

# Sri Haricharan Biswas vs The State Of Tripura on 18 March, 2019

**Author: Sanjay Karol**

**Bench: Sanjay Karol**

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## HIGH COURT OF TRIPURA AGARTALA

(i) B.A. No.149/2018

Sri Haricharan Biswas, S/o. Sri Narayan Biswas, of Rajnagar,  
Purba Gandhigram, P.O. - Gandhigram, P.S.- Airport, District :  
West Tripura.

.... Applicant on behalf of the accused.

Sri Krishna Kumar, S/o. Sri Sambhu Prasad Gupta, Ward No.11,  
Eknia, P.O. & P.S.- Mansi, Khutia Khagaria, Bihar.

---- Accused(s).

Versus

The State of Tripura

---- Respondent(s).

For Applicant(s) : Mr. Subrata Sarkar, Advocate.  
For Respondent(s) : Mr. A. Roy Barman, Addl. P.P.,  
Mr. Janardhan Bhattacharjee, Advocate.

(ii) B.A. No.10/2019

Smt. Bulti Sarkar(Roy), W/o. Sri Pritam Roy, resident of South  
Kalamchoura, P.S.- Kalamchoura, District : Sepahijala Tripura.

.... Applicant on behalf of the accused

Sri Pritam Roy, S/o. Late Mohan Lal Roy, resident of South  
Kalamchoura, P.S.- Kalamchoura, District : Sepahijala Tripura.

---- Accused(s).

Versus

The State of Tripura

---- Respondent(s).

For Applicant(s) : Mr. Janardhan Bhattacharjee, Advocate.  
For Respondent(s) : Mr. A. Roy Barman, Addl. P.P.

(iii) Criminal Petition No.12/2019

Court on its own motion

Versus

Sri Pritam Roy, S/o. Late Mohan Lal Roy, resident of South  
Kalamchoura, P.S.-Kalamchoura, District:- Sepahijala Tripura.

----- Respondent(s).

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For Court : Ms. Swarupa Chisim, Legal aid counsel.  
For Respondent(s) : Mr. Janardhan Bhattacharjee, Advocate.

HON'BLE THE CHIEF JUSTICE MR. SANJAY KAROL

Date of hearing and judgment : 8th March, 2019.

Whether fit for reporting :  
Yes No  
√

#### JUDGMENT (ORAL)

On 29th September, 2018, based on a secret information, police conducted search and seizure operations and from the dwelling house of accused Tapan Sarkar, recovered 289 Kgs. of dry ganja, concealed in different drums. While the operation was going on, police received further information that the owner of the contraband substance was actually accused Pritam Roy. Resultantly, police apprehended him. Yet same day, another information was received that purchasers of the contraband substance were waiting in a „Maruti car which was parked closely. The said vehicle was searched, in which three persons namely, accused Rajesh Dey, Krishna Kumar and Panchal Ahmed were found to be sitting. They were all arrested in the early hours of 30th September, 2018.

2. As such, crime report dated 29th September, 2018 was lodged at Police Station Kalamchoura under the provisions of Section 8/20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) against Page - 3 of 60 all the accused persons. Further investigation revealed complicity of certain other persons, for police found the arrested persons to be carrying on the illegal activity of sale of the contraband substance in an organized manner, which operations had been going on over a considerable period of time. In fact, accused Pritam Roy, Rajesh Dey, Krishna Kumar and Panchal Ahmed confessed their respective, each others and other persons involvement in the crime. Tapan Sarkar was arrested on 27th April, 2018 who also confessed the owner to be Pritam Roy on whose behalf he had stored, fully knowing the goods to be contraband substance and all the other accused having carried out such illegal activities in an organized manner. Well, this is the prosecution story.

3. At this juncture, it be observed that challan has yet not been filed, for it is pending consideration

sanction, before the appropriate authority.

4. This Court is dealing with 3(three) petitions namely, (i) Bail Application No.149/2018 titled as Haricharan Biswas on behalf of accused Krishna Kumar v. The State of Tripura;

(ii) Bail Application No.10/2019 titled as Bulti Sarkar (Roy) on behalf of accused Pritam Roy v. The State of Tripura and

(iii) Criminal Petition No.12/2019 titled as Court on its own motion v. Pritam Roy.

Page - 4 of 60 A BRIEF BACKGROUND TO THE FILING/REGISTRATION OF THE INSTANT APPLICATIONS/PETITION:

5. On 5th September, 2018, Krishna Kumar filed Bail Application No.149/2018 seeking grant of bail under Section 439 of the Code of Criminal Procedure. Along with the said application, he annexed copy of order dated 12th December, 2018 passed by the trial Judge granting interim bail to accused Pritam Roy. Since the bail was sought on parity, on 19th December, 2018 this Court, in the said petition, directed the State to ascertain as to whether the said order dated 12th October, 2018 had attained finality or not.

6. There being no response on behalf of the State, this Court on 10th January, 2019, passed the following order:-

"10/01/2019.

On 29.09.2018, FIR No.2018KLC065 stood registered at Police Station Kalamchoura under the provisions of the NDPS Act.

Allegedly huge quantity of contraband substance, to be precise 289 K.G. of dry ganja was recovered from the conscious possession of five persons including Krishna Kumar (on whose behalf the present application for bail stands filed by Haricharan Biswas) and Pritam Roy, Son of Late Mohanlal Roy of Kapali para, South Kalamcharra, Police Station KLC.

In the case pertaining to the said F.I.R., learned counsel invites attention of this Court to the order dated 12.10.2018, Annexure-C (Page-20) passed by the Special Judge, NDPS Act, 1985, Sepahijala District, Sonamura, Tripura [Case No.2018KLC065 (NDPS)] .

The said order reads as under:-

"Case record is put up today in pursuance of a put up petition by Mr. P.K. Deb, Ld. Defence Advocate.

Page - 5 of 60 A petition is annexed with an application filed under Section 37 of NDPS Act read with Section 439 of Cr.P.C. with a prayer to grant bail to one of the accused namely Pritam Roy on the ground of illness of his widow mother aged about 70 years and his minor child. Both of whom suffering from various ailments.

Photocopies of some prescriptions and pathological test report are also submitted.

Keep it with the case record.

Mr. M.K. Saha, Ld. Special P.P. present. Moving the application Ld. Defence counsel prayed to release the accused on bail on humanitarian ground so that he can take care of his mother and child as there is no other male member in the family to look after them.

Ld. Special P.P prayed to pass necessary order.

Heard and considered.

Considering the humanitarian ground only the instant application is allowed.

Accordingly, the accused Pritam Roy shall be released on ad-interim bail till next date on furnishing a bail bond of Rs.75,000/- (Rupees seventy five thousand) supported with two sureties of like amount both of whom must be the ordinary residents of Sonamura Sub-Division and with the condition that the accused shall not hamper the investigation of the case in any manner and shall also produce on the next date the documents relating to the treatment of his mother and minor child during the period of bail.

In default to J/C till as before.

To date fixed (18.10.2018)."

(emphasis supplied) Seeking support and strength of the said order, through the present application, release of co-accused Krishna Kumar, Son of Sri Sambhu Prasad Gupta is sought by the present applicant.

In the present bail application, on 19.12.2018, this Court had passed the following order:-

Page - 6 of 60 "State to ascertain as to whether order dated 12.10.2018 passed by learned Special Judge, Sepahijala District, Sonamura in case No.2018KLC065(NDPS), titled as State of Tripura vs. Sri Tapan Sarkar & others, (page-20, Annexure-C to the bail application) has attained finality or not.

List the matter on 04.01.2019."

Today learned Public Prosecutor has placed on record photocopies of certain orders passed by the trial Court.

One such order dated 14.12.2018, prima facie, reflects self-contradiction with regard to the status of grant of bail of Pritam Roy. The said order reads as under:-

"Today the case is fixed for production of a/ps/report by I/O. Accused persons Fychal Ahammed @ Pintu, Rajesh Dey and Krishna Kumar produced from J/C. Another a/p namely Pritam Roy on ad-interim bail present.

Received a report from the I/O vide dispatch No.18235 dated 14.12.2018 stating that investigation of the case is in progress and also submitting an objection regarding bail of the custody a/ps.

