



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr.MP(M) No. 1392 of 2020

Reserved on: 28.8.2020

Decided on: 02.09.2020

Sanjay Kumar

.....Petitioner.

Versus

State of H.P.

.....Respondent.

Coram

The Hon'ble Ms. Justice Jyotsna Rewal Dua, *Judge*.

Whether approved for reporting?¹ Yes.

For the petitioner : Mr. Deepak Kaushal, Advocate.

For the respondent : Mr. Anil Jaswal, Addl. Advocate
General with Mr. Manoj Bagga,
Assistant Advocate General.

ASI Gian Singh, I/O Police Station,
Paonta Sahib, District Sirmour, H.P. in
person.

Jyotsna Rewal Dua, *Judge*

Petitioner has been linked with recovery of 3541 number of intoxicating capsules containing psychotropic substance Tramadol and therefore, is an accused in FIR No. 50/2020 dated 16.4.2020 registered under Sections 21 and 29 of Narcotic Drugs & Psychotropic Substance Act (in short NDPS Act) at Police Station, Paonta Sahib, District Sirmour.

2. Instant petition for bail under Section 439 of Code of Criminal Procedure has been preferred on following grounds:

¹ ***Whether the reporters of the local papers may be allowed to see the Judgment?***

- a) Petitioner is not involved with the recovery of intoxicating capsules.
- b) Provisions of Section 42 of NDPS Act were not complied with.
- c) Investigating Officer and the complainant in the FIR in question was the same person.

The later two grounds though have not been taken in the pleadings, however, they were raised by learned Counsel for the petitioner during hearing of the case.

3. Facts: The prosecution case is that:-

3(i) On 16.4.2020 a police party comprising of HC Arun Kumar, C. Vipin, PC Om Parkash along with C. Dinesh was on patrolling duty vide Rapat No. 38 in the area under jurisdiction of Police Station, Paonta Sahib. At around 6:15 P.M., while the patrolling party was at Vishwa Karma chowk, HC Arun Kumar received a secret but reliable information that one Sanjay Kumar (bail petitioner) is involved in illegal sale of intoxicating capsules and on his demand, one Salman Khan was bringing huge quantity of these capsules from Mirzapur, Uttrakhand in the cabin of truck No. HP 17C-0903. HC Arun Kumar was further informed that the truck was about to enter Paonta Sahib border and its search at that moment itself can result into recovery of large quantity of intoxicating capsules.

3(ii) HC Arun Kumar reduced the above information in writing in accordance with the provisions of Section 42(2) of

NDPS Act. The written information so recorded was sent by HC Arun Kumar to Sub Divisional Police Officer, Police Station, Paonta Sahib through C. Vipin. Whereafter HC Arun Kumar along with other officials of patrolling party reached Yamuna barrier. HC Krishan Singh Bhandari, who was discharging his duties at barrier was also involved in the raiding party alongwith Dr. Himanshu Kaushish and Pradeep Kumar- officials of Health department deployed at Yamuna barrier on account of COVID-19 pandemic duty.

3(iii) The raiding party kept watch for the afore numbered truck. At around 6:38 P.M., the truck in question reached Yamuna barrier. It was signaled to stop by HC Krishan Singh Bhandari. The truck driver on inquiry made by HC Arun Kumar disclosed his name as Salman s/o Sabir Ali r/o Paonta Sahib. HC Arun Kumar expressed the intention of the raiding party for carrying out the search of the truck and in that process gave their own search to Salman. No incriminating article was recovered during search of the officials/members of the raiding party. Cabin of the truck was thereafter searched in accordance with law. During the search, two transparent polythene bags were found underneath a blanket kept on the cleaner seat. One polythene contained five boxes of Pyeevon Spas Plus. Each box had 30 strips of 8 capsules each. Total 1200 intoxicating capsules were recovered from five boxes of Pyeevon Spas Plus. The other polythene

contained 2341 loose capsules of PYN SPAS PLUS. In all $1200+2341=3541$ intoxicating capsules were recovered from the truck's cabin. The procedure contemplated in law was followed during search and seizure.

