

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)
Appellate Side

Present:

The Hon'ble Justice Rai Chattopadhyay

C.R.R. 1082 of 2016
With
CRAN 8 of 2018 (Old No: CRAN 757 of 2018)
With
CRAN 11 of 2019 (Old No: CRAN 1634 of 2019)
With
CRAN 16 of 2020 (Old No: CRAN 1270 of 2020)
With
CRAN 17 of 2021
With
CRAN 18 of 2021
With
CRAN 19 of 2022
With
CRAN 23 of 2022

Ramraj Choudhury
Versus
The State of West Bengal

For the Petitioner

: Mr. Sujash Ghosh Dastidar,
Ms. Maheswari Sharma,
Ms. Tulika Banerjee

For the State

: Mr. Madhusudan Sur, Ld. APP.,
Mr. Dipankar Pramanick.

Hearing concluded on : 14/11/2022

Judgment on : 06/12/2022

Rai Chattopadhyay, J. :

1. Allegedly the petitioner in this revision is the king pin of the syndicate responsible for illicit traffic, diversion and illegal sale of prohibited phensedyl.
2. He has been implicated and shown arrested in connection with Jalangi Police Station Case No.1121 dated 29.11.2013 under Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985, (hereinafter referred to as the NDPS Act). This revision case of the petitioner rests on the points inter alia that the proceedings against him is not to subsist for - the offending substance being phensedyl, lodging the case against him under the provision of the NDPS Act, 1985 has not been proper; that, the component thereof, i.e, codeine is not a contraband and prohibited drug as per provisions of the NDPS Act, 1985, that in this case provisions of NDPS Act, 1985 would not at all attract; that in case of non-applicability of the provisions of NDPS Act, 1985 in this case - initiation of proceedings against the petitioner if has not been proper and that such a criminal proceedings against him should be quashed.
3. The criminal proceeding started by registering the FIR lodged by S.I, Jalangi Police Station, Jalangi, District – Murshidabad on 22nd

December, 2013. In the FIR, it was, inter alia, alleged that the complainant got information on the same date at 17:15 hours and raided near Sirochar Bridge. Immediately he diarised the matter and proceeded to work out the source information along with his team. There, he could apprehend two persons with total 600 bottles of liquid styled as phensedyl, each containing 100ml quantity of the article. The cash amount of Rs.38,000/- was also recovered from their custody.

4. Informant had stated that the name of the present petitioner appeared to be a group leader leading the entire operation of illicit transmission of 'phensedyl'. This fact has revealed from one of the accused persons apprehended, by interrogating him. It is found from the record that at the relevant point of time the petitioner was in custody in connection with some other police case. That is why, after obtaining permission from court, he was shown arrested in connection with the present case.
5. Upon registering the FIR on 22nd December, 2013 the police started investigation and the same ended into filing of charge sheet on 30th May, 2014 under Section 22 of the NDPS Act, 1985. Petitioner is aggrieved of the entire proceeding as well as filing of charge sheet against him in the said proceedings and has challenged the same by filing the present revision case. Petitioner's grounds in a nut-shell

are that the offence as alleged against him is only unfounded and no ingredients thereof would be available against him; that the entire investigation as well as the finding of fact leading to submission of charge sheet against him is only baseless, in so far as no material has been recovered in this case from his custody; that the statement of the co-accused persons who is in police custody shall have no credibility or value to implicate the petitioner in the instant case; that the instant proceeding is a result of mala fide intention of the prosecution and the investigating agency to unnecessarily harass and commit him on the false allegation.

6. Mr. Sujash Ghosh Dastider, Ld. Advocate on behalf of the petitioner has submitted on one hand that no offending material has been recovered from the custody of his client. Implication of his client on the basis of the submission of the other co-accused person is only mala fide and prejudicial to his client's interest. He has also urged about the alleged inherent illegality in the entire process.
7. It has further been submitted on behalf of the petitioner that the recovered contraband is 'phensedyl' which is not categorized under the NDPS Act, 1985, under which the petitioner has been booked. In such circumstances, according to him, the petitioner could never have been booked under the provisions of the said Act, which is only misplaced and wrongly applied. Thus his implication in this case is

dehors the principles of law. It is submitted that the fact of this case would unfailingly point out to that the petitioner's case should not at all be committed to trial to test if he would be found guilty under the provisions of NDPS Act, 1985, or not. Instead the proceeding initiated against the petitioner under Section 22 of the NDPS Act, 1985 is liable to be quashed in limine and set aside.

