

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Criminal Misc. No.M-45799 of 2017 (O&M)

Date of decision : 25th July, 2018

Lekh Raj

... Petitioner

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present: Mr. R.P.Dhir, Advocate
for the petitioner.

Mr. Karanbir Singh, AAG, Punjab.

RAJ SHEKHAR ATTRI, J.(Oral)

“Making innumerable statues, men

merely confuse what God achieved in ten.”

Above quote of Humbert Wolfe is apposite to the present context where different provisions of the Narcotic Drugs & Psychotropic Substances Act, 1985 (in short 'the Act') as well as the Narcotic Drugs & Psychotropic Substances Rules, 1985 (in short 'the Rules') are *inter se* at variance.

The petitioner has preferred the instant petition under Section 439 Cr.P.C. for grant of regular bail in case FIR No.75 dated 28.04.2017, registered under Section 22 of the Act at Police Station Garshankar, District Hoshiarpur.

It is a case of the prosecution that on 28.04.2017, the petitioner was found in possession of 25 ampouls containing avil and 25 intoxicating vials each containing 2ml of buprenorphine. Those were taken into

possession and sealed in a separate parcels and sent to chemical examiner who opined that salt buprenorphine hydrochloride, which is a psychotropic substance, was contained therein. As per notification No.1055 (E) dated 19.10.2001 issued by Centre Government, at Sr. No.169 buprenorphine *[having chemical name as 21 – cyclopropyl – 7alpha – [(S)- 1- hydroxy – 1,2,2 – trimethylpropyl]) -6, 14, endo-ethano – 6, 7, 8, 14-tetrahydrooripavine]* above 20 grams falls within commercial quantity of contraband. As per note 4 of said notification *[inserted in the Schedule S.O. 2941 (E), dated 18.11.2009]*, the quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salt of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

In this view of the matter, the total weight of 25 vials containing 2 ml each comes to 50 ml in total that comes to 50 grams. Thus, it falls within commercial quantity of the psychotropic substance. Therefore, the rigors of Section 37 of the Act comes into play which imposes a restriction in granting bail to the said offender unless he fulfils the conditions laid down therein.

Learned counsel for the petitioner has submitted that petitioner is entitled to bail under the first proviso of sub Rule 2 of Rule 66 of the Rules as he is not required to produce any medical prescription issued by a registered medical practitioner and it shall be presumed for his personal use. In support of his contentions, he has placed reliance upon the

judgments of Hon'ble Supreme Court in **Ouseph @ Thankachan v. State of Kerala** 2006 (2) RCR (Criminal) 127; **Sanjay Kumar Kedia vs. Narcotics Control Bureau and Anr.** 2008(1) Crimes 26; as well as the judgments of this Court in **Iqbal Singh alias Kala vs. State of Punjab** in Criminal Misc.No.M-613 of 2018 decided on 12.02.2018; **Amandeep vs. State of Punjab** in Criminal Misc.No.M-250 of 2018, decided on 12.01.2018; **Hitesh Kumar alias Ashu vs. State of Punjab** in Criminal Misc.No.M-25787 of 2017, decided on 25.01.2018; **Sulakhan Singh alias Billa vs. State of Punjab** in Criminal Misc.No.M-1010 of 2018, decided on 24.01.2018; **Sabir Mohd. @ Gollu vs. State of Punjab** in Criminal Misc.No.M-4669 of 2018, decided on 09.02.2018; **Hardeep Kaur vs. State of Punjab** in Criminal Misc.No.M-43541 of 2017, decided on 19.01.2018; **Cer Boih @ Cherry vs. State of Punjab** 2016 (1) RCR (Criminal) 687; **Rajinder Gupta vs. The State** 2006 Cri LJ 674; **Rajinder Singla vs. State of Punjab** 2016 (344) ELT 3 (P&H); **Deepak Sharma vs. State of Punjab** in Criminal Misc.No.6122 of 2014 in Criminal Appeal No.S-4493-SB of 2013, decided on 17.12.2014; **Saleem Mohd. vs. State of Punjab** 2015 (5) Law Herald 3939; **Satwinder Singh vs. State of Punjab** in Criminal Misc.No.20997 of 2017, decided on 30.08.2017.

On the other hand, the learned State counsel has submitted that if the petitioner is allowed to take 100 vials of buprenorphine under the provision of Rule 66 (ibid), which falls within commercial quantity, then it will completely violate the objects of the statute and also the provisions of Section 37 of the Act and the law cited on behalf of the petitioner is distinguishable and provide no help to the case of the petitioner.

This Court has given its thoughtful consideration to the rival

contentions.

The short question under consideration of this Court is as to whether an offender having in possession the commercial quantity of psychotropic substance (above 20 grams of buprenorphine) is entitled to bail under the provisions of Rule 66 of the Rules ?

In fact, the provisions of first proviso attached with sub Rule 2 of the Rules 66 is in direct conflict with the provisions of Section 37 of the Act.

The true interpretation of the second proviso of sub rule 2 (ibid) and Section 37 of the Act can be considered under the following aspects : -

- a. Object of the Statute
- b. Blanket ban under the provisions of Section 37 of Act to grant bail.
- c. Current trend of drug abuse
- d. Absurdity of this clause

So far as the object of the statute is concerned, the same is a special law enacted by the Parliament with an object of **controlling and regulating the operations relating to Narcotic Drugs & Psychotropic Substances**. It is for this reason that stringent provisions of law have been made. In the statement of objects and reasons of the Act, it has been specifically stated that statutory control of the narcotic drugs has been exercised in India through a number of Central and State enactments but with the passage of time and the development in the field of illicit drug trafficking and drug abuse at national and international level, many deficiencies in the pre-existing laws came to the notice of the Legislature

which includes insufficient and lack of deterrent punishments; non-existence of competent and efficient officers, international treaties to curb the drug abuse and the most important, during recent years, additional drugs which have come to be known as Psychotropic Substance, have appeared in the scene and posed serious problems to national Governments.

In view of the above, there is an urgent need of enactment for a comprehensive legislation on narcotic drugs and psychotropic substances, which *inter alia*, should consolidate and amend the existing laws relating to narcotic drugs, strengthen the existing control over the drugs abuse, considerably enhance the penalties particularly for trafficking offences.

At the time of passing amendment Act, 1982, the Legislatures have observed that in the recent years, India has been facing problem of transit in illicit drugs and the spillover from such traffic has caused problems of abuse and addictions. Thus, the first and the foremost idea behind enactment of the Act was to curb and control the narcotic drugs, especially psychotropic substances.

Before coming to Rule 66, it will not be out of context to refer to the definition of 'psychotropic substance' and relevant provisions of Rule 65-A of the Rules.

Sub Section XXIII of Section 2 of the Act defines “psychotropic substance” as under:-

“psychotropic substance” means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;

A schedule is provided in the Act which contained 111 psychotropic substances and buprenorphine is one of them which is shown

at Sr. No.92 in the said schedule.

Rule 65A of NDPS make a complete ban on the sale, purchase, consumption or use of psychotropic substance. This rule reads as under : -

“65-A. Sale, purchase, consumption or use of psychotropic substances-- No person shall sell, purchase, consume or use any psychotropic substance except in accordance with the Drugs and Cosmetics Rules, 1945]

Provided that sale, purchase, consumption or use of a psychotropic substance specified in Schedule I shall be only for the purpose mentioned in Chapter VIIA].”

Further rule 66 also provides that if any psychotropic substance has been authorised under Drugs & Cosmetics Rules, 1945, even then, no person shall be possessed of any psychotropic substance for any purpose covered under Rule 45 of the aforesaid Rules unless lawfully authorised to possess such substance for any of the said purpose. Rule 2 thereof takes some leniency with regard to drugs used for research and medical purpose. This provision reads as under:-

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

Provided that possession of a psychotropic substance specified in Schedule I shall be only for the purposes mentioned in chapter VIIA.]

(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 authorised to possess any psychotropic substance under the 1945 Rules, or any Person who is not so authorised under the 1945 Rules, may Possess a reasonable quantity of such substance as may be necessary for their genuine scientific requirements or genuine medical 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;”

Further Rule 2 has been equipped with two provisos; the first authorises a person to possess up to 100 doses units at a time. This proviso reads as under : -

“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”

However, if the dose is for long term medical use, then it provides that it must be prescribed by a Registered Medical Practitioner.

The 2nd proviso reads as under : -

Provided further that an individual may possess the quantity of exceeding one hundred dosage units at a time [but no 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.”

Learned counsel for the petitioner has argued that if the quantity of the dose in scheduled psychotropic substances comes up to 100 unit, then there is no need of any medical prescription. He went to extent of saying that it shall be presumed that the same was used for personal medical use of the petitioner.

This Court has considered the above submission but same carries no weight.

If this argument of learned counsel for the petitioner is admitted to be correct, for sake of arguments, then every individual will have liberty to keep with him 100 ampoules of all the 111 psychotropic substances as shown in the schedule attached with the Act. The synthetic/manufactured drugs -such like buprenorphine - have created a havoc with the youth of the country. Even registration of numerous cases under the Act against the consumers, carriers and couriers have made little impact. This proviso had encouraged such nefarious persons to spoil the innocent minds. Hundred doses of buprenorphine as well as that of remaining 110 scheduled substances liberally authorises their mishandling and misuse. It is the need of time that appropriate amendment be made to curb the easy supply of the psychotropic substances under the garb of sub Rule 2 of Rule 66 of the Rules.

The first proviso is silent with regard to the fact if such a person has to possess any medical prescription for carrying 100 doses of the scheduled psychotropic substances. This provision is absurd to this

extent and in contradiction with object of the Act.

The object of the Act is to completely curb and put a ban on the use, consumption, sale, purchase and possession of the psychotropic substances and narcotics. In the case in hand, recovery of psychotropic substance falls within the ambit of commercial quantity, therefore, the provisions of Section 37 of the Act are applicable. This provision does not exempt any of the provisions of the Act or Rules, rather it imposes blanket ban on the possession of the psychotropic substance. Section 37 of NDPS Act reads as under : -

“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 or 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 other words, it can certainly be inferred that the power to

grant bail to a person alleged to have committed offence containing

commercial quantity of contraband is subject to the restriction prescribed by Clause (b) of Sub-section (1) of Section 37 of the Act. First of all, an opportunity to the Public Prosecutor has to be given to oppose the application for release of the accused. The other twin conditions are (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the offence alleged to have been committed; (ii) he is not likely to commit any offence while on bail. Thus, recording of satisfaction on both aspects is sine qua non to grant bail in respect of offence punishable under Section 19 or Section 24 or Section 27-A and also offence involving commercial quantity.

On a bare perusal of Section 37 of the Act, it transpires that the provisions under Section 37 of the Act overrides the provisions under the Code of Criminal Procedure, 1973 with regard to grant of bail.

The Hon'ble Supreme Court in the case of **Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798** held as under :

“As the provision itself provides that no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused

is not guilty of the offence charged.

The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word "reasonable."

"In Stroud's Judicial Dictionary, 4th Edn., p.-2258 states that it would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy."

(See **Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar** (SCC p. 504, para 7) and **Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd.**

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11.The Court 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 called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. 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.

12.Additionally, the Court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion."

In a recent judgment Hon'ble the Supreme Court in case

Satpal Singh v. State of Punjab, 2018 AIR (SCW) 2011 has discussed in

detail in para No.4 with regard to bail in commercial quantity of the

contraband which read as under:-

4. Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under the Cr.P.C or any other law in force on the grant of bail. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail.”

This Section 37 of the Act neither exempted any of the provisions of the Act nor excepted any of the provisions of the Rules, rather, it applies secularly to all the provisions of the Act and the Rules, unless the conditions imposed therein have been fulfilled. The two conditions laid down under Section 37 (ibid) authorise a court to take lenient view with regard to grant of bail but those have no concern with Rule 66 of the Rules. Even if it is so provided under the first proviso of sub rule 2 of Rule 66 (ibid), neither this Court shall presume that petitioner

is not guilty of such an offence nor there is reasonable ground for believing so.

From this angle, this Court is of the view that if a person keeps commercial quantity of the psychotropic substance falling under the schedule, he is not entitled to the benefit of Section 37 of the Act irrespective of the provisions contained in Rule 66 of the Rules.

In **Sajan Abraham v. State of Kerala**; (2004) 4 SCC 441, Hon'ble Supreme Court while relying upon the two previous decisions in **Ouseph @ Thankachan v. State of Kerala** and **Hussain v. State of Kerala (supra)** has observed that the recovery of 110 ampoules of buprenorphine falls within small quantity of contraband. After the amendment in the year 2009 - which provides that the entire contraband/psychotropic substance shall be counted for determining a particular quantity i.e. commercial or small - now the substance recovered in the case in hand will certainly fall within commercial quantity thereof. Thus, so far as the ratio descendi in above quoted precedents is concerned with regard to small quantity of the recovered contraband, that pales into insignificance after 18.11.2009.

Hon'ble Supreme Court in **Sajan Abraham's** case (supra), while placing reliance upon the case in **Ouseph @ Thankachan v. State of Kerala** (Criminal Appeal No.1256 of 2001 disposed of on 6th December, 2001), drew an inference that recovery of 110 ampoules of the same psychotropic substance i.e. buprenorphine together with two syringes points out that those were for personal medical use.

So far as decision in **Ouseph @ Thankachan's** (supra) is concerned, the conviction was awarded under Section 27(b) of the Act by

holding that 110 ampoules of Buprenorphine with its trade name (Tidigesic) falls within small quantity. This decision pertains to pre amendment of 2009 Rules. However, in that case also, two syringes were recovered from the offender along with Buprenorphine. Hon'ble Supreme Court in para 10 to 12 had made the following observations : -

“10. In the aforesaid context we notice a significant factual aspect that along with the small quantity of psychotropic substance recovered, two syringes were also recovered from him by the police. That aspect reflects that he only wanted to use buprenorphine (Tidigesic) for his personal consumption and not for trading purposes. The burden on the accused in this respect need not be discharged in the (sic this) manner and the prosecution is to prove the case beyond a reasonable doubt. It is enough that he satisfies the judicial mind by a preponderance of probability.

11. On account of the aforesaid fact situation, we are inclined to believe that the small quantity of buprenorphine (Tidigesic) was in the possession of the appellant for his personal consumption and, therefore, the offence committed by him would fall under section 27 of the ndps act.

12. We, therefore, alter the conviction of the appellant to Section 27 of the Act. We sentence him to the maximum provided under Section 27(b) of the NDPS Act, which is imprisonment for six months. He is already in jail for nearly six years by now. It is not necessary for us to say that he has been in jail far beyond the sentence imposed by us. We, therefore, direct the jail authorities to release him from jail forthwith unless required in any other case. The appeal is disposed of in the abovesaid terms.”

Thus, in **Ouseph @ Thankachan's case** (supra), the accused was convicted under Section 27(b) of the NDPS Act by holding that the recovery effected from him falls within small quantity of the contraband.

In other words, in **Ouseph @ Thankachan's case** (supra), the offender was not acquitted on the ground that he has been having 110 ampoules for his personal use rather he was convicted under Section 27(b) of the Act. But this fact has not been considered by Hon'ble Supreme Court in **Sajan Abraham's case** (supra). To the mind of this Court, after amendment of 2009, the present petitioner is not entitled to take benefit of the ratio laid down in **Sajan Abraham's case** (supra) with regard to the quantity of the recovered substance and it has to be taken as commercial quantity under existing Rules.

A single Bench of this Court in **Joginder Singh v. State of U.T., Chandigarh**; CRM-28773-2017 decided on 26.9.2017 has also discussed the ratio laid down in **Sajan Abraham's case** (supra) wherein it has been observed : -

“In the present case, at this stage, there is nothing to show that the recovery from the present petitioner is for personal purposes. No medical record has been produced to show that the recovered drug has been prescribed nor there is anything to show, from which illness, the petitioner is suffering for which the recovered injections are required for personal use. Therefore, the judgment cited above by learned counsel for the petitioner is not applicable in the present case. In no way, at this stage, it can be held that 73 injections of Buprenorphine are for the personal use for medical purposes.

The argument of learned counsel for the petitioner that petitioner can keep 100 dosages of that substance, without showing that psychotropic substance recovered from the possession of the petitioner is for medical purpose, has no merit. It means that a person can keep/possess 100 dosages of each of the psychotropic substance which falls in the NDPS Act without any medical prescription or without showing the

fact that those have been kept for medical purposes and for personal use.”

In none of the precedents relied upon by the counsel for the petitioner, provisions of Section 37 have been discussed. Therefore, the ratio decidendi in those precedents has no bearing on the facts of the case in hand.

So far as current trend of drug abuse is concerned, this court is not oblivious of the fact that deaths in huge number have occurred due to drug abuse, which causes ripples of fear and anxiety across Punjab. In fact, this part of the country fell prey to the drug terrorism.

Drug menace in our country especially in Punjab has attained dangerous proportions. The drug abuse has been destroying the vary fabric of society. The youths, who are backbone of the society, are falling victims to drug terrorism. In fact, there is nearly no control over the transportation consumption, sale and supply of said drug. In this view of the matter, the petitioner can never be allowed to take 100 doses of buprenorphine or other 110 psychotropic substances, as shown in the schedule, especially when there is no medical prescription nor it is his case that he was using the same for personal medical use.

The language of the first proviso (ibid) is not only in conflict with the provisions of section 37 of the Act but also the same is confusing. If allowed to exist it shall create injustice to the social fabric of Punjab and Haryana.

It is a well-settled principle that the intention of the Legislature must be found by reading the statue as a whole. Every clause of a statute should be construed with reference to the context of the whole statute. It is also the duty of the court to find out the true intention of the legislature and

to ascertain the purpose of the statute and give full meaning to the same. The different provisions in the statute should not be interpreted in the abstract but should be construed keeping in mind the whole enactment and the dominant purpose that it may express.

Maxwell on the Interpretation of Statutes (12th edition at Page 209) has observed as under:-

“A sense of the possible injustice of an interpretation ought not to induce Judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations. Whenever the language of the legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention to bring it about has been manifested to plain words.”

Further at page 210, it has been observed as under:-

“The same general rule applies where the result of one of two interpretations would be to lead to an absurdity.”

The provisions of the said Rule 66 do not restrain the court to apply comprehensive language used by the legislature, the wide meaning of which is in accord with the object of the statute.

The second proviso of sub-rule 2 of Rule 66 of the Rules is in fact absurd. It is contrary to the object of the Act and also the provisions of Section 37 of the Act. One of the salutary principles of interpretation which promotes and advances the object sought to be achieved by the legislation, is in preference to an interpretation which defeats such object. (MSR Leathers v. S. Palaniappan, 2013 Cri. LJ 1112 (SC).

Keeping in view the spirit behind the enactment of the provisions of the Act and Rules, this Court is of the view that in the case in

hand, recovery effected from the petitioner, falls within commercial quantity of contraband and, therefore, provisions of Section 37 of the Act comes into play.

Although, the petitioner intends to take the shelter of first proviso of sub rule 2 (ibid). Yet, he has taken a specific plea that totally false and frivolous case has been registered against him. Thus, he denied the possession of the contraband. It is not the case that he was keeping the contraband in possession for his personal use for medical purpose.

Thus, this Court is of the considered opinion that the recovery effected from the petitioner of the psychotropic substance falls within the ambit of commercial quantity of the recovered substance and the petitioner failed to fulfill the conditions laid down under Section 37 of the Act. Consequently, he is not entitled to the benefit of bail. Therefore, the instant petition stands dismissed.

25th July, 2018
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(RAJ SHEKHAR ATTRI)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No