

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

(1) **CRM-M-27760-2021 (O&M)**

Mandeep Kaur ...Petitioner

Versus

State of Punjab ...Respondent

(2) **CRM-M-21043-2021 (O&M)**

Ranjit Singh @ Rana ...Petitioner

Versus

State of Punjab ...Respondent

(3) **CRM-M-10361-2021 (O&M)**

Harjit Singh @ Happy ...Petitioner

Versus

State of Punjab ...Respondent

Date of Decision:- 25.7.2022

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. Rishu Mahajan, Advocate for the petitioner (s)
in CRM-M-27760-2021 and CRM-M-21043-2021.

Mr. Umesh Aggarwal, Advocate for the petitioner
in CRM-M-10361-2021.

Mr. Luvinder Sofat, AAG, Punjab and
Mr. Tanvir Joshi, AAG, Punjab
assisted by ASI Harpal Singh.

Mr. Rajiv Sidhu, DAG, Haryana and
Mr. Rahul Mohan, DAG, Haryana.

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GURVINDER SINGH GILL, J.

1. This order shall dispose off the above mentioned three petitions filed on behalf of Mandeep Kaur, Ranjit Singh @ Rana and Harjit Singh @ Happy seeking grant of regular bail in a case registered against them vide FIR No. 214 dated 24.11.2019 under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as '*the Act*') at Police Station Chattiwind, District Amritsar.
2. The FIR was lodged pursuant to receipt of secret information by Inspector Vikrant Sharma while he alongwith other police officials was patrolling in the area of Police Station Chattiwind. The information was to the effect that Ranjit Singh, Harjit Singh and Mandeep Kaur are proceeding in a white coloured Tata Indica car bearing registration No. PB02-BP-6906 from village Varpal to village Mehma Pandori and that they indulge in sale of *heroin* in a large scale. The information was further to the effect that even on the given day, they were proceeding for the purpose of supplying *heroin*.
3. Pursuant to receipt of said information, barricading was held and the police was able to intercept the car bearing registration No. PB02-BP-6906 in which three persons were travelling. Upon enquiry, the driver disclosed his name as Ranjit Singh. The person sitting next to him on the front seat disclosed his name as Harjit Singh and a lady sitting on the rear seat disclosed her name as Mandeep Kaur. Inspector Vikrant Sharma informed the aforesaid three persons as regards their right in terms of Section 50 of the Act to get themselves searched in the presence of some Gazetted Officer or a Magistrate. They declined to get themselves searched by Inspector Vikrant

Sharma. Accordingly, Inspector Vikrant Sharma telephonically informed SHO Police Station Chattiwind and also DSP, Attari and apprised them that he had received secret information that *heroin* was being transported in a car bearing registration No. PB02-BP-6906 and that the said car had been intercepted by him and the persons sitting in the same were required to be searched and requested the DSP to come at the spot to conduct further proceedings.

4. Pursuant to the said intimation, the SHO/Inspector accompanied by other police officials reached at the spot where Inspector Vikrant Sharma accompanied by other police officials had intercepted the car in question and extended fresh option in terms of Section 50 of the Act to the aforesaid Ranjit Singh, Harjit Singh and Mandeep Kaur. The persons opted to be searched in the presence of a gazetted officer. DSP Gurpartap Singh Sahota also reached at the spot and he also extended an offer in terms of Section 50 of the Act and Section 49 of the Act seeking their option qua their personal search and search of car but the accused reposed confidence in him. Accordingly, search of the aforesaid persons was conducted in the presence of DSP. The search of Ranjit Singh led to recovery of 600 grams of *heroin* from a pocket of jacket worn by him. The search of Harjit Singh also led to recovery of 550 grams of *heroin* from a pocket of his jacket. The search of Mandeep Kaur was got conducted through Lady Constable Kulwinder Kaur and from the jacket worn by her, 370 grams of *heroin* was recovered.
5. The learned counsel representing the petitioners, while pressing their case for grant of regular bail, have made the following submissions :-

