Ram Dayal vs Central Narcotic Bureau on 3 September, 1992

Equivalent citations: 1992(0)MPLJ834

Author: R.C. Lahoti

Bench: R.C. Lahoti

ORDER

T.N. Singh, J.

1. This reference is made by one of us (S. K. . Dubey, J.) while hearing third bail application of the accused/applicant, arrested in connection with an offence under Section 8/18, the Narcotic Drugs and Psychotropic Substances Act, 1985, for short, the 'Act', or NDPS Act. After hearing counsel, we framed following two questions which arise for our consideration in the facts and circumstances of the case :

> 1. If for offence under Section 18, NDPS Act, charge-sheet is filed 90 days after the arrest of the accused, whether the latter will, as of right, be entitled to get bail from High Court?
>
> 2. Under what circumstances, the High Court or the "Special Court" can grant bail under Section 37, NDPS Act, to a person accused of an offence under Section 18 of the said Act if plea is raised by the accused in terms of Section 50 of the said Act?

2. On 8-8-1991, the accused was apprehended while travelling in a bus with an attache case, on Agra-Bombay Road, near Shivpuri. From his possession 5,100 gms. of opium, found kept in the attache case, was seized by the officers of the Narcotics Department. On chemical analysis at Neemuch Laboratory, the identity of the seized article has been established as, opium. He has made repeated attempts in the course of last one year for release on bail.

3. By order passed on 23-11-1991, in Misc. Cri. Case No. 1823 of 1991, his first bail application was rejected by S. K. Dubey, J. and that decision is reported as Ram Dayal Koli v. State, 1991 (2) MPJR 328. It was unsuccessfully contended before him that for non-compliance of Section 50,- NDPS Act, the accused was entitled to bail and reliance was placed on this Court's Indore Bench's decision in Man Appa v. State of M. P.", 1990 MPLJ 621 = 1991 JLJ 415. In the decision rendered, S. K. Dubey, J. referred to another decision of this Court, of the same Bench, in Bhavarsingh v. State of M. P., 1990 JLJ 193 and Apex Court's decision in Narcotics Control Bureau v. Kishan Lal, AIR 1991 SC 558. However, when the instant application was pressed (repeating the prayer for bail for the third time) reliance was placed on a D. B. decision of this Court rendered at the Main Seat in the case of Kalika

Prasad v. State of M. P., 1992 (I) MPWN 5 = 1992 (I) Crimes 737 wherein it has been held that in a case in which challan is not filed within sixty days of arrest, the accused becomes entitled to bail. That decision's correctness is doubted. Obviously, therefore, accused applicant's entitlement to bail is to be considered on two grounds pertaining to the | effect of non-compliance of Section 50, NDPS Act and his right, if any, contemplated under Section 167(2), Criminal Procedure Code.

4. Arguments in this matter were heard on 3-7-1992, 14-71991, : 24-7-1992 and finally, oral hearing was concluded on 29-7-1992 when following order was passed and counsel's prayer to file written arguments was allowed :

> "During the course of hearing of this Reference, we had the advantage of hearing Shri B. K. Juneja, Assistant Narcotics Commissioner who deputises in this matter for the Commissioner of Narcotics, whose Office is situated in the City of Gwalior. It is a Central Government Office and the Commissioner's jurisdiction prevails over the entire country.
>
> We told Shri Juneja to file affidavit in regard to statements which are made by him today in Court before us, but would like to record briefly a few fact* which we found pertinent for disposing of the Reference. For Opium, he told us, the transport-route is the Agra-Bombay Road; it comes from Punjab and Rajasthan mainly and goes to Bombay. One of the main trafficking centres is Guna in relation to the crop cultivated locally in the State and in the neighbouring State of Rajasthan. He told us further that of late, it has been discovered that in Gwalior and Guna and neighbouring areas, technical knowledge has been acquired for conversion of opium into heroin and that is dangerous because trade in heroin is highly lucrative in financial terms and it is an international trade. We could understand from him that export of heroin so manufactured to other countries is the end-result of the chain of diverse clandestine activities and for investigation into the offence, the role of Interpol assumes importance. Indeed, today, a file is produced before us in respect to correspondence which Narcotics Commissioner's Office is making from time to time with the Interpol Office situated at Delhi in C.B.I, headquarters.
>
> Within a week, Shri Juneja undertakes to file an affidavit and to make that well documented with appropriate annexures. However, we may also note today that we are furnished by Shri Mittal three United Nations' publications which are conventions of 1961, 1971, 1988 and those are placed on record."

(Concluding para, not extracted).

Belatedly on 25-8-1992, Shri S. C. Mathur, Deputy Narcotics Commissioner (Enforcement), filed the affidavit confirming the statements made by Shri Juneja and he has added that the Central Government has, by Notification, laid down guidelines for chemical analysis of illegally possessed opium seized to be done "at the nearest laboratory situated throughout the country". At Neemuch and Ghazipur, the Central Bureau of Narcotics has two factories and opium there lawfully cultivated,

produced and manufactured is sent to ascertain the composition thereof.

