S.No.211

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CRM-M-30643 of 2018 (O&M)
Date of Decision:09.08.2018

Ankush Kumar @ Sonu **.....Petitioner**

Vs.

State of Punjab **.....Respondent**

CORAM:- HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present:- Mr. Sandeep Arora, Advocate
for the petitioner.

Mr. Hittan Nehra, Addl. AG,
Punjab.

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Rajbir Sehrawat, J.(Oral)

The travel of mankind, in its existential terms, have been from "Might is Right" to a "Right is Might". In his early existence, man had absolute freedom to do whatever it could, as per his strength and power. However, the craving of human beings to organise themselves into an organised Society led the individual to being ready to cede some of his freedom in favour of the interest of the Society, despite having the power and might to fulfil that freedom. Therefore, the freedom of individual was limited to some extent; for maintaining the Society as an organisation. With the passage of the time, Society metamorphosed itself into a more regulating body, which in its modern Avtar, is called the State. With the change of the character and authority of the social organisation, the State also started asserting more and more power to regulate the individual freedom. Hence, the freedom of the individual also metamorphosed into a regulated

freedom, called liberty. However, to ensure that even this liberty is not further encroached upon or ruthlessly trampled, the man, in more civilized societies, has created an instrumentality, called the Constitution, the basic document of Governance, providing for liberties of individuals and for regulation by State. Therefore, in the modern State, individual is entitled to only those rights/ liberties which are permitted to him by the Constitution, as regulated by the might of the State. The `right' of the individual, therefore, is restricted to only that `might' of the individual which is permitted by the State. However, there are certain rights, which are so fundamental to the human existence that, even if the individual so desired, these cannot be permitted to be ceded by him. Hence, in the modern constitutionalism, despite the State being mighty entity, individuals also have been given certain basic rights which cannot be taken away by the State. But the State being State, sometimes for right reasons and sometimes for presumably right reasons, tries to encroach upon even those basic and inviolable rights of an individual. Hence, the tussle between the `rights' of the individual and the `might' of the State continues. The jurisprudence is grappling with issue of finding the right balance between individual `right' and the `might'/`interest' of the State.

Under Indian Constitution as well, the persons/citizens have been given certain rights which are fundamental to the human existence. Out of those, right to life and liberty guaranteed by Article 21 of the Constitution of India is one such right, which is considered to be of such immense importance that it cannot be suspended even for the sake of or under the other provisions of the Constitution itself. Still effort is made by

the State to regulate even this right of the individual citizen, in the name of the `interest of Society' or the existence of the State. One such aspect of such Regulation of right of the individual to life and liberty is; providing for the person alleged to have committed an offence to be kept in custody; and the prohibitive conditions for his release on bail. Hence, there has been continuous debate on the right of individual not to be kept in custody during pendency of the trial and the privilege of the State to keep him in custody and to prescribe rigorous conditions for his release on bail, if at all he can be. The present case also involves the same struggle between the individual's right to life and liberty and the might of the State, as reflected in the conditions; prescribed under Section 37 of Narcotic and Psychotropic Substances Act for release on bail.

The facts of the present case are that the FIR No.35 dated 22.03.2017 was registered under Sections 22 of Narcotic Drugs and Psychotropic Substances Act at Police Station Kartarpur, Jalandhar (Punjab). The allegation as contained in the FIR against the petitioner was that on 22.03.2017, ASI Gurnam Singh of Police Station Kartarpur, Jalandhar, along with other police officials was present at Bholath Road; near Maliyan Turning of the road; in the area of Kartarpur; in connection with patrol duty and checking for the bad elements. Then the petitioner was, allegedly; seen by the police party coming from the side of Maliyan; on foot. On seeing the police party, the petitioner tried to turn back. This led the Police to have suspicion upon the petitioner. Therefore, the petitioner was apprehended by the Police Party. On being apprehended, the petitioner was told that the above said ASI suspected that the petitioner was carrying

some intoxicating substance and that he was required to be searched. Therefore, the petitioner was, allegedly, given an option; whether he wanted to be searched in presence of some gazetted officer or Magistrate. The petitioner is alleged to have reposed faith in the above said ASI Gurnam Singh and expressed no objection to his search by the Police party present on the spot. The Police, allegedly; made effort to join some independent person in the process but none came forward. Therefore, the search of the person of the petitioner was conducted by the said ASI Gurnam Singh. During the search, a plastic container containing 300 grams of intoxicating powder was allegedly; recovered from the back pocket of pant/ lower worn by the petitioner. The same was saealed into parcel and taken into possession. Accordingly, the above said FIR was registered on the basis of writing sent to the Police Sation by the abovesaid ASI Gurnam Singh. As per the allegations, the sample of the seized material was sent to Chemical Examiner and as per the report of the Chemical Examiner, Alprazolam was found in the sample. Accordingly, the petitioner was kept in custody.

The petitioner has asserted that he is a law abiding citizen and that he has been roped in a false case, to increase the statistics of the Police; during the special drive launched against the Narcotics. In fact, there was no recovery from the petitioner nor was he arrested from the spot, as claimed by the Police. The petitioner was picked up by the Police from his locality on 19.03.2017 from near the place of worship of Peer Di Jagah; in the presence of his brother Lalit Kumar, and he was brought to the Police Station and illegally detained there. Subsequently, the petitioner was involved in the present false case by the Police.

The petitioner had filed an application for releasing him on bail pending trial before the Special Judge, Jalandhar. However, the Court of Special Judge, Jalandhar dismissed the bail application filed by the petitioner; by observing that the petitioner was found in conscious possession of 300 grams of intoxicating powder. Hence, in view of the rigour of Section 37 of NDPS Act, he was held to be not entitled to the bail. However, a perusal of the order passed by the Special Judge shows that the Special Judge has adverted to only the condition mentioned in Section 37(1)(b)(ii), insofar as it has expressed itself, to say that the petitioner was found in conscious possession of the intoxicating material. However, as further required under Section 37(1)(b)(ii), the Special Court has not recorded its satisfaction for believing whether the petitioner is likely to commit any offence or not; while on bail. However, recording of this satisfaction by the Special Court may not be necessary because the Special Court has not released the petitioner on bail, rather it has dismissed the bail application filed by the petitioner.

Feeling dissatisfied with the order passed by the Special Court; and to secure his liberty, the petitioner has preferred the present application under Section 439 Cr.P.C; for grant of bail; pending trial in the above said case.