8. It has further been argued that 'phensedyl' is a therapeutic drug, covered and controlled under the provisions Drugs and Cosmetic Act, 1945. Therefore, according to him if at all any breach has been committed by the petitioner, the same should come under the penal provisions of the Drugs and Cosmetic Act and application of provisions of NDPS Act, 1985, against his client has only been erroneous.
9. In support of his argument, Ld. Advocate on behalf of the petitioner has relied on the **unreported Division Bench judgment of the Hon'ble Allahabad High Court** the case of **Vibhor Rana vs. Union of India, decided on 24th December 2021.**
10. Mr. Madhusudan Sur, Learned Additional Public Prosecutor, on behalf of the state has raised strong objection to such grounds and prayer made by the petitioner. It is submitted that chemical examination of the recovered contraband article has been made. Result of the same would reveal the contraband to contain 'codeine

phosphate' and come under the perview of the NDPS Act, 1985. It is submitted that 'codeine phosphate' is a component which has already been categorized as a contraband article under the provisions of NDPS Act, 1985. Hence, according to him there is no error or mala fide on the part of the prosecution as alleged in lodging a case against the present petitioner under the provisions of NDPS Act, 1985. It is further submitted that the petitioner is a habitual offender and extent of his involvement has been amply brought on record in this case, during investigation, resulting into submission of charge sheet against him. It is submitted that though the contraband article has not been recovered from the possession of the petitioner himself, still in view of his involvement and role suggested by the materials collected during investigation, the intensity and gravity of the alleged offence he has been involved in shall make him to face the trial, under the rigorous provisions of the law, in an appropriate court. He submits that the petitioner should be tried before the appropriate court and the prosecution should be afforded an opportunity to bring home the charges against him.

11.Case Diary has been submitted in court for consideration.

12.The chemical examination report of the article seized in this case has already been collected during investigation and is available in the

case dairy. The finding of the chemical examination of the article has been recorded therein which is as follows:-

Result of Examination

Using suitable Physical, Chemical tests and Instrumental methods of chemical analysis (TLC/HPLC techniques, of the exhibits marked as Ex.- 'A1 & B1', the following results were obtained.

- 1) The samples marked as Ex-'A1' & 'B1' were analysed by the TLC technique against reference standard and found to contain codeine phosphate.**
- 2) The samples (Ex-'A1' & 'B1') come under the purview of N.D.P.S. Act'1985.**

Protocol :- The tests are carried out as per the Manufacture's method

Note :- 1. Result relate only to exhibits tested.

2. After examination, the remnants of the exhibits marked as Ex-'A1' & 'B1', have been duly signed & sealed with the seal impression and are being returned herewith."

13.Parties in this revision have accepted such findings in chemical examination and the petitioner had founded his first and main point of argument on the same.

14.He says that codeine is for the therapeutic usage and is controlled under the provisions of the Drug and Cosmetic Act, 1945. Contravention thereof and the contravener shall be prosecuted under the said law only. Precisely, according to the petitioner if he is to be prosecuted at all in connection with the present case, the same should have been done under the provisions of the Drug and Cosmetic Act, 1945 and an application of provisions under the NDPS

Act, 1985, in this case, against him is only illegal and the prosecution so initiated is mala fide and perverse. The Allahabad High Court's decision, as mentioned above is relied on.

- 15.** It would be beneficial to mention here the provision under Section 80 of the NDPS Act, 1985, which is as follows:-

“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.”

- 16.** It would further be beneficial to observe the findings of the Hon'ble Supreme Court in a three Judges Bench decision, that is, **State of Punjab vs. Rakesh Kumar reported in (2019) 2 SCC 466**, that,

“13. However, we are unable to agree on the conclusion reached by the High Court for reasons stated further. First, we note that Section 80 of the NDPS Act, clearly lays down that application of the Drugs and Cosmetics Act is not barred, and provisions of the NDPS Act can be applicable in addition to that of the provisions of the Drugs and Cosmetics Act. The statute further clarifies that the provisions of the NDPS Act are not in derogation of the Drugs and Cosmetics Act, 1940. This Court in *Union of India v. Sanjeev V. Deshpande* [*Union of India v. Sanjeev V. Deshpande*, (2014) 13 SCC 1 : (2014) 5 SCC (Cri) 496] , has held that :

“35. ... essentially the Drugs and 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 the 1940 Act.”

14. The aforesaid decision in *Sanjeev V. Deshpande case* [*Union of India v. Sanjeev V. Deshpande*, (2014) 13 SCC 1 : (2014) 5 SCC (Cri) 496] further clarifies that, the NDPS Act, should not be read in exclusion to the Drugs and Cosmetics Act, 1940. Additionally, it is the prerogative of the State to prosecute the offender in accordance with

law. In the present case, since the action of the respondent-accused amounted to a prima facie violation of Section 8 of the NDPS Act, they were charged under Section 22 of the NDPS Act.”

