

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

928 BAIL APPLICATION NO.568 OF 2021

1. RAJU BHAVLAL PAWAR
2. MANOJ MADAN PAWAR
3. DINESH MEVALAL MOHITE
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Applicants : Mr. Abhaysinh Bhosale h/f. Sonar Anudeep D
APP for Respondents/State : Mr. S.D. Ghayal

...

CORAM : M.G. SEWLIKAR, J.
DATE : 26th October, 2021

PC.:-

Heard.

2. It is alleged in the FIR that information was received in the police station that three persons were carrying Ganja on Pulsar motorcycle of Bajaj company for sale. Police Inspector immediately called up on the cell phone of the Sub-Divisional Police Officer and communicated him about the information received. FIR also states that the information was recorded in the station diary. Thereafter, the raiding party was formed and it raided the spot of the incident. It is alleged in the FIR that the raiding party started checking the vehicles. The raiding party noticed two black colour Pulsar motorcycles of Bajaj company as mentioned in the information. On one motorcycle two

persons were riding and they were carrying two plastic gunny bags and on the other motorcycle one plastic gunny bag was tied. On asking their names they told it as Raju Pawar, Manoj Pawar and Dinesh Mohite. Ganja of 75.100 kilograms was found in those gunny bags worth Rs.13,25,000/-. After taking samples, FIR was lodged on the basis of which offence punishable under Section 8, 20 and 22 of the Narcotic Drugs and Psychotropic Substances Act (in short the NDPS Act) came to be registered.

3. Heard Shri Bhosale h/f. Shri Sonar learned counsel for the applicant. Shri Bhosale submits that there is total non-compliance of Section 42 of the NDPS Act. He submits that FIR shows that no information was recorded as required by Section 42(1) of the NDPS Act. He further submits that taking entry in station diary entry is no compliance of Section 42(1). There is no compliance of Section 42(2) of the NDPS Act either. He submits that total non-compliance of Section 42(1) and (2) is impermissible. For this purpose he placed reliance on the case of ***Karnail Singh V/s. State of Haryana; (2009) 8 Supreme Court Cases 539*** (Constitution Bench Judgment). He submits that CA report is not filed. Therefore, charge-sheet is incomplete.

4. Learned APP Shri Ghayal submits that station diary entry was recorded. Therefore, there is compliance of Section 42(1) of the NDPS Act. He further submits that on 28.01.2020 itself letter was written to the Dy. S.P.

in which there is reference of intimation received. This letter bearing outward no.145/2021 is total compliance of Section 42(1) of the NDPS Act. He, therefore, submits that there is total compliance of Section 42(1) and (2) of the NDPS Act. He further submits that admittedly CA report was not annexed with the charge-sheet. However, raiding party had carried field test kit with it and the substance which was found with the applicant was tested and it was tested as Marijuana i.e. Ganja.

5. Section 42 (1) of NDPS Act requires the person receiving the information to record it into writing. Section 42(2) of NDPS Act mandates that such information received by the police station has to be forwarded to the immediate superior of the officer receiving the information within 72 hours.

6. In the case at hand, the Police Inspector is the officer who had received the information. Therefore, it was obligatory on his part to record the information as mandated by Section 42(1) of the NDPS Act and send it to his immediate official superior within a period of 72 hours from the date of its receipt.

7. So far as recording of information as required under Section 42(1) of the NDPS Act is concerned, admittedly the said information was not recorded. It was tried to be argued that the entry was taken in station diary

and the same is sought to be treated as the information recorded under Section 42(1) of the NDPS Act. Learned counsel Shri Bhosale placed reliance on the case of ***Rajaram Kadu V/s. The State of Maharashtra*** (Bail Application No.2108/2016) decided by this Court. In the case of ***Rajaram Kadu*** cited (*supra*), this very question had fallen for consideration before this Court. It has been held thus:

“9. ...As far as non compliance with Section 42 of the Act is concerned, it can be seen that the information was received by Police Naik Bhagwat Saudane. The FIR does not indicate that he had reduced the information into writing or provided any copy of the information to his superior officer. The statement of API Divekar also does not indicate that he had reduced the information into writing or forwarded the same to his superior officer. However, the prosecution is relying upon the entries made by Senior P.I. Sable of Ulhasnagar in the station diary to show the compliance of Section 42. That cannot be considered to be the compliance of Section 42 of NDPS Act. The point which is canvassed by learned counsel for Applicant is that the person who had received the information had not forwarded it to the superior officer and there is nothing on record to indicate that any such information was forwarded in writing. It is, therefore, rightly contended that there is non compliance of Section 42(2) of NDPS Act.”

8. These observations of this Court clearly indicate that entry in station diary is not a compliance under Section 42 of the NDPS Act.

Therefore, there is non-compliance of Section 42 (1).

9. Learned counsel Shri Bhosale submits that delayed compliance is permissible but total non-compliance of Section 42 is impermissible. For this purpose he placed reliance on the case of ***Boota Singh and Others V/s. State of Haryana*** (Criminal Appeal No.42 of 2021). In this case it has been observed in para 11 as under:

*“11. In Jagraj Singh alias Hansa, the facts were more or less identical. In that case, the vehicle (as observed in para 5.3 of the decision) was not a public transport vehicle. After considering the relevant provisions and some of the decisions of this Court including the decision in **Karnail Singh**, it was observed:*

“14. What Section 42(2) requires is that where an officer takes down an information in writing under sub-section (1) he shall send a copy thereof to his immediate officer senior. The communication Ext. P-15 which was sent to the Circle Officer, Nohar was not as per the information recorded in Ext. P-14 and Ext. P-21. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).”

10. In the case of ***Boota Singh*** cited (supra), it has been clearly held that information has to be recorded in writing and copy of it has to be sent to the immediate superior officer. In the case at hand information was not recorded in writing. Therefore, question of sending it to immediate official superior does not arise. Vide outward no.145/21, what is done by the

Investigating Officer is intimation of information was given to the immediate official superior. Section 42(2) of NDPS Act requires copy of the information to be furnished to the immediate official superior. Admittedly, since information was not recorded, there is no question of forwarding copy of the said information. Therefore, there is total non-compliance of Section 42.

11. In the case of **Karnail Singh** cited (supra), it is held that delayed compliance is permissible but total non-compliance is not permissible:

“35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Section 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information [of the nature referred to in Sub-section (1) of section 42] from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the

search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

12. In the case at hand there is not even a delayed compliance. Simply a letter is forwarded to the official superior about the information received. In this view of the matter, since there is no compliance of Section 42(1) and (2), there is no possibility of conviction of the accused. As held in the case of *Sarija Banu (A) Janarthani alias Janani and Another V/s. State through Inspector of Police; 2004 AIR (SCW) 7488*, the question of compliance can be considered at the stage of consideration of application for bail. In this view of the matter, the applicants are entitled to be released on bail. Hence the following order is passed:

ORDER

- I) Application is allowed.
- II) Applicants be released on PR bond of Rs.50,000/- each with one solvent surety in the like amount each, in connection with Crime No.57 of 2021 under Section 8, 20 and 22 of the N.D.P.S. Act registered with Amalner Police Station, District Jalgaon.
- III) These observations are made only for the disposal of this application and the learned trial Court shall not get influenced by these observations and can come to its independent conclusion during trial.

[M.G. SEWLIKAR, J.]