

Common Order passed below Bail Applications Exh.23, 24, 25, 12 & 10 filed U/Sec. 439 of Cr.P.C. by accused Nos.1 to 5 in Special Case (N.D.P.S.) No.1/2017.

Shri Amiteshwaranand
(Inspector of Customs, Pune)

V/s

Shri Bipin Kumar @ Sagar Saxena & 4 Others.

1- Accused Nos.1 to 5 have filed bail applications respectively at Exh 23, 24, 25, 12 and 10 under section 439 of the Code of Criminal Procedure for their release on bail. Accused Nos.1 to 5 are facing trial for the offences under Section 8(c) punishable under Section 22(c), Section 29(1) read with 8(c) of Narcotic Drug And Psychotropic Substances Act, 1989 (NDPS Act) and additional offence under Section 25 read with 8(C) punishable under Section 22(c) is also applied against accused Nos.3 & 4. Accused Nos.1 to 3 are arrested on 2-8-2016, accused No.4 is arrested on 5-8-2016. Accused No.5 was arrested by Patana Custom at Patna on 2.8.2016 for the same incident of manufacturing contraband at Samarth Laboratories, Kurkumbh, Daund. Special Case No.53/2016 was filed against accused No.5 before Sessions Court, Patna for same offence. Later on he is got transferred to Pune Custom which has shown his formal arrest on 30-8-2016 in this case. Afterwards, Special Case No.53/2016 has been withdrawn by Patna Custom disclosing that the accused to be prosecuted in this case along with accused Nos.1 to 4 for

the same incident.

2- The allegations against accused Nos.1 to 5 are that in the month of June 2016 they have made conspiracy to manufacture contraband Psychotropic Substances namely seized Methamphetamine & Mecloqualone above the commercial quantity at Smarath Laboratory at Kurkumbh, Ta. Daund, District Pune. Accused Nos.3 is a active partner and accused No.4 is Ex partner of Samarth Laboratory but still having active control and association with the Samarth Laboratory and both of them involved in manufacturing process of the psychotropic substance. Accused No.5, who is British national and overseas citizen of India, was brain behind the entire manufacturing process of the contraband and its sale.

3- Since January- February 2015, accused Nos.1 & 5 were in contact with each other. Accused Nos.1 & 5, through accused No.2 contacted with accused Nos.3 & 4 and made agreement with them for manufacturing the contraband article. Accused No.2 has played active role to complete the negotiation amongst accused Nos.1, 5 and accused Nos.3 & 4. Accused Nos.3 & 4, are respectively continuing and former partners of Samarth Laboratory, for monetary gain agreed to allowed accused Nos.1 & 5 to use their plant at Samarth Laboratory for manufacturing the contraband psychotropic substances. Accused Nos.1 & 5 used to procure raw material to manufacture the contraband article.

4- Accused No.2 was acting as chemist and from accused No.5 he had got broacher and knowledge of manufacturing process of the contraband articles. Accused No.2 was actually looking after and supervising the manufacturing process of the contraband articles on behalf of accused Nos.1 & 5. Accused No.2, at each stage of manufacturing process, used to apprise accused No.5 about the quality and progress of the manufacturing process of the contraband by sending the photographs of every stages of the manufactured/processed contraband articles on mobile of accused No.5. Accordingly, during June 2016 till 1-8-2016 manufacturing activity of the contraband articles was carried at Samarth Laboratories, at Kurkumbh, Ta. Daund, District Pune.

5- On 1-8-2016, Satya Prakash, Intelligence Officer, of DRI Mumbai about 9-45 a.m. received telephonic information from someone that psychotropic substance i.e Mephedrone HCL is being manufactured in the factory of M/S Samarth Laboratories, MIDC Kurkumbh, Tal.- Daund, Dist.-Pune, and accused No.5 staying in a flat at Patna was the mastermind behind the manufacturing the psychotropic substance. Satyprakash, Intelligence Officer DRI Mumbai, conveyed this information to the complainant, Inspector of Customs (Narcotic Cell) at Pune as the factory was situated within the jurisdiction of Customs Commissionerate at Pune. Accordingly, the complainant written down the information in writing and immediately conveyed the said information to his superior Mr. R. B. Patil Superintendent,

Narcotics Cell, Pune Customs.

6- The Superintendent of Narcotic Cell Mr. R. B. Patil along with other officers of the customs including the complainant Amiteshwaranand, on 1-8-2016 about 1.30 p.m. went at Kurkumbh and identified the factory. They called 2 local panch witnesses and about 5.30 p.m. went in the factory. Accused Nos.1 to 4 were present in the factory premises. Accused No.1, after persistent interrogation, disclosed that as per his direction Mephedrone was being manufactured and manufactured Mephedrone was kept in 7 HDPE carboys lying in the factory. Then personal search of accused No.1 was carried after apprising him about his right to be searched in presence of Magistrate or Gazetted officer, and 4 mobiles are seized from his bag. Thereafter, accused Nos.3 and 4 shown 7 HDPE carboys containing contravened articles which were in crystalline powder which was disclosed to be Mephedrone.