- (i) that there has been non-compliance of provisions of Section 42 of the Act inasmuch as the secret information, allegedly received by Inspector Vikrant Sharma was never conveyed to any superior officer, though Section 42(2) of the Act mandates for the same;
- (ii) that since the vehicle in which the accused were alleged to be travelling was intercepted after sunset i.e. at about 9:40 p.m., therefore the police could not have conducted search without a warrant unless the officer conducting search records reasons in writing for not obtaining warrants and that omission to record reasons in writing would constitute violation of provisions of section 42(1) of the Act. The learned counsel, in order to hammer forth his aforesaid submission regarding Section 42 of the Act, pressed into service a judgment of Hon'ble Supreme Court reported as 2021(2) RCR (Criminal) 892 Boota Singh and others versus State of Haryana:
- (iii) that petitioner Mandeep Kaur and Harjit Singh have a clean record and even if petitioner Ranjit Singh happens to be involved in another case, as stated in the custody certificate of Ranjit Singh, the same *ipso-facto* cannot be made basis for declining an application for grant of bail. The learned counsel, in order to buttress his aforesaid submission, places reliance upon a judgment of Hon'ble Supreme Court reported as 2020(1) RCR (Criminal) 831 Prabhakar Tewari versus State of U.P. and another and also a judgment dated 12.5.2022 of this Court passed in CRM-M-13040-2022 Sunil Kumar versus State of Haryana:
- (iv) that there is violation of Article 21 of the Constitution of India inasmuch as the petitioners have been behind bars since the last about 2 years and 7 months and the trial has not made any headway and that in these circumstances, the petitioners cannot be kept behind bars for an indefinite period so as to deprive them of their liberty as unless proved guilty they have to be presumed innocent.

The learned counsel has pressed into service some orders/judgments passed by Hon'ble Supreme Court wherein Hon'ble Supreme Court has granted bail, solely on grounds of delay in conclusion of trial.

The said cases are :-

- (a) Amit Singh Moni vs State of Himachal Pradesh
Criminal Appeal No. 668 of 2020
(Order dated 12.10.2020 of Supreme Court of India)
- (b) Union of India vs KA. Najeb
2021(2) R.C.R.(Criminal) 145
(Supreme Court of India)
- (c) Chitta Biswas Alias Subhas v. State Of West Bengal
Criminal Appeal No. 245 of 2020
(order dated 7.2.2020 of Supreme Court of India)

6. Opposing the petition, the learned State counsel has submitted that it is a case where specific and crisp information had been received against all the three petitioners by name, as recorded in the FIR and that when the car in which they were travelling was intercepted and their search was conducted, all three were individually found in possession of 'commercial quantity' of *heroin* and as such, they do not deserve to be released on bail. It has been submitted that it is a case of recovery of contraband in 'transit' and as such Section 43 read with Section 49 of the Act would be attracted and that Section 42 of the Act would not have any application. The learned counsel, in order to substantiate his aforesaid submission, presses into service a judgment of Division Bench of this Court passed in Crl. A. No. 165-DB of 2022 - Dharminder Kumar versus State of Punjab. The learned counsel has also referred to a judgment of Hon'ble Supreme Court reported as 2004 (2) RCR (Criminal) 960 State of Haryana versus Jarnail Singh and others wherein in a case of recovery of contraband from a tanker, it was held that Section 43 of the Act would apply. The learned counsel also places reliance

upon another judgment of Hon'ble Supreme Court reported as 2004(1) RCR (Criminal) 160 – M. Prabhulal versus Assistant Director, Directorate of Revenue Intelligence to contend that in case of search by a Gazetted Officer in terms of provisions of Section 41(2) and 41(3) of the Act, the provisions of Section 42(2) of the Act are not attracted.

7. The learned State counsel has next submitted that the previous antecedents of an accused cannot absolutely be overlooked, though of course, a bail application cannot be decided solely on antecedents.
8. It has also been submitted that the delay in the present case has occurred on account of the fact that the work in the Courts had virtually remained stalled or had proceeded at snail's pace on account of spread of pandemic COVID-19 for more than a year w.e.f. 25.3.2020 due to lockdowns or restrictive functioning of Courts. It has been submitted that having regard to the nature of crime, the accused are not entitled to bail solely on ground of delay in trial.
9. The learned State counsel pressed into service a recent judgment of Hon'ble Supreme Court reported as 2022 LiveLaw (SC) 613 Narcotics Control Bureau versus Mohit Aggarwal wherein the aforesaid issues have been dealt with. The learned State counsel has, however, informed that all the petitioners have been behind bars since the last about 2 years and 7 months and that while petitioner Ranjit Singh stands involved in one more case under NDPS Act i.e. FIR No. 126 dated 23.8.2013, Police Station Gharinda, District Amritsar, the other two petitioners are not involved in any other case.