5. We are undoubtedly facing the daunting task in this matter of balancing individual freedom with societal interest. We found the Act's signature-tune salus populi est suprema lex unmistakable. It is also manifestly clear to us that the Act is amended recently to implement United Nations' 1988 Covenant mandating its Member-Nations to recognise "the importance of strengthening and enhancing effective legal means for international cooperation in criminal matters for suppressing the international criminal activities of illicit traffic" in narcotic drugs. Indeed, the Covenant's Preamble expresses United Nations' serious concern that "children are used in many parts of the world as an illicit drug consumers' market" and that the traffic in drug "pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of the society".

6. The Apex Court has recently, in Raj Kumar Karwal's case, AIR 1991 SC 45, traced the legislative history of the Act and surveyed its provisions. It was rendered on Section 53 of the Act construed in the context of Section 36A(l) and Section 173, Criminal Procedure Code. An officer of Department of Revenue Intelligence invested with the powers of an officer-in-charge of a police station under Section 53 of the Act is held to be not a 'police officer' within the meaning of Section 25 of Evidence Act. The point agitated in the bail application was that relying on the appellant's statement a "prima facie" case could not be established to prevent his enlargement on bail in respect of an offence under the Act because Section 25 of the Evidence Act barred its entry into records. The new features, incorporated by the amendment, deserve to be briefly summed up to comprehend their Lordships' approach and follow suit.

7. Under new Chapter II-A, vide Section 7A, a "national fund for control of drug abuse" is ordained. More stringent punishments are contemplated in Sections 25A, 27-A and 31-A. While the recidivist is made to suffer now death penalty under Section 31-A, what is pan passu jprohibited by Section 32-A is suspension, remission and commutation of sentence awarded under the Act. Provision for "special Courts" is made under amended Section 36 for trial of offences under the Act and special procedure therefor is prescribed in Sections 36-A to 36-D. Old Section 37 is substituted by a new one. New Chapter V-A contains provisions to deal with forfeiture of property derived from or used in illegal drug traffic. To some of the relevant old and existing provisions unaffected by the amendment, we may also refer now. Section 42 deals with the general power of entry, search, seizure and arrest without warrant or authorisation while Section 43 deals specifically, with "Seizure and arrest in public places". The Explanation to Section 43 defines the expression "in public place" to include any "public conveyance" as well among other places "intended for use by or accessible to the public", Section 49 deals with powers to stop and search conveyance. Section 50 is extracted hereinafter in extenso, but we mention here that in terms of Section 51, the provisions of Code of Criminal Procedure are made applicable mutatis mutandis "to all warrants issued and arrest, searches and seizures made under the Act". Section 52(1) requires the officer arresting any person under Sections 41, 42, 43 and. 44, "to inform him of ground for such arrest."

8. Pivotal to the controversey are the following provisions, extracted selectively: -

"36A. Offences triable by Special Courts. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

(a) .....

(b) Where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of Section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate :

Provided that where such Magistrate considers -

(i) When such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under Section 167 of the Code of Criminal Procedure, 1973, in- relation to an accused person in such case who has been forwarded to him under that section;

(d) .....

(2) .....

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

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

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

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

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

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.

50. Conditions under which search of persons shall be conducted.

"(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, or Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female."

9. We take; up now Question No. 1. It has been submitted to us that Section 167(2), Criminal Procedure Code is referentially incorporated in Section 36A, NDPS Act; and that in terms of clause (c) of Section 36A(1) the Special Court is invested with the "same power" as a Magistrate possesses under Section 167(2), Criminal Procedure Code contemplating that "on the expiry of the period of ninety days or sixty days, as the case may be, the accused person shall be released on bail" by him. The argument, attractive though, is too simplistic and naive. Not only the scheme of the Act, its object and language of the provision discredit the argument; the theory of referential incorporation is inherently fallacious. The "Special Court" functioning under the Act and the "Magistrate" functioning under Criminal Procedure Code have disperate powers and jurisdictions being creatures of two different statutes. The deeming provision contemplated under Section 36A(1)(c) is meant to subserve a limited purpose; it is only a general and enabling provision and carries no mandate binding on the Magistrate in the manner Section 167(2), proviso, does. The expressions used in it are "may exercise" and "same powers" : use of the word "all" being carefully avoided and the word "same" being used instead, the legislative intent is made clear thereby that the provision is not meant to include within its ambit all powers exercisable by a Magistrate under Section 167 including the power contemplated under the proviso to sub-section (2) and the use of the word "may", at the

same time, is meant to impart to the power purely discretionary character. The provision obviously is meant to be a directory one and not mandatory. It is well settled that effect of a legal fiction cannot be extended judicially and its scope is to be limited to the purpose it is meant to subserve. (See, Bengal Immunity Co., AIR 1956 SC 661; C.I.T. v. Vadilal, AIR 1973 SC 1106 etc.).