7- The complainant and other Custom officers under the panchanama seized the muddemal Mephedrone which was found contained in 7 HDPE carboys and their total weight was 159.100 kg. The complainant and his team drawn 7 samples in duplicate each 10 gm. and were sealed in an envelope. During search and seizure Mangesh Salunke and Pratap Pagale other partners of Samarth Laboratory about 12-30 a.m. of 2-8-2016 also came there, but they disclosed that they have no connection with manufacturing activity and they have only financed for the

factory. The inventory of raw material found in the factory was also carried out and samples of raw material were taken. The seized contraband was carried away at Custom Godown and raw material after putting the sealing them with labels of signatures of the panchas and complainant were kept in watchman room in the factory under the custody of Mangesh Salunke and Pratap Pagle, other partners of Samarth Laboratory.

8- The statements of accused Nos.1 to 4, U/Sec 67 of N.D.PS Act were recorded wherein they admitted about their involvement in the manufacturing process of Mephedrone as well as role of accused No.5. Accused No.5 declined to make statement under Section 67; therefore, same could not be recorded. The representative samples of suspected Mephedrone and raw materials used for its preparation were sent to the Central Forensic Science Laboratory at Hyderabad. On testing the samples, CFSL reported that all 7 samples Exh.1A to 7A (of the seized contraband) detected 'Methamphetamine'; and one of the sample Exh. R-2A (taken out of 170 liters raw material found in a drum having print on its top as 'chloroform') was also contraband psychotropic substance 'Mecloqualone'. Then on 25.1.2017, the complainant shifted the drum containing 170 liter from premises of Samarth Laboratory to Custom Godwon.

9- 'Methamphetamine' and 'Mecloqualone' are contraband psychotropic substances which are listed items at Ser. Nos.19 & 18 of the Scheduled under NDPS Act. As per Notification

S.O.1055(E) dated 19-10-2001 issued under clauses viia & xxiia of Sections 2 of NDPS Act, the commercial quantity at Ser. Nos.158 for Mecloqualone is 500 g.m. or above and at Ser. No.159 for Methamphetamine is 50 g.m. or above. Therefore, the complainant filed present complaint for the offences under Sections 8(c)/22(c), 25, 29(1) read with 8(c) of N.D.P.S. Act against the accused before Special Court, at Pune. As per order dated 18/7/2017 in Criminal M.A. No.242/2017 filed under Section 408 of Cr.P.C. passed by Hon'ble Principal District and Sessions Judge Pune, this case is transferred to Sessions Court at Baramati.

10- Before filing the complaint, earlier bail applications of accused Nos.4 and 5 were rejected. Accused Nos.1 to 5 have stated in their bail applications Exh.23, 24, 25, 12 & 10 that they are innocent persons. There is no prima facie material against them. The statements of accused Nos.1 to 4 recorded under section 68 are not voluntary statements. There is no compliance of mandatory provisions U/Sec. 42 and 50. They also claimed that they are not aware of any manufacturing activity. The samples sent to CFSL are tampered. Accused No.5 further claimed he is already discharged from Special Case No.53/2016 which was filed for same offence at Patna Court; therefore, in view of principle of double jeopardy he can not be again prosecuted in this case. Thus, the accused have prayed for their release on bail.

11- The complainant filed say Exh. 29, 30, 31, 18 & 21 to the bail applications and opposed the bail applications. The prosecution has reiterated all the allegations against the accused as mentioned above. In short, contention of the prosecution is that accused Nos. 1 to 5 were manufacturing narcotic drugs in violation of Section 8(c) of the Act, accused No. 5 was brain behind manufacturing activity. They denied that the procedure under Section 42 & 50 have not been followed and samples are tampered. Accused No.1 has history of committing similar offences. Commercial quantity of contravened article have been seized; therefore, in view of bar U/Sec. 37, the accused cannot be released on bail.

12- I heard learned Advocate R. L. Mate for accused Nos. 1 to 4, Advocate Dilip Mishra for accused No.5, and Spl.PP. Anjali Desai for the prosecution.

13- The copy of information written down by complainant Amiteshwaranand bearing Sr. No. 2/16 dated 1.8.2016 with the office at Customs, Pune and the report dated 1.8.2016 submitted by him sent to Superintendent of Narcotic, Custom Commissionerate Pune shows that the complainant Amiteshwaranand had received the information about 10.00 A.M. from Satya Prakash, Inspector of DRI Mumbai about manufacturing activity of Mephedrone at Samarth Laboratories, Kurkumbh and accused No.5 was mastermind of manufacturing operation. The complainant has written down the information

and immediately about 10.15 AM reported the same to his superior Shri R.B.Patil, Superintendent of Narcotic as per requirement under Sec.42 (1) and 42(2) of NDPS Act.