10. I have heard the learned counsel representing the petitioners and also learned counsel representing State of Punjab. Since the questions raised in these three petitions are raised in several matters including matters arising from State of Haryana, the officers representing State of Haryana had also been requested to assist this Court. Mr. Rajiv Sidhu, DAG, Haryana and Mr. Rahul Mohan, DAG, Haryana have, thus also assisted this Court on the legal issues involved. The submissions raised above are being discussed herein-under:

Submission no.(i) & (ii) regarding violation of Section 42 of the Act:

11. It is not in dispute that it was pursuant to receipt of secret information that the car in which the accused were travelling was intercepted after about 9:40 p.m. on 24.11.2019. It is also not in dispute that no information pertaining to receipt of secret information was sent in writing to senior officers, though there is a reference in the FIR that Inspector Vikrant Sharma, upon receipt of such information has shared the information with other police officer. He had informed the SHO and DSP telephonically. The search was, however, conducted in presence of DSP Gurpartap Singh Sahota, who had been requested to come to the spot. It is also not in dispute that no kind of any warrant had been obtained before effecting search of the accused or their car after the car had been detained by the police party headed by Inspector Vikrant Sharma. Since the petitioners allege violation of Section 42 of the Act, it is apposite to refer to the said provisions, which are reproduced hereinunder :-

“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.”

12. A perusal of the aforesaid provisions would indeed show that in case of receipt of secret information by an officer as regards there being contraband

in some building, conveyance or enclosed place, the same is required to be taken down in writing by such officer and is to be sent to an officer immediately superior to such officer receiving information, within 72 hours. Still further, in case where warrant is required for effecting search, as would be required for search after sunset, of a building, conveyance or an enclosed place but the circumstances do not afford spending time for obtaining warrant, lest it could hamper chances of the accused being caught, the police officer concerned is required to take down the reasons for such omission to obtain warrants.

13. The material question in the present case would be as to whether:

- (a) the present case is a case where Section 42 of the Act can be said to have any application and that there is violation of the same;

or

- (b) as to whether the present case is a case where the vehicle has been intercepted while in 'transit' and thus, the provisions of Section 43 of the Act will get attracted?

14. Section 43 of the Act reads as under :-

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.

15. The learned counsel for the petitioners have vehemently argued that since recovery was effected from a private vehicle, therefore, in terms of ratio of Boota Singh's case (supra), it is the procedure as per Section 42 of the Act, which was required to be adhered to and since neither secret information was taken down in writing nor any search warrant was obtained, the provisions of Section 42 of the Act stand violated. The learned counsel have drawn the attention of this Court to Para 12 of the said judgment, which reads as follows :-

“12. 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.”

16. Upon perusal of the above cited Boota Singh's case (supra), this Court finds that the factual position was distinct on some material aspects which determine as to whether Section 42 of the Act would apply or as to Section 43 of the Act would get attracted. The said distinctions are stated herein-under:

Boota Singh's case	Present case
In Boota Singh's case, secret information had been received to the effect that the accused are <u>selling 'poppy straw' from a vehicle on a <i>katcha</i> path</u> and they could be apprehended in case raid is conducted. Accordingly, raid was conducted and while two persons were found sitting on the bags kept in a Jeep, another managed to escape. It, however, needs to be noticed that in the cited case, the vehicle in question was found <u>'parked'</u> on an un-metalled path. Search of two bags led to recovery of poppy straw.	In the present case, secret information was received to the effect that Ranjit Singh, Harjit Singh and Mandeep Kaur are <u>proceeding in a car</u> for the purpose of <u>supplying heroin</u> and could be caught red-handed. Pursuant to said information, the police was able to intercept the car and three persons sitting in car were detained by Inspector Vikrant Sharma. Later when DSP reached at spot, their search was effected leading to recovery of heroin from each of them from personal search. In other words, the contraband was in process of ' <u>transit</u> ' unlike in Boota Singh's case where the accused were selling from a 'parked' jeep.
Search was conducted by Officer of the rank of Inspector .	While Inspector Vikrant had detained the accused, the search was conducted only after Gazetted Officer of the rank of DSP came at the spot.