3(iv) Suspecting that Salman might be carrying some contraband on his person, therefore, his personal search was also considered necessary by the raiding party. Provisions of Section 50 of the NDPS Act were complied, pursuant to which Salman agreed for his personal search in presence of a gazetted officer. The Sub Divisional Police Officer, Police Station Paonta Sahib was, therefore, requested to come to the spot.

3(v) All this while, the mobile phone of Salman was showing repeated calls received from one Sanjay. This tallied with the information earlier received by HC Arun Kumar leading him to believe that the caller Sanjay might be the same person at whose instance intoxicating capsules were being smuggled into the State by Salman. Assistant Sub Inspector Pratap Singh was thereafter alerted to locate Sanjay for interrogation purpose.

3(vi) The SDPO, Paonta Sahib reached the spot along with C. Vipin at around 7:50 P.M. whereafter personal search of Salman was carried out. No incriminating article was recovered during his personal search. Rukka was prepared at the spot and was sent to Police Station, Paonta Sahib through C. Vipin. This led to registration of FIR in question. For further investigation

Assistant Sub Inspector Gian Singh was deputed who reached the spot and carried out further investigation from that stage onwards. Salman was arrested on 16.4.2020. Sanjay (petitioner) was also brought to Police Station for interrogation and was arrested on 16/17.4.2020.

3(vii) As per the prosecution case, during investigation accused Salman had recorded his statement under Section 27 of Indian Evidence Act to the effect that on 16.4.2020 he as driver of truck No. HP17C-0903 was bringing raw material of Solvopet Company from Rudki (Uttarakhand). Sanjay Kumar had asked him to bring intoxicating capsules from a specific person at a specified location near Mirzapur, Petrol Pump, Pathedh Auto Service and he had accordingly procured the intoxicating capsules so demanded by petitioner Sanjay. The raiding party is said to have visited the place alongwith accused persons, however, on account of lockdown, the person could not be traced. Statements of witnesses under Section 161 Cr.P.C. were recorded. Call Detail Report (CDR) of mobile phones of accused Salman as well as of bail petitioner were obtained. CDR revealed that on 16th April, 2020 itself i.e. the date of incident, as many as 14 calls were exchanged between the two.

3(viii) According to the status report, the bail petitioner has criminal antecedents. Following cases have been registered against him at Police Station, Paonta Sahib:

a) FIR No. 49/16 dated 20.2.20216 registered under Sections 21 and 22 of NDPS Act involving recovery of 936 Spasmo Proxyvon intoxicating capsules, 18 bottles of Corex syrup and 4 bottles of MedisedXL.

b) FIR No. 205/18 dated 18.7.2018 under Section 21 of NDPS Act involving 528 intoxicating capsules, 552 capsules of Spasmo Proxyvon Plus, 8 bottles of Cough Syrup and 150 Nitravet intoxicating tablets.

c) FIR No. 76/19 dated 12.3.2019 under Section 21 of NDPS Act involving 56 intoxicating capsules of Spasmo Proxyvon.

3(ix) In the instant FIR, the State Forensic Science Laboratory (SFSL), Junga has reported that Pyeevon Spas Plus as well as PYN SPAS Plus capsules recovered from the truck's cabin contained Tramadol Hydrochloride. According to the SFSL report, total weight of recovered Pyeevon Spas Plus capsules was 782.400 grams and total weight of powder was 664.800 grams and total weight of recovered PYN Spas Plus capsules was 1526.332 grams and total weight of powder was 1296.914grams.

4. Ground No. (a): Petitioner's involvement with the recovered articles:

4(i) Learned Counsel for the petitioner argued that intoxicating capsules containing Tramadol Hydrochloride were not recovered from the petitioner. The recovery was effected even as per the case of the prosecution from the cabin of the

truck driven by accused Salman. Bail petitioner had no role to play in the transportation of the capsules in the State of Himachal Pradesh and therefore, he has been wrongly implicated with the offences alleged against him. Learned Counsel relied upon a judgment passed by a Co-ordinate Bench of this Court in Cr.MP(M) No. 992 of 2020. Whereas, learned Additional Advocate General opposed the grant of bail on the ground that the evidence available on record and the investigation carried out in the FIR in question directly connects the petitioner with recovery of huge quantity of intoxicating capsules being transported in the State without any valid document.