14- Advocates for the accused relied on **Sardar Wali Mohammad @ Sohail Vs Union of India**, 2012 ALL MR (Cri) 2126, wherein the Hon'ble Bombay High court made observations that, even if maintenance of separate register for recording the information is not required U/Sec.42, but it would be in the interest of prosecution to maintain the register. It was held in that case that the information which was recorded on the piece of paper, was not proper compliance U/Sec. 42 and consequently the accused was acquitted. However, in the present matter the evidence yet to be recorded and the copy of information does not appear to be on the piece of paper but maintained in the register at Sr. No.2/16. As such at this primary stage, it cannot be said that the information taken down by the complainant U/Sec. 42 is not in the register but on the piece of paper. So also same can not be the ground for the bail.

15- Learned Advocates Shri Mate and Mishra for the accused submitted that as per Section 42(1), it is mandatory for the officer receiving information to take down it in writing and then U/Sec.42(2) to forward the copy of recorded information to his superior. They submitted that in the present matter Satya Prakash, Intelligence Officer of DRI Mumbai has not noted down in writing the information which he had received from somebody

else, but he merely conveyed it to the complainant; therefore, there is noncompliance of mandatory provision U/Sec 42 (1) and 42(2). They have relied on **Sarija Banu V/s State** 2004 Drugs Cases (Narcotic) 119:(2004) 12 SCC 266 wherein it is held that compliance of Section 42 of NDPS Act is mandatory and is a relevant fact which should be considered while considering bail application. In **State of Rajasthan V/s Babu Lal**, 2009 SAR (Criminal) 626 & **U.O.I. V/s. Bal Mukund**, 2009 All MR (Cri) 1570 (SC) Hon'ble Apex Court held that compliance of provision under Section 42 is mandatory. In **Shaileshwar Tulshiram Bansode V/s State of Maharashtra**, Criminal B.A.No. 558/2013 decided on 9-5-2013 Hon'ble Bombay High Court has granted bail to the accused as the information was not taken down in writing and not sent to the superior officer. In **Bipin Kumar Ramsagar Pandit @ Saxena V/s. State of Maharashtra**, 2013 All MR (Cri) 4364 :2014(1) Bom. C.R. (Cri) 486 (arising out of another similar offence committed by accused No.1 Bipin Kumar), **Shri Suresh Somraju Ali V/s The State of Maharashtra**, Criminal Appl. No. 143/2011, decided on 22-2-2011 and **Taslim Halim Khan @ Diga V/s. State of Maharashtra**, Bail Application No.857/2016 decided on 27/4/2016, **A.Nasar Cherukara Vs R.G. Gokhale**, Cri. Appln No. 355/2010 in Cri. Appeal No. 1057/2008 decided on 21-10-2010, **Smt. Najma Abdul Shaikh Vs The State of Maharashtra**, Criminal Bail Appln. No. 1311/2012 decided on 23-10-2012, and **Rajram Kadu V/s. State of Maharashtra**, Bail Application 2108/2016 decided on 13.6.2017 wherein Hon'ble Bombay High

Court granted bail to the accused due to failure of the same officer who received the information to record it in writing and to communicate the same to his superior officer. In **State of Rajasthan V/s. Babu Lal** 2009 SAR (Cri) 626 the accused was acquitted as the document of receipt of oral information was not proved. Advocates for the accused submitted that in view of non compliance of mandatory provision under Section 42 of NDPS Act, there is reason to believe that the accused are not guilty of the alleged offences; therefore, rigors of provision under Section 37 (1)(b) of the Act would not be applicable to deny the bail.

16- On the other hand learned Spl. PP has submitted that due compliance under Section 42 has been made out, and at this primary stage before recording the evidence during the trial, it can not be ascertained that there is no non compliance under Section 42. The accused Nos.1 to 4 are found with manufactured large quantity of the contraband articles and there is evidence to show that accused No.5 was the mastermind behind the manufacturing the contraband articles. She submitted that there is sufficient evidence including statements of accused Nos.1 to 4 recorded under Section 67 of the Act to show their involvement. She also submitted that accused No.1 was also involved earlier in similar offences. In view of bar under Section 37 (1)(b) of NDPS Act, the accused can not be released on bail as there is no reason to believe that the accused have not committed the offence and they would not repeat such offences.

17- Spl. PP Desai has relied on **Union of India v/s. Jagdish Singh** 2011(3) Mh.L.J.(Cri) 427 wherein it held that 'Methamphetamine' is also known 'Metamfetamine' which is contraband psychotropic substance. In this case before learned Advocates for the accused have not disputed that Methamphptamine is the contraband article and its commercial quantity is 50 grams and in this case commercial quantity of 159.100 gm has been seized. Sp.PP. relied on **N.R.Mon V/s. Md. Nasimuddin** AIR 2008 SC 2576, **Union of India V/s. Rattan Mallik @ Habul** [2009 (2) Mh.L.J. (Cri)513] wherein it held that before releasing the accused on bail twin conditions namely satisfaction of the court that there are reasonable ground to believe that the accused is not guilty of the alleged offences and he is not likely to commit any offence while on bail must be made out. It is also held that 'reasonable ground' is something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify that the accused is not guilty of the alleged offence.