While arguing the case, the learned counsel for the petitioner has repeated the arguments mentioned above; to the effect that the petitioner was picked up by the Police three days in advance and he was framed in a false case. It was further pleaded that the petitioner is not involved in this case at all. The recovery against the petitioner has been concocted by the

Police. The Police have not followed the procedure prescribed under Section 50 of NDPS Act, as required by the law as laid down by the Courts in several judgments. No Magistrate or gazetted Officer was actually called on the spot, nor is even shown to have been so called by the Police. No independent witness is joined by the Police at the time of search. Therefore, the safeguard provided for by the Act; under Section 51 of the Act; has also been disregarded by the Police. All these violations have been committed by the Police for the simple reason that; had the Police complied with these provisions, the Police would not have been able to frame the petitioner in this false case. It is further contended by the counsel for the petitioner that earlier also, the petitioner was involved in a false case. However, in that case, the petitioner was acquitted by the Special Court; vide its judgment dated 05.04.2017. In fact, the petitioner has never indulged in dealing with the Narcotics at all. Counsel has further submitted that the petitioner has been in custody since 22.03.2017 and despite passage of about one and half years, the prosecution has examined only three witnesses. So, the trial is likely to take a long time. Therefore, the petitioner is entitled to be released on bail pending trial.

On the other hand, learned State Counsel has vehemently submitted that since the intoxicating powder weighing 300 grams, containing Alprazolam, a prohibited substance, is recovered from the petitioner, therefore, the petitioner is not entitled to be released on bail. It is further contended by the counsel that, in any case, before ordering the release of the petitioner on bail, this Court has to take into consideration the rigorous provisions of granting bail; as contained in Section 37 of NDPS

Act. It is contended that the `object' of the Act is of immense importance to the Society. Therefore, the right of bail can be restricted for this object. Counsel has relied upon the judgment of the Supreme Court rendered in 2017(4) RCR (Criminal) 644 – **Union of India v. Niyazuddin Sk. & Another**, as well as another judgment of the Supreme Court rendered in 2018(5) SCALE 519 – **Satpal Singh v. State of Punjab,** to contend that unless the Court applies its mind to the conditions for grant of bail, as prescribed in Section 37 of the NDPS Act, the Court cannot order the release of the petitioner on bail. Counsel for the respondent- State has also produced on record the custody certificate of the petitioner; which shows that the petitioner has been in custody for one year four months and sixteen days. The custody certificate also shows that the petitioner was earlier also accused of an offence under NDPS Act. However, he stands acquitted of the charge by the Special Court on 05.04.2017.

In reply to the argument of the State Counsel, the counsel for the petitioner has argued that as an individual, the petitioner cannot be made to suffer simply because the `object' of the Act is perceived to be important for Society. Relying upon the judgment of the Hon'ble Supreme Court in **2017 AIR (SC) 5500 – Nikesh Tarachand Shah Vs. Union of India and another,** the counsel has contended that a similar provision as contained in Section 45 of the Prevention of Money Laundering Act, 2002 has been held to be unconstitutional by holding that the importance of the `object' of the Act cannot be made a ground to trample the right of life and liberty guaranteed to the petitioner under Article 21 of the Constitution of India. Any law in any form has to confirm to Article 21 of the Constitution. In

case of conflict between the two, the `object' of the Act has to give in to the right of the individual. Fundamental right under Article 21 cannot be restricted for the sake of `object' of the Act. The judgments relied upon by the State Counsel have not taken into consideration the earlier judgments of the Large and Constitution Benches of the Supreme Court. Therefore, they are not the valid precedent on the proposition of law that only the `object' of the Act can be made basis for restricting the right given under Article 21 of the Constitution. The counsel has further argued that like any other citizen, he is also entitled to be considered for grant of bail under more liberal provisions of Section 439 of Cr.P.C. Applying strict provisions of Section 37 of NDPS Act is a discrimination with him. Still further, it is argued that otherwise also the requirements prescribed under Section 37(1)(b)(ii) are totally irrational, defy logic, and are bound to be applied in discriminatory and arbitrary manner. This part of the Section is nothing but luxury of language, drafted to disguise the attack on fundamental right. Therefore, this part of the Section deserves to be set aside. In any case, the petitioner is entitled to bail taking into consideration Article 21 of the Constitution, irrespective of any limiting provision contained in Section 37 of the NDPS Act.

The above said arguments of the counsels take the discourse to the constitutional validity of Section 37(1)(b)(ii) of the NDPS Act. But none of the counsels has pointed out any judgment where the constitutional validity of this provision is directly considered and decided by the Court. In the present proceedings, this Court also cannot pronounce upon the constitutional validity of this provision. This aspect can be considered only

by the appropriate Court/Bench and inappropriate proceedings. However, since certain arguments have been raised before this Court including the arguments having bearing upon the right of the petitioner guaranteed under Article 21 of the Constitution, therefore, this Court is called upon to consider those arguments. Hence, this Court is considering herein the arguments for the limited purpose of bail application of the petitioner.

In view of the above factual situation, it is clear that the petitioner is seeking bail under more liberal provisions of Section 439 Cr.P.C, whereas the State is seeking to restrict the right of bail of the petitioner on the basis of strict and rigorous conditions prescribed under Sections 37 of the NDPS Act. Therefore, it would be appropriate to have the reference to the language of two Sections.

Section 439 of Cr.P.C. reads as follows :-

> **"439. Special powers of High Court or Court of Session regarding bail.**—(1) A High Court or Court of Session may direct,—
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> (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;
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> (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:
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> Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an

offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

Section 37 of NDPS Act reads as follows :-

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

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

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27 A and also for offences involving commercial quantity shall be released on bail or on his own bond unless

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

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

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code

of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

A bare perusal of Section 439 of Cr.P.C shows that this Section has left the discretion of the Sessions Court or of the High Court to be comparatively unfettered and leaves upto the Court conscience as to whether to impose conditions upon the persons released under that Section, primarily, to secure his presence during trial or as an effort to prevent the person so released, from indulging in criminal activities in future. Although another Section, (added in Punjab), Section 439-A Cr.P.C casts upon High Court to record reason for its satisfaction that there are reasonable grounds for believing that such person is not guilty of any offence specified in that Section. However, this Section 439-A has its application only qua specified and limited number of offences under Indian Penal Code, Explosive Substances Act and the offences under the Arms Act. But even this restriction upon the discretion of the High Court, to release a person on bail, ends at this point only.

