited with a penalty. Thirdly, if confiscation was obligatory under the section,

the section may have to be struck down as imposing an unreasonable restrictions under Art. 19 of the Constitution.

Section 11 of the Madhya Bharat Act is not therefore to be construed as obligatory and it is for the court to consider in each case whether the

article in which the contraband opium is found or is being transported should be confiscated or not having regard to all the circumstances of the

case.

19. In the decision reported in *Velu Thevar v. State*, represented by the Inspector of Police, N.I.B. C.I.D. Theni, 1992 LW Cri 187, this Court

(Janarchanam, J.) has held that simply because the power of the High Court u/s 439, Cr.P.C. is not expressly excluded and is preserved, it does

not mean such a power can be exercised de hors stringent provisions contained in Section 37 of the NDPS Act. No reasonable grounds to hold at

the stage of consideration of suspension of sentence pending appeal, for coming to conclusion that the appellant is not guilty and in that view, there

is no justification for suspension of sentence and release appellants on bail pending disposal of the appeal. The judgment in Narcotics Control

Bureau Vs. Kishan Lal and others, has been relied upon by the learned single Judge of this Court in the above case. The law of preventive

detention and the personal liberty of a citizen as guaranteed under Articles 21 and 22 of the Constitution of India, has been considered in the

decision reported in A.K. Gopalan Vs. The State of Madras, . In the decision reported in Hussainara Khatoon and Others Vs. Home Secretary,

State of Bihar, Patna, the Supreme Court has observed that if the court is satisfied, after taking into account on the basis of information placed

before it, that the accused has his roots in the community and is not likely to abscond it can safely release the accused on his personal bond. To

determine whether the accused has his roots in the community which would deter him from fleeing, the court should take into account certain

factors concerning the accused and the Supreme Court has also observed in that case that pre-trial release should be granted in appropriate cases,

on personal bond of accused without sureties and without any monetary obligation. In the decision reported in Mrs. Maneka Gandhi Vs. Union of

India (UOI) and Another, , the Supreme Court has held that procedure established by law means that procedure should be fair and reasonable

procedure. In the decision reported in Lawarance D'souza Vs. State of Maharashtra and another, learned single Judge of Bombay High Court has

observed the question of non-compliance with provisions of Sections 41 to 58 can be looked into even at the stage of bail and that non-

compliance with procedural requirements can be looked into even at stage of bail. Learned single Judge of Bombay High Court observed as

follows (at page 402) :

The provisions of Ss. 41 to 58 of the Act would be applicable right from the inception of the investigation. It would be fallacious and pernicious to

leave the question of their compliance to be looked into only at the stage of trial. Such a situation is fraught with the danger of the prosecution

agency ignoring altogether the compliance of the provisions which contain in-built safeguards to the accused, with impunity and with ulterior

purpose in a given case. That would bring into peril the liberty of the citizen guaranteed under Art. 21 of the Constitution. The accused therefore

should be entitled to rely upon the infirmities with all its rigour even at the state of bail. There are stringent limitations on grant of bail under S. 37 of

the Act. Courts must, therefore, be vigilant to protect the rights of the accused. There can be no quarrel that an offender under the Act must be

apprehended and severely punished, provided however, that he is found guilty. That possibility has to be found to exist at the stage of bail on prima

facie consideration of the matter and only after reaching satisfaction that he is reasonably believed to be guilty. For that purpose, the compliance

with procedural requirements must be insisted upon and must be shown, at least, prima facie, at the stage of bail.

In the decision reported in Sivakumar alias Kumar alias Suguhar. In Re 1989 LW (Cri) 65, this court (Arunachalam, J.) has observed as follows :-

It is seen from S. 50 that the duly authorised officer under S. 42, shall, if a person to be searched so requires take such person without

unnecessary delay to the nearest gazetted officer or any of the department mentioned in S. 42 or to the nearest Magistrate. When the section refers

to the right of a person about to be searched, in law there is an inbuilt duty on the concerned officer to inform such person of his right to be taken

to the nearest gazetted officer. This requirement will also have a bearing in considering the category of officers who are to be empowered for

dealing with the offences under this Act.

