

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NOs.237, 277, 282, 295, 361, 483, 490 & 595 OF 2017

COMMON ORDER:

All these criminal petitions are filed for grant of regular bail to the petitioners therein, in different crimes who are in judicial custody. The details of crime number, name of the police station, name of the accused, quantity of ganja seized and details of application of regular bail in the Sessions Court are given hereunder.

	Crime No.	Police station	Name of the petitioner/ accused	Quantity of ganja	Details of application of regular bail
Crl.P.No.277 of 2017	Crime No. 216 of 2016	Ravulapalem Police Station	Vasireddy Peddi Raju	784 kgs	Crl.M.P.No.1425 of 2016 on the file of I Additional District and Sessions Judge, East Godavari at Rajamahendravaram
Crl.P.No.282 of 2017	Crime No. 216 of 2016	Ravulapalem Police Station	V. Nooka Raju	784 kgs	Crl.M.P.No.1798 of 2016 on the file of I Additional District and Sessions Judge, East Godavari at Rajamahendravaram
Crl.P.No.237 of 2017	NDPS SC No.133 of 2016 in Crime No.8 of 2016	Maredumilli Police Station	Ajmeera Veeranna	80 kgs	Crl.M.P.No.1759 of 2016 on the file of I Additional District and Sessions Judge, East Godavari at Rajamahendravaram
Crl.P.No.295 of 2017	Crime No.29 of 2016	Mothugudem Police Station	1. Banothu Ashok 2. Daravath Prasad	160 kgs	Crl.M.P.No.1308 of 2016 on the file of I Additional District and Sessions Judge, East Godavari at Rajamahendravaram
Crl.P.No.595 of 2017	Crime No.29 of 2016	Mothugudem Police Station	Jalothu Venkanna	160 kgs	Crl.M.P.No.1343 of 2016 on the file of I Additional District and Sessions Judge, East Godavari at Rajamahendravaram

Crl.P.No.361 of 2017	Crime No.76 of 2016	Chinturu Police Station	Geddeda Gangajalam	2125.3 kgs	Crl.M.P.No.1709 of 2016 on the file of I Additional District and Sessions Judge, East Godavari at Rajamahendravaram
Crl.P.No.483 of 2017	Crime No.61 of 2016	Maredumilli Police Station	Allure Rajesh Kumar	30 kgs	Crl.M.P.No.1773 of 2016 on the file of I Additional District and Sessions Judge, East Godavari at Rajamahendravaram
Crl.P.No.490 of 2017	Crime No.145 of 2016	Bommuru Police Station	P. Kondala Rao	603 kgs	Crl.M.P.No.1603 of 2016 on the file of I Additional District and Sessions Judge, East Godavari at Rajamahendravaram

In all these matters, the common question that fell for consideration is regarding non-compliance of Sections 41(2) & 42(2) of The Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and its consideration at the stage of enlarging the accused on bail for the offences punishable under Sections 8(C) read with Section 20(b)(ii)(C) of NDPS Act. Therefore, it is appropriate to decide all these petitions by common discussion.

Before advertng to the alleged violation of Sections 41(2) & 42(2) of NDPS Act, it is appropriate to advert to the relevant considerations for grant of bail under NDPS Act.

Section 37 of NDPS Act created an interdict to grant bail for an offence punishable under various provisions of the Act, where a commercial quantity of contraband is involved. According to Section 37(1)(b) of NDPS Act, unless the Court records its satisfaction that the petitioner did commit no offence and that he

would not commit no offence again while on bail under Section 439 Cr.P.C in serious offences like the offence punishable under Sections 41(2) & 42(2).

In **State of Madhya Pradesh v. Kajad**¹ the Supreme Court held that the purpose for which the NDPS Act was enacted and the menace of drug trafficking which intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the Court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant is an exception under sub clause (ii) of clause (b) of Section 37(1). For granting bail, the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail.

In **Maktool Singh v. State of Punjab**² Supreme Court held that for all the offences punishable more than five years, the Courts power to release the accused on bail during the period before conviction has been thus drastically curtailed by providing that if the Public Prosecutor opposes the bail application, no accused shall be released on bail, unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty for such offences.

