

HIGH COURT OF UTTARAKHAND AT NAINITAL

First Bail Application No. 1833 of 2023

Bhajan Singh

.....Applicant

Versus

State of Uttarakhand

.....Respondent

Present:-

Mr. Hari Om Bhakuni, Advocate for the applicant.

Ms. Manisha Rana Singh, A.G.A. for the State.

Hon'ble Ravindra Maithani, J. (Oral)

Applicant Bhajan Singh is in judicial custody in FIR No.0087 of 2022, under Section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act"), Police Station Kapkot, District Bageshwar. He has sought his release on bail.

2. Heard learned counsel for the applicant and perused the record.

3. According to the FIR, on 16.11.2022, 3.022 Kgs charas was recovered from the possession of the applicant, which he was carrying in a bag. In fact, the FIR records that when the applicant was intercepted, he revealed that he had charas in his bag. Thereafter, the Gazetted Officer of Police was called at the place and search was made under the orders of the Gazetted Officer of the Police.

4. Learned counsel for the applicant would submit that there is non-compliance of Section 42 of the Act; prior information was required to be recorded, thereafter, information ought to have been sent, in view of Section 42(2) of the Act. In support of his contention, learned counsel for the applicant placed reliance on the principles of law, as laid down in the cases of Khushal Singh Vs. State of Uttarakhand, passed in Criminal Appeal No.189 of 2008, Thankachan Vs. State of Kerala, passed in CrA No.108 of 2001, Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, passed in Criminal Appeal No.78 of 1992, Beckodan Abdul Rahiman Vs. State of Kerala, passed in Criminal Appeal No.619 of 1997, State of Rajasthan Vs. Shanti, passed in Criminal Appeal No.957 of 2003, and Koluttumottil Razak Vs. State of Kerala, passed in CrA 1016/1999. In all these cases, under the facts and circumstances of those cases, it was held that there was non-compliance of Section 42 of the Act.

5. In addition to it, learned counsel for the applicant would also refer to the statements of PW10, Sub Inspector Prahlad Singh and PW5, Sub Inspector Kundan

Singh Rautela. Reference has been made to the statement of PW10, Sub Inspector Prahlad Singh to argue that inventory was not prepared before the Magistrate. Reference to the statement of PW5, Sub Inspector Kundan Singh Rautela, has been made to argue that, in fact, he was not an officer empowered under the provisions of the Act to search and seize.

6. Learned State Counsel would submit that the statements of PW5 and PW10, as placed at the time of hearing, were not placed earlier. Therefore, she cannot comment on it. She would submit that it is not a case of non-compliance of Section 42 of the Act because the search was made under the orders of the Gazetted Officer of Police. She would also submit that in the instant case, there is no need for compliance of Section 50 of the Act, because the recovery was made from a bag.

7. The question of inventory and its implication would find deliberation at trial based on the evidence that may be adduced. Insofar as the statement of PW5 is concerned, in answer to Question No.39, he has stated that he is not entitled for search under the provisions of the Act. This he has stated in continuation to the sentence when he said that the applicant was told of his

right to be searched before a Gazetted Officer or Magistrate.

8. In the instant case, recovery has been made from a bag. It is not from personal search. It excludes the applicability of Section 50 of the Act. Insofar as application of Section 42 of the Act is concerned, in the case of *M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence*, (2003) 8 SCC 449, the Hon'ble Supreme Court has categorically held that, **“the High Court is, thus, right in coming to the conclusion that since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section and, therefore, it was not necessary to comply with Section 42.”**

9. In fact, in the case of *State of Haryana Vs. Jarnail Singh and Others*, (2004) 5 SCC 188, in Para 10, the Hon'ble Supreme Court, while relying on the principles of law, as laid down in the case of *M. Prabhulal* (*supra*), observed as follows:-

“10. In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. Section 43 therefore clearly applied to the facts of this case. Such being

the factual position there was no requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42. Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in *M. Prabhulal v. Asstt. Director, Directorate of Revenue Intelligence*, (2003) 8 SCC 449, that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act.”

10. During the course of argument, learned counsel for the applicant has placed reliance upon the principles of law, as laid down in the case of *G. Srinivas Goud Vs. State of A.P.*, (2005) 8 SCC 183, to argue that the Gazetted Officer, if he himself makes search may not be liable to make communication under Section 42 of the Act, but, if it is otherwise, he would submit that he is also required to make such compliance, as required under Section 42 of the Act.

11. In the case of *G. Srinivas Goud (supra)*, the Hon’ble Supreme Court has categorically held that if a search is made by a Gazetted Officer or under his directions by the junior officers, there is no need for reporting. The Hon’ble Supreme Court observed as follows:-

“Therefore, in our view, the requirement under Section 42(2) need not be extended to cases of arrest, search and seizure by officers of gazetted rank. The officer of gazetted rank while authorising junior officers under Section 41(2) knows what he is requiring them to do and, therefore, there is no need for reporting. For this reason Section 41 does not contain any such requirement.....
 The requirement of informing the immediate official superior under Section 42(2), in our view, has to be confined to cases where the action is taken by officers below the rank of gazetted officers without authorisation.”

12. In the instant case, the search has been made under the orders of the Gazetted Officer, therefore, there is no question of reporting, as required under Section 42(2) of the Act.

13. Having considered, this Court is of the view that it is not a case fit for bail. Accordingly, the bail application deserves to be rejected.

14. The bail application is rejected.

(Ravindra Maithani, J.)
 20.12.2023