10. A careful comparison of the two provisos, of Section 36A(l)(b), NDPS Act and Section 167(2), Criminal Procedure Code, bears out this point. In specific terms under the proviso to Section 167(2) exercise bail of power is contemplated by expressly providing that "person released under this sub-section shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter". Neither sub-section (l)(c) nor sub-section (3) of Section 36A deals with the bail power of Special Court and High Court; they do not take within their fold the bail power contemplated under Section 37, of both Courts. Indeed, reference in sub-section (3) to "special powers of the High Court regarding bail under Section 439, Criminal Procedure Code" is not meant to limit the scope of Section 37; both provisions are to be read conjointly. The expression "nothing contained in this section" of Section 36A(3) postulates that High Court's bail power is not to be deemed affected by anything contained in Section 36A only; the fiction is not meant to be extended to Section 37 which is an independent provision contemplating expressly cladding of "additional limitations" on bail powers when exercised in respect of a person who is in confinement after arrest under Section 52 of the Act. Clause (b) of Section 36A denying expressly in terms of its proviso to the Magistrate the power to take bail and limiting his jurisdiction to order detention for specified periods and thereafter for the accused produced before him "to be forwarded to the Special Court having jurisdiction", in terms of clause (c) the legislature could not have contemplated to vest that power in the Special Court and through it in the High Court in terms of sub-section (3). Legislature is supposed to enact sensibly and in any case it is Court's duty to construe statutory provisions in such manner as to avoid conflict, chaos and cavil. The Common Law maxim ut res magis valeat quam pereat must inform judicial interpretative process. See, Rao Shiv Bahadur Singh, AIR 1953 SC 394; Gur Sahai, AIR 1963 SC 1062 etc.

11. To us it appeared clear, we told counsel, that Apex Court's decision in Kishanlal (supra) has taken wind out of the controversy but there is certainly substance in the demur based mainly on Kerala High Court's Full Bench decision Berlin foseph, 1992 (II) Crimes 353. while two other decisions cited by learned Single' Judges of Orissa and Karnataka High Courts respectively, in Sanatan Singh, 1992 Cri. L.J. 352 and Kamlaba, ibid p. 561, obfuscate further the issue. In neither of the two cases is Kishanlal cited, but in Sanatan's case, reliance is placed on Apex Court's two decisions, Rajnikant, AIR 1990 SC 71 and Raghubir Singh, AIR 1987 SC 149, for the view taken. Case law galore is cited before us during the course of hearing of this Reference but we have considered it unnecessary to refer to each and every decision because only some are trend-setters while others endorse merely one or the other view.

12. Although Rajnikant (supra) is an earlier decision and yet not cited in Kishanlal (supra), there is no conflict at all between the two. To be candid and categorical, it is to be stated at once that in Rajnikant, provisions of NDPS Act whether of Section 36A or of Section 37 were not at all considered or interpreted as it was a pre-amendment case and, therefore, it had no occasion to do so. The decision is rendered on the provisions of Sections 167(2), 437, 439, Criminal Procedure

Code. On facts, however, that was also a case of a person accused under NDPS Act. The Magistrate had released the accused on 29-7-1988 (before NDPS Act was amended) in terms of proviso (a) to Section 167(2) but after the charge-sheet was filed the High Court ordered his rearrest by cancelling his bail; that order was upheld, relying on Raghubir Singh's holding that once prosecution's default which entitled the accused to be released was purged as a result of the charge-sheet being filed, "the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence". It is Kishanlal (supra) that deals squarely with thesmestion of such an accused's right to bail and Delhi High Court's D. B. decision that High Court's bail power under Section 439, Criminal Procedure Code is not controlled by section-37, NDPS Act was reversed. The decision clearly and firmly establishes the premises that Section 37, NDPS is sole repository of the bail power, whether of the "Special Court" or of the High Court, and defuses effectively the controversy mooted in Question No. 1.

13. We respectfully disagree with the view expressed in Kerala High Court's Full Bench in Berlin Joseph that Section 37, NDPS Act does not override Section 167(2), Criminal Procedure Code. Although note is taken of Kishanlal as also of Rajnikant, the holdings of these decisions have not received the consideration they deserve. The decision found it necessary and legitimate to accord primacy to Section 167(2) taking the view that if Section 37, NDPS Act has to prevail against it, "the legislative directive contained in Section 167(2) loses is commanding force". At para 16 of the report the anxiety expressed is, if Section 37, NDPS Act is conceded overriding effect "practically no accused can be released on bail even after the said period of 60/90 days". Before us also, Counsel vocalised the judicial anguish : "Unless he is set free, he will continue to remain in detention. But how-long". We entertain no such apprehension that a person accused of an offence under NDPS Act is led into a blind tunnel, even if in some cases he may have to pass through a long one when there is intervention of Interpol or C.B.I. because of his supposed involvement in inter-State or international conspiracy. Merely because the pre-trial detention -can be a long one in any particular case, the plain legislative intendment to the contrary cannot be judicially frustrated, in our view. As held in Amar Nath, AIR 1972 SC 1548 the Courts are not concerned with the policy of the legislature or with the result, whether injuries or otherwise; to give effect to the language used in the Statute when the meaning is clear is the bounden duty of the Courts. We have noted, however, the global concern of increasing drug-traffic-crimes with international ramification and involvement of large doses of muscle or fire power and money power of which judicial notice is imperated by Article 51(a) of the Constitution.

