Bombay High Court
Mr. M.D. Kale, Intelligence ... vs Mr. Mohd. Afzal Mohd. Yarkhan & ... on 3 April, 1998
Equivalent citations: 1999 (5) BomCR 214
Author: S Nijjar
Bench: S Nijjar
ORDER S.S. Nijjar, J.

1. This Criminal Revision Application has been filed by the Intelligence Officer, Narcotics Control Bureau, Bombay challenging the order below Exh. 1 in Criminal Bail Application No. 1041 of 1997 wherein the accused-respondent No. 1 has been ordered to be released on bail on furnishing P.R. Bond for Rs. 30,000/- with one solvent surety in the like amount. The accused has also been directed to attend Vasai Police Station on every Sunday between 8.00 a.m. and 5.00 p.m. and not to leave the limits of the said Police Station till further orders.

2. The facts as narrated in the impugned order may be noticed.

In accordance with the information received by the Intelligence Officer of Narcotics Bureau, Mumbai, house of the accused was searched. This search was made in the presence of the panchas. As a result of the search, 60 grams of opium and 6 grams of methaqualone powder were recovered. The search was made in the presence of the panchas and the contraband was seized from the house of the accused under panchanama. An amount of Rs. 15,000/- in cash was recovered. Some equipments for preparation of methaqualone powder were also seized from the said house. Statement of the accused was recorded under section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as "the N.D.P.S. Act". The samples from the said opium and methaqualone powder were taken and sealed. They were sent to the Chemical Analyser for an analysis. After completion of the investigation the complaint was lodged against the accused by Shri M.D. Kale, Intelligence Officer, Narcotics Bureau in the Court of Special Judge, N.D.P.S., Thane, Xerox copies of the necessary documents were submitted along with the complaint. The accused was arrested on 14-1-1996 and he was in judicial custody at the time of making the application for bail.

3. It was submitted before the learned Special Judge that the accused had been falsely implicated. The investigation into the offence was almost over and the charge-sheet had been filed before the Court. It was also submitted that there is non-compliance of the mandatory provisions of sections 42 to 50 of the N.D.P.S. Act. According to the Counsel for the accused there was non-compliance of the mandatory provisions of section 42(1) of the N.D.P.S. Act which provided that the Officer who received the information about the offence reduce the same into writing. After examining the material on record, the learned Special Judge came to the conclusion that the Intelligence Officer of the Narcotics Bureau who had received the information from the informant had reduced the same into writing and, prima facie, there appears compliance of section 42(1) of the N.D.P.S. Act. According to this section where an Officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. To satisfy the Court that this provision had been complied with, the attention of the Court was invited towards the endorsement below the gist of information. This endorsement shows that the copy has been sent to A.D., N.C.B., Bombay on 12-1-96 as required

under section 42(2) of the N.D.P.S. Act. Thus it was submitted that it is quite sufficient to show that the provisions of section 42(2) of the N.D.P.S. Act are complied with. This submission was rejected by the learned Special Judge with the observations that there is no record to show that the said copy was received by the said Officer and it was expected from the State to show that the said copy was sent along with the letter addressed to the Superior Officer. A copy of the said letter ought to have been produced in the Court. No such letter was filed in Court. In view of the above, the learned Special Judge has observed that the provisions of section 42(2) of the N.D.P.S. Act have not been strictly complied with.

4. Relying on the case of State of Punjab v. Balbir Singh 1994(1) Crimes page 753 it was submitted on behalf of the accused that non-compliance of the provisions of sections 41, 42, 50, 51, 52 and 57 will vitiate the conviction of the accused. It was further submitted that the strict compliance of the provisions should be looked into even at the stage of bail. For this proposition Counsel for the accused had relied upon the case of Lawrance D'Souza v. State of Maharashtra, 1992 Cr.L.J. 399. These submissions of the Counsel for the accused have been accepted and it has been held that there was no strict compliance of the provisions of section 42(2) of the Act. Counsel for the accused had also submitted that there is non-compliance of section 50 of the Act. This section, however, has been held to be inapplicable to the facts of the present case. On merits it was submitted on behalf of the accused that he has been in custody since 14-1-96 and his family is also suffering. Further the quantity recovered from the accused was not huge as it was only 60 grams of opium and 6 grams of methaqualone powder. It was also pointed out to the learned Special Judge that the detention of the accused under section 3(1) of the Prevention of Illicit Traffic in the Narcotic Drugs & Psychotropic Substances Act, 1988 was quashed by the Delhi High Court in Criminal Writ No. 519/96. The said detention order related to the same offence. The detention order having been set aside by the Delhi High Court, it was submitted that the accused deserves to be released on bail. The learned Special Judge, however, was not impressed with the said argument as the detention order had been set aside on different grounds. But at the same time the learned Special Judge has recorded a finding that there is no other antecedents of the accused as regards the offences under the N.D.P.S. Act, It is also recorded that no ground is shown whether there is any likelihood of the accused absconding or tampering with the prosecution evidence in case he is released on bail.

5. The Counsel also submitted that the confessional statement of the accused under section 67 of the N.D.P.S. Act is not admissible in evidence. This statement was retracted by the accused on 9th April, 1996 when he was produced in Court. It was stated that the said statement was not voluntary and it was obtained under threats, pressure and duress. Learned Counsel appearing for the accused relied on the case reported in 1990 Cr.L.J. 903 Prajesh S. Waghani v. The Intelligence Officer. In that case this Court had granted bail. It was held in this case that the confessional statements made by the accused therein were secured by physical assault and did not inspire confidence in the prosecution version. Relying on the aforesaid case and after taking into consideration all the facts and circumstances such as non-compliance of the mandatory provisions of section 42(2) of the N.D.P.S. Act, quantity of contraband seized from the house of the accused, his long detention in the jail and his complaint about statement under section 67 being under duress and threat, the learned Special Judge ordered that the accused be released on bail.

