

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

Crl. Misc. No.M-34217 of 2015

Date of Decision: 12.10.2015

Nirmal Singh @ Nimma

....Petitioner

Versus

State of Punjab

....Respondent

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

- 1. Whether reporters of local newspapers may be allowed to see the judgment ? (Yes/No)**
- 2. To be referred to reporters or not ? (Yes/No)**
- 3. Whether the judgment should be reported in the Digest ? (Yes/No)**

Present:- Mr. Ashish Gupta, Advocate
for the petitioner.

Mr. A.P.S. Randhawa, Addl. A.G., Punjab
for the respondent-State.

DAYA CHAUDHARY, J.

This petition has been filed under Section 439 Cr.P.C read with Section 167(2) Cr.P.C for grant of regular bail to the petitioner in case FIR No.73 dated 01.07.2015 registered under Section 15 of the Narcotic Drugs and Psychotropic Act, 1985 (here-in-after referred to as 'the Act') at Police Station Sadar, Kot-Kapura, District Faridkot.

Learned counsel for the petitioner submits that the bail application filed by the petitioner under Section 167(2) of the Cr.P.C has been dismissed on the ground that he was found in possession of 50 kgs. of poppy husk, whereas, the weight of the bag has not been excluded. The "commercial quantity" has been defined under the Act and any quantity

which is greater than the quantity specified by the Central Government by notification shall be treated as "commercial quantity". The recovery in the present case is 50 kgs. of poppy husk and it does not fall under the "commercial quantity".

Learned counsel for the petitioner has relied upon the judgment of ***Rajasthan High Court*** in case ***Chanda Soni (Smt.) @ Pushpa vs State of Rajasthan 2010(3) RCR (Criminal) 728***, in support of his contentions.

Learned counsel for the respondent-State opposes the submissions made by learned counsel for the petitioner on the ground that the statutory period, in case of "commercial quantity", is 180 days and no application under Section 36-A of the Act was filed by the prosecution. He further submits that in view of the same, the order passed by the learned Judge, Special Court, Faridkot is appropriate.

Heard the arguments of learned counsel for the parties and have also perused the impugned order passed by the Judge, Special Court, Faridkot, whereby, the application moved by the petitioner under Section 167(2) of the Code has been dismissed by considering the alleged recovery of 50 kgs. of poppy husk as "commercial quantity".

Admittedly, the petitioner was arrested on 01.07.2015 but the challan was not presented within a period of 90 days. Thereafter, an application was moved by the petitioner by invoking the provisions of Section 167(2) of the Code but the same was dismissed. It is to be considered by this Court as to whether the recovery of 50 kgs. of poppy husk falls within the "commercial quantity" or "non-commercial quantity". The definition of "commercial quantity" has been defined under Section 2 (vii-a) of the NDPS Act, which is reproduced as under :-

“(vii-a) ***“commercial quantity”***, in relation to

narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by Notification in the Official Gazette.”

From bare perusal of above said section, it is clear that the quantity, which is greater than the quantity mentioned in the Official Gazette, shall be termed as "commercial quantity". As per entry No.110 in the notification table, the quantity of 50 kgs. has been mentioned under the heading of "commercial quantity". By implication of the above said section, it means that any quantity which is more than 50 kgs. of poppy husk will be treated as "commercial quantity".

In the present case, the alleged recovery from the petitioner is 50 kgs of poppy husk including the weight of the bag and by no stretch of imagination, the said quantity can be considered to be "commercial quantity". Even otherwise also, the weight of the bag has not been excluded and in case that is excluded then the alleged recovery will be less than 50 kgs. and the quantity which is less than 50 kgs. will admittedly be “non-commercial.” In case, the quantity is “non-commercial,” then the provisions of Section 36-A of the Act are to be attracted and the procedure specified under Section 167 Cr.P.C is to be followed. As per provisions of Section 167(2) Cr.P.C., the said offence falls within the ambit of provision, whereby, the challan has to be presented within a period of 60 days. Section 167(2) of the Cr.P.C is reproduced as under :-

“167. Procedure when investigation cannot be completed in twenty-four hours:-

(1) xx xx xx xx

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorize

the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that:

(a) The Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding,-

(b) Ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(c) Sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.”

