

HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

*THE HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

+ **Crl.P.Nos. 2900, 3020 and 5814 of 2018**

19.06.2018

Crl.P.No.2900 of 2018

#Between:

Mohd. Younus @ Raj Kumar,

...Petitioner/ A. 1

AND

The State of Telangana

Rep. by its Public Prosecutor,

..... Respondent/ complainant

Crl.P.No. 3020 of 2018

#Between:

Mohd. Shakeel,

...Petitioner/ A. 2

AND

The Senior Intelligence Officer,

Directorate of Revenue Intelligence,

Hyderabad.

..... Respondent/ complainant

Crl.P.No. 5814 of 2018

#Between:

Brahmanandam Goud

...Petitioner/ A. 5

AND

The Senior Intelligence Officer,

Directorate of Revenue Intelligence,

Hyderabad.

..... Respondent/ complainant

!Counsels for the petitioner

: Sri Duvvuri Suryanarayana for A. 1

Sri M/s. Milind G. Gokhale for A. 2

Sri A. P. Reddy for A. 5

Counsel for the respondent

: Sri Anil Prasad Tiwari
Spl. Public Prosecutor

<Gist :

>Head Note:

? Cases referred:

1. 2001 (2) SCC 566
2. 2002 (2) SCC 562
3. 2001 (7) SCC 672
4. 2001 (7) SCC 677
5. (2004) 3 SCC 549: 2004 Cr LJ 1810
6. 2014 (13) SCC 1 : AIR 2014 SC 3625
7. (2001) CrL. L.J. 117 SC
8. 2009 CrL Law Journal 3043 (SC)
9. 2007 (7) SCC 798
10. 2003 SCC crl. 1664
11. 2002 SCC (CrI) 1769 (A&E)
12. 2002 SCC CrI 1865 (A)
13. (2009) 3 SCC (CrI) 887
14. 2014(5) SCC 345
15. 2005 (4) SCC 350
16. AIR 2011 SC 1939
17. 2011(1) SCC 609
18. 2009 (8) SCC 539
19. 2008(13) SCC 584
20. AIR 2008 SC 1044
21. 2006(13) SCC 210

22. 2009(12) SCC 161
23. AIR 1994 SC 1872=1994-SCC-CrI-634
24. 2004(5)SCC 223
25. 2004(5)SCC 230
26. AIR 1964 SC 221
27. 2005(8) SCC-725
28. 2004(3) SCC- 453
29. 2002 (4) SCC-380
30. 2004(1) SCC-337
31. 2004 (1) SCC. 337
32. 2000-SCC(CrI)1437
33. (2010) 3 SCC (CrI) 604=(2007) 15 SCC 569
34. 2009(2) SCC 624
35. 2004 (1) SCC 662
36. CrI.A.Nos.462 and 463 of 2018,dt.27.03.2018.
37. Manu/ KA/ 0177/ 2018
38. 2008(9) Scale 681=(2008) 16 SCC 417
39. 2006(13) SCC 210
40. Manu/ SC/ 1219/ 2003
41. 2004(3)SCC 453
42. 2002(4)SCC 380
43. 2018 SCC online KAR 448
44. 2017 (2) KCCR 1765
45. 2008 (5) SCC 161
46. 2010(10) SCC 219
47. AIR 2002 SC 1450
48. 2009 SCC online P&H 5213
49. 2004 (1) SCC 337
50. 2003CrILJ 4329
51. 2003 (6) scale 483
52. 2011(4) SCC 441
53. 2012 (13) SCC 491
54. Cr.M.P.(M) No.1145 of 2014
55. AIR 2009 SC 1977
56. 2004 (4) SCC 446



HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Criminal Petition Nos.2900, 3020 and 5814 of 2018

COMMON ORDER:

The three petitioners by names Mohd.Younus @ Raj Kumar-A.1 (petitioner in CrI.P.No.2900 of 2018), Mohd.Shakeel-A.2 (petitioner in CrI.P.No.3020 of 2018) and Brahmanandam Goud-A.5(petitioner in CrI.P.No.5814 of 2018) who are the accused in F.No.DR1/HZU/48D/ENQ-23(INT-14) 2017, dt.28.07.2017 registered for the offences punishable u/secs.8, 9, 22, 25, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act'), by the Officer of the Directorate and Revenue Intelligence(for short, 'DRI'), moved the three regular bail petitions.

2. The A.1 and A.2 in judicial custody since 29.07.2017 earlier moved regular bail petition in CrI.M.P.No.917 of 2017 along with one Haranathreddy(A.3) in CrI.M.P.No.1004 of 2017 before the learned I Addl.District & Sessions Judge, Medak at Sanga Reddy and those were dismissed by common order, dt.30.01.2018.

3. The A.5 in judicial custody since 22.01.2018 earlier moved regular bail petition in CrI.M.P.No.62 of 2018 and the learned Sessions Judge as in-charge of the I Addl.Sessions Judge by order dated 16.05.2018 dismissed the same. It is later they moved the present applications.