6. Mr. Agrawal, learned Counsel appearing for the petitioner, has submitted that the learned Special Judge has exceeded the jurisdiction vested in the Court for grant of bail under the Act. He submits that there was sufficient compliance of section 42(2) of the N.D.P.S. Act. In support of his submissions he has relied upon Harish M. Patel v. Inspector of Customs, 1996(3) All M.R. 608, paragraph 3, Ashok Kumar & Ors. v. Chairman, B.S. Recruitment Board, , and Booby Art Interlant & others v. Ompal Singh Hoon & others, . It is also submitted that at this stage the Court ought not to hold a mini trial on merits. In support of this proposition Mr. Agrawal relies on Garban AH v. Ad-Interim Unit),1996(2) M.L.J. 839 paragraph 8. It is further submitted that merely because statement has been retracted does not mean that a presumption arises that the same is involuntary. It is submitted that the statement itself is sufficient to hold that the accused is guilty. In support of these submissions. Counsel has relied upon The Director of Enforcement v. Shri Rohit B. Jhaveri, 1996(1) All M.R. 89 and C. Sampath Kumar v. The Enforcement Officer, Enforcement Directorate, Madras, 1997(8) Supreme Today 268. Counsel has also relied on Yinusa Olerualoje v. R.N. Kakkar, 1997(IV) L.J. 853 at page 862, para 32, onwards. Counsel further submits that under section 35 of the Act, the burden of proof is on the accused. Bail can only be granted if the learned Judge comes to the conclusion that there are grounds for acquittal of the accused. The burden of proof on the accused under section 35(2) of the N.D.P.S. Act is beyond reasonable time.

7. Mr. Chitnis, learned Counsel appearing for the accused, however, submitted that the criminal revision application is liable to be dismissed as not maintainable. He also submits that bail once granted can only be cancelled in exceptional circumstances. According to the learned Counsel the remedy for cancellation of bail is not by way of revision. The application has to be made under section 439(2) of the Cr. P.C. It is further submitted that all the judgements relied upon by Mr. Agrawal are not applicable. In support of his submissions Mr. Chitnis has relied upon judgement of the Supreme Court in the case of Amar Nath and others v. State of Haryana and another, . In this case it is categorically held that a harmonious construction of sections 397 and 482, Cr. P.C., 1973 would lead to the irresistible conclusion that where a particular order is expressly barred under section 397(2) and cannot be subject to revision by the High Court then, to such a case, the provisions of section 482 dealing with the inherent powers of the High Court would not apply. It is further held that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject matter. Where, however, there is an express provision barring a particular remedy the Court cannot resort to the exercise of inherent powers. Similar is the view expressed by this Court in the case of Mohan @ Mannu R. Basantani v. State of Maharashtra, wherein it is held as follows:

"Where the Magistrate granted bail and the State made an application for cancellation of bail to the Sessions Court but the application was treated as revision as there was a challenge to the legality of the order of the Magistrate and under the revisional powers the Sessions Judge set aside the order of the Magistrate without jurisdiction, the order granting or refusing bail being an interlocutory order and in view of section 397(2) of Criminal Procedure Code the revisional powers could not be exercised in respect of such interlocutory orders."

Mr. Chitnis also relied the judgement of the Supreme Court in the case of Usmanbhai D. Memon and others v. State of Gujarat, wherein it is categorically held that an order granting bail or refusing

bail is an interlocutory order. That being so it is submitted that no revision would be maintainable.

8. Mr. Agrawal on the other hand has relied on a number of judgments to submit that inspite of the bar under section 397(2) this Court can still interfere under section 482 of the Cr. P.C. He has relied on Talab Haji Hussain v. Madhukar Purshottam Mondkar, and Court on its own Motion v. Vishnu Pandit, 1993 Cri. L.J. 2025 Delhi High Court, wherein it is held that the powers of the High Court under section 482 of the Cr. P.C. can also be relatable to the powers of the Court under "Article 227 of the Constitution of India having the power of superintendence over the courts. It is held that no law made by Parliament or State Legislature can whittle down the powers conferred by Article 227 on the High Court.

9. In my view the aforesaid submissions made by Mr. Chitnis, learned Senior Counsel for the respondent do not have any substance. A bare perusal of the cause title of the application shows that it is styled as "in the matter of order dated 16-9-97 granting bail dated 16-9-97, passed by learned Special Judge, Thane, allowing Cri. Bail Application No. 1041/97 of respondent No. 1, original accused; and in the matter of sections 439(2), 400 and 482 of Cr. P.C. And in the matter of Article 227 of Constitution of India." Thereafter the prayers made are as follows:

"(b) This application be kindly allowed.

(c) The impugned judgement & order, releasing the accused on bail in Cr. Bail Application No. 1041/97 in N.D.P.S Special Case No. 190/96, passed by the learned Special Judge, Thane, dated 16-9-97, be kindly set aside and quashed."

In view of the above it can hardly be said that the present application is not made under section 439(2) of the Criminal Procedure Code. Once the application has been filed under section 439(2) of the Cr. P.C., mere mention of section 482 of Cr. P.C. and Article 227 of the Constitution of India would not change the nature of the application. The question raised by Mr. Chitnis may perhaps have been relevant had the application been made as a Criminal Writ Petition under section 482 of the Cr. P.C. or as a petition under Article 227 of the Constitution of India alone. In my view the cases cited by Mr. Chitnis are not applicable in the facts and circumstances of this case. Even if it is accepted that the application has to be made under section 439(2) Cr. P.C., the provision has been complied with. As noticed above application has been made under section 439(2) read with section 482 Cr. P.C. and Article 227 of the Constitution. Nevertheless the submissions made by Mr. Chitnis can be examined, as they have been specifically raised. It can be readily seen that in Amar Nath's case (supra) the Supreme Court examined the scope of section 482 Cr. P.C. in the context of the bar on revision against interlocutory orders as provided in section 397(2) Cr. P.C. The Supreme Court did not examine the power of the Court under Article 227 of the Constitution of India. In Usamanbhai's case (supra) the Supreme Court observed in para 16:

"As a matter of construction, we must accept the contention advanced by learned Counsel appearing for the State Government that the Act being a special Act must prevail in respect of the jurisdiction and power of the High Court to entertain all application for bail under section 439 of the Code or by recourse to its inherent powers under section 482. Under the Scheme of the Act, there is complete

exclusion of the jurisdiction of the High Court in any case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made the- reunder. There is contrariety between the provisions of the Act and those contained in the Code. Under the Code, the High Court is invested with various functions and duties in relation to any judgment or order passed by Criminal Court subordinate to it. Those powers may be briefly enumerated, namely, the jurisdiction and power to hear an appeal under section 374 against any judgment or sentence passed by the Court of Session, the power to hear an appeal against an order of acquittal by a Criminal Court including the Court of Session under section 378, the power to hear a reference as to the validity of any Act, Ordinance or Regulation or any provision contained therein made by a Criminal Court under section 395, the confirmation of a death sentence on a reference by a Court of Session under sections 366-371 and section 392, the power to grant bail under section 482 to make such orders as may be necessary or to prevent abuse of the process of the Court or otherwise to secure the ends of justice. Undoubtedly, the High Court has the jurisdiction and power to pass such orders as the ends of justice require, in relation to proceedings before all Criminal Courts subordinate to it."

