

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

BLAPL No.2430 of 2021

Raghu @ Rahul Rajput Thakur **Petitioner**

Mr. Shyam Manohar, Advocate

-versus-

State of Odisha **Opposite Party**

Mr. P.C. Das, A.S.C.

CORAM:

JUSTICE A.K. MOHAPATRA

ORDER

Order No.

Date of hearing : 24.09.2022 / Date of order : 14.10.2022

16.

1. This matter is taken up through Hybrid Arrangement (Virtual /Physical Mode).
2. Heard Mr. S. Manohar, learned counsel appearing for the Petitioner and Mr. P.C. Das, learned counsel appearing for the State. Perused the F.I.R., case diary, statement of the witnesses and other relevant documents placed before this Court for consideration.
3. The present bail application has been filed by the accused-petitioner under Section 439, Cr.P.C. for his release on regular bail in connection with Mathili P.S. Case No.42 of 2021 dated 07.03.2021 corresponding to Special G.R. Case No.36 of 2021 pending in the court of learned Sessions Judge-cum-Special Judge, Malkangiri for commission of offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act.
4. The prosecution case, in gist, is that on 07.03.2021 at about 12.35 A.M. on the main road of Govindpally Bus Stand, the police

found two vehicles were coming in high speed from Malkangiri side. On suspicion, the police officials on duty intercepted the vehicles and stopped it. On search, it was found by the police party that four persons are sitting inside the vehicle bearing Registration No.HR-22-R- 4972. Similarly, the 2nd vehicle which was stopped is a Toyota Corolla vehicle bearing Registration No.HR-12-J-1000. From the 2nd vehicle also four persons were found sitting inside the vehicle. On further verification, police party found two plastic sacks in the 1st vehicle and three sacks in the 2nd vehicle which were loaded in the dicky of the above described cars. After opening the dicky of the vehicle for search police team present at the spot could found pungent smell of Ganja was coming out from the dicky of both cars. On interrogation by the police, passengers of both the vehicles confessed before the police that they were carrying ganja, which were kept in the plastic sacks and loaded in the dicky of the aforesaid two vehicles. They further confessed that the ganja, which was seized from the vehicles, were procured from Chitrokonda Swabhimani area and they were transporting the same in the above noted two vehicles. Upon seizure and measurement of the contraband articles, it was found that the said articles were being transported from the place of procurement to the place of destination by using the above noted two vehicles and further police team recovered a total contraband article weighing 137 Kgs. and 300 grams. Accordingly, the F.I.R. was lodged by one Siba Prasad Bhadra, S.I. of Mathili P.S. on 07.03.2021.

5. Mr. S. Manohar, learned counsel appearing for the petitioner submits that the petitioner is in custody since 07.03.2021 and he further submits that the investigation of the case has been concluded in the meantime and charge-sheet has been filed. In course of his

argument, learned counsel appearing for the petitioner laid much emphasis on non-compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act. In the said context, learned counsel for the petitioner drew attention of this Court to the F.I.R. and submitted that with regard to compliance of Sections 42 and 50 of the N.D.P.S. Act, nothing has been mentioned in the F.I.R. Therefore, he contends that due to non-compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act, the entire seizure is vitiated and further the accused petitioner is most likely to be acquitted in the trial on the aforesaid ground. He further contends that the F.I.R. was registered after delay of seven hours from the time when the vehicle was intercepted and contraband articles were seized.

6. In course of his argument, learned counsel for the petitioner tried to demonstrate the flaws/laches in the procedure adopted by the police party. By referring to various provisions of the N.D.P.S. Act, learned counsel for the petitioner tried to impress upon this Court that the procedure prescribed by law particularly with regard to compliance of mandatory provisions under Sections 42 and 50 of the N.D.P.S. Act have neither been complied with nor there is anything in the F.I.R. to reveal as to whether any attempt was made by the police raiding party to comply the above noted provision of the N.D.P.S. Act.

