

# Sri Ashish Sarkar vs The State Of Tripura on 23 July, 2018

**Equivalent citations: AIRONLINE 2018 TRI 140**

**Author: Arindam Lodh**

**Bench: Arindam Lodh**

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HIGH COURT OF TRIPURA  
AGARTALA

B.A. 58/2018

SRI ASHISH SARKAR  
S/O Sunil Chandra Sarkar, resident of  
Karoichara, P.S. Pecharthal, District- South Tripura

..... PETITIONER

On behalf of the accused-  
SRI SUDHIR SARKAR  
S/O Sunil Chandra Sarkar, resident of  
Karoichara, P.S. Pecharthal, District- South Tripura

..... ACCUSED PERSON

Versus

THE STATE OF TRIPURA  
Represented by the Secretary,  
Department of Home, Agartala, West Tripura

----Respondent(s)

For Petitioner(s) : Mr. PK Biswas, Sr. Advocate  
Mr. P. Majumder, Advocate

For Respondent(s) : Mr. AK Bhowmik, Advocate General  
Mr. B. Choudhury, PP

Date of hearing : 16.07.2018

Date of delivery of judgment: 23.07.2018

Whether fit for reporting : Yes

HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT

This application for grant of bail under Section 439 of the Code of Criminal Procedure, 1973 read with section 37 of the NDPS Act, 1985 has been filed by the accused Sudhir Sarkar in respect of case no. NDPS (Special) 04 of 2018 by the Special Judge, Unakoti Judicial District, Kailasahar arising out of Pecharthal PS case no. 11 of 2018 under Section 20(b)(c) of the NDPS Act, 1985 who was arrested on 19.05.2018 and since then the accused is in jail for 47 days.

2. The factual matrix that led one Saikat Dey, S.I of police to lodge a written complaint on 18.05.2018 before the Officer-in-Charge of Pecharthal police station stating interalia that on the basis of secret information received by him that the accused was possessing huge quantity of dry cannabis (dry ganja leaves) in his house to transport to other place and accordingly the duty officer of Pecharthal police station Ranjan Debnath entered the said information in GD Entry no. 10 dated 18.05.2018 at 1241 hours and he informed the matter to the O/C of the police station as well as SDPO, Kumarghat and as per instruction of the O/C police station and the SDPO, Kumarghat proceeded towards Karoicherra village along with two independent witnesses and reached the house of the accused at 1415 hours and searched the house and recovered cannabis Indica leaves contained in 7 nos of plastic drums and 3 nos. of plastic gunny bags, in total 93.900 kgs. and seized the same by preparing seizure list in presence of witnesses and prepared inventory of the articles and thereafter the accused was arrested for committing offence punishable under Section 20(b)(c) of the NDPS Act and the said complaint has been treated as FIR and registered as Pecharthal PS case no. 11 of 2018.

3. After his arrest, the accused was produced before the Special Judge, Unakoti Judicial District, Kailasahar on 19.05.2018 when his bail application was rejected and accordingly he was sent to judicial custody vide order dated 19.05.2018. The accused was produced on 30.05.2018 and again on 12.06.2018 before the Special Judge, Unakoti Judicial District, Kailasahar, but he was not granted bail. The accused had approached this court vide Bail Application no. 46 of 2018 which was listed for order on 20.06.2018, but it was withdrawn with liberty to file afresh at appropriate time. Thereafter, the accused was produced before the Special Judge, Unakoti Judicial District, kailasahar on 25.06.2018 and again remanded to judicial custody on rejection of the bail prayer.

4. This is the second round of application filed before this court by the accused just within 47 days of his arrest.

5. Mr. PK Biswas, learned senior counsel assisted by Mr. P. Majumder, learned counsel appearing for the accused has mainly emphasized that the search and seizure were made in utter disregard of the mandatory provision of section 42(2) of the NDPS Act for which the accused is entitled to be released on bail. Mr. Biswas, learned senior counsel has further submitted that it is settled position of law as on today that non-compliance of the provision of section 42(2) of the NDPS Act vitiates the entire proceeding and the prosecution has failed to make out any case for such violation. In support of his submission, Mr. Biswas, learned senior counsel has placed reliance on a decision of this court in Khalek Miah vs. State of Tripura (Bail Application no. 18 of 2016) wherein this court relying upon the decision of the Apex court in Sarija Banu alias Janarthani alias Janani and another vs. State

