

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 1208 OF 2011

Mr. Ravi Prakash Goel
Age 63 years,
Prop. Of M/s. Gopish Pharma
Resident of A-96, Saraswati Vihar,
Pitampura,
New Delhi 110040

..Applicant

v/s.

1. Narcotics Control Bureau,
Exchange Building, 3rd floor,
Sprott Road, Ballard Esrtate,
Mumbai through its
Intelligence Officer
Mr.M.V.Henry

2. State of Maharashtra.

..Respondents

Mr. Ayaz Khan for the Applicant
Ms.Rebecca Gonsalves for the Respondent
Mrs. Newton, APP for the Respondent-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : 18th December, 2015
PRONOUNCED ON : JUNE 20, 2016.

JUDGMENT:

1. By this application filed under the provisions of Section 482 of Cr.P.C. the applicant has challenged the order dated 16.8.2011 whereby the learned Special Judge, (NDPS) for Gr. Mumbai dismissed the discharge application being Misc. Application No. 192 of 2005 in NDPS Special Case No.63 of 2005.

2. The brief facts necessary to decide this application are as under:

It is the case of the prosecution that the officer of the Respondent No.1 (Narcotics Control Bureau (NCB)) had received information that on 11.1.2015 at about 15.25 hours, one person by name Jalanbhai @ Aslam Mohd. Sheikh would take delivery of consignment of huge quantity of Norphazine injections containing buprenorphine from godown of M/s. Chawla Highway Carriers at Shiv Mahal Building, Dr. Maheshwari Road. Sandhurst Road, Mumbai. The said consignment was reported to have been sent by a firm M/s. Anjani Traders under lorry receipt No.23955 dated

03.1.2005. Accordingly a raid was conducted by the Officers of NCB at the godown of M/s. Chawla Highway Carriers and the consignment containing 12000 ampoules of Norphazine injections was recovered. The accused Jamalbhai @ Aslam Mohd. Sheikh, who had come to take the delivery of the consignment, was apprehended by the officers of the Respondent No.1 (NCB). It was revealed that the said injections were manufactured by M/s. Gopish Pharma, Delhi, a proprietorship concern of the applicant accused herein. The applicant was arrested on 10.3.2005 and Special Complaint Case No.63 of 2005 came to be filed against him for violating provisions of the N.D.P.S. Act and the Rules framed thereunder.

3. The applicant had filed an application for bail before the NDPS Court which was granted vide order dated 4.4.2005. The challenge to the said order was dismissed by this court in Criminal Application No.3295 of 2005 as well as by the Apex Court in SLP (Cri.) 5714 of 2006. The applicant had filed a criminal writ petition No. 1067 of 2005 seeking quashing of the NDPS Special Case No.63 of 2005.

The same was dismissed by this court by order dated 7th February, 2006.

4. The applicant filed an application being Criminal Misc. Application No. 192 of 2005, for discharge from the offences alleged in the said NDPS Case. The said application came to be rejected by the N.D.P.S. Court by order dated 16.8.2011. Being aggrieved by the said order, the applicant has invoked the jurisdiction of this court under Section 482 of Cr.P.C. to quash the said order as well as to quash the proceedings of said NDPS Act.

5. Shri Ayaz Khan, the learned Counsel for the applicant submitted that the firm M/s. Gopish Pharma has a valid license to manufacture drug formulations, including Buprenorphine Hydrochloride injection IP, brand name (Norphazine) which is specified under Schedule H to the Drug & Cosmetic Rules, 1945. H He has submitted that the drug manufactured by M/s. Gopish Pharma is a medical product falling within the proviso to section 8 of the N.D.P. S. Act.

6. The learned counsel Shri Ayaz Khan has further submitted that the applicant was not called upon in writing to comply with form VI prescribed under Rule 67 of the NDPS Rules. Furthermore, till 3.6.2004 there was a direction not to insist upon compliance of Rule 67 and that the prosecution has failed to show that such compliance was mandatory post 25.6.2004. He has submitted that at the time of the alleged incident the form VII was in existence and hence, compliance of Rule 67 was not mandatory.

7. The learned counsel for the Applicant has further submitted that there is no prima facie material to show that the applicant had sold the said ampules to Ajnanai or Jamalbhai, who had sold the same to Raghu. He has submitted that the respondent NCB had not established the link between the applicant, Ajnani and Jamalbhai. The learned counsel for the applicant has further submitted that the statement recorded under Section 67 of the NDPS Act is not admissible. In support of this contentions he has relied upon the decisions of the Apex Court in **Noor Aga v. State of Punjab 2008(3)**

RCR (Cri.) 633, UOI v. Bal Mukund 2010(1) SCC (Cri.) 541, Nirmal Singh Pehlvan v. Inspector of Customs 2012(1) SCC (Cri.) 555 , and Toofan Singh v. State of Tamil Nadu 2013 (16) SCC 31.

