



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 16th FEBRUARY, 2022

IN THE MATTER OF:

+ **BAIL APPLN. 4170/2021 & CRL.M.A. 540/2022**

YASHPAL SINHMAR

..... Petitioner

Through Mr. V K Shukla, Senior Advocate
with Mr. Rohit Pandey, Mr. Varad
Dwivedi, Advocates

versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through Mr. Subhash Bansal, Sr. Standing
Counsel for NCB with Mr. Shashwat
Bansal, Advocate

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. Vide the instant petition under Section 439 Cr.P.C, the petitioner seeks bail in NCB Case No. VIII/48/DZU/2021 dated 23.8.2021 registered under Sections 8, 22(c) and 23 NDPS Act.
2. Brief Facts leading up the present case are given as follows-
 - i. The Petitioner is the sole Proprietor of M/s Ethical Enterprises, Shop No. 4-5 J-Block Market, Sarita Vihar, New Delhi.
 - ii. Secret information was received by the NCB, Delhi Zonal Unit that a package containing psychotropic substances was to be dispatched from DHL Express Pvt. Ltd. 71/3, Rama Road, Kirti Nagar, New Delhi. A team got constituted, including constable Shamsher Singh and Driver Virender Ramand, after collecting



10 Kit weighing machine and field-testing kit, they left for the destination. On reaching DHL Express, a carton covered with white colored plastic and sealed with yellow tape of DHL was shown by one Ashit Yadav. During inspection of the carton, a copy of invoice, doctor's prescription, slip of medicine and the Aadhar Card of the Petitioner herein, who was the sender of the consignment, was found. The package was being sent to Bawai Ling, Room 505, 4th Floor, Tosta Plaza, Laydaung Kam Road, near Jeyx junction, Zawana, Thingangyun, TSP, 11071, Myanmar. Before opening the package, attempt was made to join an independent witness and one Indra Raj agreed to be the independent witness to the search process.

- iii. In the presence of independent witness, the carton was opened and two separate bundles of medicines which were wrapped with a rubber band were found in it. One bundle contained 20 strips of 10 tablets each of Pexofenadene Hydrochloride Tablets IP, Allegra and the second bundle contained 50 strips of 15 tablets each of Tramadol Hydrochloride Acetamino- PHL Tab USP, Ultracet were found. It is stated that Tramadol, being a scheduled substance is banned under the NDPS Act. Accordingly, the package was seized vide *Panchnama* dated 23.08.2021 in the presence of the independent witness. On the basis of seizure, the instant case was registered.
- iv. Notice under Section 67 of the NDPS Act was served on the Petitioner and his statement was recorded. He was arrested on 23.08.2021.



- v. On 25.8.2021, during investigation, shops of the petitioner, bearing Shop No. 4 & 5 J- Block, Sarita Vihar, New Delhi were searched. Two people - Rajeev Yadav and Mukesh Kumar were requested to join the search proceedings as independent witnesses, which they agreed to join and proceeded towards the shops. It is stated that Mukesh Kumar backed out and did not join as independent witness. It is stated that the shop was closed and Ms. Sangeeta, wife of the petitioner was informed about the search of the shop. She stated that the keys of the shop were kept at her house. The team proceeded towards the house of the Petitioner at No.77, H Block Sarita Vihar to bring the keys to shop with the Petitioner and independent witness Rajiv Yadav. On reaching the shop, it is stated that 3-4 other bystanders were requested to join the search proceedings out of whom one Md. Shazada Alam assented to become an independent witness, and the shops got opened in the presence of the Petitioner, his wife Sangeeta and the independent witness. It is stated that Shop No.4's ground floor and basement were used a storage space for medicines whereas Shop No. 5 was the office.
- vi. It is stated Shop No. 4 was searched first and some NRx medicines, namely one box containing 10 strips (15 tablets per strip) of Ultracet Tramadol Hydrochloride and Acetaminophen (Batch No.N1848, Mfg 06/2021, exp. 01/23 manufactured by Johnson & Johnson) was recovered, for which the Petitioner could not produce any bills in support thereof. On weighing,



each strip was found to be weighing 6.5 grams, hence 10 strips of the Ultracet Tramadol medicine weighed 65 grams and were put in a box, wrapped in a pullinda and marked. It is stated further, that two boxes, each containing 10 strips (15 tablets per strip) i.e. 300 tablets of Clonazepam dispersible tablets, clonotrail were found (Batch number 2jc 6H008, mfg 03/2021, Exp. 02/2022, Manufactured by Torrent Pharmaceuticals Ltd., 32 number middle camp). On weighing, each strip weighed around 2.25 grams and total weight of 300 tablets was 45 grams. The tablets were seized and the seizure memos were signed by the seizing officer and the two independent witnesses.

