

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Reserved on: 16.11.2022
Pronounced on : 30.11.2022

1. CRM-M-10429-2021

Gurwinder Singh

..... Petitioner

versus

State of Punjab

..... Respondent

2. CRM-M-27343-2021

Harpreet Singh @ Dalvear Singh

..... Petitioner

versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Balbir K. Saini, Advocate
for the petitioner (CRM-M-10429-2021).

Mr. M.S. Saini, Advocate
for the petitioner (CRM-M-27343-2021).

Mr. Arun Gupta, AAG, Punjab.

PANKAJ JAIN, J.

CRM-43634-2022 in CRM-M-10429-2021

For the reasons recorded, the application is allowed.

Documents Annexures P-5 to P-8 are taken on record.

Main Case(s)

These two petitions have been filed under Section 439 Cr.P.C.
seeking regular bail in FIR No.0082 dated 01.11.2020, registered for
offence punishable under Section 22 of NDPS Act (hereinafter referred to as
'Act'), at Police Station Bajakhana, District Faridkot.

2. The contents of FIR read as under:-

"Today I ASI along with ASI Harpreet Singh 31/Faridkot, PHG Jagtar Singh 21754, were present on a private vehicle at Bus Stand Bargari for checking. Then one informer gave information to me that Gurvinder Singh son of Bhajan Singh resident of Lande and Harpreet Singh son of Bikkar Singh resident of Charik were coming towards Bargari on Tralla Truck No.PB-13-BB-7299. Gurvinder Singh is driver of Tralla Truck and Harpreet Singh who is conductor, are coming on a Tralla Truck No.PB-13- BB-7299 and bringing intoxicant tablets by hiding in it. If proper barricading is laid, then both the persons can be apprehended along with huge amount of intoxicant tablets. Since the information is reliable and believable, therefore, the offence U/s 22/61/85 of NDPS Act is made out against Gurvinder Singh and Harpreet Singh. Therefore, ruqa has been written against above mentioned Gurvinder Singh son of Bhajan Singh resident of Lande and Harpreet Singh son of Bikkar Singh resident of Charik and same is sent to police station Bajakhana by hand through PHG Jagtar Singh 21754. After registration of case, case number may kindly be intimated. After preparing the special reports, same has been sent to the Ilaga Magistrate and Higher Officials. Since I am not an ASI of regular rank, so cannot investigate the case under NDPS Act, therefore, some regular SI/ASI be sent on the spot. I ASI along with companion officials, are going to old chowki Bargari for barricading. Sd/- Jagrup Singh ASI/672. chowki Bargari, police station Bajakhana dated 01.11.2020."

3. The petitioners were apprehended and a recovery of 22,000 intoxicant tablets were recovered from their possession. In the reply filed by the prosecution, it has been claimed that:-

“xx xx xx

3. That with the commencement of investigation, SI Harprem Singh 261/FRT alongwith police party rushed to the specified location at Bargari and laid a nakabandi. At about 11/11-15 PM one truck no. PB-13BB-7299 was rounded up which was being driven by Gurwinder Singh (petitioner) and Harpreet Singh was sitting next to him. Both were made aware by I.O about his name, rank and posting and about his suspicion of some intoxicant material in their possession. But both the suspects were made apprised about their legal right of getting search by some Gazatted officer or Magistrate who could be called at spot if they so desired. Both expressed their desire of calling some Gazetted officer at spot for their search. Therefore, on intimation, answering deponent reached at spot and SI Harprem Singh conducted the search of Truck Trola No. PB-13BB-7299 as per the direction of answering deponent in strict compliance of section 50/52 of NDPS Act and seized 32 boxes of intoxicant tablets called Tramadol Hydrochloride Clovidol 100 SR containing total 16000 tablets and 10 boxes of intoxicant tablets called Alprazolam Tablets I.P 0.5mg Alpracan 0.5 containing total 6000 tablets from the said truck. The recovered 32 boxes of Tramadol and 10 boxes of Alprazolam were converted into two separate bulk parcels respectively and sealed. Specimen of seal also prepared. Case property taken into possession vide memo. Site plan of place of recovery was prepared and statement of witness recorded.