8. The learned counsel for the Applicant has further stated that the Applicant was granted bail as there was no prima facie material to link the applicant with the alleged offence. The challenge to this order was dismissed by this court as well as the Apex Court. He therefore claims that there is no prima facie material to proceed against the Applicant for the alleged offences and hence the applicant is entitled for discharge.

9. He has relied upon the following decisions.

- i) Deepak Monga v. State of Haryana 2014(1) Drugs Cases (narcotics) 572;
- ii) Narayanbhai Mangaldas Patel v. Union of India 2014(1) Drugs Cases (Narcotics) 441,
- iii) Inderpal Singh v. Directorate of Revenue 2014(1) Drugs

Cases (Narcotics) 439.

10. Ms. Rebecca Gonsalves has raised a preliminary objection regarding maintainability of discharge application on the ground that the criminal writ petition no.1067 of 2005 filed by the applicant for quashing of the said special case was dismissed by this court by order dated 7.2.2006. She has submitted that the applicant had not challenged the said order and the order having attained finality, the applicant could not have filed an application for discharge on the same grounds.

11. Ms. Gonsalves, the learned Counsel for the respondent No.1 has submitted that while filing the discharge application the applicant had heavily relied upon the decision of the Apex Court in State of Uttaranchal v. Rajeshkumar Gupta 2007 (1) SCC 355, wherein it was held that the prohibition contained in Rule 63 of 1985 rules is applicable only to Narcotic drugs and psychotropic substances which are mentioned in Schedule I to the rule and not in psychotropic substances enumerated in the Act. She has

submitted that relying upon the said judgment the applicant had claimed that the provisions of NDPS would not apply as the substance involved in the present case was buprenorphine, mentioned in entry no.92 in the schedule to the NDPS Act but not enumerated in Schedule I to the NDPS Rules, 1985. She has submitted that the issue involved in the said case as well as in the present petition was referred to the larger bench and that by order dated 29.1.2013 this Court had deferred the present matter pending the decision of the Apex Court. She has submitted that the larger Bench of the Apex Court has now held that the conclusion reached in Rajeshkumar Gupta's case (supra) is untenable. Hence the present application has to be decided in the light of the decision of the larger bench of the Apex Court.

12. On merits of the case, the learned counsel for the respondent No.1 has submitted that the material on record prima facie reveals that the applicant is the proprietor of Gopish Pharma. The learned counsel for the Respondent No.1 has submitted that in view of section 80 of the Act, despite holding a valid license for the

manufacture of Norphazine issued under Drugs and Cosmetic act, 1940, the applicant was also required to comply with the provisions of N.D.P.S. Act and Rules framed thereunder. In support of this contention she has relied upon the decision of the Apex Court in ***D.Ramkrishnan Vs. Intelligence Officer, N.CB. AIR 2009 SC 2404.***

13. The learned counsel for the Respondent No.1 has submitted that 11950 ampules of norphazien buprenorphine injections of batch No.NP 927, manufactured by Gopish Pharma were seized under seizure panchanama dt.11.1.2005. She has submitted that the goods were described in the consignment note as well as in the Form B as 'necklace'. She has further submitted that the CA report dated 19.1.2005 reveals that the substance has tested positive for buprenorphazine.

14. The learned counsel for the respondent has further submitted that the Apex Court has consistently held that the confessional statement recorded under Section 67 of the NDPS Act by an officer

within the meaning of Sec. 42 of the NDPS Act is admissible in evidence against him and a conviction can be maintained solely on the basis of such a statement. She has relied upon the decision of the Apex Court in ***Kanhaiyalal vs. Union of India AIR 2008 SC 1044*** , ***Ram Singh v. Central Bureau of Narcotic AIR 2011 SC 2490*** and ***Bhavarsingh v. Central Bureau of Narcotics 2015 All MR (Cri.) 3687***. She has submitted that in Toofan Singh (supra) the Apex Court felt it necessary to have a relook at the ratio laid down in Kanhaiyalal and therefore, referred the matter to a larger bench for reconsideration of the issues whether the office investigating a case under N.D.P.S. Act would qualify as a police officer and whether this statement recorded by the Investigating Officer under section 67 can be stated as a confessional statement. Relying upon the decision of this Court in ***Madhav Atulchandra Bapat Vs. the State of Maharashtra 2009 (4) Bom C.R. 32***, she has submitted that the justice between the parties cannot be kept in suspended animation in view of pendency of the reference before a larger bench.