4(ii) Each case has to be decided on its own facts. In the case in hand, main accused Salman has allegedly disclosed about his transporting the intoxicating capsules at the behest of petitioner Sanjay Kumar. It has come during investigation at this stage that the capsules were being smuggled into the State by accused Salman on the asking of accused Sanjay Kumar without any legal or valid documents. This was also the secret information received by HC Arun Kumar while on patrolling duty. The Call Detail Report of mobile phones belonging to accused Sanjay Kumar (petitioner) and accused Salman reveal that as many as fourteen calls had been exchanged between two accused persons on the date of incident. Petitioner has previous criminal history (*as detailed in para supra*) under the NDPS Act in

respect of involvement with psychotropic substances. His involvement in the FIR in question, therefore, in the given facts, which have come out at this stage cannot be ruled out. ◇

4(iii) Total weight of capsules so recovered in the FIR is 2308.732 grams(782.400+1526.332) and total weight of powder of recovered capsules in the FIR was 1961.714 grams (664.800+1296.914). Hon'ble Apex Court in Criminal Appeal No. 722 of 2017, *titled as Hira Singh Vs. Union of India*, decided on 22nd April, 2020, has held that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be excluded, rather it is to be taken into consideration alongwith actual content by weight of the offending drug while determining the 'small quantity or commercial quantity' of a narcotic drug or psychotropic substance. The relevant para from the judgment is reproduced thus:-

"10. In view of the above and for the reasons stated above, Reference is answered as under:-

(I) The decision of this Court in the case of E.Micheal Raj (supra) taking the view that in the mixture of narcotic drugs and psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not required to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

(II) In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration alongwith actual content by weight of the offending drug, while determining the "small or

commercial quantity” of the Narcotic Drugs or Psychotropic Substances;

(III) Section 21 of the NDPS Act is not stand-alone provision and must be construed alongwith other provisions in the statute including provisions in the NDPS act including Notification No. S.O.2942(E) dated 18.11.2009 and Notification S.O. 1055(E) dated 19.10.2001.

(IV) Challenge to Notification dated 18.11.2009 adding “Note 4” to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed.”

In the instant case the total weight of capsules as well as total total weight of powder of capsules recovered from the cabin of the truck exceeded 250 grams notified as commercial quantity of Tramadol under the NDPS Act, therefore, rigors of Section 37 of the NDPS Act are attracted. Section 37 reads as under:

“37. Offences to be cognizable and non-bailable.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 of section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

In this regard, Hon'ble Apex Court in ***AIR 2020 SC 721, State of Kerala Etc. Versus Rajesh Etc.***, held as under vide paras 19 to 21:-

"19. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In Union of India Vs. Ram Samujh and Ors. 1999(9) SCC 429, it has been elaborated as under:-"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier v. Chief Secy., Union Territory of Goa [(1990) 1 SCC 95] as under:

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

- (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and
- (ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended."

20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with nonobstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the

underlying object of Section 37 in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

In order to make out a case for release on bail, petitioner has to satisfy the following twin conditions imposed in the aforesaid section:-

- (i) Court should be satisfied that there are reasonable grounds for believing that the petitioner is not guilty of such offence; and
- (ii) Petitioner is not likely to commit any offence while on bail.

In view of the facts as have come out and investigation carried out by the Investigating Agency, at this stage it cannot be said that there are no reasonable grounds to believe about petitioner's involvement in the recovery of psychotropic substance in the FIR in question. The first contention of the petitioner, therefore, fails and is rejected accordingly.

5. Ground (b): Compliance of Section 42 of NDPS Act.

Two fold submissions have been made by learned Counsel for the petitioner under this head:-

- a) non-recording of secret information received by the police party.
- b) HC Arun Kumar, who carried out the search was not authorised to search.

5(i) Contention regarding non-recording of secret information.

It was argued by learned Counsel for the petitioner that secret information allegedly received by HC Arun Kumar was not reduced by him into writing before effecting search of the truck in question. This according to him vitiates the entire search, the alleged recovery and seizure thereby entitling the petitioner to be released on bail.

