

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.185 OF 2021

FOLARIN ABDULLASEEZ ANDOYIN)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Mithilesh Mishra a/w. Ms.Saili Khan, Advocate for the Applicant.

Mr.H.J.Dedhia, APP for the Respondent – State.

CORAM : V. G. BISHT, J.

**RESERVED ON : 18th NOVEMBER 2021
PRONOUNCED ON : 29th NOVEMBER 2021**

P.C. :

1 The present application has been moved by the applicant under Section 439 of the Code of Criminal Procedure in Crime No.616 of 2019 registered with Police Station Chaturshrungi, Pune, for offences punishable under Section 8(c) and 21(c) of Narcotic Drugs and Psychotropic Substances Act

(NDPS Act), Section 65(E) of Maharashtra Prohibition Act and under Section 14 of Foreigner Citizen Act.

2 Informant is attached with Social Security Department, Crime Branch, Pune City as Inspector of Police. As per information received from her superiors that in Baner, Oundh, Pune, Nigerians are selling drugs like cocaine and in order to apprehend them, she formed a raiding team with police personnel and staff members including the panch witnesses.

3 They reached at around 4.30 hours at Kalamkar Chowk in Baner, Pune, and on public road, in front of Mahi Rose Nursery, found a silver Honda CRV bearing number MH 43 R9 245 parked on the side of the road. A Nigerian person was standing with a black cloth bag in his hand. The moment he saw the raiding team, he hurriedly tried to get in his car. The raiding team grew suspicious and surrounded the car. On being enquired, he introduced himself as Folarin Abdullaseez Andoyin. After apprising him of his right of search, to which he declined, the

raiding party carried out the search in presence of panchas and found 488 grams and 490 milligrams white cocaine powder in a white transparent plastic bag worth Rs.48,62,800/- . The car was also searched and cash of Rs.8,39,490/- along with other articles was found. After taking the necessary sample, First Information Report (FIR) came to be lodged.

4 Mr.Mithilesh Mishra, learned counsel for the applicant, has advanced only legal submission in the form that there is total non-compliance of mandatory provision of NDPS Act, namely, Section 42. Despite there being previous information that the person selling the drug was a Nigerian national, according to the learned counsel, no reasons are recorded for the non-compliance of Section 42 of the NDPS Act. In view of this, the bar of Section 37 of the NDPS Act will not be applicable to the case in hand. For this reason alone, the applicant deserves to be released on bail, argued learned counsel. The learned counsel also placed reliance on **Sarija Banu alias**

Janarthani alias Janani and Another vs. State through Inspector of Police¹ and Boota Singh and Others vs. State of Haryana².

5 Mr.Dedhia, learned APP, on the other hand, opposed the submissions by submitting that there is no applicability of Section 42 but it is Section 43 of the NDPS Act, which would be applicable in the facts and circumstances of the case.

6 Perused the FIR and the investigation papers. The controversy seems to be the applicability of Section 42 or Section 43 of the NDPS Act to the case in hand. Section 42 and 43 of the NDPS Act reads as under :

“42. Power of entry, search, seizure and arrest without warrant or authorisation.— (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government

1 (2004) 12 Supreme Court Cases 266

2 2021 SCC Online SC 324

including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or

freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper,

arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector.

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) 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 within seventy-two hours send a copy thereof to his immediate official superior.”

“43 Power of seizure and arrest in public place.—Any officer of any of the departments mentioned in section 42 may— (a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for

seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.—For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

7 In **Boota Singh and Others (supra)** the Hon'ble Apex Court has observed as under in paragraph 13 :

“13 In **Karnail Singh vs. State of Haryana**³ , the Constitution Bench of this Court concluded:-

³ (2009) 8 Supreme Court Cases 539

“35 In conclusion, what is to be noticed is that **Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496]** did not require literal compliance with the requirements of **Sections 42(1) and 42(2)** nor did **Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217]** hold that the requirements of **Sections 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 register concerned 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 with requirements of sub- sections (1) and (2) of [Section 42](#) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with [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 of 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.”