4. That on 02-11-2020 during the course of investigation, both the culprits including petitioner were produced before Ld. Illaqa Magistrate and got attested inventory of case property. Ld. Magistrate drawn representative samples and sealed the bulk and sample parcels with his seal and handed over to the Police, further the police remand of both accused granted for three days. On 04-11-2020, during police interrogation present petitioner had suffered a statement that he brought the recovered contrabands from Kamal Bishnoi R/o Ramji Ka Gol, Near Sadour Shahar, Jalour, Rajasthan and further was to supply Gagani son of Gurjant Singh alias Janta Dhaliwal, R/o Jeeda. Therefore both the above named persons nominated as accused vide DDR No. 28 dt. 04-11-2020 and enhancement of offence under section 29 of NDPS Act also made. The sample parcel has been deposited with R.T.F.S.L, Bathinda for chemical analysis on 06-11-2020. The report has received and depicted Parcel-1 Alprazolam-0.49 mg/tablets and

5. That on 06-11-2020 police party in connection with the furtherance of investigation visited Vill. Jeeda and conducted raid at the house of Gurtej Singh alias Gagni S/o Gurjant Singh who was apprehended by police from his house but fled away from the spot playing a trick with police party. Since thereafter police was in search of the Gurtej Singh and conducted raids his possible hide outs. Eventually the said Gurtej Singh appeared before police on 05-1-2021 and produced copy of Order Dt. 23-12-2020 passed by this Hon'ble Court in CRM No. M-43584/2020. Pursuant to the same Gurtej Singh was joined in investigation, during interrogation said Gurtej Singh disclosed that he is old friend of main accused Gurwinder Singh (petitioner), who used to bring

intoxicant tablets from Gujrat State. The information shared by said Gurtej Singh with police is in confirmation of inputs against petitioner who is working as a drug peddler. Whereas arrest of caused Kamal Bishnoi is yet to made.

6. That the result of chemical analysis received vide Report No. 1760/2020/Taxi/RTFSL/BTI Dt, 10-12-2020 and revealed the Parcel -1 containing Alprazolam tablet with average weight 162.88mg/tablet and Parcel-2 containing tablets called Clovil-100 SR with average weight -402.85mg/tablet and detected Alprazolam in parcel-1 with average quantity of ingredient of 0.49mg/tablet and parcel-II containing salt of Tramadol Hydrochloride- 98.94mg/tablet. True typed copy of FSL Report is annexed as Annexure R-1. In view of the chemical analysis report a recovery of huge quantity of contrabands are involved which came with in purview of commercial quantity. Allegations against petitioner are serious in nature. In view of gravity of offence and totality of circumstances, apprehension of petitioner to flee from justice is high and petitioner is not entitled to be enlarged on bail, present petition is liable to be dismissed.”

4. Counsel for the petitioners have argued that in present case, mandatory provision as contained in Sections 42 and 50 of the NDPS Act have not been complied with. It has been claimed that there being violation of the mandatory provisions, the chances of the present trial resulting in the conviction are feeble and thus conditions as enumerated in Section 37 of the Act stand fully complied with and the petitioners are entitled for grant of regular bail. It has further been submitted that the challan stands presented and there is no apprehension that the petitioners shall tamper with the

evidence. The petitioners are in custody since 01.11.2020 i.e. for around more than two years and they cannot be kept in custody as a punishment and have a right to speedy trial. There are around 20 cited witnesses out of which only 04 have been examined. Further reliance has been placed upon the judgment passed by this Court in **CRM-M-25498-2021** decided on 14.06.2022, titled as '**Pankaj vs. State of Punjab**' to submit that in similar circumstances, Coordinate Bench found that Section 42 of the Act was attracted. The same having been violated, the petitioners were admitted to regular bail.