¹ AIR 2001 SC 3317

² (1999) 3 SCC 321

In **Customs, New Delhi v. Ahmadalieva Nodira**³ held that the Court has to keep in mind two conditions i.e, the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail, the conditions are cumulative and not alternative, the satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds and the expression reasonable grounds means something more than prima facie grounds and it contemplates substantial probable causes for believing that the accused is not guilty of the alleged offences.

In view of the law declared by the Apex Court in the judgments referred supra, Section 37 of NDPS Act, unless the Court concludes that the accused is not guilty based on reasonable ground and that there is no possibility of committing similar offences while on bail, where the offences are punishable for more than five years, he shall be enlarged on bail.

Even according to Section 37 of NDPS Act, the general provisions regarding grant of bail under Section 437, 438 & 439 are applicable. Besides the application of general provisions of Cr.P.C, certain safeguards are provided in the Act to grant bail, while placing reversal burden in view of Section 35 & 54 of NDPS Act. Therefore, the general principles governing bails under Section 437, 438 & 439 are equally applicable to the bail applications filed

³ 2004 (1) JCC 662

for the offences punishable under Sections 8(C) read with Section 20(b)(ii)(C) of NDPS Act for enlarging the accused in the above crimes under NDPS Act, where commercial quantity is involved.

The normal principle is that, unless the Court comes to a conclusion that there are no reasonable grounds that the petitioner/accused did commit no offence and that there is no apprehension of interference in case the petitioner is enlarged on bail, the Court can enlarge the accused on bail.

While dealing with an application for bail, there is a need to indicate in the order, reasons for *prima facie* concluding why bail was being granted, particularly where an accused was charged of having committed a serious offence. It is necessary for the Courts dealing with application for bail to consider among other circumstances, the following factors also while granting bail, they are:

- 1) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
- 2) Reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;
- 3) *Prima facie* satisfaction of the Court in support of the charge.

Though a conclusive finding in regard to the points urged by the parties is not expected of the Court while considering the bail application, yet giving reasons is different from discussing merits or demerits. As noted above, at the stage of granting bail a detailed

examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. But that does not mean that while granting bail some reasons for *prima facie* concluding why bail was being granted is not required to be indicated. (vide **Lokesh Singh v. State of U.P.**⁴)

A similar view was expressed by the Apex Court in **Gajanand Agarwal v. State of Orissa**⁵.

In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**⁶, in paragraph 11, the Apex Court held that the law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such reasons for *prima facie* concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the Court granting bail to consider among other circumstances before granting bail such as the nature of accusation, the severity of punishment in case of conviction and the nature of supporting evidence, the reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant and *prima facie* satisfaction of the Court in support of the charge.

⁴ AIR 2009 SC 94

⁵ (2007) 14 SCC 537

⁶ 2004 Cril LJ 1796

Thus, an examination of each and every fact is not required, but at best, the Court has to express its opinion as to existence of *prima facie* material to conclude that the accused committed an offence and that the Court must record its satisfaction and that there is no possibility of tampering of evidence and threatening of witnesses in the event of enlarging the petitioner on bail. Keeping in view the guidelines under Cr.P.C for grant of bail under Section 439 and also the special provision relating to grant of bail under NDPS Act, I must decide the real controversy between the parties.

The main controversy is non-compliance of Sections 41(2) & 42(2) of NDPS Act. According to the learned counsel for the petitioners, in all the matters, on account of non-compliance of Sections 41(2) & 42(2), entire proceedings are deemed to have been vitiated, thereby, the petitioners are liable to be enlarged on bail. Learned counsel for the petitioners placed reliance on various judgments in support of their contention, whereas, the learned Public Prosecutor contended that filing of successive application without change of circumstances will not serve any purpose and unless changed circumstances are shown, the Court cannot grant bail to any of the accused. That apart, the Investigating Agency complied all the mandatory requirements, more particularly, Sections 41(2) & 42(2) and prayed to dismiss all the petitions, in view of the gravity and seriousness of the offences against the society at large, as substantial compliance is sufficient.