Learned single Judge of this Court has considered the impact of Sections 41, 42, 43, 44 and 52 of the NDPS Act and his view in that judgment is

that the provisions of this Act are mandatory in nature. One of us (Swamidurai, J.) had held in C.A. No. 309/91 and C.A. No. 615/90 that the

provisions in Sections 41 to 57 of the NDPS Act, are mandatory and that the non-compliance of the same would vitiate the trial.

20. In the decision reported in the The State Vs. Captain Jagjit Singh, the Supreme Court observed that in a case of non-bailable offence, the

court should consider various circumstances, namely nature and seriousness of the offence, the character of the evidence, circumstances peculiar to

the accused, possibility of his absconding, tampering with witnesses, other considerations which arise when bail is asked for in a non-bailable

offence. In the decision reported in State of Himachal Pradesh Vs. Sudarshan Kumar and etc., a Division Bench of Himachal Pradesh High Court

has observed that Criminal Procedure Code is not applicable where any different procedure is prescribed by any other law. The procedure

enacted under Chapter V of the NDPS Act, as far as applicable, shall have precedence over that of Criminal Procedure Code. To the extent the

provisions of Criminal Procedure Code are not inconsistent with those of Narcotic Act the same shall continue to govern the trial of cases under

Narcotic Act; thus the procedure laid down in the Narcotic Act is not exhaustive. The procedure laid down in various sections contained in

Chapter V of the Narcotic Act is controlled by the word ""shall"", which, in legal parlance, means that the requirement is imperative. Nevertheless,

the word ""shall"" need not be given that connotation in each and every case and the provision can be interpreted as directory instead of mandatory

depending upon the purpose which the legislature wanted to achieve, as disclosed by the scheme of the Act and the rules. The same High Court

further observed as follows (at page 1419) :-

The designated officer is bound to inform the person whom he is about to search of his right to be taken without delay to the nearest gazetted

officer of any of the departments mentioned in Section 42 or to the nearest Magistrate to be searched in their presence. This is an extremely

valuable right which the legislature has clothed him with and has been incorporated in the Narcotic Act keeping in view of the severity of the

sentence. The rationale behind this provision is manifest. A search before a Gazetted Officer or a Magistrate would impart much more authenticity

and credit-worthiness to the proceeding. I would verily strengthen the prosecution. Thus there is no conceivable reason why a designated officer

should shirk from affording a real opportunity to the person concerned to avail of his of his right if he so desires. But for it, this valuable right would

become illusory and a farce. In face the designated officer should as far as practicable, make the offer in question to the person in the presence of

two independent and respectable witnesses of the locality. If he fails to do so, onus would be on prosecution to prove that association of such

witnesses was not possible on the facts and circumstances of a particular case. The provision thus cannot but be regarded as mandatory and

violation thereof per se would be fatal to the prosecution case.

The same High Court also further observed that the provisions of Sections 52(1) and 57 of the NDPS Act regarding search and arrest of the

accused or seizure under the Act are mandatory. In the decision reported in Mari Appa and Vs. State of M.P. and etc., learned single Judge of

Madhya Pradesh High Court has observed that the provisions of Section 42 and 50 of the NDPS Act are mandatory. The learned Judge has

observed that no doubt the court expected to keep the object of the Act before it while dealing with bail petition u/s 37 of the NDPS Act, but the

object of the Act cannot be allowed to defeat the basic rights available even to an accused under Art. 21 of the Constitution. No one would be

justified in ignoring the procedural safeguards, as provided in the Act, having a vital bearing on the constitutional right. The Court while considering

an application for bail with reference to Section 37 of the NDPS Act, is not called upon to record a finding of not guilty. Section 37 of the NDPS

Act is not to be equated with Section 248, Cr.P.C. which demands acquittal on finding not guilty. It is for the limited purposes essentially confined

to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is

not guilty and record its satisfaction about the existence of such grounds, i.e. not to say that the court has to consider the matter as if, it is

pronouncing a judgment of acquittal recording a finding of not guilty. One is question of "belief" u/s 37 of the NDPS Act and the other is question

of "finding" u/s 248, Cr.P.C. and that they should not confuse any court.

