

HIGH COURT OF PUNJAB & HARYANA

Justice Jasjit Singh Bedi.

Pankaj. - Petitioner.

Versus

State of Punjab - Respondent.

CRM-M-25498-2021

14.06.2022

NDPS Act - Section 37, 42 - While delayed compliance was acceptable, however, where there was a total non compliance of Section 42 as appears to be the case herein - Accused ought to be granted the concession of regular bail - Prima facie satisfaction can be recorded under Section 37 of the NDPS Act that there are reasonable grounds to believe that the petitioner is not guilty of the offence and was not likely to commit any offence while on bail as he has clean antecedents. [Para 13, 14]

Mr. Parminder Singh Sekhon, Advocate for the Petitioner. Mr. Kirat Singh Sidhu, Deputy Advocate General, Punjab.

JASJIT SINGH BEDI, J.

The Prayer in this petition under Section 439 Cr.PC is for the grant of regular bail in case FIR No.280 dated 08.11.2020 under Sections 22, 25, 27-A and 29 of NDPS Act registered at Police Station City Sunam, District Sangrur.

2. The brief facts of the case are that when the police party was present at ITI Chowk, Sunam at about 10.05 pm a secret informer informed ASI Kashmir Singh that the petitioner-accused-Pankaj was habitual of selling intoxicating tablets and on that day also he had kept the tablets in his white colour Activa Scooter bearing number PB-07-BJ-4106 and was going to sell the same to his customers on the side of drain bridge situated at Bathinda road, Sunam and if a check post was set up he could be apprehended along with the

intoxicating tablets and scooter. Since the information was said to be reliable, therefore, at 11.00 pm a ruqa was sent to the police station concerned i.e. P.S. City Sunam for registering the FIR against the petitioner. On the basis of ruqa the present FIR No. 280 dated 08.11.2020 under Sections 22, 25, 27-A and 29 of NDPS Act came to be registered against the accused petitioner at P.S. City, Sunam, Sangrur.

3. During the course of investigation the check post was installed and one person was seen coming from the side of the bridge riding on a Aactiva scooter bearing number PB-07-BJ-4106 on which a plastic bag was lying in front of the seat of the Aactiva Scooter. When he was signalled to stop with a Torch light by SI Darshan Singh, the rider of the scooter tried to take a U Turn but the scooter slipped and fell on the ground and after slipping the engine stopped. Due to the same the plastic bag lying on the scooter fell down and intoxicating tablets/strips came out. On being apprehended the petitioner disclosed his name as Pankaj, the present petitioner and 2000 strips, each strip containing 10 tablets i.e. 20,000 intoxicating tablets of Tramadol Hydrochloride labelled as Radol-100 was recovered.

4. During the interrogation, the petitioner disclosed that the intoxicating tablets were supplied to him by Surinder Singh @ Shelly son of Gurmeet Singh resident of Sunam and he supplied the same to Ramandeep Singh owner of Deep Medical Hall and Mehroj Kumar @ Uji. Based on the above said statement, the said persons were nominated as accused.

5. The Counsel for the petitioner firstly submits that the search and seizure is completely vitiated as Section 42 of the NDPS Act has been violated. No communication of the secret information received was sent to the superior officer within 72 hours and no reasons were recorded as to why warrants/authorization could not be obtained prior to conducting the raid/setting up of a naka after sunset. The police party was travelling in a private vehicle and the details of the ownership of the said private vehicle had not been mentioned anywhere in the police proceedings which was a clear cut violation of the policy framed by the government of Punjab regarding the use of private vehicles during the investigation of a criminal case. He further contended that the petitioner was a first time offender, in custody since 8.11.2020 and as none of the 23 prosecution witness had been examined, the delayed trial itself entitled him to the grant of bail more so when his co-accused had been granted the same concession.

6. The Counsel for the petitioner has placed reliance on the judgments in **Rajender Singh v. State of Haryana Criminal Appeal No.1051 of 2009 Decided on 08.08.2011**, **Sukhdev Singh v. State of Haryana 2013(2) RCR (Criminal) 232**, **Darshan Singh v. State of Haryana 2016(1) RCR (Criminal) 333**, **State of Rajasthan v. Chhagan Lal 2014(4) RCR (Criminal) 559**, **State of Rajasthan v. Jag Raj Singh @ Hansa 2016(3) RCR (Criminal) 539**, **Boota Singh & Ors. v. State of Haryana 2021(2) RCR (Criminal) 892**, **Syed Yusuf Syed Noor v. State of Maharastra 2000(1) Crimes 193** to contend that there has been violation of Section 42 of the NDPS Act in the instant case.

7. He contends that violation of the mandatory provisions of the Act would entitle the accused to the grant of bail even if the recovery is of commercial quantity of contraband.

Reliance is placed upon the judgments in **Sarija Banu(A) Janathani @ Janani & Anr. v. State through Inspector of Police 2004(12) SCC 266**, **Gurjant Singh v. The state of Punjab CRM-M-20943-2022 Decided on 20.05.2022**, **Sarabjit Kaur v. State of Punjab CRM-M-26248-2021(O&M) Decided on 30.03.2022**, **Raju Bhavlal Pawar & Ors. v. The State of Maharashtra 2021 ALL MR (Cri) 4651**, **Basanth Balram v. State of Kerala 2019(2) RCR (Criminal) 488** and **Sudesh Singh @ Tandu v. State of Punjab 2011(9) RCR (Criminal) 922**.

8. The Counsel for the State on the other hand contends that since the plastic bag containing the intoxicating tablets had fallen on the ground and when the Activa scooter slipped it could not be said that the contraband was kept or concealed in any conveyance and, therefore, Section 42 would not be attracted. He has placed reliance upon judgment of this Court in **Pippal Singh v. State of Punjab Crl. Appeal No.1039-DB-2007 Decided on 14.11.2014** to contend that even otherwise there has been substantial compliance of Section 42 of the NDPS Act. He further contends that heavy recovery of the contraband has been effected from the petitioner which does not entitle him to the grant of bail.

9. I have heard learned Counsel for both the parties at length.

10. Before proceeding further it would be apposite to refer to Section 42 of the NDPS Act and the same is reproduced below:-

“ Section 42 in The Narcotic Drugs and Psychotropic Substances Act, 1985

1[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 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 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.]

