

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(CRIMINAL MISCELLANEOUS JURISDICTION)
APPELLATE SIDE**

Present :

Hon'ble Justice Moushumi Bhattacharya

&

Hon'ble Justice Prasenjit Biswas.

CRM (NDPS) 546 of 2023

Abdul Rakib

vs

The State of West Bengal

For the petitioner	:	Ms. Ashima Mandla, Adv. Ms. Mandakini Singh, Adv. Mr. Surya Pratap Singh, Adv. Mr. Deborshi Dhar, Adv.
For the respondents	:	Mr. Aditi Sankar Chakraborty, Ld.APP Mr. Arjun Chowdhury, Adv.
Last heard on	:	23.08.2023
Delivered on	:	25.08.2023.

Moushumi Bhattacharya, J.

1. The present application is under Section 439 of The Code of Criminal Procedure, 1973 in connection with FIR No. 966 of 2022 dated 28.08.2022

registered at P.S. New Jalpaiguri under Sections 22(c)/25/28/29 of N.D.P.S. Act, 1985.

2. This matter was last heard on 23.08.2023 and was kept today for judgment.

3. The petitioner was arrested on 28.08.2022 and is in custody for about a year.

4. The prosecution has alleged that a substantial quantity of Yaba tablets was recovered from a truck. The petitioner, through learned counsel, takes the defence that the petitioner is neither the driver, nor owner or a co-passenger of the truck and was alleged to have been found on the spot where the contraband substance was seized.

5. The other point argued by counsel appearing for the petitioner is on the violation of Section 42 of the NDPS Act, 1985 and the Standing Instructions 1/88 which was introduced for uniformity in the sampling process after seizure of narcotic substances.

6. Learned counsel appearing for the prosecution has argued that there is no violation either of Section 42(1) or (2) of the Act and that the Standing Order has also been complied with. Counsel relies on the Case Diary to show compliance of 42(2) and also that there has not been any delay in sending the samples before the Judicial Magistrate under Section 52A of the NDPS Act.

7. The first issue which is required to be clarified is whether the vehicle from which the narcotic substance was allegedly recovered was a public or a private vehicle. The clarification is significant since the rigours of Section 42(1) and (2) would only arise if the vehicle is not a public conveyance.

8. Section 43 of the NDPS Act deals with the power of seizure and arrest in a public place and defines "*public place*" in the Explanation thereto to include "*any public conveyance, hotel, shop or other place intended for use by, or accessible to the public*".

9. The factual part of the case before us as to whether the conveyance from where the narcotic substance was allegedly seized would fall under "*public place*" and more specifically "*public conveyance*" is, hence, required to be ascertained.

10. The vehicle particulars issued by the State Transport Department (Uttar Dinajpur R.T.O.), Government of West Bengal which has been placed before the court indicates that the Service Type of the vehicle is "goods service". The owner's name has been shown as Samad Sk. and the ownership type is "individual".

11. *Prima facie*, hence, it appears that the vehicle belongs to an individual owner, is classified as a goods service vehicle and is not meant for public use or transportation.

12. The Supreme Court came to a finding in *Boota Singh v. State of Haryana* reported at 2021 SCC Online SC 324, that the vehicle was not a public conveyance. The Supreme Court relied on the registration certificate of the vehicle which did not indicate the vehicle to be a public transport vehicle. The Supreme Court relied on the Explanation to Section 43 to hold that a private vehicle would not come within the expression “*public place*” as explained in Section 43 of the NDPS Act. The Supreme Court also relied on the *State of Rajasthan vs. Jag Raj Singh* reported at (2016) 11 SCC 687 to hold that Section 42 of NDPS Act would hence become relevant in the facts.

14. Considering the particulars of the document placed before us with regard to the registration details of the vehicle, we are of the view that the vehicle from which the narcotic substance was recovered would not fall under the term “*public place*” as defined in the Explanation to Section 43 of the NDPS Act.

15. In light of our above finding, we are, hence, of the view, in reliance on the decision of the Supreme Court in *Boota Singh*, that the rigors of Section 42 of the NDPS Act would, therefore, apply to the facts of the case.

