



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 20.09.2022

Date of decision: 27.09.2022

+ BAIL APPLN. 603/2022

FANTOOSH YADAV

..... Petitioner

Through: Mr. Anand Verdhan Maitrey,
Advocate.

Versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Mr. Tarang Srivastava, APP for State
with Inspector Rakesh Kumar.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J

1. The applicant, vide the present application seeks the grant of regular bail in relation to FIR No.198/2017, PS Crime Branch under Sections 21/25/29 of the NDPS Act, 1985 submitting to the effect that he is incarcerated since 09.11.2017; that he has been falsely implicated in the instant case; that he has clean antecedents and that he has nothing to do with the alleged commission of the offence.

2. Inter alia, the applicant has submitted that he was merely a driver of a transporter / facilitator named Rakesh Sharma who runs a small transport business of providing trucks/lorries on rental basis. The applicant has further submitted that he has rendered all his



cooperation for completion of the investigation. The applicant has further submitted that the charge-sheet in the matter has already been filed and charges have been framed vide order dated 08/08/2018. Inter alia, the applicant has further submitted that there are more than 57 witnesses cited of whom 23 witnesses have been examined inclusive of PW-20 who is the IO/complainant, PW-2, Vikram and PW-21, Suresh Sharma and PW-23 named Ram Babu. The applicant has further submitted that the public witnesses have not supported the prosecution version and that the trial would take time which would cause prejudice to the rights of the applicant.

3. The applicant has further submitted that the provision of Section 50 of the NDPS Act, 1985 has not been complied with, in as much as, the presence of any Magistrate or Gazetted officer at the time of search of an accused is necessary to ensure authenticity, transparency and creditworthiness of the entire proceedings.

4. The applicant has further submitted that PW-20 SI Arvind Kumar has stated in his cross examination that he has not even tried to contact any ACP or any Magistrate or any other Gazetted Officer despite availability of prior information and contact numbers in his own mobile handset which vitiates the proceedings and the trial and that legislative safeguards have been deliberately defeated and thus the same casts grave suspicion on the veracity of the prosecution version. The applicant has further submitted that ACP Jasbir Singh, (ISC) Crime Branch examined as PW-8 has also not supported the prosecution version and that three witnesses i.e. PW-2 named Vikram, PW-23 named Ram Babu and PW-21 named Suresh Sharma have also



not supported the prosecution version. The applicant has further submitted that the provisions of Section 42 of the NDPS Act, 1985 have also not been followed in the instant case.

5. The status report dated 07.03.2022 submitted by the State under the signatures of Inspector, Crime Branch (AGS), Dwarka, New Delhi puts forth the prosecution version to the effect that on 09/11/2017, a secret information was received at the IGIS Section, Crime Branch, Dwarka, Delhi that a person namely Ajay R/o Uttam Nagar, Delhi was involved in the illegal purchase of 'PHENSEDYL' Syrup in bulk quantity containing Codeine (a narcotic drug) without any authorized documents/papers from his parties in Delhi and Agra and that the said Ajay used to prepare parcels of these illegal consignments of Phensedyl Syrup clandestinely with the help of his associates Mukesh & Sanjay in Okhla Industrial Area and further supply it to their parties in Malda and Kolkata illegally by concealing under other goods in the trucks arranged by the accomplice transporter Rakesh Sharma.

6. *Inter alia*, the State has submitted through the said status report that the said Rakesh Sharma used to depute his trustworthy driver Fantoosh Yadav (the accused/applicant) on the truck for safe transportation/delivery of contraband and that one such consignment was to be smuggled by Ajay and Mukesh in truck No. HR-38T-3541 with the truck being of Rakesh Sharma driven by Fantoosh (accused/applicant herein) and the said truck was to pass through Maa Anand Mai Marg, Okhla between 7.00 AM to 7.30 AM on that day. As per the said status report, the said information was reduced into writing and a raid was conducted after due compliance of Section 42