through Inspector of Police, reported in (2004) 12 SCC 266 enlarged the accused on bail with some conditions. Mr. Biswas, learned senior counsel has placed his reliance on a decision of the Apex court in State of Rajasthan vs. Raj Singh @ Hansa reported in AIR 2016 SC 3041 whereby and whereunder the Apex court has acquitted the accused for non-compliance of provision of section 42(2) as well as section 50 of the NDPS Act. Referring to a decision of this court in Gautam Datta vs. State of Tripura reported in (2017)1 TLR 90, Mr. Biswas, learned senior counsel submits that in the said case the SDPO himself participated in the detention, search and seizure of the vehicle and recovery of the narcotic drugs, but the court acquitted the accused on the ground that the „provisions of section 42 are intended to provide protection as well as to lay down a procedure which is mandatory and should be followed positively by the investigating officer. This court placing reliance on a decision of the constitutional bench of the Apex court in Karnail Singh vs. State of Haryana reported in (2009) 8 SCC 539 wherein it was held as under:

'Sub-section (2) of Section 42 as it originally stood mandated that the empowered officer who have taken down information in writing or records the grounds of his belief under the proviso to sub section (1), should send a copy of the same to his immediate official superior forthwith. But after the amendment in the year 2001, the period within which such report has to be sent was specified to be 72 hours. Section 43 deals with the power of seizure and arrest of the suspect in a public place'.

Mr. Biswas, learned senior counsel has also placed his reliance on a decision of the Apex court in Sukhdev Singh vs. State of Haryana reported in (2013) 2 SCC 212, Kishan Chand vs. State of Haryana reported in (2013) 2 SCC 502. Lastly Mr. Biswas, learned senior counsel has placed his reliance upon an order passed by a co-ordinate bench of this court in A.B. 49 of 2018 (Haralal Majumder @ Lalu Majumder vs. State of Tripura) wherein the court has allowed the accused to go on bail for non-compliance of provision of section 42(2) of the NDPS Act. In that case 20 kgs. of cannabis and 69 bottles of phensydyd cough syrup were seized from the joint family property of the accused.

6. Per contra, Mr. B. Choudhury, learned Public Prosecutor while strongly opposing the bail prayer of the accused has contended that the State government considering the large scale drug peddling across the State of Tripura has initiated a special drive to control and regulate and protect the youth of the State as well as the nation. He has submitted that huge quantity of cannabis which is more than 93 kgs. have been recovered from the house of the accused which were under the active possession of the accused. At the time of hearing of this bail application, this court has sought assistance of the learned Advocate General on 12.07.2018. Accordingly, learned Advocate General has addressed this court on 16.07.2018.

7. Mr. AK Bhowmik, learned Advocate General assisted by Mr. B. Choudhury, learned PP has submitted that the entire State has been engulfed with the cultivation of cannabis and inter-state drug peddlers/mafias have become involved in the State of Tripura. The entire State has become a gateway of smuggling of drugs and other psychotropic substances. Even the semi-fertile lands of the State are being converted into fertile land for cultivating ganjas. The farmers and vegetable growers

have turned their face from cultivating and growing crops and vegetable and they are forced to lease their land to those illegal drug peddlers active in the State. The alarming participation of the youth in the State in the trading of cannabis and other psychotropic substances has forced the state government to take special measures to prevent and save the people from being habitual user of this poison. In view of the special drive, huge cannabis as well as other psychotropic substances have already been seized and recovered from various parts of the State and many involved in this business have been arrested. The investigation of the cases reveal that there are organized rackets and gangsters operating across the state and influencing the youth to take part in the business and the youth for their easy earning are gradually joining into those illegal trade of drugs and other psychotropic substances. The deliberations of learned Advocate General appeared to be true as this court has recently observed increased numbers of filing bail applications in connection with various cases registered under the provisions of NDPS Act. Coming to the merit of the present case, the learned Advocate General submits that in the present case, there is due compliance of provision of section 42(2) of the NDPS Act.

8. The said provision does not envisage the requirement of literal compliance in its stricto sensu, but substantial compliance is enough at the time of consideration of the bail application. Learned Advocate General concedes that bail is rule, its rejection is exception, but legislature has inserted a special provision in the NDPS Act as Section

37. Learned Advocate General has invited the attention of this court to the provision of section 37 of the NDPS Act, considering the heinous nature of crimes in drug peddling and to control and regulate the same strictly. The learned Advocate General further submits that the requirement of section 42 was that the Investigating officer has to furnish the written information to his immediate superior authority about the information he received and subsequent seizure and recovery of illegal substance forthwith, but the legislature having found the compliance of said prescription impracticable brought the amendment extending time limit of compliance of section 42(2) upto 72 hours.

9. The learned Public Prosecutor has produced the case diary before this court. He submits that there are sufficient materials which justify the arrest and detention of the accused. He further submits that on interrogation, the accused has divulged so many names who are actively involved in this illegal trade and smuggling.