7. Mr. S. Monhar, learned counsel appearing for the petitioner submits that a bare perusal of the F.I.R. would reveal that nowhere in the F.I.R. anything has been whispered with regard to compliance of the mandatory provision contained in Section 50 of the N.D.P.S. Act. He further submits that in view of Section 50 of the N.D.P.S. Act,

the petitioner is required to be informed about his legal right by the police with regard to search and seizure, which is to be carried out in presence of a Gazetted Officer or a Magistrate. He further submits that the F.I.R. does not reveal as to whether an option was given to the accused petitioner when the search and seizure was being conducted by the police patrolling party. It is also contended by learned counsel for the petitioner that such non-mentioning of compliance of the requirement under Sections 42 and 50 of the N.D.P.S. Act in the F.I.R. amounts to admission by the Police Officer that such mandatory provisions were not complied in the aforesaid context, learned counsel for the petitioner replied upon several judgments which are mentioned herein below :-

1. ***Sk. Raj Alias Abdul Haque Alias Jagga vrs. State of West Bengal*** : (2018) 9 SCC 708.
2. ***Sarija Banu(A) Janarthani and others vrs. State through Inspector of Police*** : (2004) 12 SCC 266.
3. ***Sanjev and another vrs. State of Himachal Pradesh in Criminal Appeal No.870 of 2016.***
4. ***Pankaj vrs. State of Punjab***: CRM-M-25498-2021
5. ***Basanth Balram vrs. State of Kerala*** : 2019(2) CRR (Criminal) 488.
6. ***Sudesh Singh @ Tandu vrs. State of Punjab***: 2011(9) RCR (Criminal) 922.

8. With regard to the importance of compliance of mandatory provision like Sections 42 and 50 of the N.D.P.S. Act. Mr. Monhar, learned counsel appearing for the petitioner referring to the judgments of the Hon'ble Supreme Court in the case ***Balbev Singh vrs. State of Punjab***: reported (1999) 6 SCC 172 submitted that non-compliance of said mandatory provision would vitiate the entire trial

and the sanctity of the entire trial would be lost. Further, he led specific emphasis on paragraph-28 of the said judgment which is quoted herein below:-

“The Remedy Cannot be worse than the disease itself. It must be borne in mind that severer the punishment greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. The legitimacy of the judicial process may come under a cloud if the court is seen to have condoned acts of lawlessness conducted by the investigating agency during search operations & may also undermine respect for the law & may have the effect of unconscionably compromising the administration of justice. That cannot be permitted.”

9. On a careful scrutiny of the judgments relied upon by learned counsel for the petitioner, this Court observes that most of the judgments relied upon are dealing with the issue of non-compliance of Sections 42 and 50 of the N.D.P.S. Act are final judgments delivered after trial. However, the judgment of the Hon'ble Supreme Court in the case of *Sarija Banu(A) Janarthani and others*(supra), the Hon'ble Supreme Court considering the bail application involving the provisions of the N.D.P.S. Act.

While disposing of the aforesaid bail application vide order dated 26.02.2004 in paragraph-7 of the order, it has been observed as followed:-

“7. It is pertinent to note that in the bail application the applicants, it was alleged that there was serious violation

of Section 42 of the N.D.P.S. 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 applicants 1 and 2 be released on bail in 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.”

(emphasis supplied)

So far as the other judgments relied upon by the learned counsel for the petitioner are concerned, this Court upon careful scrutiny of such judgments is of the considered view that there is no dispute with regard to the settled position of law that compliance of Sections 42 and 50 of the N.D.P.S. Act is a mandatory requirement as has been held by the Hon'ble Apex Court as well as this Court. Therefore, there is no necessity to refer to such judgments in the instant case. Moreover, as has been stated earlier most of the judgments referred to by the learned counsel for the petitioner are final judgments delivered after conclusion of the trial while dealing with the legal issue of non-compliance of Sections 42 and 50 of the N.D.P.S. Act. Therefore, such judgments are not applicable to the facts of the case in hand. Hearing the specific issue that has been raised on behalf of the accused-petitioner i.e. whether the trial court

or this Court while considering the bail application of an accused alleged to have committed a crime under the N.D.P.S. Act, the requirement of compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act could be considered at the stage of bail or not? Learned counsel for the petitioner emphasized that non-compliance of Sections 42 and 50 of the N.D.P.S. Act could be examined by the courts while considering the bail application of an accused. On the contrary, learned counsel appearing for the State submits that the court is under no legal obligation to consider the non-compliance/compliance of Sections 42 and 50 of the N.D.P.S. Act while considering the bail application of an accused alleged to have committed an offence under the provision of the N.D.P.S. Act.