Another application vide dispatch No.17759 dated 07.12.2018 is also received with a prayer to allow drawing of representative sample and certification of correctness of inventory of seized contraband in presence of a Magistrate.

Mr. P.K. Deb, Ld. Defence Advocate present for all the a/ps and an application bearing No.1376(12)/18 dated 14.12.2018 prayed to extend the ad-interim bail of a/p namely Pritam Roy and to release the other a/ps on bail on any condition.

Photocopy of some medical prescriptions also submitted.

Keep the abovestated documents with the case record.

Mr. M.K. Saha, Ld. Special P.P present and raised strong objection to the bail applications of custody a/ps but did not raise any objection Page - 7 of 60 regarding extension of ad-interim bail of the a/p namely Pritam Roy.

At the same time, Ld. Special P.P prayed to allow the application of the I/O regarding drawing of representative samples.

Considered.

In view of the nature and gravity of the offence, the bail applications stand rejected. However, ad-interim bail of the a/p namely Pritam Roy is extended till 10.01.2019 with the conditions remain intact.

The application for drawing of representative samples also stands allowed.

Ld. J.M. 1st Class, Court No.2 is requested to do the needful.

Place the case record before her immediately. The accused persons namely Fychal Ahammed @ Pintu, Rajesh Dey and Krishna Kumar are remanded to J/C till next date.

I/O is directed to expedite the investigation and submit a report on the next date.

Inform accordingly.

To 24.12.2018 for production of a/ps/report by I/O."

(emphasis supplied) During the course of hearing, the Court had directed presence of DGP, Tripura.

When the matter was taken up at 2.00 p.m., this Court requested the learned Advocate General to assist in the matter.

Under instructions from the DGP, a statement with regard to the status of the cases under the provision of the NDPS Act and release of the accused persons only for the year 2018 was furnished. The same reads as under :-

Page - 8 of 60 Statement on NDPS Cases for the year 2018 No. of charge sheet/final form submitted within 90 Cases pending for investigation beyond 90 days Cases pending for investigation within 90 days No. of persons arrested from outside the state Quantity of drugs seized No. of persons arrested from inside the state No. of charge sheet submitted after 90 days No. of persons arrested No. of persons on bail No. of cases regd.

District/unit

North	70	138
Unakoti	11	29
Dhalai	41	95
Khowai	21	32
West	71	122

Sepahij ala	152	168	103
Gomati	9	16	
South	43	40	
GRP	15	20	
Seizure U/S	-	-	
Cr.PC. Total	433	660	435

Perusal thereof reveals a shocking state of affairs with regard to the manner in which investigation is being carried out by the agencies. Also it reveals that out of 660 persons arrested in connection with the crime relating to psychotropic substance, 435 persons stand enlarged on bail.

What are the reasons for grant of bail; is it what is commonly termed as a default bail; is it that the Public Prosecutor conceded to the grant of bail; is it that the Public Prosecutors did not oppose the same; is it that the Courts have passed the orders without following the settled principles of law; or is it that innocent stand falsely implicated. If so, then why no action, in accordance with law, stands taken against the erring persons by the authorities.

Significantly, perusal of the records of the instant case, reveals that for the period 19.11.2018 to 13.12.2018 there was no specific order of grant of interim bail. Yet no steps were taken by the police to take into custody the said accused Pritam Roy Page - 9 of 60 from whom, allegedly more than 289 kgs of dry ganja was recovered. Is it the case of police that his custody was not required.

Before any further orders are passed in the present petition, this Court is desirous of perusing the records of the trial Court in proceedings arising out of FIR No.2018KLC065 dated 29.09.2018 registered at Police Station Kalamchoura.

It be called for through a special messenger. Also the DGP is directed to place on record in a tabulated form, information with respect to all the cases pertaining to NDPS registered in the year 2018. The information has to be specific, in detail and individually indicating the number of the case; number of persons arrested in connection thereto; date of their arrest; date on which interim

or final order of bail was granted; reason for grant of bail; whether interim order has attained finality; and as to whether any proceedings assailing the same stands initiated and/or is sought to be filed; the reason for not completing the investigation or not presenting the challan within the stipulated period etc. etc. Two weeks granted for such purpose.

In the meanwhile, it shall be open for the State to take appropriate action with regard to the order of grant of bail of co- accused Pritam Roy.

Learned Advocate General states that the judgment rendered by this Court in B.A. No.58 of 2018 titled as Sri Ashish Sarkar on behalf of the accused Sri Sudhir Sarkar Vs. The State of Tripura dated 23.07.2018 shall be made available to all the Public Prosecutors. In any case, Registrar General is directed to forthwith intimate all the Judicial Officers dealing with the cases of NDPS of the State of the factum of passing of the said judgment. This he shall positively do by electronics mode latest by tomorrow (12.01.2019). Compliance report be filed by the Registry.

All actions must be completed within two weeks. List the matter on 29.01.2019."

7. Further on 29th January, 2019 this Court issued notice to accused Pritam Roy, in whose favour bail stood granted by the learned trial Judge, to show-cause as to why order granting bail be not cancelled, as such it led to passing of an order dated 22nd Page - 10 of 60 February, 2019 whereby petition No.(iii) (Criminal Petition No.12/2019) stands registered.

8. When both these petitions [petition No.(i) & petition No.(iii)] were taken up for hearing, on 6th March, 2019, the Court was informed that the trial Court had cancelled the order granting bail. Resultantly, record of the Court below was called for. As a consequence of such order, accused Pritam Roy has now filed a fresh bail application before this Court, which is referred to as petition No.(ii) herein.

9. Mr. Subrata Sarkar, learned counsel for the accused Krishna Kumar, in support of bail application being application No.(i), submits that; (a) no recovery stands effected from the bail applicant; (b) nothing incriminating stands recovered from any one of the accused, linking the bail applicant with the crime or the criminals; (c) purported and alleged admissions/confessions are inadmissible in evidence and (d) the bail applicant is a victim of an altercation which took place with the police, resulting into false implication and as such bail must be granted to the accused.

10. Opposing the petition(iii), Mr. Janardhan Bhattacharjee, learned counsel appearing for accused Pritam Roy, argues that action of the Court in calling upon the accused to show-cause as to why order of bail be not quashed, is without jurisdiction. Additionally, in support of the bail application, it is argued that;

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(a) no recovery stands effected from the said accused; (b) nothing incriminating stands recovered from any one of the accused, linking the bail applicant with the crime or the criminals and (c)



purported and alleged admissions/confessions are inadmissible in evidence.

11. In opposition, Mr. Amitabha Roy Barman, learned Additional Public Prosecutor, has made the following submissions:

(a) That, the accused are involved in a heinous crime;

(b) Investigation reveals complicity of each one of the accused in the crime all of whom are carrying on the illicit trade of psychotropic substances, continuously over a period of time.

12. The law with regard to grant of bail is now well settled. This Court in its order dated 10th January, 2019 passed in Krishna Kumar(supra) has taken note of the prevalent situation, being extremely alarming, with regard to production, trafficking and use of contraband substance within the State of Tripura. A chart in a tabulated form indicating the number of cases registered; the quantity of the contraband substance recovered and the number of people to whom bail stands granted for various reasons and, more so on account of what is commonly termed as "default bail"

stands noticed which is reproduced as under:

Page - 12 of 60 Statement on NDPS Cases for the year 2018 No. of charge sheet/final form submitted within 90 Cases pending for investigation beyond 90 days Cases pending for investigation within 90 days No. of persons arrested from outside the state Quantity of drugs seized No. of persons arrested from inside the state No. of charge sheet submitted after 90 days No. of persons arrested No. of persons on bail No. of cases regd.

District/unit

North	70	138
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Sepahij ala	152	168
Gomati	9	16
South	43	40
GRP	15	20
Seizure U/S	-	-
Cr.PC. Total	433	660
Total number of cases registered		
Number of cases in which arrests have been made		
Name of Districts		
North	70	64
Unakoti	11	09
Dhalai	41	39
Khowai	21	14
West	71	57
Sepahijala	152	124
Gomati	9	09
South	43	35
GRP	15	09
Total	433	360

13. The Court now proceeds to discuss the various issues which arise for consideration, based on the submissions made and the judgments cited across the

Bar not only by the advocates representing the parties but also other learned members of the Bar, who were called upon to address. The Court has also done its Page - 13 of 60 own research. Each one of the judgments cited stands dealt with.