5. Counsel for the petitioners has also relied upon '**State of Rajasthan vs. Jag Raj Singh @ Hansa 2016 AIR Supreme Court 3041**' and '**State of Rajasthan vs. Chhagan Lal 2015 All SCR 662**'. Further reliance has been placed upon the judgment passed by Division Bench of this Court in **CRM-8286-2021 in CRA-S-372-SB-2011**, titled as '**Harpal Singh vs. National Investigation Agency and another**', wherein Division Bench admitted the accused to bail while suspending his sentences recognizing his right to speedy trial guaranteed under Article 21 of the Constitution of India after taking into consideration '**State (NCT) of Delhi vs. Lokesh Chadha**', reported as **(2021) 5 SCC 724** and the order passed by Coordinate Bench in '**Yadwinder Singh @ Rinku vs. State of Punjab**' **CRM-M-34845-2022**, decided on 19.04.2022.

6. Per contra, counsel for the State has argued that it is not a case wherein Section 42 of the Act will be attracted. It has been argued that since the contraband was in transit, Section 43 of the Act will govern the search. There being no violation of Section 43 of the Act and the vehicle from which the contraband has been recovered being in transit in a public

place, there was no requirement to meet with the provision of Section 42 of the Act. Reliance is being placed upon orders passed by Coordinate Bench in CRM-M-27760-2021, decided on 25.07.2022 titled as '**Mandeep Kaur vs. State of Punjab**'. Counsel further submits that there is no denial to the fact that the petitioners being undertrial have a right to speedy trial and a considerable period has passed in custody, yet the majority of the said period was consumed by Covid-19. The present case is not one of those cases where the trial has not even commenced. Four witnesses out of 21 cited witnesses already stand examined and the fear of the petitioners w.r.t. delayed trial can be well taken care of by directions issued to the trial Court to expedite the same.

7. Counsel submits that keeping in view the quantity recovered from the petitioner, rigors of Section 37 of the Act will be attracted and the petitioners cannot be granted bail without meeting with the requirement of law as contemplated under Section 37 of the Act.

8. I have heard counsel for the parties and have gone through the records of the case carefully.

9. Counsel for the petitioners relied upon ***Jag Raj Singh @ Hansa's case (supra)*** to claim that in a similar situation where the contraband was recovered after intercepting a jeep, the Apex Court held that Section 42 would be attracted. Reliance has been placed upon the following observations:-

“xx xx xx

25. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance of requirement of Sections 42 and 50 is impermissible whereas delayed compliance with

satisfactory explanation will be acceptable compliance of Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in paragraph 5. The present is not a case where insofar as compliance of Section 42(1) proviso even an arguments based on substantial compliance is raised there is total non-compliance of Section 42(1) proviso. As observed above, Section 43 being not attracted search was to be conducted after complying the provisions of Section 42. We thus, conclude that the High Court has rightly held that non compliance of Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.”

10. Decision rendered in *Jag Raj Singh @ Hansa's case (supra)* has been further relied upon by Coordinate Bench in '*Pankaj vs. State of Punjab*' to hold that Section 42 would be attracted in a case wherein recovery has been made after intercepting Activa scooter.

11. The issue w.r.t. the applicability of Section 42 to the vehicle in transit has been discussed by Coordinate Bench of this Court in CRM-M-27760-2021, titled as '*Mandeep Kaur vs. State of Punjab*' in the decision rendered on 25.07.2022 to hold that:-

“xx xx xx

24. In view of the discussion made above, particularly bearing in mind the factual position where the vehicle was in 'transit' in a public place and was not stationary or parked anywhere and search was conducted in presence of a Gazetted Officer, it is provisions of Section 43 and not Section 42 of the Act which would get attracted. A Gazetted Officer, in any case, draws powers from Section 41(2) of the Act. This Court is unable to accept

the contentions raised on behalf of the petitioners as regards his right to be released on bail on account of non-compliance of Section 42 of the Act. As such, submission no.(i) and (ii) are found to be devoid of merit.”