11. The Hon'ble Supreme Court and various High Court have examined Section 42 of the Act comprehensively and some of the judgments in this regard are reproduced hereinbelow:-

The Hon'ble Supreme Court in **Rajender Singh v. State of Haryana Criminal Appeal No.1051 of 2009 Decided on 08.08.2011** held as under:-

" 1. At about 4 p.m. on the 30th January 1997, PW-6 Inspector Kuldip Singh of the CIA Staff, Hisar sent Ruqa Ex. PG to Police Station Bhuna that while he was present at the Bus Adda of village Bhuna in connection with the investigation of a case, he had received secret information that the appellant Rajinder Singh @ Chhinder, was an opium addict and also dealing in its sale, and that he had kept some opium in the shed used for storing fodder in his farm house, and if raid was organized, the opium could be recovered. On the basis of the aforesaid Ruqa, a formal First Information Report was drawn up for an offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the "Act"). A wireless message was also sent to the DSP, Fatehabad PW-5 Charanjit Singh to reach the spot.

2. Mr. Zafar Sadiqui, the learned counsel for the appellant, has made four submissions during the course of the hearing. He has first submitted that as the provisions of Section 42(2) of the Act had not been complied with, the conviction of the appellant could not be sustained in the light of the judgment of the Constitution Bench of this Court in **Karnail Singh v. State of Haryana 2009 (5) RCR (Criminal) 515 : 2009(4) Recent Apex Judgments (R.A.J.) 638 : (2009)8 SCC 539 8 SCC 539**. He has further submitted that no serious effort had been made to associate an independent witness with the search and seizure and that the link evidence in the case was also missing as the Malkhana register pertaining to the recovered opium was deposited had not been produced as evidence. He has finally submitted that as the provisions of Sections 52, 55 and 57 of the Act had not

been complied with was an additional reason as to **why the conviction could not be sustained. Mr. Manjit Dalal, the learned counsel for the State of Haryana, has however supported the judgments of the courts below and has pointed out that the Ruqa Exhibit PA had been sent to the Police Station for the registration of the FIR and the fact that information had been conveyed on the wireless to DSP Charanjit Singh was sufficient compliance with the provisions of Section 42(2) of the Act. He has also controverted the other submissions made by Mr. Sadiqui.**

3. We have heard the learned counsel for the parties and gone through the judgment impugned. To our mind, the entire controversy hinges on Section 42 which is reproduced below:

“42. Power of entry, search, seizure and arrest without warrant or authorization. –

(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 or of the Border Security Force 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, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence 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 Chapter IV relating to such drug or substance; 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 Chapter IV relating to such drug or substance. Provided that if such 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.

(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 forthwith send a copy

thereof to his immediate official superior.

42(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."

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.. We have gone through the evidence of PW-6 Kuldip Singh. He clearly admitted in his cross- examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer Inspector Kuldip Singh. It is, therefore, clear that there has been complete non-compliance with the provisions of Section 42(2) of the Act which vitiates the conviction.

6. *Mr. Dalal, the learned counsel for the respondent-State has, however, referred to paragraph 34 of the judgment of the Constitution Bench in which general observations have been made with regard to the provisions of Section 41 (1) and 42(2) with respect to the latest electronic technology and the possibility that the said provisions may not be entirely applicable in such a situation. Concededly the present case does not fall in this category. In any case the principles settled by the Constitution Bench are in paragraph 35 and have already been re-produced by us hereinabove. Likewise, the dispatch of a wireless message to PW-6 does not amount to compliance with Section 42(2) of the Act as held by this Court in **State of Karnataka v. Dondusa Namasa Baddi 2010(4) RCR (Criminal) 367: 2010(5) Recent Apex Judgments (R.A.J.) 333 : (2010) 12 SCC 495.***

The Hon'ble Supreme Court in **Sukhdev Singh v. State of Haryana 2013(2) R.C.R. (Criminal) 232** held as under:-

" 21. As per the statement of PW1, no effort was made by him to reduce the information into writing and inform his higher authorities instantaneously or even after a reasonable delay which has to be explained with reasons in writing. On the contrary, in the present case, the Investigating Officer PW 1 had more than sufficient time at his disposal to comply with the provisions of Section 42. Admittedly, he had received the secret information at 11.30 a.m., but he reached the house of the accused at 2 p.m. even when the distance was only 6 kilometers away and he was in a jeep. There is not an iota of evidence, either in the statement of PW 1 or in any other documentary form, to show what the Investigating Officer was doing for these two hours and what prevented him from complying with the

provisions of Section 42 of NDPS Act.

22. There is patent illegality in the case of the prosecution and such illegality is incurable. This is a case of total non-compliance, thus the question of substantial compliance would not even arise for consideration of the Court in the present case. The twin purpose of the provisions of Section 42 which can broadly be stated are that: (a) it is a mandatory provision which ought to be construed and complied strictly; and (b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post- recovery.

23. Once the contraband is recovered, then there are other provisions like Section 57 which the empowered officer is mandatorily required to comply with. That itself to some extent would minimize the purpose and effectiveness of Section 42 of the NDPS Act. It is to provide fairness in the process of recovery and investigation which is one of the basic features of our criminal jurisprudence. It is a kind of prevention of false implication of innocent persons. The legislature in its wisdom had made the provisions of Section 42 of NDPS Act mandatory and not optional as stated by this Court in the case of Karnail Singh (supra).

24. Thus, the present appeal merits grant of relief to the accused. We accordingly set aside the judgment of the High Court as well as the Trial Court and acquit the accused of an offence under Section 15 of NDPS Act. We direct the accused to be set at liberty forthwith, if not required in any other case.

25. Before we part with this file, we consider it the duty of the Court to direct the Director General of Police concerned of all the States to issue appropriate instructions directing the investigating officers to duly comply with the provisions of Section 42 of NDPS Act at the appropriate stage to avoid such acquittals. Compliance to the provisions of Section 42 being mandatory, it is the incumbent duty of every investigating officer to comply with the same in true substance and spirit in consonance with the law stated by this Court in the case of Karnail Singh (Supra).

The Hon'ble Supreme Court in **Darshan Singh v. State of Haryana 2016(1) R.C.R. (Criminal) 333** held as under:-

" 5. At the beginning of hearing the instant appeals, learned senior counsel for the appellant informed the Bench, that he would be raising various grounds in his challenge to the order passed by the Additional Sessions Judge, Panipat, as also, the impugned judgment and order passed by the High Court. Having heard the first submission, advanced at the hands of learned senior counsel, premised on section 42 of the NDPS Act, we are satisfied, that it would not be necessary for us to deal with the remaining submissions, and accordingly, we did not hear learned senior counsel for the appellant, on the remaining submissions.

