

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-27359-2023
Reserved on: 08.08.2023
Pronounced on: 17.08.2023
...Petitioner

Balbir Singh

Versus

State of Punjab ...Respondent

CORAM: HON'BLE MR. JUSTICE ANOOP CHITKARA

Present: Mr. Vinod K. Kataria, Advocate for the petitioner(s).

Mr. Shiva Khurmi, AAG, Punjab assisted by
ASI Jaswinder Singh

ANOOP CHITKARA, J.

FIR No.	Dated	Police Station	Sections
05	16.01.2022	Ghanaur, District Patiala	22/61/85 of NDPS Act.

1. The petitioner incarcerated for violating the above-mentioned provisions of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act) per the FIR captioned above, on the allegations of possessing 1300 tablets containing DIPHENOXYLATE HYDROCHLORIDE, has come up before this Court under Section 439 CrPC seeking bail.
2. In paragraph 15 of the bail petition, the accused declares that he has no criminal antecedents.
3. The petitioner contends that the pre-trial incarceration would cause an irreversible injustice to the petitioner and family.
4. While opposing the bail, the contention on behalf of the State is that the quantity of contraband involved in the case falls in the commercial category.

REASONING:

5. The FSL found the average weight of each tablet as 79 mg and as per para 8 of the reply dated 08-08-23, the total weight of 1300 tablets come to 102.7 grams. The NDPS Act makes it an offence if someone deals in 1300 tablets containing DIPHENOXYLATE

HYDROCHLORIDE, without a license or authorization, in the terms specified in the Act and the Rules:

Substance Name	Diphenoxylate
Quantity detained	102.7 Gram
Quantity type	Commercial
Drug Quantity in % to upper limit of Intermediate	205.40%

Specified as small & Commercial in S.2(viia) & 2(xxiii) NDPS Act, 1985	
Notification No	S.O.1055(E)
dated	10/19/2001
Sr. No.	44
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	Diphenoxylate
Other non-proprietary name	*****
Chemical Name	1-(3-cyano-3,3-diphenylpropyl)-4-phenylpiperidine-4-carboxylic acid ethyl ester
Small Quantity	2 Gram
Commercial Quantity	50 Gram

Declared as punishable under NDPS Act and as per schedule defined in S.2(xi) & 2(xxiii) NDPS Act, 1985	
Notification No	S.O.826(E)
dated	11/14/1985
Sr. No.	58
Common Name (Name of Narcotic Drug and Psychotropic Substance (International non-proprietary name (INN)	DIPHENOXYLATE
Other non-proprietary name	*****
Chemical Name	Ethyl 1-(3-Cyano-3, 3-diphenylpropyl)-4-phenylpiperidine-4-carboxylic acid ethyl ester (the international non-proprietary name of which is Diphenoxylate), and its salts, preparations, admixtures, extracts and other substances containing any of these drugs, except preparations of diphnoxylate containing, per dosage unit, not more than 2.5 mg. of diphenoxylate calculated as base, and a quantity of atrophine sulphate equivalent to at least one per cent of the dose of diphenoxylate.

6. Thus, the quantity allegedly involved in this case is commercial. Given this, the rigours of S. 37 of the NDPS Act apply in the present case. The burden is on the

petitioner to satisfy the twin conditions put in place by the Legislature under Section 37 of the NDPS Act.

7. The petition states that the accused is entitled to bail because the quantity is not commercial because the actual weight of the intoxicant is less than commercial. This argument is contrary to the judicial pronouncement in *Hira Singh v. Union of India*, 2020 LawSuit(SC) 343, and any observations by this court might prejudice the petitioner's trial. The judicial pronouncement of *Deep Kumar v. State of Punjab*, 1997(2) R.C.R. (Criminal) 417, of a single bench of this court is no more applicable given the notifications issued later on the ratio of *Hira Singh v. Union of India*, 2020 Law Suit(SC) 343.