This was so done since, day in and day out question of grant of bail under the provisions of the Act arises for consideration and that too, despite the law being fully settled. The reason for doing so was only when the Court found not only in this case, but also in another case, subject matter of bail application being B.A. No.147/2018, titled as Smt. Rinku Das on behalf of accused Gobinda Das v. The State of Tripura, that the Courts dealing with the bail applications were passing orders dehors the settled principles of law, in fact, in utter violation of the provisions thereof. Section 37 of the Act imposes restriction on the right of the accused to seek bail. Finding the trial Courts not to have followed the same, the Court was constrained to issue notice to the accused.

14. In the instant case, record of the trial Court reveals that on 5th October, 2018 bail application filed by accused Pritam Roy was summarily rejected by recording a single sentence that "Perused the interrogation reports which reveal incriminating materials against all the accused persons. Accordingly, the bail applications stand rejected." However, on 12th October, 2018 the very same accused was granted ad-interim bail which order already stands reproduced (supra/Para 6). On 18th October, 2018 the said order was extended up to 19th November, 2018. However, prior thereto, on 31st October, 2018 when the matter was taken up by the Court, though the Public Prosecutor opposed the bail, yet the Court simply adjourned the matter. Again on 19th Page - 14 of 60 November, 2018, when the matter came up before Court, the Public Prosecutor opposed the application for the reason that the said accused had been extending threats to some of the witnesses. But however, the Court extended the bail till the next date, i.e. 28th November, 2018 by issuing a warning that "considered and the prayer of the I/O stands rejected. However, the accused Pritam Roy is warned of any such activity on his part." On 1st December, 2018, the next date fixed for consideration of the application for grant of bail, the Court, as the order sheet reveals, directed the said accused to be remanded to judicial custody but it appears that either there is a typographical error or the order was not executed for accused Pritam Roy continued to be out till 7th December, 2018 when on the ground of illness of his mother and daughter, he was again directed to be "released on bail" and that too "on the strength of previous bail bond". Record further reveals that on 14th December, 2018 and 10th January, 2019 when the matter came up before the Court, the Public Prosecutor did not oppose the bail application and the Court extended the bail up to 10th January, 2019 and 25th February, 2019 respectively. It is only when this Court issued notice, did the Public Prosecutor oppose the bail application before the trial Court and on 25th February, 2019, the bail order was cancelled on the ground that accused Pritam Roy had extended threats and was hampering investigation.

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15. What is shocking is that in none of the orders, be it grant of ad-interim bail or extension thereof, did the Court ever consider the factors relevant for grant of bail as envisaged under the Act. It does not even refer to the provisions of Section 37 of the Act, much less record its satisfaction with regard there to. In fact, even the basic ingredients for deciding the application of bail, any which way, were

referred to or discussed. In a most cryptic and unreasoned manner, orders rejecting/granting bail stands passed or extended from time to time. Also the Public Prosecutor failed to invite attention of the relevant provisions of the statute. In fact, State did not oppose the bail on two occasions. Can an illness of a mother or a child in a case of this nature, alone, be a ground for grant of bail? Certainly not. It is in this backdrop, the Court proceeds to discuss the law laid down by the Apex Court as also this Court in considering the applications for grant of bail. RIGHTS & LIBERTY OF UNDER TRIAL/ACCUSED AND INTEREST OF SOCIETY:

16. The Apex Court in *State of Bihar v. Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav*, (2017) 2 SCC 178 (2 Judge Bench), has elaborately discussed the rights and liberty of the under trial, when weighed with the interest of the society and fair trial of the case. By relying upon its earlier decisions rendered in *Masroor v. State of Uttar Pradesh & Anr.*, (2009) 14 SCC 286 (2 Judge Bench) and *Neeru Yadav v. State of Uttar Pradesh & Anr.*, (2014) 16 SCC 508 (2 Page - 16 of 60 Judge Bench), the Court clarified that there is no doubt about the liberty of an individual, which is very precious, to be zealously protected by the courts, but nonetheless, "such a protection cannot be absolute in every situation" for "the valuable right of liberty of an individual and the interest of the society in general has to be balanced" and that "liberty of a person accused of an offence would depend upon the exigencies of the case". Further "liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution." The Court further clarified that the sanctity of liberty is the fulcrum of any civilized society. It is a cardinal rule on which the civilization rests. It cannot be allowed to be paralyzed and immobilized. A democratic body polity which is wedded to the rule of law, anxiously guards such liberty. Further, "a pregnant and significant one, the liberty of an individual is not absolute" for "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 the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society, for 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 Page - 17 of 60 individual can make an attempt to create a concavity in the stem of social stream. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow."

17. The Apex Court in *Noor Aga v. The State of Punjab and Anr.*, (2008) 16 SCC 417 (2 Judge Bench), has held that right of fair trial is the constitutional mandate of Art.21. Further, presumption of innocence of an accused is a human right concept and not a fundamental right guaranteed under Art.21.

18. However, all rights are subjected to constitutional safeguards, restriction and limitation, which the Apex Court in *Ash Mohammad v. Shiv Raj Singh alias Lallababu and Anr.*, (2012) 9 SCC 446 has explained in the following terms:

"17. We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasize, the sacrosanctity of liberty is paramount in a civilized society. However, in a democratic body polity which is wedded to Rule of Law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others rights. It is a well accepted Page - 18 of 60 principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialized. The life of an individual living in a society governed by Rule of Law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".

18. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilized milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organized society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquility and safety which every well-meaning person desires. Not for nothing J. Oerter stated:

"Personal liberty is the right to act without interference within the limits of the law."

19. Thus analyzed, it is clear that though liberty is a greatly cherished value in the life of an individual, Page - 19 of 60 it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act."

#### MENACE OF DRUGS :

19. The Apex Court in Union of India v. Ram Samujh and Anr.,(1999) 9 SCC 429 (2 Judge Bench), has reiterated its concern of the organized activities of the underworld and the clandestine smuggling of the narcotic drugs and psychotropic substances in India and illegal trafficking of such substances and the drug addiction amongst the sizeable section of the public, particularly the adolescents and students of both the

sexes, having assumed menace of an alarming proportion.

20. Prior thereto, in *Durand Didier v. Chief Secretary, Union Territory of Goa*, (1990) 1 SCC 95 (2 Judge Bench), the Court had stated the reasons for imposition of mandatory minimum life imprisonment and fine with respect to certain category of cases of psychotropic substance. This was so done in order to effectively control and eradicate the "proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole".

21. Further in *Bachpan Bachao Andolan v. Union of India and Ors.*, (2017) 1 SCC 653 observed that "the importance of adopting a holistic solution to deal with issues pertaining Page - 20 of 60 to alcohol, tobacco and drug abuse in the school curriculum has to be adequately emphasized. We are of the view that since the entire issue is pending consideration before the Government, it would be appropriate to await the ultimate formulation. However, we may indicate that rather than resting on an "implied inclusion" of such an important subject within an extant head or topic, it would be appropriate if the competent authorities consider how children should be protected from the dangers of substance abuse. These are matters which should not be brushed under the carpet. The authorities should consider how children should be sensitised (having due regard to the age and stage of the child) of the dangers of drug use, the necessity to report drug use and the need to develop resistance to prevailing peer and social pressures."

#### NEGATION OF BAIL IS RULE AND ITS GRANT AN EXCEPTION :

22. The Apex Court in *State of Madhya Pradesh v.*

*Kajad*, (2001) 7 SCC 673 (2 Judge Bench), the Court while taking note of Section 37 of the Act held that "negation of bail is the rule and its grant an exception under Section 37 of the Act and for granting the bail the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail".

23. The position stands reiterated in *Sami Ullaha v. Superintendent, Narcotic Central Bureau*, (2008) 16 SCC Page - 21 of 60 471 (2 Judge Bench) and *Union of India v. Rattan Mallik alias Habul*, (2009) 2 SCC 624 (2 Judge Bench) wherein the Apex Court further clarified that when a prosecution/conviction is for an offence under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, such provisions cannot be ignored while dealing with such an application and observed that :

"9. The broad principles which should weigh with the Court in granting bail in a non-bailable offence have been enumerated in a catena of decisions of this Court and, therefore, for the sake of brevity, we do not propose to reiterate the same. However, when a prosecution/conviction is for offence(s) under a special statute and that

statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, these provisions cannot be ignored while dealing with such an application."