However, Section 37 of the NDPS Act prescribes much more rigorous conditions for release of a person on bail during the trial. Besides prescribing for giving opportunity of hearing to the Public Prosecutor, this Section gives a right to the Public Prosecutor to oppose the application. On mere opposition by the Public Prosecutor, to the grant of bail to the accused, this Section castes a duty upon the Court to satisfy itself that there are reasonable grounds for believing: (A) that he is not guilty of such offence; (B) that he is not likely to commit any offence while on bail. The entire controversy in this case is regarding the above-said two conditions.

Article 21 of the Constitution of India has conferred upon every person a right to life and liberty. This right to life and liberty has been prescribed to be inviolable; except in accordance with the procedure prescribed under law. This Article of the Constitution came for interpretation before the Hon'ble Supreme Court of India in **Maneka Gandhi v. Union of India (1978) 1 SCC 248** wherein the Hon'ble Supreme Court, in no uncertain terms, laid down that Article 21 confers protection not only against the executive action but also against a legislation, which deprives a person of his life and personal liberty, unless the law for deprivation is reasonable, just and fair. It was further held that it is not enough for the law to prescribe some semblance of the procedure. A procedure for depriving a person of his life and personal liberty must be eminently just, reasonable and fair. If the Court finds that it is not so, the Court will strike down the same. Therefore, the effect of the judgment of the Hon'ble Supreme Court in **Maneka Gandhi** is that the law required under Article 21 of the Constitution of India for regulating the life and liberty of a person has to be more than mere law of any kind. It has to be just and reasonable both procedurally and substantially. Still further Supreme Court in this case approvingly followed the large Bench (consisting 11 Judges) judgment of the Supreme Court rendered in **R.C. Cooper Vs. Union of India, 1970 AIR (SC)** 564 and held that it is not the `object' of the state action or the `form' thereof, which is material, it is the `direct effect' upon the right of the individual which shall be the determining factor for judging the constitutional validity of the state action. The relevant part of the judgment is as under:-

"19. However, it was only R. C. Cooper's case that the doctrine that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant, was finally rejected. It may be pointed out that this doctrine is in substance and reality nothing else than the test of pith and substance which is applied for determining the constitutionality of legislation where there is conflict of legislative powers conferred on Federal and State Legislatures with reference to legislative Lists. The question which is asked in such cases is : what is the pith and substance of the legislations; if it "is within the express powers, then it is not invalidated if incidentally it effects matters which are outside the authorised field". Here also, on the application of this doctrine, the question that is required to be considered is : what is the pith and substance of the action of the State, or in other words, what is its true nature and character; if it is in respect of the subject covered by any particular fundamental right, its validity must be judged only by reference to that fundamental right and it is immaterial that it incidentally affects another fundamental right. Mathew, J., in his dissenting judgment in Bennett Coleman & Co v. Union of India (1973)2 SCR 757 recognised the likeness of this doctrine to the pith and substance test and pointed out that "the pith and substance test, although not strictly appropriate, might serve a useful purpose"

in determining whether the State action infringes a particular fundamental right. But in R. C. Cooper's case, which was a decision given by the Full Court consisting of eleven judges, this doctrine was thrown overboard and it was pointed out by Shah, J., speaking on behalf of the majority (at pp. 596 and 597 of AIR 1970 SC) :

> "----it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's right."
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> "We are of the view that the theory that the object and form of. the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme....."
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> "In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters and in determining whether

> there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct."

The decision in R. C. Cooper's case thus overturned the view taken-in A. K. Gopalan's case and, as pointed out by Ray, J., speaking on behalf of the majority in; Bennett Coleman's case, it laid down two interrelated propositions, namely.

> "First, it is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right. Secondly,, it is the effect of the law and the action upon the right which attracts the jurisdiction of the Court to grant relief. The direct operation of the Act upon the rights forms the real test."

Still further, the Constitution Bench of Hon'ble the Supreme Court in **Indian Express Newspapers (Bombay) (P) Limited v. Union of India, (1985) 1 SCC 641** held that there is no rational distinction between the plenary legislation and subordinate legislation when it comes to the ground of challenge under Article 14. Hence, the test of manifest arbitrariness, as laid down in the judgments in case of **Maneka Gandhi's case (supra)** would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness for invalidating the legislation must be something prescribed to be done by the legislature,

irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. In this judgment again, the Supreme Court amply clarified that even if the object of the legislation is good, means to achieve that object cannot be violative of fundaments rights. The Supreme Court observed as under:-

> "41. Continuing further the Court observed at pages 867 and 868 thus:
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> > It was argued that the object of the Act was to prevent monopolies and that monopolies are obnoxious. We will assume that monopolies are always against public interest and deserve to be suppressed. Even so, upon the view we have taken that the intendment of the Act and the direct and immediate effect of the Act taken along with the impugned order was to interfere with the freedom of circulation of newspapers the circumstances that its object was to suppress monopolies and prevent unfair practices is of no assistance.
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> > The legitimacy of the result intended to be achieved does not necessarily imply that every means to achieve it is permissible; for even if the end is desirable and permissible, the means employed must not transgress the limits laid down by the Constitution, if they directly impinge on any of the fundamental rights guaranteed by the Constitution it is no answer when the

> constitutionality of the measure is challenged that apart from the fundamental right infringed the provision is otherwise legal."

In a more recent judgment in **Shayra Bano Vs. Union of India, 2017(5) RCR (Criminal) 878**, the Supreme Court dwelt upon the meaning of arbitrariness as under:-

> "281. It will be noticed that a Constitution Bench of this Court in **Indian Express Newspapers Vs. Union of India, (1985) 1 SCC 641,** stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

The effect of the above said judgments is that any law, through

which the life and liberty of an individual is sought to be curtailed, has necessarily, to satisfy the test of reasonableness, justness and fairness and also the test of exclusion of arbitrariness and irrationality. Hence, such a law has to pass the test of both, Article 14 and Article 21 of the Constitution of India. It is immaterial whether such law is made by legislature or made by executive in exercise of its powers of subordinate legislation. If such provision suffers from manifest arbitrariness, irrationality or is prescribing something to be done without adequate determining principles, then such law has to be struck down as unconstitutional, due to the same suffering from arbitrariness and discrimination and, therefore, denying the equal protection of law as guaranteed by Article 14 of the Constitution, besides unduly encroaching upon the right guaranteed by Article 21 of the Constitution of India.

