

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment reserved on: 29.01.2018

Judgment delivered on: 02.02.2018

+

CRL.REV.P. 963/2017, CrI.M.A.No.21373-74/2017,
CrI.M.A.No.706/2018

MOHD PARVEJ & ORS

..... Petitioners

Through Mr.Rakesh K. Sharma and Mr.Deepak
Chauhan, Advocates.

versus

UNION OF INDIA & ANR.

.... Respondents

Through Mr.Anil Soni, CGSC with
Ms.Priyanka,Adv. for R-1/UOI.

+

BAIL APPLN. 2140/2017

MOHD IRSHAD KHAN

..... Petitioner

Through Mr.Rakesh K. Sharma and Mr.Deepak
Chauhan, Advocates.

versus

UNION OF INDIA & ANR

..... Respondents

Through Mr.Anil Soni, CGSC with
Ms.Priyanka,Adv. for R-1/UOI.

+

BAIL APPLN. 2149/2017

MOHD PARVEJ

..... Petitioner

Through Mr.Rakesh K. Sharma and Mr.Deepak
Chauhan, Advocates.

versus

UNION OF INDIA & ANR

..... Respondents

Through Mr.Anil Soni, CGSC with
Ms.Priyanka,Adv. for R-1/UOI.

Mar.Pramod Bahuguna, Advocate for
R-2/Customs.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. This order shall dispose of the aforementioned petitions.
2. Criminal revision petition (No. 963/2017) has assailed the order of charge passed by the trial court dated 15.09.2017 wherein the court was of the view that the petitioners are prima facie guilty of an offence under Section 21(C) of the NDPS Act, 1985 as also under Section 23(C) read with Section 28 and Section 29 of the said Act. The prima facie finding returned was that on 05.09.2016 at about 2.00 pm at the departure hall of the IGI airport the petitioners were intending to depart from Delhi to Dammam by flight No. GF-131; on search of their checked-in baggages it was found to contain 225, 200, 225 bottles total 650 bottles of Chlorpheniramine Maleate

& Codeine Phosphate “Phensedyl Cough Linctus 100 ml each” respectively and equivalent to 79.417 kg; a preparation of a narcotic drug (codeine) and the petitioners intending to export the said commercial quantity of the drug were found prima facie guilty of the aforementioned offences.

3. Bail applications (Nos. 2140/2017 & 2149/2017) seek bail qua 2 petitioner i.e., Mohd. Irshad Khan and Mohd. Parvej. It is stated that the petitioners are in custody since the date of their arrest i.e. since 05.09.2016. The charge sheet had been filed against them and the charges under the aforementioned sections (noted supra) have been levelled against him vide the order now impugned in the criminal revision petition No. 963/2017. Submission being that the petitioners are at best guilty of having been found to be in possession of an intermediate quantity of the aforementioned drug (codeine) and as such they are entitled for consideration of grant of bail.

4. A status report has been filed by the State / the CBI in the bail applications. No separate status report / reply has been filed in the revision petition. Learned counsel for the CBI submits that this report filed by him in the bail applications may be treated as his reply to the revision petition as well.

5. Learned counsel for the parties have both relied upon the dicta laid down by the Apex court in the judgment reported as **2012 (13) SCC 491, Mohd. Sahabuddin & Anr vs State of Assam**. Counsel for the petitioners points out that this judgment was passed on similar facts; in this case also there was a recovery of Phensedyl cough syrup bottles from the petitioner; although bail had been refused to the petitioner for the reason that a truck load of the offending bottles were recovered from the said petitioner; (34700 being the exact quantity) but the High Court of Assam had arrived at a calculation based on the concentrated quantity of the narcotic drug which has been reflected in para 6 of the judgment; this has been extracted by the Apex court and has not been disturbed; meaning thereby that it is the concentrated quantity of the drug which has to be taken into account for the purposes of determination as to whether the alleged illegal possession was a small quantity; intermediate quantity or a commercial quantity. Attention has been drawn to the Notification (dated 16.07.1996) of the Ministry of Finance; the Narcotic Drug Codeine appears in column 28; a small quantity is 10 gm and more than 1 kg alone would quantify as a commercial quantity. In the instant case what has allegedly been recovered from the petitioners is 650 bottles of Phensedyl cough Linctus which contains a concentrated quantity

much less than 1 Kg. of codeine and thus being lesser than the commercial quantity of 1 Kg it would fall within the ambit of an intermediate quantity; the bar and embargo contained in Section 37 of the NDPS Act is not attracted. To further explain this submission, learned counsel for the petitioners has placed reliance upon a judgment delivered by a Special Judge passed in the case of the *NCB vs Md. Tabrez Ansari, Case No. SC 9563/2016*; submission being that in this case also where the accused was in possession of 150 bottles of 100 ml containing Phensedyl cough syrup; the court had prima facie noted that it would amount to 10 mg of codeine phosphate of every 5 ml dosage; it would be 30gm of codeine phosphate in total. The same calculation should apply in the instance case; also keeping in view the judgment delivered by the Apex court in Mohd. Sahabuddin (supra), a calculation based on the concentrated content of the narcotic drug not having disturbed by the Apex court, this is a clear case of a prima facie recovery only of an intermediate quantity and at the cost of repetition a case for bail is made out qua the petitioner.

6. Per contra the respondent has negated this submission.

7. Record shows that the petitioners at the departure hall of the IGI airport were found to be in possession of the 650 bottles of Phensedyl cough

Linctus. Their disclosure statements had been recorded. They admittedly had no license to carry this drug/ export it outside the country. They were also admittedly not stockists of the drug. They had no bill or invoice for the recovered bottles. They were only lay men. The only answer (in terms of their disclosure statements recorded under Section 67 of the NDPS Act) was that they wanted to sell this drug in the open market in the foreign country.

8. This court notes that wide an amendment by S.O 2941 (E) dated 18.11.2009 the following note has now been appended to the Notification dated 16.07.1996. This note reads herein as under:-

“4. The quantities shown in column 5 and column 6 of the Table relating to the respective drug shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drug or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

9. Thus it is the entire mixture of the particular drug and not just its pure drug content which has now to be taken into account to determine as to whether the quantity recovered from the alleged offender falls into a small

quantity or a commercial quantity. Note 4 of this notification was not considered in the judgment of Md. Sahabuddin (supra) by the Apex Court as this contention was never raised. Moreover, the Apex court had only reproduced the calculation arrived at by the High Court of Assam; it did not have an occasion to discuss as to whether this calculation (relating to the concentrated amount) was correct or incorrect. On the face of it in terms of note 4 of the aforementioned notification, the entire mixture of the drug and not its concentrated form i.e, its pure drug content which has to be taken into account for the purposes of determination as to whether what had been recovered from the petitioners was a small quantity or a commercial quantity.

10. This Court has been informed by the parties that the question whether the entire drug or only its concentrated content has to be considered for determination as to whether the alleged recovery was a small or a commercial quantity is even otherwise an issue which has been referred to the Full Bench of the Apex Court and this reference is yet to be answered.

11. The CBI had also sent the recovered drug to CRCL who had vide its report dated 27.10.2016 opined that the entire weight of the liquid comes to 78,000 gms which is a commercial quantity. The petitioners admittedly had

no valid license under the Drug and Cosmetic Act, 1940. They did not have any invoice or bill showing that they had purchased this drug for any legal purpose. This is also not their case. It is also not their case that this transportation was being effected for any therapeutic purpose. The embargo of Section 37 of the NDPS Act which is couched in the negative language and which requires the satisfaction of twin requirements not having been satisfied by the petitioners, the petitioners cannot be considered for bail.

12. Section 37 of the NDPS had been considered by the Apex Court in the judgment of *NCB vs Kishan Lal, 1991 (1) SCC 705*. The court had noted that this Section starts with a non-obstante clause.

“6.....As already noted, Section 37 of the NDPS Act starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein are satisfied. Consequently, the power to grant bail under any of the provisions of the CrPC should necessarily be subject to the conditions mentioned in Section 37 of the NDPS Act.”

13. This position has been reaffirmed by the Apex Court time and again in a catena of judgments. In this background, the revision petition is without merit. It is dismissed.

14. Since the petitioners are prima facie guilty of illegal possession of a commercial quantity of a prohibited drug, they are also not entitled to be considered for bail at this stage.

15. Bail applications are also dismissed.

INDERMEET KAUR, J

FEBRUARY 02, 2018
SU