17. Though, the distinctions are rather fine distinctions but the same would have entirely different ramifications. In Boota Singh's case, the accused were selling poppy straw from a jeep '*parked*' on an unmettalled path whereas in the present case the vehicle was on the move i.e. the contraband was in '*transit*'. Another distinction, as noticed above is that while in Boota Singh's case, the search was conducted by an officer of the rank of Inspector, who while drawing powers under Section 42 of the Act, would have some limitations as regards timing of search and would be required to observe some checks in the shape of taking down secret information in writing and conveying to superiors, but in the present case the Inspector had merely

'detained' the car in transit in which accused were travelling and search was conducted when DSP, i.e. a Gazetted Officer came at the spot and in which case the search would be in exercise of powers conferred by Section 43 of the Act wherein the limitations as are there in Section 42 of the Act do not apply. Section 41(2) of the Act would also come into play as search being in presence of gazetted officer, the restrictions as regards timing of search or intimation to superiors as imposed by Section 42 of the Act would not be there. The relevant provisions of Sections 42 and 43 of the Act are juxtaposed below:

Section 42	Section 43
<u>Power of entry, search, seizure and arrest without warrant or authorisation-</u> Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, or any other department..... 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, is <u>kept or concealed</u> in any building, conveyance or enclosed place, may between <u>sunrise and sunset</u>, (a) <u>enter into</u> and search any such building, conveyance or place; (b) <i>Provided</i> 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.	<u>Power of seizure and arrest in public place.</u> <u>Any officer of any of the departments mentioned in section 42 may-</u>□ (a) seize in any public place <i>or in transit</i>, any narcotic drug or psychotropic substance along with such drug or substance, any animal or conveyance (b) <i>detain and search</i> 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. <u>Explanation.</u> 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.

18. A Constitution Bench of Hon'ble Supreme Court in State of Punjab vs. Baldev Singh 1999(3) RCR(Crl) 533, while comparing provisions of Section 42 with those of Section 43 of the Act held as under:

“9. The proviso to sub-section (1) lays down that if the empowered 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. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1) shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a *public place*. 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.”

19. Another material distinction between search of a building, conveyance or enclosed place conducted under provisions of Section 42 of the Act and a search of a vehicle in '*transit*' in terms of Section 43 of the Act is that in case of a search of vehicle in transit there is no requirement of obtaining any search warrant even if search is conducted after sunset by a non-gazetted

officer unlike a case of search of a building, conveyance or an enclosed place. Boota Singh's case (Supra) has only interpreted the word 'public place' as existing in Section 43 of the Act and not the word 'transit' which is used alternatively with word public place as 'public place or transit'. As already stated above in Boota Singh's case, vehicle was 'parked' and contraband was being sold and vehicle was not on the move i.e. not in transit. The distinction between the word '*conveyance*' as existing in Section 42 of the Act and conveyance in '*transit*' as existing in Section 43 of the Act has been well highlighted in Dharminder Kumar's case.

20. In Dharminder Kumar's case (supra), it was pursuant to receipt of secret information by the police to the effect that huge quantity of 'poppy husk' was being brought by the accused in a truck from village Karimpur that the police intercepted the truck in question from which 30 bags of 'poppy husk' were recovered. In the said case also, an argument had been raised that there has been violation of Section 42 of the Act inasmuch as neither the information had been conveyed to the superior officers as contemplated by Section 42(2) of the Act, nor any reasons as regards belief of commission of an offence had been recorded by the ASI. The Division Bench of this Court in Dharminder Kumar's case(supra), while referring to judgment of Constitution Bench of Hon'ble Supreme Court in Baldev Singh's case(supra) and some other judgments discussed the scope of Section 42 and Section 43 of the Act and held as follows :-

“9. Powers of entry, search and seizure are contained in Chapter V of the Act. The scheme of the Act contemplates two categories of situation i.e. where the contrabands are found in "any building, conveyance or enclosed place" and "any

public place or in transit". For the first contingency, Section 42 of the Act is applicable whereas if any seizure is required to be made from any public place then it is Section 43 of the Act which would be applicable. Section 42 of the Act requires writing down of information if empowered officials have reason to believe from personal knowledge or information that any illegal acquired property is kept or concealed in a building, conveyance or enclosed place.

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 is 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 and Section 49 gives power to the empowered officer to stop such conveyance for the purpose of search.

