

In the High Court of Punjab and Haryana at Chandigarh

CRM M-34120 of 2018 (O&M)
Reserved on : September 14, 2018

Date of Decision: September 26, 2018

Rahil Kumar Gakhar

... Petitioner

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. D.S. Pheruman and Mr. Tarundeep Kumar, Advocates,
for the petitioner.

Mr. Luvinder Sofat, AAG, Punjab.

P.B. Bajanthri, J.

1. In the present petition, petitioner has sought for regular bail under Section 439 Cr.P.C. in case FIR No. 95, dated 02.05.2018, under Sections 22/61/85 of N.D.P.S. Act, registered at Police Station City Ferozepur, District Ferozepur.

2. Brief allegations against the petitioner are that his father Ashwani Gakhar managing M/s R.S. Pharma, Tokri Bazar, Gobbar Mandi, Ferozepur pursuant to the licence issued on 07.10.2015 which is valid from 27.05.2015 to 02.05.2020. He had godown on the Malwal Road for storage of medicines. When the police people were patrolling and for checking of suspected elements as well as inspecting suspected vehicles, a special informer gave the information that Ashwani Kumar Gakhar and Rahil Kumar Gakhar, residents of 57, Golden Encalve, Ferozepur City have a

medical store in Tokri Bazar and have taken a godown on rent at Malwal Road where they have kept huge quantity of intoxicant goods and they were dealing with the same illegally. In case raid is conducted, intoxicant goods in huge quantity could be recovered. Based on the aforesaid information which was reliable, ruqa was sent to police station for registration of FIR by the investigating officer. Police party proceeded to raid the godown of Ashwani Kumar Gakhar where petitioner – Rahil Kumar Gakhar was found and in godown huge quantity of various medicines were lying. Thus, police party recovered 28,800 tablets of Alprazolam-Pam 0.5 and 24,000 tablets of Alprazolam-Kinlo 0.5 along with other intoxicant tablets and capsules. Thus, after completing formalities proceeded to arrest the petitioner on the same day i.e. 02.05.2018.

3. Petitioner filed a bail application before the Sessions Judge, Ferozepur. It was dismissed vide order dated 13.07.2018 by Judge Special Court, Ferozepur.

4. Learned counsel for the petitioner has raised a question relating to applicability of NDPS act read with Drugs and Cosmetics Act, 1940 (hereinafter referred to “D&C Act, 1940”). It was submitted that petitioner's father Ashwani Kumar Gakhar is a license holder for dealing with medicines and he has valid license for managing M/s R.S. Pharma, Gobbar Mandi, Ferozepur City. Therefore, if any lapse on the part of the petitioner or his father in respect of managing M/s R.S. Pharma to the extent of not adhering to purchase and sale of medicines, in that event, D&C Act, 1940 would be applicable. Here the allegations against petitioner and his father Ashwani Kumar Gakhar is that they have stored Alprazolam tablets IP Kinlo 0.5, Tarmadol Hydrochloride capsules and Fortadol DM in huge

quantity which was not accountable. On the other hand, learned counsel for the petitioner relied on Annexures P/2 to P/7 relating to bills and bank's transactions in respect of purchase of the aforesaid medicines. Therefore, invoking provisions of NDPS Act is without authority of law. It was also submitted that the cited drugs do not fall under the NDPS Act with reference to Section 8 read with Rules 64, 65, 65-A, 66 of NDPS Rules read with Schedule H and H1 (Sr. No. 507). It was also submitted that Alprazolam being a psychotropic substance, it would fall in Schedule H at Sr. No. 346 of D&C Act, 1940. Identical issue was came up for consideration in the case of *State of Uttranchal vs. Rajesh Kumar Gupta*, reported in **2006(4) RCR (Crl.) 974**. Thereafter, Supreme Court taken a different view in the case of *Union of India vs. Sanjeev G. Deshpande*, reported in **2014 (4) RCR, 75**. It was further submitted that in the case of *Sanjeev G. Deshpande* certain material fact was not taken into consideration. Consequently, in the case of *Pardeep Dhond*, matter is being referred to larger bench and it is pending consideration. In *Pardeep Dhond* and *Jagdish Singh vs. Union of India (Crl. Appeal No. 1845 of 2010 arising out of SLP (Crl.) No. 4135 of 2010)* petitioners therein have been extended the bail pending consideration by the larger bench of the Supreme Court. Therefore, petitioner is entitled for regular bail. Learned counsel for the petitioner relied on the following decisions:-

