

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

374

CRA-S-1543-SB-2004 (O&M)

Reserved on: 22.11.2022

Date of Decision: 09.01.2023

Samey Singh and another

...Appellants

Versus

State of Haryana

... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Vibhor Bansal, Advocate
for the appellants.

Ms. Sheenu Sura, DAG, Haryana.

N.S.SHEKHAWAT, J.

The present appeal challenges the impugned judgment of conviction 13.07.2004 and order of sentence dated 15.07.2004 passed by the learned Judge, Special Court, Panchkula, whereby, the present appellants were convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as '**the NDPS Act**') and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 5000/- each alongwith default stipulation.

The brief facts of the case are that on 19.04.2002, ASI Karan Singh alongwith other police officials was present on Bus Stand Mauli for patrolling and crime prevention on a Government vehicle and in the meantime, a secret information was received that three persons, namely, Virender son of Sadhu Ram, Samey Singh son of Badan Singh, Randhir Singh son of Nohria Singh used to bring poppy husk from village Mauli in a Fiat car bearing registration No. HR01-B-1943. If a raid was conducted huge quantity of contraband could be recovered from their car. On getting the said information, a

Ambala and Kakrali side with high speed and on seeing the police party, the driver of the car stopped the car and started turning the car back. However, ASI Karan Singh with the help of other police officials controlled those persons and the vehicle. In the meantime, the car driver ran away from the spot, leaving behind his car and two persons were sitting on the rear seat of the car. Two persons were taken into custody and they disclosed their names and addresses as Samey Singh son of Badan Singh, resident of village Toba and Randhir Singh son of Nohria Singh, resident of Badmali District Ropar. They also disclosed that the person who had ran way from the spot was Virender @ Mintu son of Sadhu Singh, resident of Mahesh Nagar, Ambala Cantt. The police party raised a suspicion that accused were having contraband in their possession in the car and Jag Parvesh Dahiya, the Deputy Superintendent of Police, was informed telephonically, who reached at the spot with his staff and also verified the facts and the notice under Section 50 of the NDPS Act. On the direction of Jag Parvesh Dahiya, the Deputy Superintendent of Police, search was made by ASI Karan Singh and a plastic bag was found, which was kept by both the accused on the rear seat and after taking out, the bag was opened and 35 kgs of poppy husk was found in the same. 500 grams of the poppy husk was taken out as sample from the plastic bag and the sample as well as residue quantity of the contraband were sealed separately by ASI Karan Singh with the seal impression 'KS' and the seal was handed over to ASI Kehar Singh after use. Jag Parvesh Dahiya, the Deputy Superintendent of Police, also affixed his seal impression 'JP' on the sample parcel and after

use, he kept the seal with himself. Samples seals were prepared and were taken into possession by the police. *Ruka* was sent to the police station and on receipt of the *ruka*, FIR in the instant case was registered. After necessary investigation, the challan was presented against both the appellants in the competent Court. The sample sent to the FSL was analyzed by the FSL and it was found to be containing poppy straw (*chura post*).

After presentation of the challan, the appellants were charge-sheeted under Section 15 of the NDPS Act, to which, they pleaded not guilty and claimed trial.

In support of its case, the prosecution examined 11 witnesses.

EHC Ramesh Kumar was examined as PW1. On 30.04.2002, MHC Jai Singh had handed over a sealed parcel alongwith sample seals to him for delivering the same in the FSL Madhuban. SI Ram Kishan appeared as PW2, who was posted as SI/SHO Police Station Rai Pur Rani on 19.04.2002. On the said day, ASI Karan Singh produced accused, namely, Randhir Singh and Samey Singh alongwith two sealed parcels containing poppy husk before him. One parcel was a sample, whereas the other was residue of poppy husk. Even, the witnesses were also produced before him and he verified the facts of the case and affixed his seal 'RK' on both the parcels. He directed ASI Karan Singh to deposit the recovered poppy husk with the MHC. The prosecution examined PW3 SI Karan Singh who prepared the report under Section 173 Cr.P.C. HC Sat Pal was examined as PW4, who recorded the statement of Virender

