

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

927 BAIL APPLICATION NO.1232 OF 2021

Rehamsing Jalamsing Bhil,
Age : 60 Years, Occu : Labour,
R/o. Shirud, T.H. Tal. Shahada,
District Nandurbar.

... APPLICANT

VERSUS

The State of Maharashtra,
Through Police Sub Inspector,
Mhasawad Police Station, Tal. Shahada
Dist. Nandurbar.

... RESPONDENT

Shri. R. S. Wani, Advocate for the applicant
Shri. S. D. Ghayal, APP for the respondent/State

**WITH
BAIL APPLICATION NO. 1140 OF 2021**

1. Kabha s/o Genda Thelari
Age : 47 years, Occu : Shepherd,
2. Bhagwan s/o Puna Thelari
Age : 22 years, Occu : Shepherd,
R/o. Aasane, Tq. & Dist. Nandurbar
3. Bandu s/o Suka Thelari
Age : 40 years, Occu : Shepherd,
R/o. Karle, Tq. Sindhkheda, Dist. Dhule
4. Deva s/o Supdu Thelari
Age : 25 years, Occu : Shepherd,
R/o. Aasane, Tq. & Dist. Nandurbar

5. Guna s/o Janu Thelari
Age : 41 years, Occu : Shepherd,
R/o. Aasane, Tq. & Dist. Nandurbar ... APPLICANTS

VERSUS

The State of Maharashtra,
Through Mhasawad Police Station,
Dist. Nandurbar. ... RESPONDENT

Shri. C. C. Deshpande, Advocate for the applicants
Shri. S. D. Ghayal, APP for the respondent/State

CORAM : M. G. SEWLIKAR, J.
DATED : 3rd DECEMBER, 2021

PER COURT :-

1. Learned counsel Shri. Wani for the applicant seeks leave to amend the prayer clause in Bail Application No. 1232 of 2021.

2. Leave granted.

3. Both these applications can be disposed of by common order as they arise out of the same crime.

4. Facts leading to these applications are that a secret information was received by Mhasawad Police Station that in the field at village Shirud, Taluka Shahada, District

Nandurbar opium poppy was cultivated in the field of corns. This information was received on 7th March, 2021. On 8th March, 2021 informant along with his staff, panchas and concerned Talathi raided the spot of the incident. The squad found that in block No. 28/1 at village Shirud and also in block No. 28/2 and 28/3(A) opium poppy was cultivated. Owners of the block No. 28/1 are Pawalsing Nawalsing, Awalsing Nawalsing, Dawalsing Nawalsing. Owner of the block No. 28/2 and 28/3(A) is Rahemsing Jalamsing Bhil. Total amount of opium found in the field block No. 28/1 was of Rs.23,40,000/- weighing 4680 k.g. The opium found in the field block No. 28/2 was of Rs.20,16,000/- weighing 4032 k.g. In block No. 28/3/A opium of Rs.1,71,000/- weighing 342 k.g. was found to have been cultivated. Accordingly, all these contraband articles were seized and after lodging of the FIR they were referred to Chemical Analyzer for analysis. In view of CA report the contraband articles referred to the Chemical Analyzer were opium poppy. FIR was lodged on the basis of which offence under Sections 15(c), 17(c), 18(c), 20 and 46 of NDPS Act came

to be registered.

5. Heard Shri. Wani, learned counsel for the applicant in Bail Application No. 1232 of 2021, learned counsel Shri. Deshpande for the applicants in Bail Application No. 1140 of 2021 and learned APP Shri. S. D. Ghayal for the respondent/State.

6. Both the learned counsel submit that there is total non compliance of Section 42 of the NDPS Act. Information ought to have been reduced to writing as required by Section 42 of the NDPS Act which has not been done. Therefor, there is no possibility of conviction of the accused.

7. Learned APP Shri. Ghayal submits that there is compliance of Section 42 of the NDPS Act. He submits that letter dated 07th March, 2021 has been addressed to the Superior of the informant PSI Birhade. By this letter information has been communicated to the official superior

of the informant PSI Birkhade. He, therefore, submits that there is total compliance of Section 42 of the NDPS Act.

8. Section 42 of the NDPS Act requires the officer who receives the information to reduce it into writing. In terms of Section 42(2) the said information which had been taken down in writing has to be sent to the official superior of the said officer. In the case at hand admittedly the information received by the officer in-charge of the Police Station was not reduced to writing. Learned APP submits that partial compliance of NDPS Act is permissible. This submission cannot be considered. In the case of **Boota Singh and Others Vs. State of Haryana (Criminal Appeal No. 42 of 2021)** it has been observed 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 subsection(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)."

9. Thus, the Hon'ble Supreme Court in the case of **Boota Singh** (supra) has held that information has to be reduced in writing and copy of it has to be sent to the immediate superior officer. In the case of **Karnail Singh Vs. State of Haryana, (2009) 8 Supreme Court Cases 539**

(Constitution Bench Judgment) it has been held as under:

"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."

10. From this authoritative pronouncement by the Hon'ble Supreme Court it is clear that total non compliance is not permissible but delayed compliance is permissible. The Hon'ble Apex Court has held that the compliance with the requirements of Section 42(1) and 42(2) in regard to writing down 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. The question is of urgency and expediency.

11. In the case at hand it is not in dispute that there is total non compliance of section 42(1) of NDPS Act. The officer receiving the information has not reduced it into writing at all. When the information was not reduced to writing, the question of sending it does not arise. What the investigating officer has done is to incorporate the information which was received by him in a communication addressed to his official superior. This is not the compliance contemplated by the provisions of Section 42(1) of the NDPS Act. Punishment provided for the offences is stringent and therefore, compliance of the provisions of the NDPS Act has also to be strict. In this case, there is no delayed compliance also. Partial compliance cannot be treated as compliance of Section 42(1) of NDPS Act. In this view of the matter, it cannot be said that there is prima facie case against the

accused. Hence, I am inclined to release the applicants on bail.

ORDER

1. Both the Bail Applications are allowed.
2. Applicant in Bail Application No. 1232 of 2021 be released on bail on his furnishing PR bond of Rs. 50,000/- (Rupees Fifty Thousand only) with one solvent surety in the like amount in connection with CR No. 069 of 2021 under Sections 15(c), 17(c), 18(c), 20 and 46 of NDPS Act registered with Mhasavad Police Station, Tal. Shahada, Dist. Nandurbar.
3. Each of the applicants in Bail Application No. 1140 of 2021 be released on bail on their furnishing PR bond of Rs. 50,000/- (Rupees Fifty Thousand only) with one solvent surety in the like amount in connection with CR No. 069 of 2021 under Sections 15(c), 17(c), 18(c), 20 and 46 of NDPS Act registered with Mhasavad Police Station, Tal. Shahada, Dist. Nandurbar.
4. It is clarified that the observations made in the above order are restricted to the decision of this application

only and the trial Court shall not get influenced by the same and can come to its independent conclusion during trial.

5. Applications are disposed of.

[M. G. SEWLIKAR, J.]

ssp