

CRM-M-31005-2023 (O & M)

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(233) IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-31005-2023 (O & M)
Date of Decision: 21.08.2023

Mandeep

... Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Ms. Pooja Jaglan, Advocate,
for the petitioner.

Mr. Neeraj Poswal, AAG, Haryana.

JASJIT SINGH BEDI, J.

The prayer in the present petition under Section 439 Cr.P.C is for the grant of regular bail to the petitioner in case bearing FIR No.27 dated 11.01.2023 under Section 22(c) and 29 of the NDPS Act registered at Police Station Samalkha, District Panipat.

2. The brief facts of the case are that while the police party was on patrolling duty, secret information was received that Mandeep (petitioner) would come from village Chukana towards G.T. Road having in his possession prohibited injections. If a raid was conducted, he could be apprehended. The police party proceeded to the area where one boy carrying

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a plastic polythene bag was seen wandering. On seeing the police party, he started walking in a different direction but was apprehended. On a search being conducted, he was found to be in possession of 15 injections of Buprenorphine 2 ML each and 21 injection of Pheniramine Maleate Avil 10 ML each.

3. The learned counsel for the petitioner contends that Pheniramine Maleate Avil does not come within the ambit of the NDPS Act and hence possession of the same was not punishable under the Act. As far as the alleged recovery of 15 Buprenorphine injections 2 ml each is concerned, the same would not constitute an offence as they were required for personal use as was borne out from the police investigation. Therefore, the possession of the same by the petitioner would come under the proviso to Rule 66 of the NDPS Act which allows an individual to keep psychotropic substances upto 100 doses at a time without prescription of a medical practitioner. Therefore, as the petitioner was in custody since 11.01.2023 and no prosecution witness had been examined so far, he was entitled to the concession of bail, moreso, as he had clean antecedents. Reliance is placed on the judgments passed by this Court in cases titled as '*Saleem Mohd. Versus State of Punjab, 2015(25) RCR (Criminal) 816, Dr. Rajinder Singla versus State of Punjab (CRM-M- 37530-2015 decided on 18.11.2015), Sukhwinder Singh @ Vicky versus State of Punjab (CRM-M-13312-2020 decided on 10.11.2020) and Charanjit Kaur versus State of Punjab (CRM-M-2569-2022 decided on 03.02.2022)*'.

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4. The learned counsel for the State, on the other hand, contends that the petitioner has nowhere stated in his petition that 15 Buprenorphine injections recovered from him was for his personal consumption. Therefore, the petitioner could not derive any benefit from the judgments relied upon by him. He places reliance on the judgment passed by this Court in '**Samdarsh Kumar @ Joseph versus State of U.T., Chandigarh (CRM-M-21788-2022 decided on 01.12.2022)**'. He, however, concedes that the petitioner was a first-time offender, in custody since 11.01.2023 and none of the 11 prosecution witnesses had been examined so far.

5. I have heard the learned counsel for the parties.

6. Before proceeding further, it would be apposite to refer to the judgments relied upon by the learned counsel for the petitioner and the relevant paragraphs thereof are reproduced hereinbelow:-

In '**Saleem Mohd. Versus State of Punjab, 2015(25) RCR (Criminal) 816**', this Court held as under:-

"2. As per the allegations contained in the FIR, a police party headed by ASI Kashmir Singh was patrolling near Cheema Chowk, Ludhiana when they received a secret information that Nitin Goyal son of Pawan Goyal and Pawan Goyal son of Ruldu Ram, who were already involved in drug-trafficking, have opened Pharmaceutical Companies known as [i] H.L.Medicines; [ii] Shri Krishna Agencies and [iii] Atlas Pharmaceuticals along with their other partners in Ludhiana. Another person, namely, Deepak Soni has also joined hands with them and has set up another Pharmaceutical establishment known as B.G.Pharma at Pindi Estate, Ludhiana and all of them in connivance with each

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other are dealing in intoxicant medicines like Tablets, Capsules etc. and they sell the same through fake bills/invoices.

3. Based upon that information, FIR was registered and raids were conducted, whereupon 8,65,000 intoxicant capsules, 1,34,50,000 intoxicant tablets, 12000 intoxicant injections and 1400 intoxicant small bottles of syrup were recovered.