14. Long pre-trial detention is an anathema but it is not unconstitutional, nor even it is a novelty. Under Section 20(4), Terrorist and Disruptive Activities (Prevention) Act, 1987, for short, TADA, even one year's ceiling is contemplated and is made inexorable; the provisions of Sub-sections (8) and (9) thereof are in pari materia with Section 37, NDPS Act. Article 21 of the Constitution regulates State power in terms of the requirement of "reasonable procedure"; the Constitution does not make the State impotent, unable to defend itself and its peace-loving citizens against any kind of clandestine organised activity, overtly violent or covertly so, impinging on public safety and security of State. The anti-drug traffic Covenants of United Nations of 1961, 1971 and 1988 have international community's support and sanction. They derive authority from Article 25 of the United Nations Declaration of Human Rights, 1948 and Article 12 of the International Covenant on Economical,

Social and Cultural Rights, 1966. As a Member-State of United Nations, India has implemented the 1988 Covenant by amending the NDPS Act and incorporating therein the new bail provisions and also other stringent provisions aforestated. The judicial discretion contemplated in terms of Section 37, NDPS Act has to be exercised independently irrespective of any other consideration except of the "limitations" expressly prescribed. Without reference to the requirement of submission of charge-sheet, the discretion can be exercised by the Court to order release of a person accused of an offence under the Act at any stage of the; pre-trial detention if the Court is not satisfied that, as contended by the prosecution, the accused is guilty of an offence or is likely to commit any offence while on bail. There is no cause, therefore, to be unduly sceptic or despondent.

15. The Constitutional imperative of fair and speedy trial inhered by Article 21 taints prosecution's lethargy of which the Bail Court must take notice. No hard and fast rule or strait-jacket formula can be laid down for exercise of Court's discretion in this regard except that to keep a check on the investigation the Special Court shall, on the accused in custody being "forwarded" to it by the Magistrate in accordance with Section 36A(1)(b), before passing from time to time remand orders, give opportunity to the accused to complain against prosecution's lethargy or illegal manoeuvre and enquire into the same. Section 37(l)(b) in clear terms contemplating the Public Prosecutor to be given "opportunity to oppose" the bail application it will be obviously his business to place cogent materials before the Court as would constitute "reasonable ground" for the Court's contemplated satisfaction to be reached one way or the other because the arrested accused cannot be expected to do so to establish the negative. However, when the accused is first produced before the Special Court on being forwarded to it by the Magistrate and he applies for bail insisting that the "ground" of his arrest disclosed to him under Section 52(1) of the Act is not a "reasonable ground" within the meaning of Section 37(1)(b)(ii), the "Special Court" would be required to satisfy itself not only with respect of circumstances of the offence alleged but to the antecedents also of the arrested person to acquire judicial competence to grant him bail. To enable the Prosecution to place materials before it in that regard, the Court has to give it reasonable time if the prayer is opposed because accused's links with other persons and organisations will have to be investigated. Undue or explained delay in placing the requisite material with respect to the twin requirements of Section 37(l)(b)(ii) can be reasonably regarded by the Court in the facts and circumstances of the case as constituting "reasonable ground" for Court's satisfaction being recorded in accused's favour.

16. Learned Amicus Curiae, Shri J. P. Gupta, referred to us a Division Bench decision of Calcutta High Court rendered on an identical provision, Section 13A of the Essential Supplies (Temporary Powers) Act, 1946, as amended in 1950, in Badri Prasad v. State, AIR 1953 Cal. 28. It was held that the proviso represented a new species of non-bailable offence with its own rules for bail contemplating the requirement that "the Court has to believe at least prima facie that the accused is not guilty." Although clauses (a) and (b) of Section 13-A are couched substantially in the same language as of sub-clauses (i) and (ii) of Section 37, NDPS Act the material difference is absence therein 'of the positive requirement of ascertaining if the accused "is not likely to commit any offence while on bail". The words "any offence" in the setting, context and collocation being referable primarily to the ground of arrest imply thereby the duty of the Prosecution to place before the Court such antecedents of the accused as have a bearing on the crime for which he is arrested. Both requirements contemplated under Section 37(1)(b)(ii), NDPS Act are mandatory and