18- In **Customs, New Delhi V/s. Ahmadalieva Nodira** AIR 2004 SC 3022 their Lordships held that satisfaction contemplated in provision of S.37 regarding accused being not guilty has to be based on reasonable grounds. In this authority the recovery of the contraband from the accused and their confessional

statements about the seizure of the contraband tablets and report of the laboratory which were overlooked by the High Court were taken into consideration while cancelling the bail. Spl.P.P further relied on **Babua @ Tazmul Hossain V/s. State of Orissa**, AIR 2001 SC 1052 wherein it was held that since evidence was not completely adduced, it was not possible at such stage to form the opinion that the accused was not guilty. However, in my view ratio in this authority is about deciding the application on merit, but in this case before me advocates for the accused have based their submission mainly on non compliance of provisions under Section 42 of the Act.

19- In view of ratio laid down in above the authorities cited by the learned advocates for the accused it is mandatory for the officer receiving information personally to record the information in writing and then to inform the same to his superior officer. It is also held above judgments particularly in **A.Nasar Cherukara** and few other above authorities that compliance U/Sec 42 must be made by the officer who received first hand information and not by the officer to whom subsequently information is conveyed. In this case before me the first hand information was received by Satya Prakash officer of DRI Mumbai and he conveyed the same to the complainant, the empowered officer, who recorded the same and communicated same to his superior officer Shri R.B.Patil, Superintendent of Customs (Narcotic cell) who is gazetted officer.

20- It is contention of the defence that Satya Prakash, Officer of DRI at Mumbai has not written down and communicated the information to his superior officer, but he conveyed to the complainant at Pune. The compliance made by the complainant is not legal compliance of the provisions under Section 42 of the Act. It is true that the Satya Prakash has not made the compliance, but Satya Prakash was not empowered to carry the search within Pune District and the empowered officer was the complainant. As per Section 42 of the Act, the information is to be recorded by the empowered officer and then to communicate to his superior and then to make the search and seizure.

21- Hon'ble Apex court in **M Prabhulal Vs Asstt. Director, DRI**, 2003 (8) SCC 449 and **Yasihey Yobin v/s. Department of Custom**, (2014) 13 SCC 344 held that when search and seizure is made by officer authorized under S.41(2) of the Act then said officer is said to be acting under Section 41(2) and therefore compliance under Section 42 is not necessary at all. A gazetted officer is an empowered officer and so when search is carried out in his presence and under his supervision, provisions of Section 42 have no application. In **Satpal Singh @ Raja Vs State of Maharashtra**, MANU/MH/1615/2013 : 2014 (2) Bom. C. R. (Cri.) 122, no compliance under Section 42 of writing the information and its communication to superior officer was made at all, still his Lordship held that since Dy. S.P who carried the raid and searched the contraband was gazetted officer, the provision under Section 42 has no application.

22- In the present case before me the search and seizure has been made by a team of Custom officer headed by Mr. R. B. Patil, Superintendent of Customs, who was the gazetted officer. As such in light of the ratio laid down in above authorities, the submissions made on behalf of the accused that for want of non compliance U/Sec. 42 (1) and (2) of the Act, the accused are entitled for bail, cannot be accepted. In the facts of A Nasar and other authorities on similar point, it does not appear that gazetted officer had conducted the raid and seized the contraband article; therefore, those authorities are distinguishable from the facts of the present case.

23- In the present matter the complainant and team of Custom officer headed by Mr. R. B. Patil, Superintendent of Customs, NCB, Pune has carried the raid at M/s Samarth Factory. The search and seizure panchanama prepared between 5.00 p.m. of 1.8.2016 to 1.30 am of 2.8.2016 shows that accused Nos.1 to 4 were present in Samarth factory, and on persistent interrogation accused No.1 disclosed that as per his direction contraband mephedrone was manufactured in the factory and same was lying in 7 HDPE carboys, and then accused Nos.3 & 4 shown these carboys wherein total 123.10 kg contraband worth Rs.30,00,000/- as Mephedron was seized from the factory. It also shows that 7 samples in duplicate of the manufactured contraband from 7 carboys as described in Annexure C as well as 12 samples of raw material found in 12 containers as described in Annexure D at factory premises were taken.