4. The petitioner herein was allegedly an employee of Nitin Goyal at one point of time and his name having surfaced, he was arrested on 15.10.2013. The petitioner is said to have made a disclosure statement under section 27 of the Indian Evidence Act where-upon 22 injections of Buprenorphine were recovered from his house.

5. The petitioner is in custody from last more than two years. There is no other case registered against him under the NDPS Act. The alleged contraband was not recovered from the petitioner's physical possession as he is said to have got it recovered while in custody.

6. The petitioner relies upon Rule 66 of the Narcotic Drugs and Psychotropic Substances Rules, 1985 to contend that even without any medical prescription, 100 doses of such like Psychotropic substance could be retained by him.

7. Having heard learned counsel for the parties taking into consideration the total custody period of the petitioner; his past antecedents and the legal submission based upon Rule 66 ibid but without expressing any final opinion in relation thereto, we are satisfied no useful purpose shall be served by keeping the petitioner behind the bars and as such he deserves to be granted the concession of regular bail.

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8. Accordingly, this petition is allowed and the petitioner is directed to be released on regular bail to the satisfaction of the Chief Judicial Magistrate, Ludhiana”.

In ‘**Sukhwinder Singh @ Vicky versus State of Punjab (CRM-M-13312-2020 decided on 10.11.2020)**’, this Court held as under:-

“The allegations contained in the FIR are that when the police party on private vehicles was on patrolling for checking of bad elements then two gentlemen were seen coming on motor cycle and after looking at the Naka of the police, the driver of the motor cycle tried to turn back the motor cycle but the motor cycle slipped and they fell down. There was black colour glazed envelope which was in the hands of person sitting on the backside of the motor cycle who fell down on the ground. Injections which were wrapped with tape in the glazed envelope were also scattered on the ground. Thereafter, their names were asked and the driver told his name to be Rakesh Kumar @ Sunny and person sitting on the rear side told his name Sukhwinder Singh @ Vicky (petitioner). 70 injections of Pheniramine Maleate 10 ml Avil and 70 injections of Buprenorphine Rexogesic 2 ml each were allegedly recovered from them.

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In the present case it is not in dispute that the petitioner is in custody for more than two years i.e. from 17.08.2018, charges have been framed on 02.02.2019 and that out of 9 prosecution witnesses 4 have been examined. It is also not in dispute that there is no other case against the petitioner except for one earlier case in which he stands discharged. In a Division Bench judgment of this Court in Saleem Mohd.'s case (supra) the petitioner was in custody for more than two years and there was

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no case registered against him under the NDPS Act and the petitioner had relied upon Rule 66 of the NDPS Rules, 1985 to contend that even without any medical prescription, 100 doses of such like psychotropic substance could be retained by him. This Court while taking into consideration the total custody period of the petitioner, past antecedents and the legal submissions based upon Rule 66 of the NDPS Rules, 1985 but without expressing any final opinion in relation thereto, granted concession of bail to the petitioner. In Dr. Rajinder Singla's case (supra) this Court held that Buprenorphine Hydrochloride is also medication and is used as a pain reliever and that the same although is a psychotropic substance under the NDPS Act but it is not included in the Schedule I of the NDPS Rules and as such there is no contravention of the provisions of NDPS Rules and consequently, the offence under Section 8 of the NDPS Act is not made out and obviously, the punishment under Section 22 of the NDPS Act is also not attracted. Therefore, the petitioner was granted bail.

In Nitin Rajput @ Raman's case (supra) it was held that there was recovery of 12 injections of Buprenorphine and as per proviso of Rule 66 of the NDPS Act, an individual can possess 100 doses of Buprenorphine Hydrochloride and that the controversy with regard to Buprenorphine at Sr. No.169 of the Notification of the Schedule of NDPS Act would be debatable as to whether it is a psychotropic substance or not..

In Shiv Kumar @ Shiv's case (supra) this Court relied upon another judgment of this Court rendered in Sukhwinder Kumar's case (supra) in which further reliance was also placed upon the co-ordinate benches of this Court and there was a recovery of 85 injections of Buprenorphine in Sukhwinder Kumar's case and concession of regular bail was granted to the petitioner.