21. A Division Bench of Gauhati High Court in the case Md. Jainulabdin alias Nahamacha and etc. Vs. State of Manipur and etc., held that the

provision of Section 50 of the NDPS Act is mandatory and that the violation of the same would violate the order of detention. The provisions of

Section 41(2) of the NDPC Act regarding search, seizure and arrest are mandatory and the Division Bench of the said High Court further

observed that mere receiving information is not sufficient, but it must be in

writing and recording of grounds of his belief and sending of report are also mandatory. Since the offence under the Act being cognizable, even private person can arrest u/s 42, Cr.P.C. The Division Bench of the abovesaid High Court has also observed as follows (at page 705) :

If a duly authorised officer under S. 42 or any officer u/S. 42 or 43 even if not so authorised makes an arrest, the conditions laid down in said S. 50 shall be applicable. To put it otherwise, if a person is arrested by any unauthorised officer u/S. 43 he shall have to follow the conditions laid down in S. 50. The word appearing in S. 50 makes the conditions mandatory. According to S. 50, the person has a right to be taken to the nearest gazetted officer of any of the department, mentioned in S. 42 or to the nearest Magistrate. This is an important safeguard given to an accused person by the legislature keeping in view our criminal jurisprudence. That apart, seizure before a gazetted officer or before a Magistrate will make the recovery credit worthy and remove any scope to implicate a person falsely. This intention of the legislature as stated above, makes the provision mandatory. Therefore, after a person is arrested and before a search is conducted, it is mandatory on the part of the officer to inform the accused that he has a right to be searched in presence of a gazetted officer or a Magistrate. The accused will get the benefit if there is a failure to comply with this provision. Where in the present case the entire operation was done in presence of gazetted officer viz. Superintendent of Police, there was no violation of S. 50 of the Act.

Learned single Judge of Allahabad High Court in the case *Sewa Ram v. State of U.P.* reported in 1992 (2) Crimes 1022 : 1922 Cri LJ 2929 held that the mandatory provisions of Sections 42 and 50 of the NDPS Act having not been complied with, the accused deserves to be bailed out, but subject to conditions, learned single Judge in the abovesaid decision observed as follows (at page 2934 of Cri LJ) :

The provisions of a statute have to be interpreted inter alia with reference to the intention of the legislature. It may also be assumed that the legislature could always intend to ensure just and fair action. Most of the population in India is not literate and, in any case, there are very few who understand their legal rights and duties or the provisions of law, much less the provision of such special law as NDPS Act. It would not be just and

proper to hold that the accused in these cases must necessarily be deemed to know his rights given u/s 50 of the Act. In quite a number of cases

the accused are rickshaw pullers and poor and illiterate section of the society. It is too much to expect that they will know their legal rights

contained in Chapter IV of the Act. Justice demands that the authorities who have special knowledge of the Act must inform the accused of their

right u/s 50 of the Act and their failure to do so must lead to the inference that the mandatory provision has not been complied with.

The same High Court further observed that it is true that the provisions of the NDPS Act are in the nature of social legislation and it is in the interest

of the community that the real culprits must be apprehended and severely punished but at the same time care has to be taken that innocent persons

are not unnecessarily harassed and for that purpose the mandatory procedural safeguards are complied with. The social need lends special

responsibility on the investigating and prosecuting authorities as also on the public prosecutors. The public prosecutor has a vital role to play in the

whole process of reaching the required satisfaction by the Court in regard to the culpability of the accused.

