

Sundaresan Alias Meganathan Alias Mega Vs. State

Sundaresan Alias Meganathan Alias Mega Vs. State

SooperKanoon Citation : sooperkanoon.com/785321

Court : Chennai

Decided On : May-18-1993

Reported in : 1993CriLJ3342

Judge : K. Swamidurai and;K. Venkataswami, JJ.

Appeal No. : C.O. No. 3841 of 1993

Appellant : Sundaresan Alias Meganathan Alias Mega

Respondent : State

Advocate for Def. : Mr. I. Subramaniam, APP

Advocate for Pet/Ap. : Prof. S. Krishnaswamy, Adv.

Judgement :

Swamidurai, J.

1. 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 under Section 439 of the Code of Criminal Procedure.

2. The petitioner stands charged for on offence punishable under Section 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 Crl.M.P. No. 1098 of 1993, copy of telegram sent by Vijayalakshmi Jayakumar to the President of India, New Delhi affidavit of Sundaresen alias Meganathan alias Mega, the petitioner herein filed in Crl.M.P. No. 1098/93 and supporting affidavit of Shanmugham alias Shyam filed in Crl.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 under Section 20(b) of NDPS Act. The petitioner is 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 Crl.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 under Section 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 Crl.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 bicycle 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 under Section 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 under Section 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 remand 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 Pandy Bazaar Police Station has passed an order as follows :

'Accused produced at 9.00 a.m. No complaint of ill treatment by police. Remanded under Section 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 under Section 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), -

(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 Clause (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 under Section 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 under Section 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 under Section 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 under Section 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 under Section 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 v. State of Karnataka : ILR 1992 KAR3137 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 under Section 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 v. Kishan Lal*, : 1991 CriLJ654 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 under Section 439, Cr.P.C. are not subject to the limitation mentioned under Section 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 or 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 : 1991 CriLJ654 (supra), 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 v. Bombay Municipal Corporation, : AIR 1986 SC180 . 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 v. Natwarlal, : 1980 CriLJ429 . 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 : AIR 1986 SC180 (supra) 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 send 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 under Section 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 under Section 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 under Section 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 under Section 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 v. State of Haryana, : 1989 CriLJ297 . 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 under Section 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 under Section 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 under Section 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 v. J. Lal*, : [1966]3SCR1 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 under Section 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 : 1991 CriLJ654 (supra). The Supreme Court had held in that decision : 1991 CriLJ654 (supra) that the powers of the High Court to grant bail under Section 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 under Section 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 *A. R. Antulay etc. etc. v. R. S. Nayak*, : 1992 CriLJ2717 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 under Section 309, Cr.P.C. In the decision reported in *Bhagirathsingh Judeja v. State of Gujarat*, : 1984 CriLJ160 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 Krishna Habib v. State of Karnataka* reported in : ILR 1992 KAR1191 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 v. Kishan Lal*, : 1991 CriLJ654 . Right to speedy trial has been emphasised in the judgment reported in *Abdul Rahman Antulay v. R. S. Nayak*, : 1992 CriLJ2717 . In the decision reported in *R.M.D.C. v. Union of India*, : [1957]1SCR930 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 defect for which the law had not provided; (3) what remedy parliament has appointed; and (4) the reason of the remedy.'

The decision in : 1991 CriLJ654 (supra) 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 : [1957]1SCR930 (supra) 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 v. Azad Bharat Finance Co.* : 1967 CriLJ285 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 under Section 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 : 1991 CriLJ654 (supra) 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 v. State of Madras*, : 1950 CriLJ1383 . In the decision reported in *Hussainara Khatoon v. State of Bihar*, : 1979 CriLJ1036 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 *Maneka Gandhi v. Union of India*, : [1978]2SCR621 , 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 v. State of Maharashtra* , 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 (Crl) 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 State v. Captain Jagjit Singh, : [1962]3SCR622 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 H.P. v. Sudarshan Kumar , 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 v. State of M.P.* 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 under Section 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' under Section 37 of the NDPS Act and the other is question of 'finding' under Section 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 v. State of Manipur* reported in 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 under Section 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 gazette 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 under Section 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 under Section 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 v. 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 particulars 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. Learned single Judge of Madhya Pradesh High Court in the aforesaid decision has further observed that the provisions of the 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 v. State of U.P.* : 1992 All LJ 942 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 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 v. State* reported in that the applicant is entitled to bail by reason of his present detention being illegal. In the decision reported in *Raju Parshad Gupta v. State* : 1991(21)DRJ17 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 v. State* : 40(1990)DLT69 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 v. State of Orissa* : 1992(II)OLR395 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 v. The State of Delhi*, : 1955 CriLJ526 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 v. 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 v. State of Gujarat* : (1990)2GLR923, 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 v. 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 CrL 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 v. Kishanlal* : 1991 CriLJ654 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 : 1991 CriLJ654 : (supra) 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.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com