4. The sum and substance of the accusation against them is that, based on the Intelligence report about Alprazolam-a psychotropic substance which is a scheduled drug as per the NDPS Act was manufactured and secreted in the shed at Survey No.353/ AA, Kazipet Village, Narsapur Mandal, Medak District. Further a chemical intermediate is found at M/s Golden Streak Laboratories Limited situated in Survey No.329 and 334, Veliminudu, Chityala Mandal, Nalgonda District. Further at the residence of

A.1 H.No.4-5, Borapatla Hathnoora Mandal of Medak district and at the servant quarters in the guest house belongs to Mr.Laxman Rao Babu, Isnapur village, Medak District i.e. at the residence of the parents of A.1 and A.2, when simultaneous searches were conducted by the officials of the DRI at the above four places on 28.07.2017, 18.55kgs., of Alprazolam totally valued at Rs.27, 82,500/- and also the IV stage material totally weighing 4.6kgs, valued at Rs.5,52,000/- @Rs.1,20,000/- per kg was found and seized under the cover of panchanama in the presence of mediators and effected the arrest of A.1 to A.3 from they have knowingly indulged in dealing with the commercial quantity of Alprazolam-a psychotropic substance supra without any authorization or documents from any Government Agencies.

5. The accusation against A.1 and A.2 besides A.3 and A.4 there from is that as per information given by the A.1, the intermediate chemical stage IV substance to a tune of 30 kgs, along with Orthozylene(liquid chemical) was supplied by the A.3 for illegal manufacturing of Alprazolam in batches.

6. So far as A.5 is concerned the accusation against him is that, in Sy.No.353/ AA of Khajipet supra found a cowshed on the left side and a plastic cover stitched out of HDPE sacks on which half white material is spread found in the open to sky and A.1 supra has introduced the A.5 there and informed that the shed belongs to his family and it was let out by A.5 to A.1 on rent of Rs.20,000/- per month for the illegal manufacture of the drugs and thereafter the A.1 took the Officers to the adjacent portion of the shed and found a glass flask/ reactor and A.1 introduced the A.3 in the reactor shed and when the officers enquired about the material, the A.1 disclosed of the chemical illegally manufactured by them in the shed by using the glass flask/ reactor available in the shed and said chemical placed in the open sky for the purpose of drying Alprazolam and informed that he

manufactured the Alprazolam with the help of his brother A.2 at the premises. It is also the disclosure about the modes operandi in the manufacture of contraband and purchased intermediate chemical stage IV material from one Haranath Reddy-A.3 of Miyapur supra and brought around 30kgs, of the Stage IV material along with Orthozylene(liquid chemical) for manufacturing Alprazolam and A.4 informed them of he is aware of the nature of the Alprazolam and its use and the knowledge that the land is used for construction of the shed to use in the manufacturing of above contraband and thereby from the high rent offered by the A.1 and A.2 it was let out and it is in their use. Then the Officers seized 18.55kgs., of Alprazolam and the IV stage material weighing 4.6kgs., and seized the glass flask/ reactor and two steel drums and the shed was sealed and locked and paper slips affixed containing date and signatures of panchas covered by the proceedings dt.28.07.2017 and also drawn samples in the presence of the mediators as reflected in the respective panchanamas of duly sealed and slips affixed etc.

7. So far as the A.1 and A.2 concerned they initially filed single application for both of them in CrI.P.No.2900 of 2018 and later for A.2 filed another application in CrI.P.No.3020 of 2018 supra and from same is pointed out on maintainability of second one pending first one for A2, it is endorsed on 05.06.2018 of not pressed so far as A.2 the CrI.P.No.2900 of 2018 by confining same for A.1. Thus, CrI.P.No.2900 of 2018 is filed for A1, CrI.P.No.3020 of 2018 is filed for A2 and CrI.P.No.5814 of 2018 is filed for A5. The learned special Public prosecutor filed common counter in CrI.P.No.2900 of 2018 filed memo of adopting it in CrI.P.No.3020 of 2018 and filed separate counter in CrI.P.No.5814 of 2018.

8. The contentions in the respective bail applications are that the accusations are baseless and outcome of false implication, the search and seizure are illegal so far as A1 concerned and so far as the A.2 concerned,

there is no specific recovery, so also of A5. The seized material covered by panchanama from the factory premises was alleged mixed contraband placed in two drums and sealed and that shows no samples were drawn on that day and they were confined under the presumption of the contraband is Alprazolam and Sections 35, 54 and 37 of the NDPS Act have no application and otherwise Alprazolam relates to medicinal drug under Schedule-H of the Drugs and Cosmetics Act. The contentions further are that the so-called confessions/ disclosures respectively are extracted under force and created and there is non-compliance with the mandatory provisions of the Act. The charge sheet already filed appears without obtaining laboratory report to curtail to the default bail availment.

9. The contention of A.5 in specific in addition to the above is that there is no case made out against him for any of the offences under the NDPS Act, but he is falsely implicated. There is false implication for the offences punishable u/ sec.22, 25, 28 and 29 of the Act. They claimed as innocents respectively and of the languishing in judicial custody and their family members are suffering with no livelihood and bail is a rule and refusal is an exception because of the importance of personnel liberty enshrined as one of the inviolable fundamental rights and thus it may be considered for release on bail respectively.

10. The respondent/ complainant opposed the bail applications by supporting the detailed counter averments in saying none of them are entitled to the concession of bail from the limitations covered by the twin requirements of Section 37 of the NDPS Act bars the Court to grant bail for those are in addition to the general provisions for grant or refusal of the bail under CrPC and the petitioners are having conscious knowledge u/ sec.54 of the Act and u/ sec.35 of the Act there is a presumption of guilty state of mind and even so far as the A.5, he is he not only consciously let out the premises for the illegal activities but also a perpetrator of the

crime as part of their conspiracy and privy and sought for dismissal of all the three bail applications saying even the learned Sessions Judge rightly dismissed their earlier bail applications.