#### IN GRANT OF BAIL NDPS TO PREVAIL OVER CRPC. :

##### 24. The Apex Court in Narcotics Control Bureau v.

Kishan Lal and Ors., (1991) 1 SCC 705(2 Judge Bench) has held that the powers of the High Court in granting bail under Section 439 Cr.P.C are subject to the limitations contained under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 and that the provisions of the Code of Criminal Procedure are excluded to the extent of conflict and the reason as stands noticed in Ram Samujh (supra) is to check the menace of dangerous drugs flooding the market. The Court while interfering Page - 22 of 60 with the order of grant of bail passed by the High Court observed as under:

"8. .... The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended."

The interplay between procedural code i.e. Cr.P.C and a special statute i.e. NDPS Act came up for consideration before Apex Court in Union of India v. Thamisharasi and Ors., (1995) 4 SCC 190 (2 Judge Bench), wherein the Court categorically held Section 37 of the Act, to the extent it is inconsistent with the provisions of Section 437 of the Code of Criminal Procedure, to supersede the corresponding provisions in the Code imposing limitations on the right of grant of bail in addition to the limitations provided under the Code. NECESSARY COMPLIANCE OF SECTION 37 OF THE NDPS ACT :

25. This Court in Case No.BA No.147/2018 titled as Rinku Das on behalf of Gobinda Das v. State of Tripura has already reiterated the settled principles of law and the need to comply with the same in the following terms:

Page - 23 of 60 "3. The principle for grant of bail under the Act stands fully settled. Starting from Narcotics Control Bureau Vs. Kishan Lal and Ors., (1991) 1 SCC 705; Union of India vs. Ram Samujh and another, (1999) 9 SCC 429; Collector of Customs, New Delhi vs. Ahmadalieva Nodira reported in (2004) 3 SCC 549;

Sami Ullaha vs. Narcotic Central Bureau, (2008) 16 SCC 471; Union of India vs. Rattan Mallik alias Habul, (2009) 2 SCC 624 and most recently in Satpal Singh Vs. State of Punjab, (2018) 13 SCC 813 the Apex Court observed as under :

"3. Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under Cr.P.C or any other law in force on the grant of bail. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court."

(emphasis supplied).

4. Even this Court vide judgment dated 23rd July, 2018, in BA No.58/2018 titled as Sri Asis Sarkar on behalf of accused Sri Sudhir Sarkar Vs. Page - 24 of 60 The State of Tripura has reiterated strict adherence of such provisions and principles. In fact, it took note of the precarious situation prevalent with regard to illegal cultivation, production, trafficking and use of the contraband substance within the State of Tripura. The entire State appears to be engulfed in the cultivation of cannabis with the help of drug smugglers and mafias. Now fertile agricultural land appears to be used for cultivating ganja a psychotropic substance."

The twin conditions laid down in Section 37 of the Act are cumulative and not in the alternative, Collector of Customs, New Delhi v. Ahmadalieva Nodira, (2004) 3 SCC 549 (3 Judge Bench).

REASONABLE GROUNDS :

26. What is the meaning of the words "reasonable grounds"

stands explained by Apex Court in Rattan Mallik (supra); Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798 (2 Judge Bench); Narcotics Control Bureau v. Dilip Prahlad Namade, (2004) 3 SCC 619 (2 Judge Bench) and Union of India and Anr. v. Sanjeev V. Deshpande, (2014) 13 SCC 1 (3 Judge Bench).

27. The expression "reasonable grounds" contained in Section 37 has been explained to mean something more than prima facie ground. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. Also the word "reasonable" signifies in accordance with reason and Page - 25 of 60 that it would be only in the ultimate analyses being a question of fact whether a particular Act is reasonable or not would be dependent on the given facts and circumstances. NON-COMPLIANCE OF MANDATORY PROVISIONS OF THE ACT, WHETHER BAIL OR NOT :



(a) SECTION 42 :

28. The Apex Court in (2004) 12 SCC 266, Saria Banu(A) Janarthani v. State Through Inspector of Police, (2 Judge Bench) took a view that while considering the bail applications it was open for the Court to see as to whether there was violation of the mandatory provisions of Section 42 of the Act or not. In fact, the Court held that compliance of Section 42 is mandatory and that is a relevant fact which would engage attention of the Court in granting bail. The ratio stands considered by this Court in Khalek Miah v. State of Tripura,(2016) 1 TLR

617. However, there is a subsequent view taken by this Court in BA No.58/2018 titled as Sri Asis Sarkar on behalf of accused Sri Sudhir Sarkar Vs. The State of Tripura,(2018) TLR 483, in the following terms.

Relevant paragraphs are extracted herein below:

"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 Page - 26 of 60 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 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 Page - 27 of 60 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 Page 22 of 27 any stretch of doubt, be said to be compliance of section 42(2) of the NDPS Act".

29. Well, I am inclined to accept the later view of this Court more so, in view of the principle as laid down by the Apex Court in *Darshan Singh v. State of Haryana*, (2016) 14 SCC 358 (2 Judge Bench), wherein after relying upon the principle laid down in *Karnail Singh v. State of Haryana*, (2009) 8 SCC 539 (Constitution Bench) the Court clarified the distinction between sub-section (1) and sub-section (2) of Section 42 of the Act, holding only absolute non-compliance of the provisions of Sub- Section 1 of Section 42 to be fatal, being mandatory in nature. As such, each case has to be considered on the basis of the material produced on record by the investigating agency/prosecution.

This Court only reiterates as to what in *Karnail Singh* (supra) has held:

"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 Page - 28 of 60 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 Page - 29 of 60 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."

(emphasis supplied) Also, similar view was taken by this Court in Goutam Datta v. State of Tripura, (2017) 1 TLR 90.

30. Further, the Apex Court in SK. Raju alias Abdul Haque alias Jagga v. State of West Bengal, (2018) 9 SCC 708 (3 Judge Bench) clarified that the recovery of a contraband substance from the bag carried by the accused from a public place including public convenience, would not fall within the scope of sub-section (1) of Section 42 but Section 43 of the Act.

(b) SECTIONS 52 & 57 :

31. The Apex Court in Superintendent, Narcotics Control Bureau, Chennai v. R. Paulsamy, (2001) SCC (Cri.) Page - 30 of 60 648 (2 Judge Bench) interfered with the order, granting bail, which was passed accounting for the matters which could be established only during trial and compliance or otherwise of provisions of Sections 52 and 57 would result into the matter being pre-judged at the stage of consideration for bail.

(c) SECTION 50 :

32. Compliance of Section 50 of the Act has been held by the Constitution Bench of the Apex Court in State of Punjab v.

Baldev Singh, (1999) 6 SCC 172 (Constitution Bench) to be mandatory. Similar view was taken by the Constitution Bench of the Apex Court in Vijaysingh Chandubha Jadeja v State of Gujarat, (2011) 1 SCC 609 (Constitution Bench). [Also Arif Khan alias Agha Khan v. State of Uttarakhand, AIR 2018 SC 2123 (2 Judge Bench)].

(d) SAMPLE NOT SENT IN 72 HOURS - FATAL :

33. The Apex Court in Mohan Lal v. State of Punjab, (2019) Cri.L.J 420 (3 Judge Bench), has held non-compliance of the provisions of Section 55 of the Act to be fatal. The officer had failed to send the samples for analysis to the laboratory within 72 hours. The observation was made relying upon earlier view taken by the Court in Noor Aga (supra), wherein the Court had stated that the guidelines/Standing Orders cannot be allowed to be flouted blatantly and that there has to be substantial compliance to maintain sanctity of physical evidence.

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(e) WHETHER A POLICE OFFICER CAN BE SAID TO BE A PERSON EMPOWERED UNDER NDPS ACT OR NOT :

34. The question as to whether a police officer can be said to be a person empowered under the NDPS Act, stands referred to a larger Bench in Tofan Singh v. State of Tamil Nadu, (2013) 16 SCC 31 (2 Judge Bench).