In the decision reported in *Ashok and Others Vs. The State*, learned single Judge of Madhya Pradesh High Court (Indore Bench) has held that the

persons arrested have to be informed of the grounds of arrest and of their right to bail as per Section 50 of Criminal Procedure Code and every

police officer, or other person arresting any person without warrant shall forthwith communicate to him full particular of the offence for which he is

arrested or other grounds for such arrest and the police officer arrests without warrant any person other than a person accused of a non-bailable

offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf single Judge

of Madhya Pradesh High Court in the abovesaid decision has further observed code are in conformity with Art. 22(1) of the Constitution of India

and non-compliance with the aforesaid mandatory provisions of the Code amounts to non-compliance with the procedure established by law and

renders the arrest and detention of the person concerned illegal.

In the decision reported in *Sewa Ram and Others Vs. State*, learned single Judge of Allahabad High Court has held that the provisions under

sections 42 and 50 of NDPS Act are mandatory and the non-compliance of the same can be considered at the stage of grant of bail. The learned

single Judge further observed that the intention of the legislature obviously is that, when such stringent punishments are provided under the Act,

there should be a sound safeguards to ensure that innocent persons are not harassed or unnecessarily detained by any arbitrary or whimsical

actions of the police or the other authorities. Learned single Judge of Allahabad High Court has held in the decision Chandra Shekhar Shastri Vs.

State and Another, that the applicant is entitled to bail by reason of his present detention being illegal. In the decision reported in Raju Pershad

Gupta Vs. State, learned single Judge of Delhi High Court has held that the provisions of Section 50 regarding search under NDPS Act are

mandatory and that the non-compliance of the same would vitiate the prosecution.

22. Learned Additional Public Prosecutor contended that the provision of S. 439, Cr.P.C. is subject to the limitation mentioned under S. 37 of the

NDPS Act and that the non-obstante clause in S. 37 of the NDPS Act is intended to restrict the powers to grant bail and in case of any

inconsistency between S. 439, Cr.P.C. and S. 37 of NDPS Act the latter prevails over the former. In support of the above contention, he relied

upon the decision reported in Mabia Bibi v. State of W.B. 1992 (1) Crimes 762. Learned Additional Public Prosecutor also relied upon the

decision reported in Om Wati Vs. State, wherein learned single Judge of Delhi High Court has held that the provisions under S. 165, Cr.P.C.

regarding search is directory and not obligatory and that secondly assuming it obligatory the non compliance of some of the provisions under S.

165, Cr.P.C. would not vitiate the recovery. Reliance was also placed by the learned Additional Public Prosecutor on a Full Bench Judgment of

Orissa High Court reported in Banka Das, Rambalak Das, Birendra Kumar Behera and Soumitri Behera Vs. State of Orissa, where the majority

view of the Court is that the provisions under S. 50(1) of NDPS Act regarding search and seizure cast no obligation on concerned official to

inform person to be searched that he has option of making requisition to be taken before Gazetted Officer or Magistrate, whereas the minority

view of the Full Bench is that S. 50 of the NDPS Act enjoins a duty upon the officer to inform a person of his right and make contemporaneous

entry in his records of the fact of the person having been informed as also his reaction on such information given and whether he has carried out the request of the person concerned if he exercises his right under the Section. According to the learned Additional Public Prosecutor, there is no illegality in the search and that even assuming without admitting there is any illegality, it would not affect the competence of jurisdiction of the court of trial. In support of his contention he relied upon the judgment reported in H.N. Rishbud and Inder Singh Vs. The State of Delhi, wherein it has been held that it is well settled that an illegality committed in the course of an investigation does not affect the competence and the jurisdiction of the court for trial and where cognizance of the case has in fact been taken and the case has proceeded to termination the invalidity of the proceeding investigation does not vitiate the result unless miscarriage of justice has been caused thereby. Learned Additional Public Prosecutor also relied upon the decision reported Salamat Ali Vs. The State, . In that decision, learned single Judge of Madhya Pradesh High Court (Indore Bench) has observed that the officer arresting the person has to inform him the grounds of arrest and that provision is directory. Section 52 of the Act requires that every person arresting a person shall inform him of the grounds of arrest. This is in consonance with Art. 22(1) of the Constitution. The provision in this Section has to be interpreted as directory. Non-compliance with this requirement would not invalidate the entire proceedings and its only effect would be that the subsequent detention in consequence of such an arrest and not the initial arrest would be invalid. According to the said decision, that S. 50 of the Act is implicit the legislative mandate regarding the person to be searched to be informed by the person intending to take search that the former has the legal right to require that he is searched in the presence of the concerned Gazetted Officer or the Magistrate. This mandate has to be met by the prosecution in letter and in spirit so that it is not rendered nugatory. Learned Judge further observed that the use of the word "shall" in a provision is not conclusive on the question of it being mandatory in character. The provisions of a statute creating public duties are, generally speaking directory. The legislature while giving certain procedural instructions with a view to require strict compliance thereof by public functionaries, excluding all discretion on their part, uses the word ""shall"". Nevertheless, non-compliance of these instructions per se does