11. Heard both sides on the three bail applications respectively and perused the material on record including respective contentions. One of the main contentions in the course of arguments raised by the respective counsel for the petitioners/ accused particularly for A.1 and A.2 is that there is no quantitative analysis conducted of the contents of the Alprazolam and the entire prosecution is unsustainable thereby and there is no chance of any of the accused liable for conviction ultimately for non-compliance with the standing instructions regarding the procedure and thereby they are entitled to the concession of bail and referred expressions in support of the contentions.

12. The learned Public Prosecutor in opposing the bail applications referred the expressions to repel said contentions in referring to those with reference to the provisions and particularly with reference to the amendment by insertion of note 4 as per the S.O. 2941 E, dt.18.11.2009 and note of item No.239 besides item No.12 of the table as to the Narcotic Drug or psychotropic substance with reference to the Act and as to the quantitative of what is small and what is commercial and what is in between.

13. In answering rival contentions in considering the bail applications as to any of the petitioners are entitled to the concession of bail or not, the legal position is detailed hereunder:-

13-a. From the very preamble of the Act, the policy, purpose, reasons and the objects to be achieved are clearly explained as to for which the Act (NDPS Act) 61 of 1985, later amended by Act 2/ 1989, 9/ 2001 and 16/ 2014 is brought. It is an exhaustive law enacted with stringent punishments to control the malady of drug abuse of trafficking etc., by

consolidating and amending the then existing laws in this field viz., opium Act & Dangerous Drug Act. There is one more related Act called Prevention of Illicit traffic in NDPS Act, 1988.

13-b. According to Robert Jackson – liberty to be achieved is only within and through the rule of law. Article 21 of the Constitution is not an absolute fundamental right but qualified and in consideration of bail it is not the personnel liberty alone, but impact of the crime on the society. Thus what ever the contentions of the personnel liberty is a constitutional guarantee cannot be claimed for release on bail unless it is shown the limitations laid down in Section 37 of the Act have no way apply and the other general parameters for bail laid down in CrPC are no way a bar for the entitlement.

13(c). As per Section 37 (1)(b), if it is the commercial quantity of the Narcotic drug or psychotropic substance; whatever be the penal provision under the Act, leave about irrespective of commercial quantity similar rider is there for those offences punishable under Sections 19, 24 and 27(a) of the Act; unless the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail, then question of considering to grant bail if any arises.

13(d). In Babua Vs State of Orissa¹, the Apex Court held that the Court should examine whether prosecution statements, if believed would result in conviction, if it could not give an answer in negative, bail could not be granted. Another expression in Intelligence Officer, Narcotics Control Bureau Vs Shambhu Shankar² speaks that bail cannot be granted unless the public prosecutor has been heard and Court is satisfied that the accused is not guilty and not likely to commit any offence while on bail. In

¹ 2001 (2) SCC 566

² 2002 (2) SCC 562

State of M.P., Vs Kajad³ it was held that Court's satisfaction under Section 37 (1) (b) (ii) of the Act about accused being not guilty must be arrived based on the record and also held the same in D. Sarojini Vs State of A.P.,⁴ and further in Customs, New Delhi Vs Ahmadalieva Nodira⁵.

13(e). In Union of India Vs. Sanjeev V.Deshpande⁶ the Apex Court three judge bench held referring to Sections 2(xiv), 8(c), 19, 24, 37 of the Act and Rules 64, 65, 65A of the Narcotic Drugs and Psychotropic Substances Rules, 1985 as to whether exclusion of a particular substance in Schedule 1 to Rules of 1985 would exclude application of Section 8 of the Act, though it is mentioned in Schedule to the Act, it was held that both Rules 53 and 64 are really in the nature of exception to the general scheme of Chapters VI and VII respectively containing a list of narcotic drugs and psychotropic substances which cannot be dealt in any manner notwithstanding the other provisions of these two chapters. Neither Rule 53 nor Rule 64 is a source of authority for prohibiting the dealing in narcotic drugs and psychotropic substances. The source is Section 8. Rajesh Kumar Gupta's case in Court's view is wrongly decided. Provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of the Drugs and Cosmetics Act, 1940 or the rules made thereunder as per Section 80 of the Act. Same is not really called for in the instant case. It is only required to be stated that essentially the Drugs & Cosmetics Act deals with various operations of manufacture, sale, purchase etc. of drugs generally, whereas Narcotic Drugs and Psychotropic Substances Act deals with a more specific class of drugs and, therefore, it is a special law on the subject. Further the provisions of the Act operate in addition to the provisions of the 1940 Act. Considering scope of Section 37 of Act of 1985,

³ 2001 (7) SCC 672

⁴ 2001 (7) SCC 677

⁵ (2004) 3 SCC 549: 2004 Cr LJ 1810

⁶ 2014 (13) SCC 1 : AIR 2014 SC 3625

finding of the High Court that prohibition in Section 8 of the Act, 1985 is not attracted to the drugs not mentioned in Schedule 1 to Rules of 1985, though mentioned in Schedule I to Act of 1985 is held by the Apex Court as not sustainable.

13(f). The Apex Court in Superintendent, NCB, Chennai Vs. R.Poulsawmy⁷ held that once Section 37(1)(b) NDPS Act applies, it is mandatory on the part of the Court of its satisfaction to grant or decline to grant bail to consider the scope of Section 37 of the Act. The rigour of Section 37(2) of the NDPS Act is in addition to the restrictions for grant of bail under Chapter XXXIII CrPC. The subjective satisfaction of the Court must reflect in the order granting bail of the twin conditions of reasonable grounds to believe that the accused is not likely to be convicted and he is not likely to commit any offence while on bail and the conditions are cumulative and not alternative.