SUCCESSIVE BAIL APPLICATION NOT PERMISSIBLE UNLESS CHANGE IN CIRCUMSTANCE :

35. The next issue which arises for consideration is, as to whether a bail applicant can file successive bail applications or not. The Apex Court in Kajad (supra) has held it to be not so, unless there is a change in circumstance.

POSSESSION :

36. The Apex Court in Mohan Lal v. State of Rajasthan, (2015) 6 SCC 222 (2 Judge Bench), has squarely dealt with the meaning of the expression "possession" to include both corpus and animus which are necessary in law. This was in reference to the NDPS Act and the Court clarified as under :

"21. From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent Page - 32 of 60 which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others.

22. In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the said narcotic substance was not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public space. In the second category of cases, the person would be in possession because he has the necessary animus and the intention to retain control and dominion. As the factual matrix would exposit, the accused-appellant was in possession of the prohibited or contraband substance which was an offence when the NDPS Act came into force. Hence, he remained in possession of the prohibited substance and as such offence under Section 18 of the NDPS Act is made out. The possessory right would continue unless there is something to show that he had been divested of it. On the contrary, as we find, he led to discovery of the substance which was within his special knowledge, and, therefore, there can be no Page - 33 of 60 scintilla of doubt that he was in possession of the contraband article when the NDPS Act came into force. To clarify the situation, we may give an example. A person had stored 100 bags of opium prior to the NDPS Act coming into force and after coming into force, the recovery of the possessed article takes place. Certainly, on the date of recovery, he is in possession of the contraband article and possession itself is an offence. In such a situation, the accused-appellant cannot take the plea that he had committed an offence under Section 9 of the Opium Act and not under Section 18 of the NDPS Act."

#### ANTICIPATORY BAIL - REGULAR BAIL/PARITY BAIL :

37. There cannot be any parity in a grant of bail. It is also a settled principle of law that merely because an accused is under protection of an order granting anticipatory bail, under Section 438 Cr.P.C., would not mean that he is automatically entitled to regular bail under Section 439 Cr.P.C. for as has been held by the Apex Court in *Satpal Singh v. State of Punjab*, (2018) 13 SCC 813 (3 Judge Bench), the satisfaction of the Court for granting protection under Section 438 Cr.P.C. is different from the one under Section 439 Cr.P.C. while considering a regular bail. The Court held as under :

"13. In any case, the protection under Section 438, Cr.P.C. is available to the accused only till the court summons the accused based on the charge sheet report under Section 173(2), Cr.P.C.). On such appearance, the accused has to seek regular bail under Section 439 Cr.P.C. and that application has to be considered by the court on its own merits.

Page - 34 of 60 Merely because an accused was under the protection of anticipatory bail granted under Section 438 Cr.P.C. that does not mean that he is automatically entitled to regular bail under Section 439 Cr.P.C. The satisfaction of the court for

granting protection under Section 438 Cr.P.C. is different from the one under Section 439 Cr.P.C. while considering regular bail."

#### DELAYED TRIAL IN NDPS ACT - BAIL:

38. In *Thana Singh v. Central Bureau of Narcotics*, (2013) 2 SCC 603 (2 Judge Bench), the Court, while considering the application for grant of bail of an accused, who had spent more than 12 years in custody, granted bail only for the reason that there was inordinate delay in the conduct of trial. The Court found that the period of deprivation pending trial becomes unduly long, the fairness assured by Art.21 of the Constitution of India would be received as a joke. Also the accused had suffered imprisonment half of the maximum punishment provided under the offence for which he was charged to face trial.

#### BENEFIT OF JUDGMENT OF ACQUITTAL TO CO-ACCUSED WOULD ENURE TO ALL THE ACCUSED :

39. In *Md. Sajjad alias Raju alias Salim v. State of West Bengal*, (2017) 11 SCC 150 (2 Judge Bench), the Apex Court held that where the judgment of acquittal is based on no case proved by the prosecution, then only the benefit would enure to all the accused.

#### Page - 35 of 60 CO-ACCUSED STATEMENT IS NOT ADMISSIBLE :

40. The statement of a co-accused is not an evidence is all that the Apex Court has held in *Surinder Kumar Khanna v.*

*Intelligence Officer, Directorate of Revenue Intelligence*, (2018) 8 SCC 271 (2 Judge Bench) but then this principle has to be applied at the end of the trial and not at the stage of grant of bail when investigation is not complete.

#### LIBERAL VIEW IN CONSTRUING THE MANDATORY PROVISIONS OF THE ACT.

41. Though not challenged but it is contended that in view of the law laid down by the Apex Court in *Nikesh Tarachand Shah v. Union of India and Anr.*, (2018) 11 SCC 1, (2 Judge Bench) this Court should be liberal in construing the mandatory provisions of Section 37 of the Act.

42. There is a fallacy in the submission, for before the Apex Court the relevant provisions of the Prevention of Money- Laundering Act, 2002 where under considerations which were held to be ultra vires the Constitution of India. Significantly, the Apex Court took note of the provisions of the NDPS Act and found there to be reasonable nexus with the object sought to be achieved and a classification having been carved out dealing with different situations, thus, making the provisions to be totally within the Constitutional scheme of being non-arbitrary, including the principle of manifest arbitrariness.

Page - 36 of 60 The relevant paragraphs are extracted herein below:

"39. When we come to paragraph 2 of Part A of the Schedule, this becomes even more apparent. Sections 19, 24, 27-A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 are all sections which deal with narcotic drugs and psychotropic substances where a person is found with, what is defined as, "commercial quantity" of such substances. In each of these cases, under Section 37 of the NDPS Act, a person prosecuted for these offences has to meet the same twin conditions which are contained in Section 45 of the 2002 Act. Inasmuch as these Sections attract the twin conditions under the NDPS Act in any case, it was wholly unnecessary to include them again in paragraph 2 of Part A of the Schedule, for when a person is prosecuted for an offence under Sections 19, 24, 27A or 29 of the NDPS Act, together with an offence under Section 4 of the 2002 Act, Section 37 of the NDPS Act would, in any case, be attracted when such person is seeking bail for offences committed under the 2002 Act and the NDPS Act.

40. Also, the classification contained within the NDPS Act is completely done away with. Unequals are dealt with as if they are now equals. The offences under the NDPS Act are classified on the basis of the quantity of narcotic drugs and psychotropic substances that the accused is found with, which are categorized as: (1) a small quantity, as defined; (2) a quantity which is above small quantity, but below commercial quantity, as defined; and (3) above commercial quantity, as defined. The sentences of these offences vary from 1 year for a person found with small quantity, to 10 years for a person found with something between small and commercial quantity, and a minimum of Page - 37 of 60 10 years upto 20 years when a person is found with commercial quantity. The twin conditions specified in Section 37 of the NDPS Act get attracted when bail is asked for only insofar as persons who have commercial quantities with them are concerned. A person found with a small quantity or with a quantity above small quantity, but below commercial quantity, punishable with a one year sentence or a 10 year sentence respectively, can apply for bail under Section 439 of the Code of Criminal Procedure without satisfying the same twin conditions as are contained in Section 45 of the 2002 Act, under Section 37 of the NDPS Act. By assimilating all these three contraventions and bracketing them together, the 2002 Act treats as equal offences which are treated as unequal by the NDPS Act itself, when it comes to imposition of the further twin conditions for grant of bail. This is yet another manifestly arbitrary and discriminatory feature of the application of Section 45."

**DEFAULT BAIL "RIGHT WHICH ENURES IS REQUIRED TO BE EXERCISED".**

43. It is seen that in large number of cases, accused are enlarged on bail on the failure of the investigating agencies to complete the investigation within the stipulated period of time.

44. The interplay between Section 57 and Section 167 of the Code of Criminal Procedure came up for consideration before the Apex Court in *Aslam Babal Desai v. State of Maharashtra*, (1992) 4 SCC 272 (3 Judge Bench) wherein the Court observed as under:

Page - 38 of 60 "14. We sum up as under:

The provisions of the Code, in particular Sections 57 and 167, manifest the legislative anxiety that once a persons' liberty has been interfered with by the police arresting him without a court's order or a warrant, the investigation must be carried out with utmost urgency and completed within the maximum period allowed by the proviso (a) to Section 167(2) of the Code. It must be realised that the said proviso was introduced in the Code by way of enlargement of time for which the arrested accused could be kept in custody. Therefore, the prosecuting agency must realise that if it fails to show a sense of urgency in the investigation of the case and omits or defaults to file a charge sheet within the time prescribed, the accused would be entitled to be released on bail and the order passed to that effect under Section 167(2) would be an order under Sections 437(1) or (2) or 439(1) of the Code.