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So far as the proposition of law as held in Niyazuddin's case (supra) and State of Kerala etc case (supra), the same is no longer res integra. Provisions of Section 37 of the NDPS Act are mandatory in nature. However, departure can certainly be made in case the conditions contained in the aforesaid section itself are satisfied. The first condition being that the prosecution must be given an opportunity to oppose the application and the second condition being that the Court must be satisfied that there are reasonable doubts for believing that he is not guilty of such an offence and both these conditions are co-existent.

In Manjit Kaur's case (Supra) which has been relied upon by the learned State counsel, there was an allegation of recovery of 14 injections of Buprenorphine and the issue as to whether the possession of Buprenorphine injections would constitute an offence under the NDPS Act and Rules or not, this Court observed that the matter has been referred to the larger bench in CRM-M-28002 of 2018 titled as Anil Kumar @ Nehla vs. State of Punjab on 01.10.2018. However, learned State counsel has pointed out that in the aforesaid order the question which was referred to the larger bench was 'whether the pure content of the narcotic drug/psychotropic substance alone is to be taken into consideration for determining small or commercial quantity.' According to learned State counsel the matter which was referred to the larger bench was not with regard to the proposition as to whether the possession of Buprenorphine injection would be an offence under NDPS Act and Rules or not. She has further submitted that even otherwise, also now the Hon'ble Supreme Court in the case of Hira Singh and another vs. Union of India in Crl.Appeal No.722 of 2017 has decided the proposition of law with regard to as to whether pure content alone is to be taken or not. However, in Manjit Kaur's case

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(supra) the petitioner had history of cases under NDPS Act against him and was a habitual offender and was convicted in a number of cases and therefore, the bail was declined to him.

In Sarabjit Singh @ Sabbi's case (supra) this Court however, observed that Rule 66(2) of NDPS Rules were absurd and were contrary to the provisions of Section 37 of the Act. However, neither the validity of Rule 66 of NDPS Rules was challenged nor the vires of the same was decided. It is settled law that a statutory provision is presumed to be valid unless the same is struck down by a competent court of law.

In the present case, the State has been granted opportunity and time was also granted for filing of reply but the same was not filed.

It is not the case of the State that in case the bail is granted to the petitioner then there is likelihood of his tampering with the evidence or influencing of the witnessess nor the same has been pleaded by the learned State counsel. So far as the condition of existence of any reasonable ground for believing that he is not guilty of such an offence is concerned, considering the provisions of Rule 66 of NDPS Rules and aforementioned judgments the petitioner having committed an offence under Section 22 of the NDPS Act would be a debatable issue as it is also subject to fulfillment of ingredients of first proviso to Rule 66(2) of NDPS Rules. In case Rule 66(2) of NDPS Rules is applied in the present case then the same would be a reasonable ground and something more than prima facie ground to believe at this stage that the petitioner is not guilty of the alleged offence. Apart from this, the fact that the petitioner is in custody for more than two years and is not involved in any other case at present is also a relevant factor. The aforesaid observations are only for the purpose of deciding the present bail application and

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would not in any way reflect any observation on the merits of the case.

Keeping in view the above facts and totality of circumstances of case and without expressing any opinion on the merits of the case, the present petition is allowed. Petitioner is granted the concession of regular bail. He be released on regular bail subject to furnishing bail bonds/surety to the satisfaction of the concerned Trial Court/Duty Magistrate”.

In ‘Charanjit Kaur versus State of Punjab (CRM-M-2569-2022 decided on 03.02.2022)’, this Court held as under:-

“5. The quantity allegedly involved is one gram of heroin and 15 injections of Buprenorphine and 15 injections of Avil. Without going into the controversy as to whether the quantity involved is commercial or not, reference to Rule 66 of NDPS Act, 1985 would prima facie makes out a case for bail.