5(i)(a) Before delving into the related factual aspects, it may be noticed here that the search was carried out and recovery was effected from the cabin of the truck driven by accused Salman. It becomes questionable as to whether these aspects can even be raised at this stage by the bail petitioner who has been made an accused in the FIR by linking him with the alleged recovery of the contraband. Nonetheless the point raised is being considered hereinafter.

Record shows that a police party comprising of HC Arun Kumar, C. Vipin, PC Om Parkash along with C. Dinesh was on patrolling duty in area under the jurisdiction of Police Station, Paonta Sahib on 16.4.2020, when HC Arun Kumar received a secret information about contraband being illegally brought into the State by accused Salman at the behest of bail petitioner. According to the record, the secret information so received by HC Arun Kumar was reduced by him in writing and Rukka in this

regard was thereafter handed over to C. Vipin who further carried it to Police Station, Paonta Sahib. Therefore, the contention that secret information was not reduced in writing is not factually correct.

5(i)(b) Hon'ble Apex Court in **2015(6) SCC 222** titled as ***Mohan Lal vs. State of Rajasthan*** after considering entire law in subject including previous decisions in **(2009) 8 SCC 539** titled ***Karnail Singh vs. State of Haryana***; **(2000) 2 SCC 513** titled ***Abdul Rashid Ibrahim Mansuri vs. State of Gujarat***; **(2001) 6 SCC 692** titled as ***Sajan Abrajam vs. State of Kerala***; **(2011) 8 SCC 130** titled as ***Rajinder Singh vs. State of Haryana*** held that total non-compliance with the provisions of sub section (1) and (2) of section 42 of the ND&PS Act is impermissible but delayed compliance with satisfactory explanation for delay can be countenanced. Relevant paragraphs from the judgment are :

“30. It is submitted by Ms. Aishwarya Bhati, learned counsel for the appellant that there has been non-compliance of Section 42 of the NDPS Act and hence, the conviction is vitiated. It is urged by her that the Investigating Officer has not reduced the information to writing and has also not led any evidence of having made a full report to his immediate official superior. The High Court has taken note of the fact that information was given to Bheem Singh, PW-12, and recovery was made by him who was the Sub-Inspector and SHO at the police station. That apart, in this context, we may refer with profit to the Constitution Bench decision in [Karnail Singh v. State of Haryana \[\(2009\) 8 SCC 539\]](#), wherein the issue which emerged for consideration is whether Section 42 of the NDPS Act is mandatory and failure to

take down the information in writing and forthwith sending a report to his immediate officer superior would cause prejudice to the accused? The Court was required to reconcile the decisions in *Abdul Rashid Ibraghim Mansuri v. State of Gujrat* [(2000) 2 SCC 513] and *Sajan Abraham v. State of Kerala*, [(2001) 6 SCC 692]. The Constitution Bench explaining the position opined that *Abdul Rashid (supra)* did not require about literal compliance with the requirements of Section 42(1) and 42(2) nor did *Sajan Abraham (supra)* hold that requirement of Section 42(1) and 42(2) need not be fulfilled at all. The larger Bench summarized the effect of two decisions. The summation is reproduced below:-

"(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 Section 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get

postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of subsections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

31. In [Rajinder Singh v. State of Haryana](#), [(2011) 8 SCC 130] placing reliance on the Constitution Bench decision, it has been opined that total non-compliance with the provisions of subsections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with satisfactory explanation for the delay can, however, be countenanced."

5(i)(c) Present is a case of grant of bail. At this stage it is not necessary to go deeper into the evidence to find out as to whether there was strict compliance of provisions of Section 42(2) of the Act or not. The record shows that there has been substantial compliance, which for the purpose of adjudicating the

bail petition is sufficient. It will be for the trial Court to decide about its strict compliance/substantial compliance and effects thereof after recording of evidence as to whether the compliance in question was sufficient or had vitiated the trial. However, at this stage after going through the record, the compliance with respect to recording of secret information in writing before proceeding to search the vehicle cannot be said to be lacking. Accordingly, the first contention is rejected.