6. Insofar as the contention of learned senior counsel for the appellant under section 42 of

the NDPS Act is concerned, he relied on the interpretation placed by a Constitution Bench judgment of this Court on the above provisions in **Karnail Singh v. State of Haryana, 2009(5) RCR (Criminal) 515 : 2009(4) Recent Apex Judgments (R.A.J.) 638 : (2009) 8 SCC 539**, wherein, this Court recorded its conclusions in Paragraph 35, which is being extracted hereunder :

" 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 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 nonsending 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 is ours)

7. Based on conclusion (d) recorded herein above, it was the vehement contention of the learned senior counsel for the appellant, that the mandate contained in section 42 of the NDPS Act was not at all complied with, by the Station House Officer, Police Station, Shahar, Panipat, who had received the secret information and conducted a raid on the premises of the accused-appellant Darshan Singh. Based on the noncompliance of the provisions of section 42 of the NDPS Act, requiring the officer concerned to record in writing the details in respect of secret information received by him under section 42(1) of the NDPS Act, and further, to communicate the aforesaid details to the officer superior to him forthwith [under section 42(2) of the NDPS Act], learned senior counsel seeks setting aside of the conviction of the accused-appellant Darshan Singh, at the hands of the Additional Sessions Judge, Panipat, and affirmed at the hands of the High Court.

8. Whilst it was the case of the learned senior counsel for the appellant that the provisions of section 42(1) of the NDPS Act had not been complied with at all, learned counsel for the respondent State vehemently contested the aforesaid assertion. For contesting the submission advanced at the hands of the learned senior counsel for the appellant, reliance was placed on the factual position narrated in Paragraph 26 of the order dated 06.02.2001, passed by the trial court. Paragraph 26 is being extracted hereunder :

“26. In the present case, no doubt the report of the arrest of the accused and the seize has not been sent to the Police Station, but in the present case immediately after effecting the recovery, the ruqa was sent to the Police Station and on the basis of the same formal FIR Ex.PB/1 was recorded at 5.15 p.m. and Ex.PB1 further proves that the copy of the said FIR was sent through special messenger, which was received by the then Chief Judicial Magistrate, Panipat at 8.45 p.m. on the same day and the copy was also sent to the S.P., Panipat. Thus, it stands proved that about the arrest and seizure of the accused, the information was received by the superior officer, as such there is compliance of Section 57 of the Act.”

9. A perusal of Paragraph 26 extracted above reveals that immediately after conducting the raid, the concerned Station House Officer, Police Station Shahar, Panipat, registered a first information report, which was subsequently dispatched to the Superintendent of Police, Panipat on the same day, i.e. to the officer superior to the officer, who had conducted the raid (on receipt of secret information). According to the learned counsel for the respondent-State since first information report was sent to the superior officer, non-compliance of Section 42 had not caused any prejudice to the appellant, and therefore, he could claim no benefit under Section 42.

10. The solitary question that arises for our consideration in the instant appeal, is whether the registration of the first information report, narrating the factual position as has already been described at the beginning of this order, as also,

the communication of the first information report to the Superintendent of Police, Panipat would constitute an effective compliance of the provisions contained in section 42 of the NDPS Act.

11. Having given our thoughtful consideration to the submission advanced at the hands of learned counsel for the respondent, we are of the view that the mandate contained in section 42(1) of the NDPS Act, requiring the recording in writing, the details pertaining to the receipt of secret information, as also, the communication of the same to the superior officer are separate and distinct from the procedure stipulated under the provisions of the Criminal Procedure Code. Subsection 1 of section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of Second Class specially empowered by the State Government may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Sub-section (2) of Section 41 refers to issue of authorisation for similar purposes by the officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc. Sub-section (1) of section 42 of the NDPS Act lays down, that the empowered officer, if he has a prior information given by any person, should necessarily take it down in writing, and where he has reason to believe from his personal knowledge, that offences under Chapter IV have been committed or that 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 warrant between sunrise and sunset and he may do so without recording his reasons of belief. The two separate procedures noticed above are exclusive of one another. Compliance of one, would not infer the compliance of the other. In the circumstances contemplated under section 42 of the NDPS Act the mandate of the procedure contemplated therein will have to be followed separately, in the manner interpreted by this Court in Karnail Singh's case (supra) and the same will not be assumed, merely because the Station House Officer concerned had registered a first information report, which was also dispatched to the Superintendent of Police, in compliance with the provisions of the Criminal Procedure Code.

12. In the above view of the matter, it is not possible for us to accept the submission of the learned counsel for the respondent-State, that the registration of the first information report at the hands of the Station House Officer, Police Station Shahar, Panipat and its communication to the Superintendent of Police, Panipat would constitute sufficient compliance of the mandate of section 42 of the NDPS Act.

13. In aforesaid view of the matter, we are satisfied that section 42 of the NDPS Act was not complied with at all, insofar as the present controversy is concerned. Thus viewed, conclusion (d) recorded in Paragraph 35 of the judgment rendered in Karnail Singh's case (supra), would fully apply to the facts and circumstances of the present case, and we are left with no other option, but to set aside the conviction and the sentence of imprisonment of the accused-appellant Darshan

Singh. Ordered accordingly. The appeal stands allowed.