- i) *Jagdish Singh vs. Union of India and another – (Crl. Appeal No. 1845 of 2010 (Arising out of SLP (Crl.) No. 4135 of 2010);*
- ii) *Kismat Singh vs. State of Punjab reported in 2012(2) RCR (Crl.) 329 (Para-5);*
- iii) *State of Uttaranchal vs. Rajesh Kumar Gupta, reported*

in 2006(4) RCR (Crl.) 974 (Para-19);

iv) Jasbir Singh vs. State of Punjab, reported in 2014 (1) RCR (Crl.) 179 (Para-4)

v) Rajinder Gupta and etc. vs. State, reported in 2006 CriLJ 674 (Para 8, 10 and 11);

vi) Union of India and another vs. Sanjeev V. Deshpande, reported in 2014 (4) RCR (Crl.) 75 (Para 35).

5. Per contra, learned State counsel while resisting the petitioner's contention, submitted that **Sanjeev V. Deshpande** cited supra holds good even to this day with reference to para 23, 24, 29 and 34. Learned State counsel further submitted that petitioner could not apprise the police as well as Sessions Judge relating to hiring of godown as an extended premises to M/s R.S. Pharma, Gobbar Mandi, Ferozepur City by making necessary application before the competent authority, since petitioner's father had a godown for the purpose of storage of medicines under the License dated 07.10.2015 in the name of M/s R.S. Pharma, Gobbar Mandi, Ferozepur City, therefore, storage of medicines at unauthorized premises by the petitioner's father and petitioner presence during the raid and recovery of medicines are illegal. The cited documents like Annexures P/2 to P/7 relating to bills and bank's transactions do not reveal relating to Alprazolam and Tramadol so also petitioner and his father failed to give accounts relating to purchase and sale and balance Alprazolam and Tramadol, therefore, Alprazolam and Tramadol are stored illegally without there being a valid permit to store such medicines in the godown, absence of necessary material like indents for purchase, invoices, delivery note, etc. Learned State counsel further submitted that Tramadol incorporated for the first time in the NDPS Act vide notification dated 26.04.2018. Thus, rightly respondent police have

registered FIR in question under the NDPS Act. Contention of the petitioner that recovery of Alprazolam and Tramadol would fall under the Act, 1940 and not NDPS act would be untenable. Consequently, cited decisions by the petitioner have no application having regard to the factual aspects of the present case.

6. Heard learned counsel for the parties.

7. On merits, learned counsel for the petitioner's contention that petitioner's father was managing M/s R.S. Pharma with a valid license for the purpose of purchase and sale of various medicines and storage of medicines in the godown, resulted in application of D&C Act, 1940 and not NDPS Act. If the petitioner or his father Ashwani Kumar Gakhar had they produced relevant materials like permission to hire a godown in addition to medical store for the purpose of storage of medicines by the competent authority, indents, invoices, delivery note, purchase and sale register and balance medicines, etc. On all these counts, petitioner or his father could not apprise the respondent police so as to draw inference that whatever the shortcomings in respect of purchase and sale of medicines under the name of M/s R.S. Pharma, one cannot say that any shortcoming in the purchase and sale of medicines under the name of M/s R.S. Pharma, D&C Act, 1940 is attracted. Shortcomings of the above factual aspects, one has to invoke NDPS Act to the extent of illegally storing medicines like Alprazolam and Tramadol Hydrochloride in huge quantity. Thus, petitioner has not made out a case so as to contend that D&C Act, 1940 is attracted and not the NDPS Act.