Since Section 167 does not empower cancellation of the bail, the power to cancel the bail can only be traced to Section 437(5) or 439(2) of the Code. The bail can then be cancelled on considerations which are valid for cancellation of bail granted under Section 437(1) or (2) or 439(1) of the Code. The fact that the bail was earlier rejected or that it was secured by the thrust of proviso (a) to Section 167(2) of the Code then recedes in the background. Once the accused has been released on bail his liberty cannot be interfered with lightly i.e. on the ground that the prosecution has subsequently submitted a charge-sheet. Such a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Sections 57 and 167(2) of the Code. We are, therefore, of the view that once an accused is Page - 39 of 60 released on bail under Section 167(2) he cannot be taken back in custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals the commission of a non-bailable crime. The ratio of *Rajnikant's* case to the extent it is inconsistent herewith does not, with respect, state the law correctly."

(emphasis supplied).

45. The Constitution Bench of the Apex Court in *Sanjay Dutt v State Through C.B.I., Bombay*, (1994) 5 SCC 410 (Constitution Bench), while dealing with the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987, has observed as under:

"53. As a result of the above discussion, our answers to the three question of law referred for our decision are as under : -

(1) .....



(2)(a) Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the Code of Criminal Procedure and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to clause (bb) of sub-section (4) of Section 20 of the TADA Act has to be understood in the Judgment of the Division Bench of this Court in Hitendra Vishnu Thakur .....

(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the Page - 40 of 60 challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing on the challan, notwithstanding the default in filing it within the time allowed, as governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage."

46. While dealing with the provision of NDPS Act, the Apex Court in *Manoj v. State of Madhya Pradesh*, (1999) 3 SCC 715 (2 Judge Bench), clarified that as per the Constitutional mandate, no person can be deprived of personal liberty save and except in accordance with the procedure established in law. The Constitution directs that a person arrested and detained in custody shall be produced before the nearest magistrate within 24 hours of such arrest, with the time necessary for going from the place of arrest to the Court to be excluded and for noncompliance of the provisions of Section 167 of the Cr.P.C. the accused was released on bail. Hence, the law cited in *Rashid Khan alias Rashid and Ors. v. The State*, 1993 CrL. L.J 3776, is misconceived.

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DEFAULT BAIL. RIGHT NOT EXERCISED BUT CHARGE SHEET FILED - NO RIGHT FOR GRANT OF BAIL.

47. In *Dr. Bipin Shantilal Panchal v. State of Gujarat*, (1996) 1 SCC 718 (3 Judge Bench) the Court reiterated what was so stated in *Sanjay Dutt (supra)*, that failure on the part of the accused in exercising his right to be released on bail on account of non-filing of charge sheet within the maximum time would not leave an option with the accused to exercise such indefeasible right, if, in the meantime, charge sheet stands filed. Similar view was taken in *Mohamed Iqbal Madar Sheikh and Ors. v. State of Maharashtra*, (1996) 1 SCC 722 (3 Judge Bench); *Suresh Kumar Bhikamchand Jain v. State of Maharashtra and Anr.*, (2013) 3 SCC 77 (3 Judge Bench) and also in *Sayed Mohd. Ahmad Kazmi v. State (Government of NCT of Delhi) and ors.*, (2012) 12 SCC 1 (3 Judge Bench).

48. In *Dinesh Dalmia v C.B.I.*, (2007) 8 SCC 770 (2 Judge Bench), the Court clarified that once a charge sheet is filed, right of an accused under the proviso to Section 167, ceases and does not revive

only for the reason that further investigation remains pending within the meaning of Section 173(8). [Also Mustaq Ahmed Mohammed Isak and Ors. v State of Maharashtra,(2009) 7 SCC 480 (2 Judge Bench) and Jeewan Kumar Raut and Anr. v. Central Bureau of Investigation,(2009) 7 SCC 526(2 Judge Bench); Suresh Kumar(supra); Sayed Mohd. Ahmad Kazmi (supra)].

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49. In Uday Mohanlal Acharya v. State of Maharashtra, 2001 5 SCC 453 (3 Judge Bench), the Court had to deal with the peculiar situation, where even though the accused had exercised the right by virtue of Section 167(2) and the Court had passed an order in relation thereto, yet had not furnished the bail bond and in the meantime Challan/charge sheet came to be filed, the Court held the accused to have lost his right under the Act. The relevant portion of the report reads as under:

"13. ....On the aforesaid premises we would recover our conclusions as follows :

1. Under Sub-Section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorize detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

2. Under the proviso to the aforesaid Sub-

Section (2) of Section 167, the Magistrate may authorize detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the Page - 43 of 60 completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

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6. The expression "if not already availed of" used by this Court in Sanjay Dutt case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression "availed of" if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the Page - 45 of 60 provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with the law laid down by this Court in the case of Mohd. Iqbal v.

State of Maharashtra."

50. Here it be observed that a contrary view was taken by a Bench comprising of similar strength (3 in number) Rambeer Shokeen v. State (NCT of Delhi), (2018) 4 SCC 405 (3 Judge Bench) wherein, the Court observed that right of the accused is indefeasible and keeping in view the Constitutional mandate, it is the duty of the Court to not only apprise the accused of his valuable right but also release him on bail, notwithstanding the fact that the right to seek bail was exercised or not by the accused. It is noticed that one out of three Hon ble Judges expressed his dissent. But that would not matter.

51. But then even a similar view taken by the Apex Court in Pragyna Singh Thakur v. State of Maharashtra, (2011) 10 SCC 445 (2 Judge Bench) in view of law laid down by the Constitution Bench in Sanjay Dutt (supra) was corrected in Union of India through Central Bureau of Investigation v. Nirala Yadav alias Raja Ramyadav Alias Deepak Yadav (2014) 9 SCC 457 (2 Judge Bench) wherein

the Court categorically observed as under:

"28. In Uday Mohanlal Acharya (supra) the principle has been further elaborated to highlight the ratio laid down in Sanjay Dutt's case. It has been clearly laid down that if a case is adjourned by Page - 46 of 60 the court granting time to the prosecution not adverting to the application filed on behalf of the accused, it would be a violation of the legislative mandate. The principle stated in Uday Mohanlal Acharya (supra) is a binding precedent on us. Mr. Dey, learned counsel appearing for the appellant, made a feeble endeavour that it is a two-Judge Bench decision and it runs contrary to the principle stated in Sanjay Dutt's case and hence, it should be treated as per incuriam. Both the facets of the submission are absolutely fallacious. It is a judgment rendered by a three-Judge Bench and not by a two-Judge Bench simply because there is a dissenting opinion. Secondly, the judgment has not been rendered in ignorance of a binding precedent but, on the contrary, it has directly dealt with the decision in Sanjay Dutt (supra), appreciated, understood and analysed the principles stated therein and culled out the conclusions and, therefore, by no stretch of imagination it can be held to be per incuriam. Even if a two-Judge Bench or a three-Judge Bench disagrees with the view expressed in Uday Mohanlal Acharya (supra), it has to be referred to a larger Bench. As we notice, prior to the decision in Uday Mohanlal Acharya's case a three-Judge Bench in Mohamed Iqbal Madar Sheikh (supra) had stated the principle in a different way.

We are disposed to think, that is the principle which the Constitution Bench in Sanjay Dutt's case has laid down. When the charge-sheet is not filed and the right has ripened earning the status of indefeasibility, it cannot be frustrated by the prosecution on some pretext or the other. The accused can avail his liberty only by filing application stating that the statutory period for filing of the challan has expired, the same has not yet been filed and an indefeasible right has accrued in Page - 47 of 60 his favour and further he is prepared to furnish the bail bond. Once such an application is filed, it is obligatory on the part of the court to verify from the records as well as from the public prosecutor whether the time has expired and the charge-sheet has been filed or not or whether an application for extension which is statutorily permissible, has been filed. If an application for extension is filed, it is to be dealt with as has been stated in the case of Sanjay Dutt (supra). That is the duty of the Court. This is the position of law as has been stated in Uday Mohanlal Acharya (supra)."

