

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.2832 OF 2018

ORDER:

This criminal petition is filed under Sections 437 & 439 of Cr.P.C to enlarge the petitioner on bail in Crime No.F.No.,DRI/HZU/48/ENQ-03 (INT-03)/2017 on the file of Directorate of Revenue Intelligence, Regional Unit, Visakhapatnam, for the offences punishable under Sections 8(c) r/w 20, 28, 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and the petitioner is in judicial custody since 13.11.2017.

The case of the prosecution is that, upon receiving credible information of transporting Ganja, which is a Narcotic Drug under the NDPS Act, in a goods carriage bearing Registration No. AP 31 TT 7089 and that the said vehicle was coming from of Vaddadi side and moving towards Anakapalle Highway on 11.11.2017, the officers of Directorate of Revenue Intelligence, Regional Unit, Visakhapatnam intercepted the goods carriage at Sarada Nagar, Near Anjaneya Swamy Temple, Anakapalli, Visakhapatnam District and questioned the driver/A-2 of the goods carriage. It is alleged that A-2 claimed ignorance of the contents of the goods and on suspicion, the authorities verified the contents of the goods in the vehicle and found 636 kgs Ganja in the vehicle and seized the same under the cover of panchanama and issued notice under Section 67 of the NDPS Act to Accused No.2 directing him to appear before the officers. On recording the statement of A-2, the Investigating Agency summoned the present petitioner i.e. A-1 on the ground that A-2 informed to the officers that the petitioner

escorted the vehicle on his motorbike. On recording the statement of the petitioner, the officers arrested the petitioner and produced before Judicial First Class Magistrate, Anakapally and remanded them to judicial custody on 13.11.2017 on the accusation that this petitioner along with A-2 was transacting business in transporting Ganja, in contravention to Section 8(C) of the NDPS Act. Since then, the petitioner is in judicial custody.

The present petition is filed on the ground that the officer who seized ganja was not authorized under Section 41(2) and Section 42 of the Act and thereby, rendered the recovery of contraband illegal. Apart from that, the statement of A-2 recorded under Section 67 of the Act cannot be used against this petitioner to enrope him with the offences when nothing was seized from the possession of the petitioner. Even otherwise, the petitioner was allegedly escorting the vehicle in which the contraband is being carried on. But, this petitioner is neither a purchaser nor a transporter of Ganja. Therefore, he is not liable for prosecution for any of the offences. It is also further contended that the petitioner was confined in the custody by DRI Officials from 11.11.2017 to 13.11.2017 illegally and by coercion obtained the statement from A-2 and enroped this petitioner in the said offences. It is contended that the arrest of the petitioner was shown by officials of DRI on 11.11.2017, recorded the statement of the petitioner on coercion and threat, made the petitioner to accept the dictates of the officers and made the petitioner to sign on the computer print outs. Therefore, the statement is not voluntary, thereby based on the statement, the Court cannot conclude *prima facie* that there is a

reasonable ground that this petitioner committed offences punishable under Sections 8(c) r/w 20, 28, 29 of NDPS Act.

It is mainly contended that, when the search and seizure of contraband is illegal, the Court can conclude that there is a reasonable ground to conclude that the petitioner did not commit any offences punishable under NDPS Act, as required under Section 37(1)(b) of the Act. Thereby, the bar under Section 37(1)(b) of the Act will not come in the way of this petitioner. Moreover, the petitioner is languishing in jail since longtime and he was deprived of enjoying his personal liberty guaranteed under Constitution of India and requested this Court release this petitioner on bail.

During hearing, learned counsel for the petitioner Sri Duvvuri Suryanarayana mainly contended that, when the search and seizure was conducted by the officer, who was not authorized under Section 41(2) and Section 42 of the Act, render the seizure of the contraband illegal and thereby, the Court can easily conclude that there is a reasonable ground to believe that this petitioner did commit no offence punishable under NDPS Act, and as required under Section 41(1)(b) of the Act and placed reliance on the judgment of Apex Court in **Roy V.D. v. State of Kerala**¹.

Learned counsel for the petitioner further contended that the statement recorded under Section 67 of the Act alone cannot form the basis for recording conviction and unless, the Court finds some corroborative evidence, the Court cannot record conviction based on the confession recorded under Section 67(b) of the Act and in

¹ (2000) 8 Supreme Court Cases 590

support of his contention, learned counsel for the petitioner placed reliance on the judgment of the Apex Court in **Union of India v. Bal Mukund and others**².

On the strength of the law declared by the Apex Court in the above two judgments, learned counsel for the petitioner contended that, if the statement recorded under Section 67 of the Act is excluded from consideration, the seizure itself is illegal, as the officials contravened Section 41(2) and Section 42 of the Act and thereby, there is no possibility of convicting this petitioner after full-fledged trial and in such case, the Court can record its satisfaction as required under Section 37(1)(b) of the Act and enlarge this petitioner on bail.