15. The learned Counsel for the respondent has submitted that the statement of the applicant, recorded under Section 67 of the Act reveals that M/s. Gopish Pharma is involved in manufacture of medicine including Norphazine and that M/s. G&G Medicine Company of which he was one of the partners was the sole distribution agent of M/s. Gopish Pharma. She has submitted that the statement of the applicant reveals that M/s. Gopish Pharma had sold several ampules of Norphazine injections including 25000 ampules of batch no. 927 to M/s. G&G Medicines. She has further submitted that the applicant had tendered list of customers to whom M/s. G&G Medicines had sold the said medicines. Some of the invoices produced by the applicant showed that some amupules of Norphazine injections of batch No.NP 927 were sold to M/s Shiv Chemical Agencies on 11.9.2004, 15.9.2004, 18.9.2004 and 20.9.2004. She has further submitted that the statement of Pradip Bhatia, the proprietor of Shiv Chem Agency reveals that he had never purchased the said medicines as reflected in the said invoices from G&G Medicine company and that the applicant had been requesting him to give him an acknowledgement for the Norphazine

injection under a promise of compensating him handsomely.

16. The learned counsel for the respondent No.1 has further submitted that the material on record reveals that the applicant had sold the said injections to one Raghu, who did not have a valid drug license, by issuing fake invoices in the name of M/s. Shiv Chem Agency. The learned Counsel for the respondent No.1 has submitted the material on record prima facie reveals that the applicant had not maintained Form-VI for sale of the ampules/injections from M/s. Gopish Pharma to G&G medicines or from G&G Medicines to various customers. The learned counsel for Respondent No.1 submits that the intention of the applicant was to illegally divert and export to psychotropic substance to Dubai through one Jamalbhai, who had come to collect the consignment from the godown of Chawla Carriers. She contends that the applicant had violated the provisions of Section 8C of the Act as well as Rule 67 of the Rules.

17. I have perused the records and considered the oral as well as the submissions filed by the learned counsel for the Applicant and

the learned counsel for the Respondent No.1. It may be mentioned that section 482 of Cr.P.C recognizes the inherent powers of the High Court to make such order as may be considered necessary to prevent the abuse of the process of law or to serve the ends of justice. Whereas section 227 of Cr.P.C. confers powers on the Sessions Court to discharge the accused if upon consideration of the record of the case and the documents submitted therewith and after hearing the submission of the accused and the prosecution, the court considers that there is no sufficient ground to proceed against the accused.

18. In the instant case the applicant herein had filed a petition under under Article 227 of the Constitution of India r/w section 482 of the Cr.P.C. being criminal writ petition no. 1067 of 2005, for quashing and setting aside the investigation/proceeding, which were pending before the Intelligence Officer (NCB). While dismissing the said petition this Court held that:-

"7. It is for the trial court to go into the contention raised in this application and merely because I am

not inclined to exercise my inherent powers would not prevent the applicant from raising the contentions and placing materials in supporting thereof before the trial court. These materials would be certainly adverted to by the trial court. This is not a case where inherent powers should be exercised to quash the entire special case in question. Considering the objects and purpose of the NDPS Act and in public interest as well, powers under section 482 which in any event have to be sparingly exercised, need not be exercised in the facts and circumstances of this case."

19. A perusal of the said order reveals that on considering the object of the Act and the public interest involved, this court had deemed it fit not to exercise its inherent jurisdiction to quash the proceedings pending before the Intelligence Officer, NCB. The order further reveals that this Court had left the issues open with liberty to the applicant to raise the same before the trial court. Under the

circumstances, the fact that the High Court had refrained from exercising its inherent powers, which are otherwise to be exercised sparingly in exceptional cases, would not debar the Applicant from filing an application for discharge particularly when the High Court had not gone into the merits of the matter.