17. No less beneficial would be to follow the observation as regards this in the judgments of **Ajid Mondal @ Ajid Mondal vs. State of West Bengal reported in 2017 SCCOnline Cal 16221 (equivalent citation in 2018 2 CHN 146)**, and **Rasid Sk. Vs. State of West Bengal reported in 2017 SCCOnline Cal 16222**, wherein it has been held as regards applicability of the provision under Section 80 of the NDPS Act, 1985, that the section **“makes it amply clear that the provisions of NDPS Act shall have affect in addition to and not in derogation of the Drugs and Cosmetic Act or the rule made there under”**.
18. Hence, there shall be no two opinions as to what very categorically and unambiguously has been provided under Section 80 of the NDPS Act, 1985, that, provisions here and rules made hereunder shall be in addition to and not in derogation of the Drugs and Cosmetic Act, 1945 and Rules.
19. Therefore, even if, for arguments sake, it is stated that petitioner’s case should have been initiated under the provisions of the Drug and Cosmetic Act, 1945, that would not have been in defiance of the provisions of the NDPS Act, 1985, but those provisions under the NDPS Act would have been in addition to those under the Drugs and Cosmetic Act, 1945.

- 20.** Question comes if at all the provision under the NDPS Act, 1985, has rightly been applied in this case, or in view of application of erroneous penal provision against him, the petitioner should be exempted from being prosecuted at all.
- 21.** Petitioner's submission that composition 'codeine phosphate' found in the article seized would exclude application of provisions of the NDPS Act, 1985, would be refutable following the **Division Bench judgment of the Hon'ble Allahabad High Court**, as referred to in this case by the petitioner himself (mentioned earlier).
- 22.** The relevant portion of the said judgment may be reproduced here to understand the finding of the court:-

"20. Section 2 of the NDPS Act contains definitions and the following definitions are relevant for adjudicating the dispute involved in the present case:-

(xi) "manufactured drug" means-

(a) 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;

But does not include any narcotic substance or preparation which the Central government may, having regard to the available information as to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug;

(xiv) "narcotic drug" means coca leaf, cannabis (hemp), poppy straw and includes all manufactured drugs;

(xv) "opium" means-

- (a) the coagulated juice of the opium poppy; and
 - (b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2 per cent of morphine;
- (xvi) “opium derivative” means-
- (a) medicinal opium, that is, opium which has undergone the processes necessary to adopt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials;
 - (b) prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;
 - (c) phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;
 - (d) diacetylmorphine, that is, the alkaloid also known as diamorphine or heroin and its salts; and
 - (e) all preparations containing more than 0.2 per cent of morphine or containing any diacetylmorphine;

8. Prohibition of certain operations.- No person shall-

- (a).....
- (b)
- (c) produce, manufacture, possess, sell purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or transship any narcotic drug or psychotropic substance,

Except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provisions, imposes any requirement by way of licence, permit or authorization also in accordance with the terms and conditions of such licence, permit or authorization:

.....”

21. The position which emerges from a combined reading of the above quoted definition is that as per Section 2 (xvi) (C) of the Act, codeine and its salts are “opium derivatives”. As per Section 2 (xi) (a), opium derivatives are included in “manufactured drugs” and as

per Section 2 (xiv) all manufactured drugs are included in the definition of “narcotic drugs”, unless the same falls within the exception appended to Section 2 (xi) providing that “but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be manufactured drug”.

22. On 14-11-1985 the Government of India has issued a notification No.826 (E) dated 14.11.1985 and S.O 40(E) dated 29-11-1993 containing the list of narcotic drugs and Entry 35 thereof is as follows:- “Methyly 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 milligrams 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.”

23. The Hon’ble court holds that codeine content in the drug not more than 2.5 % in undivided preparations and the drug being used in therapeutic practice will not be a ‘Manufacturer Drug’ and therefore will not be ‘Narcotic Drug’.

24. Or else, evidently, codeine content beyond the said admissible limit would render the so called drug to be a ‘Manufacturer Drug’ or ‘Narcotic Drug’, usage of which would be prohibited under Section 8 of the NDPS Act, 1985.