- vii. It is stated that in the search of Shop No.5, documents stored in the computers were checked and on finding some contents therein suspicious they were taken in custody. Cash to the tune of Rs. 2,36,845/- was recovered in the locker of Shop No.5. It is stated that four computers were seized and the seizure memo and *panchnama* were prepared in the presence of the Petitioner, his wife and two independent witnesses.

3. Vide order dated 11.11.2021, the bail application of the Petitioner was dismissed by the Ld. ASJ Saket by stating that the Petitioner was selling and exporting medicines without a proper authorization under the NDPS Rules 1985, and the seized medicines formed a commercial quantity, which was an offence under Section 8, Section 22(3) and 23 of the NDPS Act. The Trial Court found that there is a recovery of 750 tablets of tramadol weighing 350 gm. which is a commercial quantity and the tablets were booked on the ID of the petitioner herein. It also found that during search of the shop, 300



tablets of tramadol weighing 130 gm and 375 tablets of clonazepam weighing 50.5 gm were also recovered for which the petitioner was not able to prove any valid bill or purchase bill. Further, it was held that there were some transactions made by the Petitioner were not recorded in the bank account statements or reflected in his Income Tax Returns submitted to the respondent and there were properties purchased by him which could not be substantiated by his income, and that investigation was still ongoing. Therefore, application for bail of the Petitioner was rejected.

4. Mr. V.K. Shukla, Ld. Senior counsel, appearing for the Petitioner submitted that the Petitioner runs a sole proprietorship business in the name and style as M/s Ethical Enterprises and holds a valid drug license issued under Form No. 20 & 20B and 21 & 21B under the Drugs and Cosmetics Rules 1945 and is authorized to sell, stock, exhibit, offer for sale and distribute various medicines specified under schedule H & H1 of Drugs and Cosmetics Rules. He submitted that the Petitioner apart from having the above licenses, has a valid Importer-Exporter Code in the name of M/s Ethical Enterprises which was issued on 05.02.2015 and had been renewed last on 26.06.2021, and has a GST number. He submitted that all the medicines bought by the Petitioner have been accounted for in his books of accounts.

5. He submitted that he is the proprietor of two other shops and has 34 employees working for him who have not been paid their salaries in the past six months. He contended that the sales of the medicines made by him have been strictly made after receiving a doctor's prescription. He further submitted that the provisions of NDPS have been incorrectly pressed into



service by the respondent as the Petitioner's business is governed by Drugs and Cosmetics Act 1945.

6. The Ld. Senior counsel contended that Ultracet is not banned from sale in India. He contended that the method used by the NCB in determining the quantity of Tramadol recovered from the petitioner and declaring it as commercial quantity was incorrect, he submitted that Ultracet is composed of a minor percentage of 37.5 grams of Tramadol and has a major percentage of 325 grams of Acetaminophen. He placed reliance on the judgment of Hira Singh V. Union of India, (2020 SCCOnline SC 382), to contend that the purpose of enacting NDPS was to remove the scourge of drugs from society and contended that the judgment held that while determining a small or commercial quantity in relation to a narcotic drug or a psychotropic substance the quantity of a neutral substance should not be taken into consideration and determination of quantity should be done by weighing the actual quantity of the offending drug.

7. Learned Senior Counsel placed reliance on a prescription by one Dr. Sandeep Guleria, Senior Consultant, Indraprastha Apollo Hospital, for a patient from Myanmar - Ngun Tham Bawi Ling, who had undergone a kidney surgery, and stated that these tablets were being sent to Myanmar on the basis of the prescription of Dr. Sandeep Guleria, Senior Consultant, Indraprastha Apollo Hospital. Mr. Shukla further contended that there are bills to substantiate the recovery of Ultracet and Clonazepam from the shop of the petitioner.