of the NDPS Act, 1985 and the said truck was intercepted along with the accused Ajay, Mukesh and Fantoosh (the applicant herein) at about 7.05 AM on 09/11/2017. It is stated through the status report that all the three accused were apprised about the secret information and they were asked to get the truck searched and on this, the accused Ajay Kumar tried to hoodwink the police team by showing the documents related to electronic goods and insisted that the truck had electronic goods only, that the accused persons were apprised about their legal rights and notices under Section 50 of the NDPS Act, 1985 were served upon them but they did not avail the legal rights available to them regarding search and they consented to the raiding team to take the search and on checking of the truck, it was found to contain 53 cartons having total 10,600 bottles of Phensedyl syrup bearing Batch Numbers PHB7262 & PHB7289 in the container (body) of the truck concealed beneath the electronic articles.

7. The status report further indicates that though, sincere efforts were made to include the public persons in the raiding team but no one joined the raiding team and that the accused persons Ajay, Mukesh and Fantoosh failed to produce any document to justify the possession of recovered Phensedyl and thus, the case was registered as FIR No. 198/2017 under Sections 21/29 of the NDPS Act, 1985, PS Crime Branch with the investigation having been taken up.

8. The said status report and the status report dated 31.03.2022 submitted by the State further stated to the effect that the applicant was in conscious possession of the contraband, in as much as, the information qua the applicant/accused herein named Fantoosh Yadav



and the co-accused Ajay Kumar and Mukesh were disclosed by a secret informer on 09.11.2017 before proceeding for the raid and that the applicant herein was apprehended from the spot along with the co-accused Ajay Kumar and Mukesh. It has been stated further through the status report that the accused persons were apprised about their legal rights about the search and they were served notices under Section 50 of the NDPS Act, 1985 but the accused persons refused to avail of their legal rights and consented to take the search and that the accused persons tried to hoodwink the police team by showing the documents related to the electronic goods and insisted that the truck had electronic goods only.

9. The State has further stated through its status report that on checking of the truck, its container (body) was found containing 53 cartons having total 10,600 bottles of Phensedyl syrup concealed beneath the electronic articles and that though, sincere efforts were made to include the public persons in the raiding team before and after apprehension of the accused persons, but no one joined the raiding team. It has been further stated through the status report that the accused persons named Ajay, Mukesh and Fantoosh (applicant/accused herein) had failed to produce any document to justify the possession of such a huge quantity of recovered Phensedyl and accordingly, a case i.e. FIR No. 198/2017, PS Crime Branch, under Sections 21/29 of the NDPS Act, 1985 was registered and the investigation was taken up.

10. It has been further stated through the status report that the accused/applicant herein named Fantoosh who was the driver of



vehicle No. HR-38T-3541 was arrested from the spot and during interrogation, he disclosed that he was working as a driver for Rakesh Sharma c/o Gemini Transport, Faridabad, Haryana and that he divulged that Rakesh Sharma runs a transport company and provides transportation services for Kolkata, Malda, Guwahati, Agartala etc. and that Rakesh Sharma supplies Codeine syrups clandestinely by concealing the Phensedyl bottles beneath other goods/articles. The State has further submitted that the applicant herein took the truck No. HR-38T-3541 to Azad Pur Delhi at the instructions of Rakesh Sharma many days before the incident i.e. on 06.11.2018, where one Ramesh, employee of M/s Prakash Parcel, got loaded 383 parcels of electronic goods in the truck and handed over the related documents to him and also affixed his company's seal on the truck's container and that thereafter, he drove the already loaded truck to Faridabad, although the goods loaded into the truck were bound for Sikkim.

11. It has been further stated through the status report that on 8/11/17, Rakesh Sharma told the applicant herein that the consignment of Codeine Syrup of Ajay was ready and would be loaded by Ajay & Mukesh in the truck from the tempo stand of Ram Babu in Okhla Industrial Area for delivery in Malda and thereafter, the applicant reached the Okhla Industrial Area in the said truck in the intervening night of 8 & 9 November, 2017 where Mukesh loaded 53 parcels of codeine Syrups and the co-accused Ajay Kumar had also joined them early in the morning. It has been stated by the State through the status report that it was further disclosed by the applicant/accused that



Rakesh Sharma used to give him Rs.5/- per bottle for delivery of consignments safely to destined place.