The Hon'ble Supreme Court in **State of Rajasthan v. Chhagan Lal 2014(4) RCR (Criminal) 559** held as under:-

*" 6. In this case, the bag was recovered from the well which the respondent claimed belonged to him by the respondent and the independent witness Pappu by entering in the well at 5.00 O'clock in the morning. **The High Court has clearly recorded a finding of fact that the bag was taken out from the well after sunset and prior to sunrise. We have no reason to disbelieve this finding.***

*7. According to the prosecution, the respondent threw the bag in the well. The suspected contraband was, therefore, tried to be concealed in a well. The possibility of its destruction was imminent. In fact, the evidence on record indicates that water entered in the bag and got mixed up with the opium. The opium was liquefied. This was indeed, an emergent situation. The well had to be searched with the help of an independent witness, which was done. **In such an emergent situation, if the officer had reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence (which, in this case, would have resulted in destruction of evidence), as per proviso to section 42(1) of the NDPS Act, he could have conducted the search of the well after recording grounds of his belief. Section 42(2) requires that grounds of belief so recorded have to be communicated to the immediate superior official within seventy-two hours. In this case, there is nothing to establish that the officer had followed this procedure. There is nothing to establish that he recorded grounds of his belief and communicated them to his immediate superior. As observed by the Constitution Bench in Karnail Singh (supra), total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible. However, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. Since in this case, there is total non-compliance of section 42 of the NDPS Act, the High Court has rightly set aside the conviction of the respondent. The impugned order calls for no interference from this end."***

The Hon'ble Supreme Court in **State of Rajasthan v. Jag Raj Singh @ Hansa 2016(3) RCR (Criminal) 539** held as under:-

" 13. 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 Exh. P-15 which was sent to Circle Officer, Nohar was not as per the information recorded in Exh. P 14 and Exh. P 24. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

14. 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. In the present case, there is no case that any ground for belief as contemplated by proviso to sub-section (1) of Section 42 or Sub-section (2) of Section 42 was ever recorded by Station House Officer who proceeded to carry on search. Station House Officer has appeared as PD-11 and in his statement also he has not come with any case that as required by the proviso to Sub-section (1), he recorded his grounds of belief anywhere. The High Court after considering the entire evidence has made following observations:

“Shishupal Singh PD-11 by whom search has been conducted, on reaching at the place of occurrence by him no reasons to believe have been recorded before conducting the search of jeep bearing HR 24 4057 under Section 42(1), nor any reasons in regard to not obtaining the search warrant have been recorded. He has also not stated any such facts in his statements that he has conducted any proceedings in regard to compliance of proviso of Section 42(1). Since reasons to believe have not been recorded, therefore, under Section 42(2) it is not found on record that copy thereof has been sent to the senior officials. Shishupal Singh could be the best witness in this regard, who has not stated any fact in his statement regarding compliance of proviso to Section 42(1) and Section 42(2), sending of copy of reasons to believe recorded by him to his senior officials.”

18. *There is one more aspect which needs to be noted. The present is a case where prosecution himself has come with case that secret information was received from informer which information was recorded in Exh. P-14 and Exh. P-21 Roznamacha and thereafter the Station House Officer with 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 of Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 has to be complied with. This Court in Directorate Of Revenue & Another v. Mohammed Nisar Holia, 2008(1) RCR (Criminal) 241 : (2008) 2 SCC 370, had occasion to consider Sections 41,42 and 43 explanation. Following was stated in paragraph 14:*

“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 of section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefor must be borne in mind that 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 “

19. Thus the present is not a case where Section 43 can be said to have been attracted, hence, non-compliance 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. Sub-section (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 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 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 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."

21. *A three Judges Bench in Saiyad Mohd. Saiyad Umar Saiyed & others v. The State Of Gujarat (supra) after elaborate consideration of provisions of the NDPS Act including section 50 had endorsed the judgment of this court in Balbir Singh's case (supra).*

22. A Constitution Bench of this Court in State of Punjab v. Baldev Singh, 1999(3) RCR (Criminal) 533 : (1999) 6 SCC 172, had occasion to consider the provisions of the NDPS Act and several earlier judgments of this Court. The Constitution Bench noticed that the earlier judgments in Balbir Singh's case has found approval by three Judges Bench in Saiyad Mohd. Saiyad Umar Saiyed & others v. The State Of Gujarat (supra) and a discordant note was struck by two Judges Bench in State of Himachal Pradesh v. Pirthi Chand and another, 1996(2) RCR (Criminal) 759 : (1996) 2 SCC 37. The Constitution Bench approved the view of this Court in Balbir Singh's case that there is an obligation on authorised officer under section 50 to inform the suspect that he has right to be informed in the presence of the Gazetted Officer. It was held by Constitution Bench that if search is conducted in violation of Section 50 it may not vitiate the trial but that would render the recovery of illicit articles suspect and vitiates the conviction and sentence of the accused. What is said about non-compliance of Section 50 is also true with regard to non-compliance of Section 42 of the Act.

23. *In Beckodan Abdul Rahiman v. State Of Kerala, 2002(2) RCR (Criminal) 385 : 2002 (4) SCC 229, this Court had occasion to consider both Section 42 and Section 50. In the above case there was non compliance of Section 42 (2) as well as Section 50. It was also noticed that a Constitution Bench in State of Punjab v. Baldev Singh (supra) has already laid down that provisions of Section 42 and 50 are mandatory and their non-compliance would render the investigation illegal. Following was held in paragraphs 5 and 6:*

" 5. In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW1). After recording the information, the witnesses is not shown to have complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a Gazetted Officer or Magistrate.

6. We are of the firm opinion that the provisions of sub- section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted "

24. *It is also relevant to note another Constitution Bench judgment of this Court in Karnail Singh v. State of Haryana, 2009(5) RCR (Criminal) 515 : 2009(4) Recent Apex Judgments (R.A.J.) 638 : 2009 (8) SCC 539, where this Court had again occasion to consider the provisions of Sections 42 and 50. The Constitution Bench noted the divergence of opinion in two earlier cases which has resulted in placing the matter before the larger Bench. The question was noticed in paragraphs 1 and 2 of the judgment which are to the following effect:*

"(1) In the case of Abdul Rashid Ibrahim Mansuri v. State of Gujarat, 2000(1) RCR (Criminal) 611 : (2000) 2 SCC 513, a three-Judge Bench of this Court held that compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of Sajan Abraham v. State of Kerala, 2001(3) RCR (Criminal) 808 : (2001) 6 SCC 692, which was also decided by a three-Judge Bench, it was held that Section 42 was not mandatory and substantial compliance was sufficient.

(2) In view of the conflicting opinions regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest without warrant or authorization, these appeals were placed before the Constitution Bench to resolve the issue.

(3) The statement of objects and reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well organised gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over"

25. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance of requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance of Section 42. The Constitution Bench noted the effect of

the aforesaid two decisions in paragraph 5. The present is not a case where insofar as compliance of Section 42(1) proviso even an arguments based on substantial compliance is raised there is total non-compliance of Section 42(1) proviso. As observed above, Section 43 being not attracted search was to be conducted after complying the provisions of Section 42. We thus, conclude that the High Court has rightly held that non compliance of 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.