13(g). In Union Of India v. Rattan Mallik @ Habul⁸, it was observed in paras 13 to 16 thatOffence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub- section (1) of Section 37 of the NDPS Act. Apart from opportunity to the Public Prosecutor to oppose, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be made out. The conditions are cumulative and not alternative. The satisfaction contemplated has to be based on “reasonable grounds”, means something more than prima facie grounds. Existence of such facts and circumstances

⁷ (2001) CrI. L.J. 117 SC

⁸ 2009 CrI Law Journal 3043 (SC)

as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

13(h). In *Union of India Vs. Shiv Shanker Kesari*⁹ also it was held that recording of satisfaction on both the aspects, noted above, is *sine qua non* for granting of bail under the NDPS Act. The Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail.

13(i). As per Section 2 sub section (vii-d) of the Act, 'controlled substance' means any substance which the Central Government may, having regard to the available information as to its possible use in the production or manufacture of narcotic drugs or psychotropic substances or to the provisions of any International Convention, by notification in the Official Gazette, declare to be a controlled substance. From this, it is important to note the fact that the contraband, involved in this case is a commercial quantity, which is undisputedly a psychotropic substance either in one category or the other very nearer to it.

13(j). Among the other provisions that to be kept in mind, Section 35 speaks on mensrea a reverse onus clause putting burden on accused to rebut the presumption and thus the Court shall draw till rebutted of the culpable mental state. Similarly under Section 54 regarding possession, which needless to say includes a conscious possession –whether physical or constructive is suffice of awareness about a particular fact from State of

⁹ 2007 (7) SCC 798

mind, is a criterion – as held in *Madanlal v. State of Himachal Pradesh*¹⁰ and *Avtar Singh and Ors. vs State of Uttar Pradesh*¹¹.

13(k). Coming to other relevant sections - Section 25 speaks same punishment of substantive against those allowed the premises in use; Section 28 speaks of an attempt is also a punishable offence providing same punishment of accomplished act, if some act done under the attempt; Section 30 speaks of even preparation is an offence punishable, (like in Sections 399 I.P.C.); Sections 29 speaks of vicarious liability (like in Sections 107 to 120-B & Sections 34 to 37 I.P.C.). For the NDPS Act not defined conspiracy separately, it can thus be taken note of the punishment provided under Section 120-B IPC from its definition under Section 120-A IPC and its application to be r/ w. Section 10 Evidence Act.

13(l). Coming to Sections 41 & 42 (like sections 100 & 165 CrPC.) where the officer is empowered officer and where the officer is authorised officer (to say because of empowerment by delegation) otherwise by statutory empowerment to intimate to the superior within the prescribed time of search proceedings, compliance of Section 42 is not required if not a delegated exercise and from Section 43 (like Section 102 CrPC.) where only seizure involved with no search, there also compliance of Section 42 not required and coming to compliance of Section 57 if any which is even directory as held by the Apex Court in *Narayana Swamy v. Assistant Director of D.R.I.*¹². In *Karnail Singh Vs. State of Haryana*¹³ the Apex Court Constitution Bench held categorically that even where Sections 41 and 42 of the Act compliance required, mere non-compliance will not vitiate the proceedings, unless it is shown from said mandatory provisions applicable not complied, prejudice is caused to the accused.

¹⁰ 2003 SCC crl. 1664

¹¹ 2002 SCC (CrI) 1769 (A&E)

¹² 2002 SCC CrI 1865 (A)

¹³ (2009) 3 SCC (CrI) 887

13(m). Coming to compliance of the mandatory provision u/ sec.50 of the Act, in *State of Rajasthan Vs. Paramanand*¹⁴ also it was held by the Apex Court that if merely a bag carried by a person is searched without there being any search of his person and finding contraband, Section 50 has no application.

13(n). In *State of H.P. Vs. Pawan Kumar*¹⁵ also the Apex Court held that, search of a person would mean person covering with clothing and pockets and baggage carrying any article or container etc., can under no circumstances be treated as search and seizure from person.

13(o). In *Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi*¹⁶ it was held by the Apex Court that for the search of a person, Section 50 compliance is mandatory and the accused is provided with an option either to be searched in the presence of any Gazetted Officer or Magistrate. The accused must be physically produced before such Gazetted officer or Magistrate once he opted to be so searched before any of them and the non-compliance by taking him before a Gazetted officer or Magistrate at his option for search of his person entitles said search and seizure illegal.

13(p). In fact regarding such requirement as to what is a compliance of section 50, the five judge bench expression of the Apex Court in *Vijayasinh Chandubha Jadeja Vs. State of Gujarat*¹⁷- observed categorically also with reference to the amendment to section 50 by Act 9 of 2001 and by clarifying the earlier constitutional bench expressions in *Baldev Singh(supra)* and another expression in *Karnail Singh Vs. State of Haryana*¹⁸ on the section 50 compliance that, informing to the suspect under section 50 of the NDPS Act of right to be searched of his

¹⁴ 2014(5) SCC 345

¹⁵ 2005 (4) SCC 350

¹⁶ AIR 2011 SC 1939

¹⁷ 2011(1) SCC 609

¹⁸ 2009 (8) SCC 539

person in the presence of any Gazetted Officer or Magistrate can be either oral or in writing and it is any of such non-compliance that too it must be shown that failure to apply such mandatory provision of Section 50 of the NDPS Act cause prejudice to the accused and then only it has to render such recovery of illicit article from the suspect inadmissible to vitiate the conviction, if the conviction is recorded solely on the basis of such illicit article recovered by violating of the section 50 of the NDPS Act by searching a person. It is also observed that whether complied with or not and any prejudice caused or not must be matters in trial to appreciate from evidence to be let in.