10. I have given my anxious considerations to the rival submissions advanced by learned Advocate General and Mr. PK Biswas, learned senior counsel appearing for the petitioner.

11. Indisputably, the legislature with a definite object to achieve have made the law of bail very arduous and inserted the provision of section 37 in the NDPS Act, the limitation of which are in addition to the limitations under the Code of Criminal Procedure, 1973. From a bare reading of this provision, it is apparent that the power of the court in granting bail under this provision is very limited, which leads me to reproduce section 37 of the NDPS Act, as below:

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 27A 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.]

12. Curious enough, the said provision started with a non-obstantive clause, which usually means to be used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned in such non-obstantive clause. The Apex court in a decision in Sami Ullaha vs. Narcotic Central Bureau reported in (2008) 16 SCC 471 has observed that it is true that the general principles of grant of bail are not applicable in a case involving the Act. The power of the court in that behalf is limited.

13. After saying so, the court in Samiullah (supra) has further observed in paragraph 12 that whether the contraband items which were seized and recovered falls „within the purview of the commercial quantity within the meaning of section 2(VIII-a) or factor which should be taken into consideration by the courts in the matter of grant or refusal to grant bail.

14. The Apex Court in Union of India vs. Rattan Mallik @ Habul, reported in 2009 Cr.L.J. 3042 had an occasion to deal with the scope of grant of bail to the accused under NDPS Act. The principles laid down by the Apex court in the said decision at paragraphs 13,14,15 and 16 are reproduced below:

"13.It is plain from a bare reading of the non-obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence 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 giving an opportunity to the Public Prosecutor to oppose the application for such release, 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 satisfied. It is manifest that the conditions are cumulative and not alternative.

The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari<sup>2</sup>] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of 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. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

15. Bearing in mind the above broad principles, we may now consider the merits of the present appeal. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are : (i) that nothing has been found(2007) 7 SCC 798 from the possession of the respondent; (ii) he is in jail for the last three years and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Indian Penal Code, 1860 etc. but are not sufficient to satisfy the mandatory requirements as stipulated in sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Merely because, according to the Ld. Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the Ld. Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge.

16. Thus, in our opinion, the impugned order having been passed ignoring the mandatory requirements of Section 37 of the NDPS Act, it cannot be sustained. Accordingly, the appeal is allowed and the matter is remitted back to the High Court for fresh consideration of the application filed by the respondent for suspension of sentence and for granting of bail, keeping in view the parameters of Section 37 of the NDPS Act, enumerated above. We further direct that the bail application shall be taken up for consideration only after the respondent surrenders to custody. The respondent is directed to surrender to custody within two weeks of the date of this order, failing

which the High Court will take appropriate steps for his arrest".

15. I may gainfully refer a decision of the Apex court in Collector of Customs, New Delhi vs. Ahmadaliev Nodira reported in (2004) 3 SCC 549 wherein the following observations have been made in paragraphs 7 and 8:

"7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) 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 for reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case at hand the High Court seems to have completely overlooked the underlying object of Section 37.

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8. In the aforesaid background, this does not appear to be a case where it could be reasonably believed that the accused was not guilty of the alleged offence. Therefore, the grant of bail to the accused was not called for. The impugned order granting bail is set aside and the bail granted is cancelled. The accused-respondent is directed to surrender to custody forthwith. Additionally it shall be open to the Trial Court to issue notice to the surety and in case the accused does not surrender to custody, as directed, to pass appropriate orders so far as the surety and the amount of security are concerned. It is made clear that no final opinion on the merit of the case has been expressed in this judgment, and whatever has been stated is the background of Section 37 of the Act for the purpose of bail".

16. From the above discussions, it is apparent that there are two important limitations and fetters imposed by Section 37 of the NDPS Act. These limitations tantamount to negative pre-condition which are authoritatively binding and would curtail discretion to bail. The Supreme Court in Narcotic Control Bureau vs. Kishanlal and others reported in (1991) 1 SCC 705 has accentuated on the importance of non-obstantive mandate of Section 37 notwithstanding anything contained in the code of Criminal Procedure, 1973. The accused facing prosecution under the NDPS Act for the offence mentioned in Clause (b) of sub-section 1 of Section 37 should be released on bail only when the conditions of Section 37 of the NDPS Act are strictly satisfied. The NDPS Act, a special enactment incorporating stringent conditions for the control and punishment of the crimes relating to narcotic and psychotropic substances. The stipulations in Section 37 of the NDPS Act are negative

for them intend to restrict the power to grant bail under the code of Criminal Procedure. Subsequent decision in Union of India vs. Ram Samujh and another reported in (1999) 9 SCC 429 affirms and reiterate this ratio. Thus, grant of bail when an accused is charged with specified offences under the NDPS Act, is impaired and circumscribed by the rigorous negative pre-conditions adumbrated in Section 37 of the NDPS Act.