12. Apex Court in '**Karnail Singh vs. State of Rajasthan**' 2000(7)

SCC 632 while considering Chapter V of the Act held as under:-

“xx xx xx

8. The Act was enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for the matters connected therewith. Chapter V comprising of Sections 41 to 68 deals with the procedure relating to issuance of warrants and authorisation, power of entry, search, seizure and arrest without warrant or authorisation, procedure where seizure of goods liable to confiscation not practicable, conditions under which searches shall be conducted, disposal of persons arrested and articles seized, presumptions regarding possession of illicit articles, punishment for vexatious entry, search, seizure and arrest, confiscation of goods used for concealing illicit drugs and substances, procedure for making confiscation and power to tender immunity from prosecution, etc. Section 42 provides that any Authorised Officer of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other Department of the Central Government or the Border Security Force,

pecially empowered by general or special order by the Central Government, or any such officer of the Revenue, Drugs Control, Excise, Police or any other Department of a State Government empowered in that behalf by general or special order, if he has reason to believe from personal knowledge or information given by any person that any narcotic drug or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset, enter into any such building, conveyance or place and in case of resistance, break open any door and remove any obstacle to such entry. Such officer has the power to seize the drug or substance and all material used in manufacture thereof and any other article or conveyance which he has reason to believe to be liable to confiscation under the Act and detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV. If such officer has reason to believe that such warrant and authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for escape of an offender, he has the authority to enter such building, conveyance or enclosed place any time between sunset and sunrise but after recording the grounds of his belief. For attracting the applicability of Section 42, it is necessary that the officer empowered thereunder, before exercise of his right, has reason to believe from personal knowledge or information regarding the movement of narcotic drug or psychotropic substance. However, if the action is taken not upon his personal knowledge or information, the

requirements of Section 42 would not be applicable.”

13. The primary question that needs to be adjudicated is as to whether Section 42 of the Act will be applicable in the present case or not. As per the case put forth by the prosecution, a secret information was received leading to registration of FIR to the effect that intoxicant tables are being smuggled by the petitioners by means of truck trolly No.PB-13-BB-7299. The information was reduced into writing and ruqa was scribed. Naka was laid and the truck was intercepted at around 11/11.15 P.M. The contraband was recovered from truck trolly.

14. Chapter V prescribes Procedure. Section 41 deals with power to issue of warrant and authorization. Section 42 deals with power of entry, search, seizure and arrest without warrant or authorisation. Section 43 deals with power of seizure and arrest in public place. It will be apt to peruse Sections 42, 43 and 49 of the Act in order to appreciate the arguments put forth by counsel for the parties:-

“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 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 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.]

49. Power to stop and search conveyance. Any officer authorised under section 42, may, if he has reason to suspect that any animal or conveyance is, or is about to be, used for the transport of any narcotic drug or psychotropic substance 1[or controlled substance], in respect of which he suspects that any provision of this Act has been, or is being, or is about to be, contravened at any time, stop such animal or conveyance, or, in the case of an aircraft, compel it to land and

(a) rummage and search the conveyance or part thereof;

(b) examine and search any goods on the animal or in the conveyance;

(c) if it becomes necessary to stop the animal or the conveyance, he may use all lawful means for stopping it, and where such means fail, the animal or the conveyance may be fired upon.”

15. Counsel for the petitioners have heavily relied upon 2nd proviso appended to Section 42(1) of the Act to submit that since the trolly from which contraband is alleged to have been recovered was searched at 11/11.15 P.M. i.e. between sunset and sunrise, it was incumbent upon the officer concerned to record the grounds of his belief that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or without facilitating the escape of the offenders.

