

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

224

CRM-M-39442-2023 (O&M)**Date of decision : 31.01.2024**

Sulakhan Singh @ Sukha

..... Petitioner

versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. L.S.Sekhon, Advocate
for the petitioner.

Mr. Iqbal Singh Mann, DAG, Punjab

PANKAJ JAIN, J. (Oral)

1 Present petition has been filed under Section 439 Cr.P.C. for grant of regular bail to the petitioner in case bearing F.I.R. No.228 dated 05.10.2022, registered for the offence punishable under Section 22 of NDPS Act at Police Station Sadar Samana.

2 As per the case of the prosecution the instant FIR was registered against the petitioner on the basis of *ruqa* received from ASI Amarjit Singh wherein he stated that on 05.10.2022 he along with police party was present at Assarpur Chupki Dana Mandi in private vehicle along with laptop, printer etc. in connection with patrolling and checking of suspected bad elements. When at about 6.15 PM an information was received by ASI Amarjit Singh from a secret informer that present petitioner i.e. Sulakhan Singh is indulging in business of selling intoxicant tablets from his house. Finding the information reliable, house of the petitioner was raided where police found that a trimmed hair person was in possession of plastic bag. On seeing police party he

managed to flee away from the spot by scaling over the wall taking benefit of the darkness and after throwing the plastic bag in the porch. Though he was chased, but could not be apprehended. The strips of the tablets lying scattered were seized and on checking the same were found to be tramadol. On counting they turned to be 5500 intoxicant tablets.

3 Learned counsel for the petitioner submits that even if the case of the prosecution is taken on its face value, it is highly improbable that a police party shall raid the house and the petitioner can escape. He further submits that whole of the action is in violation of the mandatory provisions of Section 42 of the NDPS Act. Admittedly, it was dark and time was 7.00 PM meaning thereby that it was after the sunset and thus in terms of Section 42 of the NDPS Act, the officer if had reason to believe that search warrant or authorization cannot be obtained without affording opportunity for concealment of evidence or facilitating the escape of the petitioner he could have searched the building only after recording the reasons of his belief. Thus it is a case where there is neither any search warrant or authorization nor reasons have been recorded for such belief by the officer, as required under law. On 09.01.2024 after the counsel for the petitioner raised aforesaid arguments following order was passed :-

“Learned counsel for the petitioner has placed reliance upon Section 42 of the NDPS Act, stating that whole of the action of the authorities in entering the house at 7 p.m. i.e. after sunset is arbitrary and in the teeth of the provision of law. This would hence, enure benefit to the petitioner and he shall be entitled to bail.

Learned State counsel prays for time to file specific affidavit in compliance as to whether any reasons were to be recorded by the authorities.

Adjourned to 16.01.2024.”

4 Short affidavit of Neha Aggarwal, PPS, Deputy Superintendent of Police, Sub Division Samana, District Patiala on behalf of the respondent has been filed wherein the specific stand taken by the prosecution reads as under :-

“5. That it is pertinent to mention here that when ASI Amarjit Singh No.1977/PTL, PS Sadar Samana, investigating officer along with police party was present on 05.10.2022 at Assarpur Chupki Dana Mandi on private vehicle along with laptop printer etc. in connection with patrolling and checking of suspected and bad elements. In the meantime, at about 6:15 PM, ASI Amarjit Singh received an information from secret informer to the effect that Sulakhan Singh (present petitioner) is doing the business of selling intoxicant and on 05.10.2022 also, Sulakhan Singh intends to sell intoxicant tablets by keeping the same in his house. If raid is immediately conducted at his house, he can be apprehended with above said intoxicant tablets.

It is apposite to mention here that ASI Amarjit Singh sent Ruqa to the police Station and asked to send a competent official. Upon which, ASI Jaswinder Singh along with police party had to act immediately to nab the petitioner and to recover the drugs/intoxicant tablets from the house of the petitioner as per information. Accordingly, investigating officer along with police party instantaneously raided at the house of the petitioner, however, the petitioner managed to escape from the spot while the recovery of 5500 intoxicants tablets of Tramadol Hydrochloride was affected from the house of the petitioner.

In case, the police party had not act spontaneously, delay might have aided an opportunity the accused /petitioner to destroy or remove the goods/drugs or evidence, thus, there was no opportunity for the police authorities to record in writing the information received, before initiating action. Therefore, non- sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42.”

5 Learned State counsel does not dispute that neither there are reasons recorded nor there is any search warrant or authorization.

6 Custody certificate has been filed. The same is taken on record. As per the same, the petitioner has under gone actual custody of more than 1 year, 3 months & 5 days. He has 2 more cases registered under NDPS Act.