6. In Sajjan Abraham v State of Kerala, (2004) 4 SCC 441, The case of the prosecution was that the convict was found in possession of 25 ampoules of manufactured drug, namely - Buprenorphine Hydrochloride (Tidigesic) alongwith three syringes when he was apprehended on the road. While dealing with the appeal against conviction, Hon’ble Supreme Court holds,

[3]. While allowing the review petition this Court observed that the appellant should have taken up a plea in the light of the decision of this Court in Hussain v. State of Kerala, 2000(4) RCR(CrL.) 348 (SC) : 2000(8) SCC 139 in which the same article Buprenorphine Hydrochloride (Tidigesic) was found to be a psychotropic substance and the quantity which was found in possession of the accused

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was within the prescribed limit, being a small quantity. Consequently benefit of the same was granted to the accused in that case and he was acquitted. This Court felt, while allowing the review petition, that the appellants should be permitted to take up that contention in this case in order to prevent a miscarriage of justice. This Court noticed that the total quantity involved is 25 ampoules of Buprenorphine Hydrochloride (Tidigesic) of 2 ml. each. Counsel for the State of Kerala submitted that the limit of small quantity as per the Notification is 1 gm. Thus the total quantity seized from the appellant would fall within the limit of small quantity used for medicinal purpose. The appellant was permitted to file a petition seeking permission to raise additional ground in the appeal.

[7]. Rule 66 of the Narcotic Drugs and Psychotropic Substances Rules, 1985 (hereinafter referred to as 'the NDPS Rules') provides as follows :-

"66. Possession, etc. of psychotropic substances. - (1) No person shall possess any psychotropic substance for any of the purpose covered by the 1945 Rules, unless he is lawfully authorized to possess such substance for any of the said purposes under these Rules.

(2) Notwithstanding anything contained in sub-rule (1), any research institution, or a hospital or dispensary maintained or supported by Government or local body or by charity or voluntary subscription, which is not authorised to possess any psychotropic substance under the 1945 Rules, or any person who is not so authorized under the 1945 Rules, may possess a reasonable quantity of such substance as may be necessary for their genuine

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scientific requirements or genuine medical requirements, or both for such period as is deemed necessary by the said research institution or, as the case may be, the said hospital or dispensary or person :

Provided that where such psychotropic substance is in possession of an individual for his personal medical use the quantity thereof shall not exceed one hundred dosage units at a time.

(3) The research institution, hospital and dispensary referred to in sub-rule (2) shall maintain proper accounts and records in relation to the purchase and consumption of the psychotropic substance in their possession."

[8]. Sub-rule (2) therefore permits a person to keep in his possession for his personal medicinal use the psychotropic substance upto one hundred dosage units at a time.

[9]. In the instant case there is evidence on record which indicates that the appellant used the said drug and this is obvious from the deposition of the Investigating Officer, PW-3 as well as the deposition of his mother, DW.1. Moreover three syringes were also recovered from the appellant which also is indicative of the fact that the psychotropic substance recovered from him was for his personal consumption and not for trading purposes.

[12]. Learned counsel for the State submitted that unless the appellant held a permit granted under Rule 66 of the NDPS Rules, he cannot claim benefit under the provisions of that Rule. We find no substance in the argument because having regard to the provisions of Section 9 of the Narcotic Drugs And Psychotropic Substances Act under which the Rules have been framed, the Central Government is empowered by Rules to permit and regulate the matters mentioned therein. Rule 66 itself

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permits possession of psychotropic substance below a specified quantity and subject to the conditions stated therein. Thus if the possession of psychotropic substance is justified under the said Rule, no separate permit is required to be issued to the person possessing such psychotropic substance because the Rule itself permits possession of such psychotropic substance to the extent mentioned in the Rule and subject to the conditions laid down therein. Thus following the principle laid down in Hussain v. State of Kerala (supra) and having regard to the provisions of Rule 66 of the NDPS Rules read with Section 21 of the Narcotic Drugs And Psychotropic Substances Act, we are satisfied that the psychotropic substance namely, - Buprenorphine Hydrochloride (Tidigesic) found in possession of the appellant was not in breach of Rule 66 of the NDPS Rules and having regard to the fact that the same was for his personal consumption, no offence under Section 21 of the Narcotic Drugs And Psychotropic Substances Act is made out.