The Hon'ble Supreme Court in ***Boota Singh & Ors. v. State of Haryana 2021(2) RCR (Criminal) 892*** held as under:-

“ 12. 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.

13. It is an admitted position that there was total non-compliance of the requirements of Section 42 of the NDPS Act.

14. The decision of this Court in Karnail Singh as followed in Jagraj Singh alias Hansa, is absolutely clear. Total non-compliance of Section 42 is impermissible. The rigor of Section 42 may get lessened in situations dealt with in the conclusion drawn by this Court in Karnail Singh but in no case, total non-compliance of Section 42 can be accepted.

The Hon'ble Bombay High Court in ***Syed Yusuf Syed Noor v. State of Maharashtra 2000(1) Crimes 193*** held as under:-

“ 5. Now, we revert to the main challenge based on non-compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act. According to the testimony of P.W.6, while he was sitting in the Office of the SDPO, as he was called by him along with other Police Officers, the information, that the appellant is selling brown sugar at his residence, was received. The SDPO told P.W. 6 that he should inform about this information to the SP, and he left. P.W.6 further states that he informed the SP about it on telephone and thereafter the Police Staff, Panch witnesses and Video Cameraman left for the residence of the appellant. At this stage, reference may also be made to the copy of Station Diary Entry No. 25, dated 29th February, 1996 (Exhibit No. 28), recorded at 11.20 hrs. It, inter alia, records that as per the directions of Shri Shekhar, the Sub-Divisional Police Officer (SDPO), Police Inspector V. G. Raut (P.W.6), along with other officers, two Panchas and Video Cameraman left the Police Station at Old City, Akola, District Akola, in order to lay a raid in Khidkipura Locality, on the basis of information that the appellant possessed and sold brown sugar at

his house, after giving intimation in writing to Panchas and Video Cameraman as well as to the Superiors. This is the only document on which reliance has been placed by the learned Additional Public Prosecutor to show that Section 42 of the Narcotic Drugs and Psychotropic Substances Act was complied with.

6. Section 42(1) of the Narcotic Drugs and Psychotropic Substances Act, *inter alia*, postulates that the concerned officer, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, in respect of which an offence punishable under Chapter IV has been committed, he may enter such premises, conduct search and effect seizure and arrest without warrant or authorisation. Section 42(2) stipulates 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 forthwith send a copy thereof to his immediate official superior. Section 42 has been held to be mandatory (See *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299 : (1994 Cri LJ 3702).

7. Turning to the facts of the present case, looking from any angle, i.e., whether the officer concerned, for the purposes of Section 42(1) of the Narcotic Drugs and Psychotropic Substances Act, was SDPO, Shri Shekhar, or it was Police Inspector, P.W.6 Raut, clearly there has been total non-compliance of Section 42. It deserves to be noticed that SDPO, Shri Shekhar was not examined as a witness by the prosecution. Further, as already noticed, the information to immediate official superior, namely, SP was given on telephone only. According to P.W.6, no record of any such information was prepared or kept, or if it was so prepared, it was not produced by the prosecution for the reasons best known to it. Exhibit 28 though records that intimation in writing was given to superiors, no such writing has been produced. This very document, in fact, notices that SDPO Shekhar was dealing with the matter. It was at his direction that the police party went to the residence of the appellant. He is stated to have told P.W.6 to inform his immediate superior, namely, SP, who is said to have been informed on telephone, as per the testimony of P.W.6, and in writing, as per Exhibit 28, though none was produced. In fact, there has been non-compliance both of sub-section (2) and sub-section (1) of Section 42 of the Narcotic Drugs and Psychotropic Substances Act. On the facts of the present case, Exhibit 28 cannot be pressed into service to show compliance of Section 42(1) of the Narcotic Drugs and Psychotropic Substances Act. It is only a document recording and showing departure of the police party from the Police Station. It does not record the reason of belief contemplated by Section 42(1) of the Narcotic Drugs and Psychotropic Substances Act. Alternatively, assuming that the officer to whom the information was given about the appellant selling narcotic drug at his residence was P.W.6, in that eventuality, he was required to record reasons to believe and was required to send a copy thereof to the immediate official superior in terms of Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act. In fact, P.W.6 does not even claim to be an officer to whom such information was given. According to P.W.6, SDPO told him that he should inform about the receipt of information to SP, which he informed to SP on telephone. On

these facts, we find no substance in the contention of the learned Additional Public Prosecutor that since information was given to P.W.6 by SDPO Shekhar, on the facts and circumstances of the case, it was neither necessary to comply with Section 42 of the Narcotic Drugs and Psychotropic Substances Act, nor there has been substantial compliance thereof. Section 42 of the Narcotic Drugs and Psychotropic Substances Act is mandatory. The object of the Narcotic Drugs And Psychotropic Substances Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1), and to that extent, they are mandatory. Consequently, the failure to comply with these requirements affects the prosecution case and, therefore, vitiates the trial. (See Balbir Singh's case (1994 Cri LJ 3702) (supra).

8. *Reference may also be made to the two decisions on which reliance has been placed by the learned counsel for the appellant. The first of such decisions is that of Mahinder Kumar v. State, Panaji, Goa, 1999 SCC (Cri) 79 : (1995 Cri LJ 2074), where the Supreme Court held that since the officer had, admittedly, not recorded the grounds of his belief at any stage of the investigation subsequent to his realising that the accused persons were in possession of Charas and did not forward a copy of the grounds to his superior officer, as required by Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act because he had not made any record under the proviso to Section 42(1), as such the prosecution had to fail. The second is a Division Bench decision of this Court in Lamin Bojang v. State of Maharashtra, 1997 Cri LJ 513, holding that forwarding of the information under Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act was mandatory and the written documentary information is to be forwarded to the superior officer and not oral information and that the provisions had to be strictly complied with, and the question whether the prejudice is caused to the accused or not is entirely extraneous.*

9. In view of our aforesaid conclusion about the non-compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, the trial of the appellant stands vitiated and consequently, the conviction and sentence of the appellant is set aside. In this view, we direct forthwith release of the appellant, if not wanted in some other case. In case he has paid fine, the same shall be refunded to him.