7 Learned counsel for the petitioner has produced bail orders in the aforesaid two FIRs. In FIR No.98 dated 04.07.2022 registered for offences punishable under Sections 22/29/61/85 of NDPS Act at PS Sadar Patiala the petitioner has been nominated on the basis of disclosure made by one Raj Kumar who was apprehended along with 192 intoxicant tablets and the petitioner stands admitted to bail vide order dated 03.11.2022 passed by Special Court, Patiala. In FIR No.187 dated 21.08.2022 registered for offence punishable under Section 22 of NDPS Act at PS Sadar Samana petitioner is alleged to have been found in conscious possession of 450 tablets which is non-commercial quantity and stands admitted to bail.

8 I have heard learned counsel for the parties and have gone through the records of the case.

9 In order to appreciate the plea being raised by learned counsel for the petitioner it will be apposite to peruse Section 42 of the NDPS Act which reads 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) to 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 of 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.]

10 The provision came up for interpretation before Supreme Court in the case of ***State of Punjab Vs. Balbir Singh 1994 (3) SCC 299*** wherein it was held as under :-

“The common question that arises for consideration is whether any arrest and search of a person or search of a place without conforming to the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short), becomes illegal and consequently vitiates the conviction. The trial court in these cases acquitted the accused on the ground that the arrest, search and seizure were in violation of some of the relevant and mandatory provisions of the NDPS Act. The High Court declined to grant leave to appeal against the said order of acquittal. Questioning the same the State of Punjab has filed these special leave petitions and appeals. In a few cases, the convicted accused also have questioned their convictions on the ground that arrest and trial were illegal. Since a common question arises in all these matters, they are being disposed of by a common judgment.

xxx xxxx xxx

(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 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.

(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 CrPC 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 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial. The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

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

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

11 Thereafter in ***Abdul Rashid Ibrahim Mansuri Vs. State of Gujrat (2000) 2 SCC 513*** the said view was followed as under :-

“18. A two Judge Bench of this Court has considered the said question along with other questions in *State of Punjab v. Balbir Singh, [1994] 3 SCC 299*. In paragraph 25 of that judgment the conclusions were laid down, of which what is relevant for this case regarding *Section 42(1)* is the following:

"(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."

19. When the same decision considered the impact of non-compliance of [Section 50](#) it was held that "it would affect the prosecution case and vitiate the trial". But the Constitution Bench has settled the legal position concerning that aspect in [State of Punjab v. Baldev Singh](#) (supra), the relevant portion of which has been extracted by us earlier. We do not think that a different approach is warranted regarding non-compliance of Section 42 also. If that be so, the position must be the following :

20. If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused."

12 *Abdul Rashid Ibrahim Mansuri's case (supra)* was further followed in *Koluttumottil Razak Vs. State of Kerala 2000 (4) SCC 465* to hold that :-

“6. It is a mandate of Section 42 of the Act that when an officer referred to in Sub-section (1) thereof "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 he may detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence under the Act. The other requirement of law is that the officer who takes down the information in writing or records grounds for his belief shall forthwith send a copy thereof to his immediate official superior. A three-Judge Bench of this Court held in Abdul Rashid Ibrahim Mansuri v. State of Gujarat : that non-compliance with the requirements of Section 42(1) and (2) would render the resultant search and seizure suspect, though that by itself may not vitiate the proceedings.

7. In the present case, unfortunately, apart from the evidence of the police officers there is absolutely no independent evidence to ensure confidence in our mind that the search was in fact conducted by PW 2 as he has claimed. As his evidence is required to be approached with suspicion due to violation of [Section 42](#) of the Act we may require corroboration from independent sources that is lacking in this case.”

13 Supreme Court in *Sajan Abraham Vs. State of Kerala (2001) 6 SCC 692* though held compliance of Section 42 of the NDPS Act mandatory but called for more pragmatic approach observing as under :-

“6. With regard to [Section 42](#), the submission is that PW5 has not recorded the information given by PW3 with respect to the appellant's involvement before proceeding to arrest him in this case. This constitutes violation of [Section 42](#) of the Act. It is true under [Section 42\(1\)](#), the officer concerned, when he has reason to believe from his

personal knowledge or information received from any person, he is obliged to take it down in writing if such information constitutes an offence punishable under Chapter IV of the Act and send it forthwith to his immediate superior. Such an officer is empowered to search any building, conveyance and in case of any resistance, break up any door or remove any obstacle for such entry, seizure of such drug or substance and to arrest such person whom he has reason to believe to have committed any offence punishable under the said Chapter. Thereafter such officer has to send a copy of this information forthwith to his immediate superior. Submission is that PW5 after receiving the said information has not communicated it to his immediate superior which constitutes violation of Section 42. In construing any facts to find, whether prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug, traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of law. The court however while construing such provisions strictly should not interpret it so literally so as to render its compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then prosecution case should not be thrown out.”