24- The C.A. report dated 30/11/2016 shows that all 7 samples of purported seized contraband (disclosed to be of Mephedron) after testing found to be of 'Methamphetamine' and Exh.R2A (of one of the raw material out of 12 samples) was of 'Mecloqualone' which are scheduled psychotropic substances at Sr.Nos.19 & 20 of the Schedule of NDPS Act and as per the Notification dated 19-10-2001 their commercial quantity at Sr Nos.159 & 158 is 50 grams and 500 gm. The panhanama dated 25.1.2017 shows that later on drum containing of Mecloqualone (170 Lt.) which was described as Chloroform (MH) in Annexure D was shifted from Samarth Laboratory to Custom Godwon as it was also contraband. Thus, commercial quantity of contraband psychotropic substances namely 123.10 k.g. Methamphetamine and 170 Lt. Mecloqualone have been seized from factory of Samarth Laboratory.

25- Advocates for the accused submitted that Mephedron was shown to be seized and the CA report shows Methamphetamine and of Mecloqualone, therefore, there is reason to believe that the samples are tampered. They have relied on **Bipin Ramsagar Padit** (cited supra) and **Rajesh Rammrut Mishra V/s State of Maharashtra**, Criminal Application No.501/2009 decided on 23rd March 2009. In Bipin's case (another case of accused No.1 himself) the seized contraband thought to be of amphetamine but the CA report shown it was ketamine another contraband articles. His Lordship taken into consideration this inconsistency along with main ground of noncompliance of Section 42 while

releasing accused No.1 Bipin on bail. Main ground was of non compliance of provisions under Section 42; therefore, Bipin's case would not help the accused.

26- In Rajesh's case prosecution case throughout the investigation as well as in the chargesheet came with the case that 3 kg heroine was seized, but the CA report shown the sample was of Alprazolam. In this case after receipt of the CA report the case of the prosecution is not that they have seized Mephedron, but information was received and accused disclosed that same was Mephedron. Therefore, in my view this inconsistency would not helpful to the accused. It was submitted by the complainant who was also present before me that Mephedron and Metheamphetamine both are in white crystallized form. As such, due to visual similarity in both the contraband of Mephedron and Metheamphetamine, and due to misleading information by the accused the ratio laid down in Rajesh's case is not applicable to present case.

27- The panchnama dated 1.8.2016 shows that accused Nos.1 to 4 were present in the factory premises and accused No.1 was sitting in his office chamber in the factory. The confessional statement of accused No.1 recorded on 2.8.2016 as also statements of witnesses i.e. raw material suppliers and transporters alongwith purchase bills and transport receipts show that accused No.1 & 5 had procured the raw material which was found in the factory in the name of another Company Appollo

Pharmaceuticals, Oshiwra, Mumbai of accused No.1. They had shown false address of Appollo Pharmaceuticals at Kurkumbh and used to take delivery of the raw material pretending urgency from the offices of the transporters and the purchase orders are placed by accused No.1 Bipin & accused No.5 Sunny. The statements of Ramesh Shankar Patil partner of Sairam Life Science, at Karad MIDC and other witnesses related with this firm and copy of agreement dated 14.11.2015 show that accused No.1 & 5 (accused No.5 signed as witness) also made agreement with Sairam Life Science for production of pesticides, but partners of the firm were not made aware what kind of chemical would be produced, nor they were given process of manufacturing. The production in two testing batches were produced, but accused Nos.1 & 5 told that the batches failed and then accused Nos.1 & 5 left the production job in December 2015 and later on accused No.1 carried away the raw material. Thus, prima faci there is material which point out that accused Nos.1 & 5 are having business association.

28- Copy of partnership dated 4/6/2014 shows that accused No.3, witness Pratap Gulabrao Pagle and Mangesh Arun Salunke are partners of Samarth Laboratory; and accused No.4 who was retired partner is also consenting party to the partnership agreement. The statement of Mangesh show that even after retirement of accused No.4 from the partnership accused no.4 was associated with the partnership business, and accused Nos.3 & 4 being technical qualified persons were looking after day

today work of the partnership. Accused Nos.3 & 4 have worked in chemical factories earlier the production manager/executives and thus they have technical knowledge as disclosed by them in their statements.

29- Statement of witness Mangesh also show that on 7/6/2016 meeting was held amongst accused Nos.1 to 5 in the factory premises of Samarth Laboratory, but he came late therefore, he could not attend the meeting. Later on accused No.3 disclosed the details of the meeting that accused Nos.1 & 5 would produce certain chemical in their factory and for each batch of production they would pay Rs.40,000/- to the partners of Samarth Laboratory. Thus, it is clear that accused Nos.1 to 5 held meeting and finalized the terms for production of the contraband in the factory. Mangesh and Pratap not being technical persons and merely having financed, they were not aware of what kind of chemical was agreed to be manufactured by accused Nos.1 & 5 in their factory. Accused nos.3 & 4 were technical persons having knowledge about the products. Accused Nos.3 & 4 alongwith accused Nos.1 & 2 were also present in the factory when contraband articles are seized.