10. Mr. P.C. Das, learned Additional Standing Counsel appearing on behalf of the State submits that the police party which was on patrolling duty, saw the vehicle in question from Malkangiri side had come at a very high speed. On suspicion, the vehicles were intercepted and stopped and search was conducted. Therefore, there is no occasion on the part of the police party for immediate compliance of Sections 42 and 50 of the N.D.P.S. Act. He further submits that the issue of compliance or non-compliance of the mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act can only be taken up during the trial where the parties would get full-fledged opportunity to lead evidence in support of their respective contentions.

11. Mr. Das, learned Additional Standing Counsel appearing on behalf of the State emphatically submits that at the stage of considering the bail application of an accused, the court was not under any legal obligation to examine as to whether the provisions

contained in Section 42 and 50 of the N.D.P.S. Act has been complied with or not. It is further contended by learned Additional Standing Counsel appearing on behalf of the State that the accused has no legal right to insist compliance of Section 42 as he was arrested from the spot and from the vehicle wherein the contraband ganja was kept. He further submits that the petitioner along with other accused persons have also confessed before the police that they were transporting the seized contraband articles. Further, learned Additional Standing Counsel appearing on behalf of the State draws attention of this court to the fact that the illegal transportation of contraband articles within the State of Odisha is rising every day and as such, this Court should not show any leniency while considering the bail application of the present petitioner, who has been caught red handed at the spot. With the aforesaid submissions, learned counsel for the State urges that the bail application of the petitioner be rejected at this juncture.

12. Both sides have filed their written note of submissions and the judgments and citations relied upon by them. Note of submissions filed by learned counsel for the State has been prepared by giving much emphasis on the fact that at the stage of considering the bail application, this Court is under legal obligation to consider the aspect of non-compliance of the mandatory provisions as contained in the N.D.P.S. Act.

13. Mr. Das, learned Additional Standing Counsel appearing on behalf of the State lays specific emphasis on the judgment of the Hon'ble Supreme Court in the case of *Union of India through Narcotics Control Bureau of Lucknow vrs. Mohammad Nawaj Khan* in Criminal Appeal No.1043 of 2021 (arising out of SLP (Crl.)

No.1771 of 2021) disposed of vide order dated 22.09.2021. It is further submitted by learned counsel for the State that the judgment of the Hon'ble Supreme Court in the case of **Mohammad Nawaj Khan**(supra) has also been followed by the Hon'ble Karnataka High Court in the case of **Jaswin Lobo vrs. State of Karnataka** in Criminal Petition No.6916 of 2021 decided on 02.02.2022. It is further submitted by learned counsel for the State that since the vehicles in question were intercepted and stopped by the police night patrolling party and the petitioner along with co-accused persons were arrested from the spot. He further submits that once contraband articles were detected, the matter was reported to the I.I.C. of the concerned Police Station and on his direction, the investigation continued and accordingly search and seizure were made. Further, it is submitted by learned counsel for the State that there was no time and opportunity to comply the mandatory provision as contained in the N.D.P.S. Act and as such Section 42 has not been followed in the present case. Further to establish such facts, evidence is required to be adduced and as such, the same can only be done when the matter is taken up for trial.

14. Further a careful scrutiny of note of argument submitted on behalf of the prosecution, this court observed that no specific stand has been taken in the said note of argument with regard to the compliance/non-compliance of Sections 42 and 50 of the N.D.P.S. Act. Moreover, learned counsel for the State in support of his contention contended that compliance/non-compliance of Sections 42 and 50 of the N.D.P.S. Act is a matter of trial and in that context, he relies upon judgment of the Hon'ble Supreme court in the case of **Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan** (Criminal Appeal No.1043 of 2021 disposed of on 22.09.2022)

and *Joswin Loba vrs. State of Karnataka* vide order dated 02.02.2022 passed by Hon'ble Karnataka High Court in Criminal Petition No.6916 of 2021.