(emphasis supplied).

52. In the aforesaid decisions, it also stands laid that the right which has inured to the accused has to be exercised and if not so done, upon filing the charge sheet, it would stand extinguished. In Mustaq Ahmed (supra) the Apex Court affirmed that there can be more than one application seeking extension of time to file charge sheet.

**BAIL IF REPORT OF THE EXPERT IS IN THE NEGATIVE :**

53. The Apex Court in Sami Ullaha(supra) has observed that if the report of the chemical examiner itself establishes the substance recovered not to be a psychotropic substance, the accused has a right to be enlarged on bail.

**FACTORS TO BE KEPT IN MIND WHILE GRANTING BAIL :**

54. In Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496 (2 Judge Bench) the Apex Court has Page - 48 of 60 categorically held that if the Court (in the said case the High Court) does not advert to the relevant considerations and mechanically grants bail, the order would suffer from the vice of non-application of mind, rendering it to be illegal and what are those relevant considerations in Para-9 of the report, stands culled out as under :

"9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are: (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the accusation; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; and (viii) danger, of course, of justice being thwarted by grant of bail. [See: State of U.P. through CBI Vs. Amarmani Tripathi, (2005) 8 SCC 21; Prahlad Singh Bhati Vs. NCT of Delhi, (2001) 4 SCC 280; Ram Govind Upadhyay Vs. Sudarshan Singh, (2002) 3 SCC 598].

10. It is manifest that if the High Court does not advert to these relevant considerations and Page - 49 of 60 mechanically grants bail, the said order would suffer from the vice of non-application of mind, rendering it to be illegal. In Masroor (supra), a Division Bench of this Court, of which one of us (D.K. Jain, J.) was a member, observed as follows:

".....Though at the stage of granting bail an elaborate examination of evidence and detailed reasons touching the merit of the case, which may prejudice the accused, should be avoided, but there is a need to indicate in such order reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. [See also: State of Maharashtra Vs. Ritesh, (2001) 4 SCC 224; Panchanan Mishra Vs. Digambar Mishra, (2005) 3 SCC 143; Vijay Kumar Vs. Narendra, (2002) 9 SCC 364; Anwari Begum Vs. Sher Mohammad, (2005) 7 SCC 326]."

55. The principle stands reiterated in Virupakshappa Gouda and Anr. v. State of Karnataka and Anr., 2017 5 SCC 406 (2 Judge Bench). Lastly, they stand reiterated in State of Orissa v. Mahimananda Mishra, (2018) 10 SCC 506 (2 Judge Bench) in the following terms:

"12. Though this Court may not ordinarily interfere with the orders of the High Court granting or rejecting bail to the accused, it is open for this Court to set aside the order of the High Court, where it is apparent that the High Court has not exercised its discretion judiciously and in accordance with the basic principles governing the grant of bail. [See the judgment of this Court in Neeru Yadav vs. State of Uttar Pradesh; (2014) 16 SCC 508 and Prasanta Kumar Sarkar vs. Ashis Chatterjee, (2010) 14 SCC 496]. It is by now well Page - 50 of 60 settled that at the time of considering an application for bail, the Court must take into account certain factors such as the existence of a prima facie case against the accused, the gravity of the allegations, position and status of the accused, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of tampering with the witnesses and obstructing the Courts as well as the criminal antecedents of the accused. It is also well settled that the Court must not go deep into merits of the matter while considering an application for bail. All that needs to be established from the record is the existence of a prima facie case against the accused. [See the judgment of this Court in Anil Kumar Yadav vs. State (NCT) of Delhi, (2018) 12 SCC 129.]"

56. Having discussed the law, one notices that the contraband substance recovered by the police is a psychotropic substance under the Act. The quantity recovered is huge. The activity of production, transport or sale is not authorized by any person.

57. The Apex Court in Mohan Lal (supra) has clarified the meaning of the word "possession" under the Act. It need not be actual or physical for it can be constructive or otherwise. Sections 28, 29 & 30 of the Act account for circumstances in cases where either there is an attempt, abetment and conspiracy or preparation for commission of crime under the Act.

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58. While granting bail, all that the Court is required to consider is as to whether the Court is satisfied of what is commonly termed as the "twin test" or not.

#### POWER OF THE HIGH COURT IN QUASHING ORDERS GRANTING BAIL AGAINST THE SETTLED PRINCIPLES OF LAW :

59. That the High Court has got inherent power to cancel an order granting bail, which is wholly unsustainable in law stands well settled by the Apex Court in Rasiklal v. Kishore S/o Khanchand wadhwani, (2009) 4 SCC 446 (2 Judge Bench); Rajballav Prasad (supra); Doongar Singh and Ors. v. State of Rajasthan, (2018) 13 SCC 741 (2 Judge Bench) and Dinubhai Boghabhai Solanki v. State of Gujarat and Ors., (2018) 11 SCC 129 (2 Judge Bench).

The amplitude of the power of the Constitutional Court be it under the Constitution or the statute (Cr.P.C) is wide enough to correct any illegality, either on the asking of the State or on its own motion. Even the Court cannot be unmindful of the fact that such power is being exercised in a case where allegedly the accused is involved in dealing with huge quantity of contraband substance. Under all circumstances, Court has to strike a balance vis-a-vis the liberty of an individual and the societal rights.

60. What does the Court do when one finds the prosecution to have accepted the illegality of the order? Should Page - 52 of 60 this Court remain silent? Should this Court, not exercise its inherent powers? Should this Court in public interest not rectify the mistake and the illegality committed by the Courts below, which stands accepted by the prosecution, for whatever reasons? Should this Court not prevent the abuse of process of law or is it that this Court should not interfere to secure the ends of justice?

61. The Apex Court in *Popular Muthiah v. State represented by Inspector of Police*, (2006) 7 SCC 296 (2 Judge Bench) *inter alia* observed that:

"30. In respect of the incidental or supplemental power, evidently, the High Court can exercise its inherent jurisdiction irrespective of the nature of the proceedings. It is not trammelled by procedural restrictions in that :

(i) power can be exercised *suo motu* in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused.

(ii) Such a power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed therefore.

(iii) It is, however, beyond any doubt that the power under Section 482 of the Code of Criminal Procedure is not unlimited. It can *inter alia* be exercised where the Code is silent where the power of the court is not treated as exhaustive, or there is a specific provision in the Code; or the statute does not fall within the purview of the Code because it involves application of a special law. It acts *ex debito* Page - 53 of 60 *justitiae*. It can, thus, do real and substantial justice for which alone it exists."

62. However, such power has to be exercised sparingly and with circumspection which the Supreme Court in *State of Punjab v. Davinder Pal Singh Bhullar and Ors.*, (2011) 14 SCC 770 (2 Judge Bench), has explained as under :

"60. The rule of inherent powers has its source in the maxim "*Quaeritur alicui concedit, concedere videtur id sine quo res ipsa, esse non potest*" which means that when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist. The order cannot be passed by-passing the procedure prescribed by law. The court in exercise of its power under Section 482 Cr.P.C. cannot direct a particular agency to investigate the matter or to investigate a case

from a particular angle or by a procedure not prescribed in Cr.P.C. Such powers should be exercised very sparingly to prevent abuse of process of any court. Courts must be careful to see that its decision in exercise of this power is based on sound principles.

61. To inhere means that it forms a necessary part and belongs as an attribute in the nature of things. The High Court under Section 482 Cr.P.C. is crowned with a statutory power to exercise control over the administration of justice in criminal proceedings within its territorial jurisdiction. This is to ensure that proceedings undertaken under the Cr.P.C. are executed to secure the Page - 54 of 60 ends of justice. For this, the Legislature has empowered the High Court with an inherent authority which is repository under the Statute. The Legislature therefore clearly intended the existence of such power in the High Court to control proceedings initiated under the Cr.P.C. Conferment of such inherent power might be necessary to prevent the miscarriage of justice and to prevent any form of injustice. However, it is to be understood that it is neither divine nor limitless. It is not to generate unnecessary indulgence. The power is to protect the system of justice from being polluted during the administration of justice under the Code."

