

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

945 BAIL APPLICATION NO.313 OF 2022

1. Rajendra @ Dada S/o Chagan Kale
Age : 46 years, Occ.: Agri.,
R/o.: Massa (Kh), Tq. Kallamb,
District Osmanabad.
 2. Balaji S/o Chagan Kale
Age : 41 years, Occu: Agri & Labour,
R/o.: Massa (Kh), Tq. Kallamb,
District Osmanabad.
- ... APPLICANTS

VERSUS

The State of Maharashtra
Through Police Inspector,
Kallamb, Police Station, Tq. Kallamb,
District Osmanabad.

... RESPONDENT

Mr. Shivprasad G. Jadhavar, Advocate for the applicants
Mr. V. S. Badakh, APP for the respondent/State

**CORAM : S. G. MEHARE, J.
DATED : 28th JUNE, 2022**

PER COURT :-

1. Heard, learned counsel for the applicants and learned APP for the State at length. The applicants have been behind bar since 9th June 2021 and 11th August 2021 in a crime registered by Police Station Kallamb for the offence punishable under Sections 8(c), 20(b) (ii) and 29 of the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS

Act). It has been alleged against the applicants that field survey No. 675 was owned by one Balaji Tanaji Shinde. The applicants were cultivating the said field on the lease (*Bataipatra*). The applicants have kept *ganja* in the said field beneath the fodder. On 31.05.2021, the complainant/ Police Inspector received secret information that the applicants had hidden a huge quantity of *ganja* below the hay. On getting the secret information, the complainant, Pandurang Mane informed the Police Inspector of Police station Kallamb. Police Inspector of Police station Kallamb called them to the Police station Kallamb. They went to the police station, took a station diary entry and gave the same information to Sub Divisional Officer on mobile phone, and he permitted them to take raid. Thereafter they took the raid and found that in the said field, 1132.66 K.g. *ganja was kept beneath the hay*. After all the formalities, he registered a crime against the applicants and apprehended the applicants.

2. The learned counsel for the applicant has vehemently argued that compliance with Section 42 of NDPS Act is mandatory. In this case, Section 42 of the said Act has

not complied. Therefore, the applicants are entitled to bail. The second limb of his argument is that they never took the field where the ganja was found on the lease (*Bataipatra*). But the owner of the said field, gut survey No. 675, has misled the police stating that the said field was given to the applicants on *Batai*. He referred to the statement of the land owner is at page no. 75 of the charge-sheet and tried to submit that it does not reflect that there was any *Batai* contract. To disprove the contention of *Bataipatra*, he has filed an affidavit on record stating that the applicants are not the relatives of the land owner, namely, Balaji Tanaji Shinde. To buttress his arguments, he relied on the case of *Boota Singh and others Vs. State of Haryana, AIR 2021 Supreme Court 1913*. He also relied on the case of *Karnal Singh Vs. State of Haryana, 2009 Cri.L.J. 4299*. This case was referred to the Hon'ble Apex Court in the case of *Boota Singh* (cited supra). He further relied on the case of *Raju Bhavlal Pawar & Ors. Vs. The State of Maharashtra, 2021 All MR (Cri) 4651*.

3. Learned APP has taken the Court through various

documents from the papers he supplied. He has a strong argument that a huge quantity of 1132.66 K.g., *ganja* was seized from the spot. *Prima facie*, the prosecution has evidence that the said field was in possession of the applicants as bataidar. The land owner is the relative of the applicants. Besides this 4 k.g. *ganja* was seized from the house of the applicant, Balaji Kale. The memorandum statement of applicant Balaji Kale under Section 67 of NDPS Act is recorded. There are independent witnesses stating that the applicants were cultivating a field from where the *ganja* was seized. The dog squad report is also in favour of the prosecution. A dog took the investigation officers to the house of Balaji, and then 4 K.g. *ganja* was seized from his house. As far as compliance with Section 42 of NDPS Act is concerned. He has referred to a station diary entry on page no. 181 and page no. 145 and submit that this is the complete compliance with Section 42 of the NDPS Act. He also referred to a statement of one witness, Ganesh Bapurao Thorat and pointed out that the applicant had hired his tractor to carry out the narcotic drugs i.e. *ganja*. He also stated that CDR report shows the contact touch of the

accused Balaji Kale with witness Ganesh Thorat. There is also evidence that the *ganja* seized in the crime was purchased from the State of Andhra Pradesh. He also pointed out that various crimes are to discredit of the applicants. He has strongly opposed the application. He also referred to the case of *Karnal Singh* (cited supra), wherein Section 42 of NDPS Act has been interpreted by the Hon'ble Apex Court. He has pointed out that reading the illustration mentioned in sub clause (d) of para 17 of the said judgment and submitted that it is made clear that Investigating Officer in this crime has complied with Section 42. Therefore, the applicants are not entitled to bail.

4. Learned counsel for the applicants relied on the case of *Sarija Banu Alias Janarthani alias Janani and Another Vs. State Through Inspector of Police, (2004) 12 Supreme Court Cases 266*. He has pointed out that compliance under Section 42 of NDPS Act is mandatory and it is a relevant fact which should have engaged the attention of the Court while considering the bail application. The pronouncement of the Hon'ble Apex Court is crystal clear that non-compliance with

Section 42 of NDPS Act may be considered while dealing with a bail application.