16. Further the primary ingredient to attract Section 42 is that the officer being an officer superior in rank to a peon, sepoy or constable to the departments of Central or State government empowered in this behalf by general or special order by the respective Governments if has 'reason to

believe' from personal knowledge or information given that some contraband related to offence punishable to this Act etc. liable for seizure or freezing or forfeiture is kept concealed in any building/conveyance or enclosed place. He may enter into such building, conveyance or place to search. Such search can also be carried out any time between sunset and sunrise subject to recording the grounds of his belief that the search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or escape of the offender. Under Section 49 of the Act, if the officer authorized under Section 42 of the Act, has a 'reason to suspect' that any animal or conveyance is or is about to be used for transport of any narcotic drug or psychotropic substance or controlled substance resulting into contravention of the provision of the Act, he may stop such animal or conveyance and search the conveyance or part thereof, examine and search any goods on the animals or in the conveyance. Thus, the primary ingredients of Section 49 is 'reason to suspect'. It is for this reason that the Apex Court in ***Karnail Singh's*** case (supra) held that for attracting applicability of Section 42 is necessary that the officer empowered thereunder before exercise of his rights has 'reason to believe' from personal knowledge or information regarding the movement of narcotic drug or psychotropic substance.

17. A bare perusal of Section 43 of the Act would reveal that the same deals with power of seizure and arrest in any public place. The explanation appended to the Section pertains to public place. On the other hand, Section 42 deals with contraband concealed in any building, conveyance or enclosed place. Thus, axiomatically it can be held that

Section 42 primarily deals with contraband concealed in private building or

enclosed place or conveyance whereas Section 43 deals with contraband in public place or in transit. Conveyance has been defined in Section 2(viii) of the Act, as per which the same includes aircraft, vehicle or vessel.

18. The question in present case is whether Section 42 will be attracted to a contraband in transit at public place?

19. Madras High Court in '*Ramu vs. The State*' reported as **2000 CriLJ 3412** while dealing with the comparative analysis of Sections 42 and 43 held as under:-

“xx xx xx

13. [Section 42\(2\)](#) states that the information taken down under sub-clause (1) shall be sent to superior officer. [Section 43](#) of the Act relates to seizure and arrest in Public Places, [Section 43](#) of the Act reads thus :

“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 in respect of which he has reason to believe an offence punishable under Chapter IV 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 Chapter IV relating to such drug or substance.”

As per explanation of the above section, the expression "public place" includes any public conveyance, hotel, shop and other place intended for use by or accessible to the public.

14. It is admitted in this case that while the van was proceeding in the public road, the same was intercepted

by P.W.4. Therefore, it has to be held that the search was conducted "in transit" in a public place. As the contraband was searched and seized in a public road in the van, which was proceeding on the road, it has to be held that [Section 42](#) of the Act will not apply to this case. On the other hand, the search and seizure conducted by P.W.4 would fall under [Section 43](#) of the Act. For the above reasons, I hold that the contention raised on behalf of the appellant cannot be sustained.”

20. Apex Court in the case of '*State, NCT of Delhi vs. Malvinder Singh*' reported as *2007(11) SCC 314* relied upon '*State of Haryana vs. Jarnail Singh and others*' reported as *2004 5 SCC 188* to hold that where accused was travelling on a scooter possessing opium and was stopped at a public place, Section 42 will not apply and the same will be governed by Section 43 of the Act. Relevant part of the said judgment reads as under:-

“xx xx xx

6. The next question is whether [Section 42](#) of the NDPS Act applies to the facts of this case. In our view [Section 42](#) of the NDPS Act has no application to the facts of this case. [Section 42](#) authorises an officer of the departments enumerated therein, who are duly empowered in this behalf, to enter into and search any such building, conveyance or place, 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 etc. is kept or concealed in any building, conveyance or enclosed place. This power can be exercised freely between sunrise and sunset but between sunset and sunrise if such an officer proposes to enter and search such building, conveyance or enclosed place, he must record the grounds for his belief that a search warrant or authorization cannot be

obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender.

7. [Section 43](#) of the NDPS Act provides that any officer of any of the departments mentioned in [Section 42](#) may seize in any public place or in transit any narcotic drug or psychotropic substance etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorized to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to [Section 43](#) lays down that 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. [Sections 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 NDPS Act for searching the vehicle between sunset and the sunrise.