A law prescribing an offence cannot be said to be violation of rights of an individual unless such offence is prohibiting and making punishable a conduct or consequences of conduct of an individual; which are otherwise permitted to him by the rights guaranteed under the Constitution. No individual has got a right to kill or hurt or adversely affect another person simply because the former is more strong and powerful. This freedom based upon his raw might; he has already ceded in favour of the social organisation and the State. But if mere speech and expression by an individual is made punishable offence, the same can definitely be questioned by individual, being permitted to him as a fundamental right. So if a person commits a validly prescribed offence and then as a consequence thereof his liberty is taken away by the State, the individual cannot raise a

grouse based on his right to life and liberty. But even in such case; the individual definitely, can raise such grouse qua the procedure prescribed for taking away his right to liberty and putting him in jail. Hence, in India, any procedure prescribed for taking away the life or liberty of an individual has to confirm to the above-stated test of protection guaranteed by Articles 14 and 21 of the Constitution of India.

The criminal jurisprudence, ordinarily, presumes a person to be innocent unless proved to be guilty. This is also not any concession given to him by any system or the State. This is his birth right. An individual is born as innocent. He remains innocent unless proved to be guilty through validly prescribed law and the procedure. Any procedure which directly takes away this presumption has to be treated as unreasonable and unfair. Therefore, the entire burden of proving the guilt of a person accused of an offence is upon the prosecution. Although Section 3 of the Indian Evidence Act does not make any distinction, in degree of proof required to prove a fact in civil or criminal litigation, but in view of the fact that the most valuable right of the individual is involved, by enormous precedents, to get an accused convicted of the offence, the prosecution is required to prove the guilt of the accused beyond reasonable doubt. This proof is to be adduced during a fair and properly conducted trial in accordance with law. Before that, there cannot be any presumption or any conclusion, of any degree that such a person is `guilty' of an offence. Although in certain cases, there are presumptions under which an accused is taken to be akin to guilty till he rebuts that presumption. However, even those presumptions are not of guilt of the accused as such. Rather, those presumptions are only regarding

certain facts, intentions or the circumstances or the legal fictions, attending the conduct of the accused which might have transformed into an offence. Therefore, before conclusion of the trial, no Court can presume or be satisfied, to any degree, that a person is `guilty' of an offence. As corollary to this, ordinarily, the accused cannot be kept in custody till he is proved to be guilty. Therefore, it has been established as basic principle of jurisprudence that during the pendency of a trial of an accused, the bail is a rule and the jail is only an exception. These two propositions do not need any expensive deliberation through the support of the Court judgments. However, it is relevant to reproduce few lines from the judgment of the Hon'ble Supreme Court rendered in **Gudikanti Narasimhulu v. Public Prosecutor (1978) 1 SCC 240:-**

> "...the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. ... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right."

Hence, in view of the above, since the life and liberty of a person cannot be violated except in accordance with due process of law, which has been interpreted to be a just, reasonable and fair process, therefore, it has to be seen whether the conditions prescribed under Section 37(1)(b)(ii), as mentioned above, are reasonable enough to pass the test of being due process of law as contemplated by Article 21 of the Constitution

of India and the test of being not arbitrary or irrational as are to be excluded as per the mandate of Article 14 of the Constitution.

A provision similar to Section 37 of NDPS Act is contained in Section 45 of Prevention of Money Laundering Act, 2002. The relevant part of the same is reproduced hereinbelow:-

> "(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless-
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> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
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> (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; Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or inform, may be released on bail, if the Special Court so directs: Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by-
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> xx xx xx xx xx xx
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> (2) The limitation on granting of bail specified in sub-section(1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being

in force on granting of bail."

The constitutional validity of this provision came to be considered by the Hon'ble Supreme Court in the judgment rendered in **2017 AIR (SC) 5500 – Nikesh Tarachand Shah v. Union of India and Another.** After considering all the provisions of the Constitution, previous precedents as contained in the judgment of the Hon'ble Supreme Court and the operational effects of above said Section 45 of the Money Laundering Act, the Hon'ble Supreme Court held the provision to be unconstitutional, being arbitrary and irrational. Although the Hon'ble Supreme Court declared the above said provision to be unconstitutional in view of the fact that the application of this provision was arbitrary in view of the classification of the offences contained in the Schedule of the Act, as well as qua its applicability for the offences under the general law. However, the Hon'ble Supreme Court also pointed out the irrationality of such a provision in general. It is apposite to reproduce the relevant part of the judgment of the Hon'ble Supreme Court which is reproduced as hereinbelow:-

> "35. Another conundrum that arises is that, unlike the Terrorist and Disruptive Activities (Prevention) Act, 1987, there is no provision in the 2002 Act which excludes grant of anticipatory bail. Anticipatory bail can be granted in circumstances set out in **Siddharam Satlingappa Mhetre v. State of Maharashtra, 2011(1) R.C.R. (Criminal) 126: (2011) 1 SCC 694** (See paragraphs 109, 112 and 117). Thus, anticipatory bail may be granted to a person who is prosecuted for the offence of money laundering together with an offence under Part A of the

Schedule, which may last throughout the trial. Obviously for grant of such bail, Section 45 does not need to be satisfied, as only a person arrested under Section 19 of the Act can only be released on bail after satisfying the conditions of Section 45. But insofar as pre-arrest bail is concerned, Section 45 does not apply on its own terms. This, again, would lead to an extremely anomalous situation. If pre-arrest bail is granted to Mr. X, which enures throughout the trial, for an offence under Part A of the Schedule and Section 4 of the 2002 Act, such person will be out on bail without his having satisfied the twin conditions of Section 45. However, if in an identical situation, Mr. Y is prosecuted for the same offences, but happens to be arrested, and then applies for bail, the twin conditions of Section 45 will have first to be met. This again leads to an extremely anomalous situation showing that Section 45 leads to manifestly arbitrary and unjust results and would, therefore, violate Article 14 and 21 of the Constitution.

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Also, we cannot agree with the learned Attorney General that Section 45 imposes two conditions which are akin to conditions that are specified for grant of ordinary bail. For this purpose, he referred us to Amarmani Tripathi (supra) at para 18, in which it was stated that, for grant of bail, the Court has to see whether there is prima facie or reasonable ground to believe that the accused has committed the offence, and the likelihood of that

> offence being repeated has also to be seen. It is obvious that the twin conditions set down in Section 45 are a much higher threshold bar than any of the conditions laid down in paragraph 18 of the aforesaid judgment. In fact, the presumption of innocence, which is attached to any person being prosecuted of an offence, is inverted by the conditions specified in Section 45, whereas for grant of ordinary bail the presumption of innocence attaches, after which the various factors set out in paragraph 18 of the judgment are to be looked at. Under Section 45, the Court must be satisfied that there are reasonable grounds to believe that the person is not guilty of such offences and that he is not likely to commit any offence while on bail."

