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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 01st March, 2023

Pronounced on: 28th March, 2023

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BAIL APPLN. 3185/2022

NAGESH SHARMA

..... Petitioner

Through: Ms. Malvika Trivedi, Senior Advocate
alongwith Mr. Rajiv Mohan, Mr. Nipun
Katyal, Mr. Shailendra Slaria,
Mr. Nishant Madan & Mr. Swapnil
Tripathi, Advocates.

versus

THE STATE (N.C.T OF DELHI)

..... Respondent

Through: Mr. Aman Usman, APP for the State
alongwith Mr. Shariq Ansari, Advocate
& Insp. Rakesh Kumar, AGS/Crime
Branch.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. This is the second application under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') seeking regular bail in case FIR No. 218/2018, dated 29.08.2018 under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') and Sections 63 and 65 of the Copyright Act, 1957 registered at PS Crime Branch.

The first application for bail filed on behalf of the present applicant (BAIL APPLN. 1099/2020) was dismissed by a coordinate bench of this Court *vide* order dated 24.11.2020. The said order was challenged before the Hon'ble Supreme Court and the same was dismissed *vide* order dated 15.03.2021 passed in Special Leave to Appeal (Crl.) No. 554/2021 titled 'Nagesh Sharma v. State of NCT of Delhi'.

2. Briefly stated, the facts of the present case are as under:

- i. On 20.08.2018, secret information was received at about 04:00 PM at the office of the Crime Branch that one Sunil Sharma alongwith his associates - Rajesh and Nagesh (the present applicant) were involved in illegally supplying 'Tramadol' to Kolkata and other parts of North-East India. Information was received that Sunil Sharma, Rajesh and Nagesh would arrive at a spot near the Minto Road Bus Stop, Bhavbhooti Marg, New Delhi with consignments of Tramadol in two separate cars and that Sunil Sharma would further handover these consignments to a man for sending them to Kolkata.
- ii. Acting on the said information, a team of police personnel reached the above spot and at about 07:45 PM spotted an Elantra car bearing registration number DL 7C P 0927, being driven by Sunil Sharma. He stepped out of the car and waited for some time. After 10 minutes, a Tata Indica car bearing registration number UP 14 BR 2362, being driven by Rajesh with Nagesh in the passenger seat arrived at the spot. Rajesh took one parcel out of his car, which Nagesh handed over to Sunil who put it in the trunk of his car. Rajesh took another parcel out and handed over the same to Sunil, at which time the raiding team apprehended all three of them at about 08:00 PM.

- iii. Upon a search of the Elantra car bearing registration number DL 7C P 0927, 156 boxes of Spasmo Proxyvon Plus capsule were recovered. From the search of Red colour Tata Indica car bearing registration number UP 14 BR 2362, 112 boxes of Spasmo Proxyvon Plus capsule were recovered. From the personal search of Nagesh Sharma, one white coloured parcel containing 56 boxes of Spasmo Proxyvon Plus capsule was recovered. Each of these boxes contained 18 strips of 8 capsules each. Each of these were hard gelatin capsules containing Dicyclomine Hydrochloride I.P. 10 mg, Tramadol Hydrochloride I.P. 50 mg and Acelaminophen 325 mg.
- iv. Out of the materials recovered, samples were drawn and seized and the present FIR was registered.
- v. During investigation, the accused persons were interrogated and they admitted to their involvement in the alleged offences. It was also revealed that a part of the recovered Spasmo Proxyvon Plus capsules were procured by them through black marketing channels and part of it was manufactured by them at a factory, set up in Ghaziabad.
- vi. During investigation, it was discovered that Sunil Sharma was the mastermind behind the entire racket that dealt in illegal drugs. He financed the illegal drug business. Sunil Sharma was also involved in illegally supplying Buprenorphine injections to his contacts in various states. Based on his disclosure, 1.68 lakh ampoules of Buprenorphine injection were recovered from two courier companies – Madhur Courier and Om Logistic.
- vii. Sunil Sharma disclosed that his associate and proprietor of M/s Banti Pharma - Vineet Garg had booked a consignment of 9000 ampoules of