8. The petitioner's counsel seeks bail on the grounds of parity of law with *Kulwinder Kaur v. State of Punjab*, 2023(2) RCR (Criminal) 450. The said judgment refers to the bail orders passed by Supreme Court granting bail and does not lay down any specific law regarding bail considering section 37 of NDPS Act. Furthermore, the petitioner in that case was a female for whom the statute of CrPC is liberal, whereas the petitioner in this case is a male. Thus, the petitioner is not entitled to bail based upon *Kulwinder Kaur supra*.

9. Now reverting to the facts of this case, based on a secret information, that was received at the time when the petitioner was likely to cross the area where the investigator was patrolling, the police stopped his bike and recovered 1300 tablets containing Diphenoxylate from a bag held by the petitioner in his hand. The petitioner's counsel argued that the petitioner was falsely implicated, and the drugs were planted. However, the petition lacks any corroborative evidence in this regard.

10. The petitioner's next contention is that the informant had used the words that the petitioner deals in intoxicants and did not state that he sells those. This argument is prima facie misreading the provisions of section 21 & 22 of NDPS Act.

11. Based on para 8 of the petition, Ld. counsel for the petitioner submits that the investigator conducted search and seizure violating sections 49, 50, & 52 of the NDPS.

12. Whether the Investigator complied with the mandatory provisions of sections 49, 50, and 52 of the NDPS Act is a question of fact to be adjudicated in the trial. However, before this court treats the compliances as illegal, the prosecution needs an opportunity to prove that they had complied with the mandatory provisions per law.

Such a stage would come only during the trial and certainly not at the bail stage, where

it would be hit by the maxim *Audi alteram partem*. The exception to this would be applicable only when the non-compliance of the mandatory provisions of the NDPS Act is apparent on the face of the special report under section 57 of the NDPS Act and other documents of search and seizure, and in the opinion of the court, the lapse is non-rectifiable, after recording a finding that it is an incurable defect, the court might consider granting bail on such violations.

13. In *State of H.P. v. Prithi Chand*, (1996) 2 SCC 37, Hon'ble Supreme Court holds,

[3]. The question is whether the learned Sessions Judge was justified, at the stage of taking cognizance of the offence, in discharging the accused, even before the trial was conducted on merits, on the ground that the provisions of Section 50 of the Act had not been complied with. This Court in *State of Punjab v. Balbir Singh* [(1994)3 SCC 299] : (AIR 1994 SCW 1802) has considered the provisions of the Act. Section 50 has been held to be mandatory. In paragraph 16, this Court has held that it is obligatory on the part of the empowered or the authorised officer to inform the suspect that, if so required, he would be produced before a Gazetted Officer or a Magistrate and search would be conducted in his presence. It was imperative on the part of the Officer to inform the person of the above right and if he failed to do the same, it amounted to violation of the requirement of Section 50 of the Act. It was held that when the person was searched he must have been aware of his right and that it could be done only if the authorised or empowered Officer informed him of the same. Accordingly, this Court by implication read the obligation on the part of authorised Officer to inform the person to be searched of his right to information that he could be searched in the presence of the Gazetted Officer or the Magistrate. In *Saiyad Mohd. Saiyaad Umar Saiyed v. State of Gujarat* [1995(3) JT SC 489] a three-Judge Bench of this Court had reiterated the above view and held that having regard to the grave consequences that might entail the possession of illicit articles under the Act, viz., the shifting of the onus to the accused and the severe punishment to which he became liable, the Legislature had enacted safeguards contained in Section 50. Compliance of the safeguards in Section 50 is mandatory obliging the Officer concerned to inform the person to be searched of his right to demand that search could be conducted in the presence of a Gazetted Officer or a Magistrate. The possession of illicit article has to be satisfactorily established before the Court. The Officer who conducts search must state in his evidence that he had informed the accused of his right to demand, while he is searched, in the presence of a Gazetted Officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that effect is given, the Court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit articles was not established. The presumption under Article 114, illustration (e) of the Evidence Act, that the official duty was properly performed, therefore, does not apply. It is the duty of the Court to carefully scrutinise the evidence and satisfy that the accused had been informed by the concerned Officer that he had a right to be searched before a Gazetted Officer or a Magistrate and that the person had not chosen to so demand.