13(q). Regarding length of judicial custody not a ground for any concession of bail, it was laid down by the three judge bench in Narendra K.Amin Vs. State of Gujarat¹⁹ at para-22 that mere fact that accused has undergone certain period of incarceration that by itself would not entitle him to be enlarged on bail, nor the fact that the file is not likely to be concluded in near future, when the gravity of offence is severe and there are allegations against the accused of possibility of interfering with witnesses and the like.

13(r). The Apex Court in Kanhaiyalal v. Union of India²⁰, held that confession of offence, other than to a police officer, before an officer governed by the provision of Narcotics Act is admissible under Section 67 of the Act and is not hit by Section 25 of the Indian Evidence Act. The very wording of Section 67 discloses the same. The officer in raid party is an officer governed by the provisions of the Act and not mere police officer, leave about any contention including as to the issue on correctness of Kanhaiyalal is still pending on reference before a larger bench of the Apex Court, mere pendency of reference is not a ground to say the law laid down

¹⁹ 2008(13) SCC 584

²⁰ AIR 2008 SC 1044

there is not good, leave about it is a matter for appreciation during trial to so raise and consider if at all same hit by Section 25 of the Evidence Act and to consider of the fact discovered from the disclosure for to that extent admissible under Section 27 of the Evidence Act. Further the earlier expression of the Apex Court in Francis Stanly @ Stalin Vs. I.O. Narcotic Control Bureau, Tiruvananthapuram²¹, it was held that Section 67 of the Act response is admissible. Further even in a later expression Union of India Vs. Bal Mukund²², it was held that to act on the disclosure made under section 67 of the Act, some other corroboration is required to base a conviction. Therefrom also it is a matter to consider on merits during trial.

13(s). Here from this perspective, once there are disclosure statements made by the accused, which are prima facie for purpose of the bail application scope to hold as part of prosecution material for consideration for the bar to the entitlement to the concession of bail under Section 37 of the Act, there is nothing to ignore the same.

13(t). Even coming to the contention of the search before one of the raid party even not before an independent Gazetted officer, once it is after serving notice of options available and waived and asked the search can be before him, there is nothing more on it to discuss, much less to say any non compliance of mandatory provisions. For the other contention in this regard of same tantamounts to search/seizure, report, registration and crime investigation by same officer a bar, it is the well settled position of law right from *Balbir Singh's case*²³ that there cannot be any argument in defence to doubt the prosecution case that complainant and investigating officer cannot be one person. The officer who conducted search and seizure cannot be technically called as complainant. Even there can be no

²¹ 2006(13) SCC 210

²² 2009(12) SCC 161

²³ AIR 1994 SC 1872=1994-SCC-Cri-634

bar for the person who conducted search/ seizure to investigate the case and file charge sheet. Same is also the law well laid down in State Vs. Jayapal²⁴, S.Jeevanatham Vs. State²⁵ apart from the law settled way back in State Vs. Bhagwant Kishore Joshal²⁶.

13(u). Coming to the compliance of provisions U/ s. 52 and 52-A are concerned, the law is well settled holding that compliance of Sections 57,55, 52-A & 52 are only directory and not at all mandatory. It is at best for the accused to show any prejudice from any non-compliance of such directory provisions during trial and when not so shown, from any non-compliance of such directory provisions by itself is no way fatal to the prosecution-case as held by the Apex Court in Babubhai Vs. State²⁷ at para8, State Vs. Makkan Chand²⁸; Khat Singh Vs. Union of India²⁹ and Khandoori Sahoo's case³⁰.

13(v). Coming to delay in sending samples or any other irregularities concerned, in State Vs. Kandari Sahoo³¹ it was held that delay in sending samples to laboratory is not at all fatal, where the articles are in safe custody. It is for the accused to show any prejudice to consider. In Karnal Singh Vs. State³² also it was held that the alleged violation of Secs.52 52-A, 55& 57 does not effect merits of case.

13(w). Thus, the law is very clear that without consideration of the twin requirements on the limitations to the entitlement of the bail or not applied to any of the petitioners, the question of granting bail does not arise under the Act. Article 21 is not an absolute fundamental right but qualified and in consideration of bail it is not the personnel liberty

²⁴ 2004(5)SCC 223

²⁵ 2004(5)SCC 230

²⁶ AIR 1964 SC 221

²⁷ 2005(8) SCC-725

²⁸ 2004(3) SCC- 453

²⁹ 2002 (4) SCC-380

³⁰ 2004(1) SCC-337

³¹ 2004 (1) SCC. 337

³² 2000-SCC(CrI)1437

alone, but impact of the crime on society. Thus what ever the contentions of the personnel liberty is a constitutional guarantee cannot be claimed for release on bail unless it is shown the limitations laid down in Section 37 of the Act have no way apply and the other general parameters for bail laid down in CrPC are no way a bar for the entitlement. Though the expression reasonable ground used in Section 37 as pointed out in Shiv Shankar Kesari supra and Union of India Vs. Rattan Mallik 2009 2 SCC 624 that recording of satisfaction of both the aspects by the Court though not desirable to weigh the evidence meticulously to give a positive finding of not guilty of the offence much less required of whether reasonable grounds are not for believing that accused is not likely to be held guilty which is a *sine qua non* for granting bail if at all with such finding.