Buprenorphine injections to their contacts in Bikramganj, Bihar. Accordingly, on 03.09.2018, the said consignment was intercepted and a representative of Madhur Courier presented 6 parcels of Buprenorphine injections containing 18,000 ampoules, out of which 3,000 were without any label. On enquiry, the said representative stated that the consignment was booked by one M/s Banti Pharma and was bound to M/s Deep Kumar Medical Agency in Bikramganj, Bihar.

- viii. It was further revealed that Vineet Garg had booked another large consignment of Buprenorphine injections to Ideal Chemical Works Ltd, Kanpur through Om Logistics. Accordingly, on 10.09.2018, the said consignment was intercepted and a representative of Om Logistics presented 75 parcels containing 1.5 Lakh ampoules of Buprenorphine injections, out of which 8,000 were found to be without any label.
- ix. During investigation, it was discovered that the accused persons used to send the drugs through courier/railway parcels, in the names of different medicine shops in different cities, chosen at random. However, the consignees whose details were mentioned on these parcels did not know the sender, i.e., the accused persons. The said accused persons used to track the real time status of these parcels and their contacts would take delivery directly from the godowns of the courier company, after the parcel reached the destination city.
- x. Sunil Sharma intended to send the recovered Spasmo Proxyvon Plus capsules to his contact Shamim in Kolkata.
- xi. Rajesh Sharma was also stated to be one of the main persons involved in the running of the illegal drug business. During interrogation, he disclosed that had his own Lathe machine setup in the name of

‘OSATA Industry’ in Shihani, Ghaziabad and had arranged for a private and isolated accommodation in Nandgram, Ghaziabad for running a manufacturing unit. He had known accused Sunil Sharma since 2014 and lured Nagesh Shamra, the present applicant into getting involved with them on the pretext of making money quickly and easily.

- xii. Rajesh Sharma further disclosed that he procured preparatory salts/raw materials like Tramadol, Dicycloamine and Acetaminophen from his business associate – Vijay Dubey, which were then used for preparing the recovered Spasmo Proxyvon Plus capsules. Rajesh Sharma and the applicant also carried out the work of filling, packaging and blistering.
- xiii. During the course of further investigation, accused Vijay Dubey @ Moni was also arrested and during interrogation, he disclosed that he met Rajesh Sharma through a business acquaintance, who then introduced him to Sunil Sharma. Vijay Dubey had supplied raw material, i.e., Tramadol, Acetaminophen and Dicyclomine to accused persons 2-3 times through Kalpana Travels. The said information was corroborated by a bus conductor of Kalpana Travels and the Call Detail Record (‘CDR’) analysis of Rajesh Sharma.
- xiv. The present applicant disclosed that he was responsible for arranging the machinery such as blister machine, filling/loader machine which were used in preparation of the recovered capsules. He had knowledge of operation of the said machines and arranged for labour to carry out the manufacturing work at their factory. The applicant and Sunil Sharma used to supply manufactured drugs like Spasmo Proxyvon Plus capsules, Stemil MD, Pen-40, Pseudophedrine tablets etc. to their contacts after preparing them in their factory. The applicant further

disclosed that he had once arranged 10 kg of Tramadol from one Narayan Chaoudhary for the purpose of manufacturing of Spasmo Proxyvon Plus capsules.