Again in scope of the power of the High Court under Article 227 of the Constitution was neither raised before the Supreme Court, nor was it dealt with. The Judgement of this Court in the case of Mohan @ Mannu Radhamal Basantani (supra), dealt only with the revisional powers of the Sessions Court. In this case the settled law that no revision is competent against an interlocutory order is reiterated. The power of the High Court and scope of Article 227 has not been dilated upon by the Court. The Delhi High Court on its own motion cancelled the bail granted to the accused in the case of Vishnu Pandit (supra). If the argument of Mr. Chitnis are accepted, the High Court would be powerless to cancel bail, unless the case falls within the scope of section 439(2) Cr. P.C. This to my mind would be rewriting Article 227 of the Constitution of India, which preserves the power of the High Court to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The reasons why the Delhi High Court took suo moto notice are set out in the judgement of the learned Single Judge, D.P. Wadhwa, J., which are as follows:

"ORDER; This matter arises out of suo motu Court action in calling upon the two respondents as to why their applications for their release on bail be not rejected. They are accused of offences under sections 366/376/342/506/34, Indian Penal Code. By two separate orders the learned Additional Sessions Judge had released both the respondents on bail. The order of this Court issuing show cause notice is dated 21 November, 1992 and it is appropriate to set out that order in full showing the circumstances as to why the Court thought it fit to take suo motu action: ---

It appeared in the national newspapers that the respondent Vishnu Pandit had been arrested for having allegedly committed rape on a 35 year old wife of an accountant working in D.D.A. His driver Baljeet was also taken into custody by the police. The allegations were that the woman was raped twice by Vishnu Pandit, first in front of her 15 year old son and at that time when Vishnu Pandit was molesting the woman, his driver Baljeet kept a pistol on son's head. This was on 9 November, 1992. Vishnu Pandit again committed rape on that woman on 11 November, 1992 in front of her husband. The police version as given in the newspapers was that Vishnu Pandit first struck an acquaintance with the woman in a nursing home when she had come to see her ailing mother-in-law. He met the

woman and her son outside the nursing home and on the pretext of giving them a lift to their house in his Maruti van he took them to his office in Dilshad Garden and committed rape on the woman. Yet further two days later he again took up that woman when at that tune she was accompanied with her husband and again she was raped by Vishnu Pandit at the same spot. Both Vishnu Pandit and his driver Baljeet have since been released on bail under the orders of Mr. B.S. Chaudhary, Additional Sessions Judge, Shahdara, Delhi. The order of bail in the case of Baljeet was passed on 16 November, 1992 and in the case of Vishnu Pandit on 18 November, 1992. I sent for the records granting bail to both Vishnu Pandit and Baljeet. The accused are accused of having committed offences under sections 366/ 376/342/506/34, I.P.C. These are all cognisable offences and non-bailable. In the case of an offence under section 376 sentence can be imprisonment for life.

The impugned order in the case of Vishnu Pandit would show that the woman who has been raped is Kamlesh Arya and the order records that she argued her case for about 20 minutes without fear. This fearlessness on her part appears to be a circumstance which has gone against her. The order would show as if the learned Additional Sessions Judge has already disbelieved the version of the lady though yet he remarked" without going into the merits of the case, lest it may prejudice to the either party later on, I feel the totality of the circumstances of the matter and the facts as brought by the prosecution uptill now are convincing to the extent that the case for bail of the accused is made out." But I hardly find any justification for the learned Additional Sessions Judge to come to this conclusion.

As noted above, accused Baljeet is also accused of offences under same sections of Indian Penal Code. As to what role had been assigned to him by the prosecution the order releasing him on bail is silent,. The whole of the order reads as under: -

"In view of the role assigned to the petitioner, and that he is stated to be driver and as per submission he remained outside the room throughout. In view of the circumstances, petitioner is admitted to bail on furnishing a bond in the sum of Rs. 5,000/- with one surety in the like amount to the satisfaction of the Court concerned."

"Considering the gravity of the offence and the dreadful manner in which it was committed the learned Additional Sessions Judge has not examined the possibility of the accused terrorising the witnesses. We cannot think of a more depraved act against the dignity of a woman and the approach of the learned Additional Sessions Judge in granting bail to the accused does not appear to be sound and it is rather casual and cavalier. The impugned orders do not record as to what version of the prosecution is and what investigation has so far been conducted. Prima facie it appears to me judicial discretion in the present case has not been properly exercised and the impugned orders granting bail to the accused are not legal. I, therefore, in exercise of powers conferred upon this Court under sections 482 of the Code of Criminal Procedure and all other powers enabling in that behalf would stay the operation of the orders granting bail to the accused and would call upon them to show cause as to why their applications for their release on bail be not rejected. The result of stay of operation of the impugned orders is that the accused are to be taken into custody. Let non-bailable warrants issue against them for their appearance in Court on 23rd November, 1992. Notice will also issue to the Standing Counsel (Criminal), Delhi Administration, for the same date."

Paragraphs 7, 8 and 9 read as follows :

"7. The reasons for granting bail to the respondents are quite shocking. They are accused of serious offences under sections 366/376/342/506/34 I.P.C. I do not think it will be appropriate for me to comment on the evidence as its value will have to be tested during the course of the trial. It was, however, asserted before me with great deal of vehemence that the story given by the complainant was impossible to believe and was incredible and that the respondents had been roped in a false case to blackmail them or to satisfy some one's political vendetta. Nothing on the record as then existed suggested such a thing. An accused cannot be said to be in such a privileged position that he can make all sorts of allegations....."

8. It is contended that Court should be liberal in granting bail and the accused has a right to bail under Article 21 of the Constitution which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The question of grant of bail to the accused depends upon the facts and circumstances of each case and the factors which the Court would take into consideration in a given case cannot be put into straight jacket, but some of these have been spelled out by the Apex Court which I will personally refer to. If Article 21 gives right of liberty to the accused, it at the same time protects a woman so that she can live with dignity and honour."

9. An argument was raised that an order granting or refusing bail is an interlocutory order and as such no revision lies of such an order. In this connection reference has been made to a decision of the Supreme Court in Usmanbhai Dawoodbhai Memon v. State of Gujarat, 1988(1) J.T. (S.C.) 539 : 1988 Cri.L.J. 938 and to the provisions of sub-section (2) of section 397 of the Code....."