14. Regarding the contention of any of the contraband once covered by Drugs and Cosmetics Act, the penal consequences under the provisions of the Act have no application concerned, the same is answered by the Apex Court in the recent past. In this regard in Union of India vs. Ashok Kumar Jaiswal³³ the Apex Court cancelled the bail granted by the High Court having find fault for non-application of mind to the parameters required to be considered in granting or refusal from non-consideration of the limitations laid down in Section 37 of the Act. It was held at para 3. "It is evident that the High Court did not at all take into consideration the requirements of Section 37 of the Act as it stood when the application of the respondent for grant of bail was allowed and bail was granted to him merely observing that "considering the recovery and detention it is a fit case for bail". The legislature with a view to check the menace of drugs incorporated in the Act the stringent provisions of Section 37 for considering prayer for grant of bail of those who are accused of offence punishable for a term of imprisonment of five years or more under the Act.

³³ (2010) 3 SCC (CrI) 604=(2007) 15 SCC 569

Under the mandatory conditions provided in Section 37 before granting bail the court is to be satisfied that there are reasonable grounds for believing that the accused is not guilty of offence and that he is not likely to commit offences under the Act while on bail". See also Union of India Vs. Rattan Malik @Habul³⁴, Customs, New Delhi Vs. Ahmadalieva Nodira³⁵ and the recent one in Satpal Singh Vs. State of Punjab³⁶ by a Constitution bench.

15. Now coming to the expression placed reliance by the learned counsel for the respective accused in Ben Okoro Vs. State of Karnataka³⁷ in CrI.P.No.8644 of 2017, dt.18.01.2018 by the learned Single Judge of Karnataka High Court at paras-13 and 14 that the Apex Court in Union of India Vs. Balmukund (referred therein at para-36) held that *'there is another aspect of the matter which cannot also be lost sight of. Standing instruction 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that the P.W.7 had taken samples on 25grams each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law.'* and held that therefore the averment of requirement of the standing instructions is mandate of law to fulfil and as it suffices therefrom to say a bar u/ sec.37 of the Act has no application.

16. In fact, for that observation in Bal Mukund supra at para-34, they referred Noor Aga Vs. State of Punjab³⁸ and Francis Stanley @ Stalin Vs. I.O. Narcotic Control Bureau, Tiruvananthapuram³⁹. Para-15 of Bal Mukund says - *'We are of the opinion that while it is true that a confession made before an officer of the Department of Revenue*

³⁴ 2009(2) SCC 624

³⁵ 2004 (1) SCC 662

³⁶ CrI.A.Nos.462 and 463 of 2018, dt.27.03.2018.

³⁷ Manu/ KA/ 0177/ 2018

³⁸ 2008(9) Scale 681=(2008) 16 SCC 417

³⁹ 2006(13) SCC 210

Intelligence under the NDPS Act may not be hit by Section 25 in view of the aforesaid decisions, yet such a confession must be subject to closure scrutiny than a confession made to private citizens or officials who do not have investigating powers under the Act'. It is already referred supra of the expression shows the disclosure u/ sec.67 of the Act is admissible and not hit by Section 25 of the Indian Evidence Act but for to say some corroboration is required to it to act upon for the disclosure is taken on its face value based their disclosure about the contraband is Alprazolam manufacturing process.

16-a. Para 14 of Bal Mukund on the sampling process concerned, what was observed is the guidelines given in the administrative instructions get the force and not mentioned as mandate of law and non-observance tantamounts to acquittal. In fact, what Noor Aga supra observed particularly from paras-121 to 124 is in this regard on a departmental instruction cannot totally be ignored and when directions are issued by authority having legal sanction granted therefrom, it becomes obligatory on the part of the subordinate authority to comply therewith and it referred the expression of Union of India Vs. Azadi Bachao Andolan⁴⁰ holding therein that '*statutory instructions are mandatory in nature*'.

16-b. However, the fact remains the Apex Court in State of Panjab Vs. Makam Chand⁴¹ relying upon the ratio laid down in Khat Singh Vs. Union of India⁴² and referring to Section 52(a) of the Act held that - *the contention that standing orders and instructions issued U/s.52 A are not followed regarding procedure for drawing sample is held untenable, since Section 52-A, no where empowered the Central Govt. to lay down any procedure for search/seized contraband sample collection and at best, the standing instructions and orders are a mere*

⁴⁰ Manu/ SC/ 1219/ 2003

⁴¹ 2004(3)SCC 453

⁴² 2002(4)SCC 380

guidance and have no any legal force since not the inexorable rules.

Further, it was held that Sec.52-A only deals with disposal of seized narcotic Drugs and psychotropic substances. It was further held that in

Valsala supra it was not laid down that whenever there is a delay in the sending of samples, the prosecution version would become vulnerable for it is to be shown from any inordinate delay it caused prejudice to accused and how. Thus, once sections 52 and 52A of the Act, no way empowers Central Government to lay down any procedure for search/seizure of contraband, sample collection, at best the standing instructions are mere guidance and have no legal force since not the inexorable rules.

16-c. The above expressions not came for reference or consideration in Noor Aga or Bal Mukund supra particularly with reference to the guidelines under the NDPS Act referred supra.