In this very judgment, the Hon'ble Supreme Court also observed that there have been similar provisions in other Acts and those provisions have also been upheld by the Supreme Court, only "grudgingly". Pointing out towards the probable indefensibility of such provisions and highlighting the fact that such provisions cannot be upheld except by reading them in a language other than the one in which such provisions are present in the Statute, the Hon'ble Supreme Court pointed out the para No.44 of the judgment of the Hon'ble Supreme Court rendered in **(2005) 5 SCC 294 – Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Another,** dealing with Section 21 of Maharashtra Control of Organised Crimes Act, 1999 which is as under:-

> "xx xx xx xx xx xx
>
> The wording of Section 21(4), in our opinion, does not lead to

> the conclusion that the court must arrive at a positive finding that the application for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the Court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence."

However, such construction of the provision was not accepted by the Hon'ble Supreme Court to uphold the Section 45 of the Money Laundering Act 2002, rather the provision was held to be unconstitutional. So, it is obvious that such a construction has not found favour with the Hon'ble Supreme Court itself.

The provisions of Section 37 of NDPS Act itself come before the Hon'ble Supreme Court for consideration in various cases but only qua essentiality of its applicability. It is relevant to reproduce some of the judgments of the Hon'ble Supreme Court.

The Hon'ble Supreme Court in the case of **Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798** held as under:-

> "As the provision itself provides that no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.
>
> The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.
>
> The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word "reasonable".

> "In Stroud's Judicial Dictionary, 4th Edn., p.-2258 states that it would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he think. The reasoning which built up the old scholastidc logic sounds now like the jingling of a child's toy."
>
> xx xx xx xx xx xx
>
> 11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.
>
> 12. Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.

However, the Hon'ble Supreme Court again held that Court should be satisfied that the accused is not guilty of the offence. In the case of **Satpal Singh v. State of Punjab, 2018 AIR (SCW) 2011,** with regard to bail in case of commercial quantity of the contraband held as under:-

> "4. 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 the 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."

Therefore, once again the Supreme Court held the conditions of Section 37 to be applicable with all its rigour of language of this Section, instead of the whittled down interpretation of this language as interpreted by the Supreme Court in case of **Shiv Shanker Kesari's case (supra).**

While considering the applicability of Section 37 of NDPS Act at the stage of suspension of sentence, the Supreme Court, in case of 2000 (4) RCR (Criminal) 275 **Dadu @ Tulsidass Vs. State of Maharashtra** held as under:-

"Under the circumstances the writ petitions are disposed of by

holding that (1) Section 32A does not in any way affect the power of the authorities to grant parole; (2) It is unconstitutional to the extent it takes away the right of the Court to suspend the sentence of a convict under the Act; (3) Nevertheless, a sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions spelt out in Section 37 of the Act as dealt with in this judgment."

In **2009(1) RCR (Criminal) 239 – Ratan Kumar Vishwas Vs. State of U.P. and another,** while considering the applicability of Section 37 for suspension of sentence held as under:-

"15. In the said case it was clearly observed that a sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions as spelt out in Section 37 of the Act.

16. To deal with the menace of dangerous drugs flooding the market, Parliament has provided that a person accused of offence under the Act should not be released on bail during trial unless the mandatory conditions provided under Section 37 that there are reasonable grounds for holding that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail are satisfied. So far as the first condition is concerned, apparently the accused has been found guilty and has been convicted.

xx xx xx xx xx xx

17. The High Court has dealt with the factual position in great detail to conclude that the parameters of Section 37 are not fulfilled to warrant grant of bail by suspension of sentence. We find no reason to interfere in the matter. The High Court is requested to dispose of the Criminal Appeal pending before it expeditiously."

Besides these, there are several judgments from various High Courts, following the above-said judgments of the Hon'ble Supreme Court. The common streak in all these judgments is the judicial effort to give effect to and to uphold the language of Section 37 of NDPS Act, because the `object' of this Act is of immense importance to the Society, although the language of this Section, read as it is may have been violative of the Articles 14 and 21 of the Constitution of India. However, the dilemma of the judicial effort qua such language becomes evident for the simple reason that to bring it within the vires of the Constitution, the language had to be interpreted as laying down different tests meant for the validity of the satisfaction of the Court, as contemplated by Section 37. These tests range as under:-

(a) Prima facie satisfaction.

(b) More than prima facie satisfaction but satisfaction less than the satisfaction required for recording of not guilty.

(c) Full satisfaction as to the existence of reasonable grounds to believe that accused is not guilty, i.e. as is the bare language of the Act.

Besides this, the above three kinds of satisfaction are required to be:

(i) The satisfaction being limited to the purpose of bail.

(ii) The satisfaction being supported by material and facts on record.

The multi-cotomy of the ways in which Court can be led to apply the language of Section 37 itself shows the possibility and amenability of this language to be applied in a discriminatory manner, differing from Court to Court. This may also lead the Court, to just writing that it has the satisfaction as prescribed under Section 37(1)(b)(ii) and to complete the formality of language. So despite the judges being trained in the job of appreciating the facts and circumstances, the criterion embedded in the language of Section 37(1)(b)(ii) itself being amenable to variation, difference in its application, from Court to Court, cannot be ruled out. However, this is just one instance of the irrationality of the language of this Section, probably which led the Hon'ble Supreme Court to observe in **Nikesh Tarachand Shah's Case (supra)** that the Hon'ble Supreme Court has upheld such a language only “grudgingly”.