30- Accused Nos.3 & 4 in their confessional statements recorded under Section 67 of the Act, have also admitted their role and told that first batch of contraband of 12 kg was produced and this second batch contraband of 159.100 kg. contraband was manufactured but seized by the custom officers

from the factory. They have disclosed that both of them and accused No.2 were remaining present at the time of process of manufacturing the product and accused No.2 was actually supervising the work of the manufacturing as per instructions provided by accused No.5. Accused No.2 has also admitted in his statement that he has negotiated the contract between accused No.1 & 5 with accused No.3 & 4 for production of the contraband in the factory. He has disclosed that accused No.5 has handed over the brochure containing all 4 stages A, B, C, D of production of the contraband article. The custom officers have seized the said brochure from the factory premises during search. He has disclosed in detailed what process was being carried out by him during manufacturing process of the contraband mephodron which is in fact tested to be Methamphetamine.

31- Accused No.1 in his statement recorded under Section have also disclosed his role as well as role of accused No.5 in detail and use of his mobile numbers 9820150033, 9820980033, 9321150033 and 7021200057 as well as mobile number of accused No.5 which is bearing No.725896045 to contact with each other. He has also disclosed that he and accused No.5 made unsuccessful attempt to manufacture contraband in the factory of M/s. Shree Sai Ram Life Sciences where they came into contact with accused No.2. During personal search of accused No.1, 4 mobiles are seized from accused No.1. During personal search of accused No.2 carried on 2.8.2016, 2 mobiles bearing Nos. 9527036492 and 823791371 are seized. However, it seems from

notice under Section 50 of the Act, accused No.2 opted to be searched in presence of gazetted officer or magistrate, but search and seizure of the mobiles from him, is not carried in presence of the gazetted officer or magistrate.

32- After inspection of the mobiles seized from accused No.2 it is found that he has sent several photographs of the processed manufactured contraband article to accused No.5 who was keeping watch on the quality of the contraband at each stage from Patna. The photographs also shows that accused No.5 has watched those photographs. The call details also shows that accused Nos.1, 2 & 5 were in contact with each other. The statements of the witnesses and the confessional statements of the accused no. 1 and 5 show that accused no.5 was using the mobile nos. 9102877569 and 7258960459. The call details of those mobiles shows that accused nos. 1,2 and 5 were in touch with each others. The mobile numbers used by accused no. 5 are not registered in the name of accused no. 5 but Sim cards of those mobile were obtained by accused no.1 and 2 in the name of different persons. The statement of concern witness Hanumant Javale show that without his consents accused no. 2 by misused his photograph and name, and obtained SIM card in his name. So also four mobiles are seized during personal search of accused no. 5 and he was using those mobiles to contact with accused no. 1 & 2. The photographs taken from the mobile of accused no. 2 shows that he has sent photograph of the seized contraband to accused no. 5.

33- In **Iran Khan Kasam Khan Pathan V/s. The State of Maharashtra** Criminal Revision Application No.11/2007 in NDPS Case No.5/2006 (relied by adv for accused no.5) it is observed that mere telephonic call details amongst made by co-accused is not sufficient material to proceed against the accused. However, in the present case apart from call detail there is direct evidence pointing out that accused no.5 used to visit the factory premises for manufacturing work of the contraband and accused no. 2 sent the photograph of the manufacture contraband. As such ratio in above authority is not helpful. As such there is syndicate amongst accused no.1,2 and 5 who have played active role in manufacturing contraband, and accused nos. 3 and 4 have provided there factory to be used for manufacturing the contraband, and they were also remaining present at the time of manufacturing process of the contraband. The statement of Raju Nimkar, Manager of City Inn in Hotel also shows that accused no. 1 and 5 during 16 June 16 to 21 July 2016 stayed at Hotel Inn at Baramati where from they used to visit Samrath Laboratory to continue the manufacturing process of contraband.

34- Advocates for the accused also submitted that during personal search of the accused mandatory provision under Section 50 of the Act apprising the accused about their rights to be searched before the magistrate or gazetted officer has not been followed. They have relied on **Vijay Chandubha Jadeja V/s. State of Gujrat** AIR 2001 SC 77, **Dilip V/s State of MP** AIR 2007 SC 369, **State of Rajasthan Vs Parmanand** AIR 2014 SC

1384, **Mazzanti Esposto Gian Carlo V/s. State of Goa** 1996(3) Bom CR 185 wherein it is held that when compliance under Section 50 is not made then search and seizure was held to be doubtful and the accused are acquitted. In **Afaque Asif Sayyed Vs State of Maharashtra**, Bail Application no. 1145/2015 dated 22/12/2015, **Taslim Halim Khan@Diga Vs State of Maharashtra** Bail Application no. 857/2016 have considered non compliance of provision u/s 50 while releasing the accused on bail. In view of these legal positions taken by Honourable Bombay High court, different view taken by Honourable Calcutta High court in **Sarwan Ram Vs State of West Bangal** CRM 15/2016 dated 20 Nov 2016 (cited by special PP) that the defence of noncompliance u/s 50 can not be taken at the stage of deciding bail application, can't be accepted. However, in this case before me except personal search of accused no. 2, provision u/s 50 has been followed while carrying seizure of the mobiles and other non incriminatory articles. As far as accused no. 2 is concern only mobiles are seized and not contraband during his personal search. As such merely because provision u/s 50 has been not be followed while carrying seizure of the mobile from accused no. 2 can't be the ground at this stage to release the accused on bail.