[4]. It is to be seen whether the accused has been afforded such a right and whether the authorised Officer has violated the mandatory requirement, as a question of fact, has to be proved at the trial. In *Pooran Mal v. Director of Inspection* [(1974) 1 SCC 345] : (AIR 1974 SC 348) a Constitution Bench of this Court had held that power of search and seizure, is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction to the right of possession and enjoyment of the property seized. However, the seizure will be only temporary and limited for the purpose of the investigation. The power of search and seizure is an accepted norm in our criminal law envisaged in Sections 96 to 103 and 165 of the Criminal Procedure Code, 1973 [for short, "the Code"]. The Evidence Act permits relevancy as the only test of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to invoke the spirit of Constitution to exclude such evidence. The decisions of the American Supreme Court spelling out certain Constitutional protections in regard to search and seizure are not applicable to exclude the evidence obtained on an illegal search. Courts in India refuse to exclude relevant evidence merely on the ground that it is obtained by illegal search and seizure. When the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search and seizure, is not liable to be shut out. Search and seizure are not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. If the safeguards are generally on the lines adopted by the Code, they would be regarded as adequate and render the restrictions imposed as reasonable measures.

[7]. It would thus be settled law that every deviation from the details of the procedure prescribed for search, does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search, irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The Court is required to scan the evidence with care and to act upon it when it is proved and the Court would hold that the evidence would be relied upon.

14. The stand that the accused in para 10, that he is in custody for sufficient time is also not legal ground to overcome the rigors of S. 37 of the NDPS Act at this stage because as per the petitioner's counsel the petitioner's custody is around one year and seven months which is less than 2 years and 6 months.

15. The grounds taken in the bail petition do not shift the burden placed by the legislature on the accused under S. 37 of the NDPS Act. The petitioner has not stated anything to discharge the burden put by the stringent conditions placed in the statute

by the legislature under section 37 of the NDPS Act. Thus, the petitioner has failed to make a case for bail at this stage.

16. A perusal of the bail petition and the documents attached, prima facie points towards the petitioner's involvement and does not make out a case for bail. Any further discussions are likely to prejudice the petitioner; this court refrains from doing so.

17. Any observation made hereinabove is neither an expression of opinion on the merits of the case nor shall the trial Court advert to these comments.

The petition is dismissed. All pending applications, if any, stand closed. However, considering the petitioner's right to speedy trial coupled with the pre-trial incarceration, this court requests the concerned trial court to make all endeavours to conclude the trial by Dec 31, 2023, of which the prosecution evidence be completed by Oct 31, 2023, and latest by Nov 30, 2023, and the remaining time to provide an opportunity to the accused to lead defence evidence, if so desired, and to conclude its hearing. To meet the deadline, an endeavour be made to speed up the process for service and to pass the necessary directions in this regard. It is clarified that if expediting this trial disturbs the docket of the concerned court, then a balance be struck, and if, on this account, any delay happens, then an extension can be sought by mentioning such reasons. It is clarified that this order speeding up the trial is subject to the condition that neither the petitioner shall seek any adjournment nor try to use any tactics to delay the trial. If they do so, this order of expediting the trial shall stand automatically recalled by resorting to Section 362, read with Section 482 Code of Criminal Procedure, 1973, without any further reference to this court. If any of the accused is on bail and fail(s) to attend the trial without any sufficient cause, then they be dealt with strictly but in accordance with law. It is clarified that if the trial is not concluded by the date mentioned above, and if the delay is not attributable to the petitioner, then the petitioner may file an application for bail before the trial court, which shall decide it expeditiously and consider the bail on the grounds of pre-trial custody, and all the previous orders of dismissal passed by the trial court or High Court shall not come in the way.

(ANOOP CHITKARA)
JUDGE

17.08.2023
sonia arora

Whether speaking/reasoned: Yes
Whether reportable: No.