12. The Hon'ble Supreme Court and various High Courts have granted the concession of bail where the mandatory provisions of NDPS Act have not been complied with even where the recovery is of commercial quantity of contraband. Some of the judgments in this regard are reproduced hereinbelow:-

The Hon'ble Supreme Court in **Sarija Banu (A) Janarthani @ Janani & Anr. v. State through Inspector of Police 2004(12) SCC 266** held as under:-

*" 6. The fact that such a telegram was sent and received is not disputed. However, it is stated by the respondent that they could not find whereabouts of Kandasamy. It is also pertinent to note that even though such a serious information was received by the police as per the complainant, no case was registered and no investigation started. From this facts, it appears that something happened on 9.7.2003 and these are relevant factors of granting bail. **We are conscious of the stringent provisions contained in Section 37 of the NDPS Act and we are also conscious of the fact that a charge has now been framed against the appellants and they have to face the trial.***

7. It is pertinent to note that in the bail application the appellants, it was alleged, that there was serious violation of Section 42 of the NDPS Act. In the impugned order nothing is stated about the alleged violation of Section 42, and it is observed that it was not necessary to consider such violation at this stage. The compliance of Section 42 is mandatory and that is a relevant fact which should have engaged attention of the Court while considering the bail application. In the aforesaid circumstances having regard to the special facts of the case, we direct that the appellants 1 and 2 be released on bail on executing a bail bond for Rs. 50,000 each with two solvent sureties for the like amount to the satisfaction of the Special Judge, EC/NDPS, Madurai on the following conditions:

(1) The counsel for the appellants requested that the appellants may be allowed to stay outside the State of Tamil Nadu. We are not inclined to grant such a prayer as the respondents police authorities would not be able to ensure the timely presence of the appellants in Court;

(2) The appellants shall not leave jurisdiction of the District Court, Madurai and shall report before the Circle Inspector, Karuppayurani Police Station once in two weeks for 3 months, thereafter, once in a month.

(3) The appellants shall surrender their pass-port before the Court, if not already seized by the police.

8. The Special Judge is directed to expedite the trial.

9. Whatever the Statement made regarding the merits of the case shall not have any persuasive effect on the Special Judge while finally deciding the case.

This Court in **Gurjant Singh v. The State of Punjab CRM- M-20943-2022 Decided on 20.05.2022** held as under:-

" Coming back to the facts of the present case, prima facie there has been violation of Section 42 of the NDPS Act. Once the mandatory provisions of the Act has been found to be prima facie violated, the rigors of Section 37 of the NDPS Act could be relaxed. Even otherwise, while dealing with Section 37, the Court is not called upon to record a finding of

‘not’ guilty and it is only required to say that there are reasonable grounds to believe that the accused is not guilty of the offence. In the present case, this belief could be gathered from the prima facie violation of Section 42 of the NDPS Act, itself. Further, so far as the second condition of forming an opinion that the accused was not likely to commit an offence while on bail is concerned, apparently, the petitioner is an accused only in the present FIR and since he does not have any criminal antecedents, an opinion can be expressed at this stage by the Court that he was not likely to commit an offence while on bail.”

This Court in ***Sarabjit Kaur v. State of Punjab CRM-M- 26248-2021(O&M) Decided on 30.03.2022*** held as under:-

“ 7. Today, the learned State Counsel, on instructions, meted to him, by ASI Ragvinder Dhir, submits that the prosecution case is rested, upon a prior information in respect of the premises concerned, either hiding or concealing therein, the narcotic drug or psychotropic substance(s). Therefore, an imperative or peremptory statutory duty became cast upon the IO concerned, especially, when it is also further candidly disclosed to this Court, by the learned State Counsel, that the relevant premises became raided in the interregnum, inter se, sunset, and, sunrise, to obtain search warrants or authorisations from the learned Magistrate concerned, whereupon the raid would become valid, and, also the recovered therefrom incriminatory substance, would be taint free. However, apparently neither the afore apposite authorisation nor the search warrants became obtained by the police officials concerned, from the learned Magistrate concerned.

8. Be that as it may, though it was yet open to the police officials concerned, to proceed to validly raid the premises concerned, but yet an imperative statutory duty became cast upon the police officials concerned, to yet record reasons in respect of the immensity of time being consumed, rather for the obtainings of the relevant authorizations or search warrants, from the learned Magistrate concerned, hence there being every likelihood of the accused fleeing from the crime site or thereupon an opportunity for facilitating them to conceal or hide the incriminatory narcotic drug or psychotropic substance(s), rather becoming afforded to them. However, even in respect of the above imperative statutory necessity, in exception to the necessity of search warrants, becoming obtained from the learned Magistrate concerned, rather the learned State Counsel submits, that the afore statutory duty has also remained uncomplished with, by the police officials concerned.

9. In consequence, the raid, as, made upon the premises concerned, and, also the recovery, if any, as became effected in pursuance thereof, is prima facie,

at this stage, to be concluded to be vitiated, inasmuch as, its breaching the mandatory statutory provisions embodied in Section 42 of the NDPS Act, provisions whereof enjoin the meetings of strict compliances thereto.

10. Consequently, the instant petition is allowed, and, the petitioner- bail applicant is ordered to be released from judicial custody. However, the granting of bail to the bail applicant-petitioner, is subject to her furnishing personal and surety bonds in the sum of Rs.50,000/- each, before the learned trial Court/Chief Judicial Magistrate/Duty Magistrate concerned, and, also subject to her not tampering with prosecution evidence, and, her not influencing prosecution witnesses, and, besides also her appearing before the trial Court concerned, as and when directed to make her personal appearance, unless exempted for valid reasons.

The Hon'ble Bombay High Court in **Raju Bhavlal Pawar & Ors. v. The State of Maharashtra 2021 ALL MR (Cri) 4651** held as under:-

*" 3. Heard Shri Bhosale h/f. Shri Sonar learned counsel for the applicant. Shri Bhosale submits that there is total non-compliance of Section 42 of the NDPS Act. He submits that FIR shows that no information was recorded as required by Section 42(1) of the NDPS Act. He further submits that taking entry in station diary entry is no compliance of Section 42(1). There is no compliance of Section 42(2) of the NDPS Act either. He submits that total non-compliance of Section 42(1) and (2) is impermissible. For this purpose he placed reliance on the case of **Karnail Singh v. State of Haryana; (2009) 8 SCC 539** (Constitution Bench Judgment). He submits that CA report is not filed. Therefore, charge-sheet is incomplete.*

4. Learned APP Shri Ghayal submits that station diary entry was recorded. Therefore, there is compliance of Section 42(1) of the NDPS Act. He further submits that on 28.01.2020 itself letter was written to the Dy. S.P. in which there is reference of intimation received. This letter bearing outward no.145/2021 is total compliance of Section 42(1) of the NDPS Act. He, therefore, submits that there is total compliance of Section 42(1) and (2) of the NDPS Act. He further submits that admittedly CA report was not annexed with the charge- sheet. However, raiding party had carried field test kit with it and the substance which was found with the applicant was tested and it was tested as Marijuana i.e. Ganja.