14 The aforesaid views taken in the case of **Abdul Rashid Ibrahim Mansuri's case (supra)** and the one in **Sajan Abraham's case (supra)** were comparatively analyzed by the Supreme Court in the case of **Karnail Singh Vs. State of Haryana 2009 (5) RCR (Criminal) 515** to hold as under :-

“17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements

of [Section 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 concerned Register 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 of requirements of sub-sections (1) and (2) of [section 42](#) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of [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 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.”

15 View taken by Constitution Bench in ***Karnail Singh's case (Supra)*** was again followed in ***Bahadur Singh Vs. State of Haryana (2010) 4 SCC 445*** to hold that :-

“12. It cannot but be noticed that with the advancement of technology and the availability of high speed exchange of information, some of the provisions of the NDPS Act, including Section 42, have to be read in the changed context. Apart from the views expressed in Sajan Abraham's case (supra) that the delay caused in complying with the provisions of Section 42 could result in the escape of the offender or even removal of the contraband, there would be substantial compliance, if the information received were subsequently sent to the superior officer. In the instant case, as soon as the investigating officer reached the spot, he sent a wireless message to the Deputy Superintendent of Police, Kurukshetra, who was his immediate higher officer and subsequent to recovery of the contraband, a Ruqa containing all the facts and circumstances of the case was also sent to the Police Station from the spot from where the recovery was made on the basis whereof the First Information Report was registered and copies thereof were sent to the Ilqa Magistrate and also to the higher police officers. As was held by the High Court, there was, therefore, substantial compliance with the provisions of Section 42 of the NDPS Act and no prejudice was shown to have been caused to the accused on account of non-reduction of secret information into writing and non-sending of the same to the higher officer immediately thereafter.

13. Apart from the decision in Sajan Abraham's case (supra), the decision of the Constitution Bench in [Karnail Singh's case \(supra\)](#), has also made it clear that non-compliance with the provisions of [Section 42](#) may not vitiate the trial if it did not cause any prejudice to the accused. Furthermore, whether there is adequate compliance of [Section 42](#) or not is a question of fact to be decided in each case.”

16 The same was further followed in ***Rajender Singh Vs. State of Haryana (2011) 8 SCC 130*** to observe that :-

4. A reading of the above said provision pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the Section itself. Section 42(2), however, which calls for interpretation in the matter before us, is however categorical that the information if taken down in writing shall be sent to the superior officer forthwith. In Karnail Singh's case, this Court has held that the provisions of Section 42(2) are mandatory and the essence of the provisions has been set out in the following terms:

"In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham 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 sub-sections (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."

5. It is therefore clear that the total non-compliance with the provisions sub-section (1) and (2) of [Section 42](#) is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced. Xxx xxx"

17 Thus, from the aforesaid precedents, it can be concluded
that :-

- a) Compliance of [Section 42](#) of the NDPS Act is mandatory;*
- b) The compliance as contemplated under [Section 42\(1\)](#) and [42\(2\)](#) of the NDPS Act including that in the proviso in regard to writing down the information received and the grounds of belief are mandatory;*

- c) *To interpret the same pragmatically, in some cases the prosecution may comply the same with some delay;*
- d) *The delay needs to be explained.*
- e) *Where cogent explanation has been offered by prosecution for delayed compliance, onus shifts on accused to prove prejudice caused on account of such delay.*
- f) *Total non-compliance of Section 42 of the NDPS Act is impermissible;*
- g) *Non-compliance of Section 42 of the NDPS Act itself may not vitiate the trial but puts prosecution under cloud of doubt.*

18 In the present case from the reply placed on record by the prosecution it is not forthcoming whether there is compliance of provisions of Section 42 of the NDPS Act or not. Leave aside question of delay. Obviously the non-compliance of Section 42 of the NDPS Act may not vitiate the trial but the same does put the search and seizure under cloud.

19 Without further commenting on the merits of the case and considering the incarceration suffered by the petitioner, the present petition is allowed. The petitioner is ordered to be released on bail on his furnishing bail/surety bonds to the satisfaction of the Ld. Trial Court/Duty Magistrate, concerned. However, in addition to conditions that may be imposed by the Trial Court/Duty Magistrate concerned, the petitioner shall remain bound by the following conditions :-

- (i) The petitioner shall not mis-use the liberty granted.*
- (ii) The petitioner shall not tamper with any evidence oral or documentary during the trial.*
- (iii) The petitioner shall not absent himself on any date before the trial.*
- (iv) The petitioner shall not commit any offence while on bail.*

- (v) *The petitioner shall deposit his passport, if any with the trial Court.*
- (vi) *The petitioner shall give his cellphone number to the police authorities and shall not change his cell-phone number without permission of the trial Court.*
- (vii) *The petitioner shall not in any manner try to delay the trial.*

20 Needless to say that anything observed herein shall not be construed to be an opinion on the merits of the case.

(PANKAJ JAIN)
JUDGE

31.01.2024
Pooja sharma-I

Whether speaking/reasoned	Yes
Whether Reportable :	No