Repelling the argument raised in para 9, Wadhwa, J., observed in paras 12 and 14 as follows:

"12. In Usmanbhai's case 1988 Cri.L.J. 939 (S.C.) one of the questions before the Supreme Court was as to the jurisdiction and power of the High Court to grant bail under section 439 of the Code or by recourse to its inherent powers under section 482 to a person held in custody and accused of an offence under sections 3 and 4 of the Terrorist & Disruptive Activities (Prevention) Act, 1987. The Court accepted the contention advanced by the State Government that the Act being a Special Act must prevail in respect of the jurisdiction and power of the High Court to entertain an application for bail under section 439 of the Code or by recourse to its inherent powers under section 482. Another argument raised was that the orders passed by the designated courts refusing to grant bail were not interlocutory orders and, therefore, appealable under section 19(1) of the TADA but the Court did not accept the same. The Court was interpreting the words "not being in interlocutory order" used in section 19(1) of the TADA and said that the Court must interpret the words not being an interlocutory order used in section 19(1) in their natural sense in furtherance of the object and purpose of the Act to exclude any interference with the proceedings before a Designated Court at an intermediate stage. There is no finality attached to an order of a Designated Court granting or refusing bail. Such an application for bail can always be renewed from time to time. It was in this context, therefore, that the Court said that it could not be doubted that the grant or refusal of a bail application is essentially an interlocutory order and there is no finality to such an order for an

application for bail can always be renewed from time to time."

"14. In my view section 439(2) of the Code which empowers a High Court or Court of Sessions to direct that any person who has been released on bail under Chapter XXXIII of the Code (containing provisions as to bail and bonds, sections 436 to 450) be arrested and commit him to custody is independent of section 397 and bar of sub-section (2) of section 397 is inapplicable. That being so, power to suspend which is ancillary to power to cancel is inherent in the High Court and can be exercised under section 482 of the Code. I have not come across any case and none has been cited before me where any aggrieved party has come to High Court under section 397 on refusal of grant of bail by a subordinate Court. The power which I have exercised in issuing notices to the respondents while at the same time staying operation of the orders of the learned Additional Sessions Judge releasing him on bail can also be relatable to Article 227 of the Constitution giving the source of power to the High Court in that regard. Clause (1) of Article 227 provides that every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. To my mind, no law made by Parliament or State Legislature can whittle down the powers conferred by Article 227 on the High Court. I am fortified in my view by decisions of two different High Courts."

In State of Maharashtra v. Tukaram Shiv Patil), 1977 Cri.L.J. 394 a Division Bench of this Court has held that "The High Court and even Sessions Court has powers to cancel the bail granted earlier pending the trial or investigation under section 439(2). The High Court can further cancel it in the exercise of its inherent jurisdiction under section 482 Cr.P.C. apart from the powers under Article 227 of the Constitution". These observations were made in view of the law laid down by the Supreme Court in Talab Haji Hussain v. Madhukar Purshottam Mondkar and another. In paras 1 and 12 of this judgment, the Supreme Court has observed as under :

"1. The appellant, along with others, has been charged under section 120B of the Indian Penal Code and section 167(81) of the Sea Customs Act (8 of 1878). There is no doubt that the offences charged against the appellant are bailable offences. Under section 496 of the Code of Criminal Procedure the appellant was released on bail of Rs. 75,000 with one surety for like amount on December 9, 1957 by the learned Chief Presidency Magistrate at Bombay. On January 4, 1958, an application was made by the complainant before the learned Magistrate for cancellation of the bail, the learned Magistrate, however, dismissed the application on the ground that under section 496 he had no jurisdiction to cancel the bail. Against this order, the complainant preferred a revisional application before the High Court of Bombay. Another application was preferred by the complainant before the same Court invoking its inherent power under section 561-A of the Code of Criminal Procedure. Chagla, C.J., and Datar, J. who heard these applications took the view that, under section 561-A of the Code of Criminal Procedure the High Court had inherent power to cancel the bail granted to a person accused of a bailable offence and that, in a proper case, such power can and must be exercised in the interest of justice. The learned Judges then considered the material produced before the Court and came to the conclusion that, in the present case, it would not be safe to permit the appellant to be at large. That is why the application made by the complainant invoking the High Court's inherent power under section 561-A of the Code of Criminal Procedure was allowed, the bail-bond executed by the appellant was cancelled and an order was passed directing that the appellant be arrested

forthwith and committed to custody. It is against this order that the appellant has come to this Court in appeal by special leave. Special leave granted to the appellant has, however, been limited to the question of the construction of section 496 read with section 561-A of the Code of Criminal Procedure. Thus the point of law which falls to be considered in the present appeal is whether, in the case of a person accused of a bailable offence where bail has been granted to him under section 496 of the Code of Criminal Procedure, it can be cancelled in a proper case by the High Court in exercise of its inherent power under section 561-A of the Code of Criminal Procedure?. This question is no doubt of considerable importance and its decision would depend upon the construction of the relevant sections of the Code."

"12. We must accordingly hold that the view taken by the Bombay High Court about its inherent power to act in this case under section 561-A is right and must be confirmed. It is hardly necessary to add that the inherent power conferred on High Courts under section 561-A has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. After all, procedure, whether criminal or civil, must serve the higher purpose of justice; and it is only when the ends of justice are put in jeopardy by the conduct of the accused that the inherent power can and should be exercised in cases like the present. The result is that the appeal fails and must be dismissed."

To the same effect are the observations of the Punjab and Haryana High Court in the case of State of Punjab v. Balraj Singh and another, 1986 Cri.L.J. 1255 which read as under :

"9. Now the question arises, having noted the aforesaid error, is this Court helpless and not to employ section 439(2) of the Code. Besides the afore-referred to provision, is there any other provision under which this Court can correct the error? Undoubtedly, this Court has the power of correction, if not under anything else, under Article 227 of the Constitution. The mandate of the Constitution is "every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction". The Zone concerned being within the territorial jurisdiction of this Court where the Special Judge is exercising jurisdiction, his orders are certainly amenable to the jurisdiction of Article 226 of the Constitution. Even under section 482 of the Code, this Court has the power to pass orders to prevent abuse of the process of the Court or in the interests of justice. Thus, I am of the considered view that this Court has ample powers to pass appropriate orders under the aforesaid two provisions."....

"Thus, I am of the firm view that both under sections 439 and 482 of the Code as also under Article 227 of the Constitution, this Court has the power to cancel bail granted by the Special Court as also to keep the said Court within the confines of its jurisdiction. And to repeat, it is highlighted that none of the angular tests prescribed by the Act or the Code was satisfied by the Special Court in granting bail to the respondents. On this ground alone, the order of bail need be cancelled."