5(ii) Head Constable not authorised to search.

5(ii)(a) Placing reliance upon a Single Bench judgment of High Court of Punjab and Haryana reported in 1988 Cr. L.J. 1181, titled Karam Singh vs. State of Punjab and of Rajasthan High Court reported in (1987) Cr.L.R. 698, titled Nand Lal vs. State of Rajasthan, Learned Counsel for the petitioner contended that HC Arun Kumar who carried out search and effected recovery, was not authorised to do so. Learned Counsel further argued that a Head Constable is equivalent to Constable, therefore, search and recovery effected by him was hit by the Section 42 of NDPS Act.

5(ii)(b) It will be appropriate to reproduce here Section 42 of the Act:

“ 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 personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act; or any rule or

order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

5(ii)(c) 2000(8) SCC 590, titled Roy V.D. v. State of Kerala

was a case where search was carried out by an Excise Inspector. On consideration of Section 41(2) and Section 42(1) of NDPS Act, following was observed by Apex Court therein:-

"11. Sub-section (2) of Section 41 of the NDPS Act entitles any officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force who has been empowered in that behalf by general or special order of the Central Government, or any officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in that behalf by general or special order of the State Government, to arrest a person or search a building, conveyance or a place or to authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night.

16. Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) of the NDPS Act or make a complaint under clause (d) of sub-section (1) of Section 36-A of the NDPS Act. It

follows that any collection of material, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorised officer under [Section 41\(2\)](#) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and use of such a material by the prosecution vitiates the trial.”

Further after noticing the judgment in **(1994) 3 SCC 299**, titled ***State of Punjab vs. Balbir Singh*** that if arrest or search contemplated under Sections 41 and 42 is made by an officer not empowered or authorised, it would per se be illegal, would affect prosecution case and consequently vitiate the trial; and after noticing the plea of respondent therein relying upon ***State of Punjab vs. Baldev Singh*** reported in **(1999)6 SCC 172** that even in such situation, trial would not be vitiated but recovery of article would become suspect, therefore, conviction and sentence of accused would be vitiated only if the same was recorded solely on the basis of possession of such article; it was held in para-20 of Roy V.D.’s case supra as under:

“20. It may be noticed that that conclusion was reached by the Constitution Bench in the context of non-compliance of [Section 50](#) of the NDPS Act. While emphasising that it is imperative on the officer who is making search of a person to inform him of his right under sub-section (1) of [Section 50](#) of the NDPS Act, it was held that the recovery of the illicit article in violation of [Section 50](#) of the NDPS Act would render the recovery of the illicit article suspect and use of such material would vitiate the conviction and sentence of an accused. It is manifest that the recovery of illicit article in that case was by a

competent officer but was in violation of Section 50 of the NDPS Act. In the instant case, however, the search and recovery were by an officer who was not empowered so to do. Further in Balbir Singh case (supra) this Court took the view that arrest and search in violation of Sections 41 and 42 of the NDPS Act being per se illegal would vitiate the trial. Therefore, the said conclusion cannot be called in aid to support the order under challenge. If the proceedings in the instant case are not quashed, the illegality will be perpetuated resulting in grave hardship to the appellant by making him to undergo the ordeal of trial which is vitiated by the illegality and which cannot result in conviction and sentence. It is, in our view, a fit case to exercise power under Section 482 of Cr.P.C. to quash the impugned proceedings."

5(ii)(d) Bare provisions of Section 42 make it clear that only an officer above the rank of peon, Sepoy or Constable of the police department can carry out search in terms of Section 42 of NDPS Act. Head Constable is superior in rank to a Constable and has not been barred under the Act from carrying out the search.