- xv. On 30.08.2018, the accused persons led the police party to their factory setup in Ghaziabad. During the search of the said factory, raw materials, printing and packaging materials and machine parts were recovered and seized.
- xvi. Vineet Garg was arrested on 12.09.2018, and under interrogation, he disclosed that he joined the other co-accused persons because he was in dire need of money. He met Sunil Sharma through one Harish Singhal - both of whom were stated by him to be financing the entire illegal drug business. He disclosed that he supplied the drugs to their contacts on the directions of Sunil Sharma and Harish Singhal.
- xvii. On 24.09.2018, Afroz Alam was arrested who disclosed that he was contacted by Sunil Sharma regarding supply of some materials. Sunil Sharma promised him to pay 10 times the normal price of the products and consequently, Afroz Alam supplied materials like printed boxes, PVC, labels of companies etc.
- xviii. The CDRs of all the accused persons were analysed and it was found that they were in regular touch with each other telephonically. They were also in regular touch through WhatsApp messenger. The present applicant was particularly in regular touch with Sunil Sharma and Rajesh Sharma.
- xix. Chargesheet in the present case was filed *qua* Sunil Sharma @ Rahul, Rajesh Sharma @ Manoj, Nagesh Sharma (the present applicant), Vijay Dubey @ Moni, Vineet Garg @ Banti and Afroz Alam.

xx. *Vide* order dated 23.10.2019 passed by the Learned Special Judge (NDPS) – 1, Central, Tis Hazari Courts, Delhi, charges have been framed. Charges *qua* the present applicant have been framed under Section 63 of the Copyright Act and Sections 22(c) and 29 of the NDPS Act.

3. Learned Senior Counsel appearing on behalf of the applicant submitted that the present second application for bail is maintainable on account of change of circumstances after the aforesaid order dated 24.11.2020 dismissing the first bail application was passed. The said change in circumstances, as argued by the learned Senior Counsel, are threefold;

- i. Firstly, only two witnesses out of the forty-five cited by the prosecution have been examined so far after charges were framed on 23.10.2019.
- ii. Secondly, co-accused Afroz Alam, whose bail application was dismissed by a coordinate bench of this Court has been granted bail by the Hon'ble Supreme Court *vide* order dated 09.09.2022 passed in SLP(CrI.) No. 5114/2022, titled 'Afroz Alam v. State of NCT of Delhi'.
- iii. Thirdly, it is contended that in the previous application for grant of bail, the issue of non-compliance of the mandatory provision of Section 42(1) of the NDPS Act was not raised or argued.

4. Learned Senior Counsel for the applicant submitted that only two out of the forty-five witnesses cited by the prosecution have been examined so far and the applicant has been in judicial custody for more than 4.5 years now. It was submitted that even after the first bail application filed on behalf of the applicant was dismissed by a coordinate bench of this Court, the applicant has undergone nearly 2.5 years of incarceration and that itself amounts to a

change in circumstance. Learned Senior Counsel placed reliance on the following judgments/orders with regard to grant of bail on account of delay:

- i. Imtiyaz Ahmad v. State of Uttar Pradesh, (2012) 2 SCC 688.
- ii. Shariful Islam @ Sarif v. State of West Bengal, SLP (Crl.) 4713/2022.
- iii. Gopal Krishna Patra v. Union of India, Criminal Appeal No. 1169/2022.
- iv. Chitta Biswas v. State of West Bengal, Criminal Appeal No. 245/2010.
- v. Mohd. Salman Hanif v. The State of Gujarat, SLP (Crl.) 5530/2022.
- vi. Bhola Das v. State of West Bengal, SLP (Crl.) 4809/2022.
- vii. Jakir Hussain v. State of West Bengal, Special Leave to Appeal (Crl.) 3279/2022.
- viii. Gouri Das v. State of West Bengal, Special Leave to Appeal (Crl.) 10921/2022.
- ix. Mustakin Sekh v. State of West Bengal, SLP (Crl.) 4763/2022.
- x. Amit Singh Moni v. State of Himachal Pradesh, Criminal Appeal No. 668/2020.
- xi. Hasim @ Neta v. The State of NCT of Delhi, Special Leave to Appeal (Crl.) 5187/2021.
- xii. Mahmood Kurdeya v. Narcotics Control Bureau, Criminal Appeal No. 1570/2021.