Ambit of the power of the High Court under Article 227 of the Constitution has been reiterated by the Supreme Court in the case of M/s. Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others, 1998(5) Bom.C.R. 432 : 1998 Cri.L.J. 1. The Supreme Court has observed in paras 22 and 26 as under :

"..... Under Article 227 the power of superintendence by the High Court is not only of administrative nature but is also of judicial nature. This Article confers vast powers on the High Court to prevent the abuse of the process of law by the inferior courts and to see that the stream of administration of justice remains clean and pure. The power conferred on the High Court under Articles 226 and 227 of the Constitution and under section 482 of the Code have no limits but more the power more due care and caution is to be exercised invoking these powers."

26. Nomenclature under which petition is filed is not quite relevant and that does not debar the Court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory. If in a case like the present one the Court finds that the appellants could not invoke its jurisdiction under Article 226, the Court can certainly treat the petition one under Article 227 or section 482 of the Code. It may not, however, be lost sight of that provisions exist in the Code of revision and appeal but sometime for immediate relief section 482 of the Code or Article 227 may have to be resorted to for correcting, some grave errors that might be committed by the subordinate courts. The present petition though filed in the High Court as one under Articles 226 and 227 could well be treated under Article 227 of the Constitution."

10. Now, the merits of this case. Section 37(1)(b) of the N.D.P.S. Act clearly provides that 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 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. The aforesaid section clearly provides that when the Public Prosecutor opposes the application for bail then the Court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of such an offence. These provisions have an overriding effect on the provisions of the Code of Criminal Procedure, 1973. Section 37 starts with a non obstante clause in the terms that "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) ...." This section imposes stringent restriction on the grant of bail and the conditions mentioned therein must be satisfied. Bail is not the normal rule for such offences. In order to satisfy the Court that there are reasonable grounds for believing that the accused is not guilty of an offence under the N.D.P.S. Act it is the accused who would have to furnish the material for the said satisfaction. In the present case the learned Special Judge has held that section 41 of the N.D.P.S. Act has been complied with. Bail has, however, been granted on the ground that section 42(2) of the N.D.P.S. Act has not been complied with. The learned Special Judge has held that "There is no strict compliance of the said provisions which can be looked into at this stage." This in my view is not correct. The gist of information as required under the Act was reduced to writing on 12-1-96. It has been signed by the Officers as well as the informer. Below the said gist of information it is categorically mentioned that a copy has been sent to A.D. N.C.B. BZU, B' bay on 12-1-96 as required under section 42(2) of the N.D.P.S. Act, 1985. This again is signed by the Officer. Although the non-compliance of the provisions of the Act can be looked into at the stage of bail the Court cannot be oblivious to other incriminating evidence. In the present case the accused has made a confessional statement in which he has very eloquently set out as to how he came into possession of the drugs as also the equipment for manufacture of methaqualone powder. Certain quantities of methaqualone powder which had been manufactured was also recovered. Merely because the statement has been subsequently retracted does not mean that it can be discarded at the stage of bail

itself. A retracted statement does not lose its evidentiary value. In any event at the stage of consideration of the application for bail, the Court would not be justified in holding a mini trial to decide as to whether or not the retracted statement was voluntary.

11. There is yet another reason as to why the impugned order cannot be sustained. For his conclusions the learned Special Judge has relied upon two authorities, which were cited on behalf of the accused. State of Punjab v. Balbir Singh, 1994(1) Crimes page 753 has been relied upon to hold that non-compliance with sections 41, 42, 50, 51, 52 and 57 will vitiate the conviction of the accused. The learned Special Judge did not however consider that in this very case. The Supreme Court observes:

"27. (3) Under section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

The learned Special Judge then relies on 1992 Cri.L.J. 399 Lawrence D'Souza v. State of Maharashtra, to hold that the question of non-compliance of the provisions can be looked into even at the stage of bail. In my view the reliance on the aforesaid cases is misplaced by the learned Special Judge. No doubt, non-compliance of the mandatory provisions would entitle the accused to acquittal. The learned Special Judge holds that there is no strict compliance of section 42(2) of the Act "as copy of the gist of the information sent to the superior Officer will not suffice unless it is shown by the letter along with the copy of the same, which was sent to the immediate superior officer or the acknowledgment of the Officer regarding the same." The Supreme Court in Balbir Singh's case holds that if there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not will be a question of fact.

In the facts of this case, at this stage it cannot be said that section 42(2) has not been complied. Even the learned Special Judge comes to the conclusion that section 42(1) has been complied with section 42(2) does not prescribe a mode by which the gist of the information is to be forwarded to the immediate superior. The section merely requires the officer recording the information "shall forthwith send a copy thereof to his immediate official superior". In this case it is categorically stated at the foot of the gist of information. "A copy of gist of information was given to A.D. on 12-1-96 as required under section 42(2) of the N.D.P.S. Act, 1985". The aforesaid endorsement has been signed by the A.D. on 12-1-96. In view of the above the learned Sessions Judge was not at all justified in coming to the conclusion that there has been non-compliance with the provisions of the Act. The Supreme Court in Balbir Singh's case (supra) has held that it is a question of fact as to whether the provision has been complied with. That can only be determined on the basis of the evidence, which will be led by the prosecution to show that the provisions of section 42(2) have been complied with. At this stage the endorsement of the officer recording the information and the signatures of the superior officer (A.D.) have to be prima facie accepted. On this ground it would not be possible to bold that the accused was entitled to bail.

12. The second factor which weighed with the learned Special Judge for grant of bail, is that the accused has retracted his statement made under section 67 of the Act. Thus it is observed that the statement is of no evidentiary value. The learned Sessions Judge relies on a judgment of this Court in the case of Prajesh S. Waghani v. The Intelligence Officer, 1990 Cri.L. J. 903 and quotes the following passage from the judgment.

"In the present case, the applicants are Indian nationals. There is no evidence of physical possession of the narcotics seized by the respondent No. 1. The evidence consists of the statements of the applicants in which they confessed that they have committed the offences. The narcotics were not found in the possession of the applicants, but they are sought to be connected with these drugs circumstantially through their statements. There is nothing on the record to connect the applicants with the specific, drugs seized in this case. These circumstances together with the probability that the confessional statements by the applicants were secured by physical assault, do not inspire confidence in the prosecution's version. There is no allegation that the Applicants Indian National are likely to abscond. The question of tampering with the evidence does not arise. For these reasons, the continued detention of the applicants appears punitive. It will not be proper to deny bail to the applicants."

