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HIGH COURT OF CHHATTISGARH, BILASPUR

Proceedings through Video Conferencing

CR.R. No. 336 of 2021

Reserved on 5-8-2021

Delivered on 13-8-2021

Rajesh Agrawal S/o Shri Anand Ram Agrawal, aged about 42 years R/o Devendra Nagar, Sector - 5, Tirupati Pharma, Tatiband Raipur, CG.

----Applicant

Versus

State of Chhattisgarh through Police of Police Station Maudhapara, Raipur District Raipur CG

----Respondent

 For Applicant : Mr. Shivang Dubey, Adv.
 For respondent : Mr. Dinesh Tiwari, Dy. Govt. Adv.

Hon'ble Shri Justice N.K. Chandravanshi
CAV Order

1. This criminal revision has been preferred by the applicant being aggrieved by the order dated 18-8-2020 passed in Special Criminal Case No. 6/2020 by the Special Judge, NDPS Act, Raipur (CG) whereby the application under Section 167(2) of the Criminal Procedure Code, 1973 (in short 'Cr.P.C.') filed by the applicant/accused has been dismissed.

2. Brief facts of the case are that during investigation of Crime No. 226/2019 registered at Police Station Modahapara, Raipur, police recovered 50 cartons, each containing 144 bottles, each bottle containing 100 ml, total 7,20,000 ml Codeine Phosphate RC Kuff Syrup from the possession of the applicant, which was kept by him without any authority of law. The applicant on 10-8-2020 filed an application before the Special Judge, NDPS Act, Raipur, for grant of default bail under section 167(2) of the Cr.P.C. mentioning that the applicant was arrested on 15-5-2020 for offence punishable under Section 21(b), 29 and 32 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short

'NDPS Act') and police of PS Modahapara got his judicial remand till 29-5-2020. Thereafter, on an interval of 14 days till 24-8-2020, police has been getting judicial remand of the applicant under Section 21(b), 29 and 32 of the NDPS Act. Out of above sections, Section 21(b) of the NDPS Act, provides maximum punishment for a term which may extend to 10 years. Therefore, under the proviso (a) of sub-section (2) of Section 167 of the Cr.P.C., police was required to file charge sheet against the applicant within 60 days which was completed on 15-7-2020, but the police did not file charge sheet neither within 60 days i.e. 15-7-2020 nor till the date of filing of application on 10-8-2020. Thus, the applicant is entitled to get default bail under Section 167(2) of the Cr.P.C. Therefore, he be granted default bail.

3. On 18-8-2020 the application filed by the applicant was dismissed by learned Special Judge, NDPS Act, Raipur holding that police is not bound to file charge sheet within 60 days in this case because quantity of seized Codeine Phosphate RC Kuff Syrup from the applicant is total 7,20,000 ml which is a commercial quantity, therefore, provisions of Section 36A(4) of the NDPS Act are attracted in this case. Hence, this revision.

4. Learned counsel for the applicant submits that after arrest of accused on 15-5-2020, in every remand application, police took the judicial remand of the applicant mentioning Section 21(b), 29 and 32 of NDPS Act till 24-8-2020. The bail application M.Cr.C. No. 2927/2020 filed by the applicant under Section 439 of the Cr.P.C. was dismissed by the High Court on 5-8-2020, wherein Hon'ble High Court opined that psychotropic substance seized from the applicant is more than commercial quantity. Thereafter also, police got judicial remand of the applicant from 12-8-2020 to 24-8-2020 mentioning Section 21(b), 29 and Section 32 of the NDPS Act whereas 60 days were completed on 15-7-2020. On the date of filing of application for grant of default bail under Section 167(2) of the Cr.P.C. i.e. on 10-8-2020, the applicant was in judicial remand under Section 21(b), 29 and 32

of the NDPS Act. These offences are punishable for the term which may extend to 10 years, therefore, the applicant was entitled to get default bail under Section 167(2) of the Cr.P.C. because in that period, the sections of offence registered by police were for intermediary quantity of contraband article. Despite that, learned trial Court dismissed the application of applicant holding the quantity of psychotropic substance seized from him was commercial quantity.

5. Learned counsel for the applicant also submits that learned trial Court has taken this view on the basis of order dated 5-8-2020 passed by coordinate bench of this Court in MCRC No. 2927/2020 in which it was held that quantity of Codeine Phosphate RC kuff Syrup seized from the applicant is more than commercial quantity but Hon'ble Supreme Court in SLP (Cri.) No. (s) 587-588 (Rajesh Agrawal -v- State of CG), challenging the aforesaid order passed by the High Court in M.Cr.C. No. 2927/2020, directed that "observation in the impugned order are confined to disposal of the application for bail and shall not come in the way of the trial". In view of above direction of Hon'ble Supreme Court, learned Special Judge, NDPS Act, Raipur ought not to have formed the opinion that the psychotropic substance seized from the applicant was of commercial quantity, rather to decide the application of default bail, he had to see only the section under which judicial remand of the applicant is taken by the police and granted by the Court. At that point of time, learned Court below could not have gone into an independent inquiry to ascertain quantity of alleged contraband substance during the course of investigation before filing of the charge sheet. In other words, learned Court below could not have changed the offence during investigation or the sections of that matter at the time of deciding the application for default bail.

6. Learned counsel for the applicant further submits that learned court below ought to have taken into account only the sections/ offences on the relevant date, for which the remand

was sought by the police and granted by the Court, for the purpose of calculating duration, during which the investigation has to be completed in this case, which was completed on 15-7-2020. Therefore, learned trial Court ought to have granted default bail to the applicant because default bail is a legislative command and not court's discretion and once right of default bail is accrued on the applicant then he cannot be deprived of the said right, hence the order impugned is perverse and not sustainable.

7. To buttress his arguments, learned counsel for the applicant places reliance on the decision of Hon'ble Supreme Court in the matter of **Hitendra Vishnu Thakur and others -v- State of Maharashtra and others** [1994(4) SCC 602] and **M. Ravindran -v- Intelligence Officer, Directorate of Revenue Intelligence** [2021 (2) SCC 485].

8. Per contra, learned Counsel for the State submits that contraband substance seized from the applicant was more than commercial quantity, therefore, learned Special Judge, NDPS Act, Raipur has rightly taken into consideration that provisions of Section 36A(4) of the NDPS Act will attract in this case while rejecting the application filed by the applicant under Section 167(2) of Cr.P.C. Learned State Counsel referring the judgment passed by Hon'ble Allahabad High Court in case of **Sanaul Haque -v- State of UP and another** (2008 Cr.L.J. 1998) submits that at the time of deciding judicial remand or conducting other proceeding, the Magistrate applies its judicial mind. In this case also, learned Special Judge, NDPS Act applied judicial mind on the basis of facts of the case and dismissed the application of the applicant for grant of default bail. Therefore, the order impugned does not warrant any interference by this Court.

9. I have heard learned counsel for the parties and perused the impugned order, remand papers, order sheets and other documents filed with the revision.

10. A perusal of the impugned order and the remand applications filed by the applicant shows that contraband substance seized from alleged illegal possession of the applicant was of huge quantity, i.e. 50 cartons, each containing 144 bottles, each bottle containing 100 ml, total 7,200 bottles, and total quantity 7,20,000 ml of Codeine Phosphate RC kuff Syrup.

11. The Supreme Court (two-Judges Bench) in the matter of **E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau** [(2008) 5 SCC 161] held that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. This view was doubted and the matter was ultimately referred to a larger Bench. Ultimately, their Lordships of the Supreme Court (three-Judges Bench) in the matter of **Hira Singh and another v. Union of India and another** [2020 SCC Online SC 382] have finally set at rest the controversy by holding that 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.”

12. In view of above judgment of Hon'ble Supreme Court and total quantity of contraband substance seized from the applicant i.e. 7,20,000 ml of Codeine Phosphate RC kuff Syrup, it is clear that it is more than commercial quantity. In other words, the applicant was found in possession of commercial quantity of the said article.

13. It is true that the applicant was arrested under Section 21(b), 29 and 32 of the NDPS Act and from first remand period (15-5-2020 to 29-5-2020) till remand period from 12-8-2020 to

24-8-2020, his judicial remand was taken mentioning Section 21(b), 29 and 32 of the NDPS Act. During this period, MCRC No. 2927/2020 filed by the application under Section 439 of the Cr.P.C. was dismissed by the High Court on 5-8-2020 observing that the applicant was in possession of commercial quantity of psychotropic substance. Learned Special Judge, NDPS Act, has mentioned in his impugned order the observations made by the High Court in aforesaid MCRC. Hon'ble Supreme Court in order dated 22-2-2021 passed in SLP (Cri.) No.(s)-587-588/2021 directed that the observation made by the High Court are confined to the disposal of the application for bail and shall not come in the way of the trial.

14. First of all, the impugned order was passed by learned Special Judge, NDPS Act, before the order passed by Hon'ble Supreme Court. Even otherwise, as per direction, the observation made by the High Court in M.Cr.C. No. 2927/2020 were confined to the disposal of the application for bail and shall not come in the way of trial. The order impugned shows that till that date, charge sheet against the applicant was not filed and the impugned order pertains to disposal of the application for default bail. In other words, it was not the stage of trial of the case. Therefore, the argument put-forth by learned counsel for the applicant that the impugned order is contrary to the direction of Hon'ble Supreme Court has no force.

15. All though, till the date of order impugned, judicial remand of the applicant was taken by the police and granted by the Special Judge, NDPS Act under Section 21(b), 29 and 32 of the NDPS Act for the offence of intermediary quantity of contraband article, and not under Section 21(c), NDPS Act, (commercial quantity), but only on the ground of this error, the nature of offence is not changed because as per prosecution story, psychotropic substance seized from possession of the applicant is clearly of commercial quantity. Mere mentioning of different sections of offence cannot change the facts of the case, because

the facts of the case decides as to what offence is made out and provisions of which section of the Act are attracted. In other words, actual facts of the case may change the sections of the offence but section of the offence cannot change actual facts of the case. Therefore, the arguments of learned counsel for the applicant has no force that learned trial Court ought not to have changed the offence or sections while deciding the application for default bail of the applicant. In these facts and circumstances of the case, the cases referred by the learned counsel for the applicant in the matters of **Hitendra Vishnu Thakur and others** (supra) and **M. Ravindran** (supra) are not applicable in this case.

16. Section 36A(4) of the NDPS Act is relevant and reads thus :-

36A. Offences triable by Special Courts.—

- | | | | |
|-----|-----|-----|-----|
| (1) | xxx | xxx | xxx |
| (2) | xxx | xxx | xxx |
| (3) | xxx | xxx | xxx |

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27 A or for offences involving commercial quantity the references in sub - section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to “ninety days”, where they occur, shall be construed as reference to “one hundred and eighty days” :

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.”

17. Since the contraband article seized from the possession of the applicant is of commercial quantity, therefore, Section 36A(4) of the NDPS Act attracts in this case. Therefore, learned Special Judge, NDPS Act by applying his judicial mind, has rightly held that the applicant is not entitled for grant of default bail and thereby, rightly rejected the application filed by the applicant under Section 167(2) of the Cr.P.C.

18. In view of above, I do not find any substance in the present criminal revision. The same deserves to be and is hereby dismissed.

Sd/-

**N.K. Chandravanshi
Judge**

Pathak/-