15. Having heard learned counsel for the respective parties and upon perusal of the written note of submissions submitted by either side, this Court is of the considered view that the sole question involved in the present case is whether the compliance/non-compliance of the mandatory provisions under Sections 42 and 50 of the N.D.P.S. Act is to be examined and considered at the stage of consideration of the bail application of the petitioner or the same is required to be considered by the trial court during trial after evidence is laid by both the sides before the trial court? Learned counsel for the petitioner while supporting the stand that non-compliance of Sections 42 and 50 of the N.D.P.S. Act has to be examined at the stage of consideration of the bail application of the petitioner upon the order of the Hon'ble Supreme Court dated 26.09.2004 passed in the case of *Sarija Banu(A)Janarthani and others*(supra). On a careful consideration of the judgment relied upon by the petitioner, this Court observed that the compliance of Section 42 is mandatory and that is a relevant fact which should engage attention of the Court while considering the bail application of an accused. Further, in the aforesaid case the Hon'ble Supreme Court while taking note of Section 37 of the N.D.P.S. Act was pleased to release the appellant on bail subject to certain terms and conditions. Further the aforesaid order of the Hon'ble Supreme Court, as it appears, has been followed by some of the High Courts' while considering the bail applications involving the offences under N.D.P.S. Act.

16. Per contra, learned counsel for the State in support of his

contentions relied upon the judgment of the Hon'ble Supreme Court in the case of *Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*(supra). At the outset, it is submitted that in the case of *Sarija Banu(A)Janarthani and others*(supra), the Hon'ble Supreme Court decided the matter by passing an order. However, in the case of *Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*(supra) which was decided on 2.09.2021 in a Criminal Appeal has been disposed of by a judgment. On perusal of the judgment it appears that the respondent in the said case was allegedly involved in the case involving the provisions of the N.D.P.S. Act and accordingly, he was arrested by the NCB, Lucknow. Thereafter, the bail application was filed before the High Court of judicature at Allahabad vide order dated 01.10.2020, the bail application of the respondent was allowed. Challenging the order dated 01.10.2020, N.C.B. Lucknow approached before the Hon'ble Supreme Court by filing Criminal Appeal No.1043 of 2021, which was allowed by the Hon'ble Supreme Court vide judgment dated 22.09.2021 and the order dated 01.10.2020 passed by the Allahabad High Court releasing the accused on bail was set aside and the bail application of the accused-respondent was dismissed.

17. Upon close scrutiny of the judgment of the Hon'ble Supreme Court in the date of *Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*(supra), this Court observed that search was conducted in the presence of a Gazetted Officer in view of the provisions under Section 50 of the N.D.P.S. Act but, nothing objectionable was recovered in course of personal search. Despite such fact, a ground was taken that Sections 42 and 50 of the N.D.P.S. Act were not complied with. Further, before the Hon'ble Supreme Court, N.C.B. took an additional ground that after the petitioner was

released on bail he is avoiding to appear before the learned Sessions Judge at Lucknow as a result of which charges could not be framed and eventually non-bailable warrant was issued against the respondent. Moreover, in the above noted case, the CDR details were produced before the court which revealed that the accused-petitioner was in touch with other accused persons.

While considering the validity of the order passed by the Allahabad High Court in *Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*(supra), the Hon'ble Supreme Court had an occasion to consider the scope and ambit of Section 37 of the N.D.P.S. Act. While analyzing the provision of Section 37 of the N.D.P.S. Act, the Hon'ble Supreme Court has referred to a judgment in the case of *Union of India vrs. Shiv Shankar Kesari* : reported in *(2007) 7 SCC 798* where in paragraph-11 of the judgment of the Hon'ble Supreme Court, it has been observed as follows:-

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

(emphasis supplied)

So far as non-compliance of Section 42 of the N.D.P.S. Act is

concerned, in paragraph-29 of the judgment in *Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*(supra)

“29. In the complaint that was filled on 16th October, 2019 it is alleged that at about 1400 hours on 26th March, 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that “**Section 42 of the NDPS Act was not complied with is prima facie misplaced**”. The question is one that should be raised in the course of the trial.”