not result in rendering the acts done as null and void. It has to be shown that such non-compliance has caused prejudice and failure of justice. In

the decision relied on by the learned Additional Public Prosecutor and reported in Surajmal Kanaiyalal Soni Vs. The State of Gujarat, , a Division

Bench of Gujarat High Court has observed as follows :-

It cannot be said that in absence of writing, there will be no chance to cross-examine the officer with regard to the factum and contents of the

information received and that would cause prejudice to the accused. It is always a question of fact required to be considered in the light of the

circumstances and the relevant provisions and to ascertain as to whether prejudice is caused to the accused. Merely because a particular provision

is not strictly complied with, the necessary implication may not always be that prejudice is caused to the accused.

In the same decision, learned Judges also held as follows :-

It cannot be said that except want of authority of power to take action for search, seizure and arrest, the provisions of Ss. 41, 42 and 43 are such

mandatory that violation of which would vitiate the proceedings even without establishing any prejudice to the accused or miscarriage of justice.

It is also held in the same decision that it is not obligatory on authorised officer to make offer to the person to be taken before specified gazetted

officer or Magistrate in effecting search under Ss. 42 and 50 of NDPS Act. It is also held that the provision under Ss. 48 and 57 are not

mandatory.

23. Learned Additional Public Prosecutor also relied upon the decision reported in Raj Bahadur Vs. The State of U.P., wherein the learned single

Judge of Allahabad High Court has held that failure to summon public witnesses at the time of search and recovery of brown sugar under S. 50 of

NDPS Act cannot be a ground for enlarging the accused on bail. It was also held that the grant of bail to an accused person under NDPS Act can

be regulated by the provisions of S. 37 of the NDPS Act. Learned Additional Public Prosecutor also relied upon the Judgment reported in Kantilal

Jain v. Assistant Collector, C.I.U., Madurai, 1991 LW Cri. 563 (K. M. Natarajan & Somasundaram, JJ.) Learned Judges of this court placed

reliance on the Judgment of the Supreme Court reported in Narcotics Control Bureau Vs. Kishan Lal and others, where it was held that the

powers of the High Court to grant bail under S. 439, Cr.P.C. are subject to the limitations contained in S. 37 of the NDPS Act. In that decision,

learned Judges ultimately held in the facts and circumstances of that case that the appellant/accused has not established that there are not sufficient

materials against him and that he is not guilty of the offences for which he was convicted and that he is entitled to be released on bail pending

disposal of the appeal in that view, the learned Judges dismissed the application for bail.

24. Learned Additional Public Prosecutor vehemently contended that there is prima facie against the petitioner and that he is not entitled to bail. On

hearing the rival contentions of the learned counsel for the petitioner and the learned Additional Public Prosecutor and after considering the

decisions stated above, we are of the view that the provisions of Ss. 41 to 57 of the NDPS Act are all mandatory and that violation of the same

would be fatal to the case of the prosecution and that the compliance of the mandatory provisions can be looked into even at the time of grant of

bail also. On a consideration of the decisions of various High Courts and also the Apex Court, we are of the view that the personal liberty of the

citizen as guaranteed under Arts. 21 and 22(5) of the Constitution is supreme. At the same time, we are not ignoring the reasons and objects of the