Learned counsel for the petitioners mainly drawn attention of this Court to the judgment of Apex Court in **Sarija Band alias Janarthani Alias Janani v. State Through Inspector of Police**⁷, where the Apex Court discussed about the requirement of compliance of Section 42 of NDPS Act and its relevancy at the time of considering of application at the time of granting bail. The Apex Court held in paragraphs 7 & 8 of the judgment as follows:

“7. It is pertinent to note that in the bail application the appellants, it was alleged, that there was serious violation of Section 42 of the NDPS Act. In the impugned order nothing is stated about the alleged violation of Section 42, and it is observed that it was not necessary to consider such violation at this stage. The compliance of Section 42 is mandatory and that is a relevant fact which should have engaged attention of the Court while considering the bail application. In the aforesaid circumstances having regard to the special facts of the case, we direct that the appellants 1 and 2 be released on bail on executing a bail bond for Rs. 50,000 each with two solvent sureties for the like amount to the satisfaction of the Special Judge, EC/NDPS, Madurai on the following conditions:

- (1) The counsel for the appellants requested that the appellants may be allowed to stay outside the State of Tamil Nadu. We are not inclined to grant such a prayer as the respondents police authorities would not be able to ensure the timely presence of the appellants in Court;
- (2) The appellants shall not leave jurisdiction of the District Court, Madurai and shall report before the Circle Inspector, Karuppayurani Police Station once in two weeks for 3 months, thereafter, once in a month.
- (3) The appellants shall surrender their pass-port before the Court, if not already seized by the police.”

Learned counsel for the petitioners would contend that Section 42 is mandatory and placed reliance on **Sarju Alias Ramu v. State of Uttar Pradesh**⁸, but the decision pertains to an appeal

⁷ 2004 12 SCC 266

⁸ (2009) 13 Supreme Court Cases 698

against conviction and therefore, at best, the principle laid down in the above judgment would make it clear that non-compliance of Section 42 vitiates the entire trial of the case. But, at this stage, it is difficult to express any opinion as to non-compliance, in view of production of Photostat copy of General Diary dated 28.09.2016 search was conducted by Inspector of Police, in view of the law declared and non-compliance of Section 42(2) is of no effect in view of the law declared by the Apex Court in **G. Srinivas Goud**⁷ case.

A similar view was expressed by this Court in **Bhaskara Govindu & Another v. State of Andhra Pradesh, Visakhapatnam District, rep. by Public Prosecutor, High Court**⁹. In paragraph 8 of the said judgment, this Court discussed about importance of violation of Section 42(2) of the NDPS Act and placed reliance on **Sarija Band**⁵ case and concluded that compliance with Section 42 is mandatory and that is a relevant fact which should have engaged the attention of the Court while considering the bail application.

The learned counsel for the petitioners drawn attention to several judgments of the Apex Court regarding violation of Sections 41(2) & 42(2) of NDPS Act. In **G. Srinivas Goud v. State of A.P.**¹⁰ the Supreme Court in paragraphs 9 & 10 of the judgment made it clear that Section 41(2) refers to only officers of gazetted rank and it is such officers who can authorize their subordinates, not below the rank of peon, sepoy or constable, to carry out arrest, search or

⁹ 2016 (0) Supreme (AP) 458

¹⁰ (2005) 8 Supreme Court Cases 183

seizure. The function of arrest, search and seizure carried out under Section 42(1) is by officers who do not have warrants or authorization in their hands before proceeding to take action. This is as per the heading of the section which reads: "Power of entry, search, seizure and arrest without warrant or authorization." Under Section 41 it is the specified Magistrates who issue warrants of arrest and it is officers of gazetted rank who give authorization in favour of their juniors. Provisions of sub-section (2) of Section 42 are meant to cover cases falling under Section 42(1). Therefore, in Apex Court view, the requirement under Section 42(2) need not be extended to cases of arrest, search and seizure by officers of gazetted rank. The officer of gazetted rank while authorizing junior officers under Section 41(2) knows what he is requiring them to do and, therefore, there is no need for reporting. For this reason Section 41 does not contain any such requirement. The need for reporting under Section 42(2) arises because the officer proceeds without authorization in terms of Section 41(1) or 41(2). The requirement of informing the immediate official superior under Section 42(2), in Apex Court view, has to be confined to cases where the action is taken by officers below the rank of gazetted officers without authorization. Further, the Supreme Court held that it will be anomalous to say that officers of gazetted rank who are conferred with power to authorize junior officers to carry out arrest, search and seizure, are required to report to their superior officers when they carry out arrest, search or seizure is without authorization by gazetted rank officers, the officers taking action must keep their superiors informed. The superior officers must