17. A Division bench of Delhi High Court in Athar Parvez vs. State of Delhi (Crl. Ref. 1/2005, judgment dated 26.02.2016) has observed which may gainfully reproduced hereinbelow:

"An order granting bail to a person facing prosecution under the specified offence under NDPS Act must abide and confirm the said ratio. It should satisfy the positive condition in Section 439 of the Code and also the negative stipulation of Section 37 of the NDPS Act".

18. In this regard, it may be apposite to refer to some related decisions of different High Courts while granting bail involving offences under the NDPS Act. In Rashid Khan alias Rashid and others vs. The State, reported in 1993 Cri.L.J. 3776, a learned Single Judge of Rajasthan High Court in paragraph 7 has held as under:

"7. Now I take up the last question which is most important and vital for decision in the bail applications. The NDPS Act is a special Act dealing with special class of crimes which is an international menace. In recent years, like other countries, India is also facing great problem of transit traffic in illicit drugs. In order to curb the cancerous growth of the use of such narcotics and its evil effect on the society right from a child, the Act was originally enacted in 1985. The Legislature felt need to make comprehensive and stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, and to implement the provisions of International Conventions on such drugs and substances. The Act provided deterrent punishment for drug trafficking offences. Later on the Parliament further felt that still more stringent provisions were necessary to check the menace of drug addiction and illicit traffic of such substances. Hence the Act was amended by Act No. 2 of 1989. The object and reason behind passing the amendments were given as under:-

"In recent years, India has been facing a problem of transit traffic in illicit drugs. The spill- over from such traffic has caused problems of abuse and addiction. The Narcotic Drugs and Psychotropic Substances Act, 1985 provides the deterrent punishment for drug trafficking offences. Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it has been felt."



As stated earlier N.D.P.S. Act is a special Act which deals with special class of crimes to check the menace of drug addiction and illicit traffic in such substances. It provides deterrent punishments for the offences. For most of the offences the punishment is not less than 10 years imprisonment but it may extend to 20 years with a sentence of fine not to be less than Rs. one lakh, but which may extend to Rs. 2 lakhs. Section 27A provides deterrent punishment for financing illicit traffic and harbouring offenders in the same term. Enhanced punishment is provided under Sections 31 and 31A if the offence is repeated by a person. Then Section 32A provides that sentence awarded under this Act (other than Section 27) shall not be suspended or remitted or commuted. Section 36 provides for constitution of Special Courts. Section 36A enumerates the offences triable by Special Courts and also deals with the procedure regarding the detention of the accused when produced before a Magistrate. Sub-section (b) of Section 36A lays down that if the Magistrate to whom an accused is forwarded under Section 167, Cr. P.C., considers that the detention of such person for fifteen days is unnecessary he shall forward him to the Special Court having jurisdiction who shall take cognizance and proceed with the trial. Then by Section 36A(1)(c)' the Special Court is empowered to exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate may exercise under Section 167 of the Code of Criminal Procedure. The Special Court takes cognizance of the crime just as a Magistrate does in respect of other cases under the Indian Penal Code. In other words, a Special Court under NDPS Act performs the same functions in relation to the offences under the NDPS Act, which a magistrate performs in respect of the offences under the Indian Penal Code. A Special Court is, thus, not only a trial Court but also the Court which exercises the functions similar to those of the magistrate such as taking cognizance of the offence etc.. Sub-section (3) of Section 36A and Section 37 are relevant which read thus:-

"36-A (3) : Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of Sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under Section 36."

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

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

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

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

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not 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.

This matter can be judged from another angle also. The object of NDPS Act is to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances etc. The recent Amending Act No. 2 of 1989 was enacted with a solemn object to curtail and restrict the powers to grant bail as the Legislature felt that on technical grounds drug offenders were being released on bail. It is also noteworthy that Section 36A and Section 37 have been substituted by the Amending Act which clearly demonstrates the legislative intent that whatsoever may be the provisions in the Code of Criminal Procedure, an offender of the offence under NDPS Act should not be released on bail unless the two conditions contained in Section 37 are satisfied. The underlying object of the Amending Act, and particularly when the provisions of Section 37 of NDPS Act are in negative terms limiting the scope of the applicability of the provisions of Cr.P.C. regarding bail, it can be safely held that all provisions contained in the Code to grant bail are subject to the limitations mentioned in Section 37 of the NDPS Act. The non obstante clause with which the section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail of the Special Court and the High Court. Similar view has been taken by the Bombay High in Prahlad vs. State of Maharashtra, reported in 1991 Cri.L.J. 537; Calcutta High Court in Mabi Bibi vs. State of West Bengal, reported in 1992 (3) Crimes 762; Orissa High Court in Banka Das vs. State of Orissa, reported in (1992) II CCR 1803 and by the Rajasthan High Court in Jarin Khan vs. State of Rajasthan in Cr. Misc. Bail Application no. 1694 of 1992 decided on October, 16, 1992".