8. Learned counsel for the petitioner relied on the decisions of

Pradeep Dhond and Jagdish Singh for the purpose of seeking regular bail

pending decision of the larger bench of the Supreme Court. It is to be noted that in the present case, huge quantity of 28,800 tablets of Alprazolam-Pam 0.5 and 24,000 tablets of Alprazolam-Kinlo 0.5 along with other intoxicant tablets and capsules were recovered at unauthorised premises (godown), therefore, Section 37 of the NDPS Act attracted. Moreover, storage of the aforesaid medicines were not supported by valid material as stated above like permission to hire a godown for the purpose of storage of medicines under the relevant statutory provisions of D&C Act, 1940 read with Rules. Supreme Court in the case of **Sanjeev V. Deshpande** cited supra in paras 29 to 36 held as under:-

“29. We are unable to agree with the conclusion (reached in Rajesh Kumar Gupta's case) that the prohibition contained in Rule 63[11] of the 1985 Rules is applicable only to those narcotic drugs and psychotropic substances which are mentioned in Schedule-I to the Rules and not to the psychotropic substances enumerated in the Schedule to the Act. Such a conclusion was reached in Rajesh Kumar Gupta's case on the understanding that Rule 53 (prohibiting the import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule-I to the Rules) is the source of the authority for such prohibition. Such a conclusion was drawn from the fact that the other Rules contained in the Chapter permit import into and export out of India of certain narcotic drugs and psychotropic substances other than those specified in Schedule-I to the Rules. Unfortunately, the learned Judges in reaching such a conclusion ignored the mandate of Section 8(c) which inter alia prohibits in absolute terms import into and export out of India of any narcotic drug and psychotropic substance. Rules framed under the Act cannot be*

understood to create rights and obligations contrary to those contained in the parent Act.

**[11]63. Prohibition of import and export of consignments through a post office box, etc. - The import or export of consignments of any narcotic drug or psychotropic substance through a post office box or through a bank is prohibited.*

30. On examination of the scheme of Rules 53 to 63 which appear in Chapter VI, we are of the opinion that Rule 53[12] reiterates an aspect of the larger prohibition contained in Section 8(c) i.e., the prohibition of import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule-I to the Rules. The proviso thereto however enables the import into and export out of India on the basis of an import certificate or export authorisation issued under the provisions of Chapter VI. The subsequent Rules stipulate the conditions subject to which and the procedure to be followed by which some of the narcotic drugs and psychotropic substances could be imported into India or exported out of India. For example, opium is a narcotic drug by definition under Section 2(xiv) of the Act whose export and import is prohibited under Section 8(c). But Rule 54[13]* authorizes the import of opium by Government opium factory. The construction such as the one placed on Rule 53 in Rajesh Kumar Gupta's case would in our opinion be wholly against the settled canons of statutory interpretation that the subordinate legislation cannot make stipulation contrary to the parent Act.*

**[12] 53. General prohibition - Subject to the other provisions of this Chapter, the import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule I is prohibited. Provided that nothing in this rule shall*

apply in case the drug substance is imported into or exported out of India subject to an import certificate or export authorisation issued under the provision of this Chapter and for the purpose mentioned in Chapter VIIA.

**[13] 54. Import of opium, etc. - The import of -*

- (i) opium, concentrate of poppy straw, and*
- (ii) morphine, codeine, thebaine, and their salts is prohibited save by the Government Opium Factory;*

Provided that nothing in this rule shall apply to import of morphine, codeine, thebaine and their salts by manufacturers notified by the Government, for use in manufacture of products to be exported or to imports of small quantities of morphine, codeine and thebaine and their salts not exceeding a total of 1 kilogram during a calendar year for analytical purposes by an importer, after following the procedure under rule 55 and subject to such conditions as may be specified in the import certificate issued in Form No. 4A.

31. Chapter VII deals with psychotropic substances. No doubt Rule 64[14]” once again purports to prohibit various operations other than import into or export out of India in psychotropic substances specified in Schedule-I for the obvious reason that import and export operations are already covered by Rule 53. Rule 65 authorizes the manufacture of psychotropic substances other than those specified in Schedule-I to the Rules subject to and in accordance with the conditions of a licence granted under the 1945 Rules. The rule also provides for various other incidental matters. Rule 65A prohibits the sale, purchase, consumption or use of any psychotropic substances except in accordance with the 1945 Rules.