In the present case, the petitioner was arrested on 01.07.2015 and the bail application under Section 167(2) Cr.P.C was moved by him on 31.08.2015. Accordingly, at the time of filing bail application, the challan was not presented and even till date, the challan has not been presented. It is also not disputed that till date, no application under Section 36-A of the Act has been filed by the prosecution. As such, by the implication of the above said provision, the petitioner is entitled to bail by invoking the provisions of Section 167(2) Cr.P.C read with the definition of the "commercial quantity". The application moved by the petitioner has been

dismissed only on the ground that the recovery is 50 kgs. of poppy husk, which falls within the ambit of "commercial quantity".

In **Chanda Soni's** case (supra), the recovery was 2.5 kgs of opium. As per definition of "commercial quantity", the quantity to be recovered should be greater or higher than 2.5 kg so as to make out a case of "commercial quantity". In that case, the period of filing challan was 60 days only but the same was not presented within a period of 60 days. By considering that quantity of 2.5 kgs of opium, to be "non-commercial," the accused-petitioner was granted bail under Section 167(2) of the Code.

The Full Bench of Himachal Pradesh High Court in **Ratto vs State of H.P. 2004(1) RCR (Criminal) 501**, also considered this issue as the recovery of one kg. of charas was considered as "non-commercial quantity" within meaning of Section 2(vii-a). It was held that quantity of one kg., mentioned in Section 2(vii-a) would mean any quantity more than one kg.

The Full Bench in the said judgment has held that there is no ambiguity in the language of Section 2(viia) as simple and literal meaning has to be given to the words "quantity greater than", so as to hold what would be the "commercial quantity". The relevant paras of the said judgment are reproduced as under :-

"30. As already noted there is hardly any ambiguity, muchless conflict between Section 2 (viia) and the notification as extracted here-in-above for determination of what would be the "commercial quantity". By virtue of powers conferred under subsection (viia) of Section 2, Central Government is authorized to notify as to what would be the "commercial quantity". Because the "commercial quantity" on a plain reading of its definition amongst other things has to be".....greater than the quantity specified by the Central

Government by notification.....” Under 2001 Act notification supra was issued specifying the quantity for the purpose of Section 2 (viia) of the Act. A perusal of this notification indicates that quantity specified is one kilogram. Various columns of the notification extracted here-in-above have to be read in conjunction with the substantive provision of Section 2 (viia) of the Act. This also puts a harmonious construction on both, notification as well as Section 2(viia). While determining the quantity under this Sub-section, it has to be greater than one Kg. There is hardly any doubt regarding either the words one kg. or the "commercial quantity" which has to be "greater than", which in our considered view would always mean any quantity more than/bigger than/larger than one Kg. We are further of the view that this provision, and for that matter, notification admits of no other interpretation on its reading. Thus, it cannot be said that one Kg. would be the "commercial quantity" for the purpose of Section 2 (viia), as added by 2001 Act.

31. Another reason to take this view is, that substantive and main provision of the Act is Section 2 (viia) which is subject matter of the discussion in this judgment. It is also well known and accepted rule of interpretation of statutes that rules, regulations as well as notifications issued thereunder are meant to subserve the purpose of main provision of law and not other way round. Notification in the instant case, as extracted hereinabove, is a delegated legislation. Therefore, it can in no case bypass or over-ride the substantive provision of law and in case of conflict, delegated legislation has to give way to the main provision of law.

32. In this behalf, we may also observe that legislature in its wisdom has used the words in this sub-section knowing their significance, as well as import and at the cost of repetition, it needs to be noted that when

language is clear, then ordinary meaning to the words needs to be given. As such, no aids either internal or external need to be pressed into service as was urged on behalf of the respondent to give another meaning.”

Accordingly, in view of the facts and law position as discussed above, there is merit in the contention raised by learned counsel for the petitioner.

The petitioner was found in possession of 50 kgs. of poppy husk and admittedly the weight of the bag has not been included. In case, the weight of the bag is excluded, then it comes to less than 50 kgs., then it does not come under the “commercial quantity” as it is not more than 50 kgs. of poppy husk.

The present petition is allowed and the petitioner is directed to be released on bail on his furnishing bail/surety bonds to the satisfaction of Duty Magistrate/Ilalaqa Magistrate for his appearance before the Court on all subsequent dates of hearing and as and when called upon to do so.

12.10.2015
gurpreet

(DAYA CHAUDHARY)
JUDGE