19. Again, if I make a glimpse at the facts of Kishanlal (supra), I find that in that case the accused had sought for bail due to the reason that the charge sheet was filed at a belated stage and they were entitled to be released on bail as required under Section 167(2) of the Cr.P.C. as well as on the ground of illness. The bail was granted by a Division Bench of Delhi High Court holding that the limitation placed on the Special Court under Section 37(2) of the NDPS Act cannot be read as fetter on the High Court in exercise of the powers under Section 439 of the Cr.P.C for granting bail. Considering section 37(2) of the NDPS Act as negative form of legislation, the Supreme Court has cancelled the bail granted by the Delhi High Court. Thus, period of detention in jail custody cannot be the determining factor to release an offender accused of committing such offence on bail.

20. In the light of the aforesaid legal positions, I have given my thoughtful considerations to the two decisions passed by this court through the then Hon'ble the Chief Justice, Sri Deepak Gupta and a decision passed by a co-ordinate Bench of this court.

In Khalek Miah vs. State of Tripura decided in B.A. 18 of 2016 on 19.02.2016, Hon'ble Chief Justice, Sri Deepak Gupta (as he then was), while granting bail to the accused has considered irregularities in the case diary and his Lordship has placed reliance on a decision of the Apex Court in Sarija Banu alias Janarthani alias Janani and another vs. State through Inspector of Police, reported in (2004) 12 SCC 266, wherein his Lordship found there was violation of section 42(2) of the NDPS Act in the matter of seizure and recovery of articles and subsequent arrest of accused by the police.

In Haralal Majumder @ Lalu Majumder vs. State of Tripura decided in Anticipatory Bail Application no. 49 of 2018 on 05.06.2018, a co-ordinate Bench of this court (Mr. Talapatra,J), while considering the bail application of the accused had placed reliance on Sarija Banu (supra) and found non-compliance of section 42(1)(2) of the NDPS Act. Having found irregularities in the search and seizure and the reporting of the secret information to the superior officer, my learned brother has enlarged the accused on bail.

21. On meticulous study of both the judgments, I find that the learned counsels appearing for the parties, particularly, the learned counsels appearing for the State of Tripura could not assist the court properly inviting the attention of this court to the objects and scopes of the provisions of section 37 of the NDPS Act to grant or refusal of bail. As such, this court in those two judgments (Khalek Miah vs. State of Tripura and Haralal Majumder @ Lalu Majumder vs. State of Tripura) would not have any opportunity to discuss the limitations and restrictions in built in section 37 of the Act.

22. I have also gone through the decision of this Hon'ble High Court in Gautam Datta vs. State of Tripura reported in (2017)1 TLR 90. This is a case in which the Division Bench of this court was deciding a Jail Appeal i.e. after judgment and conviction during the course of trial. In this decision, after analyzing the evidence on record and various procedural aspects, this court has found violation of relevant mandatory provisions of the NDPS Act. According to me, the ratio of the said case will not be applicable as this court is deciding a bail application where even the trial is yet to commence.

23. In my view, when the limitations and restrictions in granting bail under Section 37 of the NDPS Act was not under consideration, in those earlier cases, as discussed above (Khalek Miah) (supra), (Haralal Majumder) (supra) and (Gautam Datta) (supra) according to me, it cannot be said to be res integra to the decision of the instant bail application in hand. I have also noticed that many relevant and important decisions were not placed before the Hon'ble Judges, at the time of hearing of those bail applications.

24. Situated thus, I may gainfully refer a decision in Superintendent, Narcotic Control Bureau, Chennai vs. R. Paulsamy reported in 2001 SCC (Cri) 648 where the Apex court was deciding a criminal appeal against the release of the accused on bail being found prima facie non-compliance of the provision of section 57 of the Act and further found that "No document shows that such a report has been sent to the immediate official superior within forty eight hours, as contemplated under the said Section". Under challenge, the Apex court has observed as under:

"5. This Court has laid down the parameters to be followed while considering the application for bail moved by accused involved in offences under Narcotic Drugs & Psychotropic Substances Act vide Union of India v. Ram Samujh (1999) 6 JT (SC) 397. It is unnecessary for us to repeat those parameters over again. We have no doubt that learned single Judge has not followed the aforesaid parameters in this case.