In my view the facts and circumstances of the present case were not para materia to the facts quoted in the passage above. In Waghani's case (supra) there is no recovery; there was no evidence of physical possession of the narcotics seized; only evidence was the confessional statement; the accused were sought to be connected with drugs through circumstantial evidence only; there was nothing on the record to connect the accused with the specific drug seized, there was a possibility of the confessional statement having been secured by physical assault. Thus it was held that the confessional statement did not inspire confidence. In the present case the search has been conducted of the residential premises of the accused. Narcotic drugs have been recovered. Manufacturing implements with traces of the final product have been recovered. The accused made a statement accepting the recovery. He gives an explanation about the presence of the drugs and the manufacturing implements in his premises. He states that the machinery has been brought from Pravin Mehta, who owes the accused 38,000/-. The machine is used for production of methaqualone powder. That Pravin Mehta is said to be in jail, having been arrested by the Narcotics Cell of the Customs. He has bought his present flat with cash. He was involved in a murder case, which is pending. He was detained under TADA and later released. He refuses to disclose the source of money paid to Mehta or for the flat at Vasai. Keeping the aforesaid facts in view I do not see the remotest resemblance between the present case and Waghani's case. In my view, the learned Special Judge fell into serious factual and legal error in giving to the accused in the present case, the benefit of the observations in Waghani's case. The law with regard to retracted statements has been considered by a Single Judge of Gujarat High Court in the case of Haji Abdulla Haji Ibrahim Mandhra and another v. The Supdt. of Customs (P.I.) Bhuj and another, 1992 Cri.L.J. 2800 wherein Shethna, J., observed as under :

"1. The petitioners have filed this revision application before this Court against the impugned order passed by the learned Sessions Judge, Kutch at Bhuj on 24-9-91 in Cri. Revn. Appln. No. 64/91 learned Sessions Judge allowed the revision application filed by the respondent No. 1

Superintendent of Customs against the order passed by the learned Chief Judicial Magistrate, Kutch at Bhuj on 2-9-91 releasing the petitioners on bail in connection with the offence committed by them under section 135 of the Customs Act. (hereinafter referred to as "the Act").

2. Mr. Kapadia, L.A. for the petitioners, submitted that except the retracted statement of the co-accused there is no other evidence to involve the petitioners for the offence under section 135 of the Act for smuggling silver worth more than Rs. 6/- corers.

Such evidence is no evidence in the eye of law and on such evidence, no Court can convict the petitioners, therefore, the petitioners should be released on bail.

Merely because the statement of the co-accused recorded under section 108 of the Act is retracted subsequently by the co-accused, it cannot be said that it is no evidence. Conviction can be based by the Court even on the sole retracted statement of the co-

accused recorded under section 108 of the Act, provided that the Court is satisfied that the said retracted statement of the co-

accused is otherwise reliable and trustworthy, after considering the attending circumstances of the case. At the most it can be said that it would be risky to base conviction on the sole retracted statement of the co-accused but it can never be said that no conviction can be based on the retracted statement of the co-accused.

If the accused cannot be convicted on the basis of the retracted statement of the co-accused, then the accused would try his best to see that his co-accused has made under section 108 of the Act and in that case, the whole purpose and object behind section 108 of the Act will become nugatory. Thus, there is no merit and substance in the above submission made by Mr. Kapadia, therefore, it fails and is rejected.

Even if I had to hold that there is insufficient material against the accused in the nature of retracted statement of the co-accused while considering the question of grant of bail on this material, the bail should be refused in view of the fact that offences under the Customs Act are economic offences which are against the Nation and if it is not seriously viewed, it will ruin the economy of our country. I am supported in my view by the judgment of the Supreme Court in the case of State through Dy. Commissioner of Police, Special Branch, Delhi v. Jaspal Singh Gill, reported in 1984 Cri.L.J. 1211 equivalent to . It was a case under the Official Secrets Act; but the same principle which is enunciated by the Supreme Court will squarely apply in this case also. Therefore, also the above submission raised by Mr. Kapadia is required to be rejected.

3. Mr. Kapadia next contended that after considering the fact that both the co-accused have retracted their statements from the jail, within two days and thereafter even a criminal complaint was filed by each co-accused before the Court of learned Chief Judicial Magistrate at Bhuj against the police personnel and custom officials alleging that the co-accused were threatened and beaten and, therefore, this Court Coram V.H. Bhairavia, J. in his order of granting anticipatory bail in Cri.

Revision Application No. 944 of 1991 held that the statements of the co-accused were recorded under threats and coercion. Therefore, he has submitted that it was not open to the learned Sessions Judge to arrive at a different finding and to take a different view while considering the regular bail application and to set aside the order passed by the learned Chief Judicial Magistrate releasing the petitioners on bail. He also submitted that even I am bound by the order passed by my learned brother V.H. Bhairavia, J., and I also cannot take a different view than the one which is taken by my learned brother V.H. Bhairavia, J.

It is true that my learned brother V.H. Bhairavia at the time of passing of the order granting anticipatory bail did observe that the statements of the co-accused were recorded under threats and coercion. However, with greatest respect to my learned brother V.H. Bhairavia, J., I cannot agree with the same. In my view, it is too early at this stage for any Court to arrive at a finding that the statements were recorded under threats and coercion. That finding can only be given at the conclusion of the trial after the evidence is led before the Court and the witnesses are duly cross-examined before the Court. At this stage of the matter, the Court has to proceed upon the assumption that the statements of the co-accused were voluntary. Merely because the co-accused have retracted their statements from the jail within two days after they were sent to judicial custody and filed criminal complaints against the police personnel and customs officials, within few days thereafter, can never be considered as the evidence by the Court at that stage to hold that the statements were recorded under threats and coercion. However, as Mr. Kapadia insisted that I should give reasons at this stage as to how it cannot be said that the statements were recorded under threats and coercion. Therefore, I am compelled to deal with the same. I have gone through the three statements of each co-accused recorded on three different dates i.e. on 20th, 21st and 23rd May, 1991. If I discuss the same here, it may prejudice the accused during the trial, therefore, I have refrained myself from setting out the reasons in detail. But prima facie, it appears to me that the facts disclosed in the statements by both the co-accused and the fact that when both of them were produced on 23-5-91 after their third and last statements was recorded by the customs authorities before the learned Chief Judicial Magistrate, they were asked about the ill-treatment, if any, meted out to them by the customs officials by the learned Magistrate but they have not made any complaint about such ill treatment. They have not stated that their statements have been recorded by the customs authorities under threats and coercion. Therefore, at this stage, prima facie it can be said that the statements were voluntary.

