

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-41618-2023

Reserved On: 31.10.2023

Pronounced On: 06.11.2023

Sewa Singh

.....Petitioner

Vs.

State of Punjab

.....Respondent

CORAM: - HON'BLE MR. JUSTICE DEEPAK GUPTA

Present: - Mr. Imaan Singh Khara, Advocate
for the petitioner

Mr. M.S. Nagra, AAG, Punjab.

DEEPAK GUPTA, J. (ORAL)

The petitioner prays for regular bail by way of this petition filed under Section 439 Cr.P.C in case FIR No.115 dated 31.08.2022 under Section 15 of NDPS Act, 1985 registered at Police Station Sujanpur, District Pathankot.

2. As per prosecution allegations, as noticed by the trial court, on 31.08.2022, secret information was received by SI Ram Bhajan, when he was present along with other officials at bridge No.5, Sujanpur in connection with patrolling and checking of vehicles, to the effect that three youngsters were coming in truck bearing registration No. PB-08-BU-9855, having loaded heavy quantity of poppy husk in their truck, from the side of Lakhanpur (J&K). Finding the information to be reliable, siege was laid. After sometime, the truck in question was found coming from the side of Madhopur. Driver of the truck stopped the same on giving signal. However, one of the occupants fled away

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from the spot after opening the window from conductor side. The driver and other occupant were apprehended. The driver disclosed his name as **Jagga Singh**; whereas, the other occupant disclosed his name as **Sewa Singh (petitioner)**. SI Ram Bhajan appraised them of their legal right to be searched from him (SI Ram Bhajan) or some Gazetted Officer or the Magistrate. The accused opted to be searched from Gazetted Officer. DSP Rajinder Singh was called at the spot and after completing necessary formalities, search was conducted in his presence and 13 plastic bags concealed under Tarpaulin were recovered and on checking, poppy husk was found contained powder. Total weight of the poppy husk in all the thirteen bags was found to be 300 Kg. It was taken into possession after completing necessary formalities. Petitioner and co-accused were arrested.

3. (i) It is contended by learned counsel that petitioner has been falsely implicated, as he is neither the owner nor the driver of the truck, from which the contraband was recovered.

(ii) Further, it is argued that there is violation of Section 42 of NDPS Act, as no information was sent by the Investigating Officer nor the secret information was reduced into writing. Learned counsel has referred to ***“Karnail Singh v. State of Haryana (SC) 2009(5) R.C.R.(Criminal) 515; Boota Singh v. State of Haryana (SC): Law Finder Doc Id # 1831542; Gurjant Singh v. State of Punjab, (Punjab And Haryana): Law Finder Doc Id # 2004148; Pankaj v. State of Punjab (P&H): Law Finder Doc Id # 2013404.***

(iii) Learned counsel further contended that there is violation of Section 50 of the NDPS Act also, because the offer for search was not made as per law.

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The presence of DSP is also alleged to be doubtful as no writing work was done by him. For non-compliance of Section 50 of the NDPS Act, learned counsel has referred to ***“State of Rajasthan V. Parmanand (SC): Law Finder Doc Id # 528107 & Union of India v. Shah Alam, (SC): Law Finder Doc Id # 195476”***.

(iv) Learned counsel further contends that petitioner is in custody since 31.08.2022; that trial may take time to conclude; that all witnesses cited by the prosecution are police personnel and so, in all these circumstances petitioner be allowed bail.

4. Strongly opposing the bail petition, learned State counsel submits that recovered quantity of contraband falls in the commercial category. It is further submitted that petitioner has criminal antecedents, as he is involved in one more case under NDPS Act. It is submitted that since the recovery of contraband was effected on the basis of secret information, from a vehicle in transit, therefore, Section 42 of the NDPS Act has no applicability and as the recovery has been effected in the presence of a Gazetted Officer i.e., DSP, so provisions of Section 43 of the Act are applicable. Learned State counsel has referred to ***Mandeep Kaur v. State of Punjab, (Punjab and Haryana): Law Finder Doc Id # 2020298***. Learned State counsel further submits that though the offer was made to be searched by SI Ram Bhajan or by the Gazetted Officer or by the Magistrate but petitioner chose to be searched in the presence of Gazetted Officer and then search was conducted in the presence of DSP i.e., Gazetted Officer and so, there is compliance of Section 50 of NDPS Act. Learned State counsel submits that in ***Parmanand’s case*** relied by counsel for the petitioner, search was conducted by a member of the raiding party and it

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was because of that reason that said search was held to be vitiated for violation of Section 50 of NDPS Act. Learned State counsel also drawn attention towards the bar contained in Section 37 of NDPS Act so as to grant bail in such like cases involving recovery of contraband of the commercial category, particularly considering the criminal antecedents of the petitioner. Prayer is made for rejecting the petition.