6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the public prosecutor unless the Court is satisfied that there

are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned single Judge at the stage of consideration for bail. The minimum which learned single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned single Judge during bail stage regarding the compliance of the formalities mentioned in those two sections.

7. We may also observe that learned single Judge has not recorded a finding in terms of Section 37 of the Act which is sine qua non for granting bail to an accused involved in the offence under the Act.

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9. As we are not able to concur with the rationale adopted by the learned single Judge we have to interfere with the impugned order. Accordingly, we allow this appeal and set aside the impugned order. We are told that respondent has already been put back in jail and therefore no other consequential direction need be passed by us".

25. Now, let me discuss the issue in regard to the consequence of the presence or participation of SDPO or Superintendent of police to conduct the raid in view of the provisions of section 42(1)(2) of the NDPS Act.

26. In Sekhar Suman Verma vs. Superintendent of Narcotics Control Bureau and another reported in (2016) 11 SCC 368, the Apex court referring to its earlier decision in State of Haryana vs. Jarnail Singh reported in (2004)5 SCC 188 has held at para 12 and 13, as under:

"12. The point urged by the learned counsel for the appellant was dealt with by the High Court as under:

"Now, we come to the main area which has detained Shri Jash at length. His argument that there was no compliance of Section 42 of the said Act. This ground has to be discarded at the very outset in view of the latest decision of Supreme Court in State of Haryana Vs. Jarnail Singh and Ors. [2004 SAR (Criminal) 535] wherein Their Lordships had held:

"10. ....Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in M. Prabhulal vs. Directorate of Revenue Intelligence that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this

case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act."

Such being the position the argument of Shri Jash so far as infraction of Section 42 of the said Act is concerned has no merit at all since PW7 was a Gazetted Officer himself and he conducted the raid and also effected the search and seizure from the Appellant.

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13. We are in complete agreement with the aforementioned finding of the High Court as, in our opinion, it is just, legal and proper calling no interference in this appeal. Firstly, the High Court has recorded the finding keeping in view the law laid down by this Court in State of Haryana vs. Jarnail Singh . Secondly, since PW-7 himself was the gazetted officer, it was not necessary for him to ensure compliance of Section 42 as held by this Court in Prabha Shankar Dubey vs. State of M.P. and lastly, so far as compliance of the requirement of Section 50 is concerned, it was found and indeed rightly that the offer to search the appellant was given to him in writing and on his giving consent, he was accordingly searched".

27. Lastly, I am not unmindful of the decision arrived at by the constitutional bench of the Apex court in Karnail Singh (supra) where the Apex court after culminating the decision in Abdul Rashid (supra) and Sajan Abraham (supra) in paragraph 35 has held as under:

"35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 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) But 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. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be 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".

28. Placing reliance on the principle laid down by the Apex Court in Karnail Singh (supra), learned Advocate General has tried to persuade this court that the Apex court in the aforesaid decision wanted to say that even delay in compliance of section 42(2) will be acceptable and it may be cured afterwards by sufficient explanation.

On reading the principle of Karnail Singh (supra), this court makes it clear that, true it is, that delayed compliance with satisfactory explanation is acceptable, but that must not be inordinate delay and it must be within reasonable period having due regard to the object of the stringencies of the provisions of the NDPS Act. Needless to say, the more stringent the law is, needs more caution and transparency to set the law in motion. Ultimately, the principles of fair play and fair ends of justice would come into play.

29. Coming to the facts of the present case, I have perused the case diary. It is found that on the basis of secret information the Investigating Officer along with others raided the house of the accused and in presence of him, dry ganjas having quantity of about 93.900 kgs. were seized and recovered. Before such raid, the Investigating Officer reported the same to his superior officer i.e. the SDPO who himself participated in the said raid leading to seizure and recovery of cannabis. Necessary entries were made in the General Diary and within 24 hours i.e. on 18.05.2018, the Investigating Officer made written communication to the S.P., Unakoti District, Kailasahar about the incident of seizure and recovery of cannabis. There were independent witnesses also.