4. It appears that the learned Chief Judicial Magistrate was swayed away with the observations made by this Court (Coram: V.H. Bhairavia, J.) while granting anticipatory bail to the petitioners, that except the statements of the co-accused, which are retracted one, there is no independent evidence against the petitioners and said statements were recorded under threats and coercion and the action of the customs authorities was arbitrary. In addition to the above finding, the learned Chief Judicial Magistrate was more impressed with the argument advanced on behalf of the petitioners that they are socio-politically leading persons. He also observed that there is no reason to believe that the petitioners will not be available at the time of trial, if they are released on bail. Therefore, the learned Magistrate released the petitioners on bail on certain conditions.

The learned Sessions Judge in the revision application filed by the customs department set aside the above order passed by the learned Magistrate and cancelled the bail. The learned Sessions Judge has considered the fact that even though anticipatory bail was granted by the High Court of Gujarat (Coram. V.H.

Bhairavia, J.) in that very order, it has been made clear by the Court that the competent Court will dispose it of in accordance with law having regard to all the attendant circumstances and the material available at the relevant time uninfluenced by the fact that anticipatory bail was granted. The learned Sessions Judge, therefore, held that the learned Magistrate influenced by the order passed by the High Court granting anticipatory bail to the petitioners and without considering the attendant circumstances and relevant material on record, has ordered to release the petitioners on bail. The learned Sessions Judge considered the attendant circumstances which were not considered by the learned Chief Judicial Magistrate viz. (1) The D.S.P., Kutch at Bhuj received an information on 6-5-91 that silver is going to be smuggled in Kutch. Patrolling was intensified: but inspite of that, silver worth more than Rs. 6/ - crores was brought to Kutch and said information was received on 16-5-91. Both the informations revealed that the petitioners are connected with smuggling said silver. The police recovered 248 silver bars worth more than Rs. 6/- crores and the same was subsequently seized by the Customs Department (2) On 20-5-91, first statement of both the co-accused were recorded and on their information, three more silver bars worth more than lacs of rupees were recovered. Thereafter on 21st and 23rd of May, 1991, again their statements were recorded and all three statements clearly involved both the petitioners. (3) The D.S.P., Kutch and Assistant Collector, Customs refuted the allegations made by the petitioners against them that the statements of the co-accused were recorded under threats and coercion and filed an affidavit to that effect stating that false complaints have been filed by the co-accused and the statements of the co-accused were voluntary.

The learned Sessions Judge also considered various judgements of the Supreme Court, this Court and other High Courts and mainly relying upon the judgement of the Supreme Court in the case of Jaspal Singh Gill 1984 Cri.L.J. 1211 (supra) held that the petitioners are involved in smuggling of silver worth more than Rs. 6/- crores which is a serious economic offence against the Nation. Therefore, the learned Sessions Judge found that the order releasing the petitioners on bail passed by the learned Chief Judicial Magistrate is improper, if not illegal or incorrect. Therefore, he allowed the revision application and set aside the order passed by the learned Chief Judicial Magistrate releasing the petitioners on bail.

5. In my view, even though this Court (Coram : V.H. Bhairavia, J.) has observed that the statements of the co-accused were recorded under threats and coercion, still it was open to the learned Sessions Judge to consider the entire material on record and attendant circumstances of the case and come to a different conclusion while considering the revision application filed by the Customs Department against the order passed by the learned Chief Judicial Magistrate releasing the petitioners on bail was based on totally irrelevant considerations, therefore, the learned Sessions Judge was fully justified in setting aside the order passed by the learned Magistrate in revision. As stated earlier, even this Court (Coram : V.H. Bhairavia, J.) has also made it clear in the operative part of the order that competent Court while deciding the regular bail application should consider the attendant

circumstances and the material available without being influenced by the fact that anticipatory bail was granted. Thus, there is no substance in the above contention raised by Mr. Kapadia and, therefore, it fails and is rejected."

I respectfully agree with the aforesaid observations of Sethna, J.

13. In the case of C. Sampath Kumar v. The Enforcement Officer, 1997(8) Supreme Today 268, the Supreme Court has held that there is no presumptio that a statement made upon summons under section 40 of F.E.R.A. 1973 is always involuntary. Such a statement can be used in evidence. A Division Bench of this Court in the case of The Director of Enforcement v. Shri Rohit B. Jhaveri, 1996(1) All.M.R. 89 has held that "It is clear that it is always open to place reliance upon the statement recorded under section 40 of the Act and the contents of the statement can be relied upon even in absence of any corroboration". These observations were made when the Appellate Board (under F.E.R.A.) had refused to rely on the retracted statement of the person to whom show cause notice had been issued, by the Directorate of Enforcement, as to why adjudication proceedings be not held against the respondents therein. The plea taken was that the statement recorded on January 21, 1982 was not voluntary. This plea was taken in reply sent by the Advocate of the respondent on February 15, 1983. In adjudication proceedings the respondents (husband and wife) were held guilty of contravention of F.E.R.A. and penalty of Rs. 1,00,500/ - was imposed on the husband and Rs. 500/- on his wife. On appeal by the husband, the Appellate Board had not relied upon the statement. This finding of the Appellate Board was not accepted by the Division Bench, as noticed above. It is also now settled by a string of authorities that the evidence collected during an illegal search is admissible in evidence. In support of this proposition Mr. Agrawal has cited Division Bench judgment of this Court in the case of Yinusa Olerualoje and another v. R.N. Kakkar and another, 1997(IV) L.J. 853. This Court after considering the law as declared by the Supreme Court held:

"It is clear from the above discussion of the entire case law that the argument of the learned Special Public Prosecutor deserves to be accepted. The issue raised before us that in view of the latter judgements of the Supreme Court, the violation of the mandatory provisions of section 50 does not render ipso facto the evidence collected during search in violation of section 50 N.D.P.S. Act in admissible and does not vitiate the entire trial and therefore in such cases if there is some other evidence, the Court will have to apply its mind to the facts and circumstances of each case and will have to consider that evidence and if after that the Court is satisfied that the accused was found in possession of narcotic drug or committed an offence, under provisions of Chapter V of N.D.P.S. Act, then there is no illegality in basing conviction on such other reliable evidence."

These observations, have been made by the Division Bench after considering the ratio of the law laid down by the Supreme Court in (i) State of Punjab v. Balbir Singh, 1994(1) Crimes 753(2), Shirjeet Singh v. Union of India, 1997 A.I.R. S.C.W. 2507(3) and State of Himachal Pradesh v. Priti Chand, AIR 1976 SC 976. Similar view has been reiterated by the Supreme Court in the case of State of Punjab v. Jasbir Singh, 1996 S.C.CT (Cri.) 1. It is observed as follows :

"It is settled law that evidence collected during investigation in violation of the statutory provisions does not become inadmissible and the trial on the basis thereof does not get vitiated".

