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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 645/2020**

IQBAL SINGH

..... Petitioner

Through: Mr Pushendra Kumar Dhaka,
Advocate.

versus

STATE

..... Respondent

Through: Mr Prakash Chand Agarwal,
Advocate for NCB.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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31.07.2020

[Hearing held through video conferencing]

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, praying for bail in Case No. SC/468 in Crime No.VIII/15/DZU/2019 dated 07.08.2019 under Sections 8 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

2. The said complaint was filed by Narcotic Control Bureau (NCB), New Delhi. It is NCB's case that on 10.05.2019, secret information was received by one of the Intelligence Officers that one boy, who is proficient in Punjabi Language, will board a train to

Punjab from Sakur Basti Railway Station and he may be carrying huge quantity of drugs. The aforesaid information was reduced to writing and on perusal of the same, the Superintendent NCB directed to take the necessary action. A team was constituted and at 0915 hours, they proceeded to the Railway Station and arrived there at 0950 hours. At their request, a team of Railway Police Force (RPF) also joined the proceedings. At 10.30 A.M., they noticed three persons on the platform approaching from the northern direction. One of them (the petitioner herein) was holding a white coloured plastic bag (plastic *katta*). The NCB team suspected the said persons and they were stopped and were informed of their rights. Presence of a Gazette Officer was requested and, on his arrival, the said NCB officials searched them in his presence. Nothing incriminating was found on either of them. However, the search of the white coloured bag carried by the petitioner yielded two black polythenes containing 57 bottles of “Onerex Cough Syrup” of 100 ml each. One of the ingredients of the cough syrup is codeine phosphate.

3. The statement of the petitioner under section 67 of the NDPS Act was recorded. He admitted to the recovery of the 57 bottles of Onerex cough syrup and disclosed that he had purchased the same from Bhagirath Place, New Delhi. The officials of NCB arrested the petitioner.

4. According to NCB, 57 bottles of Onerex Cough Syrup are contraband as they contained codeine phosphate. It is also alleged that the said quantity qualifies to be considered as a commercial quantity

of the drug in question, namely, ‘Codeine’.

5. Mr Dhaka, the learned counsel appearing for the petitioner contends that the cough syrup recovered was not narcotic drug as defined under Section 2(xiv) of the NDPS Act. He referred to the definition ‘manufactured drug’, which reads as under:-

“Section 2(xi) “**manufactured drug**” means— (a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate; (b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug.”

6. He also referred to a Notification No.S.O.826(E) dated 14.11.1985 and S.O.40(E) dated 29.01.1993 and drew the attention of this Court to Entry 35, which pertains the substance Methyl Morphine (commonly known as ‘Codeine’). The said Entry reads as under:-

“35. Methyl morphine (commonly known as ‘Codeine’) and Ethyl morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrammes of the drug per dosage unit and with a concentration of not more than 2.5 % in undivided preparations and which have been established in Therapeutic practice.”

7. Mr Dhaka submitted that the content of Codeine in the cough syrup was 0.17% and therefore, the cough syrup did not fall within the definition of a manufactured drug within the meaning of Section

2(xiv) of the NDPS Act.

8. The learned counsel petitioner also drew the attention of this Court to an order dated 26.10.2005 issued by the Drug Controller General of India, *inter alia*, directing that as under:-

“As you are aware there are number of Cough preparations like Corex of M/s. Pflzer Limited, Mumbai, Phensedyl of M/s. Nicholas Piramal India Limited, Mumbai, Codokuff of M/s. German Remedies, Codeine Linctus of M/s. Zydus Alidac etc. moving in inter state commerce. These preparations contain among other drugs Codeine Phosphate 10 mg as one of the ingredients. By virtue of the fact that these preparations contain Codeine and its salts they do not fall under the provisions of NDPS Act and Rules of 1985 but they fall under Schedule H of the Drugs & Cosmetics Rule and are governed by the said rules.”

9. The petitioner contends that 100 ml bottle of cough syrup, which was allegedly recovered from the petitioner contains 0.17% of Codeine Phosphate and as such even if its aggregate is taken, it would make out total of 9.69 grams, which is less than the limit stipulated for a small quantity.

10. He also contended that the bottle of cough syrup is not dealt with as narcotic drug or a psychotropic substance but as a medicinal product.

11. Mr Aggarwal, learned counsel appearing for the NCB countered the aforesaid submissions. He relied on the decision of the Coordinate Bench of this Court in **Karan Sharma v. UOI & Ors.: CRL Bail**

Application No.891/2017, whereby the application for bail in respect of accused, who was in possession of 300 bottles “Chlorpheniramine Maleate & Codeine Phosphate Cough Linctus”, “Phensedyl Cough Linctus 50 ml each” was rejected. He submitted that irrespective of whether the product was a medicinal product and was sold as a cough syrup, it contained a narcotic drug and possession of the same would be an offence punishable under the NDPS Act. He also relied on the decision of the Supreme Court in ***Hira Singh and Anr. v. Union of India and Another: Crl.A. No.722/2017***, wherein the Supreme Court had considered the notification dated 18.11.2009 and has held that irrespective of other quantity of the narcotic drug or psychotropic substance in a mixture, the quantity of the entire substance would be considered for the purposes of ascertaining whether it is a commercial quantity or small quantity.

12. The Supreme Court had clarified that it was not necessary to determine the quantity of the active ingredients in a controlled or a prohibited substance in order to determine whether the same qualify as a small or a commercial quantity. And, the Court had overruled its earlier decision in ***E-Micheal Raj v Intelligence Office, Narcotic Contol Bureau: (2008) 5 SCC 161***.

13. This Court is of the view that the issue raised by the petitioner is certainly a substantial issue.

14. Concededly, the bottles of cough syrup recovered from the petitioner were labelled and clearly indicated the name, address and

other details of the manufacturer; the brand under which the product was sold; the batch number; the date of manufacture; and the date of expiry.

15. It is NCB's case that four samples marked as A-1, B-1, C-1 and D-1 were drawn and sent to the Central Revenues Control Laboratory for analysis. The analysis report dated 05.07.2019 is placed on record and indicates that all the four samples, were in original unit packing and were sealed condition. Thus, NCB had not drawn any samples of the allegedly illicit substance but had sent four out of the fifty seven bottles, as samples. The analysis report indicates that three of the bottles bore the description "ONEREX" Cough Syrup and one of the bottles bore the description "WINCEREX" Cough Syrup. The complaint does not mention recovery of any bottle described as WINCEREX Cough syrup. The samples were analysed and two of the samples contained 0.17% codeine Phosphate and the other two bottles contained 0.18% Codeine Phosphate.

16. The product recovered from the petitioner is a cough syrup and not any narcotic drug. Mr Dhaka also pointed out that the said product (cough syrup) is sold openly in the market and is also available online. The fact that the said product also includes miniscule quantity (0.17%) of a prohibited or controlled substances cannot, *prima facie*, change the nature of the product. In terms of Entry 35 of the list of manufactured drugs (as contained in Govt. of India notifications SO 826(E) dated 14.11.1985., S.O. 40(E) dated 29.01.1993 and S.O. 1431(E) dated 21.06.2011), the product recovered from the petitioner

does not fall within the ambit of a manufactured drug as the content of codeine phosphate is less than 2.5%.

17. The decision of the Supreme Court in ***Hira Singh and Anr.*** (*supra*) must be read in its context. In that case, the court considered the challenge to the Notification No.S.O.2942(E) dated 18.11.2009, whereby “Note 4” was added to Notification S.O.1055(E) dated 19.10.2001 specifying the “small quantity and commercial quantity” of the narcotic drugs or psychotropic substances covered under the NDPS Act. The sad ‘Note 4’ reads as under:

“The quantities shown in column 5 and 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 substance of the particular drug in dosage form or isomers, esters, ethers and salts or these drugs, including salts or esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.”

18. The court was considering the five questions that were referred to a larger bench. This included the question whether its earlier decision in ***E-Micheal Raj v Intellignce Office, Narcotic Contol Bureau*** (*supra*) required reconsideration. One of the questions framed for the court’s consideration was whether “*the NDPS Act envisages that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?*”

19. In *E-Micheal Raj's* case (*supra*), the Supreme Court held as under:

“...Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gms. and contains 0.2% of heroin or more would be punishable under Section 21(c) of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such....”

20. In *Hira Singh* (*supra*), the Supreme Court overruled the aforesaid decision in *E-Micheal Raj* (*supra*) and concluded as under:

“(I). The decision of this Court in the case of *E. Micheal Raj* (*supra*) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

(II). In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances;

(III). Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001;

(IV). Challenge to Notification dated 18.11.2009 adding “Note 4” to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed.”

21. It is relevant to refer to paragraph 8.3 of the said judgment, which indicates the rationale for doing so and the same is set out below:

“8.3 At this stage, it is required to be noted that illicit drugs are seldom sold in a pure form. They are almost always adulterated or cut with other substance. Caffeine is mixed with heroin, it causes that heroin to vaporize at a lower rate. That could allow users to take the drug faster and get a big punch sooner. Aspirin, crushed tablets, they could have enough powder to amend reversal doses of drugs. Take example of heroin. It is known as powerful and illegal street drug and opiate derived from morphine. This drug can easily be “cut” with a variety of different substances. This means that drug dealer will add other drugs or non -intoxicating substances to the drug so that they can sell more of it at a lesser expense to themselves. Brown-sugar / smack is usually made available in power form. The substances is only about 20% heroin. The heroin is mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown-sugar is cheaper but

more dangerous. These are only few examples to show and demonstrate that even mixture of narcotic drugs or psychotropic substance is more dangerous. Therefore, what is harmful or injurious is the entire mixture/tablets with neutral substance and Narcotic Drugs or Psychotropic Substances. Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of NDPS Act would be frustrated. There may be few punishment for “commercial quantity”. Certainly that would not have been the intention of the legislature.

22. It is apparent from the above that the court was considering a case where illicit substances are sold in mixtures containing neutral substances or substances which may have the effect of enhancing the effect of the offending substance or facilitate its abuse. The court was not concerned with a non-offending substance or preparation with bifacial qualities, which may have miniscule quantities of any offending substance. The litmus test would be as to how the substance is known in common parlance and dealt with by persons in trade. Is it manufactured, distributed, purchased and sold as an illicit substance, which is one of the ingredients of it, or is it known and dealt with as a separate product.

23. It is important to note that one of the Indian Drug Manufacturers’ Association had filed an application to intervene in *Hira Singh* (*supra*). One of the contentions advanced on their behalf was that the quantity of the narcotic drug is also relevant for the purposes of determining whether the provisions of NDPS Act are

applicable. The said contention, as recorded by the Supreme Court in its judgment, is set out below:

“5.3 The quantity of the narcotic drug is also relevant for the purposes of determining whether a particular preparation is subject to the provisions of the NDPS Act or not. This is borne out by clause (xi) of section 2 of the NDPS Act which empowers the Central Government to notify a narcotic substance or preparation either to be a manufactured drug or to not be a manufactured drug;

5.4 By making the percentage content of the drug irrelevant, the impugned notification has the effect of bringing pharmaceutical preparations that are exempt from the NDPS Act, under the fold of the law through the backdoor.

i) E.g.: Entry 35 ‘Codeine’ in the list of manufactured drugs vide Notification S.O. 826(E) dated 14/11/1985, Notification S.O. 40(E) dated 29/02/1993 and Notification S.O. 1431(E) dated 21.6.2011 (hereinafter collectively referred to as “notification on manufactured drugs”).

ii) Similar exemptions are contained at Entries at SI. No. 35, 36, 37, 48, 70, 76, 83 and 87 of the notification on manufactured drugs.”

24. In the aforesaid context, it is relevant to refer to paragraph 8.4 of the judgment, where the court clarified as under:

“8.4. Even considering the definition of “manufacture”, “manufactured drug” and the “preparation” conjointly, the total weight of such “manufactured drug” or “preparation”, including the neutral material is required to be considered while determining small quantity or

commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of NDPS would be achieved. Any other intention to defeat the object and purpose of enactment of NDPS Act viz. to Act is deterrent.”

25. Plainly, the quantity of the mixture of a manufactured drug and a neutral substance would require to be considered for the purposes of determining whether the quantity is a commercial quantity or a small quantity for the purposes of the NDPS Act. However, a drug which is manufactured but falls outside the scope of the definition of a ‘manufactured drug’ under the NDPS Act on account of the component of offending material being below the prescribed threshold, cannot be construed as a manufactured drug by dissecting its ingredients and considering them in isolation.

26. In the present case, it cannot be NCB’s case that 99.83% (that is, 100% minus 0.17%) of the components of the formulation are neutral substances masking 0.17% of the illicit substance. On the contrary, it is apparent that the cough syrup is a medicinal product.

27. At this stage, this Court is not required to examine the matter in any further detail. Suffice it to state that the petitioner has presented reasonable grounds for being acquitted in the present case. There is no allegation that the petitioner is involved in any other case.

28. In the given circumstances, this Court considers it apposite to allow the present petition. The petitioner shall be released on bail on his furnishing a Personal Bond in the sum of 20,000/- to the

satisfaction of the Trial Court/Duty Magistrate. This is also subject to the following further conditions:-

- a) the petitioner shall provide a phone number to the Superintendent NCB, DZU, R. K. Puram and ensure that he is reachable on it at all times;
- b) he shall report his whereabouts to the Superintendent NCB, DZU, R. K. Puram on first Monday of every calendar month and;
- b) the petitioner shall ensure that he is present for all hearings before the trial court.

29. The petition is allowed in the aforesaid terms.

30. It is clarified that the observations by this Court in the present case are only for the purposes of considering this petition and the trial court shall decide the case uninfluenced by any observations made herein.

31. A copy of this order be communicated to the concerned Jail Superintendent electronically.

VIBHU BAKHRU, J

JULY 31, 2020
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