**[14] Rule 64. General Prohibition. No person shall manufacture, possess, transport, import inter-State, export inter-State, sell, purchase, consume or use any of the psychotropic substances specified in Schedule-I.*

32. Rule 66 prohibits any person from having in possession any psychotropic substance even for any of the purposes authorized under the 1945 Rules unless the person in possession of such a psychotropic substance is lawfully authorized to possess such substance for any of the purposes mentioned under the 1985 Rules. Persons who are authorized under the 1985 Rules, and the quantities of the material such persons are authorized to possess, are specified under Rule 66(2). They are-

- (1) any research institution or a hospital or dispensary maintained or supported by Government etc. - Rule 66(2).*
- (2) individuals where such possession is needed for personal medical use subject of course to the limits and conditions specified - the two provisos to Rule 66(2).*

33. Rule 66 reads as follows -

Rule 66. Possession, etc., of psychotropic substances.-(1) No person shall possess any psychotropic substance for any of the purposes covered by the 1945 Rules, unless he is lawfully authorized to possess such substance for any of the said purposes under these rules.

(2) Notwithstanding anything contained in sub-rule (1), any research institution or a hospital or dispensary maintained or supported by Government or local body or by charity or voluntary subscription, which is not authorized to possess any psychotropic substance under the 1945 Rules, or any person who is not so authorized under the 1945 Rules, may possess a reasonable quantity of such substance as may be necessary for their genuine scientific requirements, or both for such period as is

deemed necessary by the said research institution or, as the case may be, the said hospital or dispensary or person:

Provided that where such psychotropic substance is in possession of an individual for his personal medical use the quantity thereof shall not exceed one hundred dosage units at a time:

Provided further than an individual may possess the quantity of exceeding one hundred dosage units at a time but not exceeding three hundred dosage units at a time for his personal long term medical use if specifically prescribed by a Registered Medical Practitioner.

(3) The research institution, hospital and dispensary referred to in sub- rule (2) shall maintain proper accounts and records in relation to the purchase and consumption of the psychotropic substance in their possession.

34. On the above analysis of the provisions of chapters VI and VII of the 1985 Rules, we are of the opinion, both these Chapters contain Rules permitting and regulating the import and export of narcotic drugs and psychotropic substances other than those specified in the Schedule-I to the 1985 Rules subject to various conditions and procedure stipulated in Chapter VI. Whereas Chapter VII deals exclusively with various other aspects of DEALING IN psychotropic substances and the conditions subject to which such DEALING IN is permitted. We are of the opinion that both Rules 53 and 64 are really in the nature of exception to the general scheme of Chapters VI and VII respectively containing a list of narcotic drugs and psychotropic substances which cannot be dealt in any manner notwithstanding the other provisions of these two chapters. We are of the clear opinion that neither Rule

53 nor Rule 64 is a source of authority for prohibiting the DEALING IN narcotic drugs and psychotropic substances, the source is Section 8. *Rajesh Kumar Gupta's* case in our view is wrongly decided.

35. In view of our conclusion, the complete analysis of the implications of Section 80[15]* of the Act is not really called for in the instant case. It is only required to be stated that essentially the Drugs & Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase etc. of drugs generally whereas Narcotic Drugs and Psychotropic Substances Act, 1985 deals with a more specific class of drugs and, therefore, a special law on the subject. Further the provisions of the Act operate in addition to the provisions of 1940 Act.

*[15] Section 80. Application of the Drugs and Cosmetics Act, 1940 not barred. The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder.

36. In the light of our above conclusion the correctness of the orders impugned in all the Criminal Appeals is normally required to be considered by the Bench of appropriate strength. However, in view of the fact that most of these matters are old matters [pertaining to years 2006 to 2013], we deem it appropriate to remit all these matters to the concerned High Courts for passing of appropriate orders in the light of this judgment.”

9. In view of ***Sanjeev V. Deshpande's*** case read with recovery of huge quantity of Alprazolam-Pam 0.5 and Kinlo 0.5 along with other intoxicant tablets and capsules, petitioner is not entitled to take shelter on par with ***Pardeep Dhond and Jagdish Singh's*** case like regular bail

pending larger bench decision of the Supreme Court.

10. Learned counsel for the petitioner cited decisions supra are not relevant to the facts of the present case. As is evident from the factual aspect that petitioner is not license holder in respect of purchase and sale of Alprazolam and Tramadol. Moreover, recovered drugs were stored in an unauthorised place. Hence, Drugs and Cosmetics Act, 1940 is not at all attracted in the present petition. Petitioner has not made out a case for regular bail and it is rejected accordingly.

September 26, 2018

vkd

[P.B. Bajanthri]

Judge

Whether reasoned / speaking : Yes

Whether reportable : No