The judgment of the Supreme Court in case **Nikesh Tarachand Shah's case (supra)** shows that one of the grounds for holding the provision of Section 45 of Money Laundering Act, 2002 as unconstitutional was that there was no prohibition in the Money Laundering Act for grant of anticipatory bail. Therefore, a person could be granted anticipatory bail under Section 438 Cr.P.C without adverting to the conditions prescribed under Section 45 of Money Laundering Act and he can continue on bail without the Court recording its satisfaction qua the conditions prescribed under Section 45 of the Money Laundering Act. However, if a person is

somehow arrested then he cannot be released on bail except after recording of the satisfaction by the Court as to the conditions specified in Section 45 of the Money Laundering Act. Therefore, the conditions prescribed under Section 45 of the Money Laundering Act were held to be discriminatory and arbitrary. In the present case also, there is no prohibition under NDPS Act for grant of anticipatory bail. Furthermore in case **1995(2) RCR (Criminal) 531 – Union of India Vs. Thamishrasi**, the Hon'ble Supreme Court while considering applicability of Section 37 of NDPS Act at the time of releasing an accused on bail under Section 167(2), held that before challan is filed and material is supplied to the accused, Section 37 cannot be applied. Therefore, a person can get the anticipatory bail irrespective of compliance or consideration of conditions prescribed under Section 37(i)(b)(ii), whereas, if a person is arrested, he cannot be granted bail unless the Court records its satisfaction as to the conditions prescribed under the above said clause of Section 37 of NDPS Act. This can also lead to a thoroughly absurd situation, taking for example, the case of a person who, at initial stage, is just named as an accomplish in a case under the NDPS Act, without there being anything else against him in the FIR; but his co-accused being arrested with commercial quantity. The Court can grant him an anticipatory bail in such a situation and most probably, he is likely to get the concession of anticipatory bail. No compliance of Section 37(1)(b)(ii) would be required. Whereas his co-accused arrested with commercial quantity will not be granted bail by the Court; except after recording its satisfaction as to the conditions specified in Section 37 of NDPS Act. Taking the example further, the former person who has been granted

anticipatory bail, can be found to be the person from whom the later had received the seized consignment of commercial quantity and the supplementary challan can be filed against him also, for possessing the same commercial quantity. But in this case, the first person can, very well, continue to be on bail, whereas the second person would be in jail, because a Court may not be able to record the satisfaction as required under Section 37 of NDPS Act. Therefore, in its applicability, like the provision of Section 45 of the Money Laundering Act, Section 37(1)(b)(ii) is rendered discriminatory and hence, arbitrary.

Otherwise also, the learned counsel for the petitioner appears to be right in arguing that the two conditions as prescribed in Section 37(1)(b)(ii) are irrational and defy human logic. Needles to say that the offence, by definition, is an act or the consequences of an act of a person, as reflected in a fact or set of facts; which is made punishable by law. Unless the set of facts, which are made punishable by law are established in accordance with law a person cannot be convicted. Section 37(i)(b)(ii) of the NDPS Act requires the Court to be `satisfied' that there are `reasonable grounds for believing' that the person seeking bail is `not guilty' of such an offence. The mandatory requirement of the satisfaction of the Court, at the stage of grant of bail, qua the petitioner not being guilty of such an offence militates against the presumption of the innocence of the accused till he is proved guilty. This has been so held also by the Hon'ble Supreme Court in **2014(4) RCR (Criminal) 75, Union of India Vs. Sanjeev Vs. Despande**, in para No.6 which is as under:-

"6. Section 37[1] of the Act stipulates that all the offences

punishable under the Act shall be cognizable. It further stipulates that:

(1) persons accused of an offence under Section 19, 24, 27A or persons accused of offences involved "commercial quantity" [2] shall not be released on bail, unless the public prosecutor is given an opportunity to oppose the application for bail; and

(2) more importantly that unless "the Court is satisfied that there are reasonable grounds for believing" that the accused is not guilty of such an offence. Further, the Court is also required to be satisfied that such person is not likely to commit any offence while on bail.

[1] [Section 37 – Offences to be cognizable and non-bailable.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

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

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27 and also for offences involving commercial quantity shall be released on bail or on his own bond unless

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

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds

> for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being force, on granting of bail.]
>
> [2] [Section 2(viia): "Commercial quantity", in relation to narcotic drugs and psychotropic substance means any quantity grater than the quantity specified by the Central Government by notification in the Official Gazette.]
>
> In other words, Section 37 departs from the long established principle of presumption of innocence in favour of the accused person until proved otherwise."

However, in case of **Nikesh Tarachand Shah (supra),** the Hon'ble Supreme Court has considered the inversion of the presumption of innocence of the accused as one of the factors for declaring the Section 45 of the Prevention of Money Laundering Act, 2002 ultra vires and observed as under:-

> "Also, we cannot agree with the learned Attorney General that Section 45 imposes two conditions which are akin to conditions that are specified for grant of ordinary bail. For this purpose, he referred us to Amarmani Tripathi (supra) at para 18, in which it was stated that, for grant of bail, the Court has to see whether there is prima facie or reasonable ground to

> believe that the accused has committed the offence, and the likelihood of that offence being repeated has also be seen. It is obvious that the twin conditions set down in Section 45 are a much higher threshold bar than any of the conditions laid down in paragraph 18 of the aforesaid judgment. In fact, the presumption of innocence, which is attached to any person being prosecuted of an offence, is inverted by the conditions specified in Section 45, whereas for grant of ordinary bail the presumption of innocence attaches, after which the various factors set out in paragraph 18 of the judgment are to be looked at. Under Section 45, the Court must be satisfied that there are reasonable grounds to believe that the person is not guilty of such offence and that he is not likely to commit any offence while on bail."

This language also creates an inconsistency in itself, because if a Court granting bail records a satisfaction that there are reasonable grounds for believing that the petitioner is `not guilty' of such an offence then this may, at least to some extent, foreclose the option of the trial Court for holding that the petitioner `is guilty' of such an offence although this may or may not be the intention of the legislature, as observed by the Hon'ble Surpeme Court. But the language of Section 37(1)(b)(ii) says so in so many words. As per this language, the "reasonableness" is required only qua existence of grounds for belief of Court but the belief of the Court, as such, qua the accused being not guilty is to be unqualified. No Court can record a satisfaction and belief that a person is `guilty' or `not guilty' of the offence at

the stage of grant of bail. What is required to be done after a full fledged trial of an accused cannot be sought to be considered and recorded at the initial stage of trial. If a language of a Statute does not satisfy the test of constitutional validity then that language cannot be retained on the statute book at all, except at the cost of creating avenues for its discriminatory use. If by leaning towards the presumption of the validity of a Statute, a particular language used in Statute is upheld, by reading it in a language different than the language actually used in the Statute, so as to assign it a meaning within the scope of constitutional validity, then it can create a dichotomy or multifariousness in its operation. In such situation, it is bound to be used in different manners by different Courts. One Court can apply it in a read down language while the other Court may insist upon the actual language used in the Statute. This can be clearly seen in judgments clarifying and applying the language by adopting different degrees of satisfaction of Court. So in such a situation, possibility of discriminatory application of the same provision qua two different persons cannot be ruled out. This would be violative of Article 14 of the Constitution of India.