5. Section 42 (1) of NDPS Act requires the person receiving the information to record it into writing. Section 42(2) of NDPS Act mandates that such information received by the police station has to be forwarded to the immediate superior of the officer receiving the information within 72 hours.

6. In the case at hand, the Police Inspector is the officer who had received the information. Therefore, it was obligatory on his part to record the information as mandated by Section 42(1) of the NDPS Act and send it to his immediate official superior within a period of 72 hours from the date of its receipt.

7. So far as recording of information as required under Section 42(1) of the NDPS Act is concerned, admittedly the said information was not recorded. It was tried to be argued that the entry was taken in station diary and the same is sought to be treated as the information

recorded under Section 42(1) of the NDPS Act. Learned counsel Shri Bhosale placed reliance on the case of **Rajaram Kadu v. The State of Maharashtra (Bail Application No.2108/2016)** decided by this Court. In the case of Rajaram Kadu cited (supra), this very question had fallen for consideration before this Court. It has been held thus:

“9. ...As far as non compliance with Section 42 of the Act is concerned, it can be seen that the information was received by Police Naik Bhagwat Saudane. The FIR does not indicate that he had reduced the information into writing or provided any copy of the information to his superior officer. The statement of API Divekar also does not indicate that he had reduced the information into writing or forwarded the same to his superior officer. However, the prosecution is relying upon the entries made by Senior P.I. Sable of Ulhasnagar in the station diary to show the compliance of Section 42. That cannot be considered to be the compliance of Section 42 of NDPS Act. The point which is canvassed by learned counsel for Applicant is that the person who had received the information had not forwarded it to the superior officer and there is nothing on record to indicate that any such information was forwarded in writing. It is, therefore, rightly contended that there is non compliance of Section 42(2) of NDPS Act.”

8. These observations of this Court clearly indicate that entry instation diary is not a compliance under Section 42 of the NDPS Act. Therefore, there is non-compliance of Section 42 (1).

9. Learned counsel Shri Bhosale submits that delayed compliance is permissible but total noncompliance of Section 42 is impermissible. For this purpose he placed reliance on the case of **Boota Singh and Others v. State of Haryana (Criminal Appeal No.42 of 2021)**. In this case it has been observed in para 11 as under:

“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).”

10. In the case of Boota Singh cited (supra), it has been clearly held that information has to be recorded in writing and copy of it has to be sent to the immediate superior officer. In the case at hand information was not recorded in writing. Therefore, question of sending it to immediate official superior does not arise. Vide outward no.145/21, what is done by the Investigating Officer is intimation of information was given to the immediate official superior. Section 42(2) of NDPS Act requires copy of the information to be furnished to the immediate official superior. Admittedly, since information was not recorded, there is no question of forwarding copy of the said information. Therefore, there is total non-

compliance of Section 42.

11. In the case of Karnail Singh cited (*supra*), it is held that delayed compliance is permissible but total non-compliance is not permissible:

“35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Section 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

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.”

12. In the case at hand there is not even a delayed compliance. Simply a letter is forwarded to the official superior about the information received. In this view of the matter, since there is no compliance of Section 42(1) and (2), there is no possibility of conviction of the accused. As held in the case of *Sarija Banu (A) Janarthani alias Janani and Another v. State through Inspector of Police*; 2004 AIR (SCW) 7488, the question of compliance can be considered at the stage of consideration of application for bail. In this view of the matter, the applicants are entitled to be released on bail. Hence the following order is passed:

ORDER

I) *Application is allowed.*

II) Applicants be released on PR bond of Rs.50,000/- each with one solvent surety in the like amount each, in connection with Crime No.57 of 2021 under Section 8, 20 and 22 of the

N.D.P.S. Act registered with Amalner Police Station, District Jalgaon.

III) These observations are made only for the disposal of this application and the learned trial Court shall not get influenced by these observations and can come to its independent conclusion during trial.

The Hon'ble Kerala High Court in ***Basanth Balram v. State of Kerala 2019(2) RCR (Criminal) 488*** held as under:-

“ 14. The safeguards provided under the Statute is to ensure that persons are searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. Very severe punishment are provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search is a critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. A procedure based on systematic and unconscionable violation of law by the official responsible for the enforcement of law cannot be considered to be a fair, just or reasonable procedure. As held by the Apex Court, the more severe ***the punishment, greater has to be the care taken to ensure that all the safeguards provided in a statute are scrupulously followed. In the case on hand, it is blatantly obvious that the statutory safeguards have been thrown to the winds by the detecting officer. The uncontrovertible materials in the form of certified copies obtained from the court below clearly show very serious aberrations in the search and detection of the contraband.***

15. I am also not impressed with the contention of the learned counsel that despite the production of such materials, this Court should refrain from considering the same at this particular stage and relegate the same to be considered by the trial court. In the case on hand, it is not a question as to whether the applicants were informed of their rights or whether the search

required compliance under Section 50 of the Act. The question here is with regard to the very truthfulness and sustainability of the search and seizure effected by the detecting officer on 9.10.2018.

16. As held by the Apex Court in *Baldev (supra)*, the safeguards contained in Section 50 of the NDPS Act are intended to serve dual purpose to protect a person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer. It was held that though the end result is important, but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. It was observed that the cure cannot however, be worst than the disease itself.

17. The applicants have been in custody from 9.10.2018 and when they are able to show that there are materials to suspect the very seizure and the provisions of the Act have been blatantly violated, this Court will not be justified in rejecting their submissions and in ordering them to undergo incarceration till their case is finally decided.