18. In the present case from the allegations made in the prosecution report / F.I.R., it is to be ascertained as to whether Section 42 has been complied with or not. Before going to the relevant portion of the F.I.R., it is imperative that the provisions contained in Section 42 of the N.D.P.S. Act be looked into once again at this juncture and accordingly, same is quoted herein below:-

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

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.”

Keeping in view the legal position as has been enshrined in Section 42 of the N.D.P.S. Act, this court upon careful consideration of the F.I.R./P.R. is of the considered view that the police patrolling party on suspicion intercepted the vehicle and upon verification found contraband ganja was being transported in the two vehicles in question. Therefore, they had no time or scope to record such

informant and intimate to their superior as is required under Section 42 of the N.D.P.S. Act. Further in this context law has been succinctly laid down by the Hon'ble Supreme Court in the case of ***Karnail Singh vrs. State of Haryana*** : reported in **(2009) 8 SCC 539** in paragraph-15 of the said judgment. The Hon'ble Supreme Court in the context of compliance of Section 42 of the N.D.P.S. Act has observed as follows :-

“15) Under [Section 42\(2\)](#), as it stood prior to amendment, 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 would adversely affect the prosecution case and 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, it is to be concluded that the mandatory enforcement of the provisions of [Section 42](#) of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. Abdul Rashid (supra) has been decided on 01.02.2000 but thereafter [Section 42](#) has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the

Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

16) The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy makers about it. Now for the last two decades police investigation has gone through a sea- change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the Register/Records kept for those purposes in the police station or the respective offices of the authorized officials in the Act if the emergency of the situation so requires. As a result, if the statutory provisions under [Section 41\(2\)](#) and [42\(2\)](#) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal.

Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.

17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of [Sections 42\(1\)](#) and [42\(2\)](#) nor did Sajan Abraham hold that the requirements of [Section 42\(1\)](#) and [42\(2\)](#) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of [section 42\(1\)](#).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of [section 42\(1\)](#) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of [Sections 42 \(1\) and 42\(2\)](#) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of [section 42](#) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of [section 42](#). To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of [section 42](#). But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of [section 42](#) of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation

of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.”

Therefore, in view of the aforesaid clear pronouncement of law by the Hon’ble Supreme Court, this Court has no hesitation in coming to conclusion that the present case involves a special circumstances and an emergent situation where the recording of information in writing and sending copy thereof to the official superior could not have been done at the spot and hence, the postponement of the same is permissible under the law. Accordingly, this Court is of the considered view that in the instant case, the petitioner cannot take the ground that non-compliance of Section 42 of the N.D.P.S. Act. Further on a bare reading of F.I.R., it appears that the police party had intimated the fact to their Superior over phone. Therefore, non-compliance of Section 42 involves factual aspects and hence the same is a matter of trial.

19. With regard to the petitioner’s assertion that mandatory provision of Section 50 of the N.D.P.S. Act has not been complied with is concerned, this Court is of the considered view that in the judgment of the Hon’ble Supreme court in the case of *Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*(supra), the Hon’ble Supreme Court has categorically observed that search was conducted in presence of the Gazetted Officer in compliance to the provision of Section 50 of the N.D.P.S. Act and the same is also found to have been mentioned in the F.I.R. also. On the other hand, in the present case, upon careful examination of the

F.I.R. / P.R., it is seen that there is no whisper with regard to compliance of Section 50 of the N.D.P.S. Act. So far as Section 50 of the N.D.P.S. Act is concerned, the same has been interpreted by a Constitution Bench of the Hon'ble Supreme Court in the case of ***Vijay Singh Chandubha Jadeja vrs. Stae of Gujarat*** : reported (2011) 2 SCC 609 it has been held by the Constitution Bench that so far the obligation of the authorized Officer under Section 50 of the N.D.P.S. Act is concerned, it is mandatory and requires strict compliance. The said proposition of law has also been reiterated by the Hon'ble Supreme Court of India in the case of ***Sk. Raju @ Abdul Haque Alias Jagga vrs. State of West Bengal*** : reported in (2018) 9 SCC 708 for better appreciation of the provision of Section 50 of the N.D.P.S. Act, the same is quoted herein below:-

“50. Conditions under which search of persons shall be conducted.— (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under [section 42](#) has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.” According to [Section 50\(1\)](#), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a magistrate.