20. Now coming to the merits of the matter, it is not in dispute that M/s. Gopish Pharma has been issued a license under the Drugs and Cosmetic Act and Rules to manufacture drug formulation including Buprenorphine hydrochloride injection IP (Norphazien). It may be mentioned that section 80 of the N.D.P.S. Act provides that the provisions of the N.D.P.S. Act or the Rules made thereunder are in addition and not in derogation to the Drugs and Cosmetic Act 1940 or the Rules made thereunder. In D. Ramakrishnan (supra) the Appellant and the other co-accused in the said case held licenses under the Drug and Cosmetics Act, 1940 and had general permission for import and export. The Apex Court after considering the provision of section 80 held that Drugs and Cosmetics Act do not deal with exports but provisions of Customs Act do. The Apex Court

held that the licenses were therefore, required to comply with the specific requirement of the Act and the Rules. In the light of above, in my considered view, the fact that the M/s. Gopish Pharma was holding a license under Drugs and Cosmetics Act, would not absolve it from complying with the relevant provisions of the N.D.P.S. Act and the rules framed thereunder.

21. In the instant case it is alleged that the applicant has contravened the provisions of Section 8 (c) of the Act and Rule 67 of the N.D.P.S. Rules 1985. In this regard a perusal of the seizure panchanama dated 11.1.2005 reveals that total 11950 ampules of Norphazien Buprenorphine injections IP 2 ml of Batch No.NP 927 manufactured by M/s. Gopish Pharma, were seized. The substance concerned was mentioned in entry No.92 in schedule to the N.D.P.S. Act and it did not find place in Schedule 1 to the N.D.P.S. Rules 1985. A perusal of the grounds raised in the application under consideration reveals that the prayer for discharge as well as challenge to the impugned order was mainly based on the decision of the Apex Court in *Rajesh Kumar Gupta (supra)*. This controversy

is no longer res integra in view of the decision of the larger bench of the Supreme Court in Union of India Vs. Sanjeev V. Deshpande, (Criminal Appeal No.660 of 2007). In the said decision the Apex has held that the conclusion reached by the various High Courts that the prohibition contained under section 8 is not attracted in respect to all those psychotropic substances which find mention in the Schedule to the Act but not in the Schedule 1 to the Rules framed under the Act, is untenable. The Apex Court also did not agree with the conclusion (reached in Rajesh Kumar Gupta Case) that the prohibition contained in Rule 63 of the 1985 Rules is applicable only to those narcotic drugs and psychotropic substances which are mentioned in Schedule 1 to the Rules and not to the psychotropic substances enumerated to the Schedule to the Act. The challenge raised by the applicant therefore falls flat in view of the decision of the larger bench of the Apex Court in Sanjeev V. Deshpande (supra) that Rajesh Kumar Gupta (supra) was wrongly decided.

22. It is also pertinent to note that the application for bail and the discharge application are to be decided on different parameters.

The Apex Court in ***Union of India v. Shiv Shankar Kesari (2007) 7SCC 789***, 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 required to see if there are reasonable grounds for believing that the accused is not guilty and record its satisfaction about existence of such ground. 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.” It is thus evident that the findings recorded in the bail application are of prima facie nature. Hence, the fact that the applicant has been released on bail would not ipso facto lead to a conclusion that the charge is groundless. Hence, the judgment relied upon by the applicant Indrapal Singh and Deepak Monga (supra) which are on the point of bail are not relevant to decide the present application.

23. The other contentions raised by the Ind. counsel for the applicant do not find place in the application. Nevertheless, it is not in dispute that the applicant herein is the proprietor of M/s.Gopish

Pharma. The material on record prima facie reveals that the seized goods were described in the consignment note as well as in Form B as 'necklace'. The records thus prima facie reveal that there was mis-description of the goods which were seized.

24. The material on record prima facie reveals that the statement of the applicant was recorded under section 67 of the N.D.P.S. Act, 1985. A perusal of the said statement reveals that the Applicant had admitted having sold 25000 ampules of Norphazien injections of Batch No. NP 927 to its sole distribution agent M/s. G & G Medicines of which he is one of the partners having 80% share with the other two partners having share of 10% each. The applicant had further stated that he was solely responsible for the functioning of M/s. G & G. medicines and that the other two partners do not attend the day to day business of the said firm. The applicant had stated that M/s. G & G. Medicines Company had sold 12000 Norphazien injections to M/s. Shiv Chem Agency and that Pradeep Bhatia, the proprietor of Shiv Chem Agency had taken delivery of the said ampules of Nophrazien injections in his presence. The applicant had produced

four invoices showing the sale of 12000 ampules of Norphazien injections to M/s. Shiv Chem Agencies having shop at Bhagirath palace market, Delhi. The cash memo/ sale records indicate that M/s. G.& G. Medicines had sold total 12000 ampules of Norphazien injections of batch No. NP 927 to M/s. Shiv Chem Agencies.