There is another aspect of this language which makes it discriminatory and arbitrary. Section 37(1)(b)(ii) makes the application of the conditions mentioned in this provision to be applicable only if the Public Prosecutor so desires. As per the language of this Section where the Public Prosecutor does not oppose the bail application then Court is not required to apply its mind for arriving at a satisfaction and belief as prescribed in Section 37(1)(b)(ii), despite the fact that the quantity of contraband involved may be many times more than the commercial quantity.

So the application of the conditions mentioned in Section 37(1)(b)(ii) becomes the dependant upon the uncontrolled undefined and unlimited discretion of the Public Prosecutor. This discretion of Public Prosecutor, besides, impinging upon the power of the Court to freely decide the question of bail to the accused, renders the entire process as liable to be discriminatory and un-informed, because Court cannot ensure that the Public Prosecutor has the necessary expertise or sincerity to the cause to take a proper decision, as to taking objection qua bail to the accused.

Even the reading down of the language of Section 37(1)(b)(ii) does not save it from being inherently inconsistent and from leading to absurdity of result of its operation. As per read down language also, while granting bail as per provisions of Section 37(1)(b)(ii), the Court would be required to record, at least, the prima facie, or more than prima facie, satisfaction that the accused is not guilty of the offence alleged against him. And this satisfaction has to be recorded by the Court with reference to the material on record. Whereas at the stage of framing of charge on the basis of same material and record, the Court is to arrive at a prima-facie satisfaction that such a person has committed such offence. In that situation, the accused would be entitled to get the charge quashed, moment he is granted bail by recording satisfaction of the Court as required under Section 37(1)(b)(ii). The accused as a person having protection of legal justness, fairness and rationality can very well put a poser to the Court as to how the Court is restricting its satisfaction to purpose of bail only; despite the satisfaction and belief of the Court being based on the same record and the same being reasonable, and in a given case; even the Court being the

same.

Even as per the best interpretation of Section 37(1)(b)(ii) which may be intended to retain the constitutional validity of the provision, what the Court is required to consider is that, in all reasonableness, the petitioner is not involved in the offence or that prima-facie the ingredients of the offence are not made out. There is no problem to this extent. The Couts being trained in the art of appreciation and used to filtering the grain from the chaff of the documents/ evidence, can very well come to tentative satisfaction as to whether a person is involved in the offence or not. Therefore, despite the language of first part of Section 37(1)(b)(ii), may be, not being in conformity in the principles of jurisprudence, can still be interpreted in a way which can be reasonably applied by the Courts in its practicability.

However, more problem lies with the second part of Section 37 (1)(b)(ii), which requires the Court to be satisfied that there are reasonable grounds for declaring that the accused is not likely to commit `any offence' while on bail. This part of Section 37(1)(b)(ii) militates against the rationale and reasoning considered by the Hon'ble Supreme Court in the above said case of **Nikesh Tarachand Shah's case (supra)**, wherein it has implied that if such language extends in operation not only to the offence under the special Act but also to any offence under any other legal provision where such conditions are not required to be applied for grant of bail then such language enters the realm of unconstitutionality. Therefore, this language is also arbitrary on that count because it requires the Court to satisfy itself that the petitioner is not likely to commit any offence on the

earth while on bail. Had this Section restricted the requirement of the satisfaction of the Court that the accused is not likely to commit any offence under NDPS Act, then probably it could have some rational behind it. However, since the language of the second part has been thrown open the entire criminal arena to be considered by the Court before grant of bail under NDPS Act, therefore, this language does not have even the nexus to the object to be achieved by NDPS Act.

Moreover, a Court of law would always be well advised to keep in mind that `prophesy is not thy domain'. No Court, howsoever trained, can be “reasonably” satisfied that a person would not commit any offence, may be even under NDPS Act, after coming out of the custody. It can only be a guess-work, which may or may not turn out to be correct. However, it is not the guess-work which is mandated, but it is `reasonable satisfaction'. It can occur to mind that if a person is a first offender then he is not likely to commit an offence again or that if a person has committed, say; ten offences then he is more likely to commit offence again. But it has to be kept in mind that the second, third, fourth and the Nth offence is always committed by an accused only after first, having committed the first offence. Likewise, there cannot be any `reason' and, therefore, the `reasonable ground' to believe that if a person has committed ten offences, he is again likely to commit the offence. Examples galore in daily life when a criminal calls it a day, say, after 10th crime also. After all scriptures do tell us as to how Maharishi Balmiki turned into a “Maharishi” and created that Epic, which became a treaties of one of the biggest religion of the world. Furthermore, as observed above, an offence is a conduct of a person as reflected into facts

or set of facts made punishable by law, the Court cannot grope into approximation and to arrive at any degree of satisfaction as to whether a person would indulge in set of facts after coming out of the custody. The crime being based on mens-rea is a function of mental state of an individual, which cannot be guessed by any Court in advance, by any means. Moreover, as observed above, it is not the guess-work by Court qua possibility of future conduct and mental state of accused, which is required under second part of Section 37(1)(b)(ii). It is the reasonable `satisfaction' on the basis of the material on record which is required. By extension of any human logic, it cannot be said that the Court can record, any degree of satisfaction, based on some reasonable ground, as to whether a person would commit an offence or whether he would not commit an offence after coming out of the custody. Neither the Court would be able to record a satisfaction that the accused would, likely, commit the offence after coming out of the custody, nor would the Court be able to record a satisfaction that the accused would not commit any offence after coming out of the custody. Hence, the second part of Section 37(i)(b)(ii) requires a humanly impossible act on the part of the Court. Since the second part of Section 37 (1)(b)(ii) requires a satisfaction of the Court, which is impossible by extension of any human logic, therefore, this is an irrational requirement. There is no rational way for a Court to record its satisfaction or to arrive at this satisfaction qua possible future conduct and mental state of an accused. Any record relating only to the past conduct of a person cannot be reasonably made a basis for future reasonable prediction, as against the guess work, regarding the possible mental state or possible conduct of that

person. Even the sophisticated psychological theories of human behaviour, using sophisticated statistical tools of factorization, based on common minimum behavioural factors in large number of people, are still struggling to find a credible answer in this regard.