8. He placed reliance on the decision rendered by this Court in Mohd. Hasan v. Customs (Bail Application No. 1136/2021) wherein this Court granted bail to a person who was carrying 110 bottles of Phensedyl to Saudi



Arabia, and contended that bail should be granted to the Petitioner since his case stands on a better footing, as he is a valid license holder and is authorized to sell, distribute and store medicines under the Drugs & Cosmetics Rules 1945.

9. *Per Contra*, Mr. Subhash Bansal, Sr. Standing Counsel, NCB vehemently opposed the arguments of the Petitioner. He submitted that a consignment containing 50 strips of Tramadol tablets was booked by the Petitioner for exporting to Myanmar with a prescription of one Dr. Sanjiv Saxena of Indraprastha Apollo Hospital and pursuant to which, investigation was conducted at the shops of the Petitioner where 130gms of Tramadol and 50.5 grams of Clonazepam was recovered. He submitted that the Petitioner did not produce a single bill or invoice to justify his possession of these medicines and in absence of a valid bill the same would be viewed as a contravention of the NDPS Act.

10. He submitted that during investigation, Indraprastha Apollo Hospital was contacted to verify whether Dr. Sanjiv Saxena had issued the prescription/s found with the consignment which were being exported to Myanmar and it was discovered that no doctor by the name of Sanjiv Saxena was empaneled at the Hospital. He submitted that Dr. Sanjiv Saxena was served a notice to join investigation and he tendered a voluntary statement stating that he was not working at Apollo Hospital for the last 11 years, the prescriptions were not issued by him and the letter-head and signatures on it were forged.

11. He submitted that the Petitioner in his statement under Section 67 NDPS Act has admitted of forging letter-heads in the name of Dr. Sanjiv Saxena and selling medicines and drugs covered under H & H1 category of



the Drugs and Cosmetic Rules 1945 and banned under the NDPS Act. Further, he argued that on probing the matter it was found that there were many transactions done by the Petitioner which have been unexplained and some properties purchased by the petitioner were incompatible with his income tax returns. To contradict the submission of the Petitioner on the decision of the Apex Court in Hira Singh V. Union of India (supra), he submitted that a complete reading of the said decision makes it clear that while determining the quantity of a substance/drug/contraband, the weight of the neutral substance or mixture will be included and the substance would have to be seen as whole and not separately.

12. He submitted that the Petitioner's licenses under Form 20, Form 21, Form 20B and Form 21B authorized him for sale, storage and distribution of medicines but did not permit him to export the said medicines. He stated further that for exporting the medicines, the Petitioner would have to apply for an excise permit from the State Government under Rule 58 NDPS Rules 1985 and fill out a Form No. 5 for obtaining export permit and the Petitioner did not have this specific authorization which permitted export and therefore the Petitioner has violated Section 8(c) NDPS Act. He lastly submitted that investigation into the case is still being done to find out other persons who were involved with the cross-border trafficking of medicines and therefore bail application of the petitioner should be rejected.

13. Heard Mr. V.K. Shukla, learned Senior Counsel appearing for the Petitioner and Mr. Subhash Bansal, learned counsel appearing for the Respondent. I have perused the material on record.

14. A perusal of the material on record shows that a package containing 750 tablets of Tramadol weighing 350 grams was recovered from a parcel



given by the petitioner herein at DHL Express Pvt. Ltd. which was to be dispatched to Myanmar. It has also been noted that the Petitioner owned two shops by the name of Ethical Enterprises where he sold medicines and the search done by the NCB at his premises recovered a total of 300 tablets of Tramadol weighing 130 grams and 375 tablets of Clonazepam weighing 50.5 grams and no bills were shown to the respondent. The search carried out by the NCB officilas was done before independent witnesses.

15. The argument of the Petitioner that Hira Singh v. Union of India (supra) stipulates that the different compositions of an illicit substance need to be measured individually while evaluating whether the quantity is commercial or intermediate or small is unsustainable. A holistic reading of the judgment shows that while coming to conclusion about the quantity of an illicit substance, the substance would have to be weighed in toto including the weight of the neutral or mixed substance. In other words, a piecemeal calculation of the quantity of a substance would not be tenable and any interpretation otherwise would lead to an abuse of the legislative intention of the NDPS Act.