12. The State has further submitted through its status report that during investigation, it was revealed that the recovered consignment of Phensedyl Syrup was supplied by one Kailash Gupta @ Guruji of M/s Kailash Medicos & M/s Bharat Chemist illegally and hence, the search of M/s Bharat Chemist owned by accused Kailash Gupta was conducted and 06 Purchase Invoices of 10600 bottles of Phensedyl Syrups of the recovered batch viz. PHB7262 & PHB7289 dated 08/11/17 was generated by M/s Kailash Medicos, Model Town-Ill, Delhi in the name of M/s Bharat Chemist, Kamla Nagar, Delhi were recovered and that two Invoices of the recovered invoices were found to be ditto of the invoices recovered from the car of the co-accused Ajay Kumar and that each purchase bill had a handwritten mention of an auto driver's name, an auto registration number and a mobile number and that the auto numbers were attempted to be made illegible by overwriting. It has further been stated through the status report that 28 Sales invoices dated 08/11/17 & 09/11/17 of 9450 bottles of Phensedyl Syrups of the same batches, generated by M/s Bharat Chemist to different medical shops were also recovered and that the balance 1150 bottles were neither found in stock nor any record showing their sale was found in the shop and that all the recovered purchase invoices and sales invoices were seized in the case.

13. The State has further submitted through its status report that the owners/proprietors of the medical shops were examined and they stated that they had never purchased any bottle of Phensedyl or any



other cough syrup either from M/s Bharat Chemist, Kamla Nagar, Delhi or from M/s Kailash Medicos, Model Town-III, Delhi and that the Sales Invoices generated by M/s Bharat Chemist were found to be fake & fictitious, therefore, Sections 468 & 471 of the Indian Penal Code, 1860 were also added in the case.

14. It has further been submitted by the State through its status report that during further investigation, Kailash Gupta @ Guruji and the transporter Rakesh Kumar were also arrested in the case and that it has been conspicuously established that the applicant/accused Fantoosh Yadav was actively involved in the crime and found in conscious possession of the commercial quantity of the narcotic drug alongwith the co-accused persons Ajay and Mukesh at the spot without any valid documents and that rigours of Section 37 NDPS Act is applicable to the applicant herein.

15. On behalf of the applicant, it was submitted that the co-accused in the instant case Rakesh Sharma was granted bail vide order dated 21.10.2021 in Bail Appl. No.2553/2021 of the Co-ordinate Bench of this Court. It has also been submitted on behalf of the applicant that the co-accused in the instant case named Kailash Gupta was granted bail vide order dated 11.01.2019 of the Co-ordinate Bench of this Court in Bail Appln. No.2593/2018.

ANALYSIS

16. On a consideration of the rival submissions that have been made on behalf of either side, a regards the contention raised on behalf of the applicant that the co-accused Rakesh Sharma was granted bail in Bail Appln. No.2553/2021, it is essential to observe that the said



accused was not himself found in possession of the contraband of Phensedyl Syrup, which was allegedly found concealed beneath the electronic articles seized in truck bearing No. HR-38T-3541, of which truck, the applicant herein named Fantoosh Yadav was the driver.

17. As regards the contention raised on behalf of the applicant that the co-accused Kailash Gupta was granted bail vide order dated 11.01.2019 in Bail Appln. No. 2593/2018 also, it has been specifically observed vide the said order to the effect:-

“.....

Since no recovery has been affected from petitioner, therefore the bar of Section 37 of the NDPS Act prima facie, will not apply. Considering the fact that petitioner is an authorized licensee and is in custody since 30th November, 2017 and that petitioner has no previous involvement to his credit and because the trial of this case is likely to take time, it is deemed appropriate to release petitioner on bail.

.....”,

Thus, apparently, the facts alleged against the present applicant are not in *pari materia* with the facts alleged against the co-accused persons named Rakesh Sharma and Kailash Gupta.