Whereas, Sri P. Darmesh, Special Public Prosecutor for DRI/respondent contended that the petitioner is charged for the offences punishable under Sections 8(c) r/w 20, 28, 29 of the Act and illegal seizure would not come in the way, since nothing was seized from the possession of this petitioner and thereby, non-compliance of Section 41(2) and Section 42 of the Act is not a ground to enlarge this petitioner on bail, recording satisfaction under Section 37(1)(b) of the Act. Therefore, when the petitioner was piloting the vehicle in which the contraband was being transported, still the Court is required to record its satisfaction under Section 37(1)(b) of the Act to grant bail, exercising power under Section 437 & 439 Cr.P.C, since 636 kgs of Ganja is a commercial quantity, as the said contraband was found being transported in the vehicle and piloted by this petitioner. Therefore,

² (2009) 12 Supreme Court Cases 161

it is difficult to conclude that this petitioner did not commit any offence punishable under the Act and prayed for dismissal of the criminal petition.

Considering rival contentions and perusing the material available on record, the point that arise for consideration is as follows:

“Whether non-compliance of Section 41(2) and Section 42 of NDPS Act is a ground to conclude that there is reasonable ground that this petitioner did commit no offence under the provisions of the Act to record satisfaction under Section 37(1)(b) of the Act. If so, whether the petitioner is liable to be enlarged on bail under Section 437 & 439 Cr.P.C?

POINT NO.1

As seen from the material produced before this Court, particularly, Crl.M.P.No.97 of 2018 filed by the same petitioner before the Metropolitan Sessions Judge-cum-Special Judge for Trial of Offences under NDPS act at Visakhapatnam and panchanam dated 11.11.2017 drafted at about 14:30 hrs, would show that on interrogating of G. Uma Maheswara Rao/A-2 by the officers of DRI disclosed that this petitioner was piloting the vehicle which was transporting 636 kgs of ganja in the vehicle bearing Registration No. AP 31 TT 7089, the statement under Section 67 of the Act was recorded and the authorities also seized Ganja even before interrogation and other material documents i.e certificate bearing Registration No. AP 31 TT 7089 issued by RTA, Kakinada, Authorization Certificate of N.P. (Goods) dated 13.06.2017, Permit dated 18.06.2017, Certificate of fitness dated 31.05.2017 and

Certificate-cum-Policy Schedule of vehicle insurance issued by Shriram General Insurance Company Limited. Based on the information furnished by A-2, this petitioner was arrested. But, the contention raised before this Court was that the authorities who seized the contraband from the possession of accused while transporting contraband in vehicle bearing Registration No. AP 31 TT 7089 is illegal, as it is in contravention of Section 41(2) and Section 42 of the Act.

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 Sub-section (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 DRI Officer 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.

Therefore, any person who is authorized under Section 41(2) of the Act alone is competent to enter and conduct search, seize and arrest the suspected person who committed an offence in contravention of the provisions of NDPS Act, without warrant or authorization.

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(1) 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 or from personal

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,

- 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 of 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.

Thus, when search was conducted by Gazetted Officer himself, compliance with Section 42 of the Act, is not necessary. If, the search and seizure was conducted by an officer not below the rank of Gazetted Officer, an authorization or warrant is required, in view of the law declared by the Court in **Union of India v. Satrohan**³.

Learned counsel for the petitioner Sri . Duvvuri Suryanarayana demonstrated that the respondent conducted search in utter violation of Section 41(2) and 42 of the Act, thereby, the entire search is vitiated.

No doubt, the officer who conducted search and seized the contraband is an Officer of DRI and whether he is an officer in the rank of Gazetted Cadre or not is not known for the present. Therefore, such controversy is to be resolved only at the end of the

³ (2008) 8 SCC 313

trial and if, for any reason, the Court concludes that search and seizure is vitiated, then the Court may extend the benefit of law declared by the Apex Court in **Roy V.D. v. State of Kerala** (referred supra). But, at this stage, it is difficult to extend such benefit to enlarge the petitioner on bail.

Further, in paragraph 12 of the counter filed by the respondent/DRI, it is contended that, non-compliance of Section 42 of the Act, the petitioner was arrested and the Investigating Agency registered a crime against this petitioner and other accused for the offences punishable under Sections 8(c) r/w 20, 28, 29 of the Act. But, the counter is silent whether the officer who conducted search is in the Gazetted Rank or Authorized Officer, as per Section 41(2) and 42 of the Act.

