

JPD-10
Ct No.01
23.07.2024
AK

Calcutta High Court
In The Circuit Bench at Jalpaiguri
Appellate Side

CRM (NDPS) 270 of 2024

In Re: - An application for bail under Section 439 of the Code of Criminal Procedure, 1973 in connection with Siliguri Police Station Case No. 1038 of 2023 dated 27.12.2023 under Sections 21(c)/29 of the NDPS Act, 1985.

And

In the matter of: **Abdus Samad and another**

.... petitioners

Mr. Arjun Chowdhury,
Ms. Pratusha Dutta Chowdhury,
Ms. Riya Agarwal
Mr. Koushik Kr. Kanu
Ms. Tulip Saha

... for the petitioners

Mr. Nilay Chakraborty
Mr. Ujjwal Luksom
Ms. Namrata Das

... for the State

1. The petitioners contend that the process of search and seizure was vitiated due to non-compliance of Section 42 of the NDPS Act.
2. Learned counsel cites two coordinate Bench decisions in support of his contention.
3. In the first, that is, *Abdul Rakib vs. State of West Bengal* reported at 2023 SCC Online Cal 2462, the court, *inter alia*, relied on the case of *Boota Singh vs. State of Hararyana* reported at 2021 SCC Online SC 324 for the proposition that non-compliance of Section 42 is not permissible in law.

4. That apart, it was observed that the value of a compliance of Section 42 (second proviso) as appearing from documents contained in the case diary, which is not open to public scrutiny, was held not to be sufficient compliance of the said provision.
5. In the case of *Arun Mandal vs. State of West Bengal* reported at 2024 SCC Online Cal 2729, it was importantly observed, by placing reliance on *Sarija Banu alias Janarthani alias Janani vs. State* reported at (2004) 12 SCC 266, that compliance of Section 42 is mandatory and is a relevant factor while considering an application for bail.
6. In *Karnali Singh vs. State of Haryana* reported at (2009) 8 SCC 539, a Full Bench of the Supreme Court reiterated that it would be a clear violation of Section 42 of the NDPS Act where the police officer had sufficient time to take action but fails to record the information received in writing or send a copy thereof to the official superior.
7. Learned counsel for the State contends that the arresting personnel reported the matter to his superior within the time granted under Section 42(2) of the NDPS Act and as such, no mitigating circumstances are available to dispel the presumption under Section 37 of the NDPS Act.
8. The facts of the present case in brief are that, upon source information being obtained regarding the alleged offence, the investigating party went to the spot, in the process picking up two independent witnesses.

9. However, we do not find anything on record to show that the provisions of Section 42(1), second proviso read in conjunction with sub-section (2) of Section 42 were complied with.
10. The second proviso referred to above mandates that if an officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, 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.
11. Sub-Section (2) of Section 42, on the other hand, provides that where an officer takes down any information in writing under sub-Section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.
12. Mere intimation to the official superior of the factum of arrest is, thus, not sufficient compliance of sub-Section (2) of Section 42.
13. In the absence of any such recording and intimation as contemplated in the above provisions, it is mandatory for the raiding party to undertake entry, search, seizure and arrest only with a warrant or authorization, which is absent here.
14. Another aspect of the matter also needs to be considered. The FIR mentions that the vehicle from which the contraband article was recovered is one Mahindra Scorpio having a particular number plate.

- 15.** It is nowhere indicated in the entire FIR as to whether such vehicle was a commercial vehicle, particularly in the teeth of the contention of the petitioners that the same was a private vehicle and in no manner a commercial vehicle.
- 16.** In such view of the matter, it cannot be said that the provisions of Section 43 regarding seizure and arrest in public place is applicable *ex facie* in the present case.
- 17.** In the absence of the blessings of Section 43, Section 42 is attracted and it was mandatorily to be complied with, which has apparently not been done in the present case.
- 18.** This court is not unaware of the settled position that while deciding a bail, a court is not sitting in a mini trial.
- 19.** However, in view of the points which have been argued exhaustively and controverted at length by the State, it was necessary to give the above reasonings in order to appreciate whether even the benefit of bail is required to be granted to the petitioners.
- 20.** Needless to say, the above findings are tentative and shall not prejudice the rights of either party in the trial in any manner.
- 21.** In view of the above circumstances, we are inclined to grant bail.
- 22.** Accordingly, CRM (NDPS) 270 of 2024 is allowed, thereby granting bail to the petitioners on condition that the petitioners shall furnish bonds of Rs.10,000/- each, with two sureties of like amount each, one of whom must be local, to the satisfaction of the

learned Judge, Special Court NDPS Act, Siliguri. The sureties may be common in respect of all the petitioners.

- 23.** The petitioners shall not leave the territorial jurisdiction of the trial court during the entire period of trial and shall attend each and every date of trial.
- 24.** Further, the petitioners shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts and circumstances of the case so as to dissuade such person from disclosing such facts to any police officer or the court and/or tamper with the evidence in any manner whatsoever.

(Sabyasachi Bhattacharyya, J.)

(Prasenjit Biswas, J.)