9. In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. [Section 43](#) therefore clearly applied to the facts of this case. Such being the factual position there was no requirement of the officer

conducting the search to record the grounds of his belief as contemplated by the proviso to [Section 42](#). Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in [M. Prabhulal vs. Assistant Director, Directorate of Revenue Intelligence](#) : (2003) 8 SCC 449 that where a search is conducted by a gazetted officer himself acting under [Section 41](#) of the NDPS Act, it was not necessary to comply with the requirement of [Section 42](#). For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to [Section 42](#) of the NDPS Act.

10. We, therefore, hold that in the facts of this case [Section 50](#) of the NDPS Act was not applicable since the contraband was recovered on search of a vehicle and there was no personal search involved. The requirement of the proviso to [Section 42](#) was also not required to be complied with since the recovery was made at a public place and was, therefore, governed by [Section 43](#) of the Act which did not lay down any such requirement. Additionally, since the Superintendent of Police was a member of the search party and was exercising his authority under [Section 41](#) of the NDPS Act, the proviso to [Section 42](#) were not attracted.”

21. Division Bench of this Court in ***Dharminder Kumar vs. State of Punjab***, reported as ***2002(4) RCR (Criminal) 278***, after detailed analysis of Sections 42 and 43, held as under:-

“xx xx xx

10. While Section 42 empowers the officers of the specified departments to carry out search, seizure and arrest in any building, conveyance or enclosed place, Section 43 deals with the similar power of seizure and arrest in public places. Powers under both these sections

can be exercised if the concerned officer has reason to believe that some offence relating to narcotic drugs or psychotropic substances has been committed. Section 49 15 another section in the series which empowers officers to stop and search animals and conveyance used for illegal transport of narcotic drugs or psychotropic substances. The words building, conveyance and enclosed place as used in Section 42 have been used for the specific purpose of protecting the persons who are living in the buildings, conveyance and enclosed place. The Legislature in its wisdom considered proper to draw a demarcating line between building conveyance and enclosed place on one side and public place or in transit on the other side. The words have been specifically mentioned to show the demarcating line between the two otherwise, the legislature could have used any place instead of narrating the words 'building, conveyance or enclosed place. Even a private open place does not fall within the purview of Section 42. unless it is enclosed. So, this demarcating line will have to be kept in mind. Under Section 43 of the Act, the words used are any public place or in transit. The requirement of recording of information in writing and communicating it to superiors is intended to protect the possible harassment to residents and to maintain personal liberty and human dignity. The term conveyance used in Section 42 is to be understood as *ejusdem generis* to the terms building or enclosed place. It is not every conveyance whether in public or private that would fall within the scope of Section 42 of the Act. A conveyance in a public place would fall within Section 43 of the Act.”

22. Thus, the conclusion that can be drawn from the analysis of Sections 42, 43 and 49 and the precedents on the issue is that:-

- (i) Both Sections 42 and 43 are applicable when the officer empowered under Section 42 has 'a reason to believe' that the offence punishable under the Act has been committed and the drug or substance are liable to be confiscated under the Act.
- (ii) Section 49 is applicable where there is 'a reason to suspect' for the officer authorized under Section 42.
- (iii) Section 42 will be applicable when a search is to be conducted in a building, conveyance or enclosed place and second proviso to Section 42(1) needs to be mandatorily applied with.
- (iv) Section 43 will be attracted wherein seizure of the contraband has to be from a public place or when the contraband is in transit.
- (v) Chapter V relating to procedure has to be read as a whole. Sections 42, 43 and 49 do appear to be mutually exclusive. Yet, there may be a situation wherein on secret information, concerned officer searches enclosed place attracting Section 42 and searches vehicle in public place not enclosed invoking 43 or on suspicion under Section 49.

23. In view of the aforesaid precedents and the import of law at this stage, it cannot be held that only Section 42 is attracted to the facts of the present case and violation thereof would entitle the petitioners for grant of concession of bail.

24. Accordingly, the present petitions are dismissed being without merit.

(PANKAJ JAIN)
JUDGE

30.11.2022
Dinesh

Whether speaking/reasoned : Yes

Whether Reportable : No