Although there are judgments from the Courts to say that before a Court exercises power to grant bail under NDPS Act, it has to apply its mind to the conditions prescribed under Section 37(i)(b)(ii). All the Courts have invariably held that unless the Court so applies its mind and arrive at a satisfaction qua the conditions prescribed by Section, the Court cannot grant bail to an accused. However, in none of the judgments, any adequate determining principles have been spelled out for the Court to be guided with, in exercise of such a power qua further possible events. In fact, there can be none, if the Court is to record this satisfaction in a `reasonable' manner and on the basis of the `available record' only; and it is not to delve into a pure guess-work. And if the adequate determining principles are not prescribed or decipherable under the Act or cannot be gathered even by human logic then such a procedure has to be treated to be an irrational, undue and unfair procedure for the purpose of inviolability of the right to life and liberty of an individual.

As clarified in the beginning itself, although, the above said discussion by this Court may have some indications towards constitutional invalidity of the provision, however, pronouncement on the constitutional validity of the provision is not the domain of the present petition. The constitutional validity of the provision can be considered only by the appropriate Court in the appropriate proceedings. Ordinarily, the provision

of a Section of an Act would be necessarily followed by the Court, unless declared as ultra vires of the Constitution. However, since the Hon'ble Supreme Court in case of **Shiv Shanker Kesari's case (supra)** has held that satisfaction of a Court can be for a `limited purpose' of considering the question of releasing the accused on bail also and in the recent judgment in case of **Nikesh Tarachand Shah (supra)** has again reiterated the 11 Judges Bench judgment of the Hon'ble Supreme Court and has categorically held that, it is not the `object' of the Act or the `form' and so the language or modality thereof; which is material, rather it is its `direct effect' of such state instrument, on the right of an individual which is material for the jurisdiction of the Court to grant relief of protection of right of an individual, and has held the provision similar to the one as contained in Section 37(1)(b)(ii) as ultra vires, therefore, this Court being a Constitutional Court, it would not be appropriate for it to put the citizen to legal asphyxia by refusing to entertain his reliance upon the above-said judgment of the Hon'ble Supreme Court, even for the limited purpose of granting bail, which is sought by the petitioner on the ground that his bail is being opposed by the State for the reasons which has direct effect on his fundamental rights and are discriminatory, arbitrary, irrational, unreasonable and unjust and thus violate his right under Article 21 of the Constitution. It is trite law that the Court has to chase the injustice wherever it is found and that in case of conflict between a provision of law and the fundamental right of a citizen, as interpreted by the Hon'ble Supreme Court, it is the fundamental right which has to be given precedent. In view of the above discussion and judgments, it may not be appropriate to tell the petitioner to

wait in jail till the constitutional validity is formally considered and decided. The petitioner may separately raise the challenge to the validity of the provisions of Section 37(1)(b)(ii). Therefore, for the limited purpose of considering as to whether the petitioner should be released on bail, it can be considered, whether the procedure being insisted by the State; for its plea of denying the bail to petitioner; is non-discriminatory, rational, reasonable and fair procedure or not. For this limited purpose of consideration of bail of the petitioner, this Court has considered the aspect of discrimination, arbitrariness, reasonableness and justness of the conditions being insisted upon by the State, and found the same to be discriminatory, irrational and unreasonable and unjust and thus not worth defeating the right of the petitioner to get bail, if otherwise found eligible by a Court.

However, since the judgments of the Hon'ble Supreme Court mandating the application of mind by the Court to Section 37, are binding upon this Court, so this Court is bound to apply its mind to the conditions of Section 37(1)(b)(ii) for considering bail of petitioner. So, coming to the facts of the present case, this Court finds substance in the argument of learned counsel for the petitioner that the Arresting Officer has not complied with the provisions of Section 50 and 51, as interpreted by the Hon'ble Supreme Court and by this Court, in a number of judgments. Merely asking a person whether he wants to be searched before a gazetted officer or Magistrate is not the sufficient compliance of Section 50 of NDPS Act. Even the factum of giving such option is being denied by the petitioner. The provisions of the above two Sections are meant, basically, to protect an individual against the false implication by the Police. If this protection is

sought to be denied by the Police then this is one of the reasons which can lead, and is leading, the Court in the present case, to come, to a prima-facie, but reasonable satisfaction that the petitioner is not involved in the crime allegled in the present case. The second aspect is that although 300 grams of intoxicant powder is claimed to have been recovered from the petitioner and it is also found to be containing Alprazolam powder in it, however, whether the entire powder is Alprazolam or not is not clear from the facts on record. This also contributes towards the Court coming to the abovesaid satisfaction that the petitioner may not be guilty in the present case. In the considered opinion of this Court, first part of Section 37(1)(b)(ii) qua the satisfaction of the Court is fulfilled in this case.

But, so far as second part of Section 37(1)(b)(ii), i.e. regarding the satisfaction of the Court based on reasons to believe that the accused would not commit `any offence' after coming out of the custody, is concerned, this Court finds that this is the requirement which is being insisted by the State, despite the same being irrational and being incomprehensible from any material on record. As held above, this Court cannot go into the future mental state of the mind of the petitioner as to what he would be, likely, doing after getting released on bail. Therefore, if this Court cannot record a reasonable satisfaction that the petitioner is not likely to commit `any offence' or `offence under NDPS Act' after being released on bail, then this Court, also, does not have any reasonable ground to be satisfied that the petitioner is likely to commit any offence after he is released on bail. Hence, the satisfaction of the Court in this regard is neutral qua future possible conduct of the petitioner. However, it has come

on record that earlier also, the petitioner was involved in a case, but he has been acquitted in that case. So his antecedents are also clear as of now. Moreover, since this Court has already recorded a prima-facie satisfaction that petitioner is not involved even in the present case and that earlier also the petitioner was involved in a false case, then this Court can, to some extent, venture to believe that the petitioner would not, in all likelihood, commit any offence after coming out of the custody, if at all, the Court is permitted any liberty to indulge in prophesy.

In view of the above, the present petition is allowed. The petitioner is ordered to be released on bail during trial. Let the petitioner be released on bail on his furnishing bail bonds/ sureties to the satisfaction of the trial Court.

August 09, 2018 **(RAJBIR SEHRAWAT)**
renu **JUDGE**

Whether Speaking/reasoned Yes/No
Whether Reportable Yes/No