5. I have considered submissions of both the sides and have perused the record.

6. No doubt that it has been held by Hon'ble Supreme Court in ***Karnail Singh V. State of Haryana (supra)*** that total non-compliance of Section 42 of NDPS Act is impermissible, though delay in compliance with satisfactory explanation will be acceptable compliance and that in the present case, there is no compliance of Section 42 of the Act but the question is that whether in the facts and circumstances of the present case, compliance of Section 42 of the NDPS Act was required.

7. As per prosecution allegations, the truck occupied by the petitioner and co-accused, was in transit when the secret information was received to the effect that truck was carrying contraband. The recovery was effected from the vehicle in transit after it was stopped on giving a signal. The recovery was not effected from any building, conveyance or enclosed place.

8. The distinction between Section 42 & 43 of the Act has been considered in detail by this High Court in ***Mandeep Kaur v. State of Punjab (supra)***, wherein the Court also discussed distinction between the facts of ***Boota Singh's case*** (as relied by counsel for the petitioner in this case) and the

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facts similar to the present case and then held as under:

“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:

<i>Boota Singh’s case</i>	<i>Present case</i>
<i>In Boota Singh's case, secret information had been received to the effect that the accused are selling 'poppy straw from a vehicle on a katcha path 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 'parked on an un-metalled path. Search of two bags led to the recovery of poppy straw.</i>	<i>In the present case, secret information was received to the effect that Ranjit Singh, Harjit Singh and Mandeep Kaur are proceeding in a car for the purpose of supplying heroin and could be caught red- handed. Pursuant to information, the police was able to intercept the said 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 the recovery of heroin from each of them from personal search. In other words, the contraband was in process of 'transit' unlike in Boota Singh's case where the accused were selling from a 'parked' jeep.</i>
<i>Search was conducted by Officer of the rank of Inspector.</i>	<i>While Inspector Vikrant had detained the accused, the search was conducted only after Gazetted Officer of the rank of DSP came at the spot.</i>

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 unmettaled 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
Power of entry, search, seizure and arrest without warrant or authorisation-	Power of seizure and arrest in public place.
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 kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, (a) enter into and search any	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 along with such drug or substance, any animal or conveyance (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

<i>such building, conveyance or place;</i> <i>(b)</i> <i>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.</i>	<i>possession and such possession appears to him to be unlawful, arrest him and any other person in his company.</i> <i>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.</i>
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18. A Constitution Bench of Hon'ble Supreme Court in [State of Punjab vs. Baldev Singh 1999\(3\) RCR\(CrI\) 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.**"*

9. Thus, the legal position as explained above would make it vivid that when the 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. The word

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'conveyance' used in Section 42 of the Act has to be read as '*conveyance other than in public use*'. As word 'conveyance' is also included in Section 43 of the Act, therefore, the conveyance found in a public place or in transit would be covered under Section 43 of the Act, though the conveyance used in Section 42 of the Act is to be read as conveyance which is other than in public place.

10. In the present case, since the recovery has been effected from the conveyance in transit, therefore, Section 42 has prima facie no applicability and rather, it is Section 43 of the Act, which is applicable. As such, petitioner cannot be granted any advantage of the fact that compliance of Section 42 of the Act was not made. As such, ***Karnail Singh's case***, which has been followed by this Court in ***Pankaj's case and Gurjant's case*** have no applicability to the facts of this case.

11. Coming to the compliance of Section 50 of the Act, although as per the prosecution allegations, offer was made by SI Ram Bhajan to be searched by him or in the presence of Gazetted Officer or Magistrate but the petitioner and co-accused opted to be searched in the presence of Gazetted Officer and then, search was effected in the presence of DSP i.e., Gazetted Officer. In ***Parmanand's case*** relied by counsel for the petitioner, the Investigating Officer informed the accused that they could be searched before nearest Magistrate or before nearest Gazetted Officer or before the Officer, who was part of a raiding party and the accused opted to be searched before the Officer, who was Member of the raiding party. It was in these circumstances that search was held to be vitiated and in breach of Section 50 of NDPS Act and so, conviction was set aside.

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12. Thus, breach of Section 50 of the NDPS Act was found after full-fledged trial. In this case, as has been noticed above that search was conducted, as per the consent of the petitioner, in the presence of the Gazetted Officer and so, at this stage, it cannot be stated that there is non-compliance of Section 50 of the NDPS Act.

13. The recovered quantity of contraband from the petitioner falls in the commercial category. Petitioner has no clean criminal antecedents, as he is involved in one more case pertaining to NDPS Act as per the custody certificate and as admitted by the petitioner himself in Para No.9 of the petition. Therefore, the parameters laid down in Section 37 of the NDPS Act for grant of bail are also not fulfilled.

14. Having regard to the aforesaid discussion but without commenting anything further on the merits of the case, this Court is not inclined to grant bail to the petitioner.

Dismissed.

November 06, 2023

Neetika Tuteja

(DEEPAK GUPTA)
JUDGE

Whether Speaking/reasoned
Whether Reportable

Yes/No
Yes/No