

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.1393 OF 2022

Siraj Vakil Ahmad

...Applicant

Versus

The Union of India and Anr.

...Respondents

...

Mr. A.A. Siddiqui i/b. M/s. A.A. Siddiqui and Associates for the Applicant.

Mr. Shreeram Shirsat with Mr. Amandeep Sra, Mr. Shekhar Mane, Ms Nishi Singhvi for NCB.

Mr. S.V. Gavand, APP for Respondent -State.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 14th MARCH, 2023.

P. C. :-

1. This is an application under Section 439 of the Cr.PC. filed by the aforesaid Applicant, who is facing trial in NDPS Special Case No.937 of 2021 pending on the file of learned Special Judge, Greater Bombay, for the offences punishable under Sections 8(c) r/w 21(c), 27-A, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Heard Mr. Siddiqui, learned counsel for the Applicant, Mr. Shirsat, learned counsel for Respondent No.1 and Mr. Gavand, learned

APP for Respondent No.2-State. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

3. It is the case of the prosecution that on 08/02/2021 Officers of Narcotic Control Bureau, Mumbai, received information that two persons viz Siraj Ahmed and Mohd. Saddam Rain were likely to come with huge quantity of Chlorpheniramine Maleate and Codeine Phosphate Syrup, near Sion railway station. The said information was reduced into writing and as per the directions of Superintendent, NCB, the Intelligence Officer was directed to form a team and proceed as per law. Accordingly, the NCB team proceeded towards Sion railway station. It is stated that two panchas, who had accompanied the NCB were appraised of the information received. At about 22.30 hours two persons were seen standing near Sion railway station with two big boxes in their hands. The Investigating Officer showed his ID to the said persons and disclosed his identity. Said persons disclosed their names as Siraj Ahmed and Mohd. Saddam and stated that they were in business of selling drugs for many years. After confirmation, NCB intercepted the above two persons and opened one of the boxes. It is stated that the box which was carried by the Applicant contained 120

bottles of Chlorpheniramine Maleate and Codeine Phosphate Syrup, total weight of 120 bottles of 100ml comes to 12 Kgs. Similarly, one box which was carried by Mohd. Saddam contained 119 bottles of Chlorpheniramine Maleate and Codeine Phosphate Syrup, total weight of 119 bottles of 100 ml each comes to 11.9 Kgs. Same were seized under panchanama and the Applicant and the co-accused were apprehended. The substance, which was seized was sent to CFSL and as per the report it contained Codeine. The Applicant and the co-accused were therefore prosecuted for committing the aforesaid offences.

4. Learned counsel for the Applicant submits that there was non compliance of Section 50 of the NDPS Act. He further submits that as per the CFSL report each bottle contained only 4 mg of Codeine Phosphate. He therefore contends that the total quantity seized from the Applicant is less than the commercial quantity.

5. Per contra, learned counsel for the Respondent No.1 submits that the provision under Section 50 would be applicable only when personal search is taken of the accused and not when it is made in respect of some bag or box. He submits that learned Special Judge

has considered the said fact and relied upon the case of ***State of Rajasthan vs. Bhanwar Lal, (2005) 4 SCC 350***. Learned counsel for the Respondent has also relied upon the decision of the Hon'ble Supreme Court in ***Hira Singh and Anr. vs. Union of India and Anr.*** in ***Criminal Appeal No.722 of 2017*** and decision of the Delhi High Court in ***Mohd. Ahsan vs. Customs 2022 SCC Online Del 2910*** to contend that total quantity of the entire substance has to be considered for the purpose of ascertaining commercial, intermediate or small quantity. Learned counsel for the Respondent submits that the Applicant and the co-accused were not the dealers. Relying upon the decision of ***Md. Sahabuddin and Anr. vs. State of Assam*** in ***Criminal Appeal No.1602 of 2012*** he submits that when the Applicant is not possessing documents for transporting such huge quantity of bottles containing codeine and was not in a position to explain as to whom the supply was being made either for distribution or licensed dealer dealing with pharmaceutical products, the application for bail cannot be considered.

6. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

7. The records prima facie indicate that the Applicant and the

co-accused were seen in suspicious circumstances near Sion railway station carrying two cartons. The records further reveal that said cartons were opened in presence of panchas and the box carried by the Applicant contained 120 bottles of Chlorpheniramine Maleate and Codeine Phosphate Syrup weighing 12 kg. The report of CFSL reveals that the bottles contained Codein. Learned counsel for the Applicant contends that there is non compliance of Section 50 of the NDPS Act.

8. It is well settled that the mandate of Section 50 is confined to personal search and not in respect of search of baggage like a bag, article or container, carried by the accused. Reliance is placed on the decision in the case of *State of Himachal Pradesh vs. Pawan Kumar, AIR 2005 SC 2265* and *Jeet Ram vs. Narcotic Control Bureau of Chandigarh, AIR 2020 SC 4313*.

9. The contention of the Applicant that only the quantity of seizure mixture of narcotic drugs or psychotropic substances needs to be considered while ascertaining commercial, intermediate or small quantity is misconceived and is rejected. In this regard it would be relevant to refer to the decision in *Hira Singh* (supra), a three Judge Bench of the Hon'ble Supreme Court has held thus:-

*10 (I) The decision of this Court in the case of **E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau (2008) 5 SCC 161** taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance (s), the quantity of the neutral substance (s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;*

(II). 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;

10. A similar question was also referred to a larger Bench of the Delhi High Court in **Mohd. Ahsan** (supra). The Delhi High Court while answering the reference referring to the decision of the Apex Court in **Hira Singh** (supra) has held thus:-

“If the contraband seized falls within the provisions of NDPS Act, the weight of the neutral substance would not be ignored while determining the nature of the quantity seized, whether small quantity, commercial quantity or in between.”

11. In ***Md. Sahabuddin and Anr. Vs. State of Assam 2012 (13) SCC 49***, the Apex Court has observed thus:-

12. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100ml. bottle if related to the permissible dosage, namely, 5 ml. would only result in less than 10 mg. of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14.11.1985 and 29.1.1993. As rightly held by the High Court, the said contention 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 only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for

curing a disease and as an action of remedial agent.

13. As pointed out by us earlier, since the appellants 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 too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. 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 N.D.P.S. Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the specific conditions required to be satisfied under the above referred to notifications, the application of the exemption provided under the said notifications in order to consider the appellants' application for bail by the Courts below does not arise."

12. From the dictum in ***Md. Sahabuddin*** (supra) it is evident that 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 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.

13. In the instant case, the Applicant has not been able to satisfy that they were either distributors, suppliers or that they had requisite documents to carry such large quantity of manufactured drugs which contained narcotic substance of Codeine. The material on record prima facie indicates that the Applicant was in possessing of the Narcotic substance of commercial quantity. Considering the gravity of the offence and particularly the consequences of such offences on the society at large, I am not inclined to exercise the discretion under Section 439 of the Cr.P.C. in favour of the Applicant. Hence, the application is dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)