constitute jointly the basis of Court's jurisdictional competence to decide the prayer for bail. Badri Prasad's view appears to us reasonable and acceptable that the Legislature has not altered by enacting the said Section 13-A the time-honoured basic tenet of criminal jurisprudence concerning presumption of innocence. We hold the same view in respect of Section 37(1)(b)(ii), NDPS Act. We are unable to endorse Bhavarsingh's holding that' "burden" is on the accused to show that "prima facie he is not guilty". The question really is of Court's own satisfaction or belief and exercise of its discretionary powers. "Bail or jail?" is a question, as held in Gudikanti Narasimhulu, AIR 1978 SC 429, which "largely hinges on the hunch of the Bench, otherwise called judicial discretion". Nature of charge, punishment prescribed and accused's antecedents, the Court held, are relevant for exercising the discretion. When the prayer for bail is considered the Court acts on materials available in the case-diary which the Court must objectively screen and sift to reach its own contemplated satisfaction. Because the accused has no right to peruse the case diary, no "burden" can be placed on him to establish his prima facie innocence. The decision in Balchand's case, AIR 1977 SC 366 (cited in Bhavarsingh) was rendered on Rule 184 of the Defence Internal Security of India Rules, 1971; it cannot be said to have taken a contrary view merely because it decided that the said Rule did not override Section 438, Criminal Procedure Code.

17. In the Orissa case, Sanatan Sahu, (supra), facts were similar to that of Rajnikant in that validity of cancellation of the bail had to be examined and that was done following Rajnikant's ratio. The view taken was that bail before charge-sheet could be granted in terms of Section 167(2) proviso to fulfil the legislative "command". No reasons are given except that another decision of the Court is cited as holding Section 167(2) proviso to be applicable to a proceeding under NDPS Act. In the Karnataka case Kamlabai, (supra) the question was of High Court's bail power and that was traced to Section 439 Criminal Procedure Code, outside Section 37, NDPS Act, upon holding that High Court was not "Court" within the meaning of the term employed in Section 37. Both decisions, in our view, are affected by Apex Court's Kishanlal's holding because, as has been held at the Summit level, even High Court cannot grant bail outside Section 37, NDPS Act by invoking Section 167(2), Criminal Procedure Code. This Court's Division Bench decision in Kalika Prasad (supra) is based squarely on Section 167(2), Criminal Procedure Code. It does not refer to any provision of NDPS Act and no reason is given for the view summarily taken that Section 167(2), Criminal Procedure Code is invokable by a person arrested under NDPS Act praying for bail to High Court. We overrule Kalika Prasad because the view taken is untenable in the face of Apex Court's decision is Kishanlal's case.

18. We conclude now and answer Question No. 1 in the negative. We reiterate that section-167(2) proviso, Criminal Procedure Code, is not applicable to a proceeding under NDPS Act. We hold that even if charge-sheet is filed after 90 days of the arrest of the accused on that ground itself the person charged under Section 18, NDPS Act is not entitled to get bail from the High Court. Indeed, "Special Court" and High Court are equally placed in respect of competence under Section 37, NDPS Act in the matter of grant of bail to a person accused of an offence under the said Act. Irrespective of the date of submission of the charge-sheet it will be open always to the "Special Court" and the High Court to consider the prayer under Section 37 and both Courts are required to dispose of the prayer in terms only of the said provision because no power outside that is invokable by a person accused under the Act to get released on bail.

19. We turn now to Question No. 2. We have already held that the additional "limitations" contemplated under Section 37 makes it sole repository of bail power of the Special Court and High Court in respect of a person booked for an offence committed under the Act. However, there may be cases when these "limitations" may be inoperative. Such as, when the arrest giving rise to the confinement is challenged as contravening any mandatory provision of the Act and of the entire proceeding under the Act suffering jurisdictional infirmity. In other words, the question would be of an inbuilt jurisdictional bar operating to the proceeding under the Act continuing pursuant to the arrest. In such a case, the bail power has to be found outside Section 37(1) and in terms of sub-section (2), provisions of Criminal Procedure Code, Chapter XIII, have to be resorted to and the "limitations" are to be ignored. Obviously, it will depend on the type of the bar corresponding to the nature of infraction and the provision infringed. If the arrest leads to seizure of any substance possession of which is an offence, the scope of legislative authority and manner of use of that authority may raise jurisdictional questions impinging on lawful continuity of the subsequent proceeding. Such a situation arose in K. L. Subhayya's case, AIR 1979 SC 711 when the Apex Court found it necessary to set aside appellant's conviction made under Mysore Excise Act. From the car driven by the appellant 48 bottles of contraband liquor was recovered. The search and arrest were without warrant. According to Section 54 of the said Act, that could be done only "after recording the grounds of his belief" by the authorised officer that the "offence has been, is being or is likely to be committed and that a search warrant cannot be obtained without affording the offender an opportunity of escape or of concealing evidence of the offence". Because the Excise Inspector did not record the ground of his belief, their Lordships held that "there has been a direct non-compliance of the provisions of Section 54 which renders the search completely without jurisdiction". On that ground the accused-appellant was acquitted.