16. The Respondent has contended that the Petitioner gave a disclosure statement wherein he has allegedly admitted to the stance being canvassed by the NCB, pertaining to forging prescriptions and unlawfully transporting/exporting medicines into neighbouring countries without requisite authorisation whereas the Petitioners have claimed that the statement of the Petitioner was recorded under duress and has been retracted, and has refuted the assertion of the respondent by submitting a number of bills and prescriptions before this Court. However, it is not the remit of this Court to adjudicate upon the guilt or innocence of the Petitioner



and are matters to be examined closely and determined at the time of Trial. The task of this Court at this stage is only to consider whether it would be permissible to let out the Petitioner on bail or not.

17. The principles for granting bail under Section 37 NDPS Act have been settled and reiterated, time and again, by the Supreme Court. In State of Kerala V. Rajesh, (2020) 12 SCC 122, while emphasising that the dual conditions under Section 37 NDPS should be satisfied irrefutably, it held that-

“19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in



addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for. ”

18. The Supreme Court in Collector of Customs V. Ahmadaleiva Nodira, (2004) 3 SCC 549, observed that the twin conditions for bail under NDPS Act are cumulative and not alternative and held as under:

“7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case at hand the High Court seems to have completely overlooked the underlying object of Section 37. It did not take note of the confessional statement recorded under Section 67 of the Act. ”

19. The argument of the Petitioner that the Petitioner has a valid Importer- Exporter Code and a GST registration number and further did not



require any other licenses or permissions for sending a package of medicines to Myanmar does not impress this Court. I find force in the argument of the counsel for the respondent that the Petitioner would need a valid authorisation under Rule 58 of NDPS Rules 1985 and the license which was being used for selling medicines from his shop would not suffice as it authorises the sale and distribution of medicines domestically and locally.

20. As per Notification S.O. 1760 (E.) dated 26.04.2018 issued by the Revenue Department amended S.O. 1055 (E) dated 19.10.2001 by inserting Tramadol as Entry 110Y to the Schedule of Psychotropic substances under the NDPS Act and specifies its commercial quantity to be 250gms. This makes it amply clear that the Petitioner ought to have had a valid authorization as per Rule 58 before exporting Tramadol.

21. A perusal of the Status Report shows that 750 tablets of Tramadol weighing 350 grams were recovered from a parcel given by the petitioner herein at DHL Express Pvt. Ltd. which was to be dispatched to Myanmar and 300 tablets of Tramadol weighing 130 grams and 375 tablets of Clonazepam weighing 50.5 grams were recovered from the shop of the Petitioner. Furthermore, the seizures at both, DHL office and Petitioner's shop were done in the presence of independent witnesses.

22. The prescription of Dr. Sandeep Guleria, Senior Consultant, Indraprastha Apollo Hospital, has been placed on record for the first time by the Petitioner before this Court. It was not placed on record before the Trial Court. A reading of the prescription does not show that Tramadol which was seized at the office of DHL Pvt. Ltd. had been prescribed to Mr. Ngun Tham Bawi Ling, who is a resident of Myanmar. Certain other prescriptions have been give for local consumption wherein Ultracet has been prescribed but



this does not satisfy as to from where the petitioner had purchased those tablets and whether license has been given to him to retain those tablets.

23. Even though there are prescriptions, it cannot be substantiate the presence of tablets at the shop of the petitioner. Further, in any event, the prescription amount does not match with the total number of tablets that have been recovered from the shop of the petitioner. This Court is not making any observations on this aspect lest it will prejudice the case of the petitioner. However, these facts are shows only to come to the conclusion that there are reasonable grounds to believe that the petitioner has committed an offence punishable under Sections 8, 22(c) and 23 NDPS Act and thereby the rigour of Section 37 of the NDPS Act will apply in the present case.

24. Therefore, for the above said reasons, this Court is not inclined to grant bail to the Petitioner at this juncture. The Petition is dismissed along with pending applications, if any.

25. Be it noted that the observations made in this Order are only for the purpose of bail and are not on the merits of the case.

SUBRAMONIUM PRASAD, J

FEBRUARY 16, 2022

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