

**IN THE HIGH COURT FOR THE STATES OF PUNJAB & HARYANA
AT CHANDIGARH**

CRM-M- 22004 -2020(O&M)
Date of Decision : 05.01.2021

Pushpinder Singh @ BhindiPetitioner

Versus

State of PunjabRespondent

CORAM : Hon'ble Mr. Justice Gurvinder Singh Gill

Present: Mr. L.S. Sekhon, Advocate, counsel for the Petitioner.

Mr. A.S. Sandhu, Addl. Advocate, General, Punjab for State.

(Proceedings conducted through video conferencing)

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Gurvinder Singh Gill, J.

1. The petitioner seeks grant of regular bail in a case registered against him vide FIR No. 294 dated 26.11.2018, at Police Station: Bhawanigarh, District Sangrur, under Section 22 of NDPS Act, 1985 (hereinafter referred to as 'the Act').
2. The case of prosecution is that on 26.11.2018, when ASI Walaiti Ram along with other police officials was present near bridge on Canal Thamman Singh Wala, in connection with patrolling and checking of suspicious persons, then he received secret information at about 5 P.M. to the effect that Sanju Singh and Pushpinder Singh (petitioner) indulged in sale of intoxicants and that they were proceeding towards Sangrur in a white coloured 'Swift' car bearing registration no. PB-13-W-2820 while carrying a large quantity of intoxicating tablets. The information was further to the

effect that in case barricading is laid, the aforesaid persons could be caught red-handed.

3. ASI Walaiti Ram immediately sent the aforesaid information to SHO, Police Station, Bhawanigarh, on the basis of which the instant FIR came to be lodged. Thereafter, the said ASI Walaiti Ram along with other police officials laid barricading and they were able to intercept car bearing registration no. PB-13-W-2820 in which the petitioner and co-accused Sanju Singh were travelling. A search of the car led to recovery of 23,500 tablets of Clovidol-100-SR (Tramadol) and another 17,000 tablets of Clovidol-100-SR (Tramadol) apart from 200 vials 100 ml each of Wincerex.
4. The learned counsel for the petitioner has vehemently argued that since it is a case registered pursuant to receipt of secret information pertaining to possession of contraband in a vehicle, the same was required to be immediately taken down in writing in terms of Section 42 of the Act and was required to be conveyed to the officer immediately superior to the person who received the secret information and the same not having been done resulted in violation of mandatory provisions of Section 42 of the Act and as such, the entire recovery stood vitiated and consequently the petitioner deserves to be released on bail. The petitioner places reliance upon 2016(1) RCR(Criminal) 333 Darshan Singh vs. State of Haryana to hammer forth the aforesaid submission wherein it has been held that lodging of FIR or communication of a copy of FIR to superior officers does not amount to compliance of Section 42 of the Act.
5. Sh. A.S. Sandhu, learned Additional Advocate General, Punjab, on the other hand has opposed the petition while submitting that since intimation

by way of a “*ruqa*” was sent to SHO before ASI Walaiti Ram proceeded to lay barricading and before the car was intercepted, the same would duly satisfy the requirements of Section 42 of the Act pertaining to taking down the information in writing and conveying the same to superior officer. The learned State counsel, while pressing into service a judgement of Constitution Bench of Hon’ble Supreme Court in a case reported as 2009(8) SCC 539 Karnail Singh vs. State of Haryana has submitted that non-compliance of Section 42 of the Act, if any, would not *ipso-facto* vitiate the trial if no prejudice had been caused to the accused.

6. The learned State counsel has further submitted that in any case Section 42 of the Act would not have any application as it is a case of recovery of contraband from a vehicle in transit and which would be covered by Section 43 of the Act and not Section 42 of the Act. It has further been submitted that since it is a case of recovery of a “commercial quantity” of contraband wherein the petitioner was caught red-handed, no case for grant of bail is made out.
7. I have considered rival submissions addressed before this Court. It is a case where pursuant to receipt of secret information, the police intercepted a car in which the petitioner and one Sanju Singh were found travelling and search of which led to recovery of 23,500 tablets of Clovidol-100-SR (Tramadol) and another 17,000 tablets of Clovidol-100-SR (Tramadol) apart from 200 vials 100 ml each of Wincerex. Section 42 of the Act pertaining to power of entry, search, seizure and arrest without warrant or authorisation and Section 43 of the Act pertaining to arrest of an accused in public place read 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 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 personal 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 V-A 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 V-A 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 places. –

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, alongwith 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 V-A 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.”