One of the major contentious raised before this Court is that, when search itself is illegal, the petitioner is entitled to be enlarged on bail and placed reliance on the judgment of the Apex Court in **Roy V.D. v. State of Kerala** (referred supra). But, at this stage, it is difficult to record such *prima facie* conclusion that the search and seizure are not contravened of Section 41(2) and Section 42 of NDPS Act and in view of the law declared by the Supreme Court in various judgments referred supra, at this stage, the principle laid down in **Roy V.D. v. State of Kerala** (referred supra) cannot be applied.

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 Police⁴**, 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:

⁴ 2004 12 SCC 266

(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 petitioner would contend that Section 42 is mandatory and placed reliance on **Sarju Alias Ramu v. State of Uttar Pradesh**⁵, but the decision pertains to an appeal 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**⁶. 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

⁵ (2009) 13 Supreme Court Cases 698

⁶ 2016 (0) Supreme (AP) 458

fact which should have engaged the attention of the Court while considering the bail application.

The learned counsel for the petitioner 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.**⁷ 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 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 offices 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

⁷ (2005) 8 Supreme Court Cases 183

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**⁸, the Apex Court discussed the scope of Sections 42(1) & 42(2) of NDPS Act

⁸ (1998) 8 Supreme Court Cases 655

concluded that requirement to comply with Sections 42(1) & 42(2) has been held to be mandatory.

In **Karnail Singh v. State of Haryana**⁹ 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 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

⁹ 2009 3 SCC (Cri) 887

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 is 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.

In the judgment of the Constitutional Bench of the Supreme Court in **Karnail Singh**⁹, some relaxation can be given in view of the provisio 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, 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.

In view of the law declared by various Courts discussed above, at this stage, it is difficult to enlarge this petitioner on bail, recording its satisfaction that there is a reasonable ground to conclude that this petitioner is not guilty of offences punishable under the provisions of NDPS Act.

One of the contention raised by the learned counsel for the petitioner is that, based on the statement recorded under Section 67(b) of the Act, the petitioner cannot be convicted for the offence after trial and this view is supported by the judgment of the Apex Court in **Union of India v. Bal Mukund and others** (referred supra). In the said judgment, the Trial and High Court recorded conviction of the accused for the offences punishable under the provisions of NDPS Act and when the matter reached the Supreme Court, the Supreme Court held that where the statute confers such

drastic powers and seeks to deprive a citizen of its liberty for not less than ten years, and making stringent provisions for grant of bail, scrupulous, compliance with the statutory provisions must be insisted upon. While considering a case of the present nature where two persons may barely read and write Hindi, are said to have been used as carrier containing material of only 1.68% of narcotics, a conviction, should not be based merely on the basis of a statement made under Section 67 of the Act without any independent corroboration particularly in view of the fact that such statements have been retracted.

No doubt, as per the law declared by the Apex Court in the judgment referred supra, statement recorded under Section 67 of the Act cannot alone form the basis for conviction, if it is corroborated by any evidence, the Court can record conviction of the statement, if any statement is recorded under Section 67 of the Act, only on additional circumstances to substantiate the prosecution case. But, the question of corroboration would arise only when the Trial is completed and at this stage, the same principle cannot be applied to the present facts of the case.

To grant bail, the Court has to record its satisfaction that there is a reasonable belief/ground to conclude that this petitioner is not guilty *prima facie* and that he will not commit identical offences, while on bail. In the absence of recording reasons, bail cannot be granted.

It is relevant to note Section 37 of NDPS Act which 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 2[offences under section 19 or section 24 or section 27 A and also for offences involving commercial quantity] 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 being in force, on granting of bail.

The Supreme Court in **Union of India v. Ram Samujh and another**¹⁰, **Durand Didier v. Chief Secretary, Union Territory of Goa**¹¹, wherein, the Apex Court discussed scope of Section 37 of NDPS Act. In **State of Uttaranchal v. Rajesh Kumar Gupta**¹² and **Union of India v. Rattan Mallik alias Habul**¹³, the Supreme Court extensively discussed about scope and consequences failing to adhere Section 37 of NDPS Act and concluded that 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 will not commit similar offence again while on bail under Section 439 Cr.P.C in serious offences like the offence punishable under the Act.

¹⁰ 1999 Supp (2) SCR 76

¹¹ 1989 AIR 1966

¹² (2007) 1 Supreme Court Cases 355

¹³ (2009) 2 Supreme Court Cases 624

In **Maktool Singh v. State of Punjab**¹⁴ 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.

In **Customs, New Delhi v. Ahmadalieva Nodira**¹⁵ the Apex Court 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

¹⁴ (1999) 3 SCC 321

¹⁵ 2004 (1) JCC 662

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 by accused of 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.

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/she shall not be enlarged on bail.

In view of my foregoing discussion, I am not inclined to grant bail to this petitioner.

In the result, the criminal petition is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed.

JUSTICE M. SATYANARAYANA MURTHY

Dated:16.04.2018

SP