11. x x x
12. x x x
13. x x x
14. x x x
15. x x x

16. Thus, it is evident that if seizure is made from any animal, Conveyance or article in a public place or in transit then Section 43 of the Act would be applicable. Section 43 and Section 42 of the Act operate in different spheres. Since the conveyance has been specifically included in Section 43 of the Act also, therefore, the conveyance which is found in a public place or in transit would be covered under the provision of Section 43 the Act whereas conveyance used in Section 42 of the Act has to be read as conveyance which is other than in a public place. This interpretation is the only harmonious interpretation of Sections 42 and 43 of the Act.
17. It is well settled principle of law that the provisions of a statute are to be construed in a harmonious manner so that each of the provisions are rendered not nugatory. By harmoniously construing Sections 42 and 43 of the Act it can be safely concluded that if a conveyance is intercepted or apprehended at a public place or in transit then the provisions of Section 42 of the Act would not be applicable.”
- (emphasis supplied)

21. The relevant provisions of Sections 41 and 42 of the Act are compared below:

Section 41	Section 42
<u>Power to issue warrant and authorisation. -</u> (1) xxx xxx xxx (2) Any such officer of gazetted rank of the departments of central excise, narcotics, 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 in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance..... has been kept or concealed in any building, conveyance or place, may <u>authorise any officer</u> subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance or place <u>whether by DAY OR NIGHT OR</u>	<u>Power of entry, search, seizure and arrest without warrant or authorisation-</u> (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, or any other department..... 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, is <u>kept or concealed</u> in any building, conveyance or enclosed place, may between <u>SUNRISE AND SUNSET</u>, (a) <u>enter into</u> and search any such building, conveyance or place; (b) <i>Provided</i> that if such officer has reason to believe that a search warrant or

<u>HIMSELF</u> arrest a person or search a building, conveyance or place. (3) xxx xxx xxx	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.”
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22. Contrasting the aforesaid provisions of Sections 41 and 42 of the Act, it is borne out that a Gazetted officer is competent to effect search any time during the day whereas there are some limitations as regards timings of search when conducted by a non-gazetted officer. Still further, Section 41(2) of the Act provides that a Gazetted Officer may himself arrest a person or search any building, conveyance or place or may even authorize any officer subordinate to him to arrest or to conduct such search in case he has any information regarding commission of an offence, which have been taken down in writing, but there is no such limitation prescribed in Section 41(2) of the Act as regards conveying the said information to an officer superior, as is there in Section 42(2) of the Act. Hon’ble Supreme Court in 2004(1) RCR (Criminal) 160 – M. Prabhulal versus Assistant Director, Directorate of Revenue Intelligence held that in case of search by a Gazetted Officer in terms of provisions of Section 41(2) and 41(3) of the Act, the provisions of Section 42(2) of the Act are not attracted.

23. Even if, for the sake of arguments, it is taken that some written information was required to be conveyed by the Gazetted Officer, the said is a matter to be looked into and decided during the course of trial on the basis of all such evidence which may be led before it. Hon'ble the Supreme Court in a case reported as 2021(10) SCC 100 Union of India through Narcotics Control Bureau, Lucknow versus Md. Nawaz Khan has categorically held that at the time of grant of bail, the question as regards compliance or non-compliance of Section 42 of the Act is not strictly required to be gone into as the same is a matter, which would be best left to be adjudicated at the time of trial. Hon'ble Supreme Court in Md. Nawaz Khan's case (supra), wherein issue of non-compliance of Section 42 of Act was being argued for grant of bail, held as under :-

“29 In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial.”

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.

25. **Submission no.(iii) as regards antecedents of accused:**

Insofar as the contention of the petitioners based on Prabhakar Tewari's case (supra) to the effect that the antecedents of an accused cannot *ipso facto* be made a basis for dismissal of bail application is concerned, there is no dispute as regards the said broad proposition of law. However, the limitations imposed by Section 37 of the Act in the matter of grant of bail have also to be borne in mind, wherein it is specifically provided that any person accused of possessing commercial quantity of contraband is not to be released on bail, unless the following two conditions are satisfied :-

- (a) that the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence; and
- (b) that he is not likely to commit any offence while on bail.

26. For the purpose of reaching at aforesaid conclusion that the accused is not likely to commit any offence in future, his antecedents would play a major role in ascertaining the tendencies of such a person, which certainly would be required to be taken into account, though, the same *ipso facto* cannot be made a basis for declining the bail. As such, keeping in view the fact it is a case of recovery of 'commercial quantity' of contraband (*heroin*) from each of the three petitioners and which would attract fetters imposed by Section 37 of the Act in the matter of grant of bail, the Courts can not absolutely shut its eyes to the antecedents of an accused while considering grant of bail.