In *Vijaysinh Chandubha Jadeja v State of Gujarat* (“Vijaysinh”), case a Constitution Bench of this Court interpreted [Section 50](#) thus:-

“The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case

may be, directs the authorised officer to do so ... In view of the foregoing discussion, we are of the firm opinion that the object with which right under [Section 50\(1\)](#) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of [Section 50](#) of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision ... We are of the opinion that the concept of “substantial compliance” with the requirement of [Section 50](#) of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of Sub-section (1) of [Section 50](#) nor it is in consonance with the dictum laid down in Baldev Singh's case (supra).”

The principle which emerges from Vijaysinh is that the concept of “substantial compliance” with the requirement of [Section 50](#) is neither in accordance with the law laid down in Baldev Singh, nor can it be construed from its language. [Reference may also be made to the decision of a two judge Bench of this Court in Venkateswarlu]. Therefore, strict compliance with [Section 50\(1\)](#) by the empowered officer is mandatory. [Section 50](#), however, applies only in the case of a search of a person. In Baldev Singh, the Court held “on its plain reading, [Section 50](#) would come into play only in the case of a search of a person as distinguished from search of any premises, etc.” In State of Himachal Pradesh v Pawan Kumar (“Pawan Kumar” case), a three judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on his shoulder or head, etc., would not attract [Section 50](#). It was held thus:

“In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in [Section 50](#) of the Act ...After the decision in Baldev Singh, this Court has consistently held that [Section 50](#) would only apply to search of a person and not to any bag, article or container, etc. being carried by him.” In Parmanand, on a search of the person of the respondent, no substance was found. However, subsequently, opium

was recovered from the bag of the respondent. A two judge Bench of this Court considered whether compliance with [Section 50\(1\)](#) was required. This Court held that the empowered officer was required to comply with the requirements of [Section 50\(1\)](#) as the person of the respondent was also searched. [Reference may also be made to the decision of a two judge Bench of this Court in *Dilip v State of Madhya Pradesh*]. It was held thus:

“Thus, if merely a bag carried by a person is searched without there being any search of his person, [Section 50](#) of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, [Section 50](#) of the NDPS Act will have application.” Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of [Section 50\(1\)](#) as the empowered officer erred in giving the respondent an option of being searched before the Superintendent, who was not an independent officer.

It was held thus:

“We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the

nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of [Section 50\(1\)](#) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer.

Therefore, it was improper for PW 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, who was part of the raiding party. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have given a third option to the respondents when [Section 50\(1\)](#) of the NDPS Act does not provide for it and when such option would frustrate the provisions of [Section 50\(1\)](#) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated.” The question which arises before us is whether [Section 50\(1\)](#) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his

person. Further, if the first question is answered in the affirmative, whether the requirements of [Section 50](#) were strictly complied with by PW-2 and PW-4.”

20. Upon a careful scrutiny of the provisions contained in Section 50 of the N.D.P.S. Act and further keeping in view the aforesaid analysis of law by the Hon'ble Supreme Court and applying the same to the facts of the present case and also considering the mandatory nature of the provisions, this Court upon careful scrutiny of the F.I.R. as well as record produced before this Court, is of the considered opinion that no opportunity as has been provided under Section 50 of the N.D.P.S. Act was ever given to the petitioner in the present case. Therefore, on the basis of the materials available on record, this Court is constrained to hold that prima facie provisions contained in Section 50 of the N.D.P.S. Act has not been complied with in the case in hand, of course such finding is subject to detail evidence to be laid during trial.