18. As per the status report submitted by the State dated 07.03.2022, the applicant has allegedly been found in possession of 10,600 bottles of Phensedyl syrup bearing Batch Numbers PHB7262 & PHB7289 in the container (body) of the truck concealed beneath the electronic articles which truck was being driven by the applicant. The applicant would thus, at this stage be presumed to be in conscious



possession of the truck driven by him with the contents loaded in it, specially concealed beneath electronic items.

19. The contraband of Phensedyl syrup in the instant case is stated to be in a total 10,600 bottles of 100 ml each 5ml containing 10mg Codeine Phosphate, thus amounting to 10600 liters of Codeine Phosphate which thus, falls within the ambit of a commercial quantity as held in the reference answered vide judgment dated 16.09.2022 of the Hon'ble Division Bench of this Court in ***"Mohd Ahsan Vs. Customs"*** in Bail Appln. No.1136/2021 that if the contraband seized falls within the provisions of the NDPS Act, 1985, the weight of the neutral substance cannot be ignored by determining the nature of the quantity seized whether small quantity, commercial quantity or in between and thus, the recovery of Codeine effected from the applicant allegedly from the truck that he was driving in the form of Phensedyl syrup as Codeine Phosphate, falls within the ambit of a commercial quantity.

20. There is nothing in the instant case also to show that the Codeine Phosphate was required for any therapeutic purpose.

21. As regards the contention raised on behalf of the applicant qua the non-compliance of the provisions of Section 50 of the NDPS Act, 1985 submitting to the effect that there was no Gazetted officer or any Magistrate at the time of the search of the applicant, it is essential to observe that the allegations levelled against the applicant are to the effect that though, the search of the applicant in the presence of a Gazetted officer or a Magistrate was offered, the applicant declined to avail of the same, the ratio of the verdict of the Hon'ble Division



Bench of this Court in “*Nabi Alam @ Abbas Vs. State*” 2021 SCC On Line Del 3055, is thus, wholly applicable to the facts of the instant case, wherein, it has been categorically observed vide paragraph 26 thereof to the effect:-

“26. For the sake of clarity it is held that, axiomatically, there is no requirement to conduct the search of the person, suspected to be in possession of a narcotic drug or a psychotropic substance, only in the presence of a Gazetted Officer or Magistrate, if the person proposed to be searched, after being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate categorically waives such right by electing to be searched by the empowered officer. The words “if such person so requires”, as used in Section 50(1) of the NDPS Act would be rendered otiose, if the person proposed to be searched would still be required to be searched only before a Gazetted Officer or Magistrate, despite having expressly waived “such requisition”, as mentioned in the opening sentence of sub-Section (2) of Section 50 of the NDPS Act. In other words, the person to be searched is mandatorily required to be taken by the empowered officer, for the conduct of the proposed search before a Gazetted Officer or Magistrate, only “if he so requires”, upon being informed of the existence of his right to be searched before a Gazetted Officer or Magistrate and not if he waives his right to be so searched voluntarily, and chooses not to exercise the right provided to him under Section 50 of the NDPS Act.,

thus, in as much as, the applicant in the instant case is alleged to have waived his right to be searched voluntarily and has chosen not to exercise his right provided to him in terms of Section 50 of the NDPS



Act, 1985, it cannot be contended by the applicant that there has been a non-compliance of Section 50 of the NDPS Act, 1985.

22. The aspect of compliance or otherwise of Section 42 of the NDPS Act, 1985 and the weight to be given to the testimonies of witnesses examined is a matter of trial.

CONCLUSION

23. In the circumstances of the case thus, the applicant having been found in an alleged possession of a commercial quantity of Codeine in the form of Codeine Phosphate as phensedyl syrup in bottles allegedly and consciously as he was allegedly driving the truck in which the contraband was found concealed beneath electronic articles, and thus, the embargo under Section 37 of the NDPS Act, 1985 wholly applies to the facts of the instant case, and thus, there is no ground to presently believe that the applicant is not guilty of the commission of any offence punishable or that he is unlikely to commit any such offence during trial under the NDPS Act, 1985.

24. The BAIL APPLN. 603/2022 is thus, rejected.

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ANU MALHOTRA, J.

SEPTEMBER 27, 2022

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