27. **Submission no.(iv) as regards delay in conclusion of trial :**

As far as the contention of the petitioners pertaining to violation of rights as guaranteed to the petitioners in terms of Article 21 of the Constitution of India are concerned, certainly every citizen of India is guaranteed a right to liberty. The petitioners, indeed have been in custody for a substantial period of 2 years and 7 months. However, in the present case, the petitioners have been detained pursuant to they having been caught red-handed while committing a serious offence under Section 21 of the Act i.e. while in possession of ‘commercial quantity’ of *heroin* and are in custody in accordance with provisions of law. The conclusion of trial has been delayed mainly on account of spread of pandemic COVID-19 as functioning of the Courts remained affected for almost an year.

28. The judgments being pressed into service for grant of bail on account of delay in conclusion of trial are distinguishable inasmuch as in Amit Singh Moni's case and Chitta Biswas @ Subhas's case, no argument as regards application of Section 37 of the Act was ever raised. Though, in K.A. Najecb's case, the Hon'ble Supreme Court has discussed Section 37 of the NDPS Act while granting bail but it needs to be noticed that the said case was a case registered under provisions of Unlawful Activities (Prevention) Act, 1967 (UAPA) and not the NDPS Act and the Hon'ble Supreme Court categorically noticed that the provisions of Section 43-D(5) are comparatively less stringent than Section 37 of the NDPS Act. Still further, in the cited case, the accused had been behind bars for a phenomenal period of more than 5 years and as many as 276 witnesses yet remained to be

examined and the maximum sentence for which the accused could be punished for UAPA was eight years. It was in these exceptional circumstances that the Hon'ble Apex Court chose to exercise its constitutional power for granting bail to the petitioner in the said case. The aforesaid factual position being absolutely distinct from the present case, the cited judgment would not be of any advantage to the petitioners. Still further, Hon'ble Supreme Court in a very recent judgment delivered on 19th July, 2022 in Mohit Aggarwal's case (supra) while deciding an appeal filed by Narcotics Control Bureau challenging the grant of bail to an accused by the High Court, cancelled the bail while reiterating the view that provisions of Section 37 of the Act have to be strictly complied with and that mere length of custody cannot be a consideration for grant of bail. Paras 14 and 18 of the said judgment read as follows :-

14. To sum up, the expression "reasonable grounds" used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.
15. xxx xxx xxx
16. xxx xxx xxx
17. xxx xxx xxx
18. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. **The length of the period of his custody or the fact that the charge-sheet has**

been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act.”

(emphasis supplied)

29. In view of the discussion made above, particularly in light of the above cited recent judgment in Mohit Aggarwal's case, the contentions of the petitioners as regards grant of bail solely on ground of long custody cannot be accepted. As such, submission no. (iv) is also found to be without any merit.
30. In the present case, the accused Ranjit Singh, Harjit Singh and Mandeep Kaur were caught red-handed while in possession of 600 grams, 550 gram and 370 grams of *heroin* respectively. The search was conducted in the presence of a Gazetted Officer. There is nothing on record at this stage from which it could be inferred that the petitioners are not guilty of the offence in question. The petitions are found to be sans merit and are hereby dismissed.
31. Though, certainly speedy trial is their right and all the trials could be disposed of at the earliest but recently on account of onset of spread of pandemic COVID-19 there have been some unavoidable delays. The petitioners have been behind bars for a substantial period of 2 years and 7 months and certainly the said fact cannot be overlooked. As per the information furnished by the learned State counsel, the prosecution as on date has examined only 4 out of cited 17 prosecution witnesses. Since all the witnesses would be in the nature of official witnesses, therefore, the trial Court is directed to take the following steps for expediting the conclusion of trial :-

- (i) The trial Court shall frame a schedule of dates in advance for summoning the witnesses and shall also endeavour to record the statements of the PWs whose presence is duly secured. Special Messengers be deputed for securing the presence of the PWs. If deemed necessary, a letter may be written to the Senior Superintendent of Police, concerned, for getting the needful done for ensuring timely presence of PWs; and
- (ii) The prosecution is directed to ensure the presence of all the PWs before the trial Court on the dates as may be fixed by the trial Court for recording prosecution evidence. The District Attorney concerned to take necessary steps for the purpose of securing the presence of the remaining PWs.

32. A photocopy of this order be placed on the file of connected cases.

25.7.2022

kamal

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned
Whether Reportable

Yes / No
Yes / No