(Emphasis added)

8 In the case in hand, a bare reading of the FIR would show that the informant Police Inspector was very much in the police station when she received the information from her superiors and thus had sufficient time to record in writing the

information so received. However, it appears that she did not record in writing the information received by her qua the applicant. No reasons, much less satisfactory reasons, are forthcoming on record.

9 Similarly, in the case of **Karnail singh (supra)** the Hon'ble Apex Court made following observations at paragraph 26:

“26 The material difference between the provisions of [Sections 42](#) and [43](#) is that [Section 42](#) requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, [Section 43](#) does not contain any such provision and as such while acting under [Section 43](#) of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a

public place where such possession appears to him to be unlawful.”

10 Further, in case of **Boota singh (supra)** the Hon'ble Apex Court made following observations at paragraph 15 :

“15 The evidence in the present case clearly shows that the vehicle was not a public conveyance but was a vehicle belonging to accused Gurdeep Singh. The Registration Certificate of the vehicle, which has been placed on record also does not indicate it to be a Public Transport Vehicle. The explanation to [Section 43](#) shows that a private vehicle would not come within the expression “public place” as explained in [Section 43](#) of the NDPS Act. On the strength of the decision of this Court in Jagraj Singh alias Hansa , the relevant provision would not be [Section 43](#) of the NDPS Act but the case would come under [Section 42](#) of the NDPS Act.

11 Having regard to the facts of the present case, admittedly, the applicant was found in his car which by no stretch of imagination can be termed as a public conveyance. The explanation to Section 43 NDPS Act shows that a private conveyance would not come within the expression “public place” but the case would come under Section 42 of the NDPS Act.

12 From the above it is clear that there was no compliance of Section 42(1) of NDPS Act. Even if Section 42 is seen carefully, one will note that Section 42(1) and 42(2) are with regard to writing down the information received and thereafter sending a copy thereof to superior officer should normally precede the entry, search and seizure by the officer. But in special circumstances, involving any emergent situation, the recording of the information in writing and sending a copy thereof to the officer superior may get postponed by a reasonable period, that is after the search, entry and seizure. However, there is no such obtaining situation in the case in hand.

13 The sum and substance of above discussion is that there is non-compliance of Section 42 of the NDPS Act which is mandatory and thus the applicant has made out a case for bail.

14 In view of this, the bar under Section 37(1)(ii) of the NDPS Act would not be applicable to the case in hand.

15 In view of above, I am inclined to allow the application. Hence, I pass the following order :

ORDER

- (i) Applicant – Folarin Abdullaseez Andoyin shall be released on bail in Crime No.616 of 2019 registered with Police Station Chaturshrungi, Pune, on his executing P.R.Bond in the sum of Rs.50,000/- with one or two sureties in like amount.
- (ii) As a condition of this order, the applicant shall not tamper with the prosecution evidence.

- (iii) The applicant shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case, so as to dissuade him from disclosing such facts to the court or to the Police Officer.
- (iv) The applicant should cooperate the trial Court for expeditious disposal of the Special Case pending against them.
- (v) The applicant should not repeat similar crime in future. If it is found that the applicant is repeating commission of similar offence in future, the prosecution is at liberty to get the bail of the applicant cancelled.
- (vi) The applicant should surrender his passport to the Police Station Chaturshrungi, Pune, and he shall not leave India without prior permission of the trial Court.
- (vii) Bail before the trial Court.

- (viii) Parties to act on copy of this order duly authenticated by the Sheristedar of this Court.
- (ix) It is made clear that the observations made herein are prima facie and the trial Court shall decide the case on its own merit, in accordance with law, uninfluenced by the observations made in this order.
- (x) The application is allowed in the aforesaid terms and stands disposed off accordingly.

(V. G. BISHT, J.)