35- Learned Advocates for the accused submitted that the confessional statements of accused Nos.1 to 4 can not be used against them as well against accused No.5. They also submitted that their statements are not voluntary and they have already retracted the statements stating that their signatures were

obtained on blank papers. Advocate for accused No.5 also submitted that the custom officials after arresting accused No.5 have assaulted him and tried to extract his confession; accused No.5 has already made complaint of ill-treatment before the Special Court Pune and injury certificate shows injuries on the person of accused No.5 caused due to assault by the custom officers. Advocates for the accused have relied on **Tofan Singh V/s. State of Tamil Nadu** 2014 (1) Crimes 42 (SC) wherein constitutional validity of Section 67 has been doubted and the matter is referred to larger bench to reconsider the issue as whether the officer investigating the matter under NDPS Act would qualify as police officer or not.

36- In **Noor Aga V/s. State of Punjab** 2008 Drug Cases (Narcotic) 352 it is held that confessional statements of the accused are weak type of evidence. In **U.O.I. V/s. Bal Mukund** 2009 All MR (Cri) 1570 (SC) it is held that confessional statement without corroboration is not sufficient to hold the accused guilty. In **Iran Khan Kasam Khan Pathan V/s. The State of Maharashtra** Criminal Revision Application No.11/2007 in NDPS Case No.5/2006 wherein it is held that the confessional statement of co-accused is not sufficient to frame charge against the accused. In **Dattatrya Nandan Sawant V/s. Ajay Athavia** Criminal Bail Application No.99/2014 decided on 19/6/2014 by Honble Bombay High Court, it is was observed that the confessional statement can not be said with certainty that it contain true facts particularly when there was mistake about

relationship of the applicant disclosed in the statement and the accused was released on bail. In **Noor Moh. Shaikh V/s. Narcotic Control Bureau** Criminal Application No.1617/2011 decided on 18/11/2011 it was held that only 3 kg ephedrine was seized and the accused who had made confessional statement that he was supplier of the contraband was granted the bail considering small quantity of 3 kg ephedrine which was not narcotic drug or psychotropic substance but was only controlled substance, therefore, limitation under Section 37 of the Act was held to be not applicable. Thus, ratio laid down in this authority is not applicable.

37- On the other hand SPP relied on **Girish Ragunath Mehata V/s. Inspector of Customs** Criminal Appeal 1020-1021 of 2009 decided by Hon'ble Supreme court on 7.9.2016 wherein reference is also made to Tofan Singh's case, **Ram Singh V/s. CBI** AIR 2011 SC 2490, **R.N. Kaker, Dy. Director, NCB V/s. Shabir Fidahusein** 1989(1) Bom C R 503, **G Jaykumar Vs. Superintendent CEPCP & I Unit** 1998 Cr.L.J.4427 (Ker. HC) wherein it is held that confessional statements are relevant piece of the evidence against the accused. In Girish's case it is held that the conviction was not based on sole evidence of the confession, therefore, Tofan's case was not considered. In this case before me even if confessional statements of accuse nos.1 to 4 are excluded, still there is prima facie evidence to show involvement of accused nos.1 to 5 in manufacturing contraband psychotropic substances, as accused nos.1 to 4 were present in the factory

where the contraband was manufactured which came to seized, statements of the witnesses shows that accused nos. 3 and 4 were looking after day to day business, and accused nos. 1 to 5 were present in the meeting where they decided to manufacture the contraband.

38- It was argued that accused nos. 3 and 4 were not aware that what was being produced in the factory was the contraband article. Accused Nos. 3 and 4 initially before making the search shown their unawareness about the kind of the production of the chemical manufactured in their factory at the instance of accused Nos.1 and 5, but later on in their confessional statements recorded U/Sec. 67, have admitted that contraband article mephedron was being manufactured and they had allowed accused Nos.1 & 5 to use the factory for manufacturing mephedron. Moreover, the material on record shows that accused Nos.2, 3 & 4 have expertize in chemical as they have worked in several factories; therefore, their contention that they were not aware that contraband was produced in the factory, can not be accepted. Further section 35 of the Acts requires to presume culpable mental state of accused, and it is for the accused to prove during trial that they were not aware that they were producing contraband article.