20. According to Section 52 of NDPS Act when arrest is made by an authorised officer of a person under Section 41 or 42 or 43 in connection with any offence committed under the Act he shall "inform him of the grounds for such arrest". Section 51 makes applicable relevant provisions of Criminal Procedure Code to any arrest, search and seizure made under the Act. As under Section 51, Criminal Procedure Code, so also under Section 50 of the Act, specific procedure for search of the "person" of an accused is contemplated; but care is taken to specify the "conditions under which search of persons shall be conducted" contemplating a valuable safeguard to protect liberty of person likely to be lost in the event of the man found carrying on his person the contraband substance, possession of which constitutes an offence. Section 50 is to be construed from this perspective. The safeguard is categorical and is made available for the specified event : "when any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41 or Section 42 or Section 43". The provision does not apply to search of any luggage of any person or the vehicle in which he is travelling when it is made under Section 43. It is the "person" arrested who is to be taken to the specified authorities and not anything else, on "requisition" made by him under Section 50(2). Such "requisition" indeed vests authority in the arresting officer merely to "detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1)" and such detention would not tantamount to the person being arrested. Irrespective of the "requisition" search of a female by "anyone excepting a female" is prohibited as well. Legislative anxiety is expressed manifestly against unauthorised, motivated or manipulated search of "person" of a man "or woman exposing him to the risk of losing his liberty as a result of his

or her arrest and being booked and tried consequently for an offence under the Act. Our attention is drawn to a D. B. decision of Himachal Pradesh High Court in State v. Sudarshan Kaur, 1989 Cri. L.J. 1412, taking the view, like us, that Section 50 applies only to search of the "person" of an accused.

21. What can be described as the kernel of the statutory safeguard in sub-section (3) of Section 50 vesting a Constitutional right in such a person to protect his liberty by avoiding arrest and the investigation being nipped in the bud. Legislature has vested power in the Magistrate or the Gazetted Officer before whom any accused is brought on his requisition made under sub-section (2), to "forthwith discharge the person" without formal proceedings on his sole satisfaction that "he sees no reasonable ground for search"; search takes place when he declines to "discharge" such a person. It is only when complaint is made of breach of the Constitutional safeguard and the proceeding under the Act continuing in violation thereof, there will be no occasion for Section 37(1) to operate. Evidently, there can be no question of any proceeding for prosecution continuing against any person who has got a lawful "discharge" under Section 50(3) which is patently a mandatory provision as manifested by the use therein of such significant words "shall", "forthwith" and "discharge". After his arrest, even if that is illegally made, the accused can, immediately on being produced before the Magistrate under Section 36A(1), raise protest to his confinement. If and when that is done, the Magistrate may enquire himself into the complaint of infringement of Section 52(1) of the accused not being informed of "ground" for his arrest or of search made of his person in contravention of Section 50, or he can "forward" him to the Special Court with respect to that grievance because "at any time" that order he can pass as contemplated under Section 36A(b) proviso. Accused's plea in such cases pressed before the Special Court or High Court for release on bail may then be considered with respect to his grievance and disposed of under Section 37(2).

22. Man Appa's case (supra) has taken a different view of Section 50 as will appear on examining the facts of that case. The decision disposes of a bunch of bail applications of different persons arrested and booked under the Act. Facts are discussed separately of each of five cases in paras 31-36. In the first case of Mari Appa on the ground of non-compliance of Section 50 bail is granted but there is no mention of any fact or of the circumstance pertaining to the search, seizure and accused's arrest. Similarly, in the 2 case also, of Amritram, nothing is disclosed. In either case it is not clear also if the search was of the "person" of the accused. In the 3rd case of Babulal the fact of personal search" is mentioned and that is also the fact of the 5th case of Badrunnisa. In the 4th case of Nathulal and Hiralal, the search admittedly was not of accused's person but of the luggage which included 18 Kgs. opium, carried on a motor cycle. The Court regarded, in each case, arresting Officer's omisionper se to inform the person arrested of his option to get searched before a Gazetted Officer/Magistrate as non-compliance of Section 50. At para 22 it is observed that the possibility of acquittal ultimately for non-compliance of the provision resulting in infringement of procedural safeguards meant to protect a person against fake accusation and frivolous charges should be considered by the Court in dealing with bail applications. At paras 24 and 25 the American "exclusionary rule" stated in Miranda v. Arizona, 384 US 436 is held valid for application under Indian Constitution, and applied indeed to the facts of the case. We are unable to subscribe to that view for reasons to follow hereinafter and we are obliged to hold that" law was not correctly stated even with respect to scope and application of Section 50.