Kumar and from the place disclosed by Virender Kumar RC Ex.P1, pollution control check certificate Ex.P2, insurance cover note Ex.P3 and affidavit Ex.P4 were recovered by him and the same were taken into possession by the police. Ajay Bathla was examined as PW5 who was the owner of the Fiat car bearing registration No. HR-01-B-1943 and he had sold the same to Virender, co-accused on 17.01.2002. He exhibited his affidavit Ex.P4 and all the papers regarding the ownership of the car were handed over to Virender, co-accused. The prosecution further examined Dalip Kumar Mittal, as PW6, who had identified Ajay Bathla before the notary and identified the signatures of Ajay Bathla on Ex.P4. Jai Singh MHC was examined as PW7, who produced the register relating to depositing the case property with him. Rajesh Kalyan, Miscellaneous Clerk, was examined as PW8 and as per him, vehicle bearing registration No. HR-01-B-1943 was owned by Ajay Medical Store, Ambala Cantt., which is owned by Ajay Bathla. Jag Parvesh Dahiya, the Deputy Superintendent of Police was examined as PW9, who reached at the spot and verified the facts relating to the notice under Section 50 of the NDPS Act. He supported the case of the prosecution. HC Subhash Chand was examined as PW10, who received *ruka* Ex.PB for recording of the FIR. PW11 SI Karan Singh was the main witness of the prosecution, who had witnessed the search and seizure procedure. He supported the case of the prosecution and reiterated the facts as mentioned in the present FIR. However, in his cross-examination, he admitted that no information in writing was sent regarding the secret information. They had reached at the place of the recovery after 1.5/2 minutes. The

road was blocked with tyre and wood. A telephonic message was sent to the Deputy Superintendent of Police immediately on receipt of the information. He further admitted that there were 4/5 shops near the place of occurrence, however, he did not remember the names of their owners. He did not call any Panch or Sarpanch from the village and did not take any action against the person, who showed their inability to join the search. The place of recovery was on the highway, but he did not try to join any occupant of the vehicle nor he thought it necessary.

After the closure of the evidence, the statements of both the accused were recorded under Section 313 Cr.P.C. and both of them pleaded false implication. The accused made a categorical stand that no recovery was effected from them and a false case had been registered against them. In their defence, the appellants/accused examined DW1 Surinder, who was running a shop near the bus stand of village Mauli. He stated that on 19.04.2002 nothing happened near his shop nor police recovered anything from any person. Even, the police never came to the other shops on the said day. After examining DW1, the accused closed the evidence.

I have heard the learned counsel for the parties and with their able assistance, I have gone through the trial Court record carefully.

Learned counsel for the appellants has vehemently contended that the mandatory provisions of Section 50 of the NDPS Act were not complied with. Jag Parvesh Dahiya, the Deputy Superintendent of Police PW9 had mentioned that the search was

conducted of both the accused in his presence and a plastic bag was also found in the car. Consequently, it is apparent that personal search was conducted and the compliance of the mandatory provisions of Section 50 of the NDPS Act was not made by the prosecution. Learned counsel further submitted that both the accused were given a joint notice under Section 50 of the NDPS Act, whereas each accused must be individually informed that he has a right to be searched before the nearest gazetted officer or a Magistrate. A joint communication of the right under Section 50 of the NDPS Act to the accused would frustrate the very purpose of Section 50 of the NDPS Act and the information in this regard has to be individual, clear and unambiguous. Whereas the said contention has been refuted by the learned counsel for the State by submitting that the mandatory provisions of Section 50 of the NDPS Act would not be applicable to the facts of the instant case as the recovery has been effected from the search of a bag and not from the personal search of both the appellants. I find force in the argument raised by the learned State counsel. Since the recovery of the contraband has taken place from the bag, which was kept by both the accused on the seat of the car and not from the personal search of the present appellants, provisions contained in Section 50 of the NDPS Act would not be applicable.

Learned counsel for the appellants has vehemently argued that there was complete non-compliance of Section 42 of the NDPS Act as no information was reduced into writing by the Investigating Officer and sent to the senior officers. Consequently, the non-compliance of the mandatory requirement of law under Section

42 of the NDPS Act would vitiate the entire proceedings. Even, PW11 SI Karan Singh admitted that the secret information was received, but it was not sent in writing. Even the findings were recorded by the learned trial Court that since the information was given telephonically and the same was not reduced into writing, does not vitiate the trial as Section 42 of the NDPS Act is directory in nature and not mandatory. Learned counsel further submitted that it has been held in a catena of judgments that total non-compliance of the requirements of sub-Section (1) and (2) of Section 42 of the NDPS Act was impermissible and in the present case also there was complete non-compliance of the said provision of law. The said submissions have been opposed by learned State counsel by submitting that the provisions of Section 42 of the Act would not be applicable to the facts of the instant case and rather the provisions of Section 43 of the NDPS Act would be applicable as the place of recovery was a public place. As such, the impugned judgment is liable to be upheld by this Court. I have considered the rival submissions made by the learned counsel for the parties and find sufficient force in the submissions made by the learned counsel for the appellants. For ready reference, Section 42 of the NDPS Act is reproduced as under:-

"42. Power of entry, search, seizure and arrest without warrant or authorisation.-*(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such*

officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from 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 V A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

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

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

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

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that 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."