18. *Of course, bail can be granted in a case involving commercial quantity of narcotic drugs only when it is shown that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. It is manifest that the conditions are cumulative and not alternative. The expression used in Section 37(1)(b)(ii) of the Act is "reasonable grounds" which 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. 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. For that purpose, the court is not required to consider the matter as if it is pronouncing a judgement of acquittal and recording a finding of not guilty. The court has also to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such conclusion. [See Shiv Shanker Kesari (supra)].*

19. *In the instant case, when the inbuilt safeguards are violated with impunity and when the mandatory formalities are breached, it would result in travesty of justice to leave the question of their compliance to be looked into only at the stage of trial. I am of the view that it would result in failure of justice to force the applicants to be in custody till the trial is complete. The court's satisfaction within the meaning of sub-section 1(b)(ii) of Section 37 of the NDPS Act that*

there are reasonable grounds for believing that the accused is not guilty of such offence, is not recording of a finding that the accused is not guilty within the meaning of section 235 of the Cr.P.C., 1973 Such a finding of guilty or not guilty can only be rendered after conclusion of the trial whereas the satisfaction that there are reasonable grounds for believing that the accused is not guilty as to be arrived at before the conclusion of trial, i.e., at any stage of investigation or in the course of trial itself. This Court cannot abdicate from its responsibilities by postponing the consideration of the fact whether reasonable grounds exist for believing that the accused is not guilty till the actual trial is concluded. In other words, if materials are shown to exist on the basis of which the court can feel satisfied that there are reasonable grounds for believing that the accused is not guilty, the court will not be justified in taking an alternative course other than recording its necessary satisfaction.

20. Now the question is whether this Court will be justified in holding that the applicants herein are not likely to commit any offence while on bail. The prosecution has no case that the applicants are persons with criminal antecedents or that they are involved in similar offence earlier.

21. Since I am prima facie satisfied that the seizure has been effected in contravention of mandatory provisions of Section 50 and as the contention of the applicants that a false case has been foisted by the detecting officer cannot be totally brushed aside, for the limited purpose of consideration of this application, it is held that this court is satisfied that there are reasonable grounds for believing that the applicants are not guilty of such offence and that they are not likely to commit any offence while on bail. I also take into consideration the period of detention undergone, the stage of investigation and the reasonable possibility of securing the presence of the applicants at the time of trial. Having considered all the relevant aspects, I am of the view that the applicants can be enlarged on bail on stringent conditions. Before concluding, it is made clear that these prima facie observations are made for the limited purpose of deciding this bail application and any opinion expressed above shall not be regarded as an opinion on merits during trial.

In the result, this application will stand allowed. The applicants shall be released on bail on their executing a bond for Rs.2,00,000/- (Rupees Two lakh only) each with two solvent sureties each for the like sum to the satisfaction of the court having jurisdiction. The above order shall be subject to the following conditions:

- 1) The applicant shall appear before the Investigating Officer on all Saturdays between 9 a.m. and 11 a.m., for three months or till final report is filed, whichever is earlier.
- 2) They shall not intimidate or attempt to influence the witnesses; nor shall they tamper with the evidence.
- 3) They shall not commit any offence while they are on bail.

4) The applicants shall not leave India without the permission of the Court and if having passport, shall deposit the same before the Trial Court within a week; If release of the passport is required at a later period, the applicants shall be at liberty to move appropriate application before the Court having jurisdiction.

In case of violation of any of the above conditions, the jurisdictional Court shall be empowered to consider the application for cancellation, if any, and pass appropriate orders in accordance with the law.

This Court in **Sudesh Singh @ Tandu v. State of Punjab 2011(9) RCR (Criminal) 922** held as under:-

“This petition has been filed under Section 439 Cr.P.C. for grant of regular bail to the petitioner in case F.I.R. No.26 dated 20.03.2011 registered under sections 22, 61 and 85 of the NDPS Act at P.S. Boha, District Mansa.

2. *At the very outset, learned counsel for the petitioner states that in the last order inadvertently it has been wrongly recorded that the petitioner is in custody for the last six months but actually the petitioner is in custody for the last four months and prays that the same may be read as four months. Allowed as prayed for. On 19.09.2011 the following contention was noticed:-*

“Learned counsel has argued that as per the allegations of the FIR, NDPS Act has been wrongly invoked. However, without prejudice to this argument it is argued that the mandatory provisions of Section 50 of the Act having admittedly not been followed, the petitioner, who has now been in custody for six months for an alleged recovery of 50 bottles of Racscod and 300 packets of Diatil tablets), would be entitled to bail.”

3. *In support thereof learned counsel for the petitioner has relied upon the judgment in the matter of **Sarija Banu @ Janarthani @ Janani and another v. State through Inspector of Police reported in (2004) 12 SCC 266** wherein the Hon'ble Supreme Court has held that the violation of mandatory provisions is a relevant consideration even at the time of bail. He has also relied upon the judgment in the matter of **Mohan Singh v. State of Punjab reported in 2005(1) P.L.R. 425** wherein the Full Bench of this Court has held that Section 50 is a mandatory provision.*

4. *Learned Deputy Advocate General has accepted the fact that as per the FIR the mandatory provision of Section 50 has not been complied with. He is also not in a position to cite any contrary judgment. To the averment that there is no other case pending against the petitioner, learned Deputy Advocate General on instructions from ASI Didar Singh has stated that there is no other case pending against him.*

5. *In the circumstances, without going into the merits of the case, I deem it appropriate to release the petitioner on regular bail to the satisfaction of the trial Court/Duty Magistrate.*

6. *Ordered accordingly.*

7. *Petition stands disposed of.*

13. A perusal of Section 42 of the NDPS Act along with various judgments on the issue would show that while delayed compliance was acceptable, however, where there was a total non compliance of Section 42as appears to be the case herein, the accused ought to be granted the concession of regular bail.

14. In view of the above, a prima facie satisfaction can be recorded under Section 37 of the NDPS Act that there are reasonable grounds to believe that the petitioner is not guilty of the offence and was not likely to commit any offence while on bail as he has clean antecedents.

15. Hence without commenting on the merits of the case, the present petition is allowed and the petitioner Pankajson of Sh. Ranbir Singh is ordered to be released on bail subject to the satisfaction of learned CJM/Duty Magistrate, concerned.

16. The petitioner shall appear before the police station concerned on the first Monday of every month till the conclusion of the trial and inform in writing each time that he is not involved in any other crime other than the present case.

17. If the petitioner commits a similar offence for which he is currently charged while on bail, the State would be at liberty to move an application for cancellation of bail.

18. The observations made herein are only for the purposes of deciding this bail application and the trial Court shall adjudicate upon the matter uninfluenced by any such observations made. Petition stands disposed of.