30. Entering into the chronological events of the case, it is found that one Saikat Dey, S.I. of police received a secret information that one Sudhir Sarkar, the accused person was possessing huge quantity of dry ganja leaves (cannabis Indica) in his house to transport to other place. On receipt of this information, the duty officer of Pecharthal police station, ASI, Satyaranjan Debnath made a GD entry vide Pecharthal GD Entry no. 10 dated 18.05.2018 at 12.41 hours. The matter was informed to the O.C. police station as well as SDPO, Kumarghat. Accordingly, the said official accompanied by the O.C, police station and SDPO, Kumarghat along with other staffs proceeded to the village of the accused along with two independent witnesses and had reached the house of the accused at 1415 hours. The said S.I. informed him that they were going for search operation in the house of the accused person for narcotic drugs and psychotropic substances and conducted the search. During search operation 7 nos. of plastic drums and 3 nos. of plastic gunny bags containing 93.900 kgs. of cannabis leaves were recovered and seized the same after preparing seizure list in presence of the witnesses and thereafter inventories of the seized articles. The articles were accordingly sealed observing all legal formalities and arrested the accused for possessing the illegal drugs for commercial purpose. Accordingly, on the basis of the suo moto complaint of Saikat Dey, the O.C. of the police station registered a specific case on 18.05.2018 at 2014 hours and registered Pecharthal PS case no. 2018 PTL 0011 under section 20(b)(c) of the NDPS Act, 1985.

31. In the instant case, an argument was advanced by Mr. Biswas, learned senior counsel that no written communication was sent to the superior officer of the Investigating Officer in regard to the secret information and the incident of raid. After perusing the case diary, it is found that the SDPO, being the gazetted officer as well as the immediate superior officer has himself participated in the raid, which according to the decision, as referred above, tantamount to compliance of the provision of section 42(2) of the NDPS Act. In the case in hand, according to me at the stage of granting bail, the presence of the SDPO at the time of seizure and recovery of articles and subsequent arrest of the accused, amounts to substantial compliance of section 42(2) of the Act, if not, for argument sake, literal compliance, which is to be examined at the time of trial.

32. On perusal of the case diary, I find that the chronological events described in the facts of the case have been entered into the printed forms of case diary under section 172 of the Cr.P.C. Some of the witnesses during their examination under section 161 Cr.P.C. have stated that the accused person is involved in the business of cannabis. They further have stated that his younger brother, Ashish Sarkar is also involved in the said business. It should be mentioned here that the O.C of the police station made a written communication on the same day i.e. on 18.05.2018 informing that on the basis of secret information S.I. Saikat Dey accompanied by O.C., police station and SDPO, Kumarghat conducted search in the house of Sudhir Sarkar and recovered 93.900 kgs. of cannabis indica leaves (dry ganjas) and the subsequent seizure accordingly.

33. After careful reading paragraph 35 of Karnail Singh (supra), I am of the view that the Apex court keeping pace to the changing scenario of the menace of drug trafficking has diluted the provision of section 42(2) of the NDPS Act, when their Lordships has held that delayed communication with satisfactory explanation will suffice the fulfillment of the requirements of section 42(2). Further, in the case at hand, the SDPO himself has participated in the search and seizure. The SDPO being a Gazetted officer, his presence and participation, without any stretch of doubt, be said to be

compliance of section 42(2) of the NDPS Act.

34. At this stage, Mr. Biswas, learned senior counsel accompanied by many other learned counsels at the bar has drawn the attention of this court that large scale of illegal drug trafficking has engulfed the entire state of Tripura and the involvement of the youth have been alarmingly increasing in drug paddling and smuggling. They have further stated that the state of Tripura has become a gateway of intra and interstate smuggling of drugs being smuggled to different parts of the world through the porous borders of Tripura with the neighboring country, Bangladesh. They have further submitted that the State government is a silent spectator and it encourages the ongoing cultivation of cannabis and trading of other illegal drugs. Recently, a trend has been seen that in many parts of rural areas, the villagers have been engaged in cultivating cannabis at the influence of the leading drugs smugglers and mafias and they are converting their land suitable to the cultivation of cannabis (ganjas) keeping aside their traditional cultivation of growing crops and vegetables. The learned Public Prosecutor also has conceded the present factual scenario as advanced by the learned counsel at the bar, but has strongly said that the State government is not a silent spectator, but they have taken a special drive and are active to curb this social, national and international menace. The State government has already motivated the police officials to be educated properly so that there is no violation of the compliance of any of the statutory provisions, at the same time the State government has asked the police officials not to harass the innocent persons keeping in view the stringency of the relevant provisions of the NDPS Act.

35. This court shares the concern expressed by the learned counsel who are also the officers of the court and had obligation towards the society. As they pointed out the defective investigation conducted in the NDPS Act.

36. In the light of the above, I have given my anxious consideration to the observations made by the larger bench of the Apex court in Prakash Singh and others vs. Union of India and others reported in (2006) 3 SCC (Cri.) 417, wherein the apex court in paragraph 12 has observed as under:

"12. The commitment, devotion and accountability of the police has to be only to the Rule of Law. The supervision and control has to be such that it ensures that the police serves the people without any regard, whatsoever, to the status and position of any person while investigating a crime or taking preventive measures. Its approach has to be service oriented, its role has to be defined so that in appropriate cases, where on account of acts of omission and commission of police, the Rule of Law becomes a casualty, the guilty Police Officers are brought to book and appropriate action taken without any delay".

