

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

CRM-M-34511-2023

Date of Decision:23.01.2024

Gurpreet Singh @ Gopy

...Petitioner

Vs.

State of Punjab

...Respondent

Coram : Hon'ble Mr. Justice N.S.Shekhawat

Present: Mr. Vipul Jindal, Advocate
for the petitioner.

Mr. M.S. Bajwa, DAG, Punjab.

N.S.Shekhawat J.

1. The petitioner has filed the present petition under Section 439 Cr. P.C with a prayer to grant regular bail to him in case FIR No.102 dated 05.05.2022, under Sections 21/29 of NDPS Act and under Section 25 of Arms Act, registered at Police Station Kotwali, Kapurthala.
2. The FIR in the present case was registered on the basis of the complaint moved by SI Nirmal Singh and the same has been reproduced below:-

“SHO P.S. Kapurthala, Sat Sri Akal. Today I SI alongwith Si Jaswant Singh 371/KPT. ASI Mahesh Kumar 1449/HPR, CT Kanwarpreet Singh 1324/KPT. CT Jagroop Singh 268 on government vehicle no. PB 09 X 8441 being driven by ASI Manjit Singh alongwith laptop printer in connection with special nakabandi were present on Kapurthala Subhanpur Road, T-Point, Jail Road Adda Bhila During this time, a secret informer came to me and gave me information that Ranjit Singh @ Bablu s/o Avtar Singh r/o Mahobbat Nagar, P.S. City Kapurthala and Gurpreet

Singh @ Gopi s/o Avtar Singh r/o Mahbobat Nagar, P.S. City Kapurthala who are having their houses adjacent to each other and are involved in the business of selling of heroin in Kapurthala after bringing it from Amritsar in their car bearing No. PB08-ET-9779 mark Verna Colour Silver and today also they are bringing heroin from Amritsar and are coming via village Bhulara towards this side from Jail Road. Then at this time one car mark Verna was seen coming from Jail Road side, which was driven by Sikh young person. Then on receiving signal from myside to stop the car, he immediately applied the brakes of the car and stopped it and then the car driver and the young hindu gentleman sitting adjacent to him tried to ran away after stepping out from the car, who were apprehended by me, SI with the help of fellow officials. Then name and address of young sikh man, who was driving the car was enquired and he told his name Ranjit Singh @ Bablu s/o Avtar Singh r/o H. No. B/22/245 Mohalla Mahobbat Nagar Kapurthala, P.S. City Kapurthala and another young person told his name Gurpreet Singh @ Gopi s/o Avtar Singh r/o H. No. B/22/244 Mohalla Mahobbat Nagar, P.S. City Kapurthala Then, before conducting the search of the above apprehended young person and car mark Verna bearing No. PB08-ET-9779 colour silver, I, SI introduced both the above person about my rank and my posting and thereafter told them that I had suspicion that they or their car had some suspicious Intoxicant substance for which their search and search of their vehicle was to be conducted but they both had legal right that they could get their search and search of their car conducted, from any Gazetted Officer or Magistrate. Then both replied one by one and said that they had faith on me and I could conduct their search and search of their car. On this I SI recorded the memo of consent of apprehended persons Ranjit Singh @ Bablu and Gurpreet Singh @ Gopi above, one by one; on which both the accused one by one appended their signatures and witnesses also signed. Then, before conducting search, efforts were

made to join public witness in investigation but everybody refused I, SI, in the presence of fellow officials initially conducted the search of Ranjit Singh Bablu and from the right pocket of the pant worn by him heroin was recovered in transparent polythene packet. On weighing, it weighed to 50 grams. Its parcel was prepared, on which I affixed my seal NS and then search of Gurpreet Singh @ Gopi was conducted and from the right pocket of the pant worn by him one transparent packet containing heroin was recovered and on weighing, it weighed to 50 grams and its parcel was prepared. I affixed my seal NS on parcel. Both recovered plastic box parcel having heroin 50/50 grams each were affixed with seal NS on parcel and car Verna No. PB-08-ET-9779 colour silver was taken in police possession through separate memo. Sample seal was prepared separately and seal after use was handed over to SI Jaswant Singh 371/KPT. As accused Ranjit Singh @ Bablu and Gurpreet Singh @ Gopi above both had committed an offence u/s 21-61-85 NDPS Act by keeping in possession 50 grams heroin each. On this, after writing the present ruqa, same was sent to police station by hand through C. Jagroop Singh 268/KPT for the registration of FIR. After the registration of the case, the FIR number be disclosed. Control room be informed through wireless Special reports be sent. I, SI alongwith fellow officials are busy in investigation at the spot. Latitude 31.429174 Longitude 75.385024. Sd/- Nirmal Singh SI, CIA Staff Kapurthala dated 05-05-2022. Today at the boundary of T-point Jail Road Aada Bhila at 7-50 P.M. Today at police station: on receiving the above writing at police station, FIR was registered under the above mentioned offences and original writing and copy of FIR are forwarded by hand through CT Incoming Official to SI for investigation. After preparing the special reports, same are being forwarded by hand through PHG Avtar Singh 28354 to the senior officials. Control room is being informed through wireless. Complete record is submitted in the police station.