The same sentiments have again been echoed by another learned Single Judge of this Court in the case of Bhaivaji Dnavnit Nimbalkar v. State of Maharashtra, 1997(V) L.J. 233. In para 7 of the judgement, Vishnu Sahai, J., observes :--

"7. Mr. More, learned Counsel for the appellant made two submissions before me. He firstly urged that in view of the provisions contained in section 42(1) of the Narcotic Drugs and Psychotropic Substance Act, 1985, it was obligatory on the part of the prosecution to establish that the information received by the Sub-Divisional Police Officer, Raskar pertaining to Ganja plants standing in the field of the appellant had been reduced in writing. He urged that failure of the prosecution to establish this vitiates the search and recovery in the instant case and renders the conviction and sentence of the appellant unsustainable in law. I regret that I cannot accede to this submission in view of the trustworthy evidence of P.S.I. Poman and the observations of the Supreme Court contained in para 4 of the judgement reported in A.I.R. 1996 S.C. 9077 State of Himachal Pradesh v. Shri Pirthi Chand and another, wherein the Apex Court has observed that the relevant evidence cannot be shut merely on the ground that it was obtained by illegal search and seizure. In the same para, it was also observed that "when the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search and seizure is not liable to be shut out."

In view of the settled law, I am constrained to observe that the learned Special Judge has acted in excess of jurisdiction whilst granting bail to the respondent. The evidence collected by the prosecution viz, the recovery of the contraband and the apparatus/implements for manufacture of methaqualone powder eg. heating mantles, motor with stirer device, motor with reduction gear, electric dryer, weighing scale, stoppers, cylindrical bowls, glass tube connections etc., cash in the sum of Rs. 15,000/- could not be discarded at the stage when an application for bail is being considered.

14. I am also of the considered opinion that the learned Special Judge has erred in granting bail to the applicant without recording any cogent reasons in terms of section 37(1)(b) of the N.D.P.S. Act. Section 35 of the Act raises a presumption of mens rea against the accused. This section provides that it shall be a defence for the accused to prove the fact that he had no mental state with respect to the act charged as an offence in that prosecution. Sub-section (2) of section 35 of the N.D.P.S. Act provides that such defence would have to be proved beyond a reasonable doubt and not merely by a preponderance of probability. This is a departure from the normal rule, consciously made by the Legislature. Thus while coming to the conclusion under section 37(1)(b) that there are reasonable grounds for believing that the accused is not guilty of the offences charged, provisions of section 35 have to be kept in view. In similar circumstances this Court considered the impact of section 37 of the Act, on the power of the Court to grant bail, in the case of Harish M. Patel v. Inspector of Customs and others, 1996(3} All.M.R. 605. Chandra Shekhara Das, J., has observed as follows in para 4.

"4. Section 37 of the said Act reads as follows :

Section 37 Offences to be cognizable and non-baitable-

1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974)---

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

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be cognizable,

(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 limitation 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 with regard to the granting of bail.

Aforesaid section declares that all the offences punishable under the said Act as cognizable. But from the restrictions on granting a bail in favour of the accused, who is charged under the said Act, it appears that the Policy of Government has clearly spelt out in the said section that granting of bail is only an extreme and rare circumstances have been provided in the Act, viz. that an application for bail to be considered only after hearing the Public Prosecutor which means without hearing the Public Prosecutor no bail application can be considered. Another strict and stringent condition which are very important is that if the Public Prosecutor opposed the bail application the Court was left with little discretion in granting the bail and the discretion could be exercised by the Court only where the Court is satisfied that such offence is not likely to be committed again. In other words, the Court must be satisfied that there is no basis for the allegations. If at all, the allegations are proved then it should not entail finding guilty of the accused. That means the Court must be satisfied that even if the allegations are established there exists every likelihood that the accused be acquitted. In such strong (evidential) circumstances alone a bail could be granted by the Court below. In these circumstances the contention of the Counsel for the petitioner that the petitioner has not been furnished any material substance connecting the accused with an offence cannot be considered at this stage because the entire prosecution case is built on the conspiracy between the accused. Needless to say that the charge of allegation of conspirary cannot be rejected by the Court when the prosecution is being given an opportunity to establish this charge. In view of the strict and stringent policy laid down under section 37 Part II I don't find any illegality in rejecting the application for bail made by the petitioner,"

Similarly the Punjab and Haryana High Court had exercised power under Article 227 of the Constitution in Balraj Singh's case (supra) and cancelled the bail, which had been granted in offences under TADA. Interpreting similar provision under TADA, the Punjab and Haryana High Court held that it was necessary for the Designated Court to record the satisfaction as required in section 15 of TADA. In paras 7 and 8 it is held as follows:

"7. The test, when applied to the provision in hand, makes it crystal clear that the legislature never intended to oust the applicability of the Code. Rather it expressly provided for the modified application of certain provisions of the Code in relation to bail. It is in this light that the nan obstante clause in sub-section (5) has to be viewed. Now if 1 may cull out the principles for the grant of bail to a person accused of an offence triable under the Act they are as follows:-

(1) The Court must be satisfied that the accused is not guilty of such an offence.

(2) The Court must record satisfaction that the accused is not likely to commit any offence while on bail.

(3) Wherever section 439-A of the Code is applicable in relation to offences enumerated therein, the Court is further satisfied that there are exceptional and sufficient grounds to release the accused on bail (offence under section 25 of the Arms Act being one of them and the provision applicable in Punjab).

8. It is on such recorded satisfactions that a bail order can be said to be valid. As is plain from the order of the learned Special Judge aforequoted, none of the satisfactions were ever recorded.

The order per se does not fall within the ambit of sub-sections.

(5) and (6) of section 15 of the Act."

Considering the facts and circumstances of this case it would not be possible to hold that the applicant had proved any such facts beyond reasonable doubt leading to the conclusion that there are reasonable grounds that he is not guilty of the offences. In my view, the learned Special Judge has exceeded the jurisdiction vested in the Court in passing the impugned order. No worthwhile reason is given to hold that provisions of section 42(2) of the Act have not been complied with.

15. In view of the above the application is allowed. The order releasing the accused on bail in Cr. Bail Application No. 1041 of 1997 in N.D.P.S. Special Case No. 190/96, passed by the learned Special Judge, Thane dated 16-9-97 is hereby quashed and set aside. The respondent No. 1, Mohd. Afzal Mohd. Yarkhan, be taken into custody by issuing non-bailable warrant.

16. Application allowed.