5. Learned Senior Counsel further submitted that co-accused Afroz Alam has been granted bail by the Hon'ble Supreme Court *vide* order dated 09.09.2022 passed in Special Leave to Appeal (Crl.) No. 5114/2022 titled 'Afroz Alam v. State of NCT Delhi'. It was submitted that the present applicant, thus seeks parity with the said co-accused in terms of granting bail.

6. Learned Senior Counsel submitted that as per the case of the prosecution, the police team was acting on the basis of secret information. It is the case of the prosecution itself that the raiding team took all the necessary steps in compliance with the provisions of Section 42 of the NDPS Act. Admittedly, the seizure in the present case was at 08:00 PM, i.e., between sunset and sunrise. In such a case, it was incumbent upon the raiding officer to comply with the second proviso to Section 42(1) of the NDPS Act. Section 42 of the NDPS Act provides 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 personal 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 in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further 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.”
(emphasis supplied)

It was urged that, in the present case, admittedly, there is no compliance of the second proviso to Section 42(1) of the NDPS Act, inasmuch as no grounds of belief were recorded by the raiding officer before the alleged search of the vehicle from where the contraband was recovered. In support of the said contention, learned Senior Counsel placed reliance on the following judgments:

- i. Boota Singh & Ors. v. State of Haryana, 2021 SCC OnLine SC 324.
- ii. State of Rajasthan v. Jagraj Singh alias Hansa, (2016) 11 SCC 687.
- iii. Louis Obioha v. Narcotics Control Bureau, 1997 1 Mh.L.J. 442.
- iv. Hiralal s/o Gauruddin Gore & Anr. v. State of Maharashtra, 2004 ALL MR(Cri) 3325.
- v. Pankaj v. State of Punjab, CRM-M-25498-2021 dated 14.06.2022 decided by the Hon’ble High Court of Punjab and Haryana.

vi. Gulbabu v. State of NCT of Delhi, BAIL APPLN. 732/2021 dated 01.06.2021 decided by the Hon'ble High Court of Delhi.

7. *Per contra*, learned APP for the State submitted that there is no change in circumstances after the order dismissing the first bail application was passed. The said order was unsuccessfully challenged by the applicant before the Hon'ble Supreme Court. In these circumstances, it was submitted that the present application is not maintainable and should be dismissed on this ground alone. It is further submitted that the argument with respect to Section 42 of the NDPS Act shall be deemed to have taken place at the time of hearing of the first bail application.

8. Learned APP for the State further submitted that the order granting bail to co-accused Afroz Alam cannot give any benefit to the present applicant, inasmuch as the role of the said co-accused was different. It was pointed out that at the instance of co-accused Afroz Alam, ancillary materials like printed boxes, PVC, labels of companies etc. were recovered but the present applicant was apprehended at the spot alongwith contraband. Apart from that, it was pointed out that at the instance of the accused persons, including the present applicant, search as conducted at the factory where machinery being used for manufacturing drugs was found, empty boxes of Spasmo Proxyvon Plus capsules bearing a similar batch number as that printed on the box recovered at the spot from the applicant and other co-accused person were also recovered.

9. It was further argued by the learned APP for the State that the recovery in the present case is that of a commercial quantity and therefore, rigours of Section 37 of the NDPS Act would be attracted. It is urged that the present applicant has not been able to satisfy the conditions laid down under section

37 of the NDPS Act with respect to grant of bail.

10. Learned APP for the State further submitted that so far as the issue of non-compliance of the second proviso to Section 42(1) of the NDPS Act is concerned, the same is not tenable in view of Section 43 of the NDPS Act, which 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.”

It is submitted that since the vehicle from which the alleged contraband was recovered was at a public place, the provision of Section 42 of the NDPS Act would not be attracted and therefore, non-compliance of the same would not have any effect on the present case. It was submitted that even otherwise, the police party had taken position before sunset and authorisation for search had been given by the Assistant Commissioner of Police (‘ACP’) over telephone.