16-d. Coming to the other Single Judge expression of that Karnataka High court in Noble Vs. State of Karnataka⁴³ in same line of Ben Okoro supra from what was observed is instruction No.1.18 of annexure-1 of the Standing instructions provides for expeditious analysis of the Narcotic drug-a psychotropic substance and whether if the same are not complied with, the Court need not extend the remand and accused can be entitled to bail and coming to the other decision of the another Single Judge of same High Court in Ejem Peter Vs. State of Karnataka⁴⁴ by referring to the above standing instructions 1.18 to 1.22, it was observed that qualitative analysis coupled with quantitative test is required to be conducted and once to test adulterated substance containing 1%of the contraband there cocaine in the absence of showing what percentage as to commercial or not, the benefit must go to the accused in granting bail therefrom. What was observed thereby is if the quantitative test result is not there, benefit to go to the accused and not that it is a ground to grant bail but for on facts. However

⁴³ 2018 SCC online KAR 448

⁴⁴ 2017 (2) KCCR 1765

regarding the said instruction and its binding force, the learned counsel for the petitioners also placed reliance on the expressions of the Apex Court in *Micheal Raj v. Intelligence Officer, Narcotic Control Bureau* ⁴⁵ observed whether the accused found in possession of 4.07kgs., of contraband and a chemical analysis of the purity test when conducted found 1.4% and 1.6% respectively in 2 samples of heroin and based on that the total quantity found in contraband calculated as 61.05 gms, therefrom the Apex Court held said quantity would fall below commercial quantity defined u/ sec.2(vii)(a) of the Act as notified by the Central Government. It is therefrom contended in the absence of such quantitative test of what is the Alprazolam, the benefit must go to the accused and it cannot be said same is not commercial quantity.

16-e. Thus what was observed by the Single Judge expressions of the Karnataka High Court in *Ben Okoro, Noble and Ejem Peter* respectively in granting bail for so called non-following of guidelines in standing instructions entitles acquittal is not sustainable.

16-f. Said conclusion lends support in this regard from the single Judge order of the Patna High Court, dt.22.05.2015 in *Abdul Vs. State of Bihar* and batch, where having referred the standing instructions 1 of 88, dt.15.03.88 on the contention of having the force of law, observed of only directory in nature as intended to guide Officers and to see that fair procedure is adopted by the investigating agency of a case during investigation by relying upon *Kuldeep Singh Vs. State of Panjab* ⁴⁶ and *Khet Singh Vs. Union of India* ⁴⁷ para-10 of the Standing Instructions issued by the Narcotics Control Bureau are intended to guide the Officers and to see that fair procedure is adopted by the Officer in-charge of the investigation but it is no where mentioned as those are mandatory and non-

⁴⁵ 2008 (5) SCC 161

⁴⁶ 2010(10) SCC 219

⁴⁷ AIR 2002 SC 1450

compliance entitles acquittal or a ground for grant of bail despite the other power under Section 37 of the NDPS Act and that expression in Khet Singh supra not even referred either in Noor Aga or Bal Mukund supra.

17. Undisputedly as per the schedule item No.12 Alpraprodine the commercial quantity is 100grms and above and small quantity only about 5gms, and in the case on hand, huge quantity of contraband is seized referred supra, it is even difficult to say it does not contain the commercial quantity of 100gms and above of Alprazolam. Even it is also further necessary to refer the amendment in the schedule in item No.239 that *any mixture or preparation that of with or without a natural material of any of the above drugs, lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture and lesser of the Commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture*. It is needful to say there was an amendment referred supra of SO 2941-E, dt. 18.11.2009 inserting Note-4 after Notes-1 to 3, in Note-1 it is mentioned the small quantity and the commercial quantity given against the respective drug listed above apply to isomers, with specific chemical designation, the esters, ethers and salts of these drugs, to the preparations of the drugs. So far as the newly inserted clause-4 w.e.f. 18.11.09 is concerned, it reads the quantities shown in column 5 and 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content. This amendment shows directly apply in what was laid down in the expression in Micheal Raj supra. Learned Single Judge of this Court in

CrI.P.No.109 and 1253 of 2018 by order dt.15.03.2018 in Bandaru Hanumanth Reddy Vs. the Senior Intelligence Officer, DRI and Vasamsetty Naresh Vs. the Senior Intelligence Officer, DRI placed reliance by the learned counsel for the petitioners, it was observed at para-13 that with the inability of gathering the intent of the 2009 notification, the ratio laid down in Micheal Raj case supra cannot be deviated from and thereby irrespective of the notification even taken prospective of application from 18.11.2009 and the occurrence on hand subsequent to it, the notification is of no consequence and the expression of Micheal Raj rules the field.