25. Coming to the admissibility of the statement recorded under section 67 of NDPS Act, the Apex Court in Kannhaiyalal and Ram Singh (supra) has held that the confessional statements recorded by the officers of Central Bureau of Narcotics are admissible in evidence. In Nirmal Singh (supra) the Apex Court had doubted the dicta in Kannhaiyalal. In Tufan Singh the Apex Court has held that it is necessary to have a relook into the ratio of Kannhaiyalal case and has therefore, referred the issue as to whether the officer investigating the matter under N.D.P.S. Act would qualify as police officer or not, to a larger Bench.

26. It is pertinent to note that as on date there is no authoritative pronouncement of the larger Bench on the issue and as such the law

laid down by the Apex Court in Kannhaiyalal and Ram Singh still hold the field. Furthermore, in the recent case of Bhawar Singh (supra) the Apex Court has held that "In view of the principle of law laid down in ***Badku Jyoti Savant Vs. State of Mysore [(1966) 3 SCR 698]*** r/w principle of law laid down in ***Rajkumar Karwar Vs. Union of India and Ors. [AIR 1991 SC 45]***, we are of the opinion that the confessional statements made by the accused to the officers of the Narcotic Bureau are admissible in evidence on record".

27. In the light of the above, prima facie the confessional statement of the Applicant cannot be said to be inadmissible in evidence. The decision in the case of Balmukund is not applicable to the facts of the present case as the question whether the confession was voluntary or whether it was made under duress or coercion will have to be decided only on merits and not at the stage of discharge.

28. It is also pertinent to note that in addition to the confessional statement of the Applicant, there is other prima facie material on record in the form of the statement of Pradeep Bhatia, proprietor of

M/s. Shiv Chem Agency, who has stated that he had never purchased any medicine including 12000 ampules of Norphazien injections from M/s.G & G. Medicine Co. He has stated that the applicant had been requesting him to give an acknowledgment for having received 12000 ampules of Norphazien injections and that the applicant had offered to compensate him in terms of money. Said Pradeep Bhatia had further stated that in February, 2005 the Applicant had told him that he had sold 12000 Norphazien injections to someone and prepared a bill in the name of M/s. Shiv Chem Agency. The applicant had promised to pay him Rs.300000/- if he were to sign the acknowledgment receipt in respect of 12000 Norphazien injections. Said Pradeep Bhatia was shown the bills / invoice in the name of Shiv Chem Agency and he had stated that he was seeing the said bills for the first time. He had denied having ordered or received Norphazien injections from M/s. G. & G. Medicine.

29. The statement of Pradeep Bhatia prima facie indicate that the applicant had prepared fake invoices in the name of M.s, Shiv Chem

Agency. Suffice it to say that at the stage of framing of charge, the trial Court was not required to weigh the evidence and or to go into the merits of the case but was required to consider whether the material on record was prima facie sufficient to proceed against the applicant. In the instant case the material on record prima facie indicates that the Applicant had sold 12000 ampules of Norphazien injections containing Buprenorphine a Psycotropic substance to one Raghu, who did not have a valid drug license by issuing fake invoices in the name of M/s. Shiv Chem Agency. Furthermore the said psychotropic substance was not transported for medical or scientific use but was transported by describing the same as 'necklace'. The applicant had not issued any consignment note in form 6 for transport of the Psycotropic substance. It is to be noted that the invoices/ cash memo in question are dated 11.9.2004, 15.9.2004, 18.9.2004 and 20.9.2004 whereas the proviso to Rule 67 (4) was introduced on 25.2.2005. Hence, the said proviso would not apply to the sales in question. Having perused the copy of the N.D.P.S. Rules 1985 from 2002 edition of N.D.P.S. Act and Rules, which was produced by the learned counsel for the Respondent it is

evident that consignment note was always a requirement under the Rules. In the instant case the applicant had not complied with the said requirement.

30. Thus, the material on record prima facie indicates that the applicant had violated the provisions of section 8 (c) of the Act and Rule 67 framed thereunder. Hence, there is no infirmity in the impugned order dated 16.8.2011.

31. Under the circumstances and in view of discussion supra the application is dismissed.

(ANUJA PRABHUDESSAI, J.)

At this stage, Mr. Ayaz Khan, the learned Counsel for the applicant requested to stay the order as he wants to challenge the same before the Apex Court. The request is objected by learned Counsel Ms. Gonsalves. In the interest of justice trial Court shall not frame the charge for a period of two weeks from today.

(ANUJA PRABHUDESSAI, J.)