21. To release the petitioner on bail, this Court has to examine whether the twin conditions as prescribed under Section 37 of the N.D.P.S. Act is complied with before any order is passed to enlarge the petitioner on regular bail. So far the twin conditions prescribed in Section 37 of the N.D.P.S. Act is concerned, the first condition i.e. the prosecutor must be given opportunity at the time of hearing of application for bail is duly complied with in the present case. So far as the second condition i.e. Court is satisfied that there are reasonable grounds for believing that the accused-petitioner is not guilty of such offence and that he is likely to commit such offence while on bail is concerned, due to non-compliance of Section 50 of the N.D.P.S. Act, this Court is of the prima facie opinion that there

exists a reasonable ground to hold that the petitioner prima facie is not guilty due to non-compliance of mandatory provision of Section 50 and the petitioner is likely to be acquitted by the trial court, if there are no other materials / evidence brought on record in course of trial. Further so far the condition that the petitioner is not likely to commit any such offence while on bail is concerned, this Court is of the humble view that the same can be regulated by imposing stringent conditions with power to the prosecution to seek for cancellation of bail in the event the petitioner indulges in similar nature of offence while on bail. On a conspectus of the aforesaid analysis and further taking into consideration the allegation made in the F.I.R./P.R. the bar contained under Section 37 of the N.D.P.S. Act would not be strictly applicable to the facts of the present case.

22. The next question that falls for consideration is whether the fact of compliance/non-compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act could be examined by the Court while considering the bail application? There is no doubt that often to consider the compliance/non-compliance of the mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act, the court is required to look into the facts and materials collected by the prosecution or the records maintained by the prosecution in course of search and seizure and investigation. Further to come to such a conclusion, the Court is required to scan the evidence and examine the records. Therefore, this Court is of the considered view that if the non-compliance of mandatory provision of Sections 42 and 50 of the N.D.P.S. Act is clear and self-explanatory from a bare reading of the F.I.R./Prosecution Report and the prosecution is not in a position to explain that the same has been substantially complied with, in such eventuality such non-compliance of Sections 42 and 50 of the

N.D.P.S. Act could be considered and should be taken as a ground to enlarge the petitioner on bail following the Constitution Bench judgment(supra) on non-compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act would vitiate the entire search, seizure and recovery. Therefore, if there is a possibility that the accused is likely to be acquitted for non-compliance of mandatory provision like Sections 42 and 50 of the N.D.P.S. Act, allowing the petitioner to continue in custody would not serve the ends of justice. Therefore, this Court has no hesitation to hold that if prima facie from record/F.I.R., it can be established that Sections 42 and 50 of the N.D.P.S. Act, which is mandatory in nature, has not been complied with, the court considering the bail application can always use the same as ground to enlarge the petitioner on bail and in such event the power contained in Section 37 of the N.D.P.S. Act would not be attracted to the facts of the case.

23. Having heard learned counsel for the parties and upon careful examination of the records placed before this Court and further in view of the analysis of law made hereinabove, this Court is inclined to release the petitioner on regular bail subject to certain terms and conditions. Therefore, it is directed that the petitioner be released on bail subject to furnishing a bail bond of Rs.50,000/-(rupees fifty thousand) with two local solvent sureties each for the like to the satisfaction of the Court in seisin over the matter. Further the release of the petitioner shall also be subject to verification of similar criminal antecedents of the petitioner. In the event, it is found that the petitioner has similar criminal antecedents, then this order shall stand automatically revoked and shall not be given effect to. Release of the petitioner shall also subject to following additional

conditions:-

- I. The petitioner shall not leave the jurisdiction of the Court in seisin over the matter without specific permission of the court;
- II. he shall appear before the jurisdictional Police Station once in a fortnight preferably on 'Sunday' in between 10.00 A.M. to 1.00 P.M. for period of two months and thereafter once in a month preferably on 'Sunday' in between 10.00 A.M. to 1.00 P.M. till conclusion of trial;
- III. he shall surrender his passport/travel documents before the court in seisin over the matter at the time of his release on bail, if does not have a passport then he has to file an affidavit in the court in seisin over the matter indicating such facts;
- IV. he shall appear before the court in seisin over the matter on each date of posting without fail;
- V. he shall furnish his address and mobile number to the police station from time to time;
- VI. he shall not indulge in any similar nature of offence while on bail; and
- VII. he shall furnish his address and mobile number to the jurisdictional police station regarding his whereabouts, his address, mobile number and other details and shall up-date the same at regular

intervals.

Violation of any of the terms and conditions shall entail cancellation of bail.

24. The Bail Application is accordingly disposed of.

Urgent certified copy of this order be granted on proper application.

(A.K. Mohapatra)
Judge

Jagabandhu