37. I am not oblivious of the fact that discretionary power has been vested to the court to grant or reject bail. But, according to this court, that discretion also is subject to limitation and not absolute. It is also the duty and obligation of the court while question of exercise of discretionary power relating to a case of this nature arises, it should be guided by law taking into account the object the legislature wanted to achieve and having regard to this, the court must keep pace with the changing society. Recently a Constitution Bench of the Apex court in case of Common Cause vs. Union of



India, reported in (2018) 5 SCC 1, where the Apex court laid down as under:

"The law must take cognizance of the changing society and march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of interpretation by the Court unless the same totally fall outside the constitutional framework or the constitutional interpretation fails to recognize such dynamism".

38. Keeping pace with the aforesaid view and in the light of aforesaid discussions, in my opinion, a distinction has to be made in cases where the legislature made a provision different from section 439 Cr.P.C. The twin tests as enumerated in section 37 of the NDPS Act are to be satisfied by the court while considering the grant or rejection of bail. Failure to satisfy these two conditions, would disentitle the accused to get the privilege of bail. In the case at hand, after considering the materials on record, emanated from the case diary, I am convinced that the present accused has not been able to satisfy these twin tests of section 37 of the NDPS Act.

39. To summarize the different aspects of the case, as discussed above, according to this court the legislature in its wisdom with a clear intention to achieve its object to control and regulate illicit drug trafficking has imposed limitations and restrictions in the provisions of section 37 of the NDPS Act and thereby curtails the scopes of extending the discretionary power of the courts. I am gainfully referring a recent decision of the Apex court in State of Bihar vs. Rajballav Prasad alias Rajballav Prasad Yadav alias Rajbalabh Yadav, reported in (2017) 2 SCC 178 wherein the Apex court referring to the earlier decisions has discussed the issue of maintaining balance between personal liberty and community interest. The Apex court in paragraph 27 has held as follows:

"27. This very aspect of balancing of two interests has again been discussed lucidly in Neeru Yadav v. State of Uttar Pradesh & Anr. Reported in (2014) 16 SCC 508, in the following words:

"16. The issue that is presented before us is whether this Court can annul the order passed by the High Court and curtail the liberty of the second respondent? We are not oblivious of the fact that liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on the human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to the rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an

individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law".

Therefore, no leniency should be shown to those who are found to be involved in the illicit trade of narcotic drugs and psychotropic substances, as it may completely ruin the life of a large body of persons.

40. In this view of the matter, the accused person cannot be allowed to enjoy the privilege of bail. Accordingly, the instant application for bail is rejected being devoid of merit. However, the Investigating Agency is directed to complete the investigation expeditiously and furnish the charge-sheet before the appropriate court.

41. The matter is not ended here. I have taken note of the gravity and precarious situation of the State of Tripura and having regard to the respective deliberations expressing their serious anger in the bar, this court is constrained to direct the Chief Secretary and Director General of Police (for short hereinafter referred to as the DGP), Government of Tripura

(i) To take active steps to destroy the cultivation of grown-up cannabis (ganja) as well as the cultivation of said cannabis and form an appropriate committee comprising of Superintendent of Police of all the Districts of the State of Tripura to take appropriate measures to prevent further cultivation of cannabis in any of the parts of the state of Tripura. The said exercise shall be completed within a period of 6(six) months from the period of passing of this judgment. Further, the officers, as aforesaid, are directed to furnish the report of progress of implementation of this order within 1 st week of every month;

(ii) The Chief Secretary and the DGP will take appropriate measure to train and educate the police officials in regard to the compliance of the procedure established by law, which they should follow at the time of seizure and recovery of the illegal drugs, as mentioned in the NDPS Act, and

(iii) The State government may take the assistance of Tripura Law Training Institute as well as Tripura Judicial Academy for this purpose.

(iv) At the same time, it is also directed that the two top officers of the State should keep a strong vigil so that innocents are not subjected to harassment at the behest of the true culprits.

(v) The State Government is further directed to sensitize the citizens of the State about the object and purpose of the Police Accountability Commission, Government of Tripura and apprise the people in regard to its role and modus operandi.

(v) The State Government may consider implementation of the guidelines as envisaged by the Apex Court in Prakash Singh (supra).

42. Registry is directed to supply a copy of this order to the Chief Secretary and the DGP, Government of Tripura forthwith for due compliance.

JUDGE Saikat