It has been held by the Hon'ble Supreme Court in the matter of **State of Rajasthan Vs. Jag Raj Singh @ Hansa** 2016(3)

R.C.R.(Criminal) 539 as follows:-

16. Explanation to Section 43 defines expression "public place" which includes any public conveyance. The word "public conveyance" as used in the Act has to be understood as a conveyance which can be used by public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers. The High Court has looked into the evidence and come to the conclusion that there was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court has further held that even Kartara Ram who as per owner of the vehicle Veera Ram was using the vehicle, do not support that the jeep was used as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle. Following observations were made by the High Court:

"Kartara Ram is produced as PD-5, who has deposed the statement that Vira Ram is his brother-in-law (Saala), on whose name jeep bearing No.HR 24 4057 is lying registered. He had employed Inderjit singh as driver for that jeep. Person namely Krishan has never been employed as driver. This witness has been declared hostile and he has been examined too, who does not support the prosecution case. In this manner, Viraram is the owner of the jeep. According to him he had given the jeep to Kartara Ram, but Kartara Ram has not stated anywhere in his statement that this jeep was given to him and he used the same as Public Transport Vehicle. Since powder of opium was caught in this jeep and even Notice Exh. P-6 was also served upon him by the police, he with a view to save himself, can also depose such statement that Kartara used to use the jeep as Public Transport Vehicle, whereas Kartara Ram PD-5 does not affirm this fact. Jeep was personal, it is clear on the record. In this manner, just on this ground that he has given the jeep to his brother-in-law and he used it to carry the passengers, the personal jeep could not be treated as public transport vehicle. However, the fact that jeep is used to carry the passengers has not been affirmed from the statements of Kartara Ram. There is no evidence on record on the basis of which it could be stated that jeep was public transport vehicle and they have the permit for it, rather it was the private vehicle and it is stated that Vira Ram himself is the owner of that vehicle"

17. There is nothing to impeach the aforesaid findings. We have also perused the statement of Vira Ram in which statement he has never even stated that he has any permit for running the vehicle as transport vehicle. He has stated that "..... I had given this jeep to Kartara Ram resident of who is my relative to run it for transporting passengers" Admittedly the jeep was intercepted and was seized by the police. In view of the above, the jeep cannot be said to be a public conveyance within the meaning of Explanation to Section 43. Hence, Section 43 was clearly not attracted and provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

18. There is one more aspect which needs to be noted. The present is a case where prosecution himself has come with case that secret information was received from informer which information was

recorded in Exh. P-14 and Exh. P-21 Roznamacha and thereafter the Station House Officer with police party proceeded towards the scene. The present is not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer in his statement has also come up with the facts and case to prove compliance of Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 has to be complied with. This Court in **Directorate Of Revenue & Another v. Mohammed Nisar Holia, 2008(1) RCR (Criminal) 241 : (2008) 2 SCC 370**, had occasion to consider Sections 41,42 and 43 explanation. Following was stated in paragraph 14:

"14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as noncompliance of the said provision would not render the search a nullity. A distinction therefor must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance....."

19. Thus the present is not a case where Section 43 can be said to have been attracted, hence, noncompliance of Section 42(1) proviso and Section 42(2) had seriously prejudiced the accused. This Court had occasion in large number of cases to consider the consequence of non-compliance of provisions of Section 42(1) and 42(2), whether the entire trial stand vitiated due to above non compliance or conviction can be set aside. In this context reference is made to the judgment of this Court in **State of Punjab v. Balbir Singh 1994(1) RCR (Criminal) 736 : (1994) 3 SCC 299**. In the above batch of cases, the High Court has acquitted accused on the ground that search was conducted without conforming to

the provisions of the NDPS Act. Sections 41,42 43 and other relevant provisions came for consideration before this Court, referring to the provisions of Chapter IV following was stated in paragraph 8:

"8. But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Subsection (2) of 8 1990 Cri LJ 414 (Del) Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior."