5. As far as the first ground seeking the bail of non compliance with Section 42 of the NDPS Act is concerned. The Hon'ble Apex Court, in the case of *Karnal Singh* (cited supra), has observed about literal compliance with the requirements of Sections 42(1) and 42(2) is required and recorded the following observations in paragraph no. 17. Which reads thus;

"17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 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 : 2000 AIR SCW 375 2001 AIR SCW 2970.

(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 noncompliance 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.

6. A view taken in the case of **Karnal Singh** (cited supra) has been reiterated by the Hon'ble Apex Court in the case of **Boota Singh** (cited supra).

7. This Court, in the case of **Raju Bhavlal Pawar** (cited supra), has also considered a similar issue as regards to the compliance of Section 42(2) of NDPS Act and relying on the case of **Boota Singh** (cited supra) was pleased to allow the application holding that the Investigating Officer has not complied with the provisions of Section 42(1) of NDPS Act.

8. In the case of **Karnal Singh** (cited supra), the Hon'ble Apex Court has discussed two contingencies to compliance with Section 42(1) of the NDPS Act. Those are pertaining to the place of receiving the information. If the Officer has received the information from any person in the police station, then the Officer receiving the information must record the information in writing in the concerned Register and has to send a copy of the report forthwith to his immediate official superior, before proceeding to take

action in terms of clause (a) to (d) of Section 42(1) of NDPS Act. In other words, it has been observed in the said case that the police officer receiving the information in the police station he must have to reduce the complaint in writing before proceeding to take an action as provided under Section 42 (1) (a) to (d) he is bound to intimate to his immediate official superior. The second contingency has been observed by the Hon'ble Apex Court that if in case the Officer received the information at other place and at the place other than the police station while he was on the patrolling duty or otherwise or on a mobile phone or by other means and the information calls for immediate action and any delay would have been resulted in the goods or evidence being removed or destroyed, or it would not be feasible or practical to take down the information in writing given to him. In such a situation, he may take action as per clauses (a) to (d) of Section 42(1) of NDPS Act. However, the Hon'ble Apex Court has placed a rider in such contingency that thereafter as soon after the seizure of contraband the investigating Officer must record the information in writing and forthwith inform the same to the

official superior. It is also observed in clause (c) that in compliance with the requirements of Section 42 (1) and 42(2) of NDPS Act 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. Reading this observation of the Hon'ble Apex Court, it is clear that the information received should be written in the concerned Register, and the Officer has to report to his immediate superior before the search and seizure of the contraband. But in special circumstances involving emergent situations, the writing and sending of the copy of the information may be postponed. The Hon'ble Apex Court has also observed that the delay caused to complying with the said provision may be acceptable and quoted illustration. The observation recorded by the Hon'ble Apex Court in **Karnal Singh** (supra) is clear and has given the circumstances in which writing the information received and informing the written information to the immediate superior Officer may be postponed.

9. Learned APP has referred to the station diary

entry and a letter addressed to the Sub Divisional Police Officer Kallamb and argued that the contents of the said letter dated 31st May, 2021 are pertaining to the information in writing and permission to raid. As far as the station diary is concerned, this Court, in the case of **Raju Bhavlal Pawar** (cited supra), has answered in clear words that entry in the station diary is not the compliance with Section 42 of the NDPS Act. In that case, also, the Officer had barely given intimation of information to the immediate superior Officer. In similar facts this Court has held that it was a total noncompliance of Section 42 of NDPS Act.

10. After having gone through those papers and considering the ratio laid down by this Court in the case of **Raju Bhavlal Pawar** (cited supra), the Court does not agree with the submissions of the learned APP that it is in strict compliance with Section 42 of NDPS Act.

11. As far as the factum of having conscious possession of the *ganja* is concerned. The applicants have disputed the possession of the field in which the *ganja* was

seized. It is a matter of evidence, so that cannot be considered at this juncture. Therefore, it would be inappropriate to go into the merit of that disputed fact while considering the bail application. However, the applicants have a strong case that the prosecution had not complied the Section 42 of NDPS Act. The law laid down by the Hon'ble Apex Court in the Case of **Karnal Singh** (cited Supra) and the law laid down by this Court in the case of **Raju Bhavlal Pawar** (cited supra) by this Court is squarely applicable to the case in hand. Since the mandatory compliance of Section 42 of NDPS Act has not been complied with by Investigating Officer, the applicants are entitled to bail. Hence the following order.

ORDER

I) Application is allowed.

(II) Applicant No. 1 Rajendra @ Dada s/o Chagan Kale and applicant No.2 Balaji s/o Chagan Kale be released on bail, on executing PB and SB of Rs.1,00,000/- with one solvent surety of like amount each, in Crime No. 187 of 2021, registered with Kallamb Police Station, Dist. Osmanabad for the offence punishable under

Sections 20(b)(ii)(c), 29 of the NDPS Act.

(III) Needless to State that the observations recorded by this Court, in this case, are restricted to the bail application only.

(IV) The applicants shall attend the Court on each material hearing during the course of the trial. They shall cooperate with the trial.

[S. G. MEHARE, J.]

ssp