18. In fact in this regard, there is another Single Judge expression of the Punjab & Haryana High Court in Karaj Singh Vs. State of Punjab⁴⁸ under the NDPS Act where it is reiterated the law that delay in sending of the sample or collection is of no consequence and standing orders have no statutory legal force and in deviation in its observation and non-observation is of no consequence by referring to several expressions in this regard and observed that the Apex Court in State of Orissa Vs. Kanduri Sahoo⁴⁹ observed that in Valsala's case therein, it was not even laid down that whenever there is delay in sending the samples, the prosecution version would become vulnerable. What was emphasised related to proper and safe custody of the seized articles. So far as the standing instructions concerned, it is only statutory law made by the parliament or rules made therein under deligatory legislature/power as conferred by the statute have legal force and there are instructions of prudence. The standing instructions and circular instructions are only executive instructions without statutory power and non-observance no way fatal to the case of prosecution thereby. It is observed that the Apex Court in Megh Singh Vs. State of Punjab⁵⁰ observed of the word 'conscious' means awareness about

⁴⁸ 2009 SCC online P&H 5213

⁴⁹ 2004 (1) SCC 337

⁵⁰ 2003CrILJ 4329

a particular fact indicating state of mind deliberate or intended that attracts the possession even constructive presumption u/ sec.54 equally to draw the presumption of guilty state of mind u/ sec.35 of the Act as also held by the Apex Court in *Madan Lal Vs. State of Himachal Pradesh*⁵¹. The Himachal Pradesh High Court in *Puneet Kaushal @ Sunny Vs. State of Himachal Pradesh* in CrI.M.P.(M) No.312/ 2018 dt.13.04.2018 held that the notification S0 294(E), dated 18.11.2009 speaks of the pure contest test to ascertain the exact quantity of narcotic drug or psychotropic substance or manufactured drug is not required nor it can it be used for any advantage especially by the accused. Because now the whole contraband seized is required to be considered and not the quantity of drug or contraband reflected in the report of the Chemical Analyst and thereby for that purpose by virtue of the notification even chemical analysis speaks anything is immaterial. Same is suffice to answer the contention of the learned counsel for the petitioners in the respective bail applications.

19. Further in this regard the apex court wayback in *Harjith singh Vs. State*⁵² observed referring to the State notification 294(E) dt.18.11.2009 that though the said notification provides the whole quantity of material recovered in the form of mixture has to be considered for purpose of determining commercial quantity or not including the imposition of punishment placed reliance as a binding precedence. It also referred subsequent expression of the Apex Court in *Md.Sahabuddin Vs. State of Assam*⁵³ where it is observed that even in the liquid containing 183.85 to 189.85 mg. the codeine phosphate and the each 100ml. that to be considered of the entire 189.85mg by virtue of the notification. In view of the above expressions of the Apex Court referring to the said notification dt.18.11.2009, the contention of the accused persons is unsustainable and

⁵¹ 2003 (6) scale 483

⁵² 2011(4) SCC 441

⁵³ 2012 (13) SCC 491

even the Single Judge expression of this Court in Bandaru Hanumanth Reddy supra is not the correct law, these two expressions of the Apex Court interpreting the notification dated 18.11.2009 not even brought to its notice. Thereby the observations are having *per incuram* having *sub silentio*.

20. Further the Division Bench of the Himachal Pradesh High Court in Nirmal Singh Vs. State of Himachal Pradesh⁵⁴ in answering a reference by relying upon Harjit Singh supra of the Apex Court clarified the law on the notification dt. 18.11.2009 of prospective in operation and the expression in Micheal Raj applies only to the matters for the occurrence till 17.11.2009.

21. The Madras High Court Division Bench in M. Veludurai Vs. The State in CMA No. 256 of 2009, dt. 23.12.2011 also observed the same categorically at paras-12 and 13 that the judgment in Micheal Raj referred by the Supreme Court in a subsequent judgment in NCT Delhi Vs. Ashif Khan @ Kalu⁵⁵ and observed including by referring to earlier Apex Court's expression in Ouseph Vs. State of Kerala⁵⁶ and not Harjit Singh supra these were considered and held the notification issued by Central Government dt. 18.11.2009 is prospective in operation and the expression in Micheal Raj applies only till then and not after the notification came into force. It also referred saying a close reading of the judgment in Harjit Singh make it abundantly clear that the total quantity contained need not be estimated quantitatively as to what is the Morphine quantity therein by virtue of the said notification for the entire quantity to be considered what is laid down in Micheal Raj is not applicable to the opium cases and by virtue of the notification mixture or preparation with or without any neutral substance, the entire quantity shall be decisive and thereby the ratio laid down in Micheal Raj regarding to the purity test shall be

⁵⁴ Cr.M.P.(M) No.1145 of 2014

⁵⁵ AIR 2009 SC 1977

⁵⁶ 2004 (4) SCC 446

applicable to the offence committed on or before 17.07.2009 and not from 18.11.2009.

22. Another Single Judge expression of the Madras High Court in Sadiq Basha Vs.State in CrI.M.P.No.8070 of 2016 dt.29.04.2016 by placing reliance on the Division Bench expression in M.Veludurain supra the expressions of the Apex Court referred therein particularly at para-19 quoted Veludorain observations supra therein of the notification dt.18.11.2009 is prospective and ratio in Micheal Raj is applicable for the offences committed till 17.11.2009 and not later and thereby the entire contraband and not the quantity contained of the schedule contraband therein is decisive. It is also observed that the accused is in judicial custody since long time is not even a ground for grant of bail for long incarceration no way provides as a ground u/ sec.37 of the Act.

23. Having regard to the above, leave above the fact from the expressions that even taken for arguments sake, erroneously standing instructions not followed if at all in the collection of samples, that itself does not entitle either acquittal or any reasonable ground to believe of not likely to be convicted but for in the absence of showing any prejudice thereby caused that to be considered if at all same are one of the mandatory conditions to observe and with reference to any prejudice caused thereby, which are the matters to be considered in trial and for all these reasons, none o the petitioners are entitled to the concession of bail.

24. Having regard to the above, the three Criminal Petitions are dismissed. Consequently, miscellaneous petitions, if any, in these Criminal Petitions shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:19.06.2018

Note: L.R. Copy to be marked.

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