20. After referring large number of cases, this Court recorded conclusion in paragraph 25 which is to the following effect:

"25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police

officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. (3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total noncompliance of this provision the same affects the prosecution case. To that extent it is

mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions 'of Sections 100 and 165 Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 Cr.P.C. and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

It has also been held by the Hon'ble Supreme Court in the matter of **Boota Singh Vs. State of Haryana 2021 RCR Criminal (2) and 892 AIR 2021, SC 1913** as follows:-

10. In Karnail Singh, the Constitution Bench of this Court concluded:-

*"35. In conclusion, what is to be noticed is that **Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496]** did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did **Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217]** hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:*

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the

information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of subsections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

(Emphasis added)

11. In Jagraj Singh alias Hansa, the facts were more or less identical. In that case, the vehicle (as observed in para 5.3 of the decision) was not a public transport vehicle. After considering the relevant provisions and some of the decisions of this Court including the decision in Karnail Singh, it was observed:-

"14. What Section 42(2) requires is that where an officer takes down an information in writing under sub-section (1) he shall send a copy thereof to his immediate officer senior. The communication Ext. P-15 which was sent to the Circle Officer, Nohar was not as per the information recorded in Ext. P-14 and Ext. P-21. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

.....

16. In this context, it is relevant to note that before the Special Judge also the breach of Sections 42(1) and 42(2) was contended on behalf of the defence. In para 12 of the judgment the Special Judge noted the above arguments of defence. However, the arguments based on non-compliance with Section 42(2) were brushed aside by observing that discrepancy in Ext. P-14 and Ext. P-15 is totally due to clerical mistake and there was compliance with Section 42(2). The Special Judge coming to compliance with the proviso to Section 42(1) held that the vehicle searched was being used to transport passengers as has been clearly stated by its owner Vira Ram, hence, as per the Explanation to Section 43 of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court has reversed the above findings of the Special Judge. We

thus, proceed to examine as to whether Section 43 was attracted in the present case which obviated the requirement of Section 42(1) proviso.

.....

29. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance with requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance with Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in para 5. The present is not a case where insofar as compliance with Section 42(1) proviso even an argument based on substantial compliance is raised there is total non-compliance with Section 42(1) proviso. As observed above, Section 43 being not attracted, search was to be conducted after complying with the provisions of Section 42. We thus, conclude that the High Court has rightly held that non-compliance with 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."

(Emphasis added)

From a perusal of the evidence in the present case, it is apparent that the vehicle in question was not a public conveyance but was a private vehicle belonging to Virender, co-accused. The prosecution examined PW4 HC Sat Pal, who had taken into possession the RC of the vehicle Ex.P1 and other documents relating to the vehicle. As per the registration certificate, the owner of the vehicle was Ajay Bathla, owner of M/s Ajay Medical Centre. Ajay Bathla appeared as PW5 and stated that he had sold the vehicle vide

affidavit Ex.P4 to Virender co-accused and it was in possession of the accused. Thus, it is apparent that the vehicle belonged to Virender co-accused. Still further, from a perusal of the statement of PW11 SI Karan Singh, it is apparent that he received secret information, however, no information in writing was sent regarding the secret information. There is no evidence to show that the secret information was ever conveyed to the higher officers. In such a situation, the provisions of Section 42 of the NDPS Act would be applicable. Since, the recovery was from a private vehicle, the provisions of Section 43 of the NDPS Act would not be applicable. The explanation to Section 43 of the NDPS Act shows that a private vehicle would not come within the expression “**public place**” as explained in Section 43 of the NDPS Act. Thus, it is an admitted position in the instant case that there was total non-compliance of mandatory requirements of Section 42 of the NDPS Act. The learned trial Court has wrongly recorded that the information was given telephonically and the same was not reduced into writing, which did not vitiate the trial and the said findings are liable to be reversed by this Court. In fact, it has been held in number of judgments that compliance of Section 42 of the NDPS Act is mandatory in nature and total non-compliance of Section 42 of the NDPS Act is impermissible in law.

In view of the aforementioned circumstances, the learned trial Court has fell in error in rejecting the submissions made by the leaned counsel for the appellants. Consequently, the instant appeal is allowed and the impugned judgment of conviction 13.07.2004 and order of sentence dated 15.07.2004 passed by the learned Judge,

Special Court, Panchkula are set aside and the appellants are acquitted of the charges leveled against them.

All pending applications, if any, are disposed of, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

09.01.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking : Yes/No
Whether reportable : Yes/No