know about the action taken by their subordinates. However, the position of gazetted rank officers, in view of their rank and seniority and power to authorize subordinates to proceed to action, is totally different. They are the source of power of authorization. The gazetted rank officers enjoy special position and privileges under the Act. They need not be equated to officers taking action without authorization or warrants. The requirement of sending information to superior officers under sub-section (2) of Section 42 cannot be insisted upon in their case. There is no bar in the statute to functions of arrest, search and seizure being carried out by the officers of the gazetted rank themselves. When they act on their own, they do not have to report to their seniors on such things.

In **Mohinder Kumar v. State, Panaji, Goa**¹¹, the Apex Court discussed the scope of Sections 42(1) & 42(2) of NDPS Act concluded that requirement to comply with Sections 42(1) & 42(2) has been held to be mandatory.

In **Karnail Singh v. State of Haryana**¹² the Constitutional Bench of Supreme Court considered the scope of Sections 41(2) & 42(2) and specifically held that, Legislature has made some of its provision obligatory for the prosecution to comply with, which the Courts have interpreted to be mandatory. This is an order to balance stringency for an accused by casting an obligation on prosecution for its strict compliance, balance must be struck

¹¹ (1998) 8 Supreme Court Cases 655

¹² 2009 3 SCC (Cri) 887

between need of law and enforcement of such law on one hand and protection of citizens from oppression and injustice on other. Court while constructing such provisions strictly should not interpret them literally so as to render their compliance impossible. Section 42 of NDPS Act deals with search, seizure and arrest without warrant. Search and seizure are essential steps in armory of an investigator in investigation of a criminal case. Non-compliance of Section 42 may not vitiate trial if it does not cause any prejudice to accused. In view of changed circumstances in technology, if statutory provisions under Sections 42(1) & 42(2) of writing down information is interpreted as a mandatory provision, it will disable haste of an emergency situation and may turn out to be in vain with regard to criminal wrongdoers/drug offenders as a major ground for acquittal. These provisions should be taken as discretionary measure which should check the misuse of Act rather than providing an escape to hardened drug-peddles.

In paragraph 17 of **Karnail Singh**⁹ case, the Supreme Court concluded that what is to be noticed Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) & 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) & 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

- (a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior,

before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) If the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. to illustrate, if any

delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

Thus, in view of the law laid down by the Apex Court in various judgments referred supra, more particularly, the judgment of the Constitution Bench in **Karnail Singh**⁹ case, the Court has to take discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers and that compliance of Sections 41(2) & 42(2) is a measure of check for the officials to exercise power under the Act in search, seizure and arrest of the accused persons for the offences committed under the provisions of NDPS Act. Therefore, a reasonable margin is to be given to the authorities concerned when they conducted search to detect the offences punishable under

NDPS Act and incidents of liberal compliance would denude the very object and safeguards provided under the Act.

Strangely, the learned Public Prosecutor for the State of Andhra Pradesh placed reliance on the judgment in **G. Srinivas Goud**⁷ case while dealing with Section 42(2) of NDPS Act, held that the officers of gazetted rank conducted search, seizure and arrest. Section 42(2) is not required to comply with the said requirements, as the said requirement is confined to cases where the action is taken by officers below the rank of gazetted officers without authorization.

In view of the laws declared by the Apex Court in various judgments, I must now examine the various papers produced before the Court regarding *prima facie* compliance of Sections 41(2) & 42(2) of NDPS Act.