11. Learned APP for the State relied upon a judgment of Hon'ble Division Bench of the Hon'ble High Court of Punjab and Haryana in 'Dharminder Kumar v. State of Punjab, 2003 (1) Crimes 19' to assert that a conveyance in a public place would fall within parameters of Section 43 of the NDPS Act. It is submitted that in the aforesaid decision, while relying upon the decision of the Hon'ble High Court of Gujarat in 'Aslambhai Ibrahimhai Memon and Anr. v. The State of Gujarat, 1989 SCC OnLine Guj 118' and the decision of the Hon'ble Supreme Court in 'Karnail Singh v. State of Rajasthan, (2000) 7 SCC 632', it was held that if a seizure is made from any animal, conveyance or article in a public place or in transit, then section 43 of the NDPS Act would be applicable. It was held that 'conveyance' used in section 42 of the NDPS Act has to be read as a conveyance other than that in a public place. Learned APP, relying upon the aforesaid judgment submitted that in the present case, the seizure was at a public place and therefore Section 43 of the NDPS Act would be applicable and therefore, the question of compliance with proviso Section 42(1) of the said act would not arise.

12. It was further argued that, in any case, whether or not the requirements of the second proviso to Section 42(1) of the NDPS Act were satisfied would be a matter for trial. Similarly, even the applicability of Section 42 or Section 43 of the NDPS Act is a matter of trial. In support of his contentions, learned APP for the state placed reliance on Mandeep Kumar v. State of Punjab, CRM-M-27760-2021 dated 25.07.2022 decided by the Hon'ble High Court of Punjab and Haryana.

13. Heard learned counsel for the parties. Perused the record.

14. In so far as the contention of learned Senior counsel with respect to the maintainability of the present second application for bail is concerned, it is

settled law the successive bail applications, though maintainable, can be entertained only if there is a change in circumstances or any fresh ground is being raised. The Hon'ble Supreme Court, in 'Lt. Col. Prasad Shrikant Purohit v. State of Maharashtra, (2018) 11 SCC 458', held as under:

“30. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications.”

15. In the present case, a coordinate bench of this Court had dismissed the first bail application filed on behalf of the present applicant on merits, after examining the contentions raised at the time of hearing of the said bail application. The said order was admittedly carried in appeal before the Hon'ble Supreme Court and the said SLP was dismissed. The Hon'ble Supreme Court, in 'Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and Anr., (2005) 2 SCC 42' has held as under:

“19. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher court or a coordinate Bench must receive serious consideration at the hands of the court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. **Ordinarily, the issues which had been canvassed earlier would not be permitted to be reagitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.**”

(emphasis supplied)

This Court, thus, cannot re-examine the issues determined in the previous bail application. The grounds taken in the previous bail application and decided by the learned Single Judge are therefore, not open for the applicant to raise in the present application, especially when the said order has been upheld by the Hon'ble Supreme Court.

16. A bare perusal of the order dated 24.11.2020 dismissing the previous bail application reflects that no adjudication had taken place with respect to non-compliance of second proviso to section 42(1) of the NDPS Act. In view of the aforesaid, the present application for bail is being examined on the ground raised with respect to non-compliance of second proviso to Section 42(1) of the NDPS Act and the period of incarceration.

17. At this stage, it is necessary to extract the law laid down by the Hon'ble Supreme Court in 'State of Punjab v. Balbir Singh, (1994) 3 SCC 299' with regard to non-compliance of Section 42 of the NDPS Act. It was held as under:

"25....(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 authorized 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 non-compliance 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....”

(emphasis supplied)

18. It is also pertinent to refer to the decision of the Hon’ble Supreme Court in ‘State of Rajasthan v. Jagraj Singh alias Hansa, (2016) 11 SCC 687’. The facts of the said case were that based on a secret information regarding contraband being carried in a vehicle (jeep), the said conveyance/vehicle was intercepted and contraband was recovered from therein. While dealing with the findings recorded in the judgment of the High Court of Judicature of Rajasthan impugned therein, the Hon’ble Supreme Court noted as under:

“15. Another aspect of non-compliance of Section 42(1) proviso, which has been found by the High Court needs to be adverted. Section 42(1) indicates that any authorised officer can carry out search between sun rise and sun set without warrant or authorisation. The scheme indicates that in event the search has to be made between sun set and sun rise, the warrant would be necessary unless officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded.”