63. The Apex Court in *K V Rajendran v. Superintendant of Police, CBCID South Zone, Chennai and Ors.*, (2013) 12 SCC 480, (3 Judge Bench) has further clarified that the extraordinary power must be exercised with the object of instilling faith of the people in the system. The principles stands reiterated in *E Sivakumar v. Union of India and Ors.*, (2018) 7 SCC 365 (2 Judge Bench).

64. The revisional power of the High Court, under Cr.P.C., is also extensive and as has been held by the Apex Court in *Krishnan and Anr. v. Krishnaveni and Anr.*, (1997) 4 SCC 241 (3 Judge Bench) that the High Court would be well within its right to call for the records and examine correctness, illegality or propriety of any order passed by the Court below. In fact in *Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors.*, (1998) 5 SCC 749 the Apex Court emphasized the use of such power for ascertaining as to whether the subordinate Courts/Tribunals functioned within the limits of its Page - 55 of 60 authority for ensuring that "stream of administration of justice remain clean and pure".

65. Further the Apex Court in *Rajballav Prasad* (supra) held as under:

"15. We may also, at this stage, refer to the judgment in the case of *Puran v. Rambilas & Anr.*[5], wherein principles while dealing with application for bail as well as petition for cancellation of bail were delineated and elaborated. Insofar as entertainment of application for bail is concerned, the Court pointed out that reasons must be recorded while granting the bail, but without discussion of merits and demerits of evidence. It was clarified that discussing evidence is totally different from giving reasons for a decision. This Court also pointed out that where order granting bail was passed by ignoring material evidence on record and without giving reasons, it would be perverse and contrary to the principles of law. Such an order would itself



provide a ground for moving an application for cancellation of bail. This ground for cancellation, the Court held, is different from the ground that the accused misconducted himself or some new facts call for cancellation.

16. The present case falls in the former category as the appellant is not seeking cancellation of bail on the ground that the respondent misconducted himself after the grant of bail or new facts have emerged which warrant cancellation of bail. That would be a case where conduct or events based grant of bail are to be examined and considered. On the other hand, when order of grant of bail is challenged on the ground that grant of bail itself is given contrary to principles of law, while undertaking the judicial review of such an order, it Page - 56 of 60 needs to be examined as to whether there was arbitrary or wrong exercise of jurisdiction by the Court granting bail. If that be so, this Court has power to correct the same."

(emphasis supplied).

66. Hence this Court under Articles 226 & 227 of the Constitution of India as also the provisions of the Code of Criminal Procedure, has ample power to call for the records of the Court below and make correction of any illegality found while adjudicating applications for grant of bail.

67. As already noticed, in the case of accused Pritam Roy, trial Court granted bail only on the ground that his mother was ailing and that he has a small daughter to take care of. It is in this backdrop, this Court is well within its right to exercise jurisdiction, in calling for the record and setting aside the order(s) granting bail for it does not meet the twin test. Though it is a different matter that the trial Court, during the pendency of the first two petitions, of its own did not extend the order granting bail but then illegality continued to remain on record, necessitating rectification, for the bail applicant in petition No.(i) seeks and claims parity with regard to bail applicant of petition No.(iii). It is in this backdrop, the Court finds the orders granting ad-interim bail as extended from time to time and more specifically, orders dated 12th October, 2018, 18th August, 2018, 19th November, 2018, 7th December, 2018, 14th December, 2018 and 10th Page - 57 of 60 January, 2019 to the extent of grant of bail to accused Pritam Roy to be illegal and as such quash the same.

68. There is yet another disturbing factor in the case when it comes to accused Pritam Roy and that being, despite his bail application having been rejected on 1st December, 2018, he was never arrested by the police or sent to judicial custody by the trial Judge. From 1st December, 2018 till 7th December, 2018, he was allowed to move freely. Why it was allowed to be so done, is a mystery and history. But then it is only a reflection of the manner in which the investigating agencies are working.

69. In fact, record does not reveal as to why the learned Public Prosecutor did not oppose the bail on 14th December, 2018 and 10th January, 2019.

70. This Court may not be misunderstood that in every case registered under the NDPS Act, the learned Public Prosecutor must necessarily oppose the bail.

71. It is the prerogative of the Investigating Officer (I.O.) and the police. It is a matter directly between the Court and the I.O. through the Public Prosecutor. But then in this case, the Public Prosecutor, on 19th November, 2018 had in fact brought it to the notice of the Court that accused Pritam Roy was abusing his liberty inasmuch as he had extended threats to the witnesses. Well, the position remained the same even thereafter and it is in Page - 58 of 60 this backdrop, the Court is puzzled as to why the bail was not opposed.

72. It is a serious matter which requires to be examined by the superior authorities. In fact, this Court in petition No.(i) had directed the Deputy Director, Prosecution, to file his affidavit explaining the position with regard to compliance of directions issued by Hon ble the Apex Court in State of Gujarat v. Kishanbhai and Ors.,(2014) 5 SCC 108(2 Judge Bench). Well, it is a different matter that the affidavit is wanting on the material facts and this Court independently would examine as to whether directions issued by the Apex Court in Subhash Chander v. State(Chandigarh Administration) and Ors.,(1980) 2 SCC 155 (2 Judge Bench); Vineet Narain and Ors. v. Union of India and Anr.,(1998) 1 SCC 226 (3 Judge Bench); R. Sarala v. T. S. Velu and Ors.,(2000) 4 SCC 459 (2 Judge Bench) and this Court in Member Secretary(BDO) and Anr. v. Samar Bhusan Sarkar and ors.,(2017) 1 TLR 235 stands complied with or not. The Director, Prosecution shall inquire into the matter and file his personal affidavit of compliance within 4(four) weeks.

73. Much reliance is placed on the judgment rendered by the Apex Court in Surinder Kumar Khanna (supra), but then observations made with regard to the statement of the co-accused being inadmissible in evidence is to be considered at the stage of conclusion of trial. Here, we are dealing with a case where each one of the accused have recorded their statements to the police, Page - 59 of 60 not only admitting their role but also ascribing the same with respect to each one of co-accused, in the alleged crime. Their statements, which though inculpatory, eventually may not be admissible in evidence, but at this point in time, cannot be ignored, considering the fact that accused Pritam Roy and Tapan Sarkar live in the area falling within the jurisdiction of the same police station and the other accused including Krishna Kumar not to have furnished any explanation of his presence in the area and there being no contemporaneous material to establish the plea of alibi, of altercation with the police, resulting into his false implication in the crime.

74. Having minutely examined the Case Diary(CD) as also the law of the issue, this Court does not find favour with the submissions made by the learned counsel for the bail applicants that since no recovery stands effected from any one of them, as such they deserve to be enlarged on bail. Court has already observed the law with regard to constructive possession as also taken note of the law with regard to alleged concerted acts in dealing with the crime, which undoubtedly is heinous and serious in nature. The twin test cannot be said to have been made out by the accused. It being a different matter, as to whether accused were involved with the crime or not is subject matter of trial. The Apex Court has categorically held that individual liberty must give way to the societal interests and that menace of drugs needs to be controlled and checked under all circumstances.

75. There is a distinction between cancelling an order granting bail which is illegal and cancelling an order of bail for non-compliance of terms of grant of bail. In this case, this Court has intervened to cancel the order granting bail, finding the same to be illegal, perverse and erroneous. The trial Court did not extend the order of bail finding the same to have been flouted inasmuch as allegedly, threats were extended to the witnesses by the accused. It is in this backdrop, this Court dismisses the Bail Application No.149/2018(petition No.i) & Bail Application No.10/2019(petition No.ii) and accordingly allows and disposed of Criminal Petition No.12/2019(petition No.iii).

76. It is made clear that any observation made herein, shall not be construed to be an expression/opinion on the merits of the case, for each case has to be dealt with, on its own merits and the trial Court shall decide the matter uninfluenced of the same.

77. This Court is appreciative of the efforts put in by Ms. Swarupa Chisim, learned legal aid counsel, who ably assisted the Court in the matter.

78. Registrar(Judicial) shall send copies of the order to all the judicial officer of the State including the Director, Prosecution, for compliance.

Record be sent back immediately.

(SANJAY KAROL), CJ Sukhendu/Pulak.