A division Bench of this Court in **2001(1) SLC 150**, titled **Raj Kumar v. State of Himachal Pradesh** while dealing with the plea of accused therein that ASI who effected search was not empowered under Section 42 of the Act held that it is only in case of an officer belonging to 'any other department of a state government' that a general or special order by the state government is necessary for empowering them under Section 42 of the Act and not otherwise. Relevant para from the judgment are produced hereinafter:-

"12. Placing emphasis and reliance on the words "as is empowered in this behalf by general or special order of the State Government," the learned Counsel for the accused has contended that there is nothing on the record to show that PW 13, ASI Pushap Lata, who had carried out the search, was duly empowered under Section 42 of the Act. Therefore, since the search was carried out by an officer who has not been duly empowered, such search would be an illegal search and cannot be pressed into service against the accused.

13. We do not find force in the contention raised by the learned Counsel for the accused that PW 13 ASI Pushap Lata was not empowered under Section 42 of the Act. A bare reading of the section shows that all such officers superior in rank to a peon, sepoy or constable belonging to the revenue, drugs control, excise and police are empowered under Section 42 of the Act by virtue of their office. It is only in case of an officer belonging to "any other department of a State Government" that a general or special order by the State Government is required empowering them under Section 42 of the Act. The word "or" appearing after the word "police" and before the words "any other department of a State Government" has to be read disjunctively in order to give effect to the manifest intention of the Legislature. So reading, it is evident that the words "as is empowered in this behalf by general or special order of the State Government" are to be read only with the words "any other department of a State Government". Therefore, PW 13 ASI Pushap Lata being a police officer superior in rank to a constable, is an officer duly empowered under Section 42 of the Act."

5(ii)(e) Learned Additional Advocate General has placed on record various notifications/instructions which reveal that a notification dated 18.08.1987 was issued whereby powers were given to Excise Officers under Section 42(1) and Section 67 of the Narcotics Drugs and Psychotropic Substances Act, 1985.

Vide another notification of 18.8.1987 issued in exercise of powers conferred under Section 7(1) of NDPS Act, all officers appointed under Punjab Excise Act, 1914 as applied to Himachal Pradesh have been appointed with their respective designations, classes & jurisdiction for the purposes of NDPS Act as well. Vide yet another notification of 18.8.1987 issued in exercise of powers under Sections 42(1) and 67 of NDPS Act, Excise Officers appointed under Punjab Excise Act and exercising powers under Sections 10 & 11 of the Act as group 'A' and group 'B' officers, were authorized to exercise powers and duties under Sections 42 & 67 of the Act. Further as per Govt. of Himachal Pradesh Excise & Taxation Department Notification No. 1-17/64=E&T dated 7th August, 1965, the Himachal Pradesh (Excise Powers and Appeal) orders, recognizes the following categories of officers as Excise Officers under Section 10 and Section 11 of the Punjab Excise Act 1914 as applicable to Himachal Pradesh, relevant portion of which is reproduced as below:-

"5. Under section 10 of the said Punjab Excise Act, as applied to Himachal Pradesh, there shall be three classes of Excise Officers, to the designated 1st Class, 2nd Class and 3rd Class, respectively, and the persons mentioned in groups 'A' 'B' and 'C' below shall be respectively Excise officers of the 1st, 2nd and 3rd Class.

Group 'A'

- (1) All Assistant Collectors of 1st Grade.
- (2) The Asstt. Excise & Taxation Commissioner.
- (3) All Excise and Taxation Officers.
- (4) All Tehsildars.
- (5) All Excise & Taxation Inspectors.
- (6) All Naib-Tehsildars.

(7) All Excise & Taxation Sub-Inspectors.

Group 'B'

Excise Officers of the Second Class.

All Excise and Taxation Sub-Inspectors (leave reserve)

Group 'C'

Excise Officers of the Third Class.-

(1) All Head Clerks and Clerks attached to the offices of the Excise & Taxation Officers of the Districts.

(2) All Excise Chaprasis and Peons.

6. *The persons mentioned in groups 'A' and 'B' below are, under Section 11 of the said Punjab Excise Act, as applied to Himachal Pradesh, invested with the powers of the Excise Officers of the 1st Class and 3rd Class respectively.-*

Group 'A'

(To exercise the powers of an Excise Officers of the 1st Class).

(1) All Police Officers of the rank of Head Constable and any rank superior thereto.

(2) All Assistant Commissioners, Superintendents, Assistant Superintendents and Probationary Assistant Superintendents of the Central Excise Department.