Complete Rapat No. 47 dated 05-05-2022 at 8:55 P.M.

3. Learned counsel for the petitioner contends that in the present case, the search of the petitioner was conducted from the right pocket of the pant worn by him and a transparent packet containing 50 grams of heroin was allegedly recovered by the police, which was taken into possession by the police. However, the police did not comply with the provisions of Section 50 of the NDPS Act. Apart from that, no independent witness was joined at the time of conducting the search and seizure. Still further, the policed had not complied with provisions of Section 42 of NDPS Act. Learned counsel further contended that in the present case, the petitioner had clean antecedents and at the time of alleged recovery from the residential house of the petitioner, no one from the house or even the neighbours were joined by the police. He further contended that even the recovery of 450 grams of heroin was not made from the conscious possession of the petitioner. Learned counsel further contended that the petitioner had been falsely involved in the present case.

4. On the other learned State counsel has vehemently opposed the submissions made by learned counsel for the petitioner on the ground that the recovery of contraband from the present petitioner was “commercial” in nature and the rigors of Section 37 of the NDPS Act would apply to the facts and circumstances of the present case. Learned State counsel further submitted that the huge recovery of heroin had taken place from the present petitioner and at the stage of bail, the pleas raised by the petitioner could not have been considered by this Court.

5. I have heard learned counsel for the parties and perused the record.

6. Section 42 of the NDPS Act has been reproduced below:-

"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 seventytwo hours send a copy thereof to his immediate official superior."

7. In the present case admittedly, a secret information was received with regard to the involvement of the petitioner and his co-accused in the drug trade and the police was bound to take down the information in writing and after recording the reasons, the report has to be sent to the immediate superior officers within 72 hours. Sending of ruqa to the police station was not the sufficient compliance of the mandatory provisions of Section 42 of the NDPS Act. Still further, the Verna car was a private car and therefore, Section 42 of the NDPS Act was applicable.

8. 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 and AIR 2016 SC 3041 as follows:-

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 noncompliance 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 noncompliance 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."

9. It has also been held by the Hon'ble Supreme Court in the matter of **Boota Singh Vs. State of Haryana 2021 (2) RCR Criminal 892 and 2021**

AIR (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 noncompliance 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)

10. From the above referred judgments passed by the Hon'ble Supreme Court, it is apparent that the total non-compliance of requirement of Section 42 of the NDPS Act is impermissible in law. In the present case, the police team was bound to send report to the local police station under Section 42 of the NDPS Act, however, from the record, it is apparent that no such report under Section 42 of the Act was sent to the immediate superior officer by the complainant. In fact, such non-compliance was impermissible in law.

11. In the present case, prima facie, there has been violation of Section 42 of the NDPS Act. Once the mandatory provision of Act has been found to be prima facie violated, the rigors of Section 37 of the NDPS Act could be dispensed with. Still further, the present petitioner has no criminal antecedents. Keeping in view the aforementioned discussion and the law cited by the petitioner, the petitioner would be entitled to be released on regular bail.

12. Without commenting on the merits of the case, the present petition is allowed. The petitioner is ordered to be released on bail pending trial on his furnishing bail bonds and surety to the satisfaction of the concerned trial Court/ Duty Magistrate/Chief Judicial Magistrate subject to the following conditions:-

(i) The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case, so as to dissuade him to disclose such facts to the Court or to any other authority.

(ii) The petitioner shall remain present before the Court on the

dates fixed for hearing of the case.

(iii) The petitioner shall not absent himself from the Court proceedings except on the prior permission of the Court concerned.

(iv) The petitioner shall surrender his passport, if any, (if already not surrendered), and in case he is not holder of the same, he shall swear an affidavit to that effect.

(v) The petitioner shall also file his affidavit before the concerned Court, mentioning his ordinary place of residence and number of mobile phone, which shall be used by him during the pendency of the trial. In case of change of place of residence/mobile number, he shall share the details with the concerned Court/learned Trial Court.

(vi) In case, the petitioner is involved in any other criminal activity, during the pendency of the trial, it shall be viewed seriously.

(vii) The concerned Court may insist on two heavy local sureties and may also impose any other condition, in accordance with law, while accepting the bails bonds and surety bonds of the petitioner.

(viii) The petitioner shall report on every 1st Monday of English calender month before the concerned SHO till the conclusion of the trial and SHO shall mark his presence by making an entry in the Rojnamcha.

13. In case, the petitioner violates any of the conditions mentioned above, it shall be viewed seriously and the concession of bail granted to him

shall be liable to be cancelled and the prosecution shall be at liberty to move
an application in this regard.

23.01.2024
hitesh

(N.S.SHEKHAWAT)
JUDGE

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