Thereafter with respect to the finding arrived at in the judgment impugned therein with regarding applicability of Section 43 of the NDPS Act, the Hon'ble Supreme Court noted as under:

“21....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.”

Thus, upon an examination of the aforesaid findings of the Hon'ble High Court of Judicature at Rajasthan, the Hon'ble Supreme Court held as under:

“22. There is one more aspect which needs to be noted. **The present is a case where the prosecution itself has come with case that secret information was received from the informer which information was recorded in Ext. P-14 and Ext. P-21 roznamcha and thereafter the Station House Officer along with the 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 with Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 have to be complied with. This Court in *Directorate of Revenue v. Mohd. Nisar Holia* [*Directorate of Revenue v. Mohd. Nisar Holia*, (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415] had occasion to consider Sections 41, 42 and 43 Explanation. The following was stated in para 14: (SCC pp. 377-78)

“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 with Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance with the said provision would not

render the search a nullity. A distinction therefore must be borne in mind between 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.”

23. Thus the present is not a case where Section 43 can be said to have been attracted, hence, non-compliance with Section 42(1) proviso and Section 42(2) had seriously prejudiced the accused. This Court had occasion in a large number of cases to consider the consequence of non-compliance with the provisions of Sections 42(1) and 42(2), whether the entire trial stands 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* [*State of Punjab v. Balbir Singh*, (1994) 3 SCC 299 : 1994 SCC (Cri) 634] . In the above batch of cases, the High Court has acquitted the 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 up for consideration before this Court, referring to the provisions of Chapter IV the following was stated in para 8: (SCC pp. 311-12)

“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. Sub-section (2) of 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.**”

(emphasis supplied)

Finally, while taking note of the law laid down in ‘Karnail Singh v. State of Haryana, (2009) 8 SCC 539’, the Hon’ble Supreme Court held as under:

“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 supplied)

19. Similarly, in ‘Boota Singh & Ors. v. State of Haryana, 2021 SCC OnLine SC 324’, wherein again based on a secret information with respect to contraband in a vehicle/conveyance, raid was conducted and the person found sitting in the said vehicle/conveyance were apprehended, the Hon’ble Supreme Court, while taking note of the pronouncements in Jagraj Singh (*supra*) and Karnail Singh (*supra*) held as under:

“15. 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.”

20. In the decision relied upon by the learned APP for the State, i.e., Dharminder Kumar (*supra*), the facts therein were that the seizing officer was present at the spot for *nakabandi* and received the secret information there itself, unlike in the present case wherein the secret information was admittedly received on 28.02.2018 at about 04:00 PM and the raid was conducted the same day, at about 07:45- 08:00 PM. It is further pertinent to note that the judgment in Dharminder Kumar (*supra*) does not take into account the explanation to Section 43 of the NDPS Act, which has been duly considered by the Hon'ble Supreme Court in Jagraj Singh (*supra*) and Boota Singh (*supra*). The explanation to Section 43 of the NDPS Act reads as under:

“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.”

21. Admittedly in the present case, the vehicle involved was a private vehicle and not a public conveyance. It is further pertinent to note that the secret information, in the present case was received by the concerned officer at about 04:00 PM and the fact that the proposed search/apprehension could have taken place after sunset would be logical and expected. In these circumstance, the requirement of second proviso to section 42(1) of the NDPS Act could have been complied with without any impediment. There is no document on record to show compliance of the same.

22. It is rightly contended on behalf of the applicant that the admitted case of the prosecution, as put forth in the chargesheet, is that all the conditions as envisaged in Section 42 of the NDPS Act were complied with. This in itself is an admission on the part of the prosecution that provisions of Section 42 were

applicable to the facts and circumstances of the present case and therefore, the necessary compliances had to be adhered to by the prosecution.