Group 'B'

(To exercise the powers of an Excise Officers of the 3rd Class).

(1) All field Kanungos.

(2) All Police constables.

It is evident from co-relation of the above notifications that the powers of Excise officers under Sections 10 and 11 of the Punjab Excise Act have been granted to various classes of officers and officials including police officers of the rank of Head Constable and above and the same set of officers and officials by virtue of being Excise Officers under the Excise Act derive powers under Section 42(1) and Section 67 of the NDPS Act.

Therefore, the second contention raised by the petitioner has no merit and is accordingly rejected at this stage. ◇

6. Third Ground: Complainant was himself the Investigating Officer.

6(i) Placing reliance upon *(2018) 17 SCC 627* titled *Mohan Lal vs. State of Punjab*, it has been contended that investigation in the case was carried out by the complainant, thereby vitiating the criminal process, therefor, petitioner is entitled to bail. It is apt to reproduce hereinafter relevant part of the judgment in Mohan Lal's case supra:

" 30. In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof."

6(ii) In *Varinder Kumar vs. State of Himachal Pradesh* reported in *2020 (3) SCC 321*, Hon'ble Supreme Court held that

law laid down in *Mohan Lal* (supra) will not be allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. ◇

6(iii) A constitution Bench of Hon'ble Apex Court in a judgment delivered on 31.8.2020, in case titled ***Mukesh Singh vs. State (Narcotic Branch of Delhi)***, *Special Leave Petition (Criminal) Diary No. 39528/2018* alongwith *Special Leave Petition (Criminal) No. 5648/2019* and other matters, has held that merely because the informant and the Investigating Officer is the same, it cannot be said that investigation is biased and the trial is vitiated. It has been clarified that it depends on the facts and circumstances of each case if the investigation has become tainted because the informant and the investigating officer was the same. It cannot be held as a blanket rule. Decision in *Mohan Lal vs. State of Punjab* (2018) 17 SCC 627 and other decision taking contrary view that the informant cannot be the investigator have been held as not good law and have been overruled. The concluding part of the judgment answering the reference reads as under:-

"12. From the above discussion and for the reasons stated above, we conclude and answer the reference as under:

1. That the observations of this Court in the cases of [Bhagwan Singh v. State of Rajasthan](#) (1976) 1 SCC 15; [Megha Singh v. State of Haryana](#) (1996) 11 SCC 709; and [State by Inspector of Police, NIB, Tamil Nadu v. Rajangam](#) (2010) 15 SCC 369 and the acquittal of the accused by this Court on the ground that as the

informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. It cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal; II. In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this Court in the case of [Mohan Lal v. State of Punjab](#) (2018) 17 SCC 627 and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.”

6(iv) Instant was a case of prior information received by HC Arun Kumar, who effected search at the spot. He is the one who sent Rukka to the Police Station through C. Vipin. FIR was registered on the basis of this Rukka. HC Arun Kumar is the complainant in the FIR. However, post receipt of Rukka at Police Station, further investigation in the matter was conducted by ASI Gian Singh. At this stage, therefore, it cannot be said that complainant was himself the Investigator. Even otherwise in view of pronouncement of constitution Bench of Hon'ble Apex

Court in Mukesh Singh's case *supra*, the ground at this stage of the case, lacks merit and is, therefore, rejected.

7. Normally in bail petition facts of the case in detail are not required to be ventured into. However, in the instant case, specific questions insistently raised at this very stage, have been looked into for limited purpose for finding out whether there are reasonable grounds to believe at this stage that the accused is not guilty of possessing commercial quantity of contraband for considering his release on bail under Section 37 of NDPS Act.

It is further clarified that the observations and findings given above may not be equated with the one which is to be recorded at the end of the trial. It shall be open for the petitioner to take up all pleas available to him in accordance with law including the plea of bias, prejudice, non-compliance with statutory provisions etc. during the trial. Learned trial Court will adjudicate the matter on merits in accordance with law without being influenced by above observations.

With the above observations, the petition is dismissed.

**(Jyotsna Rewal Dua),
Judge.**

**September 2nd, 2020,
(vs)**