39- Adv. for accused no. 5 relied on **Mr. Kum Thapa Tamang Vs. Union of India** in Criminal Revision Application no. 569/2008 and submitted that accused no. 5 was not aware that

the photographs allegedly sent by accused no.2. were of manufactured contraband. In the fact of this authority the statements made by accused were not incriminative. They had carried certain bags from Nepal to Delhi by bus and Delhi to Mumbai. The raid was carried and Hashish was seized from the bags which were seized from Hotel and the bags were identified of accused no. 1 and 2 who left for the Airport. In the Hotel premises present accused no. 3 and 4 were present. His Lordship held that there was no material to believe that accused no. 3 and 4 were aware that the bag contained Hashish. However, in the present matter before me the evidence on record also shows that accused no.5 again and again visited to factory in connection with manufacturing the contraband. As such ratio laid down in this authority would not be helpful.

40- Prima facie material on record show involvement of the accused in activity of manufacturing contraband articles amphetamine and Mecloqualone. The seizure panchanama shows commercial quantity i.e 159 kg of amphetamine and Mecloqualone have been seized from possession of accused Nos.1 to 4 from Samarth Factory where they prepared it. Accused No.5 was staying at Patna, at the time of search but by obtaining photograph of the manufactured contraband he was supervising the manufacturing process. The statement of witnesses including Manager of Hotel Inns at Baramati shows that accused No.5 was also visiting the said factory. The statement of partners of Sai Prasad factory at Karad also shows that accused Nos. 1 and 5

had tried to manufacture similar contraband in their factory, but could not succeed. Thus, there is prima facie evidence against the accused nos. 1 to 5.

41- Accused No.5 has taken another defence that Special court at Patna in Special Case no. 53/2016, which was filled for the same incident happened at Samarth Factory, Kurkumbh, Daund, has discharged accused no.5 vide order dated 09/02/2017. Advocate for accused no.5 submitted that in view of principle of doubt jeopardy, accused No.5 cannot be tried in this matter. The copy of order passed by Spl. Judge, Patna in Spl. Case No. 53/2016 dt 9-2-2017 shows that the complaint has been withdrawn on 02/02/2017 and it is dismissed as withdrawn, as custom department wanted to prosecute the accused no.5 in this complaint. Thus, earlier Spl. Case no. 53/2016 has not been decided on merit but disposed of as withdrawn due to continuation of prosecution of accused no. 5 in this case. The order dated 09/02/2017 does not show that accused has been discharged u/s 258 but he has been released in that case on account of withdrawal of case. Thus, there is no discharge u/s 258 or his conviction or acquittal. Therefore, bar u/s 300 of Code of Criminal Procedure would not be applicable. The Ld. App rightly relied on **Hiralal Ambalal Jain Vs Indage Vintners Ltd.** 2016 All.M.R.(Cri.)805 wherein the complaint u/s 138 N.I. Act was withdrawn against the company, and afterwards again the complainant filed application to continue the prosecution of the company. Honourable High Court Held

that as the trial has not commenced when complaint was withdrawn against accused company, therefore bar u/s 300 of Code of Criminal Procedure was not applicable as there was no trial. In this case also accused no. 5 has not been tried in Spl case no. 53/2016 which was filed before Sessions court Patana. Therefore, in my view withdrawal of earlier complaint Spl. Case no. 53/2016 against accused No.5 would not amount double jeopardy for his prosecution in this complaint.

42- Accused no.1 was also arrested in similar offence bearing C.R. No. 135/2012 by Anti Narcotic Cell Mumbai. Accused no. 1 and 5 are also facing criminal case for kidnapping. Ld. Advocate for accused relied on **Noor Mohammad Shaikh Vs NCB** Cri. Application no. 617/2011 decided on 18/11/2011, and **Ramrup Bhagwandas Gupa Vs State of Maharashtra** Cri. Application No. 706/2006 decided on 06/03/2006, wherein it is held that unless there is conviction of the accused may not be considered to reject the bail application. There can not be dispute about the ratio in those authorities. However, in the present case before me a large quantity of commercial contraband has been manufactured by accused, therefore they are not entitled for bail.

43- In view of above discussion, and particularly bar u/s 37 1(b) of N.D.P.S. Act, the accused who are facing trial offences u/s 8(c)/22(c), 29(1) rw 8(c) and u/s 25 for manufacturing and possessing commercial quantity of Psychotropic substances, and forming criminal conspiracy to manufacture psychotropic

substances, and further act of accused no. 3 and 4 allowing other accused to use their factory premises, it would not be proper to release the accused on bail. In the result, I am inclined to reject the bail applications. Therefore, I pass following order:-

ORDER

Bail Applications- Exh. No. 10 filed by accused No.5, Exh 12 filed by accused No.4, Exh. 23 filed by accused No.1, Exh. 24 filed by accused No.2 and Exh. 25 filed by accused No.3, are rejected.

Dt 17-8-2017.

(N.B.Shinde)
Addl. Sessions Judge, Baramati.

Certificate

I affirm that the contents of this PDF file Judgment are same word for word as per original Judgment.

Name of the Steno : Smt. R. S. Urde

Name of the Court : Shri N. B. Shinde

District Judge-2, Baramati.

Date : 17-8-2017

Judgment signed by Presiding Officer on : 22-8-2017

Judgment uploaded on : 23-8-2017