23. In the American Federal Constitution, the Bill of Rights (4th Amendment) prohibits in categorical terms "unreasonable search and seizure except upon probable cause", but in the Indian Constitution, Part III does not contain a similar provision. Our Apex Court holds so categorically in V. S. Kuttan Pillan, AIR 1980 SC .185 by opining that Article 20(3) of the Constitution does not hit the evidence collected on search made under Section 93, Criminal Procedure Code. State of Maharashtra v. Natwarlal, ibid p. 593 is a case of seizure of allegedly smuggled gold in a search made under Customs Act. It was held that the subsequent trial was not vitiated even if the search was illegal. In Miranda, U. S. Supreme Court was divided and certiorari was issued by majority to quash the conviction based on confession holding the same constitutionally inadmissible "solely because of lack of counsel or lack of warnings concerning counsel and silence" on account of Fifth Amendment of Federal Constitution being thereby violated. Four learned Judges entered dissent and preferred to abide by English Common Law Rule; one of them Clark, J. observed, "the ipse dixit of the majoirty has no support in our cases". The minority referred to the English and Indian experience are also their own Courts' decisions in Mapp. v. Obio, 367 US 643, which traces the birth of "exclusionary rule" to the American experience of State-Federal conflict.

24. Our Supreme Court has, we reiterate, categorically rejected the American "exclusionary rule" and indeed also the principle embodied in the Common Law maxim, nemo tenetur seipsum accusare in the case of Hira H. Advani v. State of Maharashtra, AIR 1971 SC 44 holding the Evidence Act to be the complete Code, excluding operation of any non-statutory rule of doctrine. In Natwarlal (supra) and also in State of Karnataka v. Alassery, AIR 1978 SC 933 an appraisal was undertaken of the American experience and note made of the departure in the emerging trend in regard to application of "exclusionary rule". (See, para 12, Alaserry; para 13, Natwarlat). Law stated earlier in Radhakishan, AIR 1963 SC 822 and Shayamlal, AIR 1972 SC 886 rejecting the "exclusionary- rule" is reiterated in Natwarlal. The question was again mooted in Poontnmal, AIR 1974 SC 348 when the Court revisited M. P. Sharma, AIR 1954 SC 200 and affirmatively repelled reliance on Article 20(3) and interpolation therein of the "exclusionary rule" while approving Privy Council's decision in Kuruma's case, (1955) A. C. 197 and Harman King, (1969) A.C. 304. The Indian Law was same as English Law, the Court held. There is another line of decisions which speak in terms of "prejudice" to the accused in trial on account of breach of procedural safeguard (See Sunder Singh, AIR 1956 SC 411, H. N. Rishbad, AIR 1955 SC 196; Bai Radha, AIR 1970 SC 1396 and Khanda Sonu Dhodi, AIR 1972 SC 958). Mari Appa does not refer to the Indian decisions and obviously does not state the Indian Law correctly. We hold inapplicable and inappropriate Miranda's rule to test any grievance relating to Section 50 of the Act.

25. Other decisions of this Court,- indeed all rendered by learned Single Judges, besides Mari Appa's, are also cited. Two decisions are by S. D. Jha, J. in the case of Onkar, 1991 Cr.L.R. (MP) 205 and Mohanlal, ibid p. 236; one by K. L. Shrivastava, J. in Mohammed Nabi, ibid p. 210 and another by P. N. S. Chouhan, J. in Gurucharan Singh, 1992 Cr.L.R. (MP) 111. In all these decisions the conviction was successfully challenged. The test of prejudice was applied in Gurucharan Singh holding recovery of opium doubtful in view of the defective Seizure Memo. In Mohanlal the cumulative effect of non-compliance of Sections 50 and 57 of the Act was noted. In Onkar too although notice was taken of non-compliance of Section 50 the basic fact of prosecution's case, of a 70 year old accused riding a bicycle, was disbelieved. Mohammed Nabi is squarely based on

infringement of Section 50 and the scope of the safeguard is construed in absolute terms for which it is not possible to support the view taken. Indeed, the same view is expressed by the learned Judge on the scope of Section 50 in another reported case, Salamat Ali, 1991 Cri. L.J. 1991. Decisions of other High Courts are also cited. Among them are three D. B. decisions of Bombay High Court - Abdul Sattar, 1989 Cri. L.J. 430; Wilfred Joseph, 1990 Cri. L.J. 1034; and Usman Haiderkhan, 1991 Cri. L.J. 232. In the last-mentioned case, clear dissent is expressed with the view held by M. P. High Court in Sudarshan Kumar (supra). Wilfred Joseph (supra) also expressed the same view that the requirement of informing the person arrested of his right contemplated under Section 50 cannot be interpolated. Violation of any type of the search provisions contained in Section 41 of the Act and Section 100(4), Criminal Procedure Code did not constitute "fatal infirmity" and the accused not being "prejudiced" in trial his conviction in Abdul Sattar was upheld. Delhi High Court's decisions rendered by learned Single Judges, in Nathuram, 1990 Cri. L.J. 806 and Omprakash, 1991 Cri. L.J. 2980, are both in the same line upholding convictions by applying in one case the test of "prejudice" and in the other, "miscarriage of justice". Conviction is also upheld in Gauhati High Court's D. B. decision, Md. Jaimeel Abdin, 1991 Cri. L.J. 696, repelling reliance on Section 50 because search took place in the presence of Superintendent of Police. It is also a case of no prejudice.