NDPS Act providing deterrent punishment to a person who violates the provisions of the NDPS Act. Even the judgment of the Supreme Court

reported in 1991 LW Cri 53 : 1991 Cri LJ 654 (supra) does not say that a person accused of an offence under the NDPS Act is not at all entitled

to bail. Their Lordships of the Supreme Court observed that the restrictions imposed under S. 37 of the NDPS Act have also to be considered

while considering the grant of bail under S. 437, Cr.P.C. But the Apex Court in the abovesaid decision had no occasion to consider the mandatory

provisions of the NDPS Act and that any violation of the same would vitiate the trial. The observation of the Supreme Court in the decision

reported in Narcotics Control Bureau Vs. Kishan Lal and others, is ""for the aforesaid reasons, we hold that the powers of the High Court to grant

bail under S. 439, Cr.P.C. are subject to the limitations contained in the amended S. 37 of the NDPS Act. The restrictions placed under the

abovesaid section is applicable to the High Court also in the matter of granting bail.

25. The petitioner has stated in his application for bail that he is an upright man with honest means and that he has no previous bad antecedents.

According to him, he had not committed any offence at any time much less any offence under NDPS Act. He has also stated that he is a law

abiding citizen and he will not flee from justice and that he will not commit any offence if he is released on bail. We have also perused the affidavit

of the petitioner, the affidavit of Smt. Vijayalakshmi Jayakumar and Shanmugham alias Shyam. As per S. 37(a) of the NDPS Act every offence

punishable under NDPS Act is cognizable. We are unable to agree with the learned counsel for the petitioner that the offence alleged against the

petitioner under S. 20(b) of the NDPS Act does not come within the purview of S. 37(b) of the NDPS Act. The petitioner is also subject to the

provisions of S. 37(b) of the NDPS Act. The word ""punishable"" is found in both the sections, namely, S. 20(b) and also S. 37(b) of the NDPS

Act. As per S. 20(b) of the NDPS Act, the maximum punishment is five years and whereas as per S. 37(b) of the NDPS Act, the punishment is

for a term of five years or more that means that the punishment can be for a term of five years also or more. Therefore, we are of the opinion that

there is no distinction with regard to applicability of S. 37(b) of the NDPS Act for the offence punishable under S. 20(b) of the NDPS Act. No

material has been placed by the learned counsel for the petitioner to hold a contrary view that the petitioner is not an upright man with honest

means. The petitioner also has stated that he has no previous bad antecedents which fact has not been rebutted by the prosecution. The petitioner

has also stated that he would not commit any offence if he is released on bail. These facts have not been rebutted by the prosecution by letting in

any material. Therefore, we are of the view that the petitioner satisfies the restrictions imposed under S. 37 of the NDPS Act. Further we hold that

the petitioner was not informed by the respondent of the grounds of arrest and that the respondent has not reduced into writing of his belief from

personal knowledge that the petitioner is in possession of the narcotic substance as per S. 42 of the NDPS Act. This is violation of mandatory

provisions of the NDPS Act.

26. As we have pointed out earlier, the respondent in the counter filed in H.C.P. No. 481/93 has not specifically stated that the Ganja was taken in

the carrier of the bicycle of the petitioner. But in the FIR filed in the criminal case it is mentioned that ganja was taken in the carrier of the bicycle.

As pointed out by us earlier, we are not dealing with the criminal case filed against the petitioner now. In the counter filed by the respondent in

H.C.P. No. 481/93, it is mentioned in para 8 as follows :-

I most respectfully submit that as a matter of fact Tr. Meganathan was arrested at about 7-30 p.m. on 5-3-93, while he was coming on his bicycle

near the junction of Prakasam Road and Bashyam Road near Panagal Park, T. Nagar. On interception he was found in possession of 1 Kgm and

50 gms. of Ganja for which a case in R. 4 Pondy Bazaar Police Station Cr. No. 211/93 for an offence under S. 20(b) of the Narcotic Drugs and

Psychotropic Substances Act was registered.