7. The petitioner is a first offender, and one of the relevant factors would be to provide an opportunity to course-correct. Even a prima facie perusal of paragraphs 5 to 8 of the bail petition needs consideration for bail.

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10. Without commenting on the case's merits, in the facts and circumstances peculiar to this case, and for the reasons mentioned above, the petitioner makes a case for bail, subject to the following terms and conditions, which shall be over and above and irrespective of the contents of the form of bail bonds in chapter XXXIII of Cr.P.C., 1973”.

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7. The judgment relied upon by the learned counsel for the State is reproduced hereinbelow:-

In '**Samdarsh Kumar @ Joseph versus State of U.T. Chandigarh (CRM-M-21788-2022 decided on 01.12.2022)**', this Court held as under:-

“Learned counsel for the petitioner has submitted that Rule 66 of the NDPS Rules, 1985 (hereinafter referred to as the Rules) permits possession of upto 100 dozes of a psychotropic substance. Recovery of only 15 dozes has been made from the petitioner which is well within the permissible limit. The drug Pheniramine Maleate is not a psychotropic substance and the same has to be ignored for the purpose of grant of bail. To support this argument, reliance has been placed upon Supreme Court judgment in Sajan Abraham Vs. State of Kerala, (2004) 4 SCC 441, a Division Bench judgment of this Court in Saleem Mohd. Vs. State of Punjab, 2015 (25) RCR (Criminal) 816, a Single Bench judgment of this Court dated 13.01.2020 passed in CRM-M-36753-2019 titled as Aruna @Runa Vs. State of U.T Chandigarh, a Single Bench judgment in Sukhwinder Singh @ Vicky Vs. State of Punjab, 2021 (1) RCR (Criminal) 177 and Charanjit Kaur Vs. State of Punjab, 2022 (1) Law Herald 735.

In response, learned Public Prosecutor has submitted that the petitioner cannot rely upon Rule 66 of the Rules as it is not his case that the substance recovered from him was for personal use. From the very inception, it has been his case that he has been falsely implicated. In the instant petition also, one of the grounds taken is false implication. The recovery has not been admitted, therefore, reliance upon the said Rule is misconceived. He places reliance upon judgment dated 25.07.2018

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passed in CRM-M-40371-2017 titled as Sarbjit Singh @ Sabbi Vs. State of Punjab, judgment dated 08.12.2020 passed in CRM-M-50796- 2019 titled as Manpreet Singh Vs. State of Punjab and judgment dated 08.12.2020 passed in CRM-M-24656-2019 titled as Kulwant Rai @ Rana Vs. State of Punjab.

In my considered view, reliance upon Rule 66 (supra) is patently mis-conceived. There is no evidence on record that the petitioner had been prescribed the psychotropic substance recovered from him for some medical condition. It is not even his case that recovery was infact made. His case has been of to be implication. An argument raised can only be accepted, if, it is supported by facts. That being not the case, the argument based upon Rule 66 (supra) is rejected. The judgments relied upon by learned counsel for the parties are not being discussed as the argument itself is mis-conceived”.

8. I have heard the learned counsel for the parties.
9. As per the police investigation, which is also borne out from the disclosure statement (Annexure P-2), the petitioner claims himself to be an addict. Therefore, at this stage, *prima facie*, the protection available to him under Rule 66(2) of the NDPS Act cannot be negated by holding that he had not taken any such stand regarding self-consumption in the present petitioner. Further, the petitioner is a first-time offender. He is stated to be in custody since 11.01.2023 and none of the 11 prosecution witnesses have been examined so far. Therefore, the trial in the present case is not likely to be concluded anytime soon. In this view of the matter, the further incarceration of the petitioner is not required.

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10. Thus without commenting on the merits of the case, the present petition is allowed and the petitioner-Mandeep is ordered to be released on bail subject to his furnishing bail bonds and surety bonds to the satisfaction of learned CJM/Duty Magistrate, concerned.

11. The petitioner shall appear before the police station concerned on the first Monday of every month till the conclusion of the trial and inform in writing each time that he is not involved in any other crime other than the present case.

(JASJIT SINGH BEDI)
JUDGE

August 21, 2023
sukhpreet

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No