8. The material question would be as to whether it is the procedure mandated under Section 42 of the Act which would be applicable or as to whether Section 43 of the Act alone will apply in such cases of recovery from a vehicle in public place. A Constitution Bench of Hon’ble Supreme Court in 1994(3) SCC 299 State of Punjab vs. Baldev Singh marked the distinction between the provisions of Sections 42 and 43 of NDPS Act, 1985 in the following words:

“ 9. The material difference between the provisions of Section 43 and Section 42 is that whereas 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 Substances in a public place where such possession appears to him to be unlawful.”

9. In State of Haryana v. Jarnail Singh and others, 2004(5) SCC 188, the Hon'ble Supreme Court held as follows :

"Section 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act for searching the vehicle between sunset and the sunrise."

10. The aforesaid position of law was reiterated by Supreme Court in State, NCT of Delhi vs. Malvinder Singh 2007(11) SCC 314, in a case of recovery of opium from dicky of a private scooter, which has been followed by a Division Bench of our High Court in 2012(2) RCR(Criminal) 600 Davinder Kumar vs. State of Punjab, in a case of recovery of four bags of poppy husk from a private car, wherein it was held as under:

"17. The reasoning propounded in Jarnail Singh's case (supra) was further relied upon in 'State, NCT of Delhi v. Malvinder Singh' 2007(3) R.C.R.(Criminal) 602 : 2007(3) R.A.J. 677 : (2007) 11 SCC 314. In the present case, the accused were traveling in a Cielo car coming from the side of Phillaur when the same was apprehended at Adda Lasara. Therefore, the recovery was effected when the vehicle was in transit, and hence, Section 43 of the Act is attracted. Thus, we have no hesitation to hold that non-compliance of Section 42 of the Act is not fatal to the prosecution."

11. Bearing in mind the ratio of the above referred judgements and the fact that it is a case of recovery of contraband from a vehicle while in transit, it would be Section 43 of the Act which would be applicable in the matter of procedure and not Section 42 of the Act.
12. Even if it is taken that provisions of Section were to apply, still it is a case where secret information had been duly conveyed to the superior officer i.e. the SHO, by the person receiving secret information namely ASI Walaiti Ram by way of sending a '*ruqa*' stating factum of receipt of secret information, before the vehicle in question was intercepted and before recovery was effected, which would be sufficient compliance of section 42 of the Act. Darshan Singh's case(supra), on which reliance is placed, would not apply as factual position therein was distinct inasmuch as no intimation as regards secret information was sent before effecting recovery. Further, Darshan Singh's case pertained to the period before amendment of Section 42 of the Act in 2001 when the provisions were far more strict inasmuch as the information was required to be transmitted to superior officer '*forthwith*' whereas after amendment the period was extended upto 72 hours. In other words, under the unamended provisions there was no room for delay and any aberration would be looked at strictly.
13. As an upshot of aforesaid discussion, wherein it is found that it is a case covered under Section 43 of the Act, the contention raised by learned counsel regarding non-compliance of Section 42 of the Act cannot be accepted.
14. Additionally, the recovered quantity of contraband which falls in the category of 'commercial quantity' would attract fetters imposed by Section

37 of the Act in the matter of grant of bail. Hon'ble Apex Court in a recent judgement i.e. 2020(1) RCR(Criminal) 818 State of Kerala vs. Rajesh Kumar has reiterated the legal position as regards the limitations imposed by Section 37 of the NDPS Act and has further held that a liberal approach in matters of bail in offences under NDPS Act is uncalled for. There is nothing on record at this stage from which it could be inferred that the petitioner is not guilty of the offence in question. The petition is found to be sans merit and is hereby dismissed.

(GURVINDER SINGH GILL)
JUDGE

05.01.2021
(kamal)

Whether reasoned / speaking? **Yes / No**

Whether reportable? **Yes / No**