26. Shri Mittal cited Moolchand, 1991 Supp. (2) SCC 101, case of an accused charged under TADA and FERA. Investigation by CBI being at the crucial stage in respect of "serious allegations"; Designated Court's refusal to grant bail was upheld by Apex Court. Non-disclosure of full particulars of the offence ("grounda" for arrest) was complained without avail. A learned Single Judge of Rajasthan High Court in Sunil Chaturvedi, 1992 (II) Crimes 35, noting omission in the case diary of Gazetted Officer's presence at the time of search, found scope for entertaining reasonable doubts about "prima facie offence" and granted bail conditionally. Similarly, in Balbir Singh, ibid, p. 101, a learned Single Judge of Allahabad High Court granted bail on the ground of lack of statutory authority of the officer making the arrest and seizure. However, the Bombay High Court in Prahlad, 1990 (3) Crimes 429, and the Calcutta High Court in Mibia Bibi, 1992 (1) Crimes 762, refused bail paying due attention to the heinous nature of the offence, the scheme and object of the Act. We accept the proposition canvassed on the basis of judicial consensus and other salutary considerations bearing on the object and scheme of the Act that procedural lapses are not to be overplayed when prayer for bail is considered as that may hamper territorially extensive and forensically penetrating investigation which offences committed under the Act deserve. Materials placed before us with the affidavit of Deputy Narcotics Commissioner (Enforcement) show that instances are not infrequent of C.B.I.-Interpol linkage for tracing the source and also foreign destinations, of drugs; and indeed the traffic route is by now convincingly identified. Correspondence filed shows this State as an important transit and trade centre of drug traffic having links with faroff places like Nigeria, Kenya, France but also with Pakistan. Section 37 commands the Courts to submit to the "additional limitations" deliberately contemplated; in the event only of the proceeding under the Act legitimately aborting the "limitations" are not to be considered. If that view is not taken clandestine activities in drug-trafficking may never abate, frustrating the object and purpose of the Act. The lucrative trade promotes recidivists. Paradoxically, though, it also generates corruption requiring care to be taken of any dishonest act of law-enforcement agency, booking an offender. Unless such doubt is created the offender must be tried, indeed fairly as also expeditiously, and adequately punished if found guilty. Minor and inadvertent lapses during

investigation after lawful and honest detection of the crime, may raise the question of "prejudice" to be decided during trial. On that account it will be unfair to the State, society and international community to scuttle or stagger trial of a person arrested for committing an offence under the Act which is deliberately loaded with stringent provisions. Apex Court's decisions, Rajnikant, Raj Kumar Kanval and Kishanlal, have delivered that message.

27. We answer, accordingly, Question No. 2, as follows :

> (i). Before plea raised in terms of Section 50 of the Act by a person arrested in connection with an offence under Section 18 thereof is accepted and the Court reaches the conclusion that its jurisdiction to release the accused is not curbed by the "limitations" contemplated under Section 37, it must address itself to the question of bona fides of the plea and hold an enquiry in that regard. It may reject the plea if it is found to be a mere pretence; so also, if it is not a case of searching the person of the accused and of alleged recovery, in the Course of such search, of the contraband substance.
>
> (ii). Neither High Court nor the Special Court has jurisdiction to accept the plea waiving the "limitations" contemplated under Section 37, without investigating its truth and validity. The Court has to reach affirmatively the tentative conclusion that the arrest and the subsequent proceedings are impugnable, albeit leaving open for decision in the course of trial, the question of prejudice. We hold accordingly that Mari Appa (supra) is not correctly decided and that is overruled.

28. Before parting with the records, we propose to deal with another short question incidentaly raised. A learned Single Judge of this Court has taken the view in Sheru, 1990 Cr. L.R. (MP) 194, that when opium possessed illicitly by any person is seized and he is booked for the offence, that can be chemically examined only at Neemuch and Ghazipur Laboratories to establish its identity. It is submitted to us that there would be a lot of delay in investigation and disposal of bail applications if from all over the country samples of opium so seized are examined only at those two places. We have examined the relevant provisions and we accept the contention that the view expressed in Sheru is not correct. Although Rule 2(c) of the NDPS Rules, 1985, made by the Central Government under Sections 9 and 76 of NDPS Act defines the term "Chemical Examiner" and names Neemuch and Ghazipur as places where there are "Government Opium and Alkaloid Works", that definition is meant for the purpose of Chapter III of the said Rules for analysis of samples of lawfully cultivated and produced opium, as contemplated under Rule 22. There is no provision in the said Rules or in the Act debarring chemical analysis of unlawfully possessed opium seized in connection with an offence elsewhere at any other Laboratory in the country as would expedite investigation and trial, as is rightly contended by Shri Mittal