23. It could be the contention of the prosecution that there can be no estoppel against statute and law. But, as discussed hereinabove, the Hon'ble Supreme Court, in the pronouncements cited, has clearly spelt out the facts and circumstances with respect to the applicability of Sections 42 & 43 of the NDPS Act. In view thereof, this Court is of the opinion that there has been a *prima-facie* non-compliance of second Proviso to Section 42(1) and therefore an obvious non-compliance of Section 42(2) of the NDPS Act.

24. The contention of the learned APP that the issue of non-compliance of Section 42 or applicability of Section 43 of the NDPS Act would be a matter for trial and the same cannot be determined at this stage cannot be sustained. This Court, for the purposes of granting bail, has to examine the legal issues for the purpose of Section 37 of the NDPS Act. The Hon'ble Supreme Court of India, in *Union of India v. Shiv Shanker Kesari*, (2007) 7 SCC 798, while explaining the term "reasonable ground" in context of Section 37(1)(b)(ii), observed as under:

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37 (1)(b) (ii) is "reasonable grounds". The expression means something more than *prima facie* grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

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11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”

(emphasis supplied)

In view of the above, this Court for the limited purpose of deciding the present bail application has to arrive at a *prima-facie* finding with regard to the legal issues raised herein.

25. It has been pointed out that the present applicant has been released on interim bail by orders of a coordinate bench of this Court and the said interim bail was extended from time to time. The applicant is stated to have duly surrendered on the expiry of the same and has not misused the liberty granted to him. The applicant has been in judicial custody since 03.09.2018. It is noted that only two witnesses have been examined out of forty-five cited by the prosecution and the trial is likely to take a long time. The Hon’ble Supreme Court, in *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713 observed that if a timely trial is not possible, courts are ordinarily obligated to release the undertrial on bail and statutory restrictions do not exclude the discretion of constitutional courts to grant bail on grounds of violation of fundamental rights enshrined in Part III of the Constitution. It was held as under:

“**15.** This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In *Supreme Court Legal Aid Committee*

(Representing Undertrial Prisoners) v. Union of India [Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731, para 15 : 1995 SCC (Cri) 39] , it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

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17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected."

26. It is further noted that the present applicant is not involved in the any other offences relating to the NDPS Act.

27. In view of the aforesaid discussion, this Court is of the opinion that the twin conditions of Section 37 of the NDPS Act are satisfied. The chargesheet in the present case stands filed. The trial is underway and is likely to take a long time, no useful purpose will be served by keeping the applicant in judicial custody any further.

28. In view of the facts and circumstances of the present case, the application is allowed and the applicant is admitted to bail upon his furnishing a personal bond in the sum of Rs. 1,00,000/- alongwith two sureties of like amount to the satisfaction of the learned trial Court/Duty Magistrate, further subject to the following conditions:

- i. The memo of parties shows that the applicant is residing at House No. 60, near Rameshwaram, VPO Chhajarsi, Sector 63, NOIDA, Gautam Budh Nagar, Uttar Pradesh - 201307. In case of any change of address, the applicant is directed to inform the same to the Investigating Officer.
- ii. The applicant shall report shall report at PS Crime Branch twice in a week, i.e., on every Wednesday and Friday at 10:30 AM and the concerned officer is directed to release him by 11:00 AM after recording his presence and completion of all the necessary formalities.
- iii. The applicant shall not leave India without the prior permission of the Trial Court.
- iv. The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
- v. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witness in any manner.

vi. In case it is established that the applicant has indulged in similar kind of offences or tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.

29. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case pending before the learned Trial Court.

30. The application stands disposed of along with all the pending application(s), if any.

31. Let a copy of this judgment be communicated to the concerned Jail Superintendent.

**AMIT SHARMA
JUDGE**

MARCH 28, 2023/bsr