In para 9 of the counter filed in HCP No. 481/93 it is mentioned as follows :-

..... It is incorrect to state that the grounds of arrest were not explained to Tr. Meganathan, on the contrary the petitioner who was carrying

narcotic substance referred to above was fully aware of the facts and circumstances under which he was apprehended by the police party.

In para 12 of the counter, it is stated as follows :-

..... As submitted earlier, Tr. Meganathan was apprehended while he was found carrying Ganja and as such his feigning ignorance of the

circumstances under which he was arrested cannot be entertained by this Honourable High Court.

In para 13 of the counter filed by the respondent in H.C.P. 481/93, it is stated as follows :

..... The recovery of Ganja was done in the presence of the independent witnesses and the seizure mahazar prepared at the scene would clearly

show the involvement of the petitioner with the offence for which he was produced before the XVII Metropolitan Magistrate.

Therefore, nowhere in counter filed by the respondent it is stated that the Ganja was carried in the carrier of the cycle. Therefore, as stated in para

8 of the counter filed by the respondent that on interception the petitioner was found in possession of one kilo and fifty grams of Ganja for which a

criminal case was registered under S. 20(b) of the NDPS Act. The argument of the learned Additional Public Prosecutor now before us is that the

petitioner was carrying Ganja in the carrier of his bicycle and, therefore, the

person of the petitioner was not searched for the seizure of Ganja and, therefore, the provisions of S. 50 of the NDPS Act cannot be attracted to the factual situation of this case. S. 50 of the NDPS Act has already been extracted. S. 52 of the NDPS Act enjoins upon any officer arresting a person under Ss. 41, 42, 43 or 44 to inform the person so arrested of the grounds for such arrest. Sub-clause (2) of S. 52 of the NDPS Act reads that every person arrested and article seized under warrant issued under sub-sec. (1) of S. 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. S. 57 of the NDPS

Act reads as follows :-

57. Report of arrest and seizure : Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure make a full report of the particulars of such arrest or seizure to his immediate official superior.

27. Here, we are unable to accept the contention of the learned Additional Public Prosecutor that the Ganja was seized from the carrier of the cycle of the petitioner since such contention could not be spelt out from the counter of the first respondent filed in H.C.P. No. 481/93. Therefore, we are of the view that the Ganja is alleged to have been seized only from the person of the petitioner and our opinion is without prejudice to the contention of the petitioner in the course of trial. Therefore, the provisions of S. 50 of the NDPS Act are attracted and it is not the case of the respondent that the petitioner was taken before the nearest Gazetted officer of any of the department mentioned in S. 42 of the NDPS Act or to the nearest Magistrate. The provisions of S. 50 of the NDPS Act are mandatory and there is clear violation of the same in this case.

28. From the perusal of the counter filed by the respondent in H.C.P. No. 481/93, we are also unable to find that the Inspector of Police had informed the petitioner of the grounds of arrest. We are also unable to find that the respondent had reduced into writing of his belief from his personal knowledge that the petitioner was in possession of narcotic substance as per S. 42 of the NDPS Act. We have already observed that the compliance of the mandatory provisions of the NDPS Act can be looked into even at the time of grant of bail also. In this case, the mandatory provisions of NDPS Act have not been followed by the respondent as pointed out

by us supra. Therefore, we are of the view that the petitioner is entitled to be released on bail.

29. In view of the above, we are inclined to release the petitioner on bail but subject to conditions, since we are prima facie satisfied that there are grounds for believing that the petitioner is not guilty of the offence and that he is not likely commit any offence while on bail.

30. In the result, we direct release of the petitioner on bail on his executing a bond for a sum of Rs. 20,000/- (Rupees Twenty thousand) only with two sureties for a like sum each to the satisfaction of XVII Metropolitan Magistrate, Saidapet Madras and on further condition that the petitioner should report before the respondent/police at 10-30 a.m. on every Monday for four weeks.

31. Petition allowed.