16. Section 42 of the NDPS Act relates to the power of entry, search, seizure and arrest without warrant or authorization. Section 42(1) casts a mandate on the designated officer to record his “*reason to believe*” with reference to personal knowledge or information received and to take down in writing that any narcotic drug or psychotropic substance in respect of which an offence punishable under the Act has been committed is liable for seizure and is kept

concealed in any building, conveyance or enclosed place. The officer must record the reasons for such belief before entering and searching any such building conveyance or place between sunrise and sunset.

17. Section 42(2) continues the statutory mandate on the officer who intends to enter and search such building, conveyance or enclosed place between sunrise and sunset to intimate his immediate official superior the information recorded in writing and the grounds for his belief under Section 42(1) within 72 hours.

18. In the present case, the prosecution has submitted that the alleged secret information received by the prosecution was written down vide a General Diary Entry by the Special Task Force which was subsequently intimated to the superior officer. The relevant documents are part of records.

19. We are, however, of the view that a mere GDE entry does not amount to due compliance of Section 42(1). The Bombay High Court in *Raju Bhavlal Pawar and Ors. Vs. State of Maharashtra Bail Application No.568 of 2021* held that an entry taken down in the station diary cannot be treated as information recorded under Section 42(1) of the Act. The court relied on *Rajaram Kadu vs. the State of Maharashtra Bail Application No.2108 of 2016*, also a decision of the Bombay High Court, to hold that an entry in the station diary is not due compliance of Section 42(1) of the NDPS Act.

20. The second point which merits consideration is whether there has been due compliance of Section 42(2) of the NDPS Act. The prosecution has relied on

the Case Diary to show that there has been compliance of Section 42(2) of the Act.

21. The Supreme Court, however, in *Mahabir Singh vs. State of Haryana* reported at (2001) 7 SCC 148 held, inter-alia, that the court is forbidden from using the entries of such diaries as evidence against the accused cannot also be used in any other manner against him. It was further held that if the court uses the entries in a Case Diary for contradicting a police officer, it can only be done in the manner provided under Section 145 of the Evidence Act, that is, by giving the author of the statement an opportunity to explain the contradiction. The alleged compliance of Section 42(2) being part of the Case Diary therefore falls short of due statutory compliance.

22. We also rely on *Boota Singh (Supra)* to come to the conclusion that non-compliance of Section 42 is not permissible in law. We are of the view that the report under Section 42(1) must be in terms of a clear recorded statement in writing by the authorized officer under Section 42(1) and must not be contained in a document which is closed from public view.

23. Our view is strengthened by the fact that the NDPS Act is a special legislation entailing several statutory restrictions against grant of relief. Hence, the obligation cast on the officers must strictly be construed as also the rights available to an accused under the Act which must also be given their due weightage.

24. Since we have already formed an opinion on the non-compliance of the mandate of Section 42(1) and (2) of the Act, the import of the Standing Order 1/88 is not relevant. We, however, note that there are several decisions on the desired compliance of the Standing Order by several High Courts including in *Ram Bharose vs. State (Govt. of NCT of Delhi) Bail Application No. 1623 of 2022*.

25. The above reasons are sufficient to rebut the statutory restriction under Section 37 of the NDPS Act.

26. The prayer for bail is hence allowed .

27. We accordingly, direct that the petitioner shall be released on bail upon furnishing a bond of Rs.20,000/-(rupees twenty thousand only) with two sureties each of like amount, one of who must be local and to the satisfaction of the learned Special Judge, Special Court (NDPS Act), Jalpaiguri. The petitioner shall not induce witnesses or influence them or tamper with the evidence. The petitioner shall also make himself available for the trial as and when the petitioner is required and shall also not leave the jurisdiction of the concerned police station without leave of the concerned authorities.

28. C.R.M.(NDPS) 546 of 2023 is accordingly allowed and disposed of in terms of the above.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

I agree.

(PRASENJIT BISWAS, J.)

(MOUSHUMI BHATTACHARYA, J.)