

16.08.2022
Sl. No.2
cm/PA

C.R.M. (N.D.P.S.) 836 of 2022

In Re : An application for bail under Section 439 of the Code of Criminal Procedure in connection with NDPS Case No. 213 of 2020 arising out of **Lalgola P.S. Case No. 334 of 2020** dated **17.09.2020** under Sections **22(c)/29** of the NDPS Act.

A N D

In Re : Abul Kasem @ Bhejali ***..... Petitioner***

Mr. Pushpendra Kumar Dhaka
Mr. Arnab Saha

... ... for the petitioner

Ms. Anasuya Sinha
Mr. Pinak Kr. Mitra

... ... for the State

Mr. Dhaka, appearing for the petitioner submits the seized contraband are medicinal preparations and provisions of NDPS Act are not applicable to them. He also draws attention of the Court to discrepancy in the number of bottles seized as noted in the FIR and seizure memo. He further submits test report of samples bearing labels A-1 and A-2 have not been relied upon, but a sample bearing label A-3 was sent to the laboratory for FSL examination. There is delay in dispatch of the sample for chemical examination. Percentage of codeine has not been mentioned in the laboratory report. He prays for bail.

In view of the aforesaid submissions, this Court called upon the investigating agency to submit an affidavit to clarify the discrepancy vis-à-vis quantity of narcotics substance seized. Affidavit has been filed before this Court.

We have considered the averments in the affidavit. From the said averments it appears 40 bottles of phensedyl

syrup were seized and two samples marked A-1 and A-2 were drawn from the seized consignment. Due to oversight the number of bottles seized was incorrectly reflected as 38 bottles in the seizure memo. From the records it appears the seized consignment was certified by a Magistrate under section 52-A of the NDPS Act and two samples labeled as A-3 and A-4 were drawn from the seized consignment in presence of the Magistrate. Sample so drawn in presence of Magistrate and marked as A-3 was sent for examination and tested positive to codeine phosphate.

In view of the aforesaid materials on record, we are of the opinion 40 bottles of the phensedyl containing codeine phosphate was recovered from the petitioner. No defence has been raised before us that the petitioner was in possession of the seized contraband for medicinal purposes.

Reliance has been placed on ***Ajay Bajpai vs. State of U.P.***¹, ***Iqbal Singh vs. State***² and ***Bibhor Rana vs. Union of India***³ to bolster the argument regarding inapplicability of NDPS Act. In ***Mohd Sahabuddin And Another vs. State of Assam***⁴ the Apex Court, inter alia, held transportation of phensedyl syrup containing codeine phosphate without proper document to show that the same was for medicinal purposes would attract the provisions of NDPS Act. None of the cited authorities relied on by the petitioner has considered the ratio in ***Mohd Sahabuddin*** (supra). Moreover, nothing is placed on record to

¹ 2021 SCC OnLine All 892

² MANU/DE/1494/2020

³ 2021 SCC OnLine All 908

⁴ (2021) 13 SCC 491

show petitioner was carrying phensedyl syrup for medicinal purposes. Under such circumstances and in the light of the law declared in **Mohd Sahabuddin** (supra), we are of the opinion invocation of provisions of NDPS Act cannot be said to be unwarranted.

Incorrect noting in the seizure memo was an inadvertent error and will have little bear in the light of the certification made by the Magistrate under section 52-A of the NDPS Act.

It is strenuously argued that FSL report with regard to the earlier sample bearing label A-1 has not been produced before the Court. However, we find the sample drawn in presence of the Magistrate and labelled A-3 was sent for FSL examination and tested positive to codeine phosphate. Percentage of codeine phosphate has also been mentioned in the report. There is nothing on record to give an impression that there is a snap in the chain of custody between the sample drawn before the Magistrate and labelled A-3 and that examined by the expert.

In view of the aforesaid discussion we are of the prima facie opinion section 52A of the NDPS Act have been duly complied with. In **Intelligence Officer, NCB Jammu vs. Vijay Kumar**⁵ provision of section 52A was not complied with and samples had not been drawn in terms of the aforesaid provision of law. The cited case is clearly distinguishable on facts.

⁵ MANU/JK/0212/2021

Materials on record prima facie establish recovery of phensedyl syrup containing codeine phosphate above commercial quantity from the petitioner. There is nothing to show that the petitioner was transporting the substance for medicinal purposes. In ***Narcotics Control Bureau vs Mohit Aggarwal***⁶ a three –Judge Bench of the Apex Court dwelt upon the impact of section 37 of the NDPS Act in the matter of grant of bail to an accused. The Court held as follows:-

“14. To sum up, the expression “reasonable grounds” used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.

15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.”

The Court further held:-

“The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act.”

In the present case the petitioner has not been able to demonstrate grounds giving rise to a reasonable belief that he is not guilty of the offence.

⁶ 2022 SCC OnLine SC 891

Under such circumstances, in view of the statutory restriction under section 37 of the NDPS Act, we do not consider it prudent to enlarge the petitioner on bail. Moreover, the matter is critically poised for consideration of charge. Balancing public interest of under-trial detention against the right to speedy justice, we are inclined to issue directions for prompt conclusion of trial.

Accordingly, we request the trial Court to consider the issue of framing of charge on the date fixed i.e., 28.10.2022 and if it is unable to do so due to circumstances beyond control, the Court shall positively undertake such exercise within one month thereof and the trial of the case shall be concluded within one year from the date charge is framed. No unnecessary adjournment shall be granted either to the parties. In the event, the official witnesses are not available due to transfer or other reasons, Court may resort to video conferencing to record their evidence.

With these observations the application being CRM (NDPS) 836 of 2022 is dismissed.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)