During hearing, learned counsel for the petitioners Sri Metta Chandrasekhar Rao and Sri Ilapakurti Chandrasekhar Rao strongly contended that the alleged compliance of Sections 41(2) & 42(2) is not real, but it is a substantial compliance and it appears from the material on record that some blanks were left in the general diary (G.D) and subsequently incorporated the specific compliance when bail applications are filed, so as to establish compliance of Sections 41(2) & 42(2).

Section 41 of NDPS Act deals with Power to issue warrant

and authorization. Section 41(2) permits any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the paramilitary forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer 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 has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such person or search a building, conveyance or place. Thus, a Gazetted Officer of the rank referred above who is superior in rank of peon, sepoy or constable is authorized by the State or Central Government may search, seize and arrest on receipt of any information regarding commission of offence under

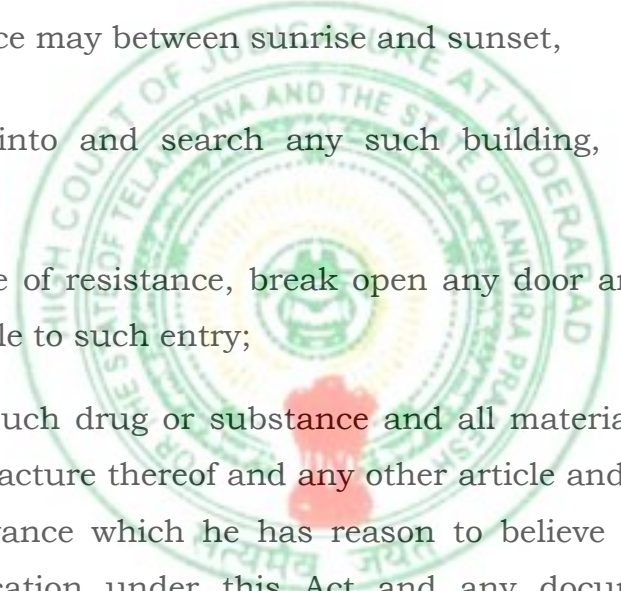
the Act. Thus, clause 19 seeks to substitute sections 41 to 43 of the principal Act to extend powers of the Central Government and State Governments to authorize subordinate officers for search, seizure, etc., and to simplify the procedure for seizure, detention and search of persons. On strict construction of Subsection (2) of Section 41, any Gazetted Officer of the department referred therein, who is authorized by the State Government is empowered in this behalf by general or special order by the Central Government, upon his personal knowledge or on information given by any person and taken in writing, conduct search, seizure etc. Here, the contention of the learned counsel for the petitioners in all the criminal petitions is that the petitioners did not take the information they received in writing. But, question of taking the information in writing would arise only when the Gazetted Officer is in the station or in the office concerned, from any third party either by telephone or personally and make necessary entry in the General Diary. Thus, safeguard is provided only to avoid unnecessary implication of various persons as accused for the serious offences punishable under the provisions of NDPS Act. It is only a check on the power of the police to ensure free and fair search, seizure and arrest under the provisions of the Act, in view of the heavy penalties prescribed for the offences punishable under this Act.

No doubt, there is some space between two lines in the specific endorsements, but still, that is not a ground at this stage whether the prosecution complied with Sections 41(2) & 42(2) at

this stage and whether such compliance was real or not is to be decided only based on evidence. Therefore, the compliance of Sections 41(2) & 42(2), I find *prima facie* material to establish a substantial compliance of Sections 41(2) & 42(2), in view of the Constitution Bench judgment in **Karnail Singh⁹** case. Moreover, in all these cases, search, seizure and arrest was effected by the Gazetted Officer i.e. Circle Inspector of Police. Therefore, in all these matters, the question of non compliance of Sections 41(2) & 42(2) does not arise, in view of the ratio laid down in **G. Srinivas Goud⁷** case.

Similarly, Section 42(2) deals with power of entry, search, seizure and arrest without warrant or authorization. Section 42(2) is in the nature of exception to Section 41 and Section 42(2) mandates that 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 within seventy-two hours send a copy thereof to his immediate official superior. Section 42 permits any officer who is 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 including paramilitary forces or armed forces 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 has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of NDPS Act is kept or concealed in any building, conveyance or enclosed place may between sunrise and sunset,

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- 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 this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; 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 this Act:

But, proviso to Subsection (1) of Section 42 thereon spelt out that if such officer has reason to believe that a search warrant or

authorization 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. Thus, proviso to Section 41 enables the officer referred in Section 41(1) to conduct search, seizure and arrest on his belief. The requirement of compliance under Section 42 is also in the nature of a safeguard to avoid concealment in evidence or facilitating for escape of the offender, who committed an offence under the provisions of the Act and at the same time, it is a check against the power of police officials to conduct such search only to avoid false implications of any person in the serious crimes.

In the judgment of the Constitutional Bench of the Supreme Court in **Karnail Singh**⁹, some relaxation can be given in view of the proviso of Section 41(1) and such relaxation is only in cases where there is a possibility of concealment of evidence or escaping from the place who allegedly committed an offence and punishable under the provisions of NDPS Act, the Constitutional Bench is of the view that the balance must be struck between need of law and enforcement of such law on one hand and protection of citizens from oppression and injustice on other. Court while constructing such provisions strictly should not interpret them literally so as to render their compliance impossible. The Apex Court further observed that, in view of changed circumstances in technology, if statutory provisions under Sections 42(1) & 42(2) of writing down

information is interpreted as a mandatory provision, it will disable haste of an emergency situation and may turn out to be in vain with regard to criminal wrongdoers/offenders as a major ground for acquittal. These provisions should be taken as discretionary measure which should check the misuse of Act rather than providing an escape to hardened drug-peddlers. Here, the petitioners are involved in different crimes and even if such law declared by the Constitutional Bench is applied to the present facts of the case, it is only a discretionary measure to have a check on the misuse of the powers of the officials under the Act, which provides a way to escape to hardened drug-peddlers or drug-traders.

Moreover, in **G. Srinivas Goud**⁷ case, while dealing with Section 42(2) of NDPS Act, the Apex Court while dealing with Section 42(2) made it clear that when a Gazetted officer conducted search and seizure, Section 42 is not required to be complied with, as the said requirement is confined to cases where the action is taken by an officer not below the rank of Gazetted Officer. In the facts of **G. Srinivas Goud**⁷ case, violation of Section 42(2) was questioned though search and seizure was conducted by the Gazetted Officer, i.e Circle Inspector. In paragraphs 9 & 10 of the judgment, the Apex Court made it clear that the officers of gazetted rank conducted search, seizure and arrest. Section 42(2) is not required to comply with the said requirements, as the said requirement is confined to cases where the action is taken by officers below the rank of gazetted officers without authorization

under Section 41(2). Therefore, there is a need for reporting. For this reason, Section 41 does not contain any requirement. The need for reporting under Section 42(2) arises where an officer takes down any information in writing in terms of Sections 41(1) or 42(2), requiring him to record grounds for his belief under the proviso thereto, to inform the immediate official superior under Section 42(2) as the information has to be confined in the cases where the action has to be taken by the Gazetted Officer.

The judgment in **G. Srinivas Goud**⁷ case is of the year 2005 i.e. subsequent to **Sarija Band**⁵ case. If the principle laid down in **G. Srinivas Goud**⁷ case is applied to the present facts of the case, when search was conducted by an officer of Gazetted rank, compliance of Section 42(2) cannot be insisted. Search, seizure and arrest was conducted by the Gazetted Officer i.e. Circle Inspector of Police and therefore, non-compliance of procedure prescribed under Section 42(2) is not a ground to grant bail to the petitioners.

So far as compliance of Section 41(2) is concerned, I have mentioned in the table, details of compliance. However, the said compliance is questioned before this Court during argument by the learned counsel for the petitioners making certain allegations that the compliance is an interpolation in the registers maintained i.e. General Diary in the concerned office. But, such enquiry cannot be undertaken by this Court while deciding the application under Section 439 of Cr.P.C and at best, this Court is required to record its satisfaction that there is no prima facie material to conclude

that the petitioners did commit offence and that there is no possibility of their interference with further investigation and threat to witnesses in the event of releasing them on bail and meticulous examinations of the evidence giving an impression that the Court has pre-judged cannot be taken up. Basing on the material produced before this Court, as shown in Table-II, the prosecution complied with the procedure contemplated under Sections 41(1) & 42(2) of NDPS Act, though with margin of few hours, in view of the urgency by exercising power as per proviso to Section 42(1) of the Act. In any view of the matter, the safeguards are provided in the Act itself by way of proviso to Section 42(1) and the intention of the Legislature is to provide such exception by way of proviso to prevent drug menace, which is increasing day by day in the present days, despite heavy penalties prescribed in the Act. On account of the alleged procedural lapses, most of the accused are being allowed to scout free on account of technical flaws or failure of the Investigating Agency to take necessary measures to comply with the procedural requirements under the Act. Despite ending several matters in acquittal, the concerned departments are not taking appropriate steps to enlighten the officials about requirements to conduct search, seizure and arrest. If they are enlightened, attached responsibility to individual officials for failure of prosecution on account of violation of such procedure for their failure, such lapses would not recur or repeat.

In Crl.P.No.277 of 2017, Inspector of Police, Ravulapalem Police Station, East Godavari District conducted search and

seizure and arrested the accused. Therefore, strict compliance of Section 42(2) is not required. So far as Section 41(2) is concerned, the learned Public Prosecutor brought to the notice of this Court, photostat copy of General Diary dated 28.09.2016 which mentioned that at about 16:40 hours, the Sub Inspector made a necessary entry on the order of Inspector of Police regarding the information that he received towards transportation of Ganja and on the same day at about 22:30 hours, entry was made by Sub-Inspector of Police in the General Diary about the search and seizure conducted.

In Crl.P.Nos.595 & 295 of 2017, Inspector of Police, Mothugudem Police Station, East Godavari District conducted search and seizure and arrested the accused. Therefore, strict compliance of Section 42(2) is not required. So far as Section 41(2) is concerned, the learned Public Prosecutor brought to the notice of this Court, photostat copy of General Diary dated 11.09.2016 which disclosed that, the Circle Inspector of Police received certain information regarding illegal transportation of Ganja and ordered the Sub Inspector of Police for conducting search and seizure conducted. The Inspector of Police conducted search and seizure and the same was mentioned in the General Diary.

In Crl.P.No.237 of 2017, Circle Inspector of Police, Maredupalli Police Station, East Godavari District conducted search and seizure and arrested the accused. Therefore, strict compliance of Section 42(2) is not required. So far as Section 41(2)

is concerned, the learned Public Prosecutor brought to the notice of this Court, photostat copy of General Diary dated 25.01.2016 which disclosed that, at about 09:15 AM, the Circle Inspector of Police received certain information regarding illegal transportation of Ganja and ordered the Inspector of Police for conducting search and seizure conducted. The Inspector of Police conducted search and seizure and the same was mentioned in the General Diary.

In Crl.P.No.483 of 2017, Inspector of Police, Maredupalli Police Station, East Godavari District conducted search and seizure and arrested the accused. Therefore, strict compliance of Section 42(2) is not required. So far as Section 41(2) is concerned, the learned Public Prosecutor brought to the notice of this Court, photostat copy of General Diary dated 23.11.2016, which mentioned that, the Circle Inspector of Police received certain information regarding illegal transportation of Ganja and ordered the Sub Inspector of Police for conducting search and seizure conducted. The Inspector of Police conducted search and seizure and the same was mentioned in the General Diary.

Learned Public Prosecutor for the State of Andhra Pradesh contended that filing of successive applications without there being any changed circumstances would not serve any purpose and it is against the principle laid down by the Apex Court in the judgment reported in **State of Tamil Nadu v. S.A. Raja**¹³, where the Apex Court held in paragraphs 8 & 9 when a learned Single Judge of the

¹³ (2005) 8 Supreme Court Cases 380

same Court had denied bail to the respondent for certain reasons and that order was unsuccessfully challenged before the appellate forum, without there being any major change of circumstances, another fresh application should not have been dealt with within a short span of time unless there were valid grounds giving rise to a tenable case for bail. Of course, the principles of *res judicata* are not applicable to bail applications, but the repeated filing of the bail applications without there being any change of circumstances would lead to bad precedents. Therefore, on this ground also, the petitioners are not entitled to claim bail.

On overall consideration of the entire material available on record, including the law declared by the Apex Court with reference to Section 37 of the Act, certain relaxations should be given, more particularly in the judgment of Constitution Bench. Such relaxation can be given to immediate compliance of procedure contemplated under Sections 41 & 42, but total violation may form a ground to grant bail to the petitioners. Here, in this matter, there is compliance of Sections 41(2) & 42(2) of the Act substantially. That apart, in view of the law declared in **G. Srinivas Goud**⁷ case, when search was conducted by the Gazetted Officer, i.e. Circle Inspector of Police, insistence upon compliance of Section 42(2) is of no use, since he is the competent person being a senior officer in the hierarchy of police department.

The language used in Sections 41(2) & 42(1) is that there must be a special or general authorization by the State or Central

Government to conduct search, seizure and arrest etc. The State Government issued G.O.Ms.No.183, Revenue (E) 14.02.1986 empowering the officers of the State Excise Department, including Enforcement Wing, not below the rank of Sub Inspectors and all the officers of the Police Department not below the rank of Sub Inspector to exercise the powers provided under Section 41(2) of the NDPS Act. Similarly, the State Government issued G.O.Ms.No.184, Revenue (E) 14.02.1986 empowering the officers of the State Excise Department, including Enforcement Wing, not below the rank of Sub Inspectors and all the officers of the Police Department not below the rank of Sub Inspector to exercise the powers provided under Section 42(1) of the NDPS Act. Therefore, the Circle Inspector and Sub Inspector were authorized to conduct search, seizure under Sections 41(2) & 42(1) and the legality and validity of the G.Os cannot be decided, in view of the limited scope of the enquiry in the petitions filed under Section 439 Cr.P.C, though it was contended by Sri Metta Chandrasekhar Rao, learned counsel for the petitioners that the G.O.s are not in strict adherence to the provisions of the Act.

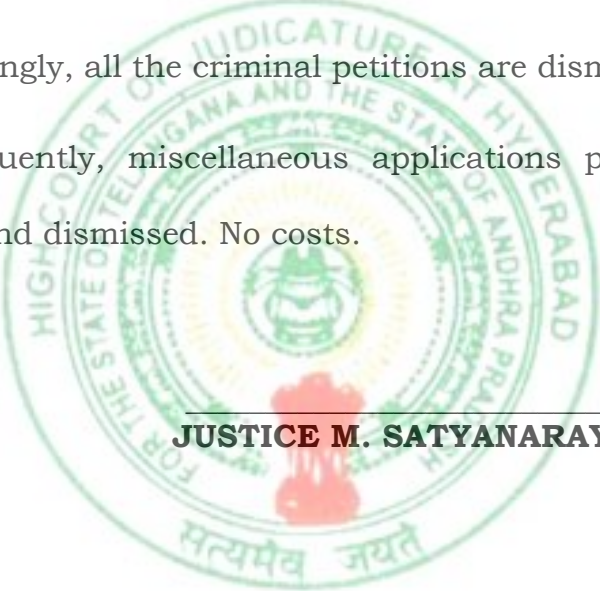
In view of the law declared by the Supreme Court in the judgments in **Kajad, Maktool Singh, Customs New Delhi** cases referred supra and Section 37 of the Act, the petitioners are not entitled to claim bail, as the quantity of ganja involved in all the matters is commercial quantity and the offence committed by them is punishable with imprisonment for term more than five years and granting bail is an exception and negating bail is a routine, in view

of the law declared by the Apex Court in the judgments referred supra. Hence, on overall consideration of the entire material available on record, I find no ground to enlarge the petitioners on bail.

As the petitioners are in jail since long time, the Presiding Officers of the Courts dealing with the respective cases are directed to decide all the cases, if charge sheets are filed, as expeditiously as possible, and in any event not later than four months from the date of receipt of order, by giving preference to these cases where they are in pre-trial detention.

Accordingly, all the criminal petitions are dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.



JUSTICE M. SATYANARAYANA MURTHY

08.02.2017

SP