25. In this regard the finding of the Hon’ble Supreme Court in the judgment of **Mohd. Sahabuddin & Anr. vs. State of Assam** reported in **(2012) 13 SCC 491**, may be mentioned, which is as follows:-

“the submission that the contain of the codeine phosphate in which 100 ml bottle if related to the permissible dosage, namely, 5 ml would only result in less then 10 mg of codeine phosphate thereby would fall

within the permissible limit as stipulated in the notification dated 14.11.1985 and 29.01.1993 should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means “contributing to cure of disease”. In other words, the assessment of codeine content on dosage basis can only be made with the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as action of remedial agent. Since the appellant had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule H drug containing narcotic substance was being transported and that to stealthily, it cannot simply presumed that such transportation was for therapeutic practice as mentioned in the notification dated 14.11.1885 and 29.01.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml content of the cough syrup containing the prohibited quantity of ‘codeine phosphate’ is meant for human consumption, the same would certainly fall within the penal provisions of the NDPS Act, 1985, calling for appropriate punishment to be inflicted upon the appellant. Therefore, the appellant’s failure to the establish the specific condition required to be satisfied under the above referred two notifications, the application of the exemption provided under the said notification un order to consider the appellant’s application for bail by the courts below does arise. Therefore, there is no merit in this appeal”.

26. Therefore the law is very well settled now that the contents of the narcotic substance should not be more than 100 mg of codeine per dose unit and with a concentration of not more than 2.5% in undivided preparation, to be exempted to come under the perview of the NDPS Act, 1985. The other condition provided for mandatory compliance is that the article should be only for therapeutic practice.

27. Let me deal in this case with the second condition as mentioned above at the first place. In this case seizure and arrest has been made by police from the place of hording of the contraband. No

record is available to show that the seized articles were either manufactured, being possessed or being transmitted for any therapeutic and medicinal purpose. No documents as to the same is available, where as contrarily, the prosecution's case is allegedly against the illegal possession and transportation of the contraband without any licenses etc. to justify its hording. Accused persons were neither licensed to deal with the seized article, nor could explain the purpose of their holding the same in such quantity or even as to who would be the ultimate consumers of such product. Under such circumstances the ratio of the case of **Mohd. Sahabuddin & Anr.** reported in **(2012) 13 SCC 491** as well as that of **Abul Kasem**, reported in **2020 SCCOnline Cal 3392** would be squarely applicable in this case. The Hon'ble High Court at Calcutta in the judgment as above followed the ratio in **Mohd. Sahabuddin's** case and found that in absence of any material to show that accused person possessed or carried 'phensedyl syrup' for medicinal purposes, invocation of provisions of the NDPS Act, 1985 was warranted.

- 28.** It shall not be out of context to mention here the observations of the Hon'ble Apex Court in **Mohd. Sahabuddin's** case, which shall be applicable to the instant case too. While rejecting petitioner's bail in that case, the court was pleased to hold **"In view of the conduct of the appellants in having transported huge quantity of cough syrup without valid documents, they cannot be heard to state that they were not**

expected to fulfil any of the statutory requirements either under the provisions of the Drugs and Cosmetics Act or under the provisions of the NDPS Act. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with the pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered". Hence, in this case acts and operations of the accused persons, including the petitioner, shall definitely fall within the prohibition of section 8 of the NDPS Act, 1985.

- 29.** So far as the point as to whether the content of prohibited article in the seized phensedyl would fall within the permissible limit or beyond the same – is concerned, firstly, it can be said that, this point is not agitated in this case at all. Even then, when this court applies its cautious and analytical mind to it, the essential fallow up would be that it is a question only to be determined in trial, upon evidence. At this stage, it would be only premature to go into this question. Fact remains that in this case, there are sufficient material on record including the chemical analysis report of the contraband seized, that makes out strong prima facie of those, to be available against the petitioner. This obviously satisfies the tests laid down by the

Hon'ble Apex Court in **State of Haryana vs. Bhajanlal reported in AIR 1992 SC 604 (also 1992 Supp (1) SCC 335)**, not to interfere into the proceedings or initiation thereof against him.

- 30.** All the discussions as made above, would warrant dismissal of this revision.
- 31.** Hence, CRR 1082 of 2016 is dismissed. Connected applications being CRAN 8 of 2018 (Old No: CRAN 757 of 2018), CRAN 11 of 2019 (Old No: CRAN 1634 of 2019), CRAN 16 of 2020 (Old No: CRAN 1270 of 2020), CRAN 17 of 2021, CRAN 18 of 2021, CRAN 23 of 2022 are disposed of. Case diary has been returned.
- 32.** It is expected that the trial court shall take into consideration the length of time for which this case has been pending and proceed as expeditiously as possible, without unnecessarily granting adjournments to either of the parties.
- 33.** Urgent certified website copy of this judgment, if applied for, be